CHAPTER 16 - Civil Liberties

OVERVIEW

Until the ratification of the Fourteenth Amendment, civil rights was pretty much a dead letter. In the 1920s, the Supreme Court for the first time applied a portion of the First Amendment to the states. In spite of James Madison's fears of the tyranny of the majority, the Court usually follows public opinion which is a reflection of the opinion of the majority.

Particularly during war time, the Court had allowed restrictions on freedom of speech and the press. Following the rejection of McCarthyism by politicians, however, the Court began to treat free speech as a fundamental freedom.

Freedom of religion is covered in two clauses of the First Amendment: the establishment clause and the free exercise clause. The former has resulted in a wall of separation between church and state. The latter has been used at times to exempt religious groups from government regulation.

In the 1960s, the Warren Court expanded the rights of the accused. In the decades that followed, public concern shifted to a concern for law and order. Although the Court backtracked somewhat, it has refused to outright overrule many of the Warren Court decisions. Although not explicitly mentioned in the Constitution, the Supreme Court, relying on the Ninth Amendment, has recognized the right of privacy. Like other rights, it is not absolute.

OUTLINE

I. Origins of Civil Liberties in the United States

- The meaning of civil liberties in the United States has been shaped by the Supreme Court, political debates, and election outcomes. It reflects the basic values shared by most citizens.

A. Origins of the Bill of Rights

- In spite of the fervor over individual rights during the American Revolution, the framers of the Constitution did not include a Bill of Rights. During ratification, the Federalists promised to add a Bill of Rights later.

B. Few Civil Liberties before the Civil War

- Prior to the Civil War, the rights listed in the Bill of Rights did not play a significant role in American politics. Except, ironically, the Fifth Amendment due process clause was used to support those owning slaves.
- This was due to the wording of the First Amendment, which specified that it applied only to Congress and the 1833 case of ***Barron v. Baltimore***, which indicated that all of the rights in the Bill of Rights applied only to Congress.

C. Applying the Bill of Rights to State Governments

- The Civil War amendments extended greatly the protection of civil rights. The Fourteenth Amendment has been particularly important in that it contained a "due process" clause that was explicitly directed at state governments.

- Relying on selective incorporation, the Supreme Court has applied most of the provisions of the Bill of Rights to the states through the 14th Amendment's due process clause (one notable exception being the Second Amendment right to bear arms).

II. Freedom of Speech, Press, and Assembly

A. Free Speech and Majoritarian Democracy

- Free speech is vital to democracy because it allows debate of issues including the official line espoused by those in government. Even if the official line is backed by a majority, the minority still has the right to speak out. Majorities can be just as dictatorial as one despot.
- Free speech was justified by John Stuart Mill on the grounds that the truth will, in the end, always win out; furthermore, suppression of what is patently not true merely serves to strengthen falsehoods. In short, there is nothing, in the end, to free from free speech.

B. From "Bad Tendency" to "Clear and Present Danger"

- In its first major decision affecting freedom of speech, the Supreme Court, in ***Schenck v. United States*** (1919), enunciated the clear and present danger doctrine, a principle that said people should have complete freedom of speech unless their language gave rise to a clearly dangerous situation. Justice Holmes wrote that following this principle, no one would have the right to falsely shout "fire!" in a crowded theater that could lead to a stampede.
- In this case, the Supreme Court, while stating this principle, upheld Schenck's conviction for violating the Espionage Act. Schenck was convicted for mailing anti-draft literature to draft-age men.
- Applying the principle, which is open to various interpretations, has not been easy. Yet, two cases decided in 1931, ***Stromberg v. California*** and ***Near v. Minnesota***, were particularly important, because for the first time, they gave court protection to the opinions of an extreme group.

C. Fighting Words Doctrine

- During World War II, free speech again came under attack. The Smith Act prohibited advocating the overthrow of the government by force. Restrictions were also passed prohibiting demonstrations against the draft.
- The Supreme Court upheld these restrictions on the grounds that fighting words were not protected by the First Amendment. It was the fighting words doctrine that many university administrators invoked in the early 1990s when they tried to enforce ethnic tolerance on campus.

D. Balancing Doctrine

- Civil liberties were not restored following the end of World War II. Fear of the spread of communism fed by McCarthyism resulted in Congress requiring all employees of the federal government to take an oath swearing loyalty to the United States. The Supreme Court, relying now on a balancing doctrine, upheld prosecutions under the Smith Act. This doctrine was clearly a limit on the more strenuous clear and present danger doctrine.

- McCarthy, in the end, was challenged not by the Court but by politicians.

