

CIVIL LIBERTIES AND CIVIL RIGHTS



UNIT 2

CHAPTER 15

CONSTITUTIONAL DEMOCRACY

CIVIL LIBERTIES AND CIVIL RIGHTS

CIVIL LIBERTIES

- **Involve basic freedoms (e.g. , speech and religion); The constitutionally protected freedoms of all persons against governmental restraint.**
- **Provisions in the Bill of Rights that provide guarantees against arbitrary interference by government.**
- **The freedoms of conscience, religion, and expression, for example, which are secured by the First Amendment.**
- **These civil liberties are also protected by the due process and equal protection clauses of the Fifth and Fourteenth Amendments.**

CIVIL LIBERTIES AND CIVIL RIGHTS

CIVIL RIGHTS

- **Protected by the 5th Amendment (against the national government)**
- **Protected by the 14th Amendment (against the state governments)**
- **Protected by congressional legislation**

CIVIL LIBERTIES AND CIVIL RIGHTS

SOURCES OF PROTECTION

- **Rights in the original Constitution**
 - **Writ of *habeas corpus*** - directs any official having a person in custody to produce the prisoner in court and to explain to the judge why the prisoner is being held; Can only be suspended during times of rebellion (Civil War)
 - **Person has the right to know why he or she is being imprisoned**
 - ***Ex post facto* laws** - Latin for “after the fact”; Punishes a person for something that was not a crime when he did it (retroactive punishment); May not be passed by Congress
 - **Bills of attainder** - An act that punishes a person without benefit of trial; May not be passed by Congress

CIVIL LIBERTIES AND CIVIL RIGHTS

SOURCES OF PROTECTION

- Bill of Rights (and subsequent amendments)
- Legislation, e.g., Civil Rights Acts of 1964 and 1968, Voting Rights Act of 1965
- Court decisions, e.g., *Brown v. Board* and *Roe v. Wade*
- State constitutions

INCORPORATING THE BILL OF RIGHTS TO THE STATES

BILL OF RIGHTS

- **Added to the original Constitution to appease states**
- **Rights of the individuals and states listed to protect them from the federal government**
- **Bill of Rights only applied to the federal government and did not include protections against state governments (Barron v. Baltimore, 1833)**

INCORPORATING THE BILL OF RIGHTS TO THE STATES

SELECTIVE INCORPORATION

- The process by which provisions of the Bill of Rights are brought within the scope of the Fourteenth Amendment and so applied to state and local governments.
- **Modifying Effect of the 14th Amendment**
 - The due process and equal protection clauses have been used to apply some of the provisions of the Bill of Rights to the states.
 - The “total incorporation” view would apply all of the provisions of the Bill of Rights to the states. It argues for nationalization (or federalization) of the Bill of Rights.
 - The “selective incorporation” view would apply only some of these provisions, and would do so on a case-by-case basis.
 - The Supreme Court selectively incorporated the Bill of Rights into the due process clause.

INCORPORATING THE BILL OF RIGHTS TO THE STATES

SELECTIVE INCORPORATION

- The important case here: *Gitlow v. New York*, 1925.
 - States may not deny free speech and press. These were protected by 14th Amendment Due Process Clause.
- Subsequent cases federalized parts of the Bill of Rights:
 - 1st – Assembly, Petition, Religion
 - 4th – Search and Seizure protections
 - 5th – Self-Incrimination, Double Jeopardy
 - 6th – Right to Counsel, Right to Bring Witnesses, Right to Confront Witnesses
 - 8th – Protection against Cruel and Unusual Punishment
- All provisions of the Bill of Rights except Amendment 2, Amendment 3, Amendment 7, Amendment 10, and the Grand Jury requirement of the 5th Amendment have been federalized.

