Unit 3: Civil Liberties and Civil Rights

Through the U.S. Constitution, but primarily through the Bill of Rights and the Fourteenth Amendment, citizens and groups have attempted to restrict national and state governments from unduly infringing upon individual rights and from denying equal protection under the law. Sometimes the Court had handed down decisions that protect both public order and individual freedom, and at other times the Court has set precedents protecting one at the expense of the other.

- To what extent do the U.S Constitution and its amendments protect against undue government infringement on essential liberties and from invidious discrimination?
- How have U.S. Supreme Court rulings defined civil liberties and civil rights?

BIG IDEA: Liberty and Order

3.1 Explain how the U.S. Constitution protects individual liberties and rights.

Our revolutionary heritage was founded upon a simple battle cry – "Give me Liberty or give me death." Despite the need for a strong government to keep us safe and secure, to help manage during difficult times, we have built safeguards in order to limit government's natural tendency to threaten inalienable individual liberties. The promissory note from our Founding Fathers on this is the Bill of Rights. The Bill of Rights, our first ten amendments to the U.S. Constitution, proclaims to the world that our experiment in self-government is rooted in personal freedom and equality. That experiment, however, is one of dynamic agency. Times change. Members of government change. We lean on the U.S. Supreme Court to help mediate these changes. **Provisions of the U.S. Constitution's Bill of Rights are continually being interpreted to balance the power of government and the civil liberties of individuals.**

Our civil liberties, as codified in our constitution's Bill of Rights, serve as both trumps and chips. Civil liberties are constitutionally established guarantees and freedoms that protect citizens, opinions and property against arbitrary government interference. Our rights trump against random authoritarian tendencies found in most governments. At the same time our civil liberties serve as chips in the policy making process. We are a nation of law but foremost we are a nation of rights. Our inalienable rights serve as the people's greatest harbinger to popular sovereignty. As we seek more and more protections, as we expand more and more of our privileges, as civil liberties expand beyond religion, race, gender, and sexual orientation "we the people" have a great bargaining chip. Here civil liberties matter. Civil liberties are not mere platitudes or empty promises. Civil liberties form the bedrock of our civil society.

It behooves us to familiarize ourselves with the language of our basic most fundamental rights as protected in our constitution's Bill of Rights:

Amendment One: *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.*

Amendment Two: *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.*

Amendment Three: *No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law*.

Amendment Four: *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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.*

Amendment Five: *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation*.

Amendment Six: *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense*.

Amendment Seven: *In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law*.

Amendment Eight: *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted*.

Amendment Nine: *The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people*.

Amendment Ten: *The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people*.

Provisions of the U.S. Constitution's Bill of Rights are continually being interpreted to balance the power of government and the civil liberties of individuals. In the end our rights are defined by legislative, executive and judicial actions. Legislatures interpret our civil liberties through the policy-making process. Legislatures, through their oversight powers and budget authority strengthen and weaken our civil liberties. Executive power enables the president through various governmental agencies to enforce laws and thereby interpret the meaningfulness of our civil liberties. More obviously, our courts are constantly interpreting our liberties and rights through contested disputes. As former chief justice Charles Evans Hughes said, "We are under a Constitution, but the Constitution is what the judges say it is." No better reason for us citizens to remain vigilant in overseeing our rights. This begins by knowing them. Help keep our rights strong by doing your best in this unit of study.

3.2 Describe the rights protected in the Bill of Rights.

The Bill of Rights contains many diverse protections. In addition to political rights like speech and press they also protect us from oppressive police powers. Criminal due process, just treatment, is a fundamental guarantee found in our Bill of Rights. Throughout our history there have been a number of landmark court cases that have defined the meaning of these rights. In doing so the Court has attempted to balance claims of individual freedom with laws and enforcement procedures that promote public order and safety.

