

# PRINCIPLES OF CIVIL LIBERTIES AND CIVIL RIGHTS

AP GOVERNMENT  
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# I. DISTINCTION

- ◉ Civil liberties involve basic freedoms (e.g., speech and religion).
- ◉ Civil liberties are protected by Amendment 1.
- ◉ Civil rights involve protections against discriminatory treatment.
- ◉ Civil rights are protected by Amendment 5 (against the national govt.), Amendment 14 (against the state governments), and by congressional legislation.

## II. SOURCES OF PROTECTION OF THESE

- A. The Constitution, e.g., no ex post facto laws or bills of attainder, habeas corpus.
- B. Bill of Rights (and subsequent Amendments)
- C. Legislation, e.g., Civil Rights Acts of 1964 and 1968, Voting Rights Act of 1965.
- D. Court decisions, e.g., *Brown v. Board* and *Roe v. Wade*.
- E. State constitutions.

### III. RELATIVE NATURE OF THESE

- A. These not absolute: they may be exercised only as long as they do not infringe upon the rights of others.
  
- B. Balancing test: courts balance individual rights and liberties with society's need for order and stability.

## IV. PEOPLE TO WHOM THESE ARE GUARANTEED

- A. Most rights and liberties are granted to all in the U.S., regardless of citizenship.
- B. Exceptions: non-citizens may not vote, serve on juries, stay in the U.S. unconditionally, or hold public office or certain jobs.

# V. IMPACT OF FEDERALISM

- A. Bill of Rights was originally a protection against the national government, and did not include protections against state governments (Barron v. Baltimore, 1833). The feeling was that people could protect themselves against the state governments that were in their own back yards, but that they needed additional protection against a new, powerful, and distant national government.

# V. IMPACT OF FEDERALISM

## B. Modifying effect of the 14th Amendment:

- ⦿ The due process clause has been used to apply most of the provisions of the Bill of Rights to the states. This clause bans states from denying life, liberty, or property without due process of law. Freedom of speech, for example, is a "liberty;" therefore states cannot deny freedom of speech without due process of law.
- ⦿ The "total incorporation" view would apply all of the provisions of the Bill of Rights to the states. It argues for nationalization of the Bill of Rights.
- ⦿ The "selective incorporation" view would apply only some of these provisions, and would do so on a gradual, case-by-case basis over time

# V. IMPACT OF FEDERALISM

4. The important case here:  
Gitlow v. New York, 1925

- Benjamin Gitlow, a communist, was convicted of criminal anarchy in a state court.
- The Supreme Court upheld the conviction, BUT also added that states may not deny freedom of speech and press. These were to be protected by the “liberty” part of the 14th Amendment’s due process clause.



# V. IMPACT OF FEDERALISM

5. Subsequent cases nationalized parts of the Bill of Rights on a selective incorporation basis:

- a. Assembly
- b. Petition
- c. Religion.
- d. Search and seizure protections.
- e. Self-incrimination.
- f. Double jeopardy.
- g. Right to counsel.
- h. Right to bring witnesses.
- i. Right to confront witnesses.
- j. Protection against cruel and unusual punishment.

## V. IMPACT OF FEDERALISM

6. Which rights must states uphold? The Palko test (from *Palko v. Connecticut*) tells us that any right that is so important that liberty would not exist without it must be upheld by states.
7. All provisions of the Bill of Rights except Amendment 2, Amendment 3, Amendment 7, Amendment 10, and the grand jury requirement of the 5th Amendment have been nationalized.

# VII. 9TH AMENDMENT

A. No complete listing of rights is possible ---> inclusion of the 9th Amendment

B. Examples of "other" rights protected by Amendment 9:

1. Privacy (*Griswold v. Connecticut*, 1965).
2. Travel.
3. Freedom of association (*Boy Scouts of America v. Dale* 2000: Boy Scouts can ban homosexuals from being scout leaders via Amendment 1 and 9)
4. Homosexual conduct (*Lawrence v. Texas*, 2003: Using the right of privacy, this decision struck down a Texas law that banned sodomy. It reversed the decision of *Bowers v. Hardwick* [1986], which upheld a Georgia law banning sodomy.

# FREEDOM OF RELIGION

# I. ESTABLISHMENT CLAUSE

- A. Examine the text.
- B. Nationalizing influence of Amendment 14 (*Gitlow v. New York*).

# I. ESTABLISHMENT CLAUSE

C. Basic meaning of establishment clause: government may not establish an official religion:

1. "Accommodationist view": Government should bend a bit and allow a certain degree of church/state blending, e.g., allowing nativity scenes on city property, allowing a non-denominational prayer in public schools. Stresses freedom OF religion.

2. "Separationist view:" Government should allow virtually no blending of church and state. There should be a "wall of separation" (Jefferson) between the two. Stresses freedom FROM religion.