FREEDOM OF RELIGION

THE ESTABLISHMENT CLAUSE

- **No Government “Establishment of Religion”**
 - A “wall of separation” - Separation of church and state (words of Jefferson; it is implied within 1st amendment, but not stated – kind of like “fair trial”)
- **Basic meaning of establishment clause: government may not establish an official religion.**
 - “Accommodationist View”: Government should bend a bit and allow a certain degree of church/state blending (allowing nativity scenes on city property, and allowing a non-denominational prayer in public school.)
 - “Separationist View”: Government should allow virtually no blending of church and state. There should be a “wall of separation” between the two.
- ***Lemon v. Kurtzman*: Established a 3-part test to determine if a statute or practice violates the establishment clause:**
 - **Non-Secular (Religious) Purpose**
 - **Advances or Inhibits Religion**
 - **Excessive Entanglement with Government.**
 - **If any is present, the statute or practice is unconstitutional**

FREEDOM OF RELIGION

THE ESTABLISHMENT CLAUSE

- **Key rulings.**
 - *Engle v. Vitale, 1962*: no state-sponsored, recited prayer in public school. No teacher-led prayer.
 - No devotional Bible-reading in public school.
 - Moment of silence in public school is constitutional (as long as the purpose is not stated as being for prayer).
 - State laws may not prohibit the teaching of evolution in public school.
 - State laws that require the posting of the 10 Commandments in public school are unconstitutional.
 - Released time for students is constitutional. Allowing students to meet on campus for religious groups (such as Christian Club) is constitutional.
 - Christmas displays in town squares are constitutional as long as they include some secular content.
 - Constitutional forms of state aid to private schools: textbooks, classrooms, lunches, bus transportation.
 - Unconstitutional forms of state aid to private schools: field trips, teacher salaries, counseling services, remedial instruction.

FREEDOM OF RELIGION

VOUCHERS AND STATE AID FOR RELIGIOUS SCHOOLS

- **Permissible and impermissible public aid to religion using the *Lemon test***
- **Aid must have secular purpose; Tax funds cannot be used in religious schools to pay teachers**
- ***Zelman v. Simmons-Harris* (2002) - Public money can be used to send disadvantaged children to religious schools in tuition voucher programs**

FREEDOM OF RELIGION

THE FREE EXERCISE CLAUSE

- Provides Freedom of Worship
- Religious practices that have been restricted:
 - Polygamy (*Reynolds v. U.S.*)
 - Not vaccinating children of Christian Scientists before they enter school
 - Not paying Social Security taxes (Amish)
 - Wearing a Jewish skullcap (Yarmulke) in the military
- Religious practices that have been permitted:
 - Not saluting flag in public school (Jehovah's Witnesses)
 - Not sending children to school past the 8th Grade (Amish)
 - Animal Sacrifice (Santeria case)
- Article 6 bans religious tests/oaths as qualifications to hold public office.

FREEDOM OF SPEECH

HISTORIC TEST

- **The Clear and Present Danger Test**
 - ***Schenck v. United States, 1919***
 - Created a precedent that 1st Amendment guarantees of free speech are not absolute; Public authorities could limit free speech
 - Speech may be restricted when it incites violent action (imminent threat to society such as falsely shouting “Fire” in crowded theater)
 - ***Brandenburg v. Ohio (1969)*** – the SC limited the clear and present danger test by ruling that the government could punish the advocacy of illegal action only if “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”

FREEDOM OF SPEECH

NON-PROTECTED SPEECH

Supreme Court holds that all speech is protected unless it falls into one of the four narrow categories – libel, obscenity, fighting words, and commercial speech.

- **Libel and slander**
 - **Libel is a written defamation that falsely attacks a person's good name and reputation**
 - **Slander is a spoken defamation that falsely attacks a person's good name and reputation**
 - ***New York Times v. Sullivan (1964)* - Supreme Court established the guidelines for libel cases**
 - **Public officials and public figures must first prove "actual malice"**
 - **State laws may allow private persons to collect damages without proving actual malice**
 - **Limits on student speech**
 - ***Bethel v. Fraser (1986)* – school can suspend a student from school for making a speech full of sexual double entendres or innuendos.**

