

CHAPTER 15

Order and Civil Liberties

PARALLEL LECTURE 15.1

- I. The failure to include a bill of rights was the most important obstacle to the adoption of the Constitution.
 - A. As it was originally written, the Bill of Rights imposed limits on the national government, but not on the state governments.
 - B. The Constitution guarantees Americans numerous liberties and rights.
 1. **Civil liberties** are freedoms guaranteed to the individual.
 - a) They declare what the government cannot do.
 - b) They may also be thought of as “negative rights.”
 2. **Civil rights** are powers and privileges guaranteed to the individual and protected against arbitrary removal.
 - a) They declare what the government must do or provide.
 - b) They may also be thought of as “positive rights.”
 - C. The Bill of Rights lists both civil liberties and civil rights that are protected by the Constitution.
- II. The First Amendment prevents government from interfering with freedom of religion in two different ways: the establishment clause and the free-exercise clause.
 - A. The Supreme Court has affirmed the **establishment clause**, which both prohibits laws establishing religion and prevents the government from interfering with the exercise of religion.
 1. The Supreme Court has accepted only incidental government support of religion.
 - a) In *Lemon v. Kurtzman* (1971) the Supreme Court, using a three-pronged test, rejected a state program authorizing purchases of secular services for church schools. The three points specified in that test were that
 - (1) The statute must have a secular purpose.
 - (2) The primary effect of the statute should not be to advance or inhibit religion.
 - (3) The statute must not excessively entangle government with religion.
 - b) In 1997, in *Agostini v. Felton*, the Court loosened its application of the “Lemon Test.” The Court ruled that New York public school teachers could teach remedial education to disadvantaged students in New York parochial schools at taxpayer expense.
 2. The Supreme Court has upheld the constitutionality of state-funded Nativity scenes when surrounded by commercial symbols of the holiday season and thus was found not to primarily benefit religion.
 3. The Supreme Court has consistently viewed prayer in public schools as government encouragement of religion.
 4. The establishment clause creates a problem for government. Support for all religion at the expense of nonreligion seems to pose the least risk to social order. Tolerance of the dominant religion at the expense of other religions risks minority discontent; support for no religion risks majority discontent.

- B. Contemporary interpretation of the **free exercise clause** of the First Amendment distinguishes between religious beliefs and actions based on those beliefs. Beliefs are protected; antisocial actions based on them are not.
1. The Supreme Court has held that the First Amendment protects religious observance (e.g., working on the Sabbath) as well as belief.
 2. A neutral law that burdens the free exercise of religion is subject to strict scrutiny.
 3. Religious groups and individual believers challenge laws that conflict with their faith. Conflict may arise from the imposition of penalties for refusing to engage in religiously prohibited conduct as well as from laws that impose penalties for engaging in religiously motivated conduct. The inevitable result is a clash between religious freedom and social order.
 4. In 1990, the Supreme Court tipped the balance in favor of social order by refusing to grant members of the Native American Church an exemption from an Oregon law that made illegal the possession of peyote, a hallucinogenic drug used for centuries in some Native American religious ceremonies.
 5. The conflict between freedom and order was analyzed through the lens of majoritarian democratic thought by Antonin Scalia. As a result The Court rejected the strict scrutiny standard, declaring that laws indirectly restricting religious practices are acceptable. Only laws aimed at religious groups are constitutionally prohibited.
 6. Pluralism in action –the political response to *Employment v. Smith*. A coalition of religious and non-religious groups organized to restore the more restrictive scrutiny test.
 7. In 1993 President Bill Clinton signed into law the Religious Freedom Restoration Act (RFRA), requiring the government to satisfy the strict scrutiny standard before it could institute measures that interfered with religious practices. In 1997, however, the government declared the act unconstitutional.
 8. The strict scrutiny standard imposed by RFRA no longer binds government actions.

III. According to the dominant view, the **free-expression clauses (the press and speech clauses)** confer on individuals the right to unrestricted discussion of public affairs, as long as public order is not directly threatened. The clauses bar most forms of prior restraint as well as after-the fact prosecution for political and other discourse.

