10. Political Rights and Guarantees

Bettman Archive

A RIGHT is an act that an individual is in every sense capable of performing and for the performance of which he has the protection of the government. A right is to be distinguished from a liberty, which may be defined simply as an act that an individual is able to carry out. A right, then, is a liberty that is protected by the government.

There are several ways of classifying the rights that are enjoyed in the

United States. One widely accepted way, which will be used for the purposes of this text, terms rights either political, judicial, or property. Political rights, which are to be the topic of this chapter, refer to the relationships between the individual and the state in the governing process. These rights include (1) a guarantee against involuntary servitude; (2) an assurance of the equal protection of the laws; (3) freedom of speech and the press; (4) freedom of assembly; (5) freedom of religion; (6) the right to bear arms; (7) a clear definition of treason; and (8) protection against being deprived of life or liberty without due process of law.

Judicial and property rights are to be discussed in later chapters which deal with issues regarding which these rights become vital. Judicial rights comprise the numerous guarantees against unfair treatment in conjunction with a case at law. They include (1) a prohibition against bills of attainder; (2) a prohibition against *ex post facto* laws; (3) assurance against unreasonable search and seizure; (4) a prohibition against excessive bail; (5) indictment by a grand jury; (6) the writ of *habeas corpus;* (7) a speedy, public trial by jury; (8) a defense attorney and witnesses for the defense; (9) protection against self-incrimination; (10) a prohibition against double jeopardy; (11) a ban on cruel and unusual punishments; and (12) a guarantee of due process of law throughout the trial proceedings. Property rights concern guarantees given to property-owners against actions of the government. Property rights include (1) a guarantee of the inviolability of contracts; (2) limitations on the power of eminent domain; and (3) the requirement that the seizure of private property by the state be done only according to the due process of the law.

One of the most important aspects of all rights, whether political, judicial, or property, is that none of them is absolute. That is to say, there is no right that has no limitations upon it. These limitations may be imposed for many different reasons, such as the fact of a state of war between the United States and a foreign power, or for the protection of the public. Indeed, it is this latter reason which probably occasions the greatest contests over rights. It is in general the function of the States, through their police power, to enact laws for the protection of the public; and it is this State legislation that most frequently clashes with the essence of rights.

SOURCES AND GUARANTEES OF RIGHTS

Documentary sources

The principal sources of rights are the Constitution, its Amendments, federal laws, and court decisions. Many of these are derived from the principles of Christianity and Roman Stoicism; such British documents as

---

The Trial of Aaron Burr, 1807. William Wirt is delivering a famous speech in prosecution of the former Vice President (1801–1805). In the background sits Chief Justice Marshall. Burr was acquitted for lack of two witnesses to the overt act of treason in levying war against the United States. The trial gave early proof of the difficulty of convicting anyone of treason under the Constitution.

the Magna Carta, the Petition of Right, and the Bill of Rights; and colonial practices. The federal Constitution itself contains few explicit statements of rights; but for many people it is an implicit assertion of rights in that it confers only delegated powers upon the national government. The Amendments, especially the first ten, the Thirteenth, and the Fourteenth, are major sources of rights; in fact, the first ten Amendments, the Bill of Rights, were adopted in 1791 to provide guarantees of rights that many Americans had expected in the Constitution proper. The Thirteenth and Fourteenth Amendments, which were originally designed to apply chiefly to the newly emancipated Negroes, have since been applied to all persons regardless of race, and even to business corporations, which are "legal persons." On the basis of the authorizations in the Constitution and its Amendments, Congress has from time to time passed laws providing for further rights. Finally, through judicial decisions the federal courts, notably the Supreme Court, have interpreted and defined many of these rights in cases in which one of these rights, or a limitation on a right, has been challenged.

The federal Supreme Court as guarantor of rights

In practice the federal Supreme Court has been the ultimate guarantor and defender of rights. A question involving a right originates in some federal or State law. An executive, either federal, State, or local, complies with the terms of this law in enforcing it. An individual, or group of individuals, may charge that the law violates a right based on the Constitution or some other foundation. A case arises from this charge which, if it concerns some federal right, will eventually come into a federal court and perhaps finally into the Supreme Court. It is then the task of the Supreme Court to determine if a right exists under the circumstances of the case and if it has been violated.

Presumably there is no appeal from the decision of the Supreme Court. However, cases containing similar issues have come before the Court separated by a period of years during which the personnel of the Court may have changed, or during which some members of the Court may have adopted other ideas, so that their decisions in the two cases may differ. Hence a right may be affirmed where it was once denied, or denied where it was once affirmed. Rights, then, are not necessarily permanent. Partly for this reason many persons have disputed the power of the Supreme Court in deciding cases involving rights, and have argued that the legislatures which have enacted the laws should be allowed greater discretion. Yet as matters stand today, short of constitutional amendment the Supreme Court is the final arbiter of rights.