The Fourth Amendment protects

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause…*

This right can be traced as far back as the *Institutes of the Laws of England (1628)* that stated, "For a man's house is his castle [and each man's home is his safest refuge]." The castle doctrine, as it is called, has teeth. The exclusionary rule, applied to the states in *Mapp* v. *Ohio* (1961), disallows in court any illegally obtained evidence. The exclusionary rule provides a safeguard for our Fourth Amendment right to be free from unreasonable searches and seizures. The exclusionary rule protects our castle. Today that castle has been extended to our cars and even our cell phones. In the case *Riley* v. *California* (2014) the Supreme Court argued

> *Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life". The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.*

Privacy rights would appear to be one of our basic freedoms even when challenged by those who feel such rights make us more vulnerable to terrorist attacks. To a certain extent the Patriot and USA Freedom Acts have attempted to compromise our commitment to individual privacy rights.

Certain rights protect the accused each step before, during and after a criminal trial. Many of these rights are found in the Fifth Amendment. The Fifth Amendment states

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

"Pleading the Fifth" has become almost cliché. The government cannot compel confessions. Furthermore in the case *Miranda* v. *Arizona* (1966), the Supreme Court held that any suspect put in custody by authorities must first be informed of their rights. The Miranda warning, hence, has become standard at the point of any legal detention – "You have the right to remain silent. Anything you say can and will be used against you. You have the right to an attorney. If you cannot afford an attorney one will be provided for you." The takings clause of the Fifth Amendment, sometimes called eminent domain, protects our private property from being taken without fair payment. Private property is considered one of our most fundamental rights.

The Sixth Amendment protects the rights of the accused ever further. It says

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.*

Gideon v. *Wainwright* (1963) made certain the right to an attorney. The government must provide legal counsel, even to those who cannot afford it. One commonly misunderstood criminal law practice is the plea bargain. Courts have frequently upheld their validity. A plea bargain allows the state and its prosecutors to offer a reduced sentence if the accused agree to plea guilty to a lesser offense. The intent of a plea bargain is to reduce the heavy workload of the court system. Plea bargains ultimately mean fewer trials and more defendants doing time for their offences.

Finally the Eighth Amendment protects all of us from cruel punishment. The Eighth Amendment appears to be clear when it states

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

But a long trail of Court precedent can be found attempting to unpack the practical meaning of these words. The Court, in the case *Atkins* v. *Virginia* (2002), ruled that it would be unconstitutional to execute someone with certain mental handicaps. So too would it be unconstitutional, the Court argued in *Roper* v. *Simmons* (2005), to execute someone who committed a capital offense under the age of eighteen. In more recent cases the Court has upheld various methods of execution, including lethal injection. As more and more states limit capital punishment, pressure is building on the Supreme Court to follow suit.

Clearly provisions of the U.S. Constitution's Bill of Rights are continually being interpreted to balance the power of government and the civil liberties of individuals.

3.3 Explain the extent to which the Supreme Court's interpretation of the First and Second Amendments reflect a commitment to individual liberty.

The First Amendment contains our most cherished rights. Often our courts give them a preferred position. Governments did not give these rights to us. Rather we empower governments to protect these natural rights. The fundamental rights contained in the First Amendment are: freedom of speech; freedom of press; freedom of religion, freedom of assembly; and freedom of petition. Majority rule cannot interfere with these rights, nor can government abridge these rights. The federal judiciary often is called upon to serve as the guardian of these rights.

The freedom of speech gets preferential treatment by the courts. It is our most sacred right. Yet even freedom of speech has its limits. You are not free to publish obscene materials. You are not free to lie or slander others nor can you write falsely which is called libel. There are numerous court precedents that define when and where our free speech can and cannot be limited. *Schenck* v. *U.S.* (1919) was an early

example of a limit on our free speech. Justice Oliver Wendell Holmes famously stated in his opinion, "…Free speech would not protect a man in falsely shouting fire in a theater." The ruling precedent of this case established the clear and present danger standard. Dangerous speech can be limited. More recently the reach of the First Amendment has extended into symbolic speech. In the case *Tinker* v. *Des Moines* (1969) the Court recognized that students do not shed their rights "at the schoolhouse gate." But more importantly symbols on clothing and/or inaudible expressions are protected by the free speech clause of the First Amendment. "School speech," however, is easier to limit as was seen in the *Morse* v. *Frederick* (2007). In this case a student's speech advocated drug use. The court upheld a limit on this kind of speech.

