



The Struggle for Civil Liberties Part I

Those in power need checks and restraints lest they come to identify the common good as their own tastes and desires, and their continuation in office as essential to the preservation of the nation.

William O. Douglas (1898-1980)
US Supreme Court Justice



Civil Liberties in the US

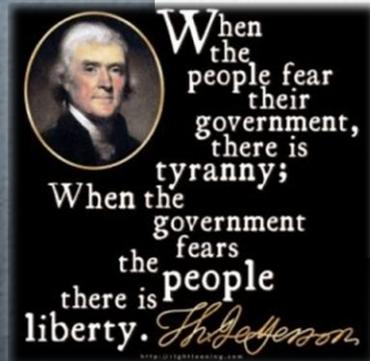
- shaped by
 - ratification of Constitution
 - Supreme Court rulings
 - political debate
 - interest group activism
 - election outcomes





Civil Liberties in the Constitution

- Civil liberties are constitutional provisions, laws and practices that protect individuals from governmental interference.
- The original Constitution specifically protected only a few liberties from the national government and almost none from state governments.
- The safeguard against tyranny that the framers preferred was to **give the national government little power with which to attack individual liberties.**





Civil Liberties in the Constitution

Civil Liberties

- o ...articulation of basic freedoms found in colonial America
- o Framers singled out a few crucial freedoms but **Constitution did not include explicit protection for individual civil liberties.**
- o prohibition against suspending the writ of *habeas corpus* except when public safety demanded it due to rebellion or invasion
- o prohibition against passing bills of attainder: acts declaring person or group guilty of crime and punishing them without a trial
- o prohibition against passing *ex post facto* laws: retroactively change the legal status of past actions or relationships



Civil Liberties in the Constitution

- o Bill of Rights addition was defeated unanimously at the national convention.
- o Federalists argued that a Bill of Rights was unnecessary.
 - o already included by states
 - o foolhardy to list things that the national government had no power to do
- o Some Federalists supported the idea ... Jefferson, for example.
- o Madison didn't until politics intervened. He sought House seat in a district that was largely Anti-Federalist in nature.





Civil Liberties in the Constitution

- In 1787, most state constitutions explicitly protected a variety of personal liberties: speech, religion, trial by jury, freedom from unreasonable search and seizure.
- New national Constitution shifted power to the national government.
- Anti-Federalists: Would the national government uphold these liberties?





Civil Liberties in the Constitution

- o Only when ratification of Constitution was in danger did a national Bill of Rights emerge.
- o Objections to the absence of a more specific listing led the Federalists to promise that a Bill of Rights would be proposed as a condition for ratifying the Constitution.
- o Yet, even with the addition of the Bill of Rights, the Constitution contains few of the liberties that Americans cherish most.

Federalists	Antifederalists
❖ Checks & Balances would protect the people from an abusive government	❖ Feared a strong central government would be more likely to abuse its power and violate the rights of the people and the states
❖ State Constitutions already had bills of rights that protected the people	❖ In the Constitution, Article I, sec. 9 had a few protections



Civil Liberties in the Constitution

- o 1789: Congress sent proposed Bill of Rights to the states for ratification, which occurred in 1791.
- o The first ten amendments to the Constitution contain numerous specific guarantees: free speech, press and religion.
- o highlighted Anti-Federalist fears of a strong national government
- o 9th amendment: *The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.*
- o 10th amendment: Reiterates that powers not delegated to the national government are reserved to the states or to the people.



Civil Liberties in the 19th Century

- o **Alien and Sedition Acts** (1798): made it harder for an immigrant to become a citizen, allowed the president to imprison and deport non-citizens who were deemed dangerous or who were from a hostile nation, and criminalized making false statements that were critical of the national government
- o **prior restraint**: government prohibition of speech in advance of publication ... generally held to be in violation of the 1st amendment





Civil Liberties in the 19th Century

- o One of the few protections of liberty in the original Constitution concerns **private property**. States are prohibited from impairing the obligation of contracts.
- o intellectual property
- o slavery
- o The importance of property rights had been reinforced by more than a century of judicial interpretation.
- o Rights of property were expanded, refined and altered to make them consistent with an emerging industrial society.





