



# Civil Liberties

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American National Government  
Topic Five



# Overview

- What are civil liberties?
- How do we decide what civil liberties we have?
- How did civil liberties come to be nationalized?
- Where did the “right to privacy” come from?

I – What are Civil Liberties and why are they important?

# Civil Liberties and Democracy

- What role do civil liberties play in democracy?
  - Recall, they are protections of citizens **from government action**
  - They are meant to be absolute protections; not to be violated under **any** circumstances
  - Civil liberties are a key instance of the principle of **limited government**
  - This may prevent government from doing certain things, even if everyone wants it to
    - May prevent popular policies from being enacted
      - No concentration camps for Japanese Americans during WWII if civil liberties actually protected

# Civil Liberties and Democracy

- Democracy requires the people to have a space beyond the government's control in which to think about and debate what the government should do
  - If the government could arrest journalists or stop newspapers from publishing certain news, like news that would make the government look bad, we couldn't hold our representatives running government accountable
    - Civil liberties necessary to address the principal-agent problem
  - Civil liberties secure for citizens the space free from government control where we decide who to vote for, what issues matter, where we stand on important political questions
    - Civil liberties necessary for popular sovereignty

II – How do we decide what civil liberties we have?

# Civil Liberties

- Civil liberties are introduced into Constitution via the Bill of Rights
  - The first ten amendments to the Constitution
  - Proposed by Madison in the first meeting of Congress, passed together

# Bill of Rights

1 <sup>st</sup> Amendment	Establishment Clause, Free Exercise Clause, Freedom of Speech, of the Press, to Assemble, to Petition Gov't
2 <sup>nd</sup> Amendment	Right to bear arms
3 <sup>rd</sup> Amendment	Quartering of troops
4 <sup>th</sup> Amendment	Unreasonable searches and seizures, probable cause, search warrants
5 <sup>th</sup> Amendment	Double jeopardy, Self-incrimination, Due Process, Takings Clause
6 <sup>th</sup> Amendment	Speedy & Public Trial, Impartial Jury, Notice of accusations, Confrontation Clause, Compulsory Process Clause, Assistance of Counsel Clause
7 <sup>th</sup> Amendment	Trial by Jury, Re-Examination Clause
8 <sup>th</sup> Amendment	Excessive Bail, Excessive Fines, Cruel and Unusual Punishment
9 <sup>th</sup> Amendment	Unenumerated rights reserved by the people
10 <sup>th</sup> Amendment	Federalism, Powers reserved by the states



# Bill of Rights

- List seems straightforward, but precise meaning of Bill of Rights' civil liberties is not clear
  - General principles, unclear application
    - Eighth Amendment
      - What does "cruel and unusual punishment" mean?
  - Some contradictions among amendments
    - Ex: 1<sup>st</sup>'s freedom of the press & 6<sup>th</sup>'s right to an impartial jury
  - Big question in American history: Does the Bill of Rights impose restrictions on state governments?

# Interpreting Civil Liberties

- Question: What does the freedom of the press mean?
  - For example, should a newspaper have the freedom to publish battle plans during wartime? (D-Day invasion plans)
  - What about a politically damaging history about an ongoing war? (Pentagon Papers)
- What does freedom of speech entail?
  - Example: Should I be able to blare political messages in a residential neighborhood at night?
    - “Time and place” restrictions are not controversial
  - Can I accuse someone of a crime without offering evidence?
    - News coverage of arrests or charges effectively do this
  - Should I be able to claim the government is fundamentally illegitimate and so should be overthrown, violently if necessary?
    - 1<sup>st</sup> Amendment said NOT to protect claims like these, states can ban

# Are Civil Liberties Protected?

- Who decides these questions?
  - Effectively, the Supreme Court
    - Because civil liberties are named using general language and unclear application, they require interpretation
      - Courts interpret them
      - For civil liberties to be protected, then, courts have to decide to enforce them

# Are Civil Liberties Protected?

- While the Court's constitutional interpretations are said to be "objective," the reality is that judicial interpretations vary with justices' ideologies, personal preferences, and partisanship
  - Critics claim that because no one can override the Court, they are free to dress up their personal political preferences in legalistic language and make up whatever principles justify the decision they want to make

