

# Chapter 5: Civil Liberties

# Nationalization of Civil Liberties

(1 of 2)

- Civil liberties claims increasingly common
  - More recent occurrence
- Civil rights and civil liberties

# Nationalization of Civil Liberties

(2 of 2)

## The Bill of Rights Checks Majority Rule

- First Amendment:
  - Six areas of personal/political liberty
- Limit government imposing conformity costs

# Writing Rights and Liberties into the Constitution

- Bill of Rights included later
  - To insulate citizens from federal interference
- Incorporation
- Nationalization of civil liberties

# The First Ten Amendments

- James Madison suggested seventeen amendments
- *Barron v. Baltimore*

# Incorporation via the Fourteenth Amendment (1 of 4)

- Due process clause
- Equal protection clause
- Privileges and immunities clause
- Selective incorporation

# Incorporation via the Fourteenth Amendment (2 of 4)

## Judicial Interpretation

- Incorporation of Bill of Rights provisions
- Interpreting Constitution objectively
- Must shed personal preferences, ideologies, and partisanship

# Incorporation via the Fourteenth Amendment (3 of 4)

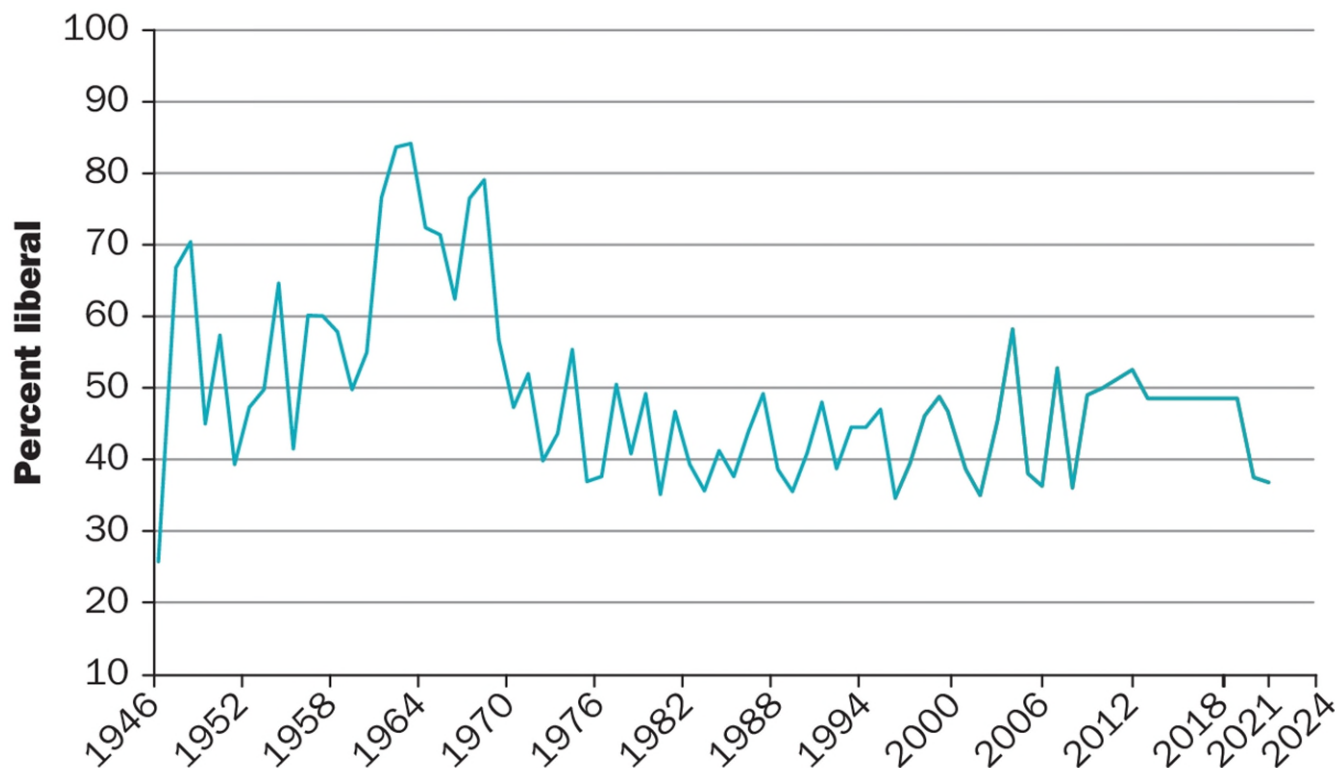
## Major versus Peripheral Rights

- Major rights litigated heavily
  - Right of assembly
  - Protection against having private property taken without compensation



# Incorporation via the Fourteenth Amendment (4 of 4)

Figure 5.1: The Supreme Court's Shifting Ideology on Civil Liberties Cases



# Freedom of Speech (1 of 3)

## Political Protest and Violence

- Clear and present danger test