Civil Liberties in the 19th Century

- o Bill of Rights intended to limit powers of the national government.
- o *Barron v. Baltimore* (1833)
 - o Court ruled that the national **Bill of Rights limited only the actions of the US government** and not those of the states.
 - o But decision suggested the possibility that some or all of the protections might be interpreted to prevent state infringement of those rights.



Civil Liberties in the 19th Century

- o Bill of Rights originally applied only to national government, not the states.
- o Several states supported Congregationalist ministers with tax money for several decades.
- o Some Bill of Rights provisions did not explicitly mention national or state government, leaving possibility that they applied to both.

A. Scott was a slave from Missouri. His master had taken him to Illinois where abolitionists helped him sue for his freedom because slavery was illegal in Illinois.

B. Chief Justice Roger Taney decides the case:

1. Scott could not file a lawsuit because he was not a person, he was property.
2. Congress did not have the power to outlaw slavery in **any** territory!!

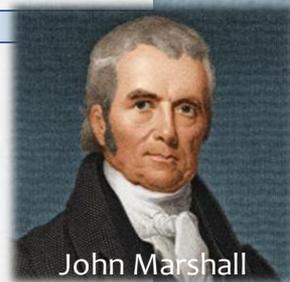
o *Dred Scott v. Sandford* (1857): Americans of African descent, whether free or slave, were **not American citizens and could not sue in national court.**





The Marshall Court (1801-1835)

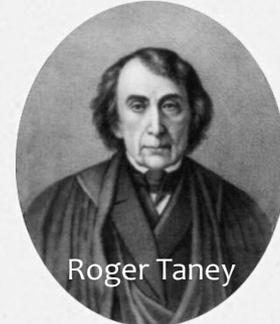
- o The **contract clause** does apply to the states ... Article I, Section 10, Clause 1 ... States are not allowed to enact a law that retroactively impairs an individual or legal entity from forming a legally valid contract.
- o *Fletcher v. Peck* (1810): **decision in which the Supreme Court first ruled a state law unconstitutional**, precedent for the sanctity of legal contracts, hinted that Native Americans did not hold title to their own lands
- o *Dartmouth College v. Woodward* (1819): **application of the contract clause of the Constitution to private corporations**





The Taney Court (1836-1864)

- o favored property that was **used to encouraged economic growth** over simple enjoyment of property
- o *Charles River Bridge v. Warren Bridge* (1837): Court sided with free Warren Bridge despite prior contract with toll Charles River Bridge arguing that no legislature should have the power to stop the state from creating internal improvements because it was such an important aspect of the state's power



Roger Taney



Civil Liberties during the Civil War

- o During Civil War, Lincoln suspended free press provision of 1st amendment.
- o Ordered arrest of editors of two NY papers who were critical of him.
- o Newspaper editor jailed by military court without having any charges brought against him.
- o Appealed to Supreme Court.

- o Congress enacted legislation prohibiting Court from issuing opinion in any case involving conviction for publishing statements critical of US.
- o Article II gives Congress power to determine the jurisdiction of the Court.





Civil Liberties after the Civil War

- o The Civil War transformed the Bill of Rights.
 - o **civil rights amendments:** The 13th, 14th, 15th amendments abolished slavery, redefined civil rights and liberties, and guaranteed the right to vote to all adult male citizens.
 - o **due process clause:** found in the 5th and 14th amendments forbid deprivation of life, liberty or property without the due process of law

What is Due Process?





