

CIVIL LIBERTIES VERSUS CIVIL RIGHTS

- Both protected by the U.S. and state constitutions, but are subtly different:
 - Civil **liberties** are limitations on government interference in personal freedoms.
 - Civil **rights** are guarantees of equal or fair treatment by the government, regardless of one's personal characteristics.
- Emphasis in United States is on *individual* rather than *collective* rights.

RIGHTS GUARANTEED IN ORIGINAL TEXT

- Several protections of individual liberties were included in the original text of the Constitution:
 - Guarantee of right to *habeas corpus*.
 - Prohibition of *ex post facto* laws.
 - Prohibition of bills of attainder.

SELECTIVE INCORPORATION

- Bill of Rights originally only applied to the national government: *Barron v. Baltimore* (1833).
- 14th Amendment, passed and ratified after the Civil War, states in part:
 - “No State shall make or enforce any law which shall abridge the *privileges or immunities* of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without *due process* of law; nor deny to any person within its jurisdiction the *equal protection* of the laws.”

SELECTIVE INCORPORATION

- Due process clause used to “incorporate” parts of the Bill of Rights into the practices of the states.
- Today most—but not all—of the Bill of Rights is incorporated.
 - Important exception: right to a jury trial in civil disputes (7th Amendment).

FREEDOM OF EXPRESSION

The First Amendment: “Congress shall make no law ... abridging the *freedom of speech*, or of the *press*; or the right of the people *peaceably to assemble*, and to *petition* the Government for a redress of grievances.

- *Prior restraint* almost always unconstitutional.
- Unpopular opinions historically less tolerated:
 - *Schenck v. United States* (1917) and the “clear and present” danger doctrine.
 - *Brandenburg v. Ohio* (1969): narrower “imminent lawless action” standard.

SYMBOLIC SPEECH

Expression that is not printed or spoken also protected.

- Clothing-as-protest
 - Black armbands as war protest—*Tinker v. Des Moines Independent Community School District* (1969)
 - “Fuck the Draft” jacket—*Cohen v. California* (1971)
- Flag burning—*Texas v. Johnson* (1989)



SYMBOLIC SPEECH

Exceptions:

- Overriding governmental interest (burning draft cards: *United States v. O'Brien*, 1968).
- As part of threat of violence (cross burning: *Virginia v. Black*, 2003).
- “School speech” (“Bong Hits 4 Jesus” case: *Morse v. Frederick*, 2007).



LIMITS ON FREE EXPRESSION

Other limits on freedom of expression:

- Restrictions on *reasonable time, place, and manner* of protests; must be “content-neutral”.
- *Commercial speech*.
- *Campaign-related speech*.
- *Libel* (but higher standard for “public figures.”).
- *Obscenity and indecency*.



RELIGIOUS LIBERTIES

Also embodied in the First Amendment: “Congress shall make no law respecting an *establishment* of religion, or prohibiting the *free exercise* thereof.”

- Challenges:
 - Government assistance to activity by religious groups: how much is OK?
 - Balancing religious freedom with general obligations.

THE ESTABLISHMENT CLAUSE

- Until 20th Century: seen as restriction on a particular *state religion* only.
- Laws that promoted Christianity or monotheism were generally permitted.
- More recently expanded to *religion in general*.
- Dispute between *separationist* and *accommodationist* views.

THE LEMON TEST

- *Lemon v. Kurtzman* (1971):
 - Laws must have a clear *secular purpose*.
 - Laws must not favor one religion over another, or religion over non-religion.
 - Laws must avoid *excessive entanglement* of public officials in religious affairs.
- *Coercion* also considered in some, more recent cases.

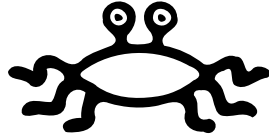
EDUCATION AND ESTABLISHMENT

- Effort to draw a bright line—particularly in K–12 education (see **U.S. Department of Education website** for details):
 - Officials and employees cannot lead prayers.
 - Schools cannot facilitate “student led” prayer as part of the curriculum.
 - Student-initiated activity OK outside of structured curriculum.
 - Judges' rulings have been ignored in many parts of the country.
- More entanglement accepted in higher education.

THE FREE EXERCISE CLAUSE

Free exercise raises different issues:

- What constitutes a “religion”?
- What practices are important to a particular religion?
- Conflict with other, legitimate goals of government.



THE SHERBERT-YODER TEST

Established in *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972):

- Is there a sincere religious belief?
- Does the law create a *substantial burden* on acting on that belief?
- If so, law must:
 - Serve a “compelling state interest.”
 - Must pursue that interest by the “least restrictive means” (lowest possible burden on religion).

THE “PEYOTE CASE” AND FREE EXERCISE

Supreme Court decision in *Employment Division v. Smith* (1990) overturned the Sherbert-Yoder Test.

