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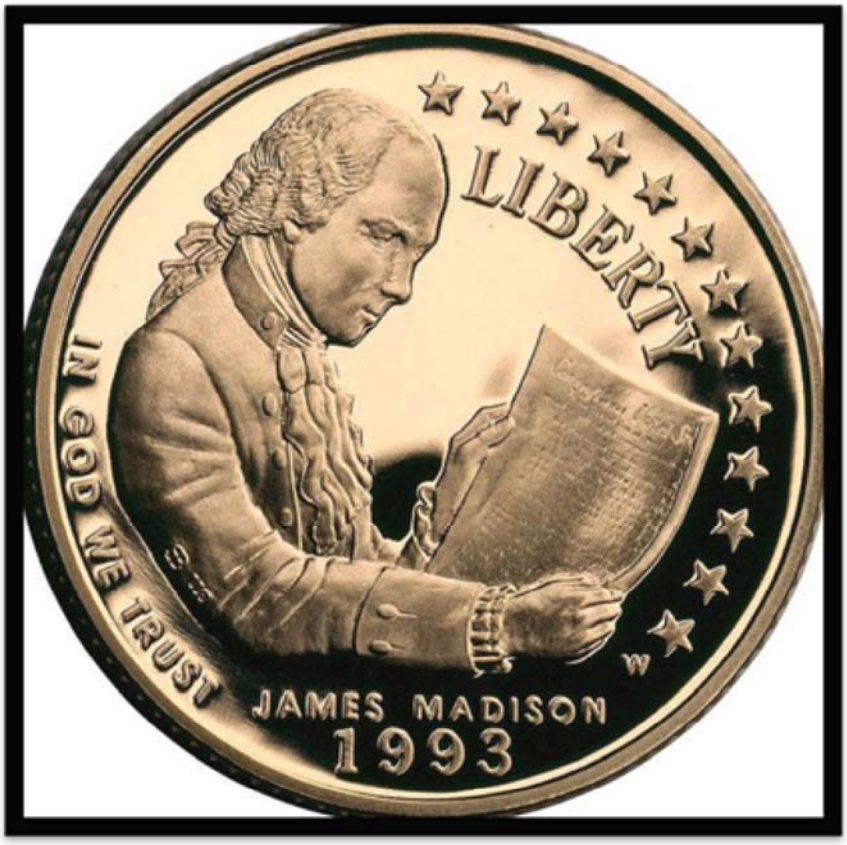
THE BILL OF RIGHTS: PART I



James Madison and the Bill of Rights: Commemorative Coin

Unit Overview

As the U.S. Constitution was being debated and ratified, the Anti-federalists argued for stronger protection of individual rights and specific limits on the national government's authority. The Constitution soon included ten amendments, known as the Bill of Rights, to address these concerns. Today, they, too, are part of a living document which continues to be defined and interpreted by judicial decisions, legislation and other practices. Americans still analyze and evaluate the freedoms of speech, religion, press, assembly and petition on a daily basis. However, these civil liberties are balanced by the obligation to respect the rights of others.

"With every civil right there has to be a corresponding obligation."
Edison Haines

The Constitution and the Rights of Individuals

During the struggle for ratification of the Constitution, Americans disagreed on a variety of political concepts and principles, but the lack of a bill of rights caused the greatest controversy. The Federalists, who supported the adoption of the Constitution as it had been drafted by the Constitutional Convention, insisted that most states had included detailed bills of rights in their individual plans for government. They also argued that, in Article I: Section 9, the Constitution does ban certain laws that violate the rights of individuals. These include bills of attainder and ex post facto laws. Writs of habeas corpus can only be denied under extreme circumstances.

- **Bills of Attainder**: A bill of attainder refers to an act of Congress that singles out a group or individual and assigns a punishment without a trial. Since the Founding Fathers knew that legislation like this had been used by European rulers to confiscate the property of prisoners, both Congress and state legislatures are prohibited from passing this type of law. Bills of attainder are rare in American history, but the Test Oath Act, passed in 1865, is one example. The Test Oath Act kept lawyers, who had been Confederate soldiers, from pleading cases in federal courts. Since it singled out a specific group and revoked privileges without a trial, the law was declared unconstitutional in 1867.

- **Ex Post Facto Laws**: Ex post facto laws are also forbidden by the Constitution. These laws, named from a Latin phrase meaning "after the deed or the action," are designed to punish people for activities that were not illegal when they were performed. For example, if a state lowers the speed limit on its highways, it cannot issue citations to those who were exceeding that limit before the law was passed.