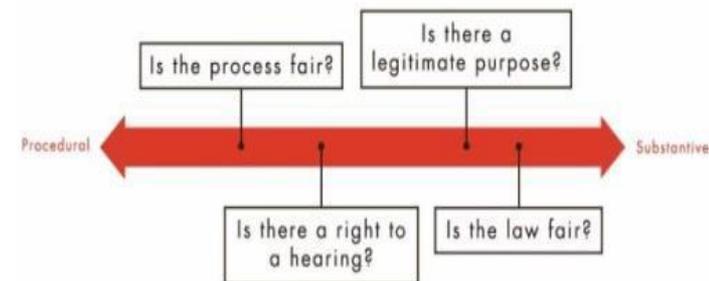
Civil Liberties after the Civil War

- o 14th amendment (1868)
 - o designed to guarantee the citizenship rights of the newly freed slaves
 - o due process clause: *No state may deprive a person of life, liberty or property without due process of law.*
 - o *Lochner v. New York* (1905): liberty of contract is implicit in the due process clause of the 14th amendment

Types of Due Process

- **Procedural Due Process:** The gov't must use fair methods when it acts
- **Substantive Due Process:** The gov't must use fair laws when it acts

PROCEDURAL VS. SUBSTANTIVE





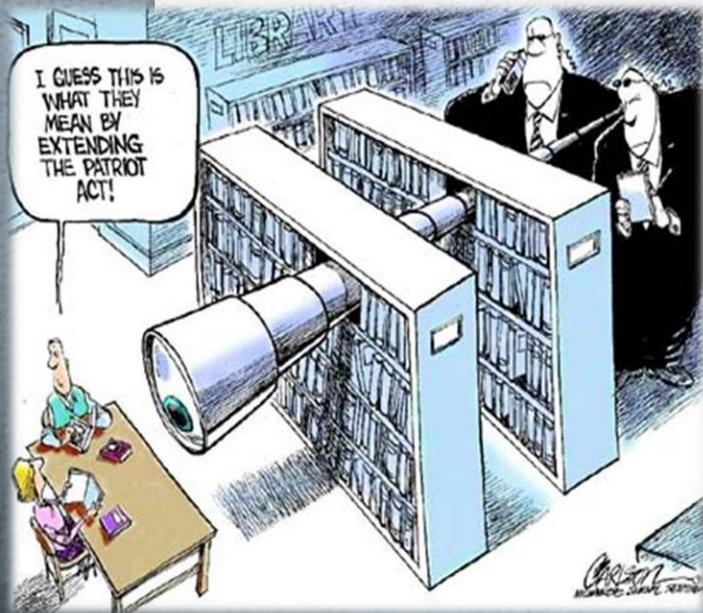
Civil Liberties after the Civil War

- o 14th amendment's **due process clause** has been construed to guarantee to individuals a variety of rights, from economic liberty to criminal procedural rights to protection from arbitrary governmental action.
- o **substantive due process**: judicial interpretation of the 5th and 14th amendments' due process clause that protects citizens from arbitrary or unjust laws



Civil Liberties after the Civil War

- o The framers were more concerned about intrusions by the national government than by state governments.
- o Congress wanted to extend the reach of the Bill of Rights when it approved the 14th amendment.



- o privileges and immunities clause
- o due process clause
- o The Supreme Court was slow in nationalizing or incorporating the Bill of Rights.



The Incorporation Doctrine: Applying the Bill of Rights to States

- o **incorporation doctrine**: interpretation of the Constitution that holds that the due process clause of the 14th amendment requires that state and local governments also guarantee those rights
- o *Gitlow v. New York* (1925): **1st amendment protection of free speech applies also to state governments**
- o *Near v. Minnesota* (1931): recognized freedom of the press by roundly **rejecting prior restraints on publication**, a principle that was applied to free speech generally in subsequent cases





Selective Incorporation of the Bill of Rights

- o Language in the 14th amendment applied the due process clause to the states.
- o But Supreme Court did not immediately conclude that the states must abide by the entire Bill of Rights.
 - o would be difficult to enforce
 - o used a gradual approach: **selective incorporation**