Prior restraint or censorship of the press must pass over a high bar. Freedom of the press is seen as an important tenet to representative democracy. Yet freedom of the press can be limited in certain circumstances. The Supreme Court clarified these limits in the case *New York Times* v. *U.S.* (1971). The government can use prior restraint when confronted by national security issues but the bar for such censorship is high. The court established a "heavy presumption against prior restraint." This case overturned the government's attempt to block publication of the leaked Pentagon Papers.

Freedom of religion might provide the best examples of minority rights protected from majority rule and opinion. Christian majorities are prevented from indoctrinating inside the political arena. Freedom of religion is split into two separate protections. We have freedom from an establishment of religion. This protects us from an official State religion. A landmark establishment case was *Engel* v. *Vitale* (1962). In this case the court ruled a government-directed prayer in school as unconstitutional. The Lemon Test, from the case *Lemon* v. *Kurtzman* (1971), prescribes the rules regarding any apparent cooperation between church and state:

> *(1) The government's action must have a secular purpose; (2) The government's action must not have the primary effect of either advancing or inhibiting religion; (3) The government's action must not result in an "excessive entanglement" with religion.*

We also have the free exercise of religion. The government generally cannot infringe upon our right to worship the way we please. For example, in the case *Wisconsin* v. *Yoder* (1972), the Court argued that the First Amendment's right to "free exercise" is predominant over any conflict with state compulsory education laws. In this case a small group of Amish parents and their right to "free exercise" triumphed over the wishes of a larger community.

Controversial in our time has been the Court's wavering interpretation of the Second Amendment's "right to bear arms." The Second Amendment simply states,

> *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.*

In *District of Columbia* v. *Heller* (2008) the Court recognized the saliency of "the right of the people." Government interests have no power or authority to infringe such rights, even the right to own a handgun. To those who argue that we live in different times and that national public policy demands new solutions to pressing problems the Court said,

> *Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.*

The Bill of Rights was included in our constitution to reflect our collective commitment to individual liberty. Even when faced with difficult policy choices, the rights of the people still carry the day.

3.4 Explain how the Supreme Court has attempted to balance claims of individual freedom with laws and enforcement procedures that promote public order and safety.

Provisions of the Bill of Rights are continually being interpreted to balance the power of government and the civil liberties of individuals. The Fourth, Fifth, Sixth and Eighth Amendments provide constitutional protection of the rights of the accused.

In review, the Fourth Amendment protects

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause…*

This right can be traced as far back as the *Institutes of the Laws of England (1628)* that stated, "For a man's house is his castle [and each man's home is his safest refuge]." The castle doctrine, as it is called, has teeth. The exclusionary rule, applied to the states in *Mapp* v. *Ohio* (1961), disallows in court any illegally obtained evidence. The exclusionary rule provides a safeguard for our Fourth Amendment right to be free from unreasonable searches and seizures. The exclusionary rule protects our castle. Today that castle has been extended to our cars and even our cell phones.

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It is worth noting again that the basic rights of the people can often conflict with government's fundamental role to keep us safe and secure. Personal liberties and collective security can be at odds with each other. This has become all the more apparent after the events of September 11, 2001.

For many the terrorist attacks of 9/11 drew a line in the sand. One chronicler wrote, "Everything now is measured by after." The torrent of literature written about that horrific day, some calling it the "white rain," agrees that our sensibilities were permanently scarred. We now demand more security and protection. For many this has meant giving up certain liberties even though majorities of Americans think it unnecessary to do so. In the years since 9/11 we have been faced with a number of public policy issues that make us ponder security at what price? We have read about prisoner and detainee abuse, over zealous search and seizures,

coercive interrogation, questionable profiling and data mining. We may feel safer but we also have less privacy.