# Are Civil Liberties Protected?

- Interpreting civil liberties puts enormous power in the hands of unelected judges
  - Not inevitable; Congress could pass laws clarifying meaning, binding courts
    - Congress could also pressure courts that don't protect them
      - Could strip courts of jurisdiction over civil liberties it doesn't protect (Art. III, Sec. 2)
      - Could add or subtract justices via ordinary legislation
      - Could impeach recalcitrant judges
      - Could begin amendment of Constitution
  - But there are strong informal norms against using these tools to check the Supreme Court

# Are Civil Liberties Protected?

- Lack of effective checks on the Supreme Court means nine (technically five) unelected judges determine what liberties you, as an American, have
  - Nobody gave them this power; this is an unintended consequence of specific design choices of judiciary (life terms), political choices and informal norms against court packing & pressure, and difficult amendment rule

# Are Civil Liberties Protected?

- Bottom line: The Court determines what civil liberties you have, can give or take them for any or no reason whatsoever, and (right now) no one can check its power to do so

III – How did Civil Liberties become nationalized?



# History of Civil Liberties

- The history of civil liberties protections in the US is largely the story of how they came to apply to the state governments
  - Most government was state government in the US until the 20<sup>th</sup> century

# Barron Case

- *Barron v. Mayor & City Council of Baltimore* (1833)
  - 5<sup>th</sup> Amendment:
    - “...nor shall private property be taken for public use, without just compensation”
  - Supreme Court ruled against Barron arguing that the Bill of Rights is not applicable to states
  - Held that individuals are citizens of the federal government and, separately, of their state
    - Separate protections necessary for state and federal action; Bill of Rights only for the federal government
    - Principle of **dual citizenship**: Liberty depends on geography

# Barron Case

- Impact of Barron ruling
  - Concept of federal constitutional rights had little meaning
  - Rendered Bill of Rights meaningless, because most citizens' quarrels were with their states, not the federal government
  - State & local governments exercise virtually unlimited authority throughout 19<sup>th</sup> century

# Extending Civil Liberties Protections

- So how did civil liberties get extended to the states?
- Answer: the Civil War, the 14<sup>th</sup> Amendment, and **incorporation**

# The 14<sup>th</sup> Amendment

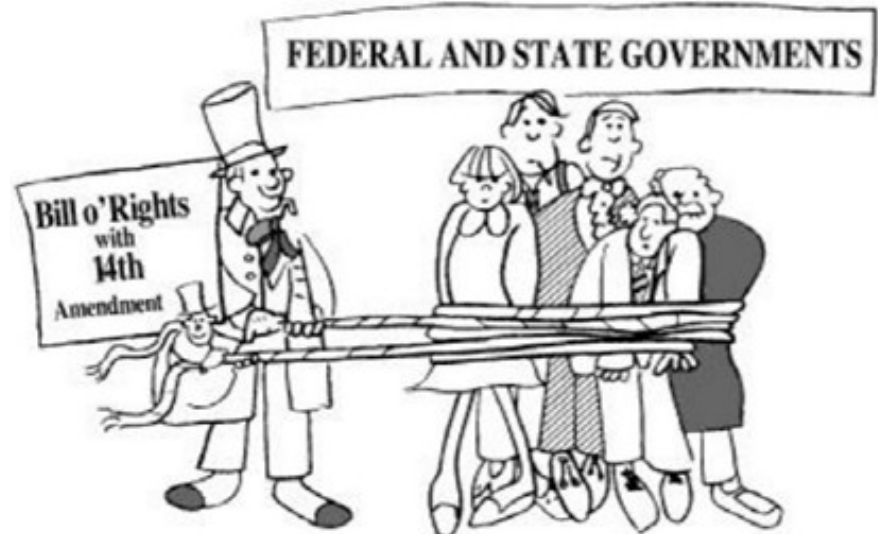
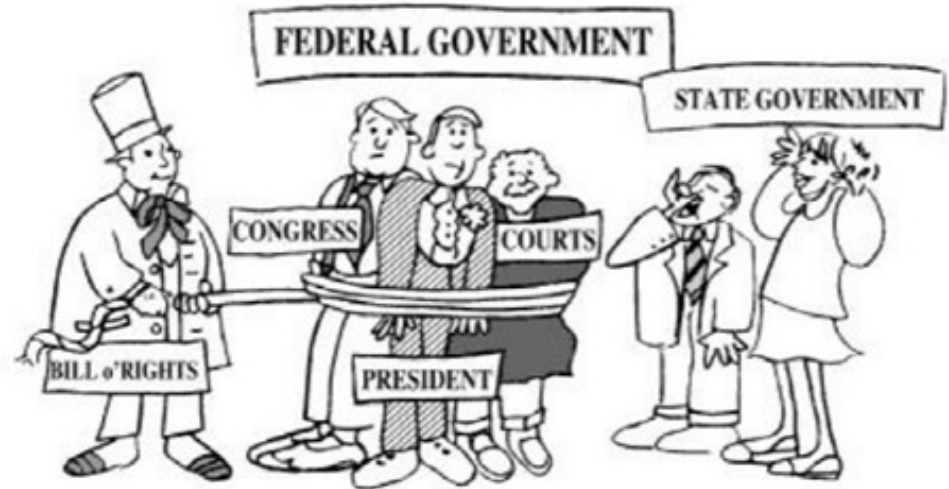
- Passed during Reconstruction (1868), the Fourteenth Amendment was intended to protect freedmen by explicitly declaring the rights of citizenship were not subject to state control
  - Its sweeping language allowed others to be covered by its protective umbrella
- The first sentence of the amendment provides for a unified national citizenship contradicting the Court's assertion in *Barron*
  - "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."
    - Dual citizenship does not exist!

