



# LESSON 9

## INCORPORATION AND FREEDOM OF RELIGION (440-450)

### UNIT 2 Civil Liberties and Civil Rights (≈10%)

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#### DIFFERENCE BETWEEN CIVIL LIBERTIES AND CIVIL RIGHTS?

- Civil liberties
  - **Definition** – legal and constitutional rights that protect individuals from arbitrary *acts of government*
  - Freedoms that are guaranteed -- either by law, constitution, or judicial interpretation
  - Involve basic freedoms (e.g. speech and religion)
  - The freedoms of conscience, religion, and expression, for example, which are secured by the First Amendment
- Civil rights
  - **Definition** – policies designed to protect people against arbitrary or discriminatory *treatment by government officials or individuals*
  - Include laws prohibiting racial, gender, physical, and religious discrimination
  - Protected by the due process and equal protection clauses of the Fifth and Fourteenth Amendments and by the civil rights laws of national and state governments

#### BASIS OF OUR CIVIL LIBERTIES – PROTECTED RIGHTS IN THE ORIGINAL CONSTITUTION

- Writ of *habeas corpus*
  - Directs any official having a person in custody to produce the prisoner in court and to explain to the judge why the prisoner is being held; Can only be suspended during times of rebellion (Civil War)
  - Person has the right to know why he or she is being imprisoned
- *Ex post facto* laws
  - Latin for “after the fact”
  - Punishes a person for something that was not a crime when he did it (retroactive punishment); May not be passed by Congress
- Bills of attainder
  - An act that punishes a person without benefit of trial
  - May not be passed by Congress

#### BILL OF RIGHTS AND THE STATES

- Bill of Rights
  - Added to the original Constitution to appease states
  - Rights of the individuals and states listed to protect them from the federal government
  - Bill of Rights only applied to the federal government and did not include protections against state governments (*Barron v. Baltimore*, 1833)
    - Feeling was that people could protect themselves against the state governments that were in their own backyards, but they needed additional protection against a new, powerful, and distant national gov't

#### SELECTIVE INCORPORATION

- The process by which select provisions of the Bill of Rights are brought within the scope of the Fourteenth Amendment and so applied to state and local governments.
- Modifying effect of the 14<sup>th</sup> Amendment
  - The due process clause has been used to apply some 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.
  - The “total incorporation” view would apply all of the provisions of the Bill of Rights to the states. It argues for nationalization (or federalization) of the Bill of Rights.

- The “selective incorporation” view would apply only some of these provisions, and would do so on a case-by-case basis.
- The important case here: *Gitlow v. New York*, 1925.
  - States may not deny free speech and press. These were protected by 14<sup>th</sup> Amendment Due Process Clause.
- Subsequent cases federalized parts of the Bill of Rights:
  - 1<sup>st</sup> – Assembly, Petition, Religion
  - 2<sup>nd</sup> – Right to Bear Arms
  - 4<sup>th</sup> – Search and Seizure protections
  - 5<sup>th</sup> – Self-Incrimination, Double Jeopardy
  - 6<sup>th</sup> – Right to Counsel, Right to Bring Witnesses, Right to Confront Witnesses
  - 8<sup>th</sup> – Protection against Cruel and Unusual Punishment
- All provisions of the Bill of Rights except Amendment 3, Amendment 7, and the Grand Jury requirement of the 5<sup>th</sup> Amendment have been federalized.

### **FREEDOM OF RELIGION - THE ESTABLISHMENT CLAUSE**

- No Government “Establishment of Religion”
  - A “wall of separation” - Separation of church and state (words of Jefferson; it is implied within 1<sup>st</sup> amendment, but not stated – kind of like “fair trial”)
- Basic meaning of establishment clause: government may not establish an official religion.
  - “Accommodationist View”: Government should bend a bit and allow a certain degree of church/state blending (allowing nativity scenes on city property, and allowing a non-denominational prayer in public school.)
  - “Separationist View”: Government should allow virtually no blending of church and state. There should be a “wall of separation” between the two.
- *Lemon v. Kurtzman*: Established a 3-part test to determine if a statute or practice violates the establishment clause:
  1. Non-Secular (religious) purpose
  2. Advances or inhibits religion
  3. Excessive entanglement with government
  - If any is present, the statute or practice is unconstitutional
- Key rulings.
  - *Engle v. Vitale*, 1962: no state-sponsored, recited prayer in public school. No teacher-led prayer.
  - No devotional Bible-reading in public school.
  - Moment of silence in public school is constitutional (as long as the purpose is not stated as being for prayer).
  - State laws may not prohibit the teaching of evolution in public school.
  - State laws that require the posting of the 10 Commandments in public school are unconstitutional.
  - Released time for students is constitutional. Allowing students to meet on campus for religious groups (such as Christian Club) is constitutional.
  - Christmas displays in town squares are constitutional as long as they include some secular content.
  - Constitutional forms of state aid to private schools: textbooks, classrooms, lunches, bus transportation.
  - Unconstitutional forms of state aid to private schools: field trips, teacher salaries, counseling services, remedial instruction.

