CHAPTER SIX

Civil Rights and Liberties: Protecting the Players

CHAPTER OVERVIEW

This chapter distinguishes between civil rights and civil liberties with a number of real-life examples. The debate between the partial and complete incorporationists is also covered. The four most important civil liberties--speech, religion, privacy, and due process--are discussed fully. The chapter then proceeds to the area of civil rights, with specific sections on race and sex as “suspect classifications” and the “actors in civil liberties and rights”--judges (activism vs. restraint), legal defense funds, private attorneys general, state agencies, the public--being covered. The chapter concludes with a case study on “Flag Burning and Flag Waving,” describing the impact of Texas v. Johnson, the congressional reactions to that Supreme Court decision (passage of a law banning desecration of a flag), and the failure to pass a constitutional amendment outlawing flag-burning.

LEARNING OBJECTIVES

After reading chapter 6, the student should be able to:

1. Distinguish between the meanings and legal implications of civil rights and civil liberties.

2. Explain the doctrine of incorporation and the debate that surrounds it.
3. Apply recent court decisions to the four most important civil liberties, explaining how those liberties have been modified.

4. Define such important terms as “suspect classifications,” equity, judicial activism/restraint, “private attorneys general,” landmark decisions, injunctions, exclusionary rule, and affirmative action.

5. Summarize the key points from the chapter’s case study on flag burning.

OUTLINE

I. Civil Rights and Liberties in the Game Analogy. These important rules that protect the players govern both the legitimate means and ends of the political process. They tell us how to play the game, as well as why we ought to play (e.g., to protect freedom of speech and religion). They are based on two principles: that the government must not violate the rights of its citizens, and that government has an obligation to provide equal protection under the law for all groups in society. This chapter focuses on how the courts and other players protect civil rights and liberties.

II. What are Civil Liberties and Rights?

   A. Civil Liberties. Defined as a set of protections against government restrictions on the rights of speech, petition, assembly, and the press. These rights protect people when they participate in the democratic political system. American government is one of laws, guaranteeing each citizen due process proceedings to ensure individual liberties. Protection of civil liberties is central to such issues as the right to criticize and oppose current policies, government censorship, and the right to organize for elections.
B. **Civil Rights.** Defined as a set of protections (granted in the Fourteenth Amendment) against discrimination on the basis of race, religion, ethnicity, or gender. The Constitution recognizes that all citizens must be treated equally under the laws and, therefore, forbids discriminatory treatment of minorities or other groups. Conversely, no racial, religious, or ethnic group can claim privileged treatment. Everyone is affected by civil rights issues.

III. Expanding the Bill of Rights

The original Bill of Rights applied only to the federal government. It has been expanded through the use of the Fourteenth Amendment to apply to state governments and individuals, and extended to cover new issues, such as due process rights in private institutions like universities.

A. **Uses of the Fourteenth Amendment.** The “due process” and “equal protection” clauses of this amendment, ratified in 1868 after the Civil War, have been used by the federal courts to expand the Bill of Rights from the national to the state governments. The **equal protection clause** has been applied to racial and sex discrimination in areas involving state interests or laws. It has also prevented discrimination by private individuals when their actions are aided by the state, furthers state activity, or involves a fundamental state interest. The vague phraseology of the **due process clause** has led to a debate over the extent to which the Fourteenth Amendment incorporated the Bill of Rights.

B. **Partial Incorporationists versus Complete Incorporationists.** These are two competing judicial interpretations of the Fourteenth Amendment. Partial incorporationists argue that only some parts of the Bill of Rights should be included in the meaning of “due process.” They point to procedures guaranteeing fair trials and the First Amendment freedoms. In
short, preferred freedoms—liberties necessary for a democracy to function—should be incorporated. The courts must decide applicability in each case. Complete incorporationists argue that every provision of the Bill of Rights is covered by the Fourteenth Amendment and must be recognized by the state courts. While the Supreme Court has never adopted full incorporation, the cumulative effect of federal court decisions has been to incorporate almost all of the Bill of Rights into the Fourteenth Amendment.