When contemplating this tension between individual freedom and public safety, it should first be recognized that our original constitution provided for moments like this. We have not changed our Constitution by one word to strengthen our national government's capacity to keep us more secure. Congress was empowered in Article One to "provide for the common defense." The President, in Article Two, was made the commander-in-chief and given implicitly energetic powers to deal against foreign agents. And the Supreme Court, empowered by judicial review, has upheld most of the provisions of such laws as the USA Patriot Act (2001).

It should also be acknowledged that this tension existed prior to 9/11. It is a debate that hearkens back to the constitutional convention itself. Tensions between social order and individual freedom are reflected in interpretations of the First Amendment that limit speech. Earlier we saw how the Supreme Court in *Schenck* v. *United States* (1919) limited speech when it posed a "clear and present danger." In *Roth* v. *United States* (1957) the Court agreed that the First Amendment did not protect obscenity. *Miller* v. *California* (1975) further clarified obscenity in this way:

> *(1) Whether 'the average person, applying contemporary community standards' would find that the work, 'taken as a whole,' appeals to 'prurient interest' (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (3) whether the work, 'taken as a whole,' lacks serious literary, artistic, political, or scientific value.*

The Court has also established "time, place and manner" (TPM) restrictions. Under these conditions speech and expression can be limited as to when, where and how:

- *Be content neutral*
- *Be narrowly tailored*
- *Serve a significant governmental interest*
- *Leave open ample alternative channels for communication*

Freedom of speech is not absolute. At times the demands of living in a civil society require us to surrender our freedom to act as we might naturally desire. So too unwarned interrogations can now be upheld under Court sanctioned "public safety" exceptions.

With some issues, like gun control, personal freedoms still trump laws intending to protect us. Gun control laws have again entered into the public policy arena. Though the Supreme Court in *The District of* Columbia v. *Heller* (2008) appears to have decided the meaning of the Second Amendment many groups continue to advocate for stricter limits. Groups like the Brady Campaign to Prevent Gun Violence have formed to speak out against handgun violence and urge both Congress and the Courts to authorize reasonable limits to our Second Amendment freedom to "bear arms."

The point here is simple but no less controversial. We have imposed limits on government, and they have returned the favor. So too are there limits on our personal freedoms. Alexander Hamilton said it best in Federalist 51:

> *If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige*

it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

The events of 9/11 have triggered a number of healthy debates over government authority and how strong it needs to be to promote public order and safety. Similar debates took place in Philadelphia in the summer of 1787. We are all founders now.

BIG IDEA: Liberty and Order

3.5 Explain the implications of the doctrine of selective incorporation.

With the Selective Incorporation Doctrine we again visit the debate that took place in Philadelphia in 1787 at the original constitutional convention. We needed a stronger central government, but how strong? The historical answer here is growing more and more obvious. With each passing generation, it would appear stronger. The doctrine of selective incorporation has implications for the balance of power in our federal system of government.

One might think that giving greater power to the national government would interfere and weaken individual rights. "Power corrupts" we have been told. Yet in the case of selective incorporation we find, more times than not, that our individual rights and liberties have been more thoroughly protected.

The Selective Incorporation Doctrine, as we have already seen, has shifted responsibility to the national government in a dramatic way. Utilizing the language of the Fourteenth Amendment, specifically that "no state…shall abridge…due process of law," the national government now serves as protector of our alienable right to "life, liberty and property." Most of the time this has resulted in the national government imposing its will on state and local laws to the contrary. We saw this already in cases that extended the exclusionary rule (*Mapp*), right to counsel (*Gideon*), right to privacy (*Griswold*) and right to an abortion (*Roe*). In all of these cases individual rights and privileges that had once been excluded by state governments were now preserved and protected by agents of the national government. This arc of history continues.