- Clear and probably danger test
- Brandenburg test

# Freedom of Speech (2 of 3)

## Disturbing Speech

- Speech as threat of violence
- Includes:
  - Publishing certain books
  - Posting names/addresses with threats

# Freedom of Speech (3 of 3)

## Sexually Explicit Expression

- Obscenity
- Difficulties with banning obscenity
- Community standards

# Freedom of the Press

- Independent press indispensable to democracy
- Sixth Amendment: impartial jury
  - Public scrutiny challenges in fair hearings

# Freedom of Religion (1 of 5)

- Establishment of religion clause
- Free exercise clause
- Separation between church and state

# Freedom of Religion (2 of 5)

## Establishment: The *Lemon* Test

- Subsidizing private schools
- *Lemon v. Kurtzman* (1971)
- *Lemon* test

# Freedom of Religion (3 of 5)

## Establishment: Testing a Policy's "Neutrality"

- Neutrality test
- *Board of Education of Kiryas Joel Village School District v. Grumet* (1994)
- *Espinoza v. Montana Department of Revenue* (2019)



# Freedom of Religion (4 of 5)

## School Prayer and Bible Reading

- Establishment issue among religious conservatives
- *Engel v. Vitale* (1962)
- Periodical congressional consideration

# Freedom of Religion (5 of 5)

## Free Exercise

- Case law on free exercise
- *Employment Division v. Smith* (1990)
- If law is not neutral

# Gun Rights (1 of 3)

- Second Amendment as peripheral right
- Most ambiguous language in Bill of Rights
- Supreme Court's refusal of cases
- *New York State Rifle & Pistol Association v. Bruen* (2021)

