

Political Freedom: Its Allies, and Its Enemies

Siobhan M charts the evolution of formal constitutional rights under the U.S. legal system, and the social and economic forces which underpin them.

By Siobhan M.

In the nearly two years since October 7, 2023, the growing movement for Palestinian liberation has been met by harsh backlash. [Universities](#), [police](#), and [prosecutors](#) across the U.S. crack down on calls to end Israel's genocide in Gaza using spurious accusations of antisemitism and support for "terrorists." Just weeks ago, in my city of Cambridge, MA, police violated the city's longstanding ban on chemical weapons, [using pepper spray on BDS protestors](#) opposing Capital One's funding of Israeli arms dealers. Non-citizens are particularly vulnerable to political repression. [Rümeysa Öztürk](#) was kidnapped in Somerville and imprisoned by federal agents after she wrote an op-ed criticizing Israel's genocide.

While freedom of speech, assembly, and press are widely regarded as core civil liberties in the U.S. political system, the Palestine exception looms large. This begs the question: if the U.S. government can disregard nominally essential civil liberties in service of the U.S. empire and its client states, what recourse do working and oppressed people have to protect their right to full social and political participation?

Our political system has many tools to suppress working-class power at its disposal. They include, among others: our unelected Supreme Court—which recently gave a green light to [mass human trafficking](#) and imprisonment of immigrants in concentration camps—our imperial President's authority to wage war on working-class people from [Yemen](#) and [Iran](#) to [LA](#) and [DC](#), our aristocratic Senate privileging [land over people](#) and abetting Republican minority rule, and our brutal carceral and immigration systems which create an underclass of workers without voting rights.

These are not simply the unintended consequences of a flawed "democracy"—they are features of a constitutional system designed to suppress majority political participation by workers and enslaved people. While most in DSA agree that the Constitution has elements which impede our fight for democratic socialism—a proportional legislature and universal suffrage are included in DSA's 2024 [Workers Deserve More](#) program—some members argue that it is dangerous to openly undermine the Constitution because we must defend its civil protections like freedom of speech and press.

To be clear, social and political freedoms are essential. But they are not protected by a piece of paper—they were won, and are protected, by powerful class interests. The capitalist courts at best only provide flimsy and temporary safeguard, and at worst actively undermine our rights. For lasting social and political freedoms of the working class, we must fight to overthrow the whole constitutional order and win pluralistic working-class rule in a democratic socialist republic.

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In the popular understanding of U.S. history, the Bill of Rights—the first ten amendments to the Constitution—was passed as a check on government interference against individual liberties. When it first went into effect in 1791, though, no one understood it as protecting an individual's freedom of speech or press, their right to an attorney at trial, or any of the other protections therein. The Bill of Rights merely prohibited the *federal* government from restricting these freedoms. State governments, on the other hand, were given free rein. The Bill of Rights was not about individual liberties—it was a set of concessions to the Jeffersonian anti-federalist local elites in the name of “states’ rights.”

This limited legal interpretation was affirmed by *Barron v. Baltimore* in 1833, in which the Court ruled the Fifth Amendment “not applicable” during a dispute over harbor rights because, compared to the federal government, states are “distinct governments framed by different persons and for different purposes.” The Court justified its decision using a specific history of Constitutional ratification—anti-federalists in several states demanded, as a condition of ratification, “security against the apprehended encroachments of the General [Federal] Government—not against those of local governments.” The Court’s unanimous decision reflected the common sense of the time.

The legal foundations for the eventual “incorporation”—or applicability of the Bill of Rights to state and local governments—were laid during early Reconstruction, when the power of the Radical Republicans was at its peak. During the Civil War, enslaved people in Confederate states [refused to work](#) and crossed enemy lines in droves, worsening the economic woes of the Confederacy and bolstering the ranks of the Union’s military and labor force. As the war drew to a close, Republicans controlling Congress saw formerly-enslaved people as a new base of power in the flailing Confederacy. In an attempt to safeguard the political participation of this base, they passed Reconstruction amendments like the Fourteenth Amendment, which purported to block states from depriving “any person of life, liberty, or property, without due process of law” (“Due Process Clause”) or denying “to any person within its jurisdiction the equal protection of the laws” (“Equal Protection Clause”).

Some proponents of the Reconstruction amendments, like Sen. Charles Sumner, [argued](#) these amendments should be understood to dramatically reshape “every clause and every line and every word” of the Constitution to “be interpreted uniformly and thoroughly for human rights.” Other conservative or moderate Republicans, and Democrats like President Andrew Johnson, [believed](#) in keeping as much of the pre-war Constitutional order as they could salvage. In any event, the practical effects of Reconstruction were not decided by politicians’ wordsmithing and clever argumentation, but by the capacity of various classes and factions within them to mobilize economic and military power.

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Lee's surrender at Appomattox Courthouse and Sherman's devastating march to the sea demonstrated the Confederacy's inability to continue large-scale military resistance to the Union's armies. With the collapse of the Confederate military, the Republican-controlled Congress was able to dictate conditions of re-entry of Confederate states to the U.S., obliging their approval of the Reconstruction amendments.