Most recently we have seen the national government apply the right to own firearms. The Second Amendment historically was interpreted to preclude the national government from banning the right to "bear arms." State and local governments, however, were free to do so and they did. Many local governments over the years banned handguns, assault rifles and types of ammunitions. There appeared to be no constitutional contradiction as long as the *Barron* precedent prevailed. The Bill of Rights did not apply to the states. The Incorporation Doctrine changed all of that. With the Fourteenth Amendment's "due process" clause the Court now had an instrument to use to apply fundamental rights to all by protecting them from all. In the case *McDonald* v. *Chicago* (2010) the U.S. Supreme Court applied the right to "bear arms" to the states for the first time. Most state gun control laws were ruled unconstitutional. Here again is another example of the implications of the doctrine of selective incorporation on the balance of power in our federal system.

Of course there are some examples that demonstrate the national government's Incorporation Doctrine, a newfound power and authority, used as a weapon to impede our apparent liberties. The Supreme Court upheld a state's limitation on free speech in the case *Gitlow* v. *New York* (1925). In another case the use of the drug peyote, ceremonially by two native-Americans, was not protected from job discrimination in the case *Oregon* v. *Smith* (1990). Many saw this precedent as dangerously close to the national government impeding on our fundamental right to "free exercise" of religion. There are implications when granting power, especially when given to governments.

Some have called the passage of the Fourteenth Amendment a second revolution. The doctrine of selective incorporation has had a dramatic impact on the balance of power. In many instances the use of the "due process" clause has been used by the national government to further protect our fundamental rights. Yet as we have seen this has not always been the case. It is here where we best heed the words of Madison in Federalist 51 and recognize "*the necessity of auxiliary precautions*." The legitimacy and authority to rule is ultimately in our hands. **Protections of the Bill of Rights have been selectively incorporated by way of the Fourteenth Amendment's due process clause to prevent state infringement of basic liberties.**

3.6 Explain the extent to which states are limited by the due process clause from infringing upon individual rights.

Many political scientists insist, with the passage of the Fourteenth Amendment following the American Civil War, that a second revolution took place. Others argue it merely reinforced principles already in place in the original constitution. Both sides, however, would agree that the relationship between the federal government and the states and the federal government and the people was changed forever. The text from Section 1 of the Fourteenth Amendment seems simple enough:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.*

Yet the incorporation of the federal government's authority to oversee the "due process" and "equal protection" of all citizens represents a significant change. **Protections of the Bill of Rights have been selectively incorporated by way of the Fourteenth Amendment's "due process" clause to prevent state infringement of basic liberties.**

First a little historical context might help us understand this "second revolution." The Founding Fathers may have abandoned the Articles of Confederation in favor of a new constitution but they did not dismiss state sovereignty all together. Rather they created a federal system. The national government was created to be supreme but state and local governments maintained certain reserved powers. This was codified in the Tenth Amendment. Furthermore the rights and privileges contained in the Bill of Rights were imposed limits on the national government and not the states. The Bill of Rights only protected our civil liberties and civil rights from being infringed by the national government. This was clearly defined by the Supreme Court in the case *Barron* v. *Baltimore* (1833). The court made clear that the rights contained in the first ten amendments did not apply to the states. In other words, the United States Congress could not violate your freedom of speech but the State of New York could. It would take a number of generations before this confusion was remedied. It would take the passage of the Fourteenth Amendment.

The extension of the Bill of Rights to the States is called the Selective Incorporation Doctrine. It could not have occurred without the Fourteenth Amendment. The Fourteenth Amendment guaranteed to all citizens in all of the States both the due process of law and the equality of opportunity granted to all. Furthermore no State could abridge the privileges or immunities given to citizens of the United States. It was not until 1925, in the case *Gitlow* v. *New York,* when the Supreme Court applied the language of the Fourteenth Amendment into a State dispute. When the court ruled in this case that the First Amendment took precedence in a state

dispute over speech the second revolution had officially begun. Now the national government and its courts would be the final arbitrator of our rights and privileges superseding all state and local laws.

Today virtually all of our civil liberties as guaranteed in the Bill of the Rights have been applied or incorporated to the States. To summarize, little by little the Supreme Court applied or incorporated the Bill of Rights to the States using the due process clause of the Fourteenth Amendment. This difficult concept is best understood by looking at a few critical examples.