IV. Civil Liberties: Protecting People From Government

Civil liberties provide protection for players in the political game against abuses of government authority while making sure electoral losers have a fair chance to get back into power. These rules are essential to allow democracy to work. They enable people to keep informed, and to communicate with each other, and with the government without fear. Indeed, Supreme Court Justice Oliver Wendell Holmes wrote that a democratic society needs competition among ideas as much as economic competition. Fundamental to Holmes’s thinking was that good ideas will drive bad ideas out of the market, with the public rejecting the false over the true. However, propaganda may sometimes overwhelm reason. A closer look at four important liberties (freedom of speech, freedom of religion, right to privacy, and due process) demonstrates their importance to the democratic processes of open discussion, opposition, and reform.

A. Freedom of Speech. This guarantee has been expanded to state governments under the Fourteenth Amendment, and the definition has been broadened to include such things as membership in organizations, public demonstrations, leafleting, symbolic speech (“speech plus”—including burning flags or wearing buttons with a message), and, with some debate, speech in cyberspace. The Supreme Court upheld congressional laws that make it a crime to conspire to overthrow the government by force, but belief in revolution is not a crime as long as
conspiracy or an actual act cannot be proven. However, the First Amendment does not protect speech that motivates listeners to illegal conduct or, apparently, politically incorrect acts on some college campuses. The First Amendment also protects you by prohibiting the government from forcing you to say anything you don’t believe (i.e., Jehovah’s Witnesses and Pledge of Allegiance case).

The First Amendment does not protect speech that leads to illegal conduct (yelling fire in a crowded theater when there is no fire), libel or slander, making or selling child pornography, or “fighting words.” However, free speech online, even if pornographic, has been protected by the Supreme Court in the Reno et al. V. ACLU et al. Ruling (1997). See “Freedom on the Internet” text insert.

B. Freedom of Religion. Although there has never been a complete separation of church and state in America, the increasing political power of Christian Fundamentalists has led them to attempt to redefine church-state relations. A constitutional amendment to allow school prayer is an example of the freedom of religion controversy, and recent government guidelines have attempted to navigate this controversy. Most Americans favor prayer in school, viewing it as an issue of free exercise of religion. However, most Americans also believe that government must not favor one religion over another.

Yet, there has never been complete church-state separation. Note President George W. Bush’s plan giving government funds to faith-based groups for their charitable work. See “Dos and Don’ts on Religion in the Public Schools” text insert.

C. Rights of Privacy. Protection from government intrusion in the private lives and beliefs of citizens is guaranteed by the First and Ninth Amendments. Although not explicitly mentioned in the Constitution, the courts have created a “zone of privacy”
guarding individuals from government intrusion. Issues of sexual conduct between adults—the state cannot prevent couples from using contraceptive devices—and abortion—states cannot forbid abortions in the first three months of pregnancy—are recent examples of the right to privacy. But the courts have also placed limits on some of these freedoms. For example, homosexual marriages need not be recognized by the states and states are not required to fund abortions for those individuals who cannot pay. Finally, in Romer v. Evans (1996), the Supreme Court ruled that Colorado could not single out gays and prohibit local laws designed to end discrimination against them.

D. Due Process Rights. These rights involve fundamental procedural fairness and impartial rulings by government officials, especially in criminal procedures. For example, these procedural guarantees include the presentation of charges, the right to a lawyer and time to prepare a defense, a speedy and fair trial by an impartial judge and jury of peers, and the right to appeal. These rights have been extended to state criminal trials and to other settings, such as educational and social service hearings. These rights were granted in federal criminal trials under the Fifth and Sixth Amendments.

V. Civil Rights: Protecting People From People

The government can assume a positive role in protecting the rights of minorities of race, religion, sex, or national origin. Minorities may seek redress for discrimination through the political or judicial system. Of course, civil rights issues are not always clear cut. Minorities that achieve the status of “protected class” are eligible for inclusion in Affirmative Action programs. Ironically, minorities seeking protection under Affirmative Action increasingly come into conflict with one another rather than with the majority. Nevertheless, these programs have also fueled White resentment against “reverse discrimination.”
A. Which People Need Protection? Suspect Classifications. A limit placed by the courts on the government’s ability to classify and legislate for certain groups. In any economic issues, the laws passed by Congress or state legislatures are routinely approved by the judiciary, under the doctrine of “presumptive legislative rationality.” On the other hand, if lawmakers apply racial or religious classifications, the courts subject these to “close scrutiny,” because these are “suspect” classifications. The burden of proof is on the government to prove that laws for a suspect category (i.e., a racial group) are necessary. Racial classifications are almost always considered suspect and are therefore struck down. Courts usually strike down most gender classifications, but a few are upheld, such as women not having to register for the draft.

