

A USER’S GUIDE TO THE CONSTITUTION – PART IV
THE RELATIONSHIP BETWEEN THE U.S. GOVERNMENT
AND
THE PEOPLE

WHAT MAKES US FREE?

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THE RELATIONSHIP BETWEEN THE U.S. GOVERNMENT AND THE PEOPLE

- I. Summary:** (a) Initially, it was thought the enumeration of foundational civil liberties unnecessary, as the new central government was to be limited. However, there were sceptics and, to secure ratification, it was promised that a Bill of Rights would be added after ratification. As the enumerated rights are not a comprehensive enumeration of liberties, a look at the rights the Founders chose to enumerate and why. Why do half of the enumerated rights address criminal procedure? Why is the right to a jury in civil proceedings a fundamental right?
- (b) Much like the invention of the cotton gin in 1795, technology has once again upended a legal framework, which in this case secures our First Amendment rights. Speech, including political speech, moved from the three-dimensional public space to a privately owned digital space and the law, so far, has not followed. The functional result is engagement in civic society without a First Amendment – an intolerable situation. Where is the locus of the solution? The Congress? Or, the Judiciary?
- (c) The freedom of the press is incidental to the citizens’ right to be accurately informed. We rely upon the press as we can not always personally observe the workings of our government. What happens if the press becomes corrupt and decides to tell you what to think, instead of telling you what is going on? Is it time to reconsider NYT v. Sullivan, the major case that affords the press broad protection from defamation laws?
- (d) What makes us free? Is it because we live in the United States? Or is it a heart and mind committed to freedom? Open-mindedness and fair-mindedness are the *sine qua non* of freedom. What is the impact on freedom of ideological partisanship – perhaps caused consuming the work-product of a corrupt media? What is the impact of using ideological partisanship as a prism through which criminal charges brought against an ideological “foe” are viewed? Is a citizen who “believes all women” qualified to serve on a jury in which a gender relationship is relevant to the case? How about someone who believes “ACAB”? Freedom is lost when the people lose the discipline of open-mindedness and fair-mindedness.

II. Background: One Last Compromise to Secure Ratification:

The Constitution was ratified in 1789, without the Bill of Rights. Concern about overreaching by the federal government remained, however. *Compare, e.g., Brutus 1* (R. Yates?) *with Federalist 1* (Hamilton).

The Bill of Rights was promised to ensure the Constitution's ratification. After ratification, the first Congress proposed 12 amendments, of which 10 (the Bill of Rights) were ratified by the States effective Dec. 15, 1791.

III. The Design (Part 1): The Specific Safeguards:

(a) *Protection of the 'free mind' (Liber):*

First Amendment: no State-sponsored religion (Establishment Clause)
free exercise of religion (Freedom of worship)
freedom of Speech
freedom of the Press (indirectly, the right to be informed)
freedom of *peaceable* public assembly
right to petition the Government for redress of grievances

Note the rights range from: (a) the interior space to worship and think for yourself, to (b) speaking about and acting upon your beliefs in the political arena. In sum, the First Amendment identifies and safeguards the core components of personhood.

(b) *Protection of Person and Property from direct governmental tyranny:*

Second Amendment: keep and bear arms

Third Amendment: In peacetime, no housing of soldiers without owner's consent;
in wartime, only as allowed by law

(c) *Identifying the procedures necessary before the government may extinguish an individual's liberty:*

Fourth Amendment: freedom from searches and seizures of person or property;
Judicial warrant based upon sworn statement
probable cause required to obtain a warrant

Fifth Amendment: right to criminal process initiated by a Grand Jury

Indictment (finding probable cause to charge; not random)

no Double Jeopardy (*i.e.*, may not be charged twice for the same crime). *But note*, State and federal government are separate sovereigns who may each charge based on the same incident, *Gamble v. U.S.*, 587 U.S. ____ (2019) (S.Ct. No. 17-646) (dual sovereignty doctrine; based upon federalism))

no self-incrimination in a criminal case

may not be deprived of life, liberty or property without due

process of law (applies to civil as well as criminal proceedings)

private property may not be taken for public use, without just compensation

Sixth Amendment: criminally accused has right to a ‘speedy and public trial’
right to trial by impartial jury in locale where crime committed
right of prior notice of criminal charge
right to confront and cross-examine adverse witness
right to compel testimony of witness
right to an attorney

Eighth Amendment: pretrial: excessive bail not allowed
post-conviction: no cruel and unusual punishment
no excessive fines

Food for thought: the enforcement of criminal law is a governmental function necessary to secure ‘ordered liberty’. Nonetheless, criminal law enforcement is the exercise of public power against an individual whose ‘consent to be governed’ legitimizes the very exercise of that power. The procedural safeguards in the Bill of Rights are fundamental because they ensure that each citizen, the despised as well as the admirable, is treated with equal fairness by the law. Hence the saying over the entryway of many courthouses, including the U.S. Supreme Court Building: “Equal Justice Under Law.”