Until 1961, state and local laws defined most police action. Federal authority was immaterial when determining when, where and how state law enforcement officials engaged in searches and seizures of private property. This changed with the case *Mapp* v. *Ohio* (1961). In this case the Supreme Court, using the authority of the "due process" clause of the Fourteenth Amendment, applied the Court interpreted provisions of the Fourth Amendment to the States. More specifically, the Court extended the Exclusionary Rule to the States as it had earlier (see *Weeks* v. *U.S.*, 1914) to the national government. Now warrantless seizure of private property was inadmissible in both federal and state courts.

Another similar example of the Selective Incorporation Doctrine can be found in the case *Gideon* v. *Wainwright* (1963). Here the Supreme Court applied the Sixth Amendment right to counsel not just to defendants in federal trials but in state trials as well. The authority of the federal government to impose these new procedural requirements, fundamental individual rights, was not found in the words of the Bill of Rights alone. Rather it was required to use the "due process" clause of the Fourteenth Amendment. Little by little the Supreme Court applied or incorporated the Bill of Rights to the States using the due process clause of the Fourteenth Amendment.

The Selective Incorporation Doctrine goes beyond the mere application of the Bill of Rights to the States. Any and all rights, as defined by Congress and the Courts, have been equally applied to state governments. Here the best example is the extension of privacy rights. *Griswold* v. *Connecticut* (1965) utilized the vague language of the Bill of Rights to establish the right to privacy. The Court defended their discovery of privacy by arguing:

> *The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See Poe v. Ullman, (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."*

At issue in this case was a state prohibition denying access to contraceptives, even to married couples. The Court would apply this reasoning further. Though not specifically mentioned in the Constitution's Bill of Rights the right to privacy was later extended to include a women's right to choose an abortion in *Roe* v. *Wade* (1973). Due to the Incorporation Doctrine, national, state and local governments now could no longer infringe upon a woman's inalienable right to privacy. Though Court's have more recently allowed for limits to these rights the second revolution has been thoroughly grounded in American life.

There are many other examples of how the Incorporation Doctrine has been used but the lessons are the same. States are now limited by the Fourteenth Amendment's "due process" clause from infringing upon individual rights.

BIG IDEA: Civic participation in a representative democracy

3.7 Explain how constitutional provisions have supported and motivated social movements and policy responses.

The Fourteenth Amendment's revolutionary impact goes beyond the application of the "due process" clause. Its "equal protection" clause, as well, has dramatically changed the arc of American government. Many have written that the ultimate purpose of government is to superintend social cohesion and happiness. If so, advancing and defending equality must be seen as government's greatest challenge. The Declaration of Independence certainly upholds liberty but it endorses equality as well. It would be difficult to imagine real freedom without equality. **The Fourteenth Amendment's "equal protection clause" as well as other constitutional provisions have often been used to support the advancement of equality.**

If "due process" rights protect our individual civil liberties than "equal protection" safeguards our civil rights. Civil liberties protect individuals and their individual rights. Civil rights protect groups and their equal treatment. The U.S. Constitution, at one time considered a "slave document," is now seen as a beacon for both civil liberties and civil rights. The people and its government have been empowered to bring about a "perfect equality." Realizing this promise, however, has been "America's dilemma." Defending equality almost tore us apart during the American Civil War. But as Lincoln wrote in his Gettysburg Address, we fought for "a new birth of freedom." We continue to fight. Our form of representative democracy upholds majority rule while putting in place protections for minority rights.

The equal protection clause of the Fourteenth Amendment not only inspires formal public policy debate inside the institutions of government but also motivates "we the people" to act. We should never underestimate how the advances in equality here was in part a by-product of courageous leadership. Social movements throughout history have ignited policy changes. Never was this more apparent than in the 1960s. In the black community the leadership of Martin Luther King, Jr. deserves the attention he receives. Beyond being a community organizer King's speeches and essays inspired many to fight for greater equality. In his seminal essay *Letter from a Birmingham Jail* (1963) King wrote,

Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.