# Structure of the 14<sup>th</sup> Amendment

- Section 1
  - Birthright citizenship
  - Privileges and Immunities Clause: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the US...”
  - **Due Process Clause**: “...nor shall any state deprive any person of life, liberty, or property, without due process of law...”
  - **Equal Protection Clause**: “...nor deny to any person within its jurisdiction the equal protection of the laws.”
- Section 2
  - States that deny voting rights to anyone lose representation in Congress
- Section 3
  - No rebels or insurrectionists in Congress without okay from 2/3rds of house
- Section 4
  - Public debt; repudiation of Confederate debts; no payments to slaveholders

# Incorporation

- **Incorporation** is the process of extending the protections of the Bill of Rights (and other amendments) to cover state laws and practices through the Fourteenth Amendment's Due Process clause
  - Consequences: Altered the balance of power between Washington and the states and expanded the range of protections offered by the Bill of Rights.



# The 14<sup>th</sup> Amendment

- Incorporation occurred through accumulated case law and judicial interpretation, not legislation or the amendment process
  - Remember those informal hacks?
- Recall that constitutional interpretations vary according to justices' ideologies, personal preferences, and partisanship
  - When the composition of the Court changes, it often takes a new direction on meaning of the Constitution
    - We wouldn't expect this to happen if judges were just 'calling balls and strikes'





# The Court is Political

- As justices come and go from the Court, the Court's position changes
  - This is evidence that politics guides judicial decisions
- Trends in whose civil liberties are well protected and which ones you have tend to reflect the shifting ideological composition of the Court
  - Some civil liberties are better protected than others; some groups' civil liberties are protected at a cost to others, and all these change over time
  - Example: Supreme Court has recently made major efforts to protect civil liberties of corporations; *Citizens United*, *Hobby Lobby*
  - Example: Religious liberty (for Christians) wins in virtually every recent case; *Masterpiece Cakeshop* (2018), *Fulton v. Philadelphia* (2021), *Carson v. Makin* (2022), *Kennedy v. Bremerton School District* (2022), *Shurtleff v. Boston* (2022), shadow docket COVID-19 religious services cases
    - *Trump v. Hawaii* (2018) and *Dunn v. Ray* (2019) suggest religious discrimination against non-Christians (like Muslims) is a-okay

# Nationalization of the Bill of Rights

- At the turn of the 20<sup>th</sup> century, the Supreme Court began to nationalize the Bill of Rights (via incorporation)
  - *Chicago, Burlington, & Quincy Railroad Company v. City of Chicago* (1897)
    - 5<sup>th</sup> Amendment applied to the states; effectively overturned *Barron*
  - But Supreme Court still reluctant to fully apply Bill of Rights to states
- *Gitlow v. New York* (1925) started the modern trend of incorporating the Bill of Rights protections
  - *Gitlow* incorporated the 1<sup>st</sup> Amendment, which was not previously held to bind the states

# Nationalization of the Bill of Rights

- Gradually many more of the Bill of Rights were applied to state governments
  - Through this process (**selective incorporation**) civil liberties have gradually been nationalized
- Some provisions in the Bill of Rights have never been incorporated!