# Gun Rights (2 of 3)

## Legislative Action and the Second Amendment

- Political impasse
- Mass shootings increase favor

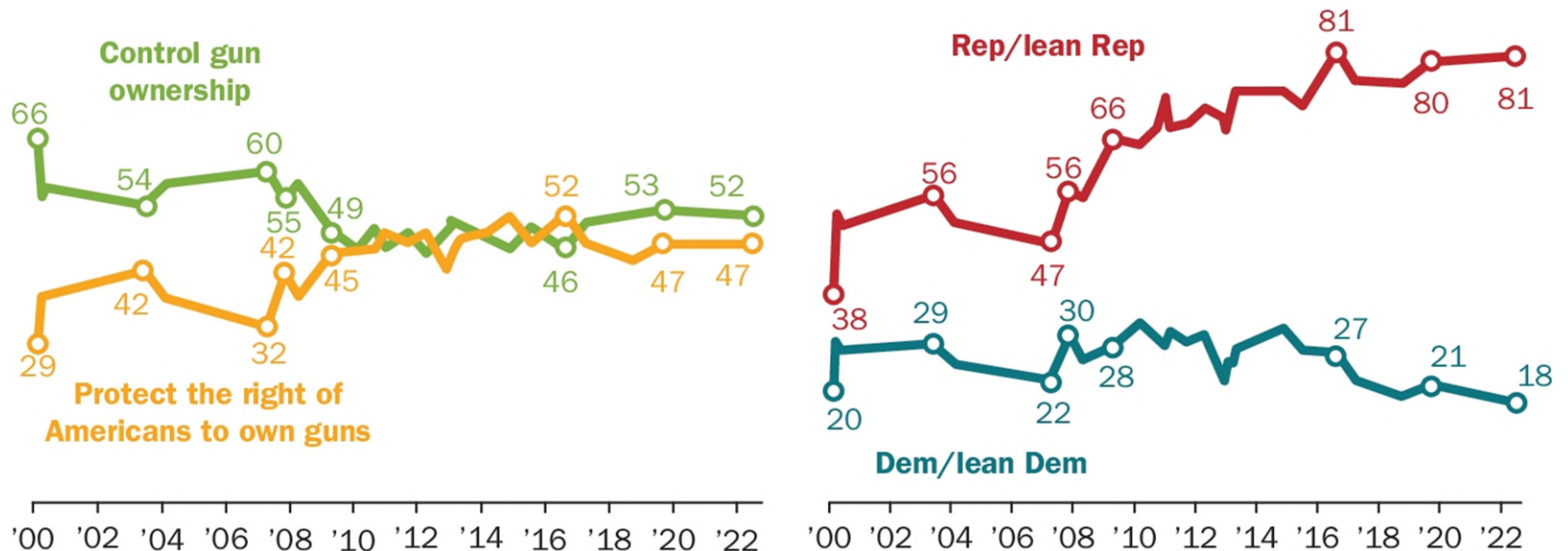
# Gun Rights (3 of 3)

Figure 5.2: The Public's View of Gun Rights

**Public remains closely divided over controlling gun ownership and protecting gun rights, with Republicans and Democrats holding opposing views**

% who say it is more important to ...

% who say it is more important to protect the right of Americans to own guns ...



# Criminal Rights (1 of 9)

- Procedural safeguards
- State and local responsibilities

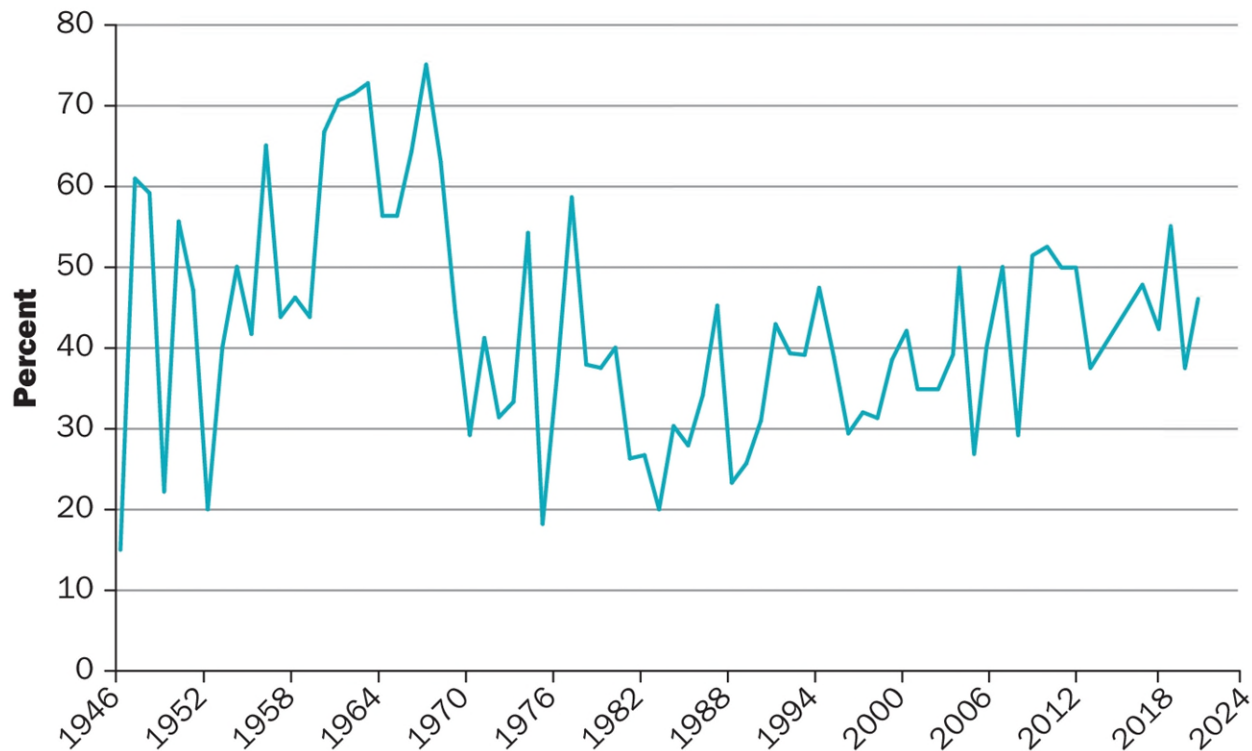
# Criminal Rights (2 of 9)