The function of public opinion

It is sometimes maintained that the final judge in the case of political rights is public opinion. Indeed, in the early debates over the desirability of incorporating a bill of rights into the Constitution, Alexander Hamilton

wrote in *The Federalist*, No. 84: ". . . [a political right] whatever fine declarations may be inserted in any constitution respecting it must altogether depend upon public opinion, and on the general spirit of the people and of the government. And here, after all . . . must we seek for the only solid basis of our rights."

Perhaps it is true that many rights draw their principal strength from public opinion. It might be more nearly accurate, however, to assert that the public, or at least any given interest group within the public, supports rights usually only for those who agree with them; but the same group would forbid rights to those who disagree with them. For example, in recent years in various American communities members of the sect of Jehovah's Witnesses have been physically assaulted and have seen their property destroyed by mobs. Yet the Supreme Court has upheld the right of their children not to salute the American flag in schools. Here is only one of the many instances in which the Supreme Court has upheld a right in defiance of public opinion.

Perhaps the most important role played by public opinion in the matter of rights is that of supporting Supreme Court decisions as final. Again, it is only those groups that want the decision which will accept it without complaint; after the Supreme Court, in 1954, overthrew many State laws providing that the white and Negro races must be segregated in the public schools, certain groups in the southern States inaugurated immediate campaigns to keep segregated education. Yet a Supreme Court decision affirming a right will greatly add to its acceptability in many circles of society.

THE CHIEF THREATS TO RIGHTS

Government

The chief threats to rights in the United States come from the various units of government and from the public. Judging from numerous decisions of the Supreme Court respecting rights, the federal government only rarely has denied a citizen his rights. However, the laws and ordinances of State and local governments have frequently been overturned as destructive of a right guaranteed by the federal courts. As indicated above, the background of such a ruling has usually been that the State or local government has exercised its police power to regulate people's activities in such a way that an individual or group has felt his or its rights infringed.

One of the most important legal developments over the years has been the expansion of certain parts of the federal Bill of Rights so that it restrains State governments. Originally it was denied that the Bill of Rights limited State behavior, if only because the State constitutions normally had their own bill of rights. However, parts of the Fourteenth Amendment were deliberately phrased so as to apply specifically to State governments; the dominant northern Republicans at the time feared lest some of the southern States restrict the political life of the former slaves. With the passage of time, successive court rulings have gradually extended a

large part of the Bill of Rights to State governments. A crucial turn came when the Supreme Court ceased to interpret the word "liberty" in the Fourteenth Amendment as meaning simply "freedom from arrest," and expanded its interpretation to include such matters as "freedom of speech" and "freedom of the press." It must be emphasized that the Supreme Court has held most *political* rights to be protected from State interference by the Fourteenth Amendment, especially by its due process clause; many *judicial* rights, on the other hand, are not within the scope of the Amendment.

The public

It is sometimes forgotten that the public, in one form or another, may be a menace to rights. This forgetfulness stems in part from one interpretation of the concept of popular sovereignty, an interpretation which holds that the public not only is the source of all the powers that it confers upon governments but also that it cannot be restrained in the exercise of those powers that it withholds from governments. At the same time, save in cases concerning infractions of the Thirteenth Amendment, it is usually quite difficult to secure favorable court judgments for those who charge that an individual or group, by contrast to a government, has violated one of their rights.

The federal Constitution is almost entirely concerned with protecting individual rights from violation by the federal and State governments. What, then, would be needed to protect individuals' liberties from interference by other people and private groups? The answer is that the federal government must pass legislation to protect any liberty from private interference; this legislation would convert the liberty into a right. In connection with some liberties, the federal government has acted against private obstacles; for example, federal law prohibits conspiracies by groups, such as the Ku Klux Klan, to prevent Negroes (or, in some cases, whites) from enjoying the freedom of speech, the freedom of assembly, and other liberties, as well as the power to exercise the suffrage.

In other cases, however, there are no federal laws to protect liberties that many people possess or desire to possess. Sometimes actual crimes are perpetrated against liberty; then the only recourse of the injured, or of those affected by the crime, is a government prosecution on some ground other than that of the denial of the liberty. This would have been the only way to deal with the mob that denied freedom of the press to Elijah Lovejoy (an abolitionist newspaper editor of Alton, Illinois) and lynched him, in 1837; they might have been tried for murder. Likewise, this sort of prosecution would have been the only defense against the mob in Carthage, Illinois, that in 1844 denied freedom of religion to the Mormons and shot their leader, Joseph Smith.