- **Writs of Habeas Corpus**: Section 9 of Article I also addresses writs of habeas corpus. The term is derived from a Latin phrase meaning "you have the body." The body, in this instance, means collection of evidence or valid reasons. When a prisoner is held by the federal government, he/she can request a writ of habeas corpus. Then, it is the government's obligation to bring the prisoner to court and to show that the arrest was made for specific reasons. However, the Constitution notes that these writs can be suspended if a case involves a rebellion or an invasion that threatens public safety. President Lincoln chose this course of action during the Civil War, and President George W. Bush also denied these writs during the Global War on Terror. In both situations, these presidential decisions aroused criticism and controversy.

On the other hand, many Anti-federalists did not believe that these safeguards were sufficient. They saw the lack of a bill of rights as a critical flaw and refused to support the adoption of the Constitution.

Antifederalist 84: On the Lack of a Bill of Rights

This principle, which seems so evidently founded in the reason and nature of things, is confirmed by universal experience. Those who have governed, have been found in all ages ever active to enlarge their powers and abridge the public liberty. This has induced the people in all countries, where any sense of freedom remained, to fix barriers against the encroachments of their rulers. The country from which we have derived our origin, is an eminent example of this. Their magna charta and bill of rights have long been the boast, as well as the security of that nation. I need say no more, I presume, to an American, than that this principle is a fundamental one, in all the Constitutions of our own States; there is not one of them but what is either founded on a declaration or bill of rights, or has certain express reservation of rights interwoven in the body of them. From this it appears, that at a time when the pulse of liberty beat high, and when an appeal was made to the people to form Constitutions for the government of themselves, it was their universal sense, that such declarations should make a part of their frames of government. It is, therefore, the more astonishing, that this grand security to the rights of the people is not to be found in this Constitution

The debate over these issues became so intense that several noted Federalists, such as George Washington and James Madison, agreed to support the addition of a bill of rights once the Constitution was ratified. Shortly after the Constitution was adopted, Congress sent proposals for twelve amendments to the states. Ten, now known as the Bill of Rights, were approved and were added to the Constitution in 1791. Originally, the purpose of the first ten amendments was to protect the rights of citizens living under a strong, national government. However, throughout American history, the Bill of Rights has also been used to define the principle of limited government and to ensure that state governments do not violate basic civil rights.

Go to Questions 1-5.

The First Amendment and Individual Freedoms

The First Amendment lists five of the most important civil liberties enjoyed by Americans. They include the freedoms of religion, speech, press, petition and assembly.

U.S. Constitution: Amendment 1

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.

Freedom of Religion

The First Amendment presents two facets of freedom of religion. First, in what is called the **establishment clause**, the government is prohibited from requiring or supporting a specific religion. Since most European countries had one official religious institution, which people were forced to support, the Founding Fathers understood that this policy could result in discrimination and persecution. Thomas Jefferson referred to this clause in the Constitution as a "wall of separation" between the church and the state. Questions concerning the meaning of the establishment clause have triggered a number of cases before the Supreme Court. Many of these have involved schools and religion. For example, the principal of Nathan Bishop Middle School asked a rabbi to speak at a graduation ceremony. It was a common practice in the area to invite clergy for benedictions and invocations at school-related functions. A parent of one of the students at the middle school took the matter to court on the grounds that it violated the establishment clause in the First Amendment. In 1991, the Supreme Court heard the case of *Lee v. Weisman* and ruled that clergy who offer prayers in public school ceremonies are in violation of the Constitution. To hear about this case from the point of view of the Weisman family, click on the picture below.

The second aspect of freedom of religion addressed in the First Amendment is derived from the words "…or prohibiting the free exercise thereof". This phrase, called the **free exercise clause**, guarantees Americans the right to practice whatever religion they choose without government interference. Sometimes, however, religious practices and rituals may conflict with public safety and health. In these situations, the government can apply certain restrictions without violating the Constitution. The Supreme Court has made a number of rulings that define the right of worshipping freely or not worshipping at all. *Thomas v. Review Board of the Indiana Employment Security Division* is one such case. In 1980, the Blaw-Knox Foundry & Machinery Co. shifted operations in one of its plants to the manufacture of weapons. Because his faith prevented him from producing arms, Eddie Thomas, an employee, asked to be laid off. The request was granted, and he applied for unemployment benefits. Since it did not believe that his reasoning was justified, the Indiana Employment Security Division denied his claim; then, Thomas filed a lawsuit based on the free exercise clause. In 1989, the Supreme Court heard the case and ruled that the state of Indiana had violated Thomas' First Amendment rights.