B. Race as a Suspect Classification. In 1896, the Supreme Court in Plessy v. Ferguson supported state actions that segregated the races. But over a half-century later, in the landmark case of Brown v. Board of Education, the Court reversed itself and established race as a suspect classification. The courts then struck down all laws based on race. This has been modified to allow government to make laws that will serve to eliminate prior inequities caused by state-sponsored segregation. But the Rehnquist Court’s 1989 decision in City of Richmond v. Croson and Adarand v. Pena (1995) seemed to throw all racial classifications into question. While not declaring all affirmative action programs unconstitutional (the 1978 Bakke case had seen the principle of affirmative action upheld), the Court made clear that there had to be a “compelling interest” to relieve a specific case of discrimination. Most existing programs were not expected to survive the Court’s “strict scrutiny.” Other branches of government have responded to the Court’s actions. The Clinton administration eliminated or altered 17 Affirmative Action programs. In California, voters passed Proposition 227, which banned the use of race and sex in college admissions and
public employment. The argument over affirmative action continues, as noted in the text by the Coleman-Sowell debate.

C. Is Sex Suspect? Laws based on sex were supported in the past because they were thought to protect women. These laws were known as “protective legislation.” The women’s movement has objected to these laws as paternalistic, but sex remains an “uncertain” suspect category. The federal courts do retain part of the protective movement (i.e., sexual harassment laws). The Supreme Court has struck down many laws based on sex, although the “rule of intention” favors the government because victims of sex discrimination must prove that officials intended discrimination. It is likely that more sex-based classifications will fall as a result of present standards applied by the courts.

VI. Actors in Civil Liberties and Rights

The government, as well as voluntary organizations, are players in the political game, attempting to strike a balance between competing claims.

A. Judges. Judges play a leading role in developing civil rights and liberties. Two approaches to the use of law shape society. Activist judges, along with those called civil libertarians, may support civil liberties and rights by backing class action suits that have wider implications, or by applying the concept of equity. Equitable remedies allow the courts to prevent future discrimination by shaping remedies not covered by existing law, such as requiring school districts to develop plans overcoming racial imbalances. Non-activist judges are unsympathetic to class actions and tend to stress existing policies developed by Congress and the president. They tend to follow past decisions rather than expand the scope of constitutional protections. They see elected officials as being more accountable to the people.
B. The Justice Department. Historically, the Department of Justice has played a key role in protecting civil rights and liberties. But its role has varied by administration. The Department in the Reagan and Bush administrations opposed many civil rights measures, but the Clinton administration has been generally supportive of civil rights groups and causes in a quiet way. George W. Bush, elected with little Black support, has pursued a moderately conservative course toward civil rights, although opposing affirmative action. Bush’s Attorney General John Ashcroft is likely to be less active in civil rights enforcement.

C. “Private Attorneys General.” These are privately supported groups that sponsor cases against the government or other groups. They are funded in part by foundations and wealthy donors, and in part by dues-paying members. The largest of these, the American Civil Liberties Union (ACLU), handles more than 6,000 cases a year defending the rights of such groups as women, minorities, students, and minors. Legal defense funds have also been formed by minority group associations, such as the NAACP Legal Defense and Educational Fund. These focus their efforts against discrimination in housing, schools, employment, voting rights, and the legal system.

D. Legal Strategies. These organizations use a variety of legal tactics. They search for patterns of discrimination, they write articles in law journals, they offer services to individuals whose rights may have been violated. Organizations such as the ACLU concentrate on offering their services to individuals unable to pursue their case alone in the hopes of finding a test case (i.e., one that has a good chance of setting a new precedent). These legal groups hope that their case will be argued in the Supreme Court, where it will become a landmark decision, creating a new legal standard that affects later decisions in the same area.
E. **Obeying the Courts.** In addition to declaring state laws unconstitutional, the courts can issue injunctions and court orders to ensure that rights are protected. Federal orders must be obeyed by state officials and can be enforced by citations, fines, jail sentences, and the use of federal marshals or, as Eisenhower and Kennedy did, troops. Compliance often requires pressure from federal authorities, as was the case with police departments following the warning guidelines of *Miranda*. The police were further pressured by the courts applying the exclusionary rule.

