

Civil Liberties

- Reigning in Majorities -

- The Framers believed a bill of rights was not necessary if the institutions of government were designed correctly.
- Others believed that listing rights in the Constitution might imply that the federal government had the authority to restrict freedoms that were not expressly protected.

Civil Liberties

- Reigning in Majorities -

- Many, however, particularly Antifederalists, saw the need for a federal bill of rights as a firewall against potential tyranny of a strong federal government.
- REMEMBER: The Constitution, in its original form in 1787, did NOT seriously address civil liberties.

Civil Liberties

- Reigning in Majorities -

- Framers understood that civil liberties policy would at times check majority preferences.
- First Amendment... “Congress shall make no law,” which covers six different areas of personal and political liberty.

Civil Liberties

- Reigning in Majorities -

- What are they?
- No law respecting an establishment of religion
- No law prohibiting the free exercise of religion

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- Reigning in Majorities -

- Freedom of speech
- Freedom of the press
- Freedom to assembly
- Freedom to petition government

Civil Liberties

- Reigning in Majorities -

- National majorities will be constrained in fixing national policy.
- Judiciary predicted to be guardians of civil liberties.

Civil Liberties

- Reigning in Majorities -

- Bill of Rights designed to limit the capacity of national majorities to impose conformity costs on those individuals and minorities whose views differ from those of the majority.

Civil Liberties

- Reigning in Majorities -

- The clear and absolute language of the Bill of Rights offers little latitude to politicians who might want to change its constitutionally protected liberties, but none are absolute.
 - However, some amendments not as clear cut.
 - Establishment clause of First Amendment
 - Does it prevent a moment of silent prayer in public schools?

Civil Liberties

- Reigning in Majorities -

- Eight Amendment
 - What does “cruel and unusual” punishment mean? Who decides?
- First versus Sixth Amendment
 - Freedom of the Press versus the Right to an Impartial Jury

Civil Liberties

- Limited Civil Liberties -

- The Constitution actually acquired civil liberties protections in several steps:
 - The inclusion of the Bill of Rights (originally 17 proposed!)
 - BUT:
 - Its interpretation by the Supreme Court applied the Bill of Rights only to restraining the actions of the federal government—not the states!!!

Civil Liberties

- Limited Civil Liberties -

- *Barron v. Baltimore* (1833) is an example of their interpretation.

Civil Liberties

- Limited Civil Liberties -

- These rulings basically rendered the Bill of Rights meaningless, for most citizens' quarrels were with their states, not the federal government.
- According to the Court, if state citizens wanted such protections at the state level, they could amend their state constitution.

Civil Liberties

- Extending Civil Liberties: Incorporation -

- So how did Civil Liberties then get extended?
- Answer: Civil War & the 14th Amendment and the process of incorporation.

Civil Liberties

- Extending Civil Liberties: Incorporation -

- Incorporation is the process of bringing state laws and practices under the Bill of Rights protections by applying the Fourteenth Amendment to the states.
 - Consequences: Altered the balance of power between Washington and the states and expanded the range of protections offered by the Bill of Rights.

Civil Liberties

- Extending Civil Liberties: Incorporation -

- Passed during Reconstruction (1868), the Fourteenth Amendment was intended initially to protect former slaves by explicitly declaring the rights of citizenship were not subject to state controls.
 - The first sentence of the amendment provides for a unified national citizenship contradicting the Court's assertion in Barron.
 - Strict dual citizenship did not exist!!

Civil Liberties

- Extending Civil Liberties: Incorporation -

- But its sweeping language allowed others to be covered by its protective umbrella.
 - It goes on to say that all citizens enjoy the same civil liberties and rights (the due process clause and the equal protection clause).

Civil Liberties

- Extending Civil Liberties: Incorporation -

- It took a while: one of the great ironies of American history is that, while it failed to achieve its immediate goal, a century later the Fourteenth Amendment extended the rights and liberties of all citizens in directions unimaginable to its authors.

Civil Liberties

- Extending Civil Liberties: Incorporation -

- Incorporation occurred not through legislative mandate or the amendment process but through judicial interpretation.

Civil Liberties

- Extending Civil Liberties: Incorporation -

- While interpretations are meant to be “objective,” the reality is that judicial interpretations often vary.
 - This variation may be the product of justices’ ideologies, personal preferences, and partisanship.

Civil Liberties

- Extending Civil Liberties: Incorporation -

- As justices come and go from the Court, judicial doctrine may change.
- Trends in civil liberties tend to reflect the shifting ideological composition of the Court.
- This predictability helps presidents choose judicial nominees who will likely continue the president's policy preferences.
- => Waxing and waning of incorporation

Civil Liberties

- Major vs. Peripheral Rights -

- Major rights: litigated heavily and developed in detail by the Court.
- Peripheral rights: parameters have not been fully developed.
- Examples of peripheral rights:
 - Right of assembly under the First Amendment

Civil Liberties

- Major vs. Peripheral Rights -

- The Fifth Amendment’s protection against having private property taken by government without compensation.
 - “taking clause”
- Second Amendment had been an example until recently.
 - *McDonald v. Chicago* (2010)