3. Endorsement view: forbids governmental practices that endorse religion, e.g., nativity scene at City Hall or 10 Commandments being posted in a court house

4. Nonpreferentialist view: Const. prohibits favoritism towards a particular religion, but allows governmental support for religion in general.

# I. ESTABLISHMENT CLAUSE

## D. Key rulings.

### 1. Everson v. Board, 1947:

- a. Upheld a NJ law allowing tax money to pay transportation costs for students attending private (incl. Religious) schools. Bus transportation is not a religious activity.
- b. However, the Court stated that a “wall of separation” exists between church and state, and that the **establishment clause** of Amendment One applied to the states via the due process clause of Amendment Fourteen

# I. ESTABLISHMENT CLAUSE

## D. Key rulings:

2. *Zorach v. Clauson*, 1952: released time for students is constitutional
3. *Engle v. Vitale*, 1962: no state-sponsored, recited prayer in public school.
4. *Abington v. Schempp*, 1963: no devotional Bible-reading in public school.
5. *Epperson v. Arkansas*, 1968: state laws may not prohibit the teaching of evolution in public school.



# I. ESTABLISHMENT CLAUSE

## D. Key rulings.

6. **Lemon v. Kurtzman (1971):** In this case, the Supreme Court struck down a Penn. law in which the state reimbursed nonpublic schools (most of which were Catholic) for teachers' salaries, textbooks and instructional materials. The case established "permissible" and "Impermissible" aid. It established a 3-part test (the Lemon test) to determine if a statute or practice violates the **establishment clause**:
  - a. Nonsecular (religious) purpose.
  - b. Advances or inhibits religion.
  - c. Excessive entanglement with government.(If any of these is present, the statute or practice is unconstitutional)
  
7. **Zelman v. Simmons-Harris 2002:** Public money can be used to send disadvantaged students to religious schools in school voucher programs

## II. FREE EXERCISE CLAUSE

- A. Provides freedom of worship.
- B. Nationalizing influence of Amendment 14.
- C. Problem of contradiction between **establishment clause** and free exercise clause, e.g., a law requiring students to salute the flag might violate freedom of worship for a Jehovah's Witness, but exempting that student from doing so might be construed as favoring religion and therefore might violate the **establishment clause**.
- D. Distinction between belief and practice: the former is always allowed, but the latter is not always allowed. Freedom of worship is a relative, not absolute, right. Balancing test once again applies.

## II. FREE EXERCISE CLAUSE

- E. Standard used for judging whether or not religious expression is constitutional:
- Old standard: govt. could not deny religious expression unless there was a compelling purpose for it to do so. Burden of proof was on states. This made it difficult for states to restrain religion.
  - That standard was reversed by Employment Division of Oregon v. Smith, 1990: state denied unemployment benefits to a man who was fired from his job because he used peyote, even though he used peyote as part of a Native American religious ceremony. Supreme Court upheld the state's ruling: govt. no longer needed a compelling purpose to deny religious expression. Burden of proof was on religion. The only laws that would be struck down would be those that were intended to stifle a particular religion. This made it easier for states to restrain religion.

## II. FREE EXERCISE CLAUSE

- A strange congressional coalition led by Orrin Hatch and Ted Kennedy sponsored the Religious Freedom Restoration Act, 1993: restored the old compelling purpose standard, and burden of proof was once again on states. This made it difficult for states to restrain religion.
- In *City of Boerne v. Flores*, 1997, the Supreme Court struck down the Religious Freedom Restoration Act and restored the standard used in *Oregon v. Smith*. Burden of proof was once again on the religion. This made it easier for states to restrain religion.

## II. FREE EXERCISE CLAUSE

- F. Religious practices that have been restricted:
  - Reynolds v. US, 1879: Morrill Bigamy Act (1862) criminalized polygamy. George Reynolds was prosecuted under the act. Supreme Court ruled that free exercise clause protected religious beliefs, but not necessarily religious actions. Polygamy therefore not protected by Amendment One, and Reynolds was convicted.
  - US v. Lee, 1982: Amish cannot refuse to pay Social Security taxes for religious reasons.
  - Employment Division of Oregon v. Smith, 1990 (noted above)

## II. FREE EXERCISE CLAUSE

### G. Religious practices that have been permitted:

1. *West Virginia v. Barnette*, 1943: one of the Jehovah's Witnesses cases. Students may not be compelled to salute the flag in school.

2. *Wisconsin v. Yoder*, 1972: Amish do not have to send children to school past the 8th grade.

3. *Church of Lukumi Babalu Aye v. Hialeah*, 1993: City of Hialeah banned the religious ritual of animal sacrifice, which was practiced by the Santerians. Supreme Court struck down that city ordinance, allowing the practice of animal sacrifice.

