

F.O.R.C.E VIDEO SCRIPT - THE "OTHER" AMENDMENTS

Voice Over: The First, Fourth, and Fifth Amendments to the U.S. Constitution are arguably the most important, and certainly the most litigated, parts of the Bill of Rights. But there are seven more amendments to consider, as well—and they're no less important to our democracy. What are they? And what do you need to know? Professor Sheila Kennedy breaks down the remaining amendments—and sheds some light on your rights as an American citizen.

Sheila: We've talked about the First Amendment, the Fourth Amendment, about due process and the due process amendments, and equal protection. But clearly, that is not all of the Bill of Rights. So today we're going to talk about the provisions of the Bill of Rights that we have not yet addressed.

The amendments we've been discussing are those that have been the most important, most litigated, and most protective of individual rights over time. But that doesn't mean that these other amendments are obsolete: far from it. In today's lecture, I want to go through those often-less-discussed amendments and explain why it's important to know about them and know what they mean.

A number of Americans would certainly take issue with my relegating the Second Amendment to secondary status. We've all heard the arguments over the Second Amendment, usually offered to rebut calls for additional controls on gun ownership. I'm unwilling to participate in those arguments, but I can, and will, explain what they are about. The imprecise way in which the Second Amendment was drafted has allowed partisans and ideologues to argue over its original meaning. The text itself, as you probably know, is brief: "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." That's it. Some people read this language as confirmation of the right of the states to maintain "well regulated" militias. Others read the language as a personal right to bear arms.

Until very recently, the Second Amendment had not been incorporated. You will remember that incorporation means applying an amendment's constraints to state and local units of government. In fact, cases involving the amendment hadn't even come before the Supreme Court. That was primarily due to the fact that many, if not most, state constitutions, did declare an unambiguous personal right to own a weapon.

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In 2008, a case challenging a gun control ordinance did come before the Supreme Court.

In District of Columbia versus Heller, the Supreme Court ruled that the Second Amendment does confer a personal right to bear arms for "lawful purposes" and for self-defense. A subsequent case incorporated it. But since Washington DC isn't a state, the question of incorporation didn't come up in Heller.

Gun rights advocates who laude the decision tend not to quote the part that emphasized government's right to control guns in many circumstances. And I quote, "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

What we now know about the Second Amendment is that, while government cannot ban or confiscate guns, government can constitutionally place substantial restrictions on their sale or ownership. The reasons such restrictions have not been enacted is political, not legal.

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The Third Amendment has long been thought to be obsolete.

It reads, "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." Now at the very least, the amendment means that government can't force civilians to house troops without their permission.

The Third Amendment has also been cited in connection to the right of privacy, because it's part of the language of the Bill of Rights that displays the underlying respect of that document for personal autonomy and "zones" where government regulation is just not permissible.

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Interestingly, thanks to President Trump, the Third Amendment may be newly relevant. During the unrest that follow George Floyd's murder, forty-five hundred National Guard troops from various states across the U.S. were deployed to Washington D.C., and some were being housed in local hotels. This raised questions about the potential applicability of the Third Amendment, although any effort to challenge the housing of troops on that basis was pretty unlikely.

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The provisions of the Sixth Amendment are part of the due process discussion that we had earlier, and they were covered during that discussion. The Sixth Amendment gives an accused person the right to a speedy trial, the right to trial by jury, and the right to confront witnesses, have service of process, and have assistance of counsel.

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The Seventh Amendment preserves citizens' right to a trial by jury in civil suits. And once again, in the wind up to this series, I will provide you with additional resources and explanations.

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The Eighth Amendment is best known as the amendment that prohibits cruel and unusual punishment, Fewer of us are aware that it also prohibits excessive bail and excessive fines.

Arguments over application of the Eighth Amendment tend to center our disagreements about the legal effects of social change. What most Americans would define as constituting cruel and unusual punishment is undoubtedly different now than it was when the language was first employed. For example, we no longer draw and quarter people convicted of crimes.

