Unit 2: Civil Liberties and Civil Rights

Ch 18: Civil Liberties
Principles of Civil Liberties & Civil Rights

Distinctions / Definitions

• Civil Liberties
  – Involves basic freedoms such as speech, religion, etc.
  – Protected by the 1st Amendment

• Civil Rights
  – Involves protections against discriminatory treatment.
  – Protected by 5th (national gov) and 14th Amendments (state)
Sources / Methods of Protection

• The Constitution
  – No *ex post facto laws* or *bills of attainder*, and *habeas corpus* protection

• The Bill of Rights

• Legislation

• Court Decisions
  – *Brown v. Board* and *Roe v. Wade*

• State Constitutions
Protections are relative / not guaranteed

– Rights / protections are exercised only as long as they do not infringe upon the rights of others

– **Balancing Test**: courts balance individual rights and liberties with society's need for order and stability

To Whom are Protections Guaranteed?

– Most rights and liberties are granted to all in US regardless of citizenship

– Exceptions: non-citizens may not vote, serve on juries, stay in the US unconditionally, or hold public office or certain jobs
Why do liberties come into conflict?

• Rights in Conflict
  – The protection of one groups rights comes in conflict with the protection of another groups rights
    • Police powers v. ACLU desire to place further limits

• Entrepreneurial Politics
  – Desire to protect the government has led to the passage of several laws designed to limit free speech during times of war
    • The Sedition Act (1798), Espionage and Sedition Acts (1917 & 1918), Smith Act (1940), etc.

• Political Culture in Conflict / Competing Political Principles
  – “Americanism” espoused the values of White Anglo-Saxon Protestants
  – Immigrants have brought with them a new way of viewing / interpreting the Constitution and its protections
Federalisms Impact on Civil Liberties

– Bill of Rights was originally intended to protect against the Federal Gov [Barron v. Baltimore (1833)]

– Commonly believed that people would have no need for protections from state gov

– Citizens needed protection from new, powerful, and distant national gov
Modifications caused by 14th Amendment

– Due Process Clause used to apply most provisions of Bill of Rights to the states

– Total Incorporation view, would like to see all provisions applied to states (argues for the nationalization of the Bill of Rights)

– Selective Incorporation view, would only apply some of the provisions on a case-by-case basis over time

Establishing Case:

– Gitlow v. New York (1925)
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- Benjamin Gitlow, a communist, was convicted of criminal anarchy in state court.
- He was distributing flyers telling people to refuse to report for the draft.
  - The Supreme Court upheld the conviction but also added that states may not deny freedom of the speech and press.
  - These were protected by the 14th Amendment’s due process clause.
Which rights must state uphold?

– The Palko Test: A right that is so important that liberty could not exist without it must be upheld by the states

– All provisions of the Bill of Rights have been incorporated (nationalized) except for: 2\textsuperscript{nd}, 3\textsuperscript{rd}, 7\textsuperscript{th}, and 10\textsuperscript{th} Amendments

9\textsuperscript{th} Amendment (Due Process)

– No complete list of rights is possible (this amendment was created to serve as a general protection of natural rights)

– “Other rights protected by 9\textsuperscript{th} Amendment
  • Privacy [Griswold v. Connecticut (1965)]
  • Travel (people may move freely from state to state without the need of passports)
9th Amendment (Due Process) - continued

– Political Association (Boy Scouts of America v. Dale, 2000) The Boy Scouts may bar homosexuals from becoming leaders via 1st [freedom of speech / religion] and 9th Amendments [freedom of association]

– Homosexual Conduct (Lawrence v. Texas, 2003) states may not pass laws banning homosexuality via 1st Amendment [right to privacy]
Freedom of Religion

• **The Establishment Clause:** Government may not establish an official religion

• Differing ways of interpreting the meaning of the *Establishment Clause*:
  
  – Accommodationist View- government should allow some blending / compromise. Protects freedom OF religion.
  