Civil Liberties

- Major vs. Peripheral Rights -

- Not incorporated rights:
- Some provisions of the Bill of Rights not applied to the states:
 - Third Amendment's prohibition of quartering of soldiers
 - Seventh Amendment's right to a jury in civil cases
 - Eight Amendment's right against excessive bail and fines

Civil Liberties

- Criminal Rights -

- The Bill of Rights was carefully crafted to provide barriers to arbitrary law enforcement => first-hand experience with Britain's attempts to tighten political control over the colonies

Civil Liberties

- Criminal Rights-

- BUT: Amendments that focused upon the rights of the criminally accused were some of the last to be incorporated into the Fourteenth Amendment, and applied to all levels of government.
 - Public safety and law enforcement are generally the realms of state and local governments.

Civil Liberties

- Criminal Rights-

- The rights of the criminally accused have also been the least publicly or politically supported:
 - Elected officials responded to the public by paying closer attention to the legal opinions of those appointed to judgeships.
 - Result: this recruitment practice has brought in judges who are less supportive of criminal rights and thus more in line with public opinion in the United States.

Civil Liberties

- Criminal Rights -

- In 2008: United States—2.3 million prisoners; China—.6 million prisoners, that is:
- United States has 751 people in prison or jail for every 100,000 in population. (If you count only adults, one in 100 Americans is locked up.)

Source: New York Times (2008):

http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?_r=1&pagewanted=all

Civil Liberties

- Fourth Amendment: Illegal Searches and Seizures -

- The Fourth Amendment addresses the “right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.”

Civil Liberties

- Fourth Amendment: Illegal Searches and Seizures -

- It assures them that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

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- Fourth Amendment: Illegal Searches and Seizures -

- Quite specific and detailed.
 - If no warrant, then no search.
 - No violation of an individual's private PHYSICAL space, one's domicile
 - Congress first going beyond the physical with Federal Communications Act of 1934 (proscribing most police use of wiretaps legal until then)

Civil Liberties

- Fourth Amendment: Illegal Searches and Seizures -

- Not until 1967 did the Supreme Court start expanding the domain of privacy and limiting police use of technology to conduct warrantless searches.
- *Katz v. United States*
 - Court agreed that the telephone booth was a “constitutionally protected area.”

Civil Liberties

- Fourth Amendment: Illegal Searches and Seizures -

- In this case, where wiretap evidence was questioned, the Court broke new ground.
 - First, the Court did not limit protections to discovery of physical evidence.
 - Second, indicated that even searches not involving “physical penetration” of an individual’s space might be illegal.

Civil Liberties

- Fourth Amendment: Illegal Searches and Seizures -

- The Court generally allows police searches without a warrant under the following circumstances:
 - During a valid arrest
 - When searching to ensure evidence is not lost

Civil Liberties

- **Fourth Amendment: Illegal Searches and Seizures -**
 - When searching with the consent of the suspect
 - When the search occurs in “hot pursuit” of suspect in “act”
 - When seizing evidence that is in plain view
 - When searching places other than residences that the Court has decided merit low protection (cars)

Civil Liberties

- Fourth Amendment: Illegal Searches and Seizures -

- What about illegally obtained, incriminating evidence?
 - 1914 decision that such material must be excluded
 - But as late as 1949 the Court has resisted incorporating this exclusionary rule.

Civil Liberties

- Fourth Amendment: Illegal Searches and Seizures -

- Under the leadership of Chief Justice Earl Warren, the Court turned to incorporation of criminal rights: *Mapp v. Ohio* (1961) the Court extended the so-called exclusionary rule to the states. No improperly obtained evidence could be admitted at a trial.

Civil Liberties

- Fourth Amendment: Illegal Searches and Seizures -

- BUT: Public outrage when incriminating evidence thrown out of cases.
 - As Court became more conservative, the absolute standard set out in Mapp became more ambiguous and flexible, for example, *Hudson v. Michigan* (2006)—softening of “knock-announce” rule

Civil Liberties

- Fourth Amendment: Illegal Searches and Seizures -

- Modern technology is introducing new Fourth Amendment issues:
 - DNA
 - GPS

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- Fourth Amendment: Illegal Searches and Seizures -

- Will these be challenged as invasions of privacy and inappropriate search and seizure?
- Federal and state court rules disagree.

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- Fifth Amendment: Self-Incrimination -

- The Fifth Amendment states that no person shall “be compelled in any criminal case to be a witness against himself.”

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- Fifth Amendment: Self-Incrimination -

- This applies not only to testimony in a trial but also to any statement made by a defendant awaiting trial.
- Abuses in law enforcement triggered the Court to move toward incorporation of the Fifth Amendment.

Civil Liberties

- Fifth Amendment: Self-Incrimination -

- 1964 Supreme Court applied the Fifth Amendment to the states
- Followed with one of its most famous decisions: *Miranda v. Arizona* (1966)
 - Aimed at protecting suspects from self-incrimination during the critical time between arrest and arraignment

Civil Liberties

- Fifth Amendment: Self-Incrimination -

- Required that defendants be advised of:
 - their constitutional right to remain silent,
 - and be warned that what they say can be used against them in a trial,
 - informed that they have the right to a lawyer,
 - and be told of the right to end the interrogation at any time.