In yet other cases, however, no crime is committed; hence no recourse at all is available to those deprived of liberties save to agitate for the passage of favorable laws. For example, an organization, such as a business corporation that founds so-called "company towns" in which the corporation

owns virtually all the property and in which only corporation employees live, may forbid practically all political liberties to the inhabitants of the town. An organization of workers may in the same fashion refuse individuals a political liberty. For instance, in 1951 the Brotherhood of Locomotive Firemen and Enginemen negotiated a union shop agreement with the New York Central Railroad, providing characteristically that all employees of the railroad performing types of work under the jurisdiction of the Brotherhood must become members. Subsequently the railroad was compelled by the Brotherhood to discharge two employees whose religious convictions prohibited their joining a labor union.

Another commonly resented private practice is racial discrimination in the hiring of workers. People who are as poor as most Negroes find it a great disadvantage to be barred from many kinds of work because of their color. Consequently, many persons and groups have besought Congress to enact a fair employment practices law designed to prevent employers from discriminating against any person on the ground of his or her race, creed, or national origins, when selecting workers. To this date, Congress has not enacted such a law; however, several States and cities have. In this case, as in the two others noted immediately above, the nation-wide protection of the desired liberty requires a federal statute.

THE PROHIBITION ON INVOLUNTARY SERVITUDE

Involuntary servitude is prohibited by the Thirteenth Amendment, which forbids "slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted. . . ." Freedom from involuntary servitude is one right that is guaranteed against both governments and private parties. Although intended principally to abolish slavery, the guarantee protects individuals from other forms of compulsion. Its real force rests in the interpretation made by the courts of the term "involuntary servitude." For instance, conscript military service is not involuntary servitude; it is held to be a duty to the country. On the other hand, because of their obligations to the passengers, sailors and railroad employees may be compelled to complete a voyage or a trip. By contrast, a State may not enact legislation making it a criminal offense for an individual to fail to do work for which he has received payment in advance. An individual cannot be held to work by threat of criminal prosecution; if he refuses to do the work for which he has been paid, he may only be sued for obtaining money under false pretenses.

THE RIGHT TO EQUALITY UNDER THE LAW

The right to equality under the law is stated in the Fourteenth Amendment, which forbids any State to "deny to any person within its jurisdiction the equal protection of the laws." This Amendment was at first designed to prevent the southern States from discriminating against Negroes; in practice, however, it has come to be applied in litigation having no bearing

upon race, and even to corporations. This Amendment does *not* prohibit the classifying of persons or things into different categories, and then the application of different treatments to the various categories. For example, a State may impose one tax rate upon locally-owned stores and another upon chain stores. The whole working of the progressive income tax demands first a classification of the population according to income. Indeed, one of the most important aspects of law is the fact that it classifies. What the courts resist, when a law is questioned, is impropriety in classification; in other words, the courts examine the intent of the classification and its consequences. For instance, should a State attempt to pass laws or otherwise to prevent people from other States moving into it to live and to work, the courts would find the State action to be an unconstitutional act in violation of the "equal protection" guarantee.

Education

The most notable cases arising under the "equal protection" clause have been those concerning race relations, especially with respect to education, transportation, and housing. All the southern States have insisted since the Civil War that whites and Negroes must not attend the same schools; and these States have enacted and strictly enforced laws providing for racial segregation in the public schools. In 1896 the Supreme Court, although not by a unanimous decision, held that segregation was permissible so long as the facilities for the Negroes were equal in quality to those for the whites. However, the "separate but equal" principle has been slowly undermined. For example, in 1938 the Supreme Court ordered the State of Missouri either to establish a separate law school for Negroes or else to admit Negroes to the law school at the white University of Missouri. In subsequent years the Court directed other State universities in the South to admit Negroes to their graduate and professional schools. Finally, in 1954 the Supreme Court rejected the entire system of segregated education and instructed the southern States to admit both Negroes and whites to the same schools (*Brown* versus *Board of Education*).

Transportation

With respect to transportation, cases involving equality before the law again have usually been concerned with the segregation of Negroes from whites in the southern States. Actually, where the Supreme Court has been able to overthrow State and local ordinances it has done so not on the ground that segregation has violated the right of equality before the law but that it has comprised an interference with interstate commerce. Using this as a basis, the Court in 1946 ruled that segregation on interstate transportation amounts to a violation of the federal Interstate Commerce Act (*Morgan* versus *Virginia*).

merely those in the South, and it has involved not only Negroes but also such other non-white nationalities as the Chinese and the Japanese. The means used to exclude members of the unwanted race or nationality has been the so-called "restrictive covenant," a document which amounted to a contract signed by all the property-owners of a given district agreeing that they would not sell their property to a member of an unwanted group. Courts from time to time have held that any person who violated such a covenant might be sued for breach of contract. In 1948, however, in the case of Shelly *versus* Kraemer, the Supreme Court ruled that whereas property-owners might negotiate such agreements among themselves, the agreements are unenforceable in court. The Court declared that "the Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws."

