

MODULE 9 • PART TWO BEGINS

Introduction to Fundamental Rights; The State Action Doctrine

Civil Rights Cases • Marsh • Shelley • Burton • Jackson • Halleck • Brentwood • Lindke • Garnier

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Where do rights come from?

Part Two begins: what no government may do.

THE ORIGINAL TEXT

- Habeas corpus.
- No bills of attainder or ex post facto laws.
- Contracts; criminal juries.

THE AMENDMENTS

- The Bill of Rights.
- The Thirteenth, Fourteenth and Fifteenth.

UNENUMERATED

- The Ninth Amendment.
- Due process, equal protection.

Part One asked who may act. Part Two asks what no government may do.

The Fourteenth Amendment: three doors

Rights against the States. Which clause carries which right.

PRIVILEGES OR IMMUNITIES

- Slaughter-House: no real content.
- Saenz: the right to travel.

DUE PROCESS

- Procedural and substantive.
- Contract; family, marriage, privacy.

EQUAL PROTECTION

- Classifications.
- Modules 10 to 11A.

Each clause is a door. Most of Part Two is about which door fits.

The Ninth Amendment

A rule of construction — and the Court has rarely leaned on it.

THE TEXT

- The list of rights “shall not be construed to deny or disparage others.”

HOW IT IS USED

- A rule of construction.
- Not an independent source of rights.

Goldberg, 1965: the list of rights is not to “be deemed exhaustive.”

A method for Part Two

Two sets of questions for every rights case.

A • QUESTIONS OF SCOPE

- What is fundamental?
- How broad is the right?
- What counts as an infringement?

B • QUESTIONS OF JUSTIFICATION

- The end: the government's interest.
- The means: the regulation.
- The fit: tailoring, over- and under-inclusion.

Before either: is there a government at all? That is state action.

The Civil Rights Cases, 1883

The Constitution binds governments, not private persons.

THE RULE

- The Fourteenth Amendment reaches the State.
- Not private discrimination.

THE EXCEPTION

- The Thirteenth Amendment reaches private slavery.
- Reaffirmed: Morrison, 2000.

“Individual invasion of individual rights is not the subject-matter of the amendment.”

When a private party is the State

Halleck's list: three ways in.

1

Public function

Traditional and exclusive —
both.

2

Compulsion

The State dictates the
decision.

3

Joint action

Entanglement; entwinement.

Regulation alone is not enough. Neither is money, or a license.

Public function: Marsh and Terry

A company town, and a whites-only pre-primary.

MARSH, 1946

- A company town's sidewalk.
- Private owner, public function.

TERRY, 1953

- A private pre-primary.
- “The only effective part” of the election.

Shopping centers: the Court flirted, then refused (Hudgens, 1976).

Public function narrowed: Jackson, Halleck

A regulated utility and a public-access channel are private.

JACKSON, 1974

- A regulated monopoly utility.
- Electricity is not a State function.

HALLECK, 2019 (5-4)

- Public-access channels: private.
- Hosting speech is not a State function.

The State must have performed the function “traditionally and exclusively.”

Entanglement: Shelley v. Kraemer

Racially restrictive covenants, enforced by state courts.

THE COVENANTS

- Private agreements: private.
- Kept voluntarily: no state action.

THE ENFORCEMENT

- A court order is state action.
- Enforcing them denies equal protection.

The puzzle: if a court's enforcement is state action, what private choice is not?

Entanglement: Burton, Moose Lodge

A restaurant in a public garage; a club with a liquor license.

BURTON, 1961

- A restaurant inside a public garage.
- The State is a “joint participant.”

MOOSE LODGE, 1972

- A private club with a liquor license.
- A license is not state action.

Otherwise electricity, water and fire protection would make everyone the State.

Entwinement and joint action

A school sports association; a creditor with a sheriff.

BRENTWOOD, 2001

- An association run by public schools.
- “Pervasive entwinement”: the State.

LUGAR, 1982

- A creditor, a clerk and a sheriff.
- Joint action with officials.

Private in name, “overborne by the pervasive entwinement” of public officials.

Lindke v. Freed, 2024

When is a public official's social-media account the State?

1

Actual authority

To speak for the State on the matter.

2

Purported to use it

In the posts at issue.

Appearance and function matter at step two — they cannot supply step one.

Current case: Garnier v. O'Connor-Ratcliff

Lindke applied on remand: school-board trustees blocking parents.

STATE ACTION

- Real authority: state law and bylaws.
- Exercised on pages run as official.

THE FIRST AMENDMENT

- Blocking was content-neutral.
- Indefinite blocking: not narrowly tailored.

The lesson for officials: keep the official account official.

Is this private party the State?

The module's cases, sorted.

A company town	Marsh, 1946	Yes
A pre-primary that decides elections	Terry, 1953	Yes
A regulated utility	Jackson, 1974	No
A public-access cable channel	Halleck, 2019	No
A court enforcing a covenant	Shelley, 1948	Yes
A restaurant in a public garage	Burton, 1961	Yes
A club with a liquor license	Moose Lodge, 1972	No
An association of public schools	Brentwood, 2001	Yes

Marsh · Terry · Jackson · Halleck · Shelley · Burton · Moose Lodge · Brentwood.

For discussion: the new frontier

My board's "potential areas for litigation."

THE SITUATIONS

1. A private company runs a prison.
2. A platform removes posts after the governor calls.
3. A contractor detains protesters overseas.
4. A mayor blocks a critic on "Mayor Pat — Official."

QUESTIONS FOR DISCUSSION

1. Traditional and exclusive?
2. Compelled, or only asked?
3. Public function or joint action?
4. Real authority, used in the posts?

Module 9 on one slide

One line per rule.

THE LINE, ONE RULE AT A TIME

- The Constitution binds governments (Civil Rights Cases).
- Public function: traditional and exclusive (Marsh; Halleck).
- Entanglement: the State as joint participant (Shelley; Burton).
- Entwinement: public officials run it (Brentwood).
- Officials online: real authority, actually used (Lindke).

Next — Module 10: equal protection.

Next: Module 10 — Equal Protection: A Framework for Analysis. Readings on the course website.