Throughout and following the Civil War, many Black leaders and some of their white allies connected legal equality to calls for redistribution of slaveholders' land to the families that worked it. Sherman heeded these calls in some areas under control of his army, issuing his [Special Field Order No. 15](#) to grant 400,000 acres of Confederate land to freedmen. Within a year of Sherman's redistributive attempt, however, Johnson [ordered](#) most of the land returned to its former white owners and sent in federal troops to evict freedmen. Without land redistribution, the agricultural labor force of the south shifted from enslaved labor to sharecropping. This maintenance of the economic status quo all but ensured the eventual restoration of legal white supremacy across the former Confederacy.

President Johnson consistently intervened to frustrate Reconstruction, and his [1867 annual message to Congress](#) was a broadside against Congress's decision, over his veto, to split the former Confederacy into military districts subject to martial law. He referenced the Constitution more than 50 times in the speech, primarily to argue Congressional Reconstruction violated Confederate states' constitutional rights. He also came out in favor of the eradication of the fiat currency system adopted by Lincoln to finance the Civil War. In doing so, Johnson sided with the northern banker segment of the Republican coalition and against expansionist western farmers and impoverished southern freedmen.

A few months after his speech, Johnson was impeached by the House. Were Johnson removed, he would have been succeeded by Benjamin Wade, a leader of the Senate's Radical Republicans. Wade was a former laborer who drew the ire of northern capital for his ties to labor unions and support for fiat currency, which threatened bankers' profits on loans and represented a reprieve for debtors. When several Republican senators flipped and Johnson was acquitted by a single vote, Wade's support for fiat currency was a key factor. *The Detroit Post* [wrote](#) that "Andrew Johnson is innocent because Ben Wade is guilty of being his successor."

Johnson finished out his term to the end, and was succeeded by former Union General Ulysses Grant. Grant was somewhat more willing than Johnson to impose Reconstruction on the former Confederacy, and used Congress's Enforcement Acts and Ku Klux Klan Act to stamp out the first iteration of the Klan. However, with rising unemployment from the financial panic of 1873, repeated [uprisings](#) by white southerners against Republican voters and elected officials began to overwhelm the political will of northern Republicans. Reconstruction formally ended when Republican Rutherford B. Hayes was handed the presidency by southern Democrats in exchange for his promise to withdraw the remaining federal troops from the South.

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As Reconstruction wound down and southern landowners reasserted control over the levers of political power, the Supreme Court again weighed in on the applicability of the Bill of Rights to states in *United States v. Cruikshank* (1876). This case involved the federal prosecution of white perpetrators of the Colfax massacre, where dozens of Black freedmen assembled to uphold Louisiana's disputed gubernatorial election were slaughtered. The Court ruled in favor of the murderers, holding that the right to free assembly "was not intended to limit the powers of the State governments in respect to their own citizens." It reiterated this limited view of the applicability of the Bill of Rights in *Presser v. Illinois* (1886), where it upheld convictions of socialist militia members, arguing the Second Amendment did not prevent states from prohibiting their residents from forming militias.

According to these decisions, citizens had no right to protect themselves, and the federal government had no authority to intervene to protect citizens' rights to speech and assembly. When considering the property rights of railroad tycoons, however, and not the political rights of Black southerners or socialist militants, the Supreme Court held a different opinion.

In *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago* (1897), the Court broke with established precedent and "incorporated" the Fifth Amendment's prohibition on taking property without compensation—previously applied only to the federal government—to apply to state and local governments. Incorporation rests on the idea that the Due Process Clause of the Fourteenth Amendment gives local governments some obligation to follow constitutional restrictions. This ruling—granting a titan of industry's request to raid Chicago's coffers—is indicative of the Court's willingness to change its tune when appealed to by the ruling class.

In 1925, the Court theoretically extended incorporation to the First Amendment's free speech and press protections in *Gitlow v. New York*. This case involved the prosecution of a socialist politician for publishing his faction's revolutionary literature in violation of New York's "Criminal Anarchy Law" during the first Red Scare (1919-1920). The Court ruled that, in theory, the First Amendment protected the right to publish free of repression by state or local governments. However, the Court also took the opportunity to distinguish revolutionary socialist ideas from protected discourse which does not threaten capital's hegemony over the state. Noting that Gitlow was "a member of the Left Wing Section of the Socialist Party, a dissenting branch or faction of that party formed in opposition to its dominant policy of 'moderate Socialism,'" the Court ruled that his printing and distribution of the faction's manifesto and program could be outlawed. First Amendment protections did not include "publications or teachings which tend to subvert or imperil the government." Here, the Court made explicit that it would only tolerate speech that does not threaten the ruling class.

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In October 1929, the stock market crashed, plunging much of the world into the Great Depression and shaking the foundations of capitalist governments. The spiking unemployment rate empowered socialist and communist groups like the Communist Party's Unemployed Councils, which held [over 700 protests](#) across the country in the early 1930s. In this context,

lawyers from CPUSA's International Labor Defense twice appealed the death sentences of nine Black teenagers convicted by all white juries in *Powell v. Alabama* (1932) and *Norris v. Alabama* (1935). The teenage boys, accused of rape, were nearly lynched before being rushed through show trials with attorneys who refused to help them. The Court, facing militant working-class pressure, twice sided with CPUSA's lawyers and ordered retrials—first, because the teenagers were not adequately represented, violating the thus-incorporated right to counsel in capital cases, and second, that Black people were excluded from the juries, violating the Equal Protection Clause of the Fourteenth Amendment.