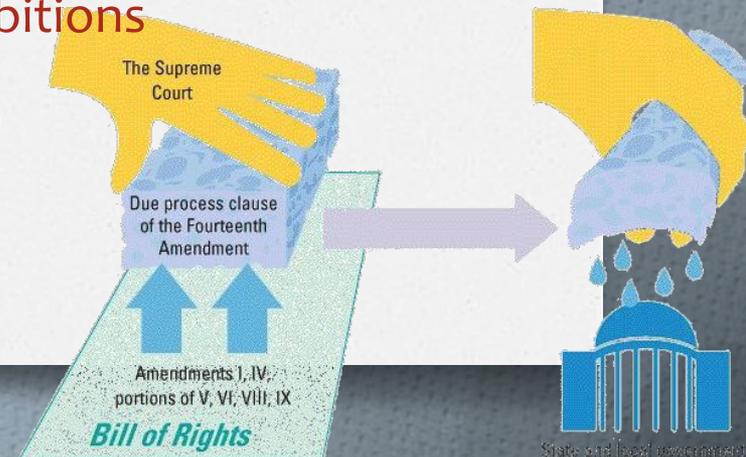
- o the case-by-case incorporation, by the courts, of the Bill of Rights into the due process clause of the 14th amendment





The Incorporation Doctrine: Standards for Incorporation

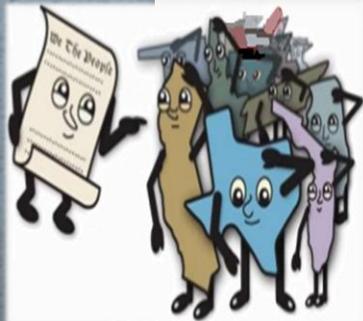
- o How does the Supreme Court decide whether to incorporate some portion of the Bill of Rights?
- o The answer is spelled out in footnote four of the Court's opinion in *US v. Carolene Products Company* (1938).
- o state actions bring strict scrutiny if they:
 - o contradict Constitutional prohibitions
 - o restrict the democratic process
 - o discriminate against minorities





Selective Incorporation of the Bill of Rights

- o Liberties unrelated to property were not protected before the 20th century because the Bill of Rights did not apply to state governments.
- o The Supreme Court only gradually applied the Bill of Rights to the states through selective incorporation.
- o **selective incorporation**: judicial doctrine whereby most but not all of the protections found in the Bill of Rights are made applicable to the states via the 14th amendment
- o *Palko v. Connecticut* (1937): incorporation of the 5th amendment protection against **double jeopardy**
- o **fundamental freedoms**: those rights defined by the Court to be essential to order, liberty and justice





Selective Incorporation of the Bill of Rights

<i>Date</i>	<i>Amendment</i>	<i>Right</i>	<i>Case</i>
1925	I.	Speech	<i>Gitlow v. New York</i>
1931		Press	<i>Near v. Minnesota</i>
1937		Assembly	<i>DeJonge v. Oregon</i>
1940		Religion	<i>Cantwell v. Connecticut</i>
	II.	Right to bear arms	<i>not incorporated</i> (Generally, the Supreme Court has upheld reasonable regulations of the right of private citizens to bear arms. Should a tough gun-control law be adopted by a state or local government and a challenge to it be made, a test of incorporation might be presented to the Court in the future.)
	III.	No quartering of soldiers	<i>not incorporated</i> (The quartering problem has not recurred since colonial times.)
1949	IV.	Unreasonable searches and seizures	<i>Wolf v. Colorado</i>
1961		Exclusionary rule	<i>Mapp v. Ohio</i>
1897	V.	Just compensation	<i>Chicago, B&O R.R. Co. v. Chicago</i>
1964		Self-incrimination	<i>Malloy v. Hogan</i>
1969		Double jeopardy	<i>Benton v. Maryland</i> (overruled <i>Palko v. Connecticut</i>)
		Grand jury indictment	<i>not incorporated</i> (The trend in state criminal cases is away from grand juries and toward reliance on the sworn written accusation of the prosecuting attorney.)