**III. ARTICLE 6 BANS RELIGIOUS  
TESTS AND OATHS AS A  
QUALIFICATION TO HOLD  
PUBLIC OFFICE.**

# FREEDOM OF SPEECH



# I. NATIONALIZING INFLUENCE OF AMENDMENT 14

- What does nationalizing mean?
  - A. Involves Both the Freedom to Give and Hear Speech
  - B. Belief is most protected, action can be most restricted, but speech falls somewhere in between.

## II. HISTORIC TESTS USED BY COURTS TO DETERMINE IF SPEECH IS PROTECTED.

- A. Bad tendency doctrine.
  1. State legislatures, and not the courts, should generally determine when speech should be limited.
  2. Speech can be limited when it might lead to harm/illegal action
  3. Example: university speech code banning "racially abusive" speech would be constitutional.
  4. A restrictive test.

# PART II CON'T.

## B. Clear and present danger doctrine.

1. Schenck v. U.S., 1919. Case involved a man who was urging others to avoid the draft during WWI. The conviction was upheld, however: **Speech can be suppressed only if there is an imminent threat to society, e.g.,** falsely shouting "Fire!" in a crowded theater.
2. The university speech code would be unconstitutional because there is no imminent threat to society.

# PART II CON'T.

- C. Preferred position doctrine.
  1. Free speech is of utmost importance and should therefore occupy a "preferred position" above other values ---> government should virtually never restrict it.
  2. The university speech code would be clearly unconstitutional.

# III. NON-PROTECTED SPEECH

- A. Libel and slander.
- B. Obscenity
- C. “Fighting words:” Speech that leads to violence can be restricted.
- D. Commercial speech is subject to far greater regulation than political speech

# III. NON-PROTECTED SPEECH

## E. Sedition

1. In the past, could be mere criticism of the government (e.g., Alien and Sedition Acts)

2. Smith Act, 1940: banned advocacy of overthrowing the government.

3. Supreme Court narrowed the definition even further when it stated that sedition was prohibited only when:

a. there is imminent danger of an overthrow, and

b. people are actually urged to do something rather than merely believe something.

# IV. PROTECTED SPEECH

## A. Prior restraint.

1. Blocking speech before it is given.
2. Such action is presumed by courts to be unconstitutional.
3. In the Pentagon Papers case, the court refused to impose prior restraint: the revelations may have embarrassed the government, but they did not endanger national security.

# IV. PROTECTED SPEECH CON'T

## B. Vagueness.

1. Speech restrictions cannot be written in too vague a manner. They must be clear to the average person.
2. The university speech code would be unconstitutional.



# IV. PROTECTED SPEECH CON'T

- C. Least drastic means test.
  - 1. Laws cannot restrict speech if there are other means to handle the problem.
  - 2. The university speech code would be unconstitutional.

## IV. PROTECTED SPEECH CON'T

- D. Centrality of political speech:  
political speech is given special protection because of its importance in a democracy.  
Political speech is less likely to be restricted than other types of speech, e.g. commercial speech

# IV. PROTECTED SPEECH CON'T

## E. Symbolic speech:

1. Somewhere between speech and action.  
Generally protected.
2. U.S. v. O'Brien, 1968: draft card burning was not a protected form of speech.
3. Tinker v. Des Moines, 1969: wearing black armbands in school as a form of protest (against the Vietnam War) is constitutionally protected.
4. Texas v. Johnson, 1989: flag burning was a protected form of speech.

# FREEDOM OF THE PRESS

# I. NATIONALIZING EFFECT OF AMENDMENT 14

Describe....again

## II. BALANCING TEST ONCE AGAIN APPLIES

Explain what this is....

# III CONTROVERSIAL AREAS

- A. Right of access.
  - 1. Generally granted to the press, but not always.
  - 2. "Sunshine laws" require agencies to open their meetings to the public and press.
  - 3. Freedom of Information Act (1966) allows public access to government files.
  - 4. Electronic Freedom of Information Act of 1996 requires agencies to put files online.

# III CONTROVERSIAL AREAS

## B. Executive privilege

1. The right of presidents to withhold information from Congress or the courts.

2. U.S. v. Nixon, 1974: A President generally does have executive privilege, but not in criminal cases. Even the President is not above the law.



# III CONTROVERSIAL AREAS

- C. Gag orders may be issued by courts to ensure fair trials
  
- D. Shield laws
  1. Protect reporters from having to reveal their sources.
  
  2. The press claims that without them, their sources would "dry up," and they would be unable to provide information to the public.
  
  3. While Congress has not passed a shield law, many states have done so.

# III CONTROVERSIAL AREAS

## E. Defamation.

1. Distinction between libel (written word) and slander (spoken word).
2. Not protected by Amendment 1.
3. To win a libel or slander case, one must generally prove that the allegations were false and that they damaged his/her reputation.
4. In *New York Times v. Sullivan* (1968), however, the Court ruled that public figures must also prove malice. This makes it difficult for public figures to win libel suits, so the case was seen as a major victory for freedom of press.