FREEDOM OF SPEECH AND THE PRESS

Freedom of speech and the press is declared in the First Amendment: "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ." According to this section of the First Amendment, Congress may enact no restriction upon the freedom of speech or the freedom of the press. Moreover, through decisions of the Supreme Court this Amendment functions by the agency of the Fourteenth Amendment as a restraint upon State and local authorities as well. Yet the very way in which these freedoms may be used and abused has made them the object of frequent limitations at all levels of government, limitations which for various reasons have been sustained by the courts.

Prohibition on censorship

One principle to which the courts have adhered under almost all circumstances is that speech and the press may not be subjected to censorship, or, in legal terminology, "previous restraint." That is to say, under almost all conditions, no laws may be enacted that will inflict a penalty upon any utterance or publication before evidence is given that some damage has been incurred. In other words, a person is to be free to say or print what he pleases, with the understanding that he may have to suffer the consequences; but he is not to be prohibited beforehand from saying or printing what he chooses.

Limitations on seditious utterances

Wartime Restraints: Under conditions of warfare even the ban on censorship may be lifted, so as to forbid seditious utterances, or utterances that will tend to promote uprisings against the government. The first of such limitations was the Sedition Act of 1798, ostensibly to prevent hindrance with the undeclared American war against France being waged at the time, but actually to curtail Republican criticism of the Federalist administration and Congress. During the Civil War and the two world wars Congress passed sedition acts, on these occasions with the clear

intent of protecting the government from its enemies rather than the party in power from its political rivals. The legislation in World War II was indeed less severe than that in World War I, certainly because the newspapers censored themselves from 1941 on and also perhaps because the second war was more generally, if less enthusiastically, supported.

Peacetime Restraints: During the past four decades, almost entirely because of the world revolutionary aims of the Soviet Union, various governing agencies have imposed certain peacetime restraints on the freedom of expression. States and localities, especially after the Russian Revolution of 1917, have passed laws designed to curtail utterances that might tend toward domestic upheavals. These laws often have been called "criminal syndicalism" acts, probably because the chief group of political radicals in the United States before 1918, the Industrial Workers of the World (I.W.W.), was syndicalist rather than communist. The revolutionary syndicalists urged the violent overthrow of government by labor unions. Under the provisions of these acts, State and local officials have attempted to silence not only those groups that were indisputably subversive but also certain organizations whose beliefs, although comparatively harmless, clashed with those of most people.

Beginning in 1940, the federal government likewise has enacted peacetime restraints on seditious activities. Congress in that year passed the Alien Registration (Smith) Act, the first of a series of laws designed to limit freedom of speech and of the press on the part of those who would seek to overthrow or disrupt the federal government not only in time of war but also in peacetime. The Smith Act makes it a federal offense to persuade members of the armed forces to mutiny, to conspire to teach the violent overthrow of the American government, to advocate the overthrow of the government, or to publish material designed toward that end. In the following year, eighteen members of the Socialist Workers (Trotskyite) Party were convicted of violating the Smith Act and were sent to prison. In 1949 eleven leaders of the Communist Party were convicted of violating the Smith Act; and on hearing their appeal, the Supreme Court upheld both the decision of the lower court and the constitutionality of the Act. Later numerous other important communists were arrested and jailed under the terms of this Act. In these decisions the Court seems to be holding to the precedent set by Associate Justice Oliver Wendell Holmes in 1919 that the accused had used words in a fashion which would "create a clear and present danger that they [the words] will bring about the substantial evils that Congress has a right to prevent." However important the Smith Act has been, it probably will be superseded as a weapon against communists by the Communist Control Act of 1954 (see below, under "Freedom of Assembly").

Other restraints on speech and the press

Libel and Slander: Freedom of speech and the press is also limited by the penalties that the speaker or publisher may have to suffer after the act is committed. For instance, one may not state openly or publish materials

that are intended to damage the character or the social or professional standing of another individual. Such an act, if spoken, constitutes *slander* and, if written, *libel.* However, most cases of libel and slander reach court as civil trials, that is, as trials in which one person sues another for damages, with the government as referee; and in such cases, if the truth of the statement can be shown, no damages can be allowed. The more severe instances of libel may be tried as criminal cases, in which the offense is deemed to be against the State, and in which the punishment is fine or imprisonment; under such circumstances, the proof that the statement is true may not be a defense, since certain truths may be regarded as indecent or injurious to public morals.

Blasphemy and Obscenity: Freedom of speech and of the press may also be limited by laws against blasphemy and obscenity. This sort of law is almost invariably an enactment of a State or local government, as a function of its police power; however, the federal government forbids the sending of obscene matter through the mails. In ruling on cases in which blasphemy or obscenity has been charged the courts have usually been rather lenient. For example, if a city directs its police commissioner to remove obscene publications from public magazine stands, the courts may hold that a police commissioner is not a qualified judge of literature. Actually there are on the statute books of many States laws regarding obscenity in literature which are completely inapplicable to modern tastes; these the courts simply do not enforce. However, courts rarely rule such a law unconstitutional.