FREEDOM OF SPEECH

NON-PROTECTED SPEECH

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- **Obscenity and pornography**
 - *Miller v. California (1973)* gave constitutional definition of obscenity
 - Appeals to prurient interest in sex,
 - Patently offensive, and
 - Must lack serious literary/artistic/political/scientific value.
 - X-rated movies are entitled to some constitutional protection, but less protection than political speech, and they are subject to greater governmental regulation
 - Sexually explicit materials about or aimed at minors are not protected by the First Amendment
 - *Reno v. ACLU* and Communications Decency Act of 1996 - Court struck down provisions of the Communications Decency Act of 1996 that had made it a crime to send obscene messages to anyone under 18 years of age (Internet unique, less intrusive)

FREEDOM OF SPEECH

NON-PROTECTED SPEECH

Supreme Court holds that all speech is protected unless it falls into one of the four narrow categories – libel, obscenity, fighting words, and commercial speech.

- **Fighting words**
 - **Governments may punish certain well-defined and narrowly limited classes of speech that by their very utterance inflict injury or tend to incite an immediate breach of peace.**
- **Commercial speech**
 - **Commercial speech (such as advertising) is more restricted than are expressions of opinion on religious, political, or other matters.**
 - **The Federal Trade Commission (FTC) decides what kinds of goods may be advertised on radio and television and regulates the content of such advertising.**

FREEDOM OF SPEECH

PROTECTED SPEECH

- **Prior restraint**
 - **Blocking speech before it is given.**
 - **Such action is presumed by courts to be unconstitutional.**
 - **In the Pentagon Papers case, the court refused to impose prior restraint: the revelations may have embarrassed the government, but they did not endanger national security.**

- **Symbolic speech is protected**
 - ***Tinker v. Des Moines (1969)* – wearing black armband at school at protest Vietnam War**
 - ***Texas v. Johnson (1989)* – flag burning**

FREEDOM OF THE PRESS

CONTROVERSIAL AREAS

- **Executive Privilege**
 - Right of presidents to withhold information from the courts.
 - *U.S. v. Nixon (1974)*: A President generally does have executive privilege, but not in criminal cases. Even the President is not above the law.
- **Shield laws**
 - Protect reporters from having to reveal their sources.
 - The press claims that without them, their sources would “dry up,” and they would be unable to provide information to the public.

FREEDOM OF THE PRESS

CONTROVERSIAL AREAS

- Courts have protected press's right to publish
 - Sunshine laws require "open meetings" of public agencies
 - The 1966 Freedom of Information Act
 - Liberalized access to non-classified government records
 - Electronic Freedom of Information Act of 1996 requires most federal agencies to put their files online and to establish an index of their records - NASA a leader (UFO documents!)
 - Student Press
 - *Hazelwood v. Kuhlmeier* (1988)
 - High school newspaper was not a public forum and could therefore be restricted just as other high school activities could be restricted by school authorities

FREEDOM OF ASSEMBLY

PUBLIC FORUMS AND TIME, PLACE, AND MANNER REGULATIONS

- **Governments may not specify what can or cannot be said, but they can make reasonable time, place, and manner regulations for the holdings of assemblies, protests, or gatherings**
- **Police must have right to order groups to disperse (public order)**
- **Problem of “heckler’s veto”: if govt. restricted assembly every time an opposing group claimed that there might be “violence or disorder,” there would be very few assemblies. Courts are therefore reluctant to impose prior restraint.**
- **The extent to which governments may limit access depends on the kind of forums involved:**
 - **Public forums (historically associated with free exercise such as streets, parks)**
 - **Limited public forums (public property such as city hall or schools after-hours)**
 - **Nonpublic forums (libraries, courthouses, government offices) - can not interfere with normal activities in order to stage a public protest**
- **Civil disobedience is not a protected right**
- **Federal crime to obstruct abortion clinic activity**

CHAPTER 16

RIGHTS TO LIFE, LIBERTY, PROPERTY

PROPERTY RIGHTS

CONSTITUTIONAL PROTECTION OF PROPERTY

- **Definition - Property rights are the rights of an individual to own, use, rent, invest in, buy, and sell property**
- **National and state governments' power of eminent domain - the power to take private property for public use**
 - **Taking clause**
 - **"Just compensation" is not always easy to define (court determines value in a dispute)**