F. **Public Opinion and Civil Liberties.** Judicial decisions are often not supported by public opinion. A majority of the public does not believe that criminals should be released on “legal technicalities.” The judiciary is not directly accountable to the public, and debate over its pronouncements is a sign of health in the system, although dissent may make compliance a sometime thing.

VII. **Case Study: Flag Burning and Flag Waving**

In 1989, the Supreme Court overturned a Texas law against desecrating a venerated object--applied to an incident in which the American flag was burned for clear political protest purposes. The 5-4 decision was written by Justice William Brennan, a liberal, but supported by Reagan appointees Antonin Scalia and Anthony Kennedy. Brennan, echoing similar High Court decisions of 1969 and 1974, said that since the law was obviously aimed at curtailing free expression, it had to pass the “most exacting” standards. He wrote that the high value placed on protection of speech outweighed the state interest in protecting the physical integrity of the flag.

A political uproar followed, led largely by President Bush and Republicans who saw the chance to hold Democratic feet to the fire on a patriotism issue. An attempt to pass a constitutional amendment protecting the flag faltered as public opinion cooled on flag-burning and public resistance to changing the Constitution increased. A law
against desecrating the flag passed as an alternative to the failed amendment, but failed the constitutionality test in several lower courts and the Supreme Court in a decision written by Justice Kennedy. In 1995 and 1997, the amendment passed the House by more than the two-thirds vote needed, but was twice narrowly defeated in the Senate.

KEY CHAPTER TERMS AND IDENTIFICATIONS

civil liberties
civil rights
Bill of Rights--1791
Fifth Amendment
Fourteenth Amendment
“Due process” and “equal protection”
campus “speech codes”
preferred freedoms
partial versus complete incorporationists
First Amendment freedoms--speech, religion, privacy, due process
“speech plus”
libel and slander, “yelling fire in a crowded theater”
Communications Decency Act of 1996
Reno et al. v. ACLU et al. (1997)
school prayer
President Bush’s “faith-based groups”
Ninth Amendment
“Zone of privacy”
Romer v. Evans (1996)
due process rights
affirmative action
suspect classifications--race and sex
“close scrutiny”
Plessy v. Ferguson
Brown v. Board of Education
University of California Regents v. Bakke
City of Richmond v. Corson
Adarand v. Pena
Proposition 227
equality of opportunity
equality of results
“Our Constitution is color-blind” (Justice Harlan)
civil libertarians
class action suits
equity law
private attorneys general
American Civil Liberties Union
NAACP Legal Defense & Educational Fund
test case
landmark decision
injunctions and orders
Little Rock Central High School
Miranda v. Arizona
exclusionary rule
Alien and Sedition Acts

TEACHING SUGGESTIONS

1. Invite a representative of the ACLU to class. The function of the ACLU can be explained to the class, as well as a number of important cases involving civil liberties.

2. If possible, obtain a video of the documentary EYES ON THE PRIZE, which chronicles the civil rights struggle in this country. By showing it to the class, the full drama of the civil rights movement can be realized.

3. Ask students their opinions on whether prayer should be permitted in the public schools. Despite the prohibition against prayer, it is possible
that students may have experienced religious activities in their high schools before coming to college.

4. Set up a debate involving the issue of the Internet and pornographic materials. As preparation for the debate, review the Supreme Court ruling (Reno).

SUGGESTED RESEARCH ASSIGNMENTS

1. Study how other democracies approach issues of civil liberties and civil rights. How are freedom of speech laws different in Great Britain, for example, as compared with the U.S.? How are they similar?

2. Ask a team of students to interview local police officers regarding their use of the Miranda warnings in making arrests. In addition, what search and seizure procedures are they obligated to follow? The results of the interviews can be tabulated and form the core of a term paper.