There's a long-standing argument over whether the cruel and unusual language in the amendment should forbid all capital punishment. Thus far, the court has not gone that far. However, it has banned capital punishment for juveniles and for the intellectually disabled.

The Supreme Court has also held that the excessive fines clause prohibits fines that "are so grossly excessive as to amount to a deprivation of property, without due process of law."

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The first time the Supreme Court struck down a fine as excessive was in 1998 in a case called United States versus Bajakajian. In that case, a Syrian refugee was flying overseas with three hundred and fifty thousand dollars in cash in his luggage. None of that money, it turned out, was connected to criminal activity. The only legal failure was non-compliance with a law that required reporting of international transactions in excess of ten thousand dollars. The federal government had initially required forfeiture of the entire sum, the whole \$350,000. The federal court said that was "grossly disproportionate" and in violation of the Eighth Amendment.

Under the excessive bail clause, the Supreme Court has held that the federal government can't set bail at a figure higher than is reasonably calculated to ensure that the defendant will show up at trial. As many of you may know, the entire system of bail in the United States is currently a matter of considerable dispute, with some studies showing that it doesn't improve the percentage of defendants who appear for trial, and others demonstrating that it has had a profoundly negative impact on poor people, comparing it to debtors' prisons. The Supreme Court has incorporated the cruel and unusual punishment clause, applying to state and local governments as well as to the federal government. But so far it hasn't incorporated the excessive bail clause.

On February twentieth of 2019, however, the Supreme Court did unanimously incorporate the excessive fines clause in a case called Timbs versus Indiana. Timbs was an interesting case. He had pleaded guilty in an Indiana State Court to dealing in a controlled substance and conspiracy to commit theft.

The police then seized his Land Rover SUV, a car 'limbs had purchased with money he received when his father died. Indiana argued that the state was entitled to take the car—in a process that we call civil forfeiture—because it had been used to transport heroin. But Timbs had recently purchased the car for more than four times the amount of the maximum fine the state could have assessed against him for that. The Supreme Court held that forfeiture would violate the Eighth Amendment's excessive fines clause.

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Far too little attention is paid to the Ninth and Tenth Amendments, sometimes referred to as the Rights and Powers Amendments. As we all learned in school, the Constitution that replaced the original Articles of Confederation did not originally include a Bill of Rights. What we don't usually learn is that the omission wasn't because founders disagreed with each other about the importance of those rights.

The founders who objected to adding a Bill of Rights felt it was unnecessary because they saw this new government that they created as having only such authority to exercise power as they had specifically delegated to it. And those powers didn't include censoring speech, dictating religious beliefs, or otherwise infringing on what they all agreed were fundamental liberties. Since government hadn't been given the power to infringe those individual rights, founders, like Alexander Hamilton argued we didn't need a Bill of Rights. Hamilton and others who opposed adding those written guarantees to the Constitution were worried that any effort to list fundamental liberties the government was forced to respect would inevitably miss some.

Nevertheless, as those of you who studied American history know, it quickly became clear that the new constitution wasn't going to be ratified without a Bill of Rights that spelled out specific rights that the government was forbidden to infringe. The compromise that was eventually reached between the Federalists and Anti-Federalists was a Bill of Rights in which the first eight amendments list specific rights to be protected.

But the Ninth and Tenth address the concerns of those, who like Hamilton, worried that any list of protected rights would inevitably leave some out. The Ninth and Tenth Amendments were added to make it clear that just because a right wasn't 'enumerated"—in other words, it wasn't on the list—didn't mean that people didn't have that right...

and to affirm that the powers that weren't specifically given to the federal government or kept by the states were retained by the people. The Ninth and Tenth Amendments remind us that the founders did not view the Bill of Rights as a document that granted rights, but as a document forbidding government from infringing on the rights to which we are entitled simply by virtue of being human. And once again, I'll remind you of our next lecture, we'll share with you additional resources making some of this background clear.