Limitations on mechanical devices

In the wake of modern technology have come several new means of mass communication whose regulation the Constitution makes no provision for; principal among these new means are motion pictures, radio, television, and electronic sound-amplifying devices. In some respects, their regulation differs from that imposed upon speech and the press.

Motion Pictures: Local and State governments have established boards of censorship for motion pictures, to purge them of matter that may be obscene, sacrilegious, overly suggestive, or, in the opinion of the censors, contrary to the public welfare. In 1915 the Supreme Court upheld such boards by ruling that motion pictures are purely a form of business and therefore not entitled to the protection of the First Amendment. The motion picture industry, however, never ceased demanding this protection. Ultimately its efforts were in part rewarded; for, in 1952, the Supreme Court ruled not only that the State of New York had acted improperly in banning the film "The Miracle" on the ground that it was sacrilegious, but also that motion pictures in a sense are sheltered by the protection of the First Amendment. However, the Supreme Court admitted that because of its peculiar nature the motion picture industry might be subjected to restraints different from those imposed upon any other medium of mass communication. Hence in 1956 certain State and local boards of motion picture censorship were still functioning. The Supreme Court was probably directed to its recent decision partly because of the change in public tastes

and also partly because the industry has organized its own board of censorship and production code to regulate itself.

Radio and Television: The very nature of radio and television lays certain restrictions upon their freedom. There are only a limited number of wave lengths available for transmitting purposes; and the unrestricted use of these wave lengths would produce such chaos that broadcasting would be impossible. Consequently the privilege of using these wave lengths is distributed and administered by the Federal Communications Commission (FCC), a bipartisan board created by Congress in 1934, whose seven members are appointed by the President and confirmed by the Senate. The control of broadcasting is exercised chiefly through the license that every commercial broadcasting station must have and that must be renewed every three years. Since the FCC is directed to consider the "public interest, convenience, or necessity" in granting these licenses, it can to some extent censor radio and television programs; a few licenses have been withheld on the ground of objectionable practices. In fact, the FCC has not greatly interfered with these media; and federal law does prohibit overt censorship by the FCC. The federal government has tried to prevent any station from being monopolized by any one political party; for it requires that if any station give program time to a candidate of one party, it must make an equal amount of time available to candidates of other parties for the same office.

Electronic Sound Amplifiers: Electronic devices for the amplification of sound have become important parts of political campaigning. Frequently such devices are mounted on trucks to broadcast a candidate's message through the streets of a city. Some local authorities have passed ordinances restricting the use of such mobile devices on the ground that they are public nuisances. In 1948, however, the Supreme Court struck down such an ordinance in Lockport, New York, which had authorized the city chief of police to grant or deny permits for the use of sound trucks; the Court held that the ordinance amounted to a violation of the freedom of speech. In 1949, on the other hand, the Court upheld an ordinance of Trenton, New Jersey, which banned the projection of "loud and raucous" sound from a moving vehicle on the city streets. The Court probably found a distinction between the two cases in that the Trenton ordinance was specific whereas the Lockport ordinance was so loosely phrased that it might have been invoked only against the political foes of the municipal government.

Picketing

Another form of expression unknown to the Founding Fathers is picketing. Its protection has been a matter of litigation in recent years. Picketing is any stationing of people, by workers, before a place of employment. Picketing may be designed to urge workers not to enter a factory whose labor force is on strike; or it may be aimed at persuading the public not to patronize an establishment which presumably engages in unfair labor practices or refuses to recognize a union. In the past, municipal governments dominated by employers' interests have enacted restraints against

picketing, even though it was peaceful. However, in 1940 the Supreme Court ruled that picketing for the purpose of informing the public about labor disputes enjoyed federal protection against prohibition by the State or the local governments.

THE FREEDOM OF ASSEMBLY

The freedom of assembly is protected by the First Amendment, which declares that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble. . . ." This provision assures the American people the right to meet for the purpose of discussing political matters, and the right to organize political associations to influence the government. It should be apparent that this right has a close functional relationship with the freedom of speech, since the freedom to assemble for political ends presumes the right to speak in the assembly. Like other rights, the freedom of assembly may be restricted for the sake of the public welfare or the safety of the government. However, basing its action on the due process clause of the Fourteenth Amendment, the Supreme Court has overturned many State and local prohibitions on the freedom of assembly, owing to the fact that these prohibitions were not intended for the benefit of the public but were designed to limit lawful political activity which might threaten to oust the group in power without subverting the government itself.

For some time the most sensitive issue connected with the freedom of assembly has been the Communist Party. In the past decade there has been wide public demand that the Communist Party be made illegal. States have attempted to use their criminal syndicalism acts noted above not only to stifle disloyal utterances but also to disperse subversive organizations; usually, however, the Supreme Court refuses to uphold such legislation unless the "clear and present danger" formula is satisfied. At length, in 1954 Congress passed the Communist Control Act, which at least on paper outlawed the Party.