E. Fundamental Freedom Doctrine

- After the political demise of Senator McCarthy, Americans were in a mood to be more protective of civil liberties. The Supreme Court became committed to the fundamental freedom doctrine, which said that some constitutional provisions such as free speech have a preferred position because they are basic to the functioning of a democratic society. It became the Court's governing doctrine during the 1960s, in the midst of the Vietnam War.
- In virtually every case that came before it, the Court ruled against efforts to suppress free speech. A significant case in this regard was the Pentagon Papers case ***New York Times v. United States***, 1971. More recent examples of the Court's commitment to free speech are the flag burning cases (***Texas v. Johnson***, 1989 and ***Eichman v. United States***, 1990).
- Even conservatives on the Court voted to strike down a St. Paul ordinance forbidding the placement of a symbol that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender on public or private property" (***R.A.V. v. City of St. Paul***, 1990).

F. Freedom of the Press

- Freedom of the press during the early colonial period was governed by the prior restraint doctrine, which said the government could not censor an article before it was published. It was nearly two centuries later (1931) before the Supreme Court ruled that a publisher could not be punished for promoting a particular point of view. The Supreme Court has often treated freedom of the press as synonymous with freedom of speech. If speech is permitted in a certain case, a publication containing the same message is also permitted under the Constitution.

G. Freedom of Association

- The freedom of association has long been considered inseparable from the freedoms of speech and of the press.

H. Limitations on Free Speech

- Although free speech is now given strong protection, three types of speech can still be subject to regulation.

  1. Commercial Speech

  - The court says regulation of commercial speech which includes advertising or other speech made for business purposes is needed so that customers are not provided false or misleading information, or to discourage the consumption of harmful substances such as cigarettes and alcohol.

  2. Obscenity

  - Obscenity is not protected by the First Amendment. The Court has struggled with the definition of obscenity, but overall, it seems to say that local communities may, if they wish, ban hard-core pornography.

3. Libel

- Libel, the defamation of character by print, is not protected by the First Amendment. In the ***New York Times v. Sullivan*** case (1963), the Supreme Court ruled that for a public official to win a libel suit, they must demonstrate not only that what was printed was false but that it was done with actual malice meaning to say that they knew it was false or they had a reckless disregard for the truth.

III. Freedom of Religion

- The First Amendment contains two provisions relating to religion: the establishment clause and the free exercise clause.

A. The Establishment of Religion Clause

- Religious issues often arise in conjunction with the provision of public education in good part because many think schools need to teach not only reading and arithmetic but morals and values, as well.
- The Court has pretty much followed Thomas Jefferson's separation of church and state doctrine, which recognizes a wall separating government from religious activity.
- This has usually prevented tax money from going to support parochial schools. It has also resulted in prohibiting teacher-led school prayer in public schools along with sacred moments of silence and legally mandated Bible readings in public schools.
- In 1990, however, a more conservative Court relaxed the ban on prayer somewhat, saying students may allow for Bible-reading or prayer clubs as long as other clubs are allowed to use school property. Other recent decisions such as ***Agostini v. Felton*** have opened up windows in the wall of separation between church and state.

B. The Free Exercise of Religion Clause

- In applying this clause, the Court has prohibited a state from closing all private religious schools, requiring those who object on religious grounds from saluting the American flag (having upheld the law just three years earlier), and allowed the Amish to refuse to follow the law requiring mandatory school attendance.

C. Establishment of Religion or Free Exercise?

- The debate over school choice using vouchers, which surfaced during the 1996 and 2000 presidential elections, involves weighing the establishment of religion clause against the free exercise clause.
- The Supreme Court has yet to decide the issue of school vouchers, but in a 1983 case (***Mueller v. Allen***) the Court ruled that tax breaks can be given to families who send their children to religious schools, provided the same tax breaks are available to families sending their children to public schools. It remains to be seen if the Court will extend this decision to the use of vouchers. The recent appointments of John Roberts and Samuel Alito to the Supreme Court could affect the outcome of such a decision.

IV. Law, Order, and the Rights of Suspects

- The procedural rights that protect the accused are often thought to come into conflict with the need for government to maintain social order. Some believe that carefully enforcing procedural rights will result in the guilty going free. Others believe that unless procedural safeguards are carefully observed, innocent people will be unjustly convicted.

A. Election Politics and Criminal Justice

- Politics affect criminal justice since law and order is a major concern for many Americans. Politicians feel obligated to "do something" about crime.
- Whether crime rates are actually rising is not so easy to determine because many crime statistics are notoriously unreliable. Most victims of homicides are black and male. For older men, the murder rate has decreased since the 1980s, but it rose sharply for young, particularly black, males in the early 1990s.

B. Search and Seizure

- The Fourth Amendment requires the police to get a warrant before they search a private dwelling. To obtain the warrant, the police must demonstrate that there is probable cause that a crime has been committed. Improperly obtained evidence cannot be used in court (***Mapp v. Ohio***, 1961).
- In early 2000, a unanimous Supreme Court ruled that police may sometimes stop and search people because they turn and run when they see the police approaching. Running, the Court indicated, is cause for reasonable suspicion.