- “Neutrality” standard: religious beliefs do not exempt people from following generally-applicable laws.
- Sherbert-Yoder Test restored for *federal* laws by the *Religious Freedom Restoration Act* (RFRA) and the *Religious Land Use and Institutionalized Persons Act* (RLUIPA).
- Some (but not all) states have also passed “mini-RFRAs.”

RIGHT TO BEAR ARMS



Second Amendment: “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.”

- Traditionally viewed as a *collective* right.
- Found to be an *individual* right in *D.C. v. Heller* (2008).
- Incorporated by *McDonald v. Chicago* (2010).
- Like other rights, subject to limitations.

THE RIGHT TO PRIVACY

- No *explicit* right to privacy in the Constitution.
- *Implied* right found in *Griswold v. Connecticut* (1965).
- Applied to abortion in *Roe v. Wade* (1973), although the Supreme Court has allowed numerous limitations over the past four decades.
- Also: assisted suicide/euthanasia.

PRIVACY AND GAY RIGHTS

The Supreme Court's rulings on the right to have sex with someone of the same sex have evolved in recent decades:

- *Bowers v. Hardwick* (1986) allowed Georgia to prosecute a man caught engaging in sex with another man.
- Supreme Court reversed itself in *Lawrence v. Texas* (2003), a virtually identical case.
- (We will discuss the issue of *same-sex marriage* along with civil rights.)



PROPERTY RIGHTS

- *Due process clauses* (5th and 14th amendments) limit taking life, liberty, or property.
- Property may be taken for public use (*eminent domain*) if *just compensation* is paid.
- Recent Supreme Court cases have restricted *regulatory takings* of property (government land-use regulation that diminishes property values).



RIGHTS OF THE CRIMINALLY ACCUSED

Much of the Bill of Rights deals with the rights of individuals suspected of criminal conduct:

- 4th Amendment: limits on *search and seizure* of evidence.
- 5th Amendment: right against *self-incrimination*; *double jeopardy*; *due process clause*.
- 6th Amendment: right to *trial by jury* and *assistance of counsel*.
- 8th Amendment: prohibition of *cruel and unusual punishments*.

SEARCH AND SEIZURE

- General requirement for a *warrant* to search and seize evidence.
- Obtaining a warrant requires *probable cause* to believe a crime was committed.
- Exceptions: *consent*; places with limited or no “reasonable expectation of privacy” (open fields, plain view, motor vehicle).
- The *exclusionary rule*: *Mapp v. Ohio* (1961).

TAKING THE FIFTH

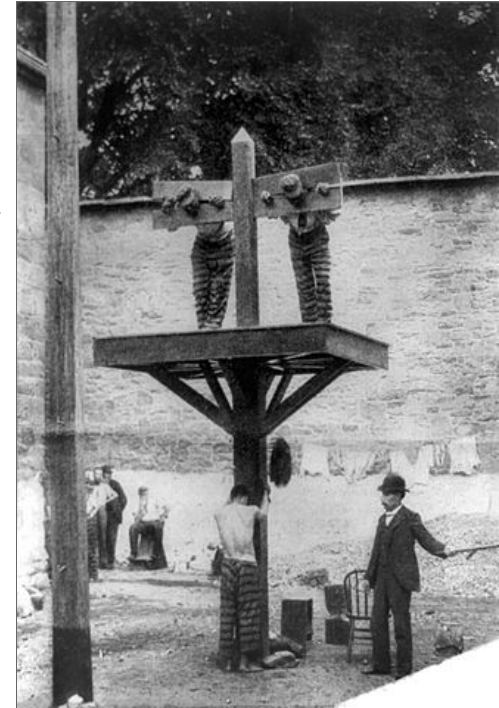
- *Miranda v. Arizona* (1966): suspects must be informed of their rights before custodial interrogation.
- Protection against *self-incrimination*.
- Protection against *double jeopardy* (but limited).

RIGHTS TO JURY TRIAL AND COUNSEL

- Defendant has right to jury trial for any crime that risks “loss of liberty.”
- Jury must be *impartial* and have a fair composition to the defendant.
- Right to assistance of counsel, even if indigent: *Gideon v. Wainwright* (1963).

“CRUEL AND UNUSUAL PUNISHMENTS”

- Painful forms of punishment and execution common around founding era.
- Until 1930s, confessions extracted through torture were still accepted in some states.
- Today, mostly controversy over application of the *death penalty*.
- As of 2013, 18 states have abolished the death penalty (only applies to crime under state law).



NARROWING THE DEATH PENALTY

Modern debate centers on the application of the death penalty; while still legal in general, there are limits:

- *Atkins v. Virginia* (2002) forbade execution of the mentally handicapped.
- *Roper v. Simmons* (2005) forbade execution of those who were minors when they committed crimes.
- *Kennedy v. Louisiana* (2008) forbade death penalty for crimes other than murder.