# III CONTROVERSIAL AREAS

## F. Obscenity.

1. Not protected by Amendment 1.
2. Old standard for proving obscenity:  
material appealing to prurient interests  
and utterly without redeeming value.
3. New standards in *Miller v. California*, 1973:
  - a. Community standards must be violated.
  - b. State obscenity laws must be violated.
  - c. Material must lack serious literary/artistic/political value.

# III CONTROVERSIAL AREAS

## G. Student press:

Hazelwood v. Kuhlmeier, 1988

high school newspaper was not a public forum and could therefore be restricted just as other high school activities could be restricted by school authorities.

# III CONTROVERSIAL AREAS

## H. Regulation of the electronic media

1. Radio and t.v. stations need license from FCC, and must comply with FCC regulations, e.g., devoting a certain amount of time to public service, news, and children's programming.
2. Fairness Doctrine required that stations allow a broad spectrum of viewpoints, but that was repealed by the FCC in 1987.

# III CONTROVERSIAL AREAS

3. FCC restricts the use of obscene words. Fine imposed upon Howard Stern. FCC also fined CBS \$500,000 for the Janet Jackson incident at the Super Bowl halftime show.
4. The Court struck down the Communications Decency Act (CDA) in 1997, which had prohibited the circulation of "indecent" material on the Internet to minors.
5. "Virtual" child pornography is protected by Amend. 1 (Ashcroft v. ACLU, 2002): this case struck down the Child Online Protection Act using the least drastic means test: the goal of protecting children could be accomplished in a less restrictive manner.

# FREEDOM OF ASSEMBLY AND PETITION

# I. NATIONALIZING EFFECT OF AMENDMENT 14

- ◉ What is this ..... Yes.... Again!



## II. FREEDOM OF PETITION

- A. Right to petition the govt. for redress of grievances, i.e., right to ask for government action.
- B. Serves as constitutional justification for lobbying.

## II. FREEDOM OF PETITION

- C. Since people "petition" the govt. in groups, this has also provided the constitutional basis for freedom of association. Two types:
1. Political association (e.g., belonging to parties, interest groups, PACs).
  2. Personal association (e.g., belonging to private clubs). *Boy Scouts of America v. Dale* (2000) is a relevant case here: Boy Scouts can ban homosexuals from being scout leaders.

## II. FREEDOM OF PETITION

- D. Freedom of association has been limited by the Hatch Act for federal employees (restricts their political activities).
  
- E. Freedom of association has been limited by restrictions on campaign contributions, but these restrictions have generally been upheld. However, the Court struck down in *Buckley v. Valeo* limits on the amount that a congressional candidate can spend on his campaign. Such campaign spending is a form of expression protected by Amendment One.

## II. FREEDOM OF ASSEMBLY

- A. Government may regulate the time, place, and manner.
- B. Government may require police permits for assemblies.
- C. Problem of "heckler's veto:" if govt. restricted assembly every time an opposing group claimed that there might be "violence or disorder," there would be very few assemblies. Courts are therefore reluctant to impose prior restraint. (Skokie case)
- D. Applies to public places, not private places.

# EQUAL PROTECTION UNDER THE LAW

# I. DISCRIMINATION

- A. General meaning of the term: classification/treating groups differently.
- B. Some is inevitable, e.g., age requirements for driver's licensing and drinking.
- C. 14th Amendment's equal protection clause bans the state governments from practicing unreasonable discrimination.

## II. COURT TESTS USED TO DETERMINE IF STATE GOVERNMENT DISCRIMINATION IS CONSTITUTIONAL

- A. Rational basis test.
  1. Discrimination is constitutional if it has a reasonable relationship to a proper purpose of govt.
  2. Burden of proof is on the plaintiff.
  3. Examples of acceptable discrimination:  
polygamy, marriage age, prohibiting felons from obtaining a teaching credential.
  4. Rational basis test cannot be used if a case involves a suspect class, an almost-suspect class, or a fundamental right.

## II. COURT TESTS USED TO DETERMINE IF STATE GOVERNMENT DISCRIMINATION IS CONSTITUTIONAL

### B. Suspect classifications test (strict scrutiny)

1. Suspect class: a class that has historically suffered unequal treatment on the basis of race or national origin.
2. When govt. discriminates on this basis, burden of proof shifts to the defendant, i.e., the government.
3. Courts subject such discrimination to strict scrutiny -- there must be a compelling purpose for the discrimination to be constitutional.