Evangelical Lutheran Churchwide Assembly

Freedom of Speech

Freedom of speech has long been considered the cornerstone of American democracy. For citizens to be informed and to participate in the decision-making process, they need to hear and to discuss a variety of opinions. The concept of speech has expanded over the years to include many forms of expression, such as films, television broadcasts, books and telephone conversations. Social media and email are also under this broad umbrella. Even though freedom of speech is protected by the Constitution, it does have limits. Exactly what these limits are is continuously being defined by the courts. Judges must sometimes balance free speech against national security and public safety. Types of expression that the Supreme Court has ruled not protected in most situations by the First Amendment include the following:

- **Causing panic**: During World War I, Charles Schenck mailed distributed a large number of flyers criticizing the use of the military draft. This resulted in his arrest. He believed that his First Amendment rights had been violated and filed a lawsuit. When his case reached the Supreme Court, the justices ruled that his conviction did not violate the Constitution. When he wrote the majority opinion for this case, Chief Justice Oliver Wendell Holmes stated the following: "The most stringent protection of free speech would not protect a man in falsely shouting 'Fire!' in a theater and causing a panic." This established the principle of weighing free speech against public safety.

- **Obscenity**: The idea of obscenity is one of the most controversial aspects of the First Amendment. Since what is obscene to one person may not be obscene to another, it represents a continuous challenge to the court system. When writing the majority opinion in the case of *Miller v California*, Chief Justice Warren Burger established a list of guidelines, known as the Miller Test; it is still being used to decide what questionable material is protected as free speech. Social media and technological innovations continue to create new concerns requiring the court's interpretation of the First Amendment.

- **Defamation**: Defamation is a basic term for attacks on another person's name, character or reputation. If it is in spoken form, such as a public speech or a radio address, this type of defamation is called **slander.** When it appears as written remarks in newspapers or other printed media, it is known as **libel**. However, valid criticism of politicians and celebrities is considered an appropriate use of free speech. The landmark decision in the case of *New York Times v. Sullivan* (1964) emphasized this point. A civil rights group paid the *New York Times* to print an advertisement concerning the actions of the police department in Montgomery, Alabama. L.B. Sullivan, the police commissioner, sued the newspaper on the grounds that he had been libeled. When the case reached the Supreme Court, the justices decided in favor of the *New York Times*, but they also noted that the First Amendment does not cover statements made with "actual malice" or "reckless disregard for the truth".

Freedom of Speech

- **Fighting words**: Fighting words are those expressions that, when spoken, inflict injury and destroy the peace. To a degree, they are protected by the First Amendment. If the danger to the public is "clear" and "imminent", law enforcement can limit the right of free speech. *Brandenburg v Ohio* makes this point. Charles Brandenburg was a Ku Klux Klan leader, who staged a rally in Ohio. He refused to follow a police order to clear the street, and Brandenburg was arrested. When his case reached the Supreme Court, his right to free speech was upheld because there was no immediate danger that the crowd would riot.

- **Sedition**: Sedition refers to words that are used to incite rebellion or to promote the overthrow of the government. Espionage, treason, and sabotage are all forms of seditious speech, but the meaning of these terms has also been defined by a number of court decisions. In the 1950s, Oleta Yates and other members of the Communist Party were convicted of advocating the overthrow of the United States government. After a number of appeals, the case reached the Supreme Court in 1957. When the justices ruled in favor of Yates, they noted the difference between speech that expresses a theory or an idea and speech that encourages others to break the law. Discussions concerning ideas and theories are protected under the First Amendment; organizing a revolution or a riot is not.

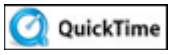
Freedom of the Press

Americans consider freedom of the press to be an important component of a democratic society. Articles from printed and electronic sources foster constructive debate, encourage investigative reporting and present different points of view. They can also threaten national security, promote obscenity and make false statements in the name of advertising. Along with the power to inform, the press also has the power to distort. As a result, judicial rulings have expanded freedom of the press in some areas and limited it in others. The case of *New York Times Co. v. United States* is one example. The New York Times and the Washington Post received copies of a classified report known as the Pentagon Papers from Daniel Ellsburg, a government employee. When the newspapers began to publish these documents, the Nixon administration tried to stop them by filing a lawsuit. The Supreme Court ruled on the case in 1971 and upheld the publishing company's right to print the Pentagon Papers under the First Amendment. The majority opinion noted that the government failed to prove a genuine threat to national security.

New York Times Offices: Photo Credit--Jleon

Conflicts between the government and the press have also developed over revealing the sources for news stories. Reporters insist that naming their informants or forcing them to testify in court is an unfair limitation on a free press. The Supreme Court, on the other hand, has not extended the First Amendment to cover the sources of journalists. In 1972, Earl Caldwell, a reporter for the *New York*

Times, refused to give testimony before a federal grand jury about the operations of a radical political group, the Black Panthers. He asserted that a court appearance would end his access to certain confidential sources. The Supreme Court ruled that criminal investigations override a reporter's right to confidentiality. Some states have passed laws that name conditions under which a reporter may not be required to testify in state courts. These are called **shield laws**; however, they do not apply in federal cases.