Women as well saw their civil rights improved during this time, thanks in part to a number of outspoken leaders. Betty Friedan and others founded the advocacy group the *National Organization of Women* (NOW) in 1966. Friedan argued that their purpose was

> *To take action to bring women into full participation in the mainstream of American society now, exercising all privileges and responsibilities thereof in truly equal partnership with men.*

The civil rights movement of the 1960s heralded the rights of African-Americans and Women. Subsequently it was extended to Latinos. Today such civil rights are being waged on behalf of the LGBT community and the Pro-Life movement.

BIG IDEA: Competing policy-making interests

3.8 Explain how the government has responded to social movements.

We can learn from the civil rights movements of the past on how best to pursue even greater equality in our future. African-Americans following the Civil War found much of America to be unwelcoming. Though grateful for their freedom, Jim Crow laws segregated and relegated African Americans to second-class citizens. Work was difficult to find. They were not permitted to join in society as equal partners. Even the United States Supreme Court ruled in *Plessy* v. *Ferguson* (1896) that "separate but equal" was a tenable standard. De jure segregation, that is segregation by law, was deemed constitutional.

Public policy promoting civil rights is influenced by citizen-state interactions and constitutional interpretation over time. The early civil right movement saw the courts as their battleground. Through litigation civil rights attorneys could argue their case in court. Their greatest victory came in 1954 in the case *Brown* v. *Board of Education. Brown* overturned the *Plessy* precedent by ruling that "separate was not equal." Schools could no longer segregate on the basis of race. This landmark decision set in motion an end to de jure segregation. The law of the land would no longer permit a racially divided society. Its rationale was found in the due process and equal protection clauses of the Fourteenth Amendment. The national government was flexing its authority over the states. De facto segregation, separation by private choices, still exists.

The Brown ruling was met with defiance. Implementation would not be easy. The Court ruled in the following year, in a case referred to as *Brown* II, that enforcement of desegregation would fall to both the local school districts and federal district courts. Desegregation must be realized "with all deliberate speed." Every arm of government had for a long time upheld majority rule over Southern school practices. In the *Brown* case, however, the Courts recognized the legitimacy of minority rights and overturned race-based discrimination in school.

With the courts solidly behind them, the civil rights movement turned to Congress. Political pressure combined with a heavy dose of personal courage helped to pass the Civil Rights Act of 1964 and the Voting Rights Act of 1965. These historic pieces of legislation extended equality even further. Segregation, discrimination and prejudice would no longer be accepted. Voting rights would be protected. Rules to suppress black political participation through literacy tests were outlawed. America was moving closer to its promise of equality for all.

Affirmative action programs were put in place to offer racial minorities a chance to catch up for past discrimination. This preferential treatment has not gone unnoticed. The civil rights movement continues, as the fight for equality is not over.

African-Americans were not the only marginalized groups to win political victories in the wake of the civil rights movement. One of the more notable victories occurred for women with Title IX of the Education Amendments of 1972. This prohibited any form of discrimination on the basis of gender in any education program or activity.

Constitutional provisions have supported and motivated social movements and policy responses. Note as well how federalism often delays and complicates the extension of civil rights. A limited government, like ours, is not fitted to make dramatic changes in a hurry. Perfect equality has not been realized yet. It is our dilemma. But it is also in our constitutional DNA to keep up the fight.

3.9 Explain how the Court has at times allowed the restriction of the civil rights of minority groups and at other times has protected those rights.

Constitutional provisions and the language of our laws require constant attention and interpretation. We rely on the U.S. Supreme Court to provide clarity. Former Chief Justice Charles Evans Hughes said it best, "We are under a Constitution, but the Constitution is what the judges say it is." This helps explain why the arc of civil rights in American history is an inconsistent story. At times our Court's have restricted minority rights. And at other times they have protected those rights. This becomes all the more apparent when looking at a number of specific examples.