PRIVACY RIGHTS

ABORTION

- Fundamental rights are those which are explicitly in the Constitution (Bill of Rights)
- Such rights also include those which are implicitly in the Constitution (travel, political association, privacy – *Griswold v. Connecticut*, 1965).
- Abortion Cases:
 - Prior to 1973: states set own abortion policies.
 - *Roe v. Wade*, 1973: established trimester guidelines. Based upon right of privacy implied in Bill of Rights.
 - *Webster v. Reproductive Health Services*, 1987: did not overturn *Roe*, but gave states more leeway in restricting abortion.
 - *Planned Parenthood v. Casey*, 1992: somewhat defined that leeway: states cannot impose an “undue burden” on a women’s right to an abortion.

PRIVACY RIGHTS

HOMOSEXUALS

- ***Lawrence v. Texas (2003)* – Court struck down Texas sodomy law through use of “liberty” part of 14th Amendment’s due process clause**
- **Gay marriage**
- **Most effective way to secure rights has been through litigation in the courts to gain protections against discrimination**

RIGHTS OF PERSONS ACCUSED OF CRIMES

FOURTH AMENDMENT RIGHTS

- **The Constitution forbids only "unreasonable" searches and seizures**
- **A police search without consent is constitutionally unreasonable unless it has been authorized by a valid search warrant**
 - **Ex: police use of sobriety checkpoints in enforcing drunk driving laws**
- **The Constitution requirements of a specific search warrant**
 - **Must describe what places are to be searched**
 - **Must describe what things are to be seized**

RIGHTS OF PERSONS ACCUSED OF CRIMES

FOURTH AMENDMENT RIGHTS

- The Exclusionary Rule
 - *Mapp v. Ohio (1961)* - The Supreme Court ruled that evidence obtained unconstitutionally cannot be used in court against person from whom it was seized
- Adopted mainly to prevent police misconduct
- Not used if:
 - There would be “inevitable discovery” of the evidence (*Nix v. Williams*)
 - Police operate “in good faith” that the warrant was valid (*U.S. v. Leon*)

RIGHTS OF PERSONS ACCUSED OF CRIMES

FIFTH AMENDMENT RIGHTS

- **Due Process Rights**
 - When govt. denies life, liberty or property, it must use fair procedures:
 - **Observe Bill of Rights.**
 - **Provide reasonable notice.**
 - **Provide chance to be heard.**
 - **Procedural due process** refers to the methods by which a law is enforced; pertains not to the law itself, but to the way in which the law is applied
 - **Examples of violations of procedural due process:**
 - **Illegal Searches.**
 - **Unfair Court Procedures.**
 - **Substantive Due Process** places limits on what a government may do; pertains to the content of the law
 - **It's not enough to govt. use fair procedures in denying life, liberty and property; the laws themselves that enable govt. to do so must be fair.**
 - **Examples of violations of substantive due process:**
 - **Ban on all abortions within a state.**
 - **County ordinance banning all firearms.**
 - **Example of distinction between procedural and substantive: a law prohibits possession of narcotics (substantive) and police must generally obtain a warrant before conducting a search for narcotics in one's home (procedural).**

RIGHTS OF PERSONS ACCUSED OF CRIMES

FIFTH AMENDMENT RIGHTS

- **The Right to Remain Silent**
 - **5th Amendment protection against self-incrimination**
 - **You do not have to testify against yourself; “I plead the 5th”**
 - **Designed so that the burden is on the government to prove guilt**
- **The Miranda Warning**
 - ***Miranda v. Arizona (1966)* - Supreme Court announced that no conviction could stand if evidence introduced at the trial had been obtained by the police during "custodial interrogation" unless suspects have been:**
 - **Notified that they are free to remain silent**
 - **Warned that what they say may be used against them in court**
 - **Told that they have a right to have attorneys present during questioning**
 - **Informed that if they cannot afford to hire their own lawyer, attorneys will be provided for them**
 - **Permitted to terminate any stage of the police interrogation**

