

What Rights Does the Bill of Rights Protect?

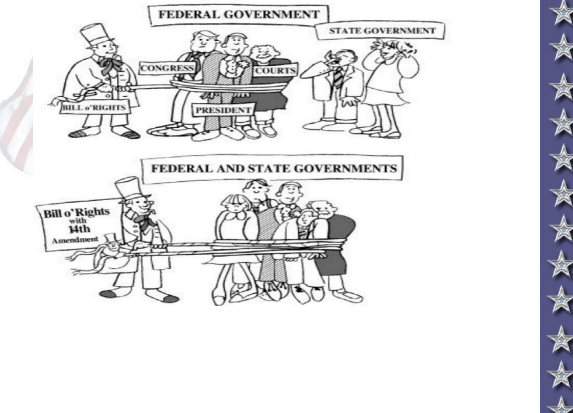
- Selective Incorporation
- Fundamental Freedoms, but Not Always Clear & Never Absolute

Protection Against Whom?,

- National majorities who might impose conformity costs on those individuals whose views differ from those of the majority
- *Barron v. Baltimore* (1833)
- Basically rendered the Bill of Rights meaningless, because most citizens' quarrels were with their states, not the national government
- According to *Barron*, if citizens wanted protections at the state level, they should look to their state constitution

How Changed?

- 14th Amendment
- "No State shall ... deprive any person of life, liberty, or property, without due process of law."
- Selective Incorporation: the process of bringing state laws & practices under the Bill of Rights protections by applying the Due Process Clause of the 14th Amendment to the States
 - Consequences: altered the balance of power between National & State governments, expanding the range of protections offered by the Bill of Rights



The cartoon illustrates the shift in the scope of the Bill of Rights. In the top panel, labeled 'FEDERAL GOVERNMENT', Uncle Sam holds a sign for the 'BILL OF RIGHTS' while standing next to figures representing 'CONGRESS' and 'COURTS'. A figure representing 'STATE GOVERNMENT' and 'PRESIDENT' stands nearby. In the bottom panel, labeled 'FEDERAL AND STATE GOVERNMENTS', Uncle Sam now holds a sign for the 'Bill of Rights with 14th Amendment', and the figures representing both federal and state government are shown together, indicating that the protections now apply to both levels.

INCORPORATION OF PROVISIONS OF THE BILL OF RIGHTS VIA THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT

Provision	Case	Year
1st Amendment		
Freedom of Speech & Press	<i>Gitlow v. New York</i>	1925
Freedom of Assembly	<i>DeLoach v. Oregon</i>	1937
Freedom of Religion	<i>Hague v. CIO</i>	1939
Free Exercise of Religion	<i>Cantwell v. Connecticut</i>	1940
Establishment of Religion	<i>Everson v. Board of Education</i>	1947
2nd Amendment		
Right to Keep & Bear Arms	<i>McDonald v. Chicago</i>	2010
3rd Amendment		
Right Against Quartering Soldiers	Not Incorporated	
4th Amendment		
Unreasonable Search & Seizure	<i>Wolf v. Colorado</i>	1949
Exclusionary Rule	<i>Mapp v. Ohio</i>	1961
5th Amendment		
Payment of Compensation for Taking of Private Property	<i>Chicago, Burlington & Quincy Railway Co. v. Chicago</i>	1897
Self-Indemnification	<i>Malloy v. Hogan</i>	1964
Double Jeopardy	<i>Benton v. Maryland</i>	1956
When Jeopardy Attaches	<i>Cris v. Bretz</i>	1978
6th Amendment		
Public Trial	<i>In re Oliver</i>	1948
Due Notice	<i>Cole v. Arkansas</i>	1948
Right to Confront (Witnesses)	<i>Gideon v. Wainwright</i>	1963
Confrontation & Cross-Examination of Adverse Witnesses	<i>Pointer v. Texas</i>	1965
Speedy Trial	<i>Klopfer v. North Carolina</i>	1967
Compulsory Process to Obtain Witnesses	<i>Washington v. Texas</i>	1967
Jury Trial	<i>Duncan v. Louisiana</i>	1968
Right to Counsel (Misdemeanor when Jail is Possible)	<i>Argersinger v. Hamlin</i>	1972
7th Amendment		
Right to Jury Trial in Civil Cases	Not Incorporated	
8th Amendment		
Cruel & Unusual Punishment	<i>Louisiana ex rel. Francis v. Resweber</i>	1947
9th Amendment		
Privacy (Not Specifically Mentioned)	<i>Griswold v. Connecticut</i>	1965

All Protections Limited!

- Balancing Test

1st Amendment: Religion, Establishment Clause, I

- "Congress shall make no law respecting an establishment of religion,"
- *Everson v. Bd. Of Education* (1947): first articulation principle of church/state separation; state may neither support/prefer
- *Engel v. Vitale* (1962): S.Ct. strikes down use of the NY "Regent's Prayer" —a daily invocation that students are compelled to recite

1st Amendment: Religion, Establishment Clause, II

- *Abington Township v. Schempp* 1963); *Murray v. Curlett* (1963): Mandatory Bible reading & daily recitation of Lord's Prayer in public schools declared unconstitutional
- *Stone v. Graham* (1980): KY law requiring public schools to post the Ten Commandments in classrooms declared unconstitutional

1st Amendment: Religion, Establishment Clause, III

- *Edwards v. Aguillard* (1987): LA law mandating "balanced treatment" between evolution & creationism struck down
- *Lee v. Weisman* (1992): Clergy-led prayers at public school graduations ruled unconstitutional
- *Santa Fe Independent School District v. Doe* (2000): Student-led prayer before football games struck down

Should Christian Symbols Be Allowed on Government Property?