  – Separationist View- government should allow no blending of church and state. Protects freedom FROM religion. Sometimes referred to as a “Wall of Separation”
• Differing ways of interpreting the meaning of the *Establishment Clause* - continued

  – Endorsement View- Forbids governmental practices that endorse religion (see examples in notes)

  – Non-preferentialist View- The Constitution prohibits favoritism towards a *particular* religion but allows governmental support for religion *in general.*
The Lemon Test

- **Lemon v. Kurtzman**: SC struck down a Penn law that used federal money to pay teachers salaries in nonpublic (Catholic) schools. Created what became known as the “Lemon Test”.

- **The Lemon Test**: used to determine if a statute practice violates the Establishment Clause and defines “permissible and impermissible aid”

- In order to receive federal aid (or be considered Constitutional) the program / law must;
  1. Serve a Non-secular purpose
  2. Must not advance nor inhibit religion
  3. Promote / create an excessive entanglement with Government

*If any of the above conditions are present, the statute or practice is unconstitutional.*
Key “Lemon” Cases

Familiarize yourself with the cases below. Each deals with some aspect of the freedom of religion.

- Everson v. Board (1947)
- Zorach v. Clauson (1952)
- Abbington v. Schempp (1963)
- Epperson v. Arkansas (1968)
Free Exercise Clause

• Provides “Freedom of Worship”
• A contradiction?
  – Establishment Clause v. Free Exercise

• Distinctions:
  – Belief: Always allowed / protected
  – Practice: May be restrained / denied
    • Freedom of worship is relative, not absolute
    • Balancing test is used to judge
Religious freedom has been through many struggles over the years. The current interpretation forces the religious group to PROVE that the government unfairly / unjustly denied them their religious freedom. [It is easier for states to deny / ban religious practices]

- **Restricted Practices**
  - Reynolds v. US (1879): banned polygamy

- **Permitted Practices**
  - W. Virginia v. Barnette (1943): JW’s do not have to salute the flag
  - Wisconsin v. Yoder (1972): Amish don’t have to attend school beyond 8th grade
Freedom of Speech

• Free speech involves the freedom to give and hear speech

• Protection / limitation
  – Belief is protected
  – Action can be the most restricted
  – Speech falls somewhere in-between
Supreme Court Tests of Free Speech

• Bad Tendency Doctrine
  – States (not the courts) must determine how / when to limit speech
  – Speech may be limited when it leads to harmful or illegal actions
  – Rules subject to the concept known as *Strict Scrutiny*.

**Strict Scrutiny**: Applies to rights that go to the heart of freedom (such as speech). In order for a government to restrict such a freedom, the statute (law) must pass three tests
  1. Compelling government interest
  2. The law must be narrowly tailored (in other words, it must be specific)
  3. The least restrictive means must be applied (cannot be too heavy-handed)
Supreme Court Tests of Free Speech

• Clear and Present Danger Doctrine:
  – Schenck v. US (1919)
  – Speech may be suppressed if it poses an *imminent* threat to society

• Preferred Position Doctrine:
  – Speech is the most important of liberties and therefore should have the most stringent of protections
  – Calls for virtually no limits place upon it

• Prior Restraint:
  – Blocking speech before it is given (ex. Arresting someone before they go on stage to make speech)
  – Court declares such action unconstitutional
Supreme Court Tests of Free Speech

• Vagueness
  – Speech restrictions cannot be written in a vague manner, they must be clear to the average person
  – Rules limiting speech must be specific (see *Strict Scrutiny* and the Preferred Position Doctrine)

• Least Drastic Means Test
  – Speech should not be limited if there are other ways / means to handle the problem
Supreme Court Tests of Free Speech

• Political Speech
  – Political speech is even more heavily protected
  – It is deemed to be extremely important to democracy, therefore it has special protection and is less likely to be restricted than other forms of speech
  – Political speech still may not advocate violence or illegal activity

