

CIVIL LIBERTIES AND RIGHTS

- I. PROTECTIONS UNDER THE BILL OF RIGHTS
 - a. Constitutional protection of fundamental rights is not absolute
 - b. Speech that threatens national security or even fundamental rights can be restricted

- II. RIGHTS IN THE ORIGINAL CONSTITUTION
 - a. Foremost of the rights in the Constitution is the WRIT OF HABEAS CORPUS, which means there needs a specific reason of why a person is being held against his/her will (prisoner)
 - i. Has been challenged with Hamdan v. Rumsfeld in 2006 and Court rebuffed Bush that enemy combatants could be tried in military commissions
 - ii. Courts had to hear combatant's writ
 - b. The Constitution also bars EX POST FACTO LAWS – a retroactive criminal law that works to the disadvantage of a person

- III. THE BILL OF RIGHTS AND THE STATES
 - a. The Bill of Rights are the first 10 Amendments to the Constitution, added in 1791 to secure ratification
 - b. CIVIL LIBERTIES – constitutionally protected freedoms of all persons against governmental restraint
 - c. CIVIL RIGHTS- are the constitutional rights of all persons, not just citizens, to due process and equal protection of the laws
 - d. LEGAL PRIVILEGES – granted by the government and may be subject to conditions or restrictions; i.e. driver's license

- e. The guarantees of the Bill of Rights applied only to NATIONAL GOVERNMENT, not the state governments...why?
 - i. Framers believed that citizens could control their own state officials and most state constitutions had bills of rights
 - ii. Not until 14th Amendment in 1868 that the restrictions of the Bill of Rights applied to the states
 - 1. Supporters contend that its DUE PROCESS CLAUSE limits states the same way the Bill of Rights limits the national government
 - 2. Gitlow v. NY was revolutionary in that for the first time the U.S. Constitution was interpreted to protect freedom of speech for abridgement by state and local government; changed federalism I the U.S.
 - 3. SELECTIVE INCORPORATION of the due process clause of the 14th Amendment into the Bill of Rights applied these rights to the state
 - a. Most significant constitutional development since the Constitution was written

IV. FIRST AMENDMENT FREEDOMS

a. FREEDOM OF RELIGION

- i. ESTABLISHMENT CLAUSE- 1st Amendment forbids governmental support of any or all religions
 - 1. Reacting against English support for Anglican church as ESTABLISHED religion of England
 - 2. “Wall of separation” between government and religion

3. In *Lemon v. Kurtz* (1971) court laid down the three-part Lemon test
 - a. Law must have a secular legislative purpose
 - b. It must neither advance or inhibit religion
 - c. Must avoid “excessive government entanglement with religion”
 4. O’Connor championed the ENDORSEMENT test: reasonable observer would see that government is endorsing a religion or religion in general
 5. Scalia and Thomas believed in NONPREFERENTIALIST test; do not prefer one over another, but ALL
 6. Liberal judges preferred STRICT SEPARATION between religion and the state
 7. One area of conflict is over the VOUCHER program in schools; key is money went to the parents, who made choice, not government or religion
- ii. FREE EXERCISE CLAUSE- Congress will make no law prohibiting the free exercise of religion
1. 1st Amendment threw a “mantle of protection” around religious practices and the burden was on the government to justify interference
 2. Supreme Court struck down the Religious Freedom Restoration Act of 1993 as unconstitutional in overstepping federal-state authority and the separation of government and religion

b. FREE SPEECH AND FREE PEOPLE

- i. Government by the people is based on every person's right to speak freely, organize in groups, question the decisions of the government, and to campaign openly against them.
- ii. Courts have never interpreted this freedom in absolute terms
- iii. BELIEF, SPEECH AND ACTION
 1. Cannot infringe on anyone's belief
 2. Can stop an action; can't punch a nose
 3. Speech is somewhere in between – libel, obscenity, fighting words and commercial speech are not entitled to constitutional protection; cannot yell "fire" in a crowded hall

c. JUDGING: DRAWING THE LINE

- i. Depends on the context, which level of government is attempting to regulate the speech, what was said, etc.