 The Pentagon Papers (00:52)

Freedoms of Petition and Assembly

The last section of the First Amendment addresses the right to assemble and to petition. Freedom of assembly includes participation in marches, parades, protests and picket lines. The Constitution specifies that these must be peaceful gatherings. Like all the freedoms addressed in the First Amendment, the right to assemble is limited by concerns for the public safety. For example, protestors are not permitted to disrupt rush hour traffic or to obstruct airport runways. Participants do not have the right to loot stores, to start fires or to take over public offices. Sometimes it is not the protestors who are disorderly, but the bystanders. Hecklers disturb the scene by shouting insults or by interfering with the demonstrators. In these instances, law enforcement may put a stop to the assembly for the sake of public safety. Generally, people can legally assemble in areas supported by tax dollars. Parks, sidewalks, state capitol grounds and national monuments have served as sites for demonstrations. Court rulings have restricted the public venues that may be used for this purpose. Harriet Louise Adderly and a group of thirty-one other students from Florida A & M University conducted a protest inside a local jail without permission. The sheriff asked them to leave, and the group refused. The students were arrested and were charged with trespassing. When their case (*Adderly v. Florida*) came before the Supreme Court in 1966, their convictions were upheld. The majority opinion explained that, even though jails are public institutions, they are built for security reasons and inappropriate for protests.

Freedom of Assembly

Unlike the other provisions of the First Amendment, very few court cases have interpreted the right to petition. It is simply a way to encourage or to disapprove of a government action. Lobbying, letter-writing, e-mailing and collecting signatures are all acceptable means to exercise the freedom of petition. Although this right is often taken for granted, the process of petitioning helps to ensure that leaders listen to the people, even when they would prefer to do otherwise.

Go to Questions 6-14.

The Second Amendment and the Right to Bear Arms

When congressmen first prepared to send a list of proposed amendments to the states, the Revolutionary War and British tyranny were fresh in their minds. The Second Amendment, based on the language of the Anti-federalist arguments, limited the power of the federal government by addressing the necessity of state militias and the right to bear arms.

Anti-federalist 84 On the Lack of a Bill of Rights--1788	U.S. Constitution: Amendment 2 Ratified 1791
Does not the same necessity exist of reserving this right under their national compact, as in that of the States? Yet nothing is said respecting it. In the bills of rights of the States it is declared, that a well regulated militia is the proper and natural defense of a free government; that as standing armies in time of peace are dangerous, they are not to be kept up, and that the military should be kept under strict subordination to, and controlled by, the civil power.	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.

Does this amendment simply acknowledge the idea that the federal government cannot outlaw state militias, or does it mean that, in the tradition of the minutemen, every citizen is part of the militia and has a right to bear arms? For the most part, the courts have upheld that this privilege applies to individuals, but the Supreme Court's ruling in the case of the *United States v. Miller* (1939) supported the right of Congress to pass gun control legislation. The Second Amendment continues to be controversial as Americans debate the impact of assault weapons, mandatory background checks and the availability of ammunition.

Go to Questions 15 and 16.

The Third Amendment and the Quartering of Soldiers

Before the American Revolution, the British demanded that their soldiers be housed and fed in the homes of the colonists. Since there were few inns and little time to build barracks, this seemed to be a practical solution. However, the colonists deeply resented this invasion of their privacy and the additional household expense. Many citizens of the new country believed their property needed to be safeguarded. The Third Amendment promises that United States citizens will not be forced to keep soldiers in their homes during peacetime without their consent. It also, along with the Second Amendment, reinforces the principle of limited government.

U.S. Constitution: Amendment 3
No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

What's Next?

The amendments discussed in this unit consider the personal rights of individuals and offer protection from government interference. They are intended to provide the necessary freedom of self-expression to the people they serve, but they are not without limitations and restrictions. The rights guaranteed by the First Amendment are not absolute; they must be balanced with respect for the rights of others. The Anti-federalists believed that citizens needed protection from unwarranted searches, unwanted invasions of their property and unfair treatment of accused persons in court. These things are also covered in the Bill of Rights. Can the government take private property for public use? Can you be tried twice for the same crime? Does the accused have the right to confront those who witness against him? We will consider all of these issues in the next unit. Before continuing, review the terms found in throughout this unit and complete Questions 17 through 26.

Go to Questions 17-26.

Below are additional educational resources and activities for this unit.

Unit 7 Advance Organizer

Unit 7 Application Activity