(d) *The facts of civil disputes are decided by a jury of one’s peers and not by a government official:*

Seventh Amendment: right to a jury trial in civil actions where the value in controversy is greater than \$20.

judicial review of a jury’s factual findings restricted

Why is the right to a civil jury trial fundamental? (The Sixth Amendment guarantees a jury trial in criminal cases). Civil trials are about personal disputes. A jury is drawn directly from “We the People”, and not from a representative government official. In this way, the citizenry is directly responsible for the quality of justice in its community; a responsibility too important to delegate to the government!

Justice via jury service is what we do for one another.

IV. The Design (Part 2): The Catchall Safeguard:

Ninth Amendment: the rights of the people are not limited to the rights mentioned in the Constitution and the Bill of Rights

V. The Contours of the Bill of Rights: The Personal Experience of Liberty:

- (a) *The Limited Reach of the Bill of Rights:* The Bill of Rights is limited to a person's relationship with the *Government* and, in some cases, non-governmental officials who qualify as 'state actors. The Bill of Rights, thus, extends to civic rights *only*. The Bill of Rights *does not apply* to the private sector (*e.g.*, private employers) or persons).
- (b) *When is a non-governmental official a state actor?* There are several analytical approaches. One theory of current interest in the digital age is the 'public function theory,' *Marsh v. Alabama, 326 U.S. 501 (1946)*(Company-owned town; statute banned distribution of religious literature in public spaces. Statue ruled unconstitutional on state actor theory).
- (c) *Additional Limitations of the Bill of Rights:* Even when the Bill of Rights applies, a right is *not absolute*; it may be restricted if there is a compelling governmental interest and the impingement is the least necessary and the law is narrowly drawn to fulfill its purpose. (*See, e.g.*, COVID related lockdown orders affecting the right to worship.) In sum, there is always a balance between legitimate governmental action that may touch upon fundamental rights and the exercise of those rights. There is a personal responsibility to exercise civic rights responsibly. Consider: John Winthrop, Speech to the General Court, excerpted in Miller, ed., *The American Puritans*, p. 92 (1956).

VI. Current Challenges to the Personal Experience of Liberty:

- (a) *First Amendment and Speech:* Much like the invention of the cotton gin in 1795, technology has once again upended the legal framework, which in this case secures our First Amendment rights. Speech, including political speech, moved from the three-dimensional public space to a privately owned digital space and the law, so far, has not followed. The result is engagement in civic society without a First Amendment – an intolerable situation. Where is the locus of the solution? The Congress? Or, the Judiciary?

In an age when the locale of the 'marketplace of ideas' has shifted from physical space to digital space, are social media companies 'state actors'? (*See, supra* at p. 5, sec. V(a)(2)). If so, they have limited ability to censor the content of speech, including political speech. If not, they are private owners of companies with the ability to censor speech, including political speech.

See, Manhattan Community Access Corp. v. Halleck, 587 U.S. ____ (2019)(S.Ct. Dkt. No. 17-702)(private operators of a public access channel are not state actors required to follow the Constitution.) And see, amicus brief submitted by the Internet Association, whose members include Twitter, Facebook and Google.

But see, Tulsi Now, Inc., v. Google, LLC, Dkt. No. 2:19-cv-06444 (Dist. Central Ca., filed 7/25/19)(Count I alleges manipulation of search engine and other activities violate the First Amendment rights of speech, free association and assembly in violation of the First Amendment because Google is a state actor. *See, Complaint* at p. 21-24). The court found no state action and dismissed the case on March 3, 2020, relying on *Halleck*, among other legal authority.

See also, related: “Section 230 of the [Communications Decency Act](#) (CDA) of 1996 (a common name for Title V of the [Telecommunications Act of 1996](#)) is a landmark piece of [Internet](#) legislation in the United States, codified at [47 U.S.C. § 230](#). Section 230(c)(1) provides immunity from liability for providers and users of an "interactive computer service" who publish information provided by third-party users” [*Wikipedia*]

(b) *First Amendment and the Press:* The freedom of the press is incidental to the citizens’ right to be accurately informed. We rely upon the press as we can not always personally observe the workings of our government. What happens if the press becomes corrupt and decides to tell you what to think, instead of telling you what is going on? Where is the check to impel the press towards factual honesty? Is it time to reconsider *NYT v. Sullivan*, the landmark case that affords the press broad protection from defamation laws?

(c) *The Criminal Procedure Amendments and the Jury System:* What makes us free? Is it because we live in the United States? Or is it a heart and mind committed to freedom? Open-mindedness and fairmindedness are the *sine qua non* of freedom. What is the impact on freedom of ideological partisanship – perhaps caused by consuming the work-product of a corrupt media? What is the impact of using ideological partisanship as a prism through which criminal charges brought against an ideological “foe” are viewed? Is a citizen who “believes all women” qualified to serve on a jury in which a gender relationship is relevant to the case? How about someone who believes “ACAB”? Freedom is lost when the people lose the discipline of reasonableness, open-mindedness and fair-mindedness.