Figure 5.3: The American Criminal Justice System

Stage	Governing Amendment*
Reported or suspected crime	
↓	
Investigation by law enforcement officials	Fourth Amendment search and seizure rights
↓	Fifth Amendment self-incrimination clause
Arrest	
↓	Sixth Amendment right to counsel clause
Booking	
↓	
Decision to prosecute	
↓	
Pretrial hearings (initial appearance, bail hearing, preliminary hearing, arraignment)	Fifth Amendment grand jury clause
↓	Sixth Amendment notification clause
↓	Eighth Amendment bail clause
Trial	
↓	Fifth Amendment self-incrimination clause
	Sixth Amendment speedy and public trial, jury, confrontation, and compulsory process clauses
Sentencing	
↓	Eighth Amendment cruel and unusual punishment clause
	Eighth Amendment excessive fines clause
Appeals, postconviction stages	
	Fifth Amendment double jeopardy clause

# Criminal Rights (3 of 9)

Figure 5.4: The Supreme Court's Criminal Rights Decisions in Favor of the Accused





# Criminal Rights (4 of 9)

## Fourth Amendment: Illegal Searches and Seizures

- Difficult to define
- Violation of *physical space*
- *Katz v. United States*
- Exclusionary rule

# Criminal Rights (5 of 9)

## Fifth Amendment: Self-Incrimination

- Right against self-incrimination
- *Miranda* rule

# Criminal Rights (6 of 9)

## Sixth Amendment: Right to Counsel and Impartial Jury of Peers: Impartial Juries

- States determine jury size/unanimity
- Two types of unrepresentative juries
- Jurors rejected for “cause”