% saying symbols like nativity scenes should be allowed on government property ...



Survey conducted Dec. 3-7, 2014. Q24. See topline for full question wording.

PEW RESEARCH CENTER

1st Amendment: Religion, Establishment Clause: General Rule

- Government authority cannot approve or support activity of religious content

1st Amendment: Religion, Free Exercise Clause

- "Congress shall make no law ... prohibiting the free exercise [of religion.]"
- What is religious faith?

1st Amendment: Religion, Free Exercise Clause

- Justice Douglas: "The religious views espoused [in this case] might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect" *U.S. v. Ballard* (1944).



1st Amendment: Religion, Free Exercise Clause

- *Reynolds v. U.S.* (1879): belief/action distinction; Federal law banning polygamy (clearly targeting LDS)
- Attempts to limit JW's duties to spread gospel by fees, permits, & taxes generally struck down

1st Amendment: Speech & Press=Expression

- Issues
 - Prior Restraint
 - Differing Interpretations Depending on Context
 - "Clear and present danger"—*Schenk v. U.S.* (1919)
 - "Dangerous tendency"

1st Amendment: Speech & Press

- Issues
 - Symbolic Speech (e.g. *Tinker v. Des Moines* [1969]; *Texas v. Johnson* [1989])
 - Hate Speech: enhanced sentences
 - Speech Zones

1st Amendment: Speech & Press

- Unprotected Speech
 - "Imminent Lawless Action," aka "Fighting Words"
 - Libel (written) v. Slander (spoken)
 - Requirements for Proof of Libel (for Non-Public Figures)
 - Publication Observable by Third Parties
 - Aggrieved Party Clearly Specified
 - Aggrieved Party Must Suffer
 - For Public Figures: + "actual malice" & "reckless disregard" for the truth




1st Amendment: Speech & Press

- Obscenity (*Miller v. California* [1973])
 - The average person applying contemporary standards finds that the work as a whole appeals to prurient interests
 - The work “depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.”
 - The work lacks “serious literary, artistic, political, or scientific value”



1st Amendment: Freedom of Assembly & Petition

- Connected with Speech, can be regulated by “time, place, & manner”



2nd Amendment: Right to Keep & Bear Arms

- *McDonald v. Chicago* (2010)



4th Amendment: Rights of Criminal Defendants

- 4th addresses the “right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.... [&] “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.”
- Congress first going beyond the physical with Federal Communications Act of 1934 (proscribing most police use of wiretaps legal until then)
- Remedy: Exclusionary Rule (*Mapp v. Ohio* [1961])



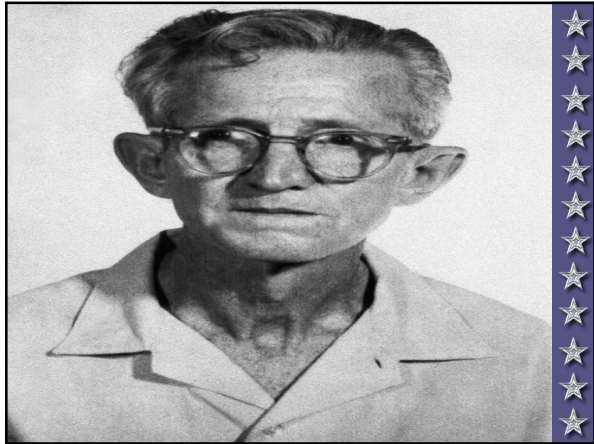
5th Amendment: Rights of Criminal Defendants

- 5th Amendment: no person shall “be compelled in any criminal case to be a witness against himself”
- Applies to testimony in a trial & to any statement made by a defendant awaiting trial
- Remedy: *Miranda v. Arizona* (1966)



6th Amendment: Rights of Criminal Defendants

- 6th—Right to Counsel—*Gideon v. Wainwright* (1963)
- 6th—Jury Trials—Peers?



8th Amendment, I: Rights of Criminal Defendants

- 8th Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."
- *Furman v. Georgia* (1972) [243 pages, longest in Court history] put capital punishment on hold, but the death penalty itself was NOT declared unconstitutional as cruel & unusual

8th Amendment, II: Rights of Criminal Defendants

- *Gregg v. Georgia* (1976): GA law separating conviction from sentencing stage of the trial, allowing juries to weigh the particular crime & defendant & any mitigating/aggravating circumstances, proclaimed to be a "model" law
- Decisions over the last 10 years have found the following to be cruel and unusual punishment:
 - Executing "mentally retarded" defendants
 - Executing juveniles
 - Executing a defendant who raped, but did not murder, a child
 - Sentencing a juvenile to life in prison without possibility of parole

9th Amendment: Right to Privacy

- 9th Amendment: "the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."
- *Griswold v. Connecticut* (1965) —9th + 1st, 3rd, 4th, & 14th —Contraception
- *Roe v. Wade* (1973)—Abortion
- *Lawrence v. Texas* (2003)—Homosexuality