## II. COURT TESTS USED TO DETERMINE IF STATE GOVERNMENT DISCRIMINATION IS CONSTITUTIONAL

### 4. Affirmative action:

- a. U.C. Regents v. Bakke, 1978: race can be taken into account as a factor in admission decisions.
- b. Richmond v. Croson, 1989: banned city set-aside programs.
- c. Gratz v. Bollinger, 2003: struck down use of “bonus points” for race in undergraduate admissions at Univ. of Michigan
- d. Grutter v. Bollinger, 2003: allowed use of race as a general factor in law school admissions at University of Michigan
- e. CA Proposition 209 banned state affirmative action programs

### 5. Racial gerrymandering banned (Shaw v. Reno). Race cannot be “overriding, predominant force” in redistricting (Miller v. Johnson)

## II. COURT TESTS USED TO DETERMINE IF STATE GOVERNMENT DISCRIMINATION IS CONSTITUTIONAL

C. Quasi-suspect classifications test (heightened scrutiny).

1. Quasi-suspect class: sex
2. Scrutiny for sex discrimination is not quite as high as for race, in recognition of some biological differences between the sexes (e.g., state law allowing pregnancy leave for women, but not men, is probably acceptable)
3. To justify such discrimination, states must show that the law bears some relation to important governmental objectives. Law cannot be based upon archaic or old notions about women being of the fairer sex.
4. Male-only draft registration has been allowed



## II. COURT TESTS USED TO DETERMINE IF STATE GOVERNMENT DISCRIMINATION IS CONSTITUTIONAL

### D. Fundamental rights test

1. Court subjects laws which deny fundamental rights to strict scrutiny.
2. Fundamental rights are those which are explicitly in the Constitution, e.g., 1st Amendment liberties, voting.
3. Such rights also include those which are implicitly in the Constitution, e.g., travel, political association, privacy
4. *Griswold v. Conn*, 1965

## II. COURT TESTS USED TO DETERMINE IF STATE GOVERNMENT DISCRIMINATION IS CONSTITUTIONAL

### 4. Abortion court cases:

- a. Prior to 1973: states set own abortion policies
- b. *Roe v. Wade*, 1973: one federal policy, w/trimester guidelines. Based upon right of privacy implied in Bill of Rights (via *Griswold v. Conn.*).
- c. *Webster v. Reproductive Health Services*, 1987: did not overturn *Roe*, but gave states more leeway in restricting abortion.
- d. *Planned Parenthood v. Casey*, 1992: somewhat defined that leeway: states cannot impose an "undue burden" on a woman's right to an abortion.
- e. *Gonzales v. Carhart*, 2007: Upheld Partial Birth Abortion Act of 2003

## II. COURT TESTS USED TO DETERMINE IF STATE GOVERNMENT DISCRIMINATION IS CONSTITUTIONAL

5. Voting: *Bush v. Gore*, 2000: use of 14th Amendment's equal protection clause.
6. Same-sex marriage:
  - a. Four states allow same-sex marriage (MA, CT, VT, IA)
  - b. Defense of Marriage Act (1996):
    - 1) Defined marriage as union of a man and a woman
    - 2) Allowed states to not recognize same sex marriages contracted in other states. Based this upon last part of Full Faith and Credit clause that allows Congress to "prescribe the effect thereof."

## II. COURT TESTS USED TO DETERMINE IF STATE GOVERNMENT DISCRIMINATION IS CONSTITUTIONAL

### 7. Gay rights:

- a. Lawrence v. Texas (2003):  
Court struck down Texas sodomy law through use of “liberty” part of 14th Amendment’s due process clause. This reversed the Court’s decision in Bauer v. Hartwick (1986)

# THE STRUGGLE FOR EQUAL RIGHTS

# I. FOR WOMEN

## A. First feminist wave.

1. Seneca Falls Convention, 1848.
2. Struggle for suffrage --->  
19th Amendment, 1920.



# I. FOR WOMEN

- B. The second feminist wave: 1960-present
  - 1. Rise of feminists such as Betty Friedan
  - 2. Rise of NOW and other women's groups (e.g., EMILY'S LIST).
  - 3. Legislation.
    - a. **Equal Pay Act of 1963**
    - b. **Title VII of the Civil Rights Act of 1964** prohibited employment discrimination on the basis of sex.
    - c. Proposal, ratification struggle, and defeat of ERA.
    - d. **Title IX of Education Act of 1972** prohibited gender discrimination in federally subsidized education programs, including athletics.

# I. FOR WOMEN

## 4. Litigation:

### a. Reed v. Reed, 1971:

Court ruled against arbitrary gender-based discrimination as a violation of the 14th Amendment's equal protection clause.

### b. Roe v. Wade, 1973

# I. FOR WOMEN

5. Success in electoral politics.
  - a. 1992: Year of the Woman: many women elected to Congress.
  - b. In 111th Congress, 74 women hold House seats, 17 women hold Senate seats
  - c. Gender gap
  - d. "Soccer Moms," Million Mom March (gun control), "Security Moms"
  - e. 2 female Justices on Supreme Court.
  - f. "Sex sensitive" issues: war/peace, education, pornography, abortion
  - g. Active interest groups: NOW, Feminist Majority, EMILY'S LIST.