d. CONSTITUTIONAL TESTS OF SPEECH RESTRICTIONS

- i. Beginning of the 20th century
 1. BAD TENDENCY TEST- corrupt society or cause people to engage in crime
 2. CLEAR AND PRESENT DANGER TEST- only if presented with an immediate danger; leading to a riot
 3. PREFERRED POSITION DOCTRINE- freedom of expression should rarely be curtailed

e. PROTECTED AND NONPROTECTED SPEECH

- i. PROTECTED SPEECH- judges are most suspicious of PRIOR RESTRAINT – censorship before publication
 1. Most prior restraints are unconstitutional

2. Laws that favor one viewpoint over another will most likely be struck down, but **CONTENT NEUTRAL** or **VIEWPOINT NEUTRAL** laws which apply to all types of speech, will have a better chance of being allowed.
- ii. **NONPROTECTED SPEECH** – Supreme Court holds that all speech is protected except **LIBEL, OBSCENITY, FIGHTING WORDS, OR COMMERCIAL SPEECH**; how we define these can be greatly contested
 1. **LIBEL**- published defamation or false statements
 - a. Constitutional standards for libel charges brought by private persons are not as rigid as those for public officials and figures
 2. **OBSCENITY AND PORNOGRAPHY**- difficulty in defining obscenity
 - a. *Miller v. California* (1973), constitutional definition of **OBSCENITY** – pg. 419
 3. **FIGHTING WORDS AND COMMERCIAL SPEECH** –
 - a. **FIGHTING WORDS**- incite an immediate breach of peace; cross burning by the KKK
 - b. **COMMERCIAL SPEECH**- advertisements and commercials; false and misleading advertising or promoting the sale of anything illegal
- f. **FREEDOM OF THE PRESS**
 - i. Courts have protected the rights to publish information; however they have not allowed

- journalists to withhold information from grand juries or legislative investigating committees
- ii. Freedom of Information Act of 1966 has liberalized access to unclassified federal records.
- g. OTHER MEDIA AND COMMUNICATIONS
 - i. BROADCAST AND CABLE COMMUNICATIONS – TV receives least 1st Amendment protections; CPB, FCC
 - ii. The Internet poses problems of protecting 1st Amendment rights
 - 1. Attempts to regulate the Internet have been unsuccessful
- h. FREEDOM OF ASSEMBLY
 - i. How to determine if unpopular march is constitutionally allowed; no violence
 - ii. TIME, PLACE AND MANNER REGULATIONS - not absolute; cannot block traffic; must get permit
 - 1. Subject to reasonable time, place and manner restrictions
 - 2. Evenhandedly and not on what people are saying
 - 3. CIVIL DISOBEDIENCE- deliberate refusal to obey a law or comply with public official orders- even if peaceful, is not a protected right
 - a. Abortion protestors in front of a clinic; injunction as to not physically interfere with operations of the clinic; but can protest
 - iii. 1st Amendment freedoms are crucial for the survival of our republican form of democracy

V. PROPERTY RIGHTS

- a. People have rights, not property; right to own, use, rent, invest in, buy and sell property
- b. Close connection between property and liberty
- c. Framers wanted a limited government, but needed clauses to protect PROPERTY RIGHTS
- d. National and state governments have the power of EMINENT DOMAIN -power to take private property for public use; but owner must be fairly compensated
- e. REGULATORY TAKING- a government regulation that effectively takes land by restricting its use, even if it remains in the owner's name- must compensate the owner
- f. Controversial in eminent domain for purposes of advancing economic development of the community; tearing down homes for a shopping mall; Kelo v. City of New London
- g. Just compensation is difficult to define

VI. DUE PROCESS RIGHTS

- a. DUE PROCESS- rules and regulations that restrain those in government who exercise power; two types- procedural and substantive
- b. PROCEDURAL DUE PROCESS – How the law is applied; government must proceed by proper methods; limits how government can exercise power
 - i. Law will violate procedural due process if it is too vague or improperly assumes guilt
- c. SUBSTANTIVE DUE PROCESS- limits what a government can do; governments act reasonably and that the substance of the laws be reasonable and fair; mostly given to legislative branch in business and corporate decisions