While the trials of the boys dragged on for years, these rulings created precedent for the right of the accused to be represented by attorneys in state—and not just federal—capital cases, and judged by a jury of their peers. Once this precedent was set, and with no desire to spark additional unrest, the Court incorporated additional rights. These included the freedom to exercise religion for conscientious objectors to mandatory conscription in *Hamilton v. Regents of University of California* (1934), and freedom of assembly for the Communist Party (when not advocating for revolution) in *De Jonge v. Oregon* (1937).

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Following WWII, the U.S. looked to promote its national identity as an opponent of the U.S.S.R. U.S. politicians [contrasted](#) “individual liberties” with Soviet “totalitarian[ism]” and “our [western Christian world](#)” with “the atheistic Communist world.” Along these lines, further incorporation of rights continued in the immediate post-war period. In *Everson v. Board of Education* (1947), the Court ruled that individuals had nominal freedom from state or local government establishment of religion. It also found, however, that bussing students to Christian schools did not represent state establishment of religion. *In re Oliver* (1948) extended the right to a public trial to state and local courts.

With the ramp up of the Cold War and the second Red Scare, the U.S. ruling class decided to temper its liberal “democratic” national identity with active suppression of the organized left. The Court followed Sen. Joseph McCarthy and his allies in both ruling parties, backtracking on its decision in *De Jonge v. Oregon*. In *Dennis v. U.S.* (1951), it upheld convictions of eleven Communist Party leaders under the Smith Act, holding that even without specific evidence of calls for revolution, all Communist Party activities were part of a “conspiracy to advocate” for “an attempt to overthrow the Government by force and violence.”

By the 1960s, however, the rise of the civil rights movement and, later, the anti-war movement stretched state capacity for repression increasingly thin as both movements faced harsh treatment by the police and prosecutors. The Court issued a string of incorporation rulings designed to limit abusive police and prosecutorial practices in response. These included *Mapp v. Ohio* (1961), prohibiting “unreasonable” searches and seizures; *Robinson v. California* (1962), prohibiting cruel and unusual punishment; *Gideon v. Wainwright* (1963) and *Argersinger v. Hamilin* (1972), expanding right to counsel; *Malloy v. Hogan* (1964), incorporating freedom from self-incrimination; *Pointer v. Texas* (1965) and *Washington v. Texas* (1967), granting rights to

compel and confront witnesses; *Parker v. Gladden* (1966), *Klopfer v. North Carolina* (1967), and *Duncan v. Louisiana* (1968), promising a speedy and impartial jury trial; and *Benton v. Maryland* (1969), prohibiting multiple state prosecutions for one offense. With these rulings, the doctrine of incorporation largely reached its modern form and covered most of the Bill of Rights.

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Even now, though, the words of the Constitution do not protect us. Centuries of U.S. history show us that, unless forced to concede, the courts protect capital and white supremacy and repress the efforts of working and oppressed people to fight back. Despite the nominal protections of the First Amendment, we have all borne witness to the Palestine exception to free speech, with opposition to Israel's genocide recast as antisemitism and used to exact academic, professional, and even criminal repercussions.

Despite the slew of newly-incorporated rights in the criminal legal system, the U.S. prison population has ballooned from [198,870](#) in 1970 to [1,230,100](#) in 2022. So long as social and political liberties are subject to the whims of the ruling class and their lapdogs on the Supreme Court, they will be used to weaken working-class efforts to resist capitalism, imperialism, and carceral violence—whether through removing checks on capital, placing revolutionary speech, press, and assembly outside the bounds of protected discourse, or by granting nominal concessions to ease class tensions.

Until workers assume democratic control over both the engines of the economy and the halls of political power, any protections we win will be temporary bandages for the wounds of capitalist exploitation, ready to be ripped away at the first sign that our class is not prepared to defend them.

Popular misconceptions about the origins and nature of U.S. social and political liberties persist, supported by classroom history curricula and the near-religious devotion to the Constitution demanded by much of U.S. society. The Constitution and Bill of Rights are still broadly looked upon favorably. Some DSA members, recognizing the uphill battle required to shake this social misunderstanding, dismiss pro-democracy agitation against the Constitution as hopeless or, more generously, untimely.

But politics does not simply reflect majorities—it creates them. We cannot hope to build a truly democratic society, with full social and political rights for all, by tailing the state propaganda that our imperial presidency, aristocratic Supreme Court, and the like somehow advance democracy and individual liberties. In order to build a majority to seize power, socialists must be consistent, principled opponents of the capitalist rule perpetuated by the Constitution. We must be consistent proponents of democracy—uniting the economic, political and social demands of working-class and oppressed people. Only a workers' democracy, backed by a workers' economy, can truly safeguard our rights.

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