

Study Outline

Chapter 18: Civil Liberties

- I. The politics of civil liberties
 - A. The objectives of the Framers
 - 1. Limited federal powers
 - 2. Constitution: a list of dos, not don'ts
 - 3. Bill of Rights: specific do nots
 - a. Not intended to affect states
 - b. A limitation on popular rule
- II. Politics, culture, and civil liberties
 - A. Liberties become a major issue for three reasons
 - B. Rights in conflict: Bill of Rights contains competing rights
 - 1. *Sheppard* case (free press versus fair trial)
 - 2. *New York Times* and Pentagon Papers (common defense versus free press)
 - 3. Kunz anti-Jewish speeches (free speech versus public order)
 - 4. Struggles over rights show same pattern as interest group politics
 - C. Policy entrepreneurs most successful during crises, especially war, by arousing people
 - 1. Sedition Act of 1789, during French Revolution
 - 2. Espionage and Sedition Acts of World War I
 - 3. Smith Act of World War II
 - 4. Internal Security Act of 1950, Korean War
 - 5. Communist Control Act of 1954, McCarthy era
 - D. Cultural conflicts
 - 1. Original settlement by white European Protestants produced Americanism
 - 2. Waves of immigration brought new cultures, conflicts
 - a. Non-Christians offended by government-sponsored creches at Christmas
 - b. English speakers prefer monolingual schools
 - c. Boy Scouts of America exclude homosexuals from being scout leaders
 - 3. Differences even within cultural traditions
- III. Interpreting and applying the First Amendment
 - A. Speech and national security
 - 1. Original Blackstone view: no prior press censorship
 - 2. Sedition Act of 1789 followed Blackstone view
 - 3. By 1917-1919, Congress defines limits of expression
 - a. Treason, insurrection, forcible resistance
 - b. Upheld in *Schenck* via test of "clear and present danger"
 - c. Justice Holmes dissents, saying test not met
 - 4. Fourteenth Amendment "due process" not applied to states originally; *Gitlow* elicits "fundamental personal rights"
 - 5. Supreme Court moves toward more free expression after WWI
 - a. But communists convicted under Smith Act under "gravity of evil"
 - b. By 1957, test of "calculated to incite"
 - c. By 1969 (*Brandenburg*), "imminent" unlawful act
 - d. 1977 American Nazi march in Skokie, Illinois, held lawful
 - e. "Hate" speech permissible but not "hate crime"
 - B. What is speech?
 - 1. Some forms of speech not fully protected; four kinds
 - 2. Libel: written statement defaming another by false statement
 - a. Oral statement: slander
 - b. Variable jury awards
 - c. Malice needed for public figures
 - 3. Obscenity
 - a. Twelve years of decisions; no lasting definition
 - b. 1973 definition: patently offensive by community standards of average person
 - c. Balancing competing claims remains a problem
 - d. Localities decide whether to tolerate pornography but must comply with strict rules

- e. Protection extended: nude dancing only marginally protected
- f. Indianapolis statute: pornography degrading but court disagreed
- g. Zoning ordinances upheld
- h. Regulation of electronic Internet (computer-simulated child pornography)
- 4. Symbolic speech
 - a. Acts that convey a political message: flag burning, draft card burning
 - b. Not generally protected
 - c. Exception is flag burning: restriction of free speech

IV. Who is a person?

- A. Corporations, etc., usually have same rights as individuals
 - 1. Boston bank, antiabortion group, California utility
 - 2. More restrictions on commercial speech
 - a. Regulation must be narrowly tailored and serve public interest
 - b. Yet ads have some constitutional protection
 - 3. Young people may have fewer rights; Hazelwood; school newspaper can be restricted

V. Church and state

- A. The free exercise clause: no state interference, similar to speech
 - 1. Law may not impose special burdens on religion
 - 2. But no religious exemptions from laws binding all
 - 3. Some cases difficult to settle
 - a. Conscientious objection to war, military service
 - b. Refusal to work Saturdays; unemployment compensation
 - c. Refusal to send children to school beyond eighth grade
- B. The establishment clause
 - 1. Jefferson's view: "wall of separation"
 - 2. Congress at the time: "no national religion"
 - 3. Ambiguous phrasing of First Amendment
 - 4. Supreme Court interpretation: "wall of separation"
 - a. 1947 New Jersey case (reimbursements)
 - 1. Court: First Amendment applies to the states
 - 2. Court: State must be neutral toward religion
 - b. Later decisions struck down
 - 1. School prayers (voluntary, nonsectarian, delivered by a rabbi or minister or student elected by others students)
 - 2. Teaching of creationism
 - 3. In-school released time programs
 - c. Public aid to parochial schools particularly controversial
 - 1. Allowed: aid for construction of buildings, textbook loans, tax-exempt status, state deductions for tuition, computers, and sign language interpreters
 - 2. Disallowed: teacher salary supplements, tuition reimbursements, various school services, money to purchase instructional materials, special districts
 - 3. Though the Court can (and does) change its mind
 - d. Development of a three-part test for constitutional aid
 - 1. It has a strictly secular purpose
 - 2. It neither advances nor inhibits religion
 - 3. It involves no excessive government entanglement
 - e. Failure of the Court's test to create certainty in our law
 - 1. Nativity scenes, menorahs, and Christmas trees
 - 2. Seeming anomalies: Prayer in Congress, chaplains in the armed services, "In God We Trust" on currency
 - 3. Deep division / confusion among members of the Court

VI. Crime and due process

- A. The exclusionary rule
 - 1. Most nations punish police misconduct apart from the criminal trial
 - 2. United States punishes it by excluding improperly obtained evidence
 - 3. Supreme court rulings
 - a. 1949: declined to use exclusionary rule
 - b. 1961: changed, adopted it in *Mapp* case

B. Search and seizure

1. When can "reasonable" searches of individuals be made?
 - a. With a properly obtained search warrant with probable cause
 - b. Incident to an arrest
2. What can police search incident to an arrest?
 - a. The individual being arrested
 - b. Things in plain view
 - c. Things under the immediate control of the individual
3. What of an arrest while driving?
 - a. Answer changes almost yearly
 - b. Court attempts to protect a "reasonable expectation of privacy"
 - c. Privacy in body and home but not from government supervisor
4. Testing for drugs and AIDS
 - a. Mandatory AIDS testing called for, not yet in place
 - b. Government drug testing now in courts but private testing OK
 - c. Supreme Court: some testing is permissible
 1. Law enforcement and railroad employees
 2. Random sobriety checks on drivers
 3. Key: concern for public safety or national security
 4. High school athletes

C. Confessions and self-incrimination

1. Constitutional ban originally against torture
2. Extension of rights in the 1960s
 - a. *Escobedo*
 - b. *Miranda* case: "Miranda rules" to prove voluntary confession

D. Relaxing the exclusionary rule

1. Positions taken on the rule
 - a. Any evidence should be admissible
 - b. Rule had become too technical to work
 - c. Rule a vital safeguard
2. Supreme Court moves to adopt second position

E. Terrorism and Civil Liberties

1. USA Patriot Act
 - a. Telephone and internet taps, voice mail seizure
 - b. Grand jury information exchange
 - c. Detainment of non-citizens and deportation of aliens
 - d. Money laundering
 - e. Crime and punishments
2. Executive order for use of military courts
 - a. Trial before commission of military officers, may be secret
 - b. two-thirds vote for conviction, appeal to secretary of defense and the president
3. Intensified investigations and concerns of civil liberties organizations