## II. FOR AFRICAN AMERICANS

- A. 13% of the population.
- B. Dred Scott decision, 1857, denied the right to Scott to sue: slaves were not citizens.
- C. Civil War Amendments: 13, 14, 15: to protect blacks against state govts.
- D. Rise of Jim Crow laws -> Plessy v. Ferguson, 1896 ("separate but equal").
- E. Resistance against de jure segregation -> Use of courts ---> Brown v. Board, 1954.

## II. FOR AFRICAN AMERICANS

F. Nonviolent civil disobedience of 50s and 60s, violence of late 60s.

G. Success in electoral politics:

1. Esp. at the local and state level.
2. Increasingly at federal level.
3. With more blacks voting, white politicians have to take into

account black needs

H. Backlash against affirmative action (e.g., Prop. 209 in CA).

I. "Achievement gap" issue

# III FOR HISPANICS

- A. ~15% of the population.
- B. Main groups: Mexican-Americans, Puerto Ricans, Cubans, Central Americans.

# III FOR HISPANICS

## C. Key issues:

1. Bilingualism (Lau v. Nichols, 1974: schools must take active steps to help non-English speaking students). States must now provide bilingual ballots for areas with high concentration of non-English speakers.
2. Immigration: In an era of such close elections, neither party wants to offend Hispanics by taking a restrictive position on immigration.
3. Massive demonstrations throughout the country in 2006 over immigration bills in Congress
4. "Day Without Immigrants" boycott on May 1, 2006, to show the importance of immigrants in American society
5. Electoral politics: Bush 43 and Jeb Bush tapped into the Hispanic vote. However, Hispanics strongly supported Obama in election of 2008
6. "Achievement gap" issue

# IV. ASIANS

- A. ~4% of the population.
- B. Main groups: Chinese, Korean, Japanese, Filipinos, Southeast Asians, South Asians
- C. Key issues:
  1. Immigration restriction in the past.
  2. Internment of Japanese-Americans during WWII ---> reparations.
  3. "Reverse discrimination" in college admissions.
  4. "Model minority"



**PRIVATE  
DISCRIMINATION AND  
THE FEDERAL  
RESPONSE**

# I. 5TH AND 14TH AMENDMENTS

- ⊙ prohibit government from discriminating
  - what sources protect against discrimination by private individuals or businesses?
    - A. 13th Amendment has been broadly interpreted to prohibit the relics of slavery.
    - B. Commerce clauses.
    - C. Power to tax and spend (attaching "strings" to federal grants and contracts).

## II. FEDERAL LEGISLATION

- A. Civil Rights Act of 1866 prohibits racial discrimination in making of private contracts.
  
- B. Civil Rights Act of 1964.
  - 1. Title II bans discrimination in places of public accommodation on basis of race, color, national origin, or religion (upheld by Heart of Atlanta Motel v. U.S., 1965). Based upon Congress' power to regulate interstate commerce.

# II. FEDERAL LEGISLATION

## 2. Title VII.

a. Prohibits employment discrimination on same bases + sex

b. Employers cannot be required to give racial preferences to remedy past discrimination, but they may voluntarily do so

c. Executive Order #11246 required federal contractors to adopt affirmative action programs

d. Allowed class action suits

e. Enforced by EEOC

## II. FEDERAL LEGISLATION

### C. Civil Rights Act of 1968 (Fair Housing Act of 1968)

1. Restrictive covenants had previously been declared unconstitutional in 1948

2. This act banned housing discrimination on same bases as above.

## II. FEDERAL LEGISLATION

- D. Age Discrimination in Employment Act of 1967: bans age discrimination for jobs unless age is related to job performance.
  
- E. Americans with Disabilities Act of 1990: bans job and access to facilities discrimination if "reasonable accommodation" can be made.

# BARRIERS TO VOTING

# I. 15TH AMENDMENT BANNED VOTING DISCRIMINATION ON THE BASIS OF RACE

- ◉ Southern states devised other ways of discriminating
- ◉ Federal government stepped in with remedies
  - A. White primary ---> declared unconstitutional in 1944
  - B. Poll tax: banned by 24<sup>th</sup> Amendment
  - C. Literacy test: banned by Voting Rights Act of 1965
  - D. Grandfather clause: declared unconstitutional



## II. VOTING RIGHTS ACT OF 1965

### A. Provisions

1. Suspended literacy tests
2. Empowered federal officials to register voters
3. Empowered federal officials to ensure that citizens could vote, e.g., w/marshals

## II. VOTING RIGHTS ACT OF 1965

4. Empowered federal officials to count ballots

5. Subsequent amendments require states to include ballots in languages other than English if a significant number of non-English speakers reside in an area.

6. Most controversial: States that have history of voting discrimination must clear w/Justice Dept. any changes in voting practices (e.g., polling places, candidacy requirements, filing deadlines, changes from district to at-large elections, etc.) in order to prevent states from “diluting” minority voting strength. This clearance requirement was challenged in the Supreme Court in 2009.