Jim Crow laws and other deeply rooted practices institutionalized racism and discrimination. White supremacy was the law of the land for a long time. In notable cases like Plessy v. Ferguson (1896) the Supreme Court validated these laws. In Plessy the Court established the "separate but equal" precedent, a doctrine that prevailed for over fifty years. Though it paid lip service to equality the "separate but equal" doctrine legitimized a discriminatory culture. It rendered our egalitarian ideal as a bounced check. More importantly it appeared to uphold a concept loathed by our constitutional framers, a tyranny of the majority.

It took a brave and courageous Supreme Court and its new chief justice to overturn the Plessy precedent in 1954. Inspired by the diligent advocacy of the NAACP and other black interest groups, the Brown v. Board of Education case took on the common practice in the south to segregate the public school system. The Court invalidated race-based segregation based upon a close reading and interpretation of the Fourteenth Amendment's "equal protection" clause. In the unanimous Court opinion Chief Justice Warren wrote:

Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does…

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the [black] group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of [black] children and to deprive them of some of the benefits they would receive in a racially integrated school system…

We conclude that, in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.

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It should be noted that majorities still maintained some semblance of power, even in the area of public education following the Brown case. A common strategy used in America to integrate public schools was to bus students, in some instances great distances. In 1974 the Court, in the case Miliken v. Bradley, acknowledged that segregation is not always the result of racially based discriminatory policy. Plans to bus students across district lines took the Brown precedent too far. School segregation based upon personal choice, rather than government policy, was beyond the reach of the Brown precedent. The tension between

majority rule and minority rights continues. Another battleground for civil rights in our time has been the public policy of affirmative action.

Affirmative action can be described "as a civil rights policy premised on the concept of group rather than individual rights, which seeks equality of results rather than equality of opportunity." Affirmative action was an attempt to address discriminatory hiring practices. Classes of people who have been "adversely impacted," including race and gender, can claim they have been discriminated against. As a result, public and private employers and schools must demonstrate that these "protected classes" have in fact been provided equal opportunities. Opponents cry "racial quotas" and "reverse discrimination." Some have insisted that our Constitutional commitment to equality necessitates colorblindness. Again we turn to the Supreme Court for guidance.

In the case Regents of California v. Bakke (1978) the Court opinion stated that race conscious policies adopted as a remedy for proven discrimination were permissible under the Civil Rights Act and the Constitution. Despite the Reagan administration's attempt in the 1980's to stop the spread of affirmative action the Supreme Court reaffirmed the legality of quotas. In Local 28 Sheet Metal Workers v. E.E.O.C. (1986) the Court argued, ". . . race conscious class relief [quota]" was appropriate where an employer or union "has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination." In Johnson v. Santa Clara County (1987) the Court acknowledged that affirmative action is a prospective policy based on the idea of group rights that aims at achieving racial and gender balance.

The Supreme Court in more recent years has seemingly shown their lack of patience with affirmative action policies. Little by little the Court has weakened previous precedent. The Court has applied a "strict scrutiny" test to programs seeking diversity. In cases like Gratz v. Bollinger (2003) and Fisher v. Texas (2013) the Supreme Court's tolerance of extending preferential treatment to minorities is waning. The Court has at times allowed the restriction of the rights of minority groups and at other times has protected those rights.

Need more evidence? Check out the Court's treatment of LGBT issues. In 1986, in the case Bowers v. Hardwick, the Court upheld state laws that prohibited same sex activities. By 2015 the Court, in Obergefell v. Hodges, overturned any state law banning same-sex marriage. Our civil rights prove again to be a dynamic force in American life.

Civil liberties and civil rights took center stage with the passage of the Fourteenth Amendment. The "due process" clause along with the "equal protection" clause brought about a revolutionary change in American public life. The Selective Incorporation Doctrine made most of our fundamental liberties efficacious in all fifty states. And the national government took on a greater responsibility to safeguard minority rights, our egalitarian ideal. In Federalist 10 Madison had warned, "The great danger in republics is that the majority will not respect the rights of the minority." As much as "we the people" hope our elected officials, in both the executive and legislative branches, are up to the task it has been the U.S. Supreme Court who has played the role of guardian. As we continue to debate the full meaning of civil liberties and civil rights, we engage in that revolutionary struggle that started over 200 years ago.