

## CIVIL LIBERTIES

- **Civil liberties** are the personal rights and freedoms that the federal government cannot abridge, either by law, constitution, or judicial interpretation.
- These are limitations on the power of government to restrain or dictate how individuals act.

## The Bill of Rights

- The Bill of Rights consists of the first ten amendments to the Constitution and includes specific guarantees such as free speech, free press, and religion.
- The proposed Bill of Rights was sent to the states for ratification and was approved in 1791.

## The Incorporation Doctrine

- The Bill of Rights was designed to limit the powers of the national government.
- In 1868, the Fourteenth Amendment was added to the Constitution and its language suggested that the protections of the Bill of Rights might also be extended to prevent state infringement of those rights.
- The amendment begins: "No state shall....deprive any person, of life, liberty, or property without due process of law."
- The Supreme Court did not interpret the 14th Amendment that way until 1925 in *Gitlow v. New York*.

## The Incorporation Doctrine

- In 1925, the Court ruled in *Gitlow v. New York* that states could not abridge free speech due to the 14th Amendment's Due Process Clause.
- This was the first step in the development of the incorporation doctrine whereby the Court extended Bill of Rights protections to restrict state actions.
- Not all of the Bill of Rights has been incorporated. For example the 2<sup>nd</sup> and 3<sup>rd</sup> amendments have not been incorporated.

## First Amendment: Freedom of Religion

The First Amendment states that: “Congress shall make no law

1. respecting an establishment of religion,
2. or prohibiting the free exercise thereof;...”

In this section we will look at each of these clauses of the First Amendment, the controversy and power struggles surrounding them and the way the Courts have interpreted and applied them.

## Founding Fathers

- While not all of the founders endorsed religious freedom for everyone, some of them notably Jefferson and Madison, cherished the right of all individuals to believe as they pleased.
- Many of the colonies and later states had established religions. After independence all but TWO of the former colonies had declared themselves “Christian states.”
- Non-Christian minorities were rarely tolerated (Jews could not hold office in Massachusetts until 1848).

## An Established Religion

means that the Government will create and support an official state church...often

- tax dollars support that chosen church.
- that church’s laws become the law of the land.
- the Nation’s leader usually appoint the leading clerics.
- often other religions are often excluded.

## Drafting the First Amendment

- They asked, “Should we establish a religion or not?”
- Thomas Jefferson wrote that there should be “a wall of separation between church and state.”



## Arguments for Religious Freedom

1. From the *Holy Roman Empire* to the *Church of England* history indicates that when church and state are linked, all individual freedoms are in jeopardy.

- If government is merely an arm of God what power of government is not justified?
- What could happen to religious minorities if government and religion were linked?

## Arguments for Religious Freedom

2. Many of the founding fathers believed that the spiritual purity and sanctity of religion would be ruined if it mixed with the worldly realm of politics.

If religion becomes part of the government, in Madison's words, it results in "pride and indolence in the clergy; ignorance and servility in the laity; in both superstition, bigotry and persecution."

## The Establishment Clause

- The Establishment Clause of the First Amendment guarantees that the government will not create and or support an official state religion.

## The Supreme Court and the Establishment Clause

- The Supreme Court has held fast to the rule of strict separation between church and state when issues of prayer in public school are involved.
- In the early 1960s, the Court ruled that official lead prayer and bible reading is unconstitutional.
- In *Engel v. Vitale*, the Court ruled that even nondenominational prayer could not be required of public school children.

## Prayer in School

- In *Lee v. Weisman* (1992), the Court continued its unwillingness to allow prayer in public schools by finding the saying of prayer at a middle school graduation unconstitutional.



## Lemon v. Kurtzman



- In 1971, the Court ruled that New York state could not use state funds to pay parochial school teachers' salaries.
- To be Constitutional the challenged law must
  1. Have a secular purpose
  2. Neither advance nor inhibit religion
  3. Not foster excessive government entanglement with religion.
- In 1980, this *Lemon Test* was used to invalidate a Kentucky law that required the posting of the Ten Commandments in public school classrooms.