3. Ask a few students to investigate the speech standards on their own campus. How have they evolved? How have they been applied? Are students and faculty familiar with them? How much support is there for them at your college?

MULTIPLE-CHOICE QUESTIONS

1. The main constitutional reason why the Bill of Rights has been incorporated relates directly to which specific amendment?
   a. Tenth Amendment
   b. Thirteenth Amendment
   c. Fourteenth Amendment
   d. First Amendment
2. The equal protection clause prevents discrimination by private individuals when
   a. it is aided by state action such as a law.
   b. it involves a fundamental state interest such as education.
   c. both a and b are correct
   d. both a and b are incorrect

3. The “due process” clause of the Fourteenth Amendment applies to
   a. the federal government only.
   b. only minority groups.
   c. all levels of government.
   d. laws passed since Miranda v. Arizona.

4. The notion that a democratic society needs competition among ideas as much as an economic marketplace needs competition was stated by
   b. Oliver Wendell Holmes.
   c. Bill Clinton.
   d. Janet Reno.

5. According to the author, the most important civil liberties are those that
   a. protect ethnic minorities from the majority.
   b. protect children.
   c. protect players in the political game from government.
   d. all of the above

6. The phrase “equal protection of the laws” is found in what amendment?
   a. the Fourteenth Amendment
   b. the Fifth Amendment
   c. the First Amendment
   d. none of the above
7. The Supreme Court struck down the Communications Decency Act of 1996 because
   a. the technology creating the Internet was too new.
   b. the law was too vague.
   c. it did not protect children from viewing offensive material.
   d. a majority of the Court watch pornography.

8. The Bill of Rights is fundamentally designed to protect
   a. individuals from other individuals.
   b. state governments from the federal government.
   c. individuals from government interference.
   d. all of the above

9. The Supreme Court found a “zone of privacy” that shields individuals from government intrusion in
   a. the constitutional provision against illegal searches.
   b. the legal arguments behind the ruling in Plessy v. Ferguson.
   c. the First and Ninth Amendments.
   d. none of the above

10. The 1996 decision of Romer v. Evans, the Supreme Court ruled
    a. a state could not single out a group and prohibit local laws designed to end discrimination against them.
    b. homosexual marriages should be on the same footing as heterosexual marriages.
    c. school prayer was constitutional.
    d. discrimination was permitted as long a majority of the community disliked the discriminated group.

11. According to the Supreme Court, Affirmative Action programs must now
    a. have a compelling interest behind them.
    b. be narrowly tailored.
    c. both a and b are correct
    d. both a and b are incorrect
12. The main thrust of Proposition 227 passed in California in 1994 was
   a. limiting the real estate taxes in every urban community.
   b. ending the ACLU’s support of illegal immigration.
   c. banning the use of race and sex in college admissions and public employment.
   d. mandating that race be a major factor in admitting students to public universities.

13. In *Adarand v. Pena*, the Supreme Court threw out
   a. the equal protection clause.
   b. federal set-aside programs for minority contractors.
   c. all forms of affirmative action.
   d. the exclusionary rule.

14. Which of the following cases dealt with the issue of sexual harassment?
   a. *Texas v. Johnson*
   b. *Oncale v. Sundowner*
   c. *Steelworkers v. Weber*
   d. *Plessy v. Ferguson*

15. Protective legislation refers to
   a. laws outlawing the exploitation of child labor.
   b. laws regarding wage and hour regulations for female workers.
   c. laws passed to outlaw unsanitary work conditions.
   d. all of the above

16. The exclusionary rule refers to
   a. those cases that the Supreme Court will not hear.
   b. a principle upheld in *Brown v. Board of Education*.
   c. throwing out evidence obtained by unconstitutional means.
   d. an intent to withhold information from the courts.
17. Due Process rights are most closely associated with which amendments?
   a. First and Second Amendments.
   b. Fifth and Fourteenth Amendments.
   c. Sixth and Eighth Amendments.
   d. None of the above.

18. The ACLU
   a. defended individuals against the “red scares” of the 1920s.
   b. opposed “civility” codes on college campuses.
   c. a and b are correct
   d. a and b are incorrect

19. A landmark case is one that
   a. is heard by the Supreme Court.
   b. creates a new general standard for judicial decisions.
   c. becomes an amendment to the Constitution.
   d. Congress refers to the Supreme Court.