RIGHTS OF PERSONS ACCUSED OF CRIMES

FIFTH AMENDMENT RIGHTS

- **Double jeopardy**
 - **Fifth amendment prevents individual from being tried again (if found innocent)**
 - **Still can be tried by both federal and state governments for the same offense (or by two states)**
 - **Double jeopardy does not forbid civil prosecution after acquittal in a criminal trial**
- **Grand Jury Indictment**
 - **Grand jury indictment is necessary in order to require anyone to stand trial for a serious crime**
 - **Grand jurors are concerned with whether there is enough evidence to warrant a trial**
 - **Plea bargaining - pleading guilty to a lesser offense in return for not having to stand trial for a more serious charge (about 90% of cases)**

RIGHTS OF PERSONS ACCUSED OF CRIMES

SIXTH AMENDMENT RIGHTS - FAIR TRIAL PROCEDURES

- The Right to counsel
- Judges have an obligation to ensure that all persons subject to any kind of custodial interrogation are represented by lawyers
- Right to counsel extends to all hearings for all offenses for which an accused could be deprived of liberty
- In *Gideon v. Wainwright* (1963), the United States Supreme Court ruled that the Sixth Amendment right-to-counsel provision applies to those accused of major crimes under state laws
- Trial
 - Government is obligated to give the defendant a speedy and public trial
 - An impartial jury consists of persons who represent a fair cross-section of the community
 - Defendant has the constitutional right to obtain witness in his favor
 - Constitution gives accused persons the right to be confronted with the witnesses against them

RIGHTS OF PERSONS ACCUSED OF CRIMES

EIGHTH AMENDMENT RIGHTS

- **Bail**
- **The Death Penalty**
 - Eighth Amendment forbids the inflicting of cruel and unusual punishments
 - The death penalty is not considered cruel and unusual punishment in America
 - *Furman v. Georgia (1972)* - Court halted capital punishment until states could administer it in "consistent fashion" decision that ruled on the requirement for a degree of consistency in the application of the death penalty.
 - The case led to a de facto moratorium on capital punishment throughout the United States, which came to an end when *Gregg v. Georgia* was decided in 1976.
 - *Gregg v. Georgia (1976)* - The death penalty does not, automatically, violate the Eighth Amendment.
 - If the jury is furnished with standards to direct and limit the sentencing discretion, and the jury's decision is subjected to meaningful appellate review, the death sentence may be constitutional.
 - If, however, the death penalty is mandatory, such that there is no provision for mercy based on the characteristics of the offender, then it is unconstitutional.

CHAPTER 17

EQUAL RIGHTS UNDER THE LAW

- **Civil rights are the constitutional rights of all persons, not just citizens, to due process and the equal protection of the laws: the constitutional right not to be discriminated against by governments because of race, ethnic background, religion, or gender.**

RIGHTS FOR WOMEN

FIRST FEMINIST WAVE

- **Struggle for suffrage – 19th Amendment, 1920**

SECOND FEMINIST WAVE: 1960-PRESENT

- **Rise of NOW and other women's groups (e.g., EMILY'S List)**
- **Legislation**
 - **Equal Pay Act of 1963**
 - **Title VII of Civil Rights Act of 1964 prohibited employment discrimination on the basis of sex**
 - **Proposal, ratification struggle, and defeat of ERA**
 - **Title IX of Education Act of 1972 prohibited gender discrimination in federally subsidized education programs, including athletics**

VOTING RIGHTS

PROTECTING VOTING RIGHTS

- **After federal troops withdrew from the South in 1877, southern Democrats used social pressure, violence, and terrorist activities to keep African-Americans from voting**
- **Southern States created Jim Crow laws that made it difficult or impossible for African-Americans to vote; use of grandfather clause to keep white people voting**
- **Other devices used to keep African Americans from voting**
 - **White primary - Primary operated by the Democratic party in southern states that, before Republicans gained strength in the “one-party South,” essentially constituted an election; ruled unconstitutional**
 - **Racial gerrymandering - the drawing of election districts to ensure that African Americans would be a minority in all districts – unconstitutional (15th Amendment)**
 - **Poll tax**
 - **Registration requirements**
 - **Literacy tests**