VII. PRIVACY RIGHTS

- a. Most important extension of substantive due process has protected rights of privacy, especially marital privacy: 3 aspects
 - i. The right to be free from governmental surveillance and intrusion, especially with respect to intimate decisions on sexuality
 - ii. The right to not have government make private affairs public
 - iii. The right to be free in thought and belief from governmental regulations

b. ABORTION RIGHTS

- i. 2 controversial issues: state regulation of abortion and private, adult consensual sexual conduct
 - 1. Roe v. Wade (1973) women's decision, in consultation with physician, to terminate pregnancy; details on pg. 425
 - a. Led to heated debate with conservative presidents
 - b. Led to passage of ban on partial birth abortions; upheld by 5-4 in Supreme Court

c. SEXUAL ORIENTATION RIGHTS

- i. The Court, overall has protected the rights of homosexuals. Lawrence v. Texas (2003) struck down a law making homosexual sodomy a crime-violated personal autonomy and right to privacy
- ii. Protection of homosexuals from discrimination was achieved by striking down an initiative amending the Colorado constitution

VIII. RIGHTS OF CRIMINAL SUSPECTS

- a. FREEDOM FROM UNREASONABLE SEARCHES AND SEIZURES

- i. 4th Amendment secures rights against unreasonable searches and seizures
 - ii. Requires police to have a valid SEARCH WARRANT, issued by magistrate after police officer, UNDER OATH, as probable cause to justify search. GENERAL SEARCH WARRANTS- without limitation- are unconstitutional
 - iii. 4th Amendments protects people, not places, from unreasonable government intrusion
 - iv. Person's consent allows a reasonable search as long as not coerced; and if the public is at risk
 - v. Supreme Court upheld a STOP AND FRISK exception to the warrant requirement in Terry v. Ohio (1968) where someone is believed armed and dangerous or about to commit a criminal offense; quick pat down is allowed
 - vi. Police and border guards can conduct BORDER SEARCHES
- b. THE EXCLUSIONARY RULE – a requirement that evidence unconstitutionally or illegally obtained be excluded from a criminal trial; prevents police misconduct
 - c. RIGHT TO REMAIN SILENT- 5th Amendment; persons shall not be compelled to testify against themselves in criminal prosecutions; innocent until proven guilty; burden on the government to prove guilt
 - d. THE MIRANDA WARNING – reduce abuse of police questioning; Miranda v. Arizona (1966); right to remain silent, right to an attorney, anything they say can be used against them; terminate questions at any point, attorney will be appointed if can't afford; controversial
 - e. FAIR TRIAL PROCEDURES: all persons accused of crimes will have the right to representation by counsel, and to a fair trial by an impartial jury

- i. Before a person is forced to stand trial for a criminal offense, they must be INDICTED by a GRAND JURY or before a judge in what is called an INFORMATION proceeding; GRAND JURY is not concerned with guilt or innocence, but whether there is enough evidence to warrant a trial
 1. If a majority of the grand jurors agree that a trial is justified, they return a TRUE BILL, or INDICTMENT
 2. Communication between the accused and counsel is privileged and cannot be revealed to a jury
- ii. Constitution guarantees the right of the accused to be informed of the nature and cause of the accusation; and to prepare a defense
- iii. Can discuss the possibility of a PLEA BARGAIN which is pleading guilty to a lesser offense
- iv. Constitution guarantees a SPEEDY AND PUBLIC TRIAL; if not done, can be dismissed outright
- v. Under the 6th Amendment, the accused has a right to trial before a PETIT JURY- 6-12 persons that determines guilt or innocence from the state or district the crime was committed; an IMPARTIAL JURY – fair cross-section of the community
- vi. Accused has right to obtain witnesses and to have judge subpoena them
- vii. The sentencing phase begins after the conclusion of the trial
- viii. Some states have enacted the “three strikes” law
- ix. The convicted can APPEAL the verdict if they claim they have been denied some constitutional

right or the due process and equal protection of the law

- x. 5th Amendment provides that no person shall be subject to the same offense twice or DOUBLE JEOPARDY; still can be civil after criminal and can be both state and federal sentences and trials

IX. THE DEATH PENALTY

- a. U.S. is unusual among industrialized nations for retention of the death penalty
- b. Supreme Court ruled that the death penalty is not cruel and unusual punishment
- c. Rehnquist Court made it easier to impose the death penalty
- d. Upheld lethal injections as a constitutionally permissible means of carrying out the death penalty

X. PROTECTING OUR CIVIL LIBERTIES: WHOSE RESPONSIBILITY?

- a. The Supreme Court and judicial branch relies on the executive and legislative branches to enforce and provide funding to carry out its decisions
- b. It is essential for citizens to be active in protecting our civil liberties
- c. The judicial branch is a reactive institution. It relies on citizens