20. Thurgood Marshall is significant because he
   a. helped defend O.J. Simpson in his civil liberties case.
   b. was the only male employee in the National Organization for Women Legal Defense & Educational Fund.
   c. was the first Black appointed to the Supreme Court.
   d. wrote the landmark Brown v. Board of Education decision.

21. When President Dwight D. Eisenhower sent federal troops to protect Black students at the Little Rock Central High School, he was
   a. enforcing a court order.
   b. protecting the rights of the accused.
   c. adhering to provisions in the Equal Rights Amendment.
   d. stopping the Governor of Arkansas from filing an injunction.
22. If state agencies refuse to obey a Supreme Court order, the Supreme Court can
   a. do nothing, but the Chief Justice can appeal to the governor.
   b. fire the heads of those disobedient state agencies.
   c. ask the state’s national guard to close down those agencies.
   d. none of the above

23. The exclusionary rule
   a. outlaws using previous discrimination in civil rights cases.
   b. forbids female Supreme Court Justices from ruling on sex cases.
   c. forbids applying more than one constitutional provision to any case.
   d. none of the above

24. The attitude of the Justice Department toward civil rights groups during the Clinton administration has been
   a. generally hostile.
   b. generally supportive.
   c. one that preferred a “class conscious” approach.
   d. one preferring a “color-blind” approach.

25. Which of the following is a true statement about the Supreme Court justices regarding the flag-burning case?
   a. Justice Brennan argued that flag-burning was not protected by the First Amendment.
   c. both a and b are true
   d. both a and b are false

26. Plessy v. Ferguson
   a. upheld racial segregation.
   b. outlawed racial segregation.
   c. is the law of the land.
   d. none of the above
27. Thomas Sowell argues that
   a. affirmative action does not work.
   b. affirmative action creates resentment against Blacks.
   c. a and b are correct
   d. a and b are incorrect

28. Sexual harassment law is an example of
   a. freedom of action.
   b. an issue the Supreme Court will not address.
   c. President Clinton’s demand to “mend it, but don’t end it.”
   d. protective legislation.

29. The following is allowed religious activity in public schools
   a. Student prayer
   b. Wearing religious symbols
   c. Both a and b
   d. Neither a nor b

30. O.J. Simpson refusing to testify in his criminal trial was an example of
   a. freedom of speech.
   b. civil rights.
   c. due process.
   d. freedom from harassment.

**TRUE-FALSE QUESTIONS**

1. Civil liberties are those rights that protect citizens against government actions.

2. Civil rights are the protections granted in the Constitution recognizing that all citizens must be treated equally under the laws.

3. The Supreme Court has stated that only federal legislation can address civil liberties issues.
4. The Miranda decision ruled that anything suspects said before booking could not be used against them in court.

5. In the past few years, the courts and voters have reduced the impact of affirmative action.

6. Members of the ACLU are among the most prominent supporters of First Amendment rights.

7. John F. Kennedy used the army to enforce a federal court order.

8. Regarding segregation, the Supreme Court reversed itself in this century by rejecting the “separate but equal” doctrine.

9. Since most employees of the Justice Department are career civil servants, it does not matter who the president is when issues of civil rights and liberties arise.

10. The Supreme Court has ruled that the flag is a unique symbol demanding unusual protection.

ESSAY QUESTIONS

1. Summarize the main philosophical differences between the partial incorporationists and the complete incorporationists. Then do the same for judges who practice judicial activism versus those who believe in judicial restraint.

2. Do Supreme Court Justices follow the judicial philosophies expected of them by the presidents who nominate them? Why?

3. Should sex be considered a “suspect classification?” Should it be treated the same as race? Cite examples of where it has been treated the same and where it has been treated differently and argue your point of view.
4. Black conservatives argue that affirmative action hurts African Americans more than it helps them. What are the arguments for and against them? How has Proposition 227 affected the African-American community in California?

5. How have the courts restricted the rights of criminal defendants over the past few years?

6. Is it possible to keep the Internet separate from the freedom of speech restrictions that govern other areas of public communications?