VOTING RIGHTS

THE VOTING RIGHTS ACT OF 1965

- Prohibits any voting qualifications or standards that result in a denial of the right of any citizen to vote on account of race and color
- Requires that states that had a history of denying African-Americans the right to vote must clear any changes in any voting practice or laws that might result in dilution of voting power with the Department of Justice
- The Supreme Court, in a series of cases beginning with *Shaw v. Reno*, announced that although states may take race into account, they may not make race the sole reason for drawing district lines (majority-minority districts are LEGAL)
- Effect - It has been a major instrument for increasing the number of African American and other minority voters

EDUCATION RIGHTS

PLESSY V. FERGUSON (1896)

- **The Court endorsed the separate-but-equal doctrine**
- **Separate but equal always resulted in discrimination against African-Americans, leading to lawsuits challenging the doctrine**

EDUCATION RIGHTS

BROWN V. BOARD OF EDUCATION (1954)

- **The Court reversed its *Plessy* decision; segregation is itself discrimination (separate-but-equal unconstitutional)**
- ***Brown I* was the end of segregation**
- ***Brown II* was the process of integration**
- **Title VI of the Civil Rights Act of 1964 stipulates that federal dollars under any grant or project be withdrawn from a school that discriminates (Civil Rights Act of 1964 essentially ends Jim Crow laws)**

EDUCATION RIGHTS

FROM SEGREGATION TO DESEGREGATION

- **Supreme Court sustained the right of judges to order busing to overcome de jure segregation**
- **The Court has refused to permit judges to order busing to overcome the effects of de facto segregation**
- **The Supreme Court started to limit mandates to those violating the Constitution**
- **Political support behind efforts to integrate schools by busing is fading**

RIGHTS TO PUBLIC ACCOMMODATIONS, JOBS, AND HOMES

ACCOMMODATIONS

- **Title II (of Civil Rights Act of 1964): Places of public accommodation**
 - Makes it a federal offense to discriminate against any customer or patron in a place of public accommodation because of race, color, religion, or national origin
 - *Heart of Atlanta Motel v. U.S. (1964)* - Congress has a right to regulate individual businesses in the interest of promoting interstate travel
- **Title VII (of Civil Rights Act of 1964): Employment**
 - Makes it illegal for any employer in any industry affecting interstate commerce and employing 15 or more people to discriminate in employment practices against any person because of race, color, national origin, religion, or sex
 - Aggrieved persons can file a class action suit
 - Equal Employment Opportunity Commission (EEOC) enforces its provisions
 - Affirmative action programs - 1965 presidential executive order requires all contractors of the federal government, including universities, to adopt and implement affirmative action programs to correct for “underutilization” of women and minorities
- **Housing: Fair Housing Act and Amendments, 1968 and 1988**
 - The Fair Housing Act of 1968, amended in 1988, forbids (with some exclusions) owners to refuse to sell or rent to any person because of race, color, religion, national origin, sex (since 1978), handicap, or because a person has children (since 1988)
 - Housing segregation persists

THE AFFIRMATIVE ACTION CONTROVERSY

- **Affirmative action - policies requiring special efforts in employment, promotion, or school admissions on behalf of disadvantaged groups**
 - The goal of affirmative action is to move beyond equal opportunity toward equal results.
 - Some groups have claimed that affirmative action programs constitute “reverse discrimination.”
- **Constitutionality of affirmative action programs**
 - *University of California Regents v. Bakke (1978)*
 - Quotas cannot be used for admissions (cannot reserve seats for racial minority groups)
 - Affirmative action programs are not necessarily unconstitutional
- **Reaffirming the Importance of Diversity**
 - *Gratz v. Bollinger (2003)* – race cannot be used as a “bonus” point
 - *Grutter v. Bollinger (2003)* – race can be one of the factors to be considered in admissions