# Nationalization of the Bill of Rights

Incorporation	Year
Eminent domain (5 <sup>th</sup> )	1897
Freedom of speech (1 <sup>st</sup> )	1925
Freedom of press (1 <sup>st</sup> )	1931
Freedom of assembly (1 <sup>st</sup> )	1939
Freedom from warrantless search (4 <sup>th</sup> )	1961
Right to legal counsel (6 <sup>th</sup> )	1964
Right to remain silent (6 <sup>th</sup> )	1966
Right against double jeopardy (5 <sup>th</sup> )	1969
Right to bear arms (2 <sup>nd</sup> )	2010

# What Has NOT Been Incorporated

- Right to indictment by a grand jury (5<sup>th</sup>)
- Right to a jury trial in all civil cases (7<sup>th</sup>)
- Protections against excessive bail and excessive fines (8<sup>th</sup>)

IV – Where did the Right to Privacy come from?

# Right to Privacy

- Supreme Court has recognized many rights that are not expressly mentioned in Constitution
  - Due Process clause of 14<sup>th</sup> Amendment
    - “...nor shall any state deprive any person of life, liberty, or property, without due process of law...”
      - Substantive Due Process rights
    - Has been widely used to protect unenumerated rights
  - Basis also found in the 9<sup>th</sup> Amendment
    - “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”
  - Why did the first Congress include the 9<sup>th</sup> Amendment in the Bill of Rights?
    - *expressio unius est exclusio alterius*: legal principle that when one or more things of a particular type are mentioned, others of the same type are excluded
    - There was worry that a definite list of rights would license government violation of unenumerated rights
      - A very reasonable worry!!

# Right to Privacy

- *Griswold v. Connecticut* (1965)
  - Planned Parenthood & doctor convicted of violating Connecticut ban on contraceptives sue to overturn it
  - Supreme Court agree, rule that there is a right to privacy protected under the Constitution which includes birth control decisions
    - Privacy implicit in many of the provisions in the Bill of Rights
    - Found in the “penumbras” & “emanations” of other rights
      - Why would we care about protecting us in our homes (3<sup>rd</sup>), our papers and effects (4<sup>th</sup>), or from self-incrimination (5<sup>th</sup>) unless we thought there was a sphere of privacy where others cannot justifiably trespass?



# Right to Privacy

- *Roe v. Wade* (1973)
  - Supreme Court ruled that the right to privacy includes a woman's decision to terminate a pregnancy
  - Examined common law tradition and found viability to be pivotal
  - Laid out a trimester-based scheme of regulation to balance the woman's right to end a pregnancy against the State's interest in fetal life
    - First trimester, no restrictions
    - Second trimester (pre- and post-viability), regulations for maternal health ok
    - Third trimester (post-viability), regulation ok up to prohibition
  - Has led to an intense political debate between abortion rights opponents (pro-life) and abortion rights supporters (pro-choice) which has helped define American politics, esp. regarding the Supreme Court

# Right to Privacy

- Several *additional* rights have been extended out of the Due Process and Equal Protection clauses of 14<sup>th</sup> Amendment
  - Right to marry
  - Right to procreate
  - Right to keep the family together
  - Right to control the upbringing of one's children
  - Right to purchase and use contraceptives
  - Right to refuse medical treatment

# Dark Future of the Right to Privacy

- Privacy rights are in decline
  - Abortion
    - *Planned Parenthood v. Casey* (1992)
      - Preserves right to abortion but abandons Roe's trimester-based regulation scheme. Replaces with "undue burden" standard that opens the door to new regulations
      - State governments following Casey impose many new regulations on abortion
    - *Gonzales v. Carhart* (2007)
      - Upholds "partial birth" abortion ban because unclear it's medically necessary
    - *Whole Women's Health v. Hellerstedt* (2016); *June Medical v. Russo* (2019)
      - Struck down Texas & Louisiana laws that made it difficult for abortion providers to operate
    - *Dobbs v. Jackson Women's Health Organization* (2022)
      - Strikes down Roe, enabling states to ban abortion without exceptions for rape, incest, or health of the mother
      - Rules against Due Process justification, says only rights deeply rooted in tradition protected
  - Supreme Court has signaled it may be prepared to undo other rights protected by the Due Process clause in existing precedents (right to contraception, marriage equality, prohibition on anti-sodomy laws)

# Conclusions

- Civil liberties are not settled
- Incorporation via the 14<sup>th</sup> Amendment nationalized the Bill of Rights' protections of civil liberties
- Supreme Court controls Americans' liberties due to informal norms against checking Court's power
- What the Supreme Court giveth, the Supreme Court can taketh away