# II. VOTING RIGHTS ACT OF 1965

## B. Effects

1. Huge increase in black turnout
2. Large increase in number of black elected officials
3. Forced white elected officials to take into account the needs of blacks.

# III. ADDITIONAL DEVELOPMENTS

- A. Creation of majority-minority districts in 1990s to increase representation for racial minorities
  
- B. Shaw v. Reno (1993): no racial gerrymandering
  
- C. Miller v. Johnson (1995): Race cannot be predominant factor in drawing district lines  
→ many court challenges to state redistricting plans

# RIGHTS OF AN ACCUSED PERSON

# I. COUNSEL

- A. *Gideon v. Wainwright*, 1963: states must provide legal help for suspects who cannot afford it
  
- B. *Johnson v. Zerbst*: the fed. govt. must also do so

## II. EXCESSIVE BAIL AND FINES

- A. Amendment 8 states that excessive bail and fines cannot be imposed
- B. Generally, this means that the amount of bail set must bear some relationship to:
  - 1. The gravity of the offense.
  - 2. The likelihood that the suspect will “jump bail”
- C. Denial of bail does not constitute excessive bail
- D. The amount of a fine must be proportionate to the offense

### III. SPEEDY AND PUBLIC TRIAL

- A. The first provision protects against unreasonable delays. It generally means "as speedy as possible," given the backlog of cases in our courts.
  
- B. The second provision bans the government from conducting trials in secret. By having trials out in the open, judicial abuse of power is less likely.



# IV. GRAND JURY INDICTMENT

- A. Grand jury simply charges a person with a crime by issuing an indictment. This does not mean that the person is guilty, but simply means that there is enough evidence to take the accused to trial
- B. By requiring this first step, frivolous govt. cases against an individual are therefore less likely
- C. Required in federal cases, but not state cases. 5<sup>th</sup> Amendment has not been nationalized in this area
- D. Some charge that the grand jury has merely become a tool of prosecutors.

# V. TRIAL BY JURY

- A. Guaranteed in criminal cases (though most cases are disposed of by plea bargaining).
  
- B. Guaranteed in federal civil cases worth more than \$20 (Amendment 7).

# VI. WITNESSES

- A. A suspect has the right to bring witnesses on his behalf.
  
- B. A suspect also has the right to confront (cross-examine) witnesses.

# VII. CRUEL AND UNUSUAL PUNISHMENT

- A. Banned by Amendment 8
- B. Punishment must be proportionate to the crime
- C. Death penalty is not cruel and unusual
- D. Supreme Court struck down death penalty for mentally retarded in *Atkins v. Virginia*, 2002
- E. *Ewing v. California*, 2003: "Three strikes and you're out" law was upheld in the case of a man who received his "third strike" (and 25 yrs. to life in prison) as his punishment for stealing golf clubs

# VIII. DOUBLE JEOPARDY

- A. A person may not be tried twice for the same criminal act
  
- B. Exceptions:
  1. When the crime violates both state and federal law
  
  2. When there is a mistrial, e.g., where the jury could not come to a unanimous verdict

# ARRESTS, QUESTIONING, AND IMPRISONMENT

# I. ARRESTS ("SEIZURES")

May be conducted:

- A. With a warrant issued upon "probable cause." (Amendment 4)
  
- B. Without a warrant in emergencies, in cases of "hot pursuit," or when probable cause exists

## II. SEARCHES

May be conducted:

A. With a warrant issued upon "probable cause." (Amendment 4)

1. Warrant must be specific: must state place to be searched and objects to be searched for

2. These restrictions resulted from the English abuses of authority during colonial times when writs of assistance -- general search warrants -- were often issued.



# II. SEARCHES

B. Without a warrant under these exceptions:

1. If probable cause exists w/automobile (“automobile exception”)
2. Terry exception: if police have reason to believe suspect is armed and dangerous
3. When police make lawful arrest
4. If suspect gives consent
5. At border crossings
6. If evidence is in plain view
7. Exigent circumstances, e.g., to protect lives and property
8. Schools can impose random drug tests on students in extracurricular activities (Board of Pottawatomie v. Earls, 2002)

## II. SEARCHES

- C. Wiretapping legal only if a warrant has been issued
  
- D. Foreign Intelligence Surveillance Act (1978): established a FISA court to secretly authorize electronic surveillance of telephones, etc. for foreign intelligence purposes. Requires fed. govt. to go through this court if it wants to conduct such secret surveillance.

# II. SEARCHES

## E. Exclusionary rule

1. Illegally-obtained evidence may not be used in court.

2. Established in case of *Mapp v. Ohio*, 1961 (for state cases), *Weeks v. U.S.* (fed. cases)

3. Supporters claim that it discourages police misconduct

4. Critics claim that it lets crooks "off the hook" on technicalities. They ask why society should pay for the misconduct of a few police officers

5. Not used if:

a. There would be "inevitable discovery" of the evidence.

b. Police operate on a "good faith" assumption that a warrant was valid.