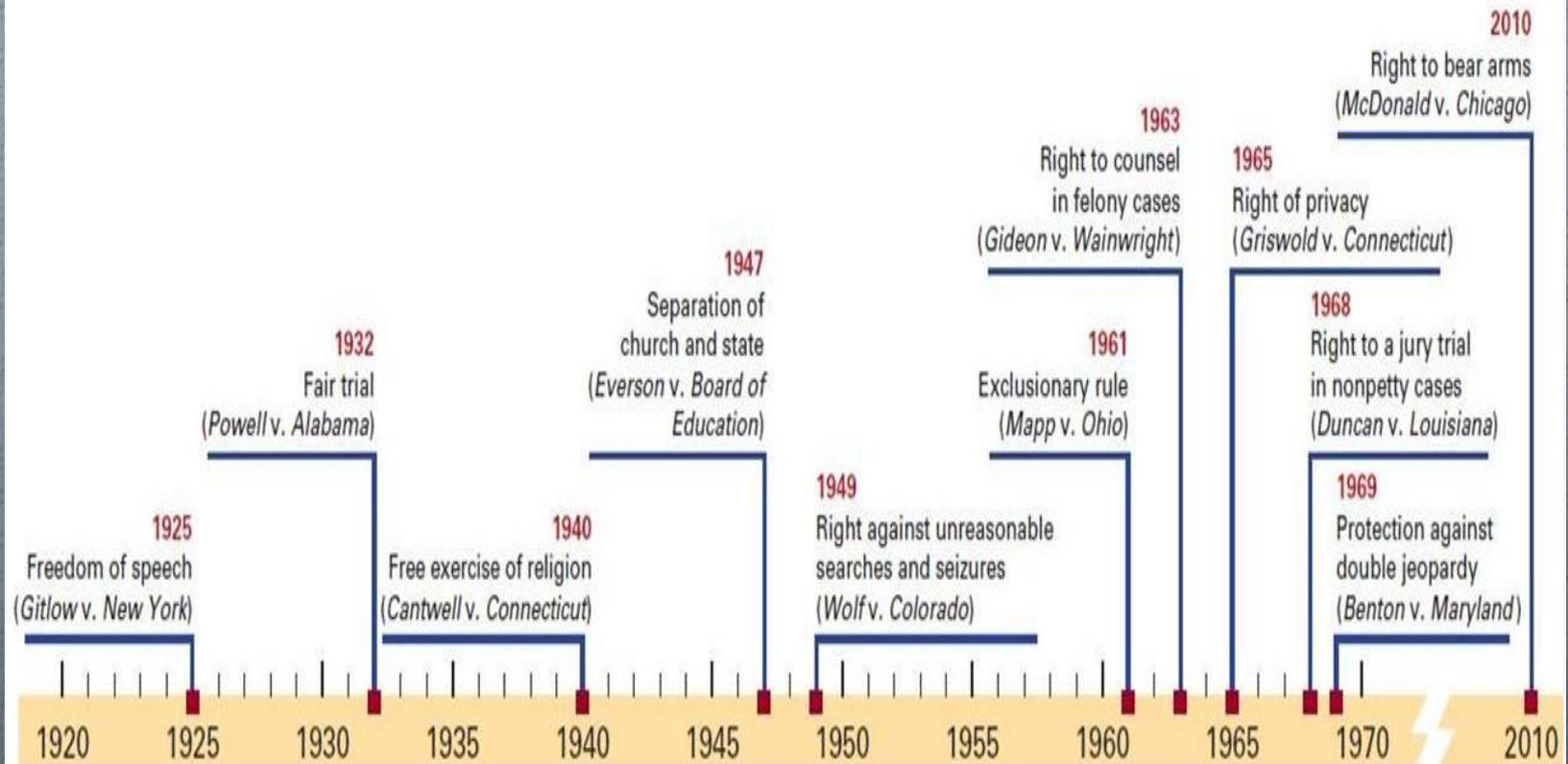


Selective Incorporation of the Bill of Rights

Date	Amendment	Right	Case
1948	VI.	Public trial	<i>In re Oliver</i>
1963		Right to counsel	<i>Gideon v. Wainwright</i>
1965		Confrontation of witnesses	<i>Pointer v. Texas</i>
1966		Impartial trial	<i>Parker v. Gladden</i>
1967		Speedy trial	<i>Klopper v. North Carolina</i>
1967		Compulsory trial	<i>Washington v. Texas</i>
1968		Jury trial	<i>Duncan v. Louisiana</i>
	VII.	Right to jury trial in civil cases	<i>not incorporated</i> (While Warren Burger was chief justice, he conducted a campaign to abolish jury trials in civil cases to save time and money.)
1962	VIII.	Freedom from cruel and unusual punishment	<i>Robinson v. California</i>
		Freedom from excessive fines or bail	<i>not incorporated</i>