The Communist Control Act specifically terms the Communist Party an "instrumentality of a conspiracy to overthrow the United States government" and includes a long description of the Party and its purposes. By this definition Congress has greatly simplified reaching convictions under the Smith Act, since it no longer will be necessary to prove that the Party is a conspiracy aiming to subvert the American government. Then the Act in effect outlaws the Party, for it declares that the Party is "not entitled to any of the rights, privileges, and immunities" of lawful bodies organized in the United States. The Act provides for the possibility that the Party may change its name. It further states that any person knowingly joining the Party in full awareness of its nature (something that may be very difficult to prove in court) shall be denied the rights of citizenship, including the right to hold a federal civil service post or to work in a defense plant. Members of the Party must register with the Department of Justice (a requirement similar to one in the Internal Security Act of 1950, which had not been enforced six years later). Communist-infiltrated unions may not

represent workers in industry for collective bargaining purposes under the National Labor Relations Act; and the Act fixes a number of standards whereby communist infiltration may be detected. If a small percentage of the workers in a factory wish, an election shall be held to determine what union shall be their bargaining agent; and no communist-infiltrated union may appear on the ballot.

Another freedom, one related to that of assembly, is the right to petition Congress. One of the earliest functions of the British Parliament was the drafting of a "petition of grievances" for the king, enumerating wrongs that the members of Parliament wished to see righted. Whereas this practice formerly was of great importance in the legislative process, today it occupies a primarily ceremonial status. There are so many pressure groups that draw up and submit petitions to Congress today that these documents usually receive only cursory note. In short, the freedom of petition does not include a guarantee that the grievances will be attended to, or even that the petition will be read.

THE FREEDOM OF RELIGION

Prohibition against an established church

The freedom of religion is guaranteed by the First Amendment, in the statement that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." An established religion is one in which the church in one way or another is supported by the state. The established church in any country has an obvious advantage over any other faith, in that it can rely upon the support of the government in any doctrinal or jurisdictional questions. At the time of the American Revolution, as it is today, the Anglican Church was the established church in England; and members of many of the dissident faiths, such as the Puritans, came to the American colonies rather than suffer the harsh treatment meted out by the English government and the Anglican clergy. The First Amendment was designed to prevent this situation in the United States by separating the churches from the federal government.

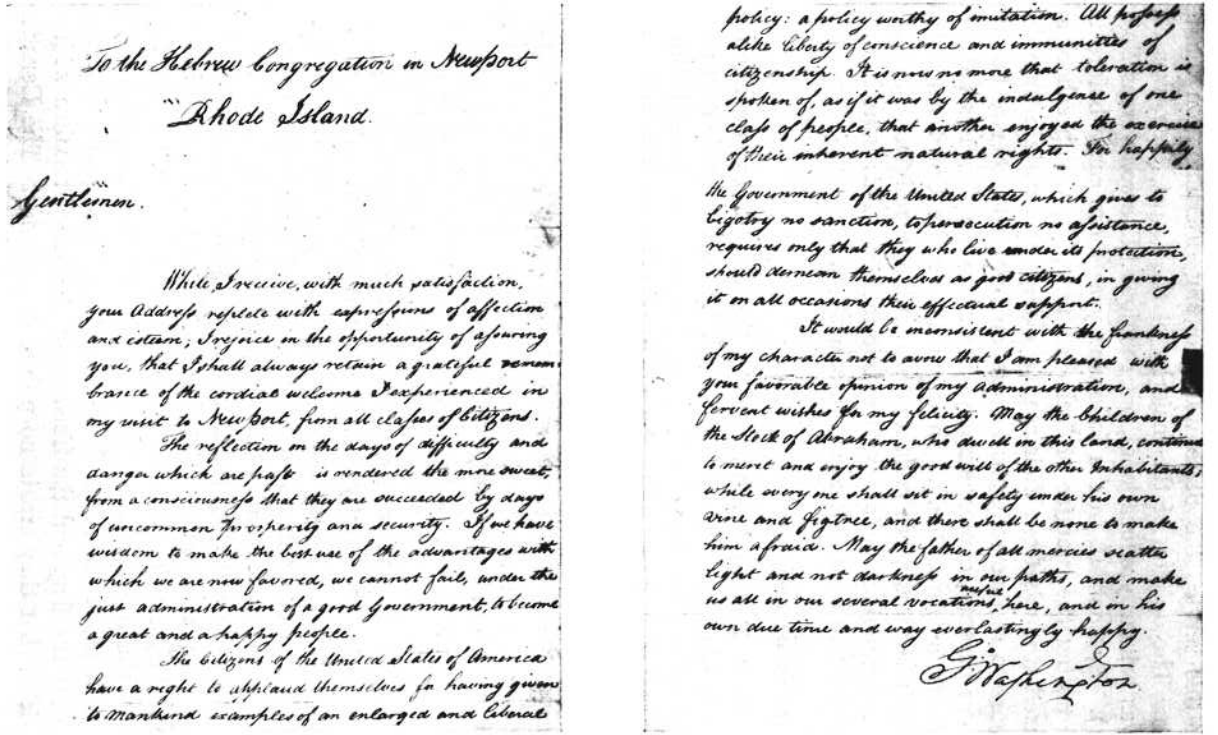
There has never been a determined effort to found an established church under the national government of the United States. However, for some years after the Revolution, certain New England States retained the system of established churches that they had inherited from the colonial era; the last of the State-established churches, the Congregational in Massachusetts, was not separated from the government until 1833. Today, since the limitations of the First Amendment are now held to apply to State governments as well as to the federal regime, it is difficult to see how a State might organize an established church even in the improbable case that the people would want one.