# Criminal Rights (7 of 9)

## Sixth Amendment: Right to Counsel and Impartial Jury of Peers: The Right to Counsel

- Speedy and public trial
- Applied in 1932
- Gradual expansions

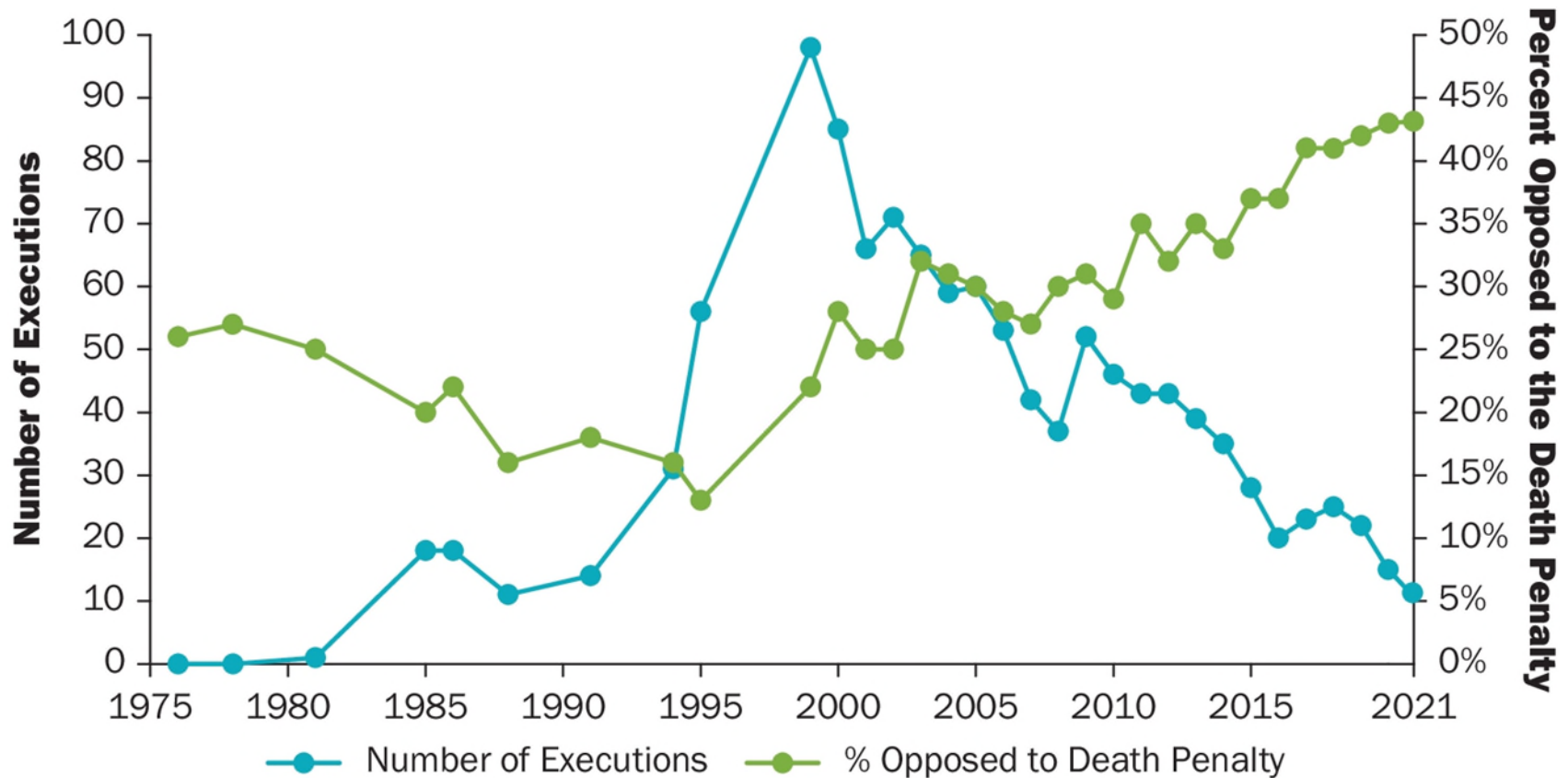
# Criminal Rights (8 of 9)

## Eighth Amendment: “Cruel and Unusual” Punishment

- “Cruel and unusual punishments”
- *Furman v. Georgia*
- Recent cruel and unusual punishment rulings

# Criminal Rights (9 of 9)

Figure 5.5: As More Americans Oppose the Death Penalty, the Number of Executions Has Declined



# Privacy (1 of 2)

## Childbearing Choices

- Penumbras
- *Eisenstadt v. Baird* (1972)
- *Roe v. Wade* (1973)
- *Dobbs v. Jackson* (2022)
- Abortion politics and debate

# Privacy (2 of 2)

## Privacy on the Internet

- Line blurred between government/third party gatherings
- Reasons for lack of invasion of privacy cases



# Civil Liberties as Public Policy

- Modern civil liberties divisive/unsettled
- Disagreement on democracy in life-tenured justices
- Civil liberties constantly changing