Timeline of Selective Incorporation





Civil Liberties in the 20th Century

- o **bad tendency**: rule from English law saying that speech could be punished if it could ultimately lead to illegal behavior
- o First major Supreme court decisions affecting freedom of speech arose out of the conscription of young men into the army during WWI.
- o Schenck: socialist who mailed anti-conscription materials to draft-age men
- o found guilty of the 1917 Espionage Act (law that made it illegal to obstruct armed forces recruitment)



Civil Liberties in the 20th Century

- o Supreme Court reviewed *Schenck* case and enunciated the clear and present danger doctrine.
- o **clear and present danger**: doctrine adopted by Supreme Court to determine under what circumstances limits can be placed on 1st amendment freedoms of speech, press or assembly ... articulated by Supreme Court in *Schenck v. US* (1919) to draw line between protected and unprotected speech





Civil Liberties in the 20th Century

- o clear and present danger doctrine
 - o meaning open to interpretation
 - o Court looks to see *whether the words used could create a clear and present danger that they will bring about substantive evils that Congress seeks to prevent.*
 - o *Abrams v. US (1919)*: Holmes' attempt to fine-tune the doctrine
 - o *Stromberg v. California (1931)*: gave 1st amendment protection to extremely unpopular opinions





Civil Liberties in the 20th Century

- o clear and present danger doctrine
 - o Anti-war leaflets okay during peace but not during war ... too dangerous.
 - o But what constitutes a danger?
- o **direct incitement test**: test articulated by Supreme Court in *Brandenburg v. Ohio* (1969) ... advocacy of illegal action is protected by 1st amendment unless imminent lawless action is intended and likely to occur



The modern American airport



Civil Liberties in the 20th Century

- o **symbolic speech**: symbols, signs and other methods of expression generally also considered to be protected by the 1st amendment
- o *Stromberg v. California* (1931): upheld flying of red flag (symbol of opposition to US government)
- o *Tinker v. Des Moines Independent Community District School* (1969): Court upheld wearing of black armbands as protest against Vietnam War.





Fundamental Freedoms Doctrine

- o ...laws impinging on the freedoms that are fundamental to the preservation of democratic practice are to be scrutinized by the courts more closely than other legislation
- o fundamental freedoms: speech, press, assembly and religion
- o Democracy depends on a free exchange of ideas.
- o volatile area of constitutional interpretation
- o *Texas v. Johnson* (1989): invalidated prohibitions on desecrating the American flag, as protected speech





Fundamental Freedoms Doctrine

- o *US v. Eichman* (1990): invalidated a national law against flag desecration as violation of free speech
- o *RAV v. City of St Paul* (1990): struck down St Paul Bias-Motivated Crime Ordinance and reversed the conviction of a teenager for burning a cross on the lawn of an African American family as violating freedom of expression protections ... teen could be arrested for violating burning laws, private property, etc but not for biased motivation
- o Supreme Court Justice William O. Douglas (1898-1980): *The 1st and 14th amendments say that Congress and the states shall make no law which abridges freedom of speech or of the press. In order to sanction a system of censorship I would have to say that no law does not mean what it says, that no law is qualified to mean some laws. I cannot take this step.*





Selective Incorporation and Fundamental Freedoms

- o The Court used the doctrine of selective incorporation to determine which rights in the Bill of Rights apply to states under the due process clause of the 14th amendment.
- o Fundamental freedoms protected under selective incorporation include the rights defined by the Court as essential to order, liberty and justice.
- o States are bound by these rights and must ensure that individuals have these rights.
- o 1st Amendment freedoms are more fundamental than any other freedoms ... If a law prohibits those freedoms it must be absolutely necessary or it is unconstitutional.





continued in
The Struggle for Civil Liberties
Part II