## II. SEARCHES

- F. Effects of Patriot Act of 2002: designed to combat terrorism by:
  - 1. Giving FBI and CIA greater powers to:
    - a. Wiretap phones
    - b. Monitor email
    - c. Survey financial and student records
    - d. Conduct searches without prior notification
  - 2. Giving fed. Govt. power to deport/detain noncitizens without judicial appeal
  - 3. In essence, the act has strengthened the powers of the federal govt. and weakened the protections of Amendment 4

## II. SEARCHES

- G. In 2006, NSA leaks revealed that it was engaged in the analysis of telephone records and e-mails where one party was outside US and where one party was linked to terrorism

# III. PROTECTION AGAINST SELF- INCRIMINATION

- A. Provided by Amendment 5.
- B. Associated with concept that people are innocent until proven guilty.
- C. Protects suspects against testifying against themselves in court proceedings or agency hearings.
- D. Can be invoked only if crime involved -- can't be used to protect against embarrassment.
- E. Cannot be invoked when prosecutors grant immunity.

# IV. POLICE QUESTIONING

- A. Forced questioning prohibited
- B. Miranda warnings to silence and counsel (Miranda v. Arizona, 1966)

# V. HABEAS CORPUS

- A. Latin for "present the body."
- B. A court order that requires the authorities to bring an accused person to court to determine if he is being held legally. It therefore prevents unfair and arbitrary imprisonment.
- C. Can be suspended by Congress only in case of rebellion or invasion.
- D. Extensive use by death row inmates.
- E. Habeas corpus petitions were used by detainees at Guantanamo in an attempt to receive court hearings.



# VI. TWO OTHER CONSTITUTIONAL GUARANTEES

## A. Ex post facto law.

1. Latin for "after the fact"
2. Punishes a person for something that was not a crime when he did it, i.e., retroactive punishment
3. May not be passed by Congress or states

# VI. TWO OTHER CONSTITUTIONAL GUARANTEES

## B. Bill of attainder

1. An act that punishes a person without benefit of trial.
2. Possible example: seizure of Nixon's White House papers by act of Congress.
3. May not be passed by Congress or states.

**LIFE, LIBERTY,  
PROPERTY AND DUE  
PROCESS OF LAW**

# I. PROPERTY RIGHTS V. PUBLIC WELFARE

- A. Property rights closely connected with liberty and freedom
  
- B. Contract clause (Article 1, Section 10) in Const. forbids states from passing any law "impairing the obligation of contracts." Fear that states would cave in to pressure from debtors and declare debts to be null and void.

# I. PROPERTY RIGHTS V. PUBLIC WELFARE

- C. However, states MAY impose limits on property rights:
  - 1. States may exercise police powers to protect public welfare (e.g., meat inspection, worker safety laws, child labor laws)
  - 2. States may exercise right of eminent domain.
    - a. *Kelo v. New London*, 2005: The case arose from a city's use of eminent domain to condemn privately owned real property so that it could be used as part of a private redevelopment plan. The Court held that "the city's proposed disposition of this property qualifies as a 'public use' within the meaning of the Takings Clause of the Fifth Amendment." The private use of the property would lead to overall economic growth in the city, and thus constituted a "public use."

# I. PROPERTY RIGHTS V. PUBLIC WELFARE

3. Controversy over regulatory "takings:" when states restrict property rights to the point of making that property less valuable.

D. Prior to 1937, Supreme Court more protective of property rights; since then, it has been more likely to uphold legislation that protects the public welfare.

## II. DUE PROCESS OF LAW

- 5th (fed.) and 14th (st.) Amendments prohibit govt. from denying life, liberty, or property without due process of law.
  
- Two types of due process:
  - A. Procedural: the “how” a law is applied
    - 1. When govt. denies life, liberty or property, it must use fair procedures:
      - a. Observe Bill of Rights
      - b. Provide reasonable notice
      - c. Provide chance to be heard
  
    - 2. Examples of violations of procedural due process:
      - a. Illegal searches.
      - b. Unfair court procedures.

## II. DUE PROCESS OF LAW

B. Substantive: the “what” a government may/may not do:

1. It's not enough that govt. use fair procedures in denying life, liberty and property; the laws themselves that enable govt. to do so must be fair
2. Examples of violations of substantive due process:
  - a. Ban on all abortions within a state
  - b. County ordinance banning all firearms



## II. DUE PROCESS OF LAW

- C. Example of distinction between procedural and substantive: a law prohibits possession of narcotics (substantive) and police must generally obtain a warrant before conducting a search for narcotics in one's home (procedural).

## II. DUE PROCESS OF LAW

- D. Classify the following as procedural or substantive:
1. Police strip searches (P)
  2. Compulsory vaccination laws (S)
  3. Minimum wage law (S)
  4. Firing a city employee without giving a hearing (P)

THE END!

FINALLY!