## The Free Exercise Clause

- "Congress shall make no law.....prohibiting the free exercise thereof (religion)" is designed to prevent the government from interfering with the practice of religion.
- This freedom is not absolute.
- Several religious practices have been ruled unconstitutional including:
  - snake handling
  - use of illegal drugs
  - Polygamy
- Nonetheless, the Court has made it clear that the government must remain NEUTRAL toward religion.

## "See You at the Pole"

- Student participation in before - or after - school events, such as "see you at the pole," is permissible.
- School officials, acting in an official capacity, may neither discourage nor encourage participation in such an event.



## First Amendment: Freedom of Speech and Press

- In the United States we each have the right to speak our mind (within some broad limits).
- In this section we will discuss
  - The history of speech in the United States
  - Prior Restraint
  - Politically Correct and Hate Speech
  - Symbolic Speech
  - Libel and Slander
  - The Internet

## “make no law”

The Courts have frequently wrestled with the question of whether *freedom of expression* is an *absolute*. *Does no mean no?*

Supreme Court Justice Hugo Black believed that the words no law literally meant that Congress shall make no laws abridging the fundamental rights of the First Amendment.

## A Balance

- In their attempt to draw the line separating *permissible* from *impermissible* speech, judges have had to balance freedom of expression against competing values like
  - Public order
  - National security
  - and the right to a fair trial

## Alien and Sedition Acts (1798)

- These acts were designed to silence criticism of the government.
- They made it a criminal offense to publish “any false, scandalous writing against the government of the United States.”
- A new Congress allowed the acts to expire before the Supreme Court had a chance to rule on the Constitutionality of the laws.

### Speech During the Civil War

- During the Civil War, President Lincoln suspended the free press provision of the First Amendment.
- President Lincoln also ordered the arrest of editors of two New York newspapers. Congress support him.

### Espionage Act (1917)

- In World War I anti-German feelings ran high. Anything German was renamed – such as Sauerkraut to Liberty Cabbage.
- This law curtailed speech and press during World War I.
- The law made it illegal to urge resistance to the draft, and even prohibited the distribution of antiwar leaflets.
- Nearly 2,000 Americans were convicted under the Espionage Act.

### Espionage Act (continued)

- Schenck v. United States (1919) the Supreme Court upheld the conviction of Schenck (a secretary of the Socialist Party) for interfering with the draft.
- The ***bad tendency*** test was used by the Court. Engaging in speech that had a tendency to induce illegal behavior was **not** protected by the 1<sup>st</sup> Amedment.

### Espionage Act (continued)

- Holmes sought to allow limits on the 1<sup>st</sup> Amendment.
- Justice Holmes defined the “***Clear and Present Danger***” test in the Schenck case.
- “***Even the most stringent protection of free speech would not protect a man falsely shouting fire in a crowded theatre.***” ***Justice Holmes.***

### Debs v. United States (1919)

- In *Debs* the Court upheld the conviction of Eugene V. Debs (a Socialists candidate for the U.S. Presidency) because his anti-war speeches had the “tendency” to obstruct recruitment efforts.
- While serving his 20 year prison sentence he received nearly one million votes in the 1920 presidential election!
  - Debs was later pardoned by President Harding.

### Libel and Slander

- Libel is a written statement that defames the character of a person.
- Slander is spoken words that defame the character of a person.
- In the United States, it is often difficult to prove libel or slander, particularly if “public persons” or “public officials” are involved.

### What Types of Speech are Protected?

**Symbolic speech**--symbols, signs, and other methods of expression. The Supreme Court has upheld as constitutional a number of actions including:

- An example of protected symbolic speech would be the right of high school students to wear armbands to protest the Vietnam War (*Tinker v. De Moines Independent Community School District*, 1969).
- flying a communist red flag
- burning the American flag

### Flag Burning

- Burning the American flag is a form of protected symbolic speech.
- The Supreme Court upheld that right in a 5-4 decision in *Texas v. Johnson* (1989).