C. Immunity against Self-Incrimination

- The Fifth Amendment prevents the government from coercing an individual in a criminal case to testify against themselves. The Warren Court in the ***Miranda*** case ruled that police must inform those being arrested of this right before questioning them. If they do not, the testimony cannot be used in court except to impeach the veracity of the suspect were he or she to take the stand.
- In 2000, the Supreme Court revisited the ***Miranda*** decision judging a provision in a 1968 law that some thought overruled Miranda; the Court upheld that decision partially on the grounds that warning people of their right to remain silent had become part of our culture.
- In 2001, to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes, the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001" was passed by Congress and signed into law by President Bush.

D. Impartial Jury

- Following the ***Sheppard v. Maxwell*** (1966) case, the Supreme Court established several criteria to help guarantee an impartial jury trial:
  1. Trials should be postponed until public attention has subsided.
  2. Jurors should be screened to exclude those with extensive knowledge of a case or a biased opinion.

3. Judges should instruct jurors to base their decisions solely on the evidence presented in the trial.
4. Jurors may be sequestered during a trial.
5. Courts should consider changing a trial venue in order to keep jurors from being exposed to pretrial publicity.

E. Legal Counsel

- The Warren Court ruled that the Sixth Amendment guarantees everyone accused of a crime the right to legal counsel even if they can't afford an attorney.
- Since not many lawyers wanted to volunteer their services to the poor, many states created the office of public defender to represent indigent criminal suspects.
- Public defenders are often not respected by police and even their own clients who view them as crummy lawyers.

F. Double Jeopardy

- The Supreme Court has ruled that a person may be tried in federal and state courts for the same offense and this does not constitute double jeopardy.

G. Rights in Practice: Habeas Corpus

- The writ of habeas corpus is a judicial order that a prisoner be brought before a judge to determine the legality of their imprisonment.
- In 2001, some of the suspected enemies of the United States were labeled "illegal combatants," and placed as detainees in "Camp X-Ray" at the U.S. military base at Guantanamo Bay, Cuba. Because these terrorists are labeled as "illegal combatants," the government is not holding them under a status subject to the Geneva Convention, and their right to writ of habeas corpus has been suspended.

H. Rights in Practice: The Plea Bargain

- In most cases, the criminally accused is not tried by a jury. Trial court judges depend on the willingness of prosecutors and defenders to settle cases before going to trial. Defenders and prosecutors are usually expected to try to arrange a plea bargain.
- The extensive use of the plea bargain has resulted in some politicians calling for a "three strikes and you're out" policy. After conviction of three felonies, a person would receive life imprisonment, whether or not a plea bargain is struck.
- The United States now seems to have the largest incarceration rate in the world. Does this reduce crime? The evidence is inconclusive.

V. The Right of Privacy

- Although not explicitly mentioned in the Constitution, the Supreme Court, relying on the Ninth Amendment, has recognized the right of privacy.

A. Regulation of Sexual Behavior

- The Court declared a Connecticut law prohibiting the use of contraceptives between consenting married couples unconstitutional in 1965.
- In 1986, however, it upheld a Georgia law outlawing sodomy in this case between two males.
- In both cases, the court majority decided in a manner consistent with the views of a majority of voters.

B. Abortion: Right to Life or Right to Choose?

- In ***Roe v. Wade*** (1973), the Court declared that the right of privacy was broad enough to include at least a partial right of abortion. In response, the right to life movement became engaged in state and national politics. In response, Congress enacted legislation in 1976 that prevents coverage of abortion costs under government health insurance programs, such as Medicaid. The Supreme Court began to declare constitutional certain restrictions on abortion. When given the chance to overrule its ***Roe*** decision in the 1992 case of ***Planned Parenthood v.Casey***, the Court refused to do so. It has, in close conformity to public opinion, upheld laws requiring teenagers to inform their parents before getting an abortion but struck down laws requiring women to get their husbands' consent before getting an abortion.

C. Privacy in the Information Age

- The Internet and related technologies have sparked an information revolution, but technology also reduces the privacy of the individuals.
- According to the Brookings Institution, electronic information networks offer extraordinary advantages to business, government, and individuals in terms of power, capacity, speed, accessibility, and cost. But these same capabilities present substantial privacy issues. With an unprecedented amount of data available in digital format-which is easier and less expensive to access, manipulate, and store—others know more about you than ever before.
- Consider this: data routinely collected about you includes your health, credit, marital, educational, and employment histories; the times and telephone numbers of every call you make and receive; the magazines you subscribe to and the books you borrow from the library; your cash withdrawals; your purchases by credit card or check; your electronic mail and telephone messages; where you go on the world wide web. The ramifications of such a readily accessible storehouse of information are astonishing. Privacy law in the United States is fragmented, inconsistent, and offers little protection for privacy on the internet and other electronic networks.