

Civil Liberties and Civil Rights

It is ironic that the Bill of Rights was not part of the original Constitution because it has become such an important part of our constitutional law beginning with the twentieth century. In introducing students to the subject, point out that no civil liberty or right is absolute. However, it is difficult to determine under what circumstances constitutional and inalienable or higher-law rights may be abridged. The Supreme Court has typically used a balancing test, weighing governmental interests against private rights and interests, to decide at what point the government may curtail civil liberties and rights.

The constitutional premise of the Bill of Rights, and even of those founding fathers who did not believe it should be spelled out in the Constitution, is that natural law and natural rights give individuals inalienable rights that the government cannot take away except under the most compelling circumstances. Defining civil liberties and rights is a matter of constitutional and higher law interpretation to be done by the courts, rather than a determination that is to be made through the political process in which the majority can, at whim, trample upon and stamp out individual freedoms.

Unique in the American system is the dominant and expansive role of the courts in interpreting both the constitutional and higher law of civil liberties and rights. The latter is incorporated into the former in such controversial cases as *Roe v. Wade* (1973), upholding a woman's right to have an abortion based on the individual's fundamental right to privacy, a right that is not explicitly part of the Bill of Rights but one that can be interpreted as part of the liberty of the due process clause of the Fourteenth Amendment. As Justice Douglas stated in the precedent to *Roe*, *Griswold v. Connecticut*, 381 U.S. 479 (1965), a right to privacy is created from a penumbra of various Bill of Rights provisions, such as the First Amendment freedoms of association, speech, and press; the Fourth Amendment protection against unreasonable searches and seizures; and the Fifth Amendment protection against self-incrimination.

THE NATIONALIZATION OF THE BILL OF RIGHTS

In leading into the next discussion on the nationalization of the Bill of Rights, ask students to evaluate the arguments of the opponents of the Bill of Rights. Did the listing of rights, essentially in the first eight amendments to the Constitution, actually create an important bulwark against intrusion by the national government upon the civil liberties and civil rights of the people? Historical evidence certainly suggests that the major invasion of rights has been by the states and not the national government. The irony is that the Supreme Court, under the due process clause of the Fourteenth Amendment, ultimately used the Bill of Rights far more to curb *state* than national power.

The note introducing *Gideon v. Wainwright* (1963) is a capsule summary of the history of the nationalization process under the due process clause of the Fourteenth Amendment. The relevant part of the text of that amendment is given, followed by a brief overview of the *Slaughterhouse Cases*, 16 Wallace 36 (1873); *Gitlow v. New York*, 268 U.S. 652 (1925); and *Near v. Minnesota*, 283 U.S. 697 (1931).

But before proceeding to the nationalization of the Bill of Rights, students should clearly understand Chief Justice John Marshall's decision in *Barron v. Baltimore* (1833), in which he examined both the intent and the text of the Constitution to conclude that the Bill of Rights limited only the national government.

In response to a plea that the Fifth Amendment should be applied to the City of Baltimore, as an agent of the state, to prevent property confiscation without just compensation, Chief Justice John Marshall's opinion in *Barron v. Baltimore* stated:

Serious fears were extensively entertained, that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those unvaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general [national] government-not against those of the local [state] governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.

***Gideon v. Wainwright*, 372 U.S. 335 (1963)**

As direct background to the *Gideon* case, *Powell v. Alabama*, 287 U.S. 45 (1932), and *Betts v. Brady*, 316 U.S. 455 (1942), are covered in the text. The general debate over the proper extent of nationalization of the Bill of Rights, as well as the controversy over going beyond the explicit provisions of the Bill of Rights in incorporating such rights as privacy is discussed, and reference is made to *Adamson v. California*, 332 U.S. 350 (1947), *Griswold v. Connecticut* (1965), and *Roe v. Wade* (1973). The story of the *Gideon* case is brilliantly told in Anthony Lewis' classic book, *Gideon's Trumpet* (New York: Random House, 1964), which is often assigned in introductory American Government courses.

QUESTIONS FOR DISCUSSION

1. What were the essential facts of the *Gideon* case, and what constitutional issue was involved?
2. What arguments did the Court use to justify inclusion of the right to counsel under the due process clause of the Fourteenth Amendment?