### What Types of Speech are Protected? Pentagon Papers

- **Prior Restraint** – a government action that *prevents* material from being published.
- The Supreme Court has generally struck down prior restraint of speech and press (Near v. Minnesota, 1931).
- In *NYT v. United States* (1971) the Court ruled that the publication of the top-secret Pentagon Papers could not be blocked.

### What Types of Speech are Protected?

**Hate Speech** – hate speech is the new frontier.

Campus speech codes, city ordinances, and the Communications Decency Act are just a few examples.

### Politically Correct Speech

- This controversy grew out of the movement colleges to ban offensive speech.
- Incidents in which reprimanded students have challenged the college's code of speech have been challenged successfully by the American Civil Liberties Union

### The Right to Keep and Bear Arms

- The 2nd Amendment states that
- "*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.*"
- This amendment has been hotly contested in recent years particularly since the 1999 shootings at Columbine High School.
- The Court has not incorporated this right, nor have they heard many cases about it.

## Rights of Criminal Defendants



Are the due process rights and the procedural guarantees provided by the Fourth, Fifth, Sixth, and Eighth Amendments

## Fourth Amendment

- The 4<sup>th</sup> Amendment's general purpose
  - is to ***deny the government*** the authority to make general searches.
- The Supreme Court has interpreted the 4<sup>th</sup> to allow the police to search
  - The person arrested
  - Things in plain view of the accused
  - Places or things that the person could touch or reach, or which are otherwise in the arrestee's "immediate control."

## Fourth Amendment

- Provides protection against "unreasonable" searches and seizures
- Requires search warrants-probable cause
- Allows "Stop and Frisk"-warrant less searches only with reasonable suspicion
- Testing for drugs and HIV?

## Fifth Amendment

- The 5<sup>th</sup> Amendment states that "No person shall be ...compelled in any criminal case to be a witness against himself.
- So criminals cannot be required to take the stand in a trial.



## Sixth Amendment

- The 6<sup>th</sup> Amendment Guarantees a right to counsel.
- In the past this meant that a defendant *could* hire and attorney.
- Since most criminals are poor they did not have counsel.
- In the case of *Gideon v. Wainwright* (1963).
- In *Gideon*, a poor man, was accused of a crime and denied a lawyer.
- The Court ruled unanimously that a lawyer was a necessity in criminal court, not a luxury. The state must provide a lawyer to poor defendants in felony cases.

## Eighth Amendment

- The 8<sup>th</sup> Amendment prohibits *cruel and unusual punishment*.
- The 8<sup>th</sup> is most often used in arguing death penalty cases? Some of the major death penalty cases are:
  - *Furman v. Georgia* (1972) the Court ruled that the death penalty constituted unconstitutional cruel and unusual punishment when it was imposed in an *arbitrary* manner.
  - *Mckleskey v. Kemp* (1987) the Court rules that the death penalty – even when it appeared to discriminate against African Americans – did not violate the constitution.
  - *McKleskey v. Zant* (1991) the Court made it more difficult for death row inmates to file repeated appeals.

## The Right to Privacy

- The Supreme Court has also given protection to rights not specifically enumerated.
- The Court has ruled that though privacy is not specifically mentioned in the Constitution, the Framers expected some areas to be off-limits to government interference.

## The Right to Privacy - Abortion

- In *Roe v. Wade* (1973) The Supreme Court ruled that a Texas law prohibiting abortion violated a woman's constitutional right to privacy.
- Since *Roe*, a number of other cases on abortion have been decided, in general they have limited abortion rights in some way.
- *Webster v. Reproductive Health Services* (1989) - upheld fetal viability tests
- *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) - Pennsylvania was allowed to limit abortions as long as they did not pose 'an undue burden' on pregnant women.

## **The Right to Privacy The Right to Die**

- In 1990, the Court heard the case *Cruzan by Cruzan v. Director, Missouri Department of Health*.
- In a 5-4 ruling, the Court rejected a right to privacy in such cases but argued that living wills, written when competent, were constitutional.
- In 1997, the Court ruled that there was no constitutional right to assisted suicide.