### **FREEDOM OF RELIGION - THE FREE EXERCISE CLAUSE**

- Provides Freedom of Worship
- Religious practices that have been restricted:
  - Polygamy (*Reynolds v. U.S.*)
  - Drug use (*Oregon v. Smith*)
  - Not vaccinating children of Christian Scientists before they enter school
  - Not paying Social Security taxes (Amish)
  - Wearing a Jewish skullcap (Yarmulke) in the military
- Religious practices that have been permitted:
  - Not saluting flag in public school (Jehovah’s Witnesses)
  - Not sending children to school past the 8<sup>th</sup> Grade (Amish)
  - Animal Sacrifice (Santeria case)
- Article 6 bans religious tests/oaths as qualifications to hold public office.

## FREE RESPONSE QUESTION (FRQ) REVIEW

1. The framers of the United States Constitution created a federal system.
  - (a) Define federalism.
  - (b) Explain how selective incorporation has been used to increase the power of the federal government.
  
2. The Supreme Court ruled in *Barron v. Baltimore* (1833) that the Bill of Rights did not apply to the states.
  - (a) Explain how the Court has interpreted the Fourteenth Amendment to apply the Bill of Rights to the states.
  - (b) Discuss the Court's decision in one of the following cases to support your explanation.
    - *Gitlow v. New York* (1925)
    - *Wolf v. Colorado* (1949)
    - *Gideon v. Wainwright* (1963)
  
3. Initially, the United States Constitution did little to protect citizens from actions of the states. In the twentieth century, the Supreme Court interpreted the Constitution to protect the rights of citizens from state governments in a process referred to as incorporation.
  - (a) Define selective incorporation
  - (b) Explain how the First Amendment has been incorporated. Your explanation must be based on a specific and relevant Supreme Court decision.
  
4. The First Amendment includes two clauses relating to the freedom of religion.
  - (a) Select one of the following cases and identify the First Amendment clause upon which the United States Supreme Court based its decision.
    - *Engel v. Vitale* (school prayer)
    - *Lemon v. Kurtzman* (state funding for private religious schools)
  - (b) Describe the Supreme Court's decision in the case that you selected in (a).
  - (c) Select one of the following cases and identify the First Amendment clause upon which the United States Supreme Court based its decision.
    - *Reynolds v. United States* (polygamy)
    - *Oregon v. Smith* (drug use in religious ceremonies)
  - (d) Describe the Supreme Court's decision in the case that you selected in (c).
  
5. The framers of the Constitution created a political system based on limited government. The original Constitution and the Bill of Rights were intended to restrict the powers of the national government. Later constitutional developments also limited the powers of state governments.
  - (a) Explain how each of the following two provisions in the Bill of Rights limits the powers of the national government.
    - Establishment clause
  - (b) Choose one of the following and explain how it limits the power of state governments.
    - Citizenship clause of the Fourteenth Amendment
    - Selective incorporation
  
6. The Fourteenth Amendment protects civil rights and civil liberties.
  - (a) Describe the difference between civil rights and civil liberties.
  - (b) Identify the primary clause of the Fourteenth Amendment that is used to extend civil rights.
  - (c) Identify the primary clause of the Fourteenth Amendment that is used to extend civil liberties.

## MULTIPLE CHOICE (MC) REVIEW

- Civil liberties are \_\_\_\_\_ that the government cannot take away.  
(A) property rights  
(B) personal freedoms  
(C) business rights  
(D) recognitions of equality  
(E) property rights
- Which clause prevents the national government from sanctioning an official religion?  
(A) establishment  
(B) free exercise  
(C) full faith and credit  
(D) equal protection  
(E) due process
- Selective incorporation makes the protections from the Bill of Rights applicable to the states through which of the following amendments?  
(A) Fourth  
(B) Fifth  
(C) Sixth  
(D) Tenth  
(E) Fourteenth
- The free exercise clause guarantees that the national government will not interfere with which of the following?  
(A) education  
(B) finance  
(C) business  
(D) speech  
(E) religion
- Which amendment protects the right to bear arms?  
(A) First  
(B) Second  
(C) Third  
(D) Fourth  
(E) Fifth
- Which test examines the constitutionality of religious establishments?  
(A) *Orange*  
(B) *Free Exercise*  
(C) *Prior Restraint*  
(D) *Lemon*  
(E) *Due Process*
- The Supreme Court has used selective incorporation to \_\_\_\_\_ the rights of states.  
(A) protect  
(B) limit  
(C) expand  
(D) define  
(E) enforce
- In matters of religion, the free exercise clause protects individuals from which of the following?  
(A) discrimination  
(B) persecution  
(C) obstruction  
(D) segregation  
(E) dissenting opinions
- In *Barron v. Baltimore*, the Supreme Court held that the Bill of Rights limits \_\_\_\_\_, not \_\_\_\_\_, action.  
(A) federal, state  
(B) state, federal  
(C) state, local  
(D) local, state  
(E) federal, local
- Article I of the Constitution prohibits which of the following, which make an act punishable as a crime even if the act was legal when it was committed?  
(A) writs of *habeas corpus*  
(B) bills of attainder  
(C) *ex post facto* laws  
(D) procedural guarantees  
(E) prior restraints
- Convicted criminals whose sentences increase during their prison term due to a change in the law have been illegally subjected to what kind of law?  
(A) cruel and unusual  
(B) *habeas corpus*  
(C) *ex post facto*  
(D) bill of attainder  
(E) writ of *certiorari*