• “Fighting Words”
  – Not protected by 1st Amendment
  – Speech that leads to violence may be restricted
  – Sometimes these limitations are not clear
    • Racial epitaphs
    • Hate speech
    • Subject to interpretation by the courts
Symbolic Speech
- Lies somewhere between speech and action – is usually protected speech
- Burning the flag in protest is legal (Texas v. Johnson, 1989)
- Burning a draft card is not (US v. Obrien, 1968) – What is the difference?
- Protests involving the wearing of specially designated clothing (black armbands, buttons / pins, etc. constitutional

The key to protecting free speech lay in protecting the right to protest against the government without advocating violence or posing a danger to society.
Sedition

• Laws defining sedition have changed over the years
  – Past: merely criticizing the government
  – Smith Act: banned advocacy of overthrowing the government (clear and present danger)

• Present: may be prohibited only when;
  – There is imminent danger of an overthrow of government or violence, and
  – People are urged to do something rather than merely believe in an idea
Freedom of the Press

• Balancing Test Applies

• Areas of Controversy (individual liberty v. national safety)
  – Right of Access (to information)
    • Generally granted to the press (not always)
    • Sunshine Laws: release of information
      – Sunshine laws were first created in the mid-70s in a bid to increase public disclosure of governmental agencies. Sunshine laws do not allow all citizens to attend meetings, but they do ensure that media and representatives of the public can attend.

• Freedom of Information Act, 1966
• Electronic Freedom of Information Act, 1996
Freedom of the Press: Areas of Controversy

• Executive Privilege
  – Presidents have the right to withhold information from the courts
  – US v. Nixon (1974): President usually has Ex. Privilege but not in cases where crime was involved.
Freedom of the Press: Areas of Controversy

• Gag Orders
  – Limits may be placed on reporters doing stories on controversial trials
  – This is designed to protect a person’s right to a fair trial
  – Judges fear information leaks to the press may unduly influence the jury / jury pool
Freedom of the Press: Areas of Controversy

• Shield Laws
  – Protect reporters from having to reveal their sources
  – Congress has not officially sanctioned this form of protection
  – Many states have passed shield laws
  – Protection is granted through tradition
Freedom of the Press: Areas of Controversy

• Defamation of character
  – Not protected by 1st Amendment
  – Types of defamation
    • Libel: Defaming a person using the written medium
    • Slander: A public utterance (spoken word) that holds a person up for contempt, ridicule, or hatred. Must have the effect of damaging a person’s reputation.
  – To win a defamation case it must be shown that allegations were false and that they damaged the reputation of the victim
Freedom of the Press: Areas of Controversy

- **Obscenity**
  - Not protected by 1st Amendment
  - Old standard of proving obscene
    - “material must be utterly without redeeming value”
  - New standard: Miller v. California (1973)
    - Community standards must be violated
    - State obscenity laws must be violated
    - Material must lack serious literary / artistic / or political value
  - “Virtual” Child pornography is protected by 1st Amendment: Ashcroft v. ACLU (2002)
Freedom of the Press: Areas of Controversy

• Student Press
  – High school papers may be restricted. Hazelwood v. Kuhlmeier (1988)
  – Not a public forum
  – Subject to the restrictions of other high school activities
Freedom of the Press: Areas of Controversy

• Restriction of public airwaves
  – Radio and TV stations must be licensed by FCC
    • Subject to FCC rules / regulations
    • Must dedicate a specific amount of time for public service announcements, news, and children's programming
  – FCC restricts the use of obscene words
    • Fines imposed for violation
  – The Internet
    • Supreme Court struck down the Communications Decency Act (1997) that would have prohibited the circulation of “indecent” material on the internet to minors
Freedom of Assembly and Petition

• Implemented by 14th Amendment
• Right to petition the government for redress of grievances
• Used to justify lobbying
• Provides Constitutional basis for the freedom of association
Freedom of Association

• Two types:
  – Political Association:
    • Belonging to political parties, special interest groups, and Political Action Committees (PAC’s)
  – Personal Association
    • Belonging to private clubs or groups
  – Limits placed on Federal employees
    • The Hatch Act (1939): made it illegal for civic employees to take an active part in campaigning / soliciting for funds