Civil Liberties

- Fifth Amendment: Self-Incrimination -

- 1968 Congress enacted legislation that sought to overturn Miranda by permitting all demonstrably voluntary confessions.
 - But it went unenforced by attorney generals and local prosecutors.

Civil Liberties

- Fifth Amendment: Self-Incrimination -

- In 2000 the Supreme Court found that Congress did not have the authority to change the Miranda decision. But the Court could if it wished.
- 2010 three Supreme Court rulings lessened to some degree the protections under Miranda, for example, in *Berghuis v. Thompkins*: suspect must unambiguously invoke the right to remain silent.

Civil Liberties

- Eight Amendment: Cruel and Unusual Punishment -

- The death penalty is the most important and contentious policy issue falling under the Eight Amendment—But is it “cruel and unusual”?

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- Eight Amendment: Cruel and Unusual Punishment -

- “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”
- In 1972 *Furman v. Georgia*. (243 pages, longest in Court history) => put capital punishment on hold

Civil Liberties

- Eight Amendment: Cruel and Unusual Punishment -

- BUT: not the death penalty itself was declared unconstitutionally cruel and unusual—it was the discriminatory practices that led to more African American males being convicted and sentenced to death that was questioned; only three judges maintained that the death penalty inherently violated the Bill of Rights.

Civil Liberties

- **Eight Amendment: Cruel and Unusual Punishment -**

- The federal government and 35 states began to redraft laws to satisfy the justices' requirements (eliminating discrimination):

Civil Liberties

- Eight Amendment: Cruel and Unusual Punishment -

- Gregg v. Georgia (1976)
 - Georgia law separated the conviction from the sentencing stage of the trial.
 - Allowed juries to weigh the particular crime and defendant and any mitigating or aggravating circumstances.
 - Court proclaimed it the “model” law and the death penalty ceased to constitute cruel and unusual punishment.

Civil Liberties

- Eight Amendment: Cruel and Unusual Punishment -

- In other cases over the last ten years the Court has found the following to be cruel and unusual punishment:
 - Execution of defendants with “mental retardation.”
 - Execution of juveniles.
 - Execution of a defendant who raped, but did not murder, a child.

Civil Liberties

- **Eight Amendment: Cruel and Unusual Punishment -**

- 2009 case in Roberts Court found it also a violation to sentence a juvenile to life in prison without possibility of parole.

Civil Liberties

- Privacy and the Ninth Amendment -

- A right to privacy, unlike other civil liberties, is not explicitly stated in the Bill of Rights or elsewhere in the Constitution.
- Although it was postulated as implicit by legal jurists as early as the 1890s, the Supreme Court did not recognize its existence until 1965.

Civil Liberties

- Privacy and the Ninth Amendment -

- Indeed, the Ninth Amendment states that “the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.”

Civil Liberties

- Privacy and the Ninth Amendment -

- What does liberty mean if not privacy from state surveillance? The Court argued that a number of explicit rights presupposed privacy. They could not exist without some measure of privacy.

Civil Liberties

- Privacy and the Ninth Amendment -

- These explicitly guaranteed rights form penumbras, or implicit zones of protected privacy rights on which the explicit rights depend in order to exist.

Civil Liberties

- Privacy and the Ninth Amendment -

- What actions are so personal or private that they should be shielded from interference by the government and other third parties?

Civil Liberties

- Privacy and the Ninth Amendment -

- Court's attention mostly on one important but narrow domain of public policy: reproductive rights.
- An 1879 Connecticut law banned the use of contraceptives.

Civil Liberties

- Privacy and the Ninth Amendment -

- In 1961 Estelle Griswold opened up a planned parenthood clinic which dispensed them. She was arrested, lost her case in the state courts, but was redeemed with the Supreme Court decision in 1965 in *Griswold v. Connecticut*.
 - Court found that Americans' guaranteed rights are not limited to those specifically identified in the Constitution.

Civil Liberties

- Privacy and the Ninth Amendment -

- Cases that followed such as *Eisenstadt v. Baird* (1972) and *Roe v. Wade* (1973) gave support to feminist and reproductive freedom groups to pursue abortion rights.
 - Decisions were made in a national climate that had seemed to be easing or repealing states' abortion statutes
 - But the Court's decision did not remove abortion from government regulation.

Civil Liberties

- Privacy and the Ninth Amendment -

- In *Roe v. Wade* the Court stated that in the interest of the mother's health and the "potential" life of the fetus, state governments could regulate abortions from the end of the first trimester of pregnancy to fetus viability.

Civil Liberties

- Privacy and the Ninth Amendment -

- 1992: Court backed away from the first trimester standard and substituted a more ambiguous “undue burden” criterion.

Civil Liberties

- Privacy and the Ninth Amendment -

- In this way some “burdens” were deemed constitutional—as long as they were not an “undue” burden.
- In sum: Modern civil liberties number among the most divisive and unsettled issues facing the nation.