America's early history established ideals that we didn't, and still don't, always live up to. The last time the Constitution changed substantially was when the Fourteenth Amendment was ratified.

Over the years, other amendments and court rulings have changed the way we view the Constitution and the Bill of Rights. The courts have had to apply the values and principles of our original Constitution to facts on the ground that the Founders could never have imagined. Constitutional rights have also been augmented by statutory rights, and especially by civil rights laws.

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As I indicated in our last lecture, there are too many Americans who don't know the difference between civil rights and civil liberties. The distinction is lost on many, if not most citizens and on a good deal of legislators. Remember, civil liberties are the individual freedoms that are protected by the Bill of Rights. They are rights that agencies of government must respect. Citizens of the new United States refused to ratify the Constitution unless a Bill of Rights was added, specifically protecting them against official infringements of their human rights. Among our civil liberties are the right to free expression, the right to worship or not as we choose, and the right to be free from unreasonable searches and seizures.

After the Civil War, the Fourteenth Amendment added the equal protection clause, which prohibited government from treating equally situated citizens unequally. As I have repeatedly emphasized, only the government can violate your civil liberties. Civil rights took a lot longer to achieve, and they are still a great deal more controversial. Congress passed the Civil Rights Act in 1964, and civil rights laws protect people against private acts of discrimination in employment, housing, and education. The original Civil Rights Act applied to businesses engaged in interstate commerce—businesses that held themselves out to be public accommodations. And state and local civil rights acts followed passage of that federal law.

Unlike our civil liberties, which enumerate the rights that are being protected, civil rights laws generally include a list of characteristics that can't be used to disfavor or discriminate against people: race, religion, gender, and so forth. Why is it important to know the difference between rights that are rooted in the Constitution and those that are created by statute? Well, first of all, it helps Americans better understand our national history and better understand the arguments made by groups that remain unprotected by civil rights laws.

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For example, LGBTQ people in states with civil rights laws that do not prohibit discrimination on the basis of sexual orientation can legally be fired just for being gay. Landlords can refuse to rent apartments to them. The Fourteenth Amendment's equal protection clause prohibits government employers from treating gays and lesbians differently, but it says nothing about private employers.

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Similarly, knowing which rights are constitutionally protected should relieve concerns expressed by some religious groups that passage of a civil rights law will force them to moderate their religious beliefs or prevent their pastors from preaching about those beliefs.

Since the free exercise clause is a constitutional guarantee, the amendment of a civil rights measure to include protection for gays and lesbians would have absolutely no effect on the practices or preaching of churches that consider homosexuality to be sinful. Just as legal recognition, civil recognition, of divorce didn't mean that the Catholic Church had to change its theological opposition to that practice, these laws do not affect religious practices at all.

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The great arguments between the Federalists and the anti-Federalists are arguments we are still having. What's government for? How much power should government have, and in what areas of our common life?

Those arguments have been made much more complicated by globalization, by the emergence of multinational corporations that wield as much or more power than some countries, and by the ubiquity of social media platforms and the algorithms that they use. We continue to struggle with efforts to ensure that government is responsive to *We the People*, and not just to wealth and power.

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Finally, we need to acknowledge that some of the constitutional structures and democratic norms we have lived with are no longer functioning properly. We are currently seeing arguments about which ones those are: gerrymandering, electoral college, the filibuster, and many others. A satisfactory resolution of those arguments will require citizens who understand the history and the development of our Constitution and our Bill of Rights, who understand how our system operates and what the various proposals would change.

I hope that these videos and the references that I'm about to provide have been educational... and that they've motivated a lot of individual further research. I'm really grateful to Women for Change and the Indiana Bar Foundation for sponsoring them...and especially grateful to all those who have taken time to participate in discussions about America's constitutional system. Thank you all.

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