However, it is sometimes alleged that the principle of the separation of church and State is being violated with respect to government services that are extended to students of parochial schools. For example, when the

State of New Jersey in 1941 began to pay for school-bus transportation to students in church-operated schools, some observers declared that the State was thereby contributing, through public taxes, to the churches. However, in a suit at law which arose over this dispute, the Court in 1947 ruled by a five-to-four margin that religion was only incidental to the issue and that by providing this service the State was avoiding discrimination against some children. The opinion of the majority of the Court, then, was that this service was primarily educational, not religious (*Everson* versus *Board of Education*). By contrast, in the following year there came before the Court a case testing the practice of "released time," in which school authorities excused students from their regular classes at a certain time during school hours to receive religious instruction from a teacher of the sect of their, or their parents', choice, employed by church authorities (*McCollum* versus *Board of Education*). In this instance the Court ruled that the school administrators were collaborating with the religious bodies so as to disseminate religious beliefs with public money. This issue has also been raised in debates over federal aid to education.

The free exercise of religion

The letter from George Washington to the Jewish congregation of Newport, Rhode Island, reproduced in Figure 20, is an excellent example of the attitude fostered by the constitutional guarantee of the right to the free exercise of religious belief. But the members of the various faiths may be subject to local or federal police restrictions. For example, the Mormons in Utah taught and practiced the belief in polygamy, the family structure in which one man has more than one wife. Yet, acting under its authorization to legislate for the territories, Congress while Utah was a territory forbade the institution of polygamy; and the Supreme Court upheld the legislation. In late years the religious group most commonly at odds with the governing power has been the Jehovah's Witnesses. This sect has aroused public wrath in many communities by its refusal to abide by some of the customs of the community and by its contention that civil government is evil. Members of this faith teach their children not to salute the flag during patriotic observances at school. Local authorities have enacted a host of ordinances aimed at curbing the Witnesses, notably requirements that any person soliciting funds from the public be licensed. The Witnesses have brought many cases involving violations of these ordinances into the federal Supreme Court on the ground that the ordinances comprised denials of the freedom of religion; and the Court has tended to uphold the sect. In recent cases the Witnesses have been guaranteed their right not to salute the flag, and the freedom to sell their literature without a license provided that they create no public disturbance. The Constitution provides further assurance of the separation of the government from all religious faiths in its guarantee that ". . . no religious test shall ever be required as a qualification to any office or public trust under the United States" (Art. VI, cl. 3).



To the Hebrew Congregation in Newport
Rhode Island.

Gentlemen.

While I receive, with much satisfaction, your Address replete with expressions of affection and esteem; I rejoice in the opportunity of assuring you, that I shall always retain a grateful remembrance of the cordial welcome I experienced in my visit to Newport, from all classes of Citizens.

The reflection on the days of difficulty and danger which are past is rendered the more sweet, from a consciousness that they are succeeded by days of uncommon prosperity and security. If we have wisdom to make the best use of the advantages with which we are now favored, we cannot fail, under the just administration of a good Government, to become a great and a happy people.

The Citizens of the United States of America have a right to applaud themselves for having given to Mankind examples of an enlarged and liberal policy: a policy worthy of imitation. All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection, should demean themselves as good citizens, in giving it on all occasions their effectual support.

It would be inconsistent with the frankness of my character not to avow that I am pleased with your favorable opinion of my administration, and fervent wishes for my felicity. May the Children of the Stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other Inhabitants; while every one shall sit in safety under his own vine and fig tree, and there shall be none to make him afraid. May the father of all mercies scatter light and not darkness in our paths, and make us all in our several vocations here, and in his own due time and way everlastingly happy.

G. Washington

National Archives and Mr. Howard L. Milkman

Figure 20. Washington's Letter on Freedom to the Newport Synagogue. In response to a letter of welcome from the Sexton of the Hebrew synagogue, on the occasion of his visit to Newport, R. I., in 1790, President Washington penned this reply. It is an elegant and clear interpretation of several key doctrines of the Constitution and Bill of Rights.

