UNIT 6
PRINCIPLES OF CIVIL LIBERTIES AND CIVIL RIGHTS

I. Distinction: Civil liberties involve basic freedoms (e.g., speech and religion), civil rights involve protections against discriminatory treatment. Civil liberties are protected by Amendment 1. 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)
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.

VI. 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.
B. Modifying effect of the 14th Amendment.

1. 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.
2. 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.
3. The “selective incorporation” view would apply only some of these provisions, and would do so on a gradual, case-by-case basis over time
4. The important case here: Gitlow v. New York, 1925.
   a. Benjamin Gitlow, a communist, was convicted of criminal anarchy in a state court.
   b. 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.
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.

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.


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.

1. Endorsement view: forbids governmental practices that endorse religion, e.g., nativity scene at City Hall or 10 Commandments being posted in a court house
2. Nonpreferentialist view: Const. prohibits favoritism towards a particular religion, but allows governmental support for religion in general.

E. 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

2. Zorach v. Clauson, 1952: released time for students is constitutional
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.
E. Standard used for judging whether or not religious expression is constitutional:
   1. 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.
   2. 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.
   3. 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.
   4. 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.
F. Religious practices that have been restricted:
   1. 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.
   3. Employment Division of Oregon v. Smith, 1990 (noted above)
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.

II. Involves both the freedom to give and hear speech -- see Mill’s quotation.

III. Belief is most protected, action can be most restricted, but speech falls somewhere in between.

IV. 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.

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.

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.

V. 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

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.
VI. 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.

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.

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.

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

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.

FREEDOM OF THE PRESS

I. Nationalizing effect of Amendment 14.
II. Balancing test once again applies.
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.**

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.

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 unable to provide information to the public.
   3. While Congress has not passed a shield law, many states have done so.

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.

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.

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.

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.
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.
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.
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.

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.

THE STRUGGLE FOR EQUAL RIGHTS

I. For women.

A. First feminist wave.
   1. Seneca Falls Convention, 1848.

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.
   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.
   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
      e. 1 female Justice on Supreme Court.
      f. “Sex sensitive” issues: war/peace, education, pornography, abortion
      g. Active interest groups: NOW, Feminist Majority, EMILY’S LIST.

II. For blacks.

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 govt.
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.
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"

**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.

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.
4. Affirmative action:
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)

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.

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 (go over Griswold v. Conn., 1965).
4. Abortion court cases:
   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.

6. Same-sex marriage:
   a. Four states allow same-sex marriage (MA, CT, VT, IA)
      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 Congess to "prescribe the effect thereof."

7. Gay rights. 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)
BARiaERS 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 24th Amendment.
   D. Grandfather clause: declared unconstitutional.


   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.
      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.

   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.

II. Additional developments

   A. Creation of majority-minority districts in 1990s to increase representation for racial minorities
   C. Miller v. Johnson (1995): Race cannot be predominant factor in drawing district lines → many court challenges to state redistricting plans

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.
      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.

C. Civil Rights Act of 1968 (Fair Housing Act of 1968)
   1. Restrictive covenants had previously been declared unconst. in 1948.
   2. This act banned housing discrimination on same bases as above.


E. Americans with Disabilities Act of 1990: bans job and access to facilities discrimination if “reasonable accommodation” can be made.

CITIZENSHIP

I. Methods of acquisition.
A. Birth.
   1. Jus soli
      a. Latin for “right of soil”.
      b. All born in U.S., regardless of parentage, are citizens by virtue of Amend. 14.
   2. Jus sanguinis.
      a. Latin for “right of blood.”
      b. Anyone born to U.S. citizens living overseas is a citizen.
      c. Possibility of dual citizenship.

B. Naturalization.
   1. Legal process in which an alien acquires citizenship.
   2. Two forms:
      a. Individual: done through INS when an individual has met various requirements.
      b. Collective: done by Congress when it makes a group of people citizens, e.g., Congress granted collective naturalization to Hawaiians and Puerto Ricans.

II. Methods of losing citizenship.
A. Expatriation: voluntarily renouncing citizenship, e.g., becoming a citizen of another nation.
B. Denaturalization: stripping of cit. from a naturalized citizen who gained cit. through fraud or deception.

III. Aliens.
A. Definition: citizens of other nations who are living in U.S.
B. Types:
   1. Resident: permanent residents.
   3. Illegal: entered without permission.
4. Enemy: citizens of a nation at war w/U.S.
5. Refugee: fled political persecution.

C. Rights: basically, the same as those of citizens. Some exceptions:
   1. Suffrage.
   2. Serving on juries.
   3. Holding certain jobs within the public or private sector.
   4. Unconditionally staying in U.S.

D. Entry into U.S.
   1. Current law allows ~675,000 to be legally admitted each year.
   2. Admission based upon a complex preference system that takes into account:
      a. Relatives in U.S.
      b. Needed job skills.
      c. “Diversity exceptions” for Europeans since the above two qualifications make it difficult for Europeans to enter.
   3. Political refugees (~100,000 yr.) also allowed above and beyond the 675,000

E. To deal w/problem of illegal aliens: Simpson-Mazzoli Bill of 1986:
      a. Amnesty for illegals here before 1982, as long as they applied for it.
      b. Fines for employers who knowingly hire illegals.
      c. A certain number of aliens are allowed to enter each year as temporary farm workers.
   2. Analysis:
      a. First portion gives legal sanction to those who broke the law.
      b. Second has raised concerns that employers will refuse to hire any Hispanics for fear of being fined.
      c. Third portion has raised concern that temporary workers will be exploited.

F. Bush 43 met with Mexican President to discuss immigration
   1) Concern over terrorism has again raised issue of immigration to prominence.
   2) Both parties are reluctant to deal with immigration for fear of alienating Hispanic vote.

IV. Sources of immigration.
A. Pre-1880: primarily from Northern and Western Europe.
B. 1880-1920: primarily from Southern and Eastern Europe ---> nativist fears.
C. 1924: National Origins Act: set a nation-by-nation quota system that gave large quotas to N. and W. European nations, but smaller ones to S. and E. Europe and Asia.
D. 1965: National Origins Act repealed ---> replaced with a preference system (see above).
   1. Most immigrants now from Latin America and Asia.
   2. 1980s saw the second largest number of immigrants of any decade in U.S. history.
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.

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.”
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.

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.

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).

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).

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.
   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)
   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.

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.

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
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
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.

RIGHTS OF AN ACCUSED PERSON

I. Counsel.

A. Gideon v. Wainright, 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. 5th Amendment has not been nationalized in this area.
D. Some charge that the grand jury has merely become a tool of prosecutors.

VI. 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).

VII 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.

VIII 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. Virg., 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.

IX. 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.