THE RIGHT TO BEAR ARMS

The right of every citizen to possess firearms is protected by the Second Amendment, which declares that "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." This guarantee was far more important at the time it was adopted than it is today; for it was assumed that the armed forces of the United States would consist primarily of the State militias. One of the chief aims of this Amendment, then, was to discourage the development of a professional, mercenary army such as the British had used in their efforts to quell the American Revolution. For many years, however, the United States has supported professional military forces; and in any event, the average citizen today could not afford to furnish himself with modern weapons. Moreover, at the time the Amendment was ratified, many people fed themselves and their families by hunting; today, by contrast, there are few areas in which many people provision themselves in this manner.

The right to bear arms may be, and has been, restricted on behalf of the public welfare. Local authorities demand that weapons be registered, and enact ordinances prohibiting the carrying of concealed weapons. The federal government, too, through both its taxing powers and its control over interstate commerce, has enacted laws against the sale, use, or possession of certain types of arms such as sawed-off shotguns.

LIMITATIONS ON TREASON TRIALS

No person in the United States may be lightly convicted of treason against the federal government, for the Constitution states that treason ". . . shall consist only in levying war against [the United States], or in adhering to their enemies, giving to them aid and comfort" (Art. III, sec. 3, cl. 1). The same Article fixes definite procedural requirements in treason trials, for it provides that "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." In many countries rulers have been able to dispose of their enemies by charging them with treason on quite indefinite grounds and having them convicted, perhaps with no more evidence than a confession exacted under torture. However, in the United States the Constitution defines the crime narrowly and fixes the trial procedure; moreover these can be changed only by constitutional amendment.

On the other hand, the federal government is free to legislate with regard to the act of sedition, which consists in urging others to commit treason, or in committing acts that approach treason but do not include an overt act. It may also create laws to deal with subversion and espionage. No person was executed in peacetime for an act of espionage until 1953, when Julius and Ethel Rosenberg were executed after being convicted of having given secret information regarding the atomic bomb to the Soviet Union during World War II. In 1954, Congress passed a law providing for capital

punishment in cases of peacetime espionage. Actually, with the changed concepts of warfare, it is very difficult to tell precisely when peacetime shades into wartime; hence this action by Congress may not mean a great deal.

ASSURANCES OF DUE PROCESS OF LAW

Life, liberty, and property cannot be taken without due process of law, say the Fifth Amendment (regarding the federal government) and the Fourteenth Amendment (regarding State and local governments). This protection gives, at one and the same time, a political, a judicial, and a property right. Commonly, it is asserted as a judicial right, and it will be discussed as such in a later chapter. Sometimes it is also used in a substantive sense to create or assert rights that are not otherwise mentioned in the Constitution: rights of an economic or political type. The economic rights of this character will be treated in yet another chapter, but the political rights must be mentioned here.

With regard to the Fourteenth Amendment, the Supreme Court has come to the view that words in it mean that a number of the political rights protected by the Bill of Rights with reference to the federal government are also protected with reference to the States and localities. Hence, when a State violates the rights of free speech, of free assembly, of petition, or of other political rights, it may be restrained by the Supreme Court in the language of the Fourteenth Amendment.

The Fifth Amendment refers to the federal government. An example of how it adds to the substantive rights of Americans is afforded by a recent case concerning a passport to travel abroad. The United States Court of Appeals held that the Department of State could not treat the desire to travel abroad as a mere privilege that could be granted or withheld at will. Rather, to "go from place to place" is a "natural right subject to the rights of others and to reasonable regulation under law." The Fifth Amendment was thus given new meaning; the substance of political rights was increased by prescribing due process of law for what could previously be denied without due process of law.

QUESTIONS AND PROBLEMS

1. From a merely preliminary reading of the three lists of political, judicial, and property rights, which group of rights, if any, would you guess to be most necessary to the survival of constitutionalism (see Chapter 6)? Explain your answer.
2. Suppose a would-be Hitler wishes to deliver a speech in Washington Square, New York City, and on arriving at the Square reads a sign saying, "No speeches permitted, by order of the Department of Police." What might he do from that point on and how might the authorities react?
3. In your opinion, are threats to political rights today more likely to come from government or from the public or from other sources? Explain your answer.
4. Although the Fourteenth Amendment specifically guarantees "equal protection of the laws," is the equivalent right of equal protection of the laws

implied and provided by other parts of the Constitution? Explain your answer.

5. As a "friend of the Court," write a 300-word argument justifying a village ordinance banning loudspeaker trucks of all kinds.

6. What limitations, penalties, harassments, and embarrassments can be expected by a person who is a member of the American Communist Party today?

7. When Congress refused to admit Utah to the Union until the Mormons abolished polygamy, was its action not a violation of the First Amendment? Explain your answer.