- A. According to the **clear and present danger test** – the starting point for any analysis of free speech – government has the right to restrict freedom of speech when public order is threatened.
1. In *Gitlow v. New York* (1925), the Court upheld the prosecution of individuals calling for the establishment of socialism.
 2. In *Brandenburg v. Ohio* (1969), the Court offered wider latitude for the expression of political ideas, putting more emphasis on freedom by declaring that threatening speech is protected by the Constitution, unless the government can prove that such advocacy is “directed to inciting or producing imminent lawless action.”
- B. **Symbolic expression**, or nonverbal behavior, has been upheld by the Court; although it is generally less protected than free speech, the courts have upheld certain types of symbolic expression. (In *Tinker v. Des Moines Independent County School District* (1969), the Court overturned the suspension of three high school students who wore black armbands to school to protest the Vietnam War).
- C. **Fighting words** are a notable exception to the protection of free speech. In *Cohen v. California* (1971), the Court recognized that “one man’s vulgarity is another’s lyric”

- by protecting two elements of speech: the expression of emotion and the expression of ideas.
- D. The Internet poses new challenges to free speech. The clash between free speech and social order takes new forms.
 - a) Intimidating speech, such as threats to abortion doctors, was not protected in court, though the losers of this battle are still appealing the verdict.
 - b) The demand for social order on the Internet. 1996 -The Communications Decency Act passed by Congress. A federal court declared the act unconstitutional.
 - c) In *Reno v. ACLU* in 1997 the Supreme Court argued that the Internet was more analogous to print media than to television, and so deserved broad First Amendment protection). The Internet poses challenges to copyright protections.
 - E. Obscene material is entirely excluded from constitutional protection.
 1. Difficulties arise in determining what is obscene.
 2. In *Miller v. California* (1973), the Court declared that a work is obscene if
 - a) Taken as a whole, it appeals to prurient interest.
 - b) It portrays sexual conduct in a patently offensive way.
 - c) Taken as a whole, it lacks serious literary, artistic, political, or scientific value.
 - F. The First Amendment guarantees that government will not interfere with the freedom of the press.
 1. In *New York Times Co. v. Sullivan* (1964), the Supreme Court declared that freedom of the press takes precedence over the rights of public officials suing for **libel**.
 2. The Supreme Court has extended the concept of freedom of the press to protect publishers against suits from public figures. Free speech protects criticism of public figures, even if the criticism is outrageous and offensive.
 3. The Supreme Court has recognized that prior restraint of the press may be necessary, but it has not specified under what circumstances restraint is appropriate.
 4. The courts have consistently held that freedom of the press does not override the requirements of law enforcement.
 - G. The right to petition and to assemble peaceably have merged with the guarantees of freedom of the press and speech.
- IV. The Second Amendment—which acknowledges “the right of the people to keep and bear arms”—has been the focus of heated controversy in recent years.
- A. Though restrictions on gun ownership have passed constitutional muster, prohibitions on gun ownership may infringe on the Second Amendment.
 - B. Gun control advocates argue that the right to bear arms should apply only to state militias, not to individuals.
- V. Because of the adoption of the Fourteenth Amendment, most of the individual protections found in the Bill of Rights now apply to the states.
- A. Even before its amendment, the Constitution set some limits on both the national and the state governments with regard to citizens’ rights.
 1. **Bills of attainder**—laws that make an individual guilty of a crime without a trial—were barred.
 2. **Ex post facto laws**, which declared an action a crime after it had been performed, were not permitted.
 3. Both the nation and the states were also barred from impairing the **obligation of contracts**.

- B. The Supreme Court’s interpretation of the due process clause in the Fourteenth Amendment has allowed individuals to contest state violations of their liberties. (See text Figure 15.1)
 - C. The Supreme Court has ruled, however, that extension of the Bill of Rights guarantees to the states via the due process clause applies only to “fundamental” rights.
 - 1. In *Palko v. Connecticut* (1937), the Court determined that double jeopardy and trial by jury were not fundamental rights to be protected by the states.
 - 2. In the thirty years after the *Palko* decision, the Court found that most of the guarantees found in the Bill of Rights were indeed fundamental.
 - D. The application of constitutional procedural safeguards in criminal proceedings to the states has reshaped the American criminal justice system in the last thirty years.
 - 1. Procedural safeguards have been applied to the states through a two-step process:
 - a) The judiciary decides whether the guarantee in question is applicable to the states.
 - b) The judiciary gives specific meaning to the guarantee.
 - 2. The Supreme Court has recognized that there are a variety of ways to prosecute the accused while heeding their fundamental rights.
 - a) The right to a jury trial was made obligatory for the states, but nothing regulates jury size or whether judgments should be unanimous.
 - b) In *Gideon v. Wainwright* (1963), the Supreme Court determined that defendants in criminal proceedings were entitled to a lawyer.
 - c) In *Miranda v. Arizona* (1966), the Supreme Court instituted the **Miranda warnings** to ensure protection against self-incrimination.
 - d) In *Mapp v. Ohio* (1961), the Supreme Court determined that the exclusionary rule—which protects individuals from unreasonable searches and seizures—applied to all levels of government.
 - e) In *United States v. Leon* (1984), the Supreme Court created a “good faith exception” to the exclusionary rule. This permitted evidence obtained from a mistakenly issued search warrant to be presented in court. This narrowing of the exclusionary rule may be an indication that a new era favoring order over freedom has begun.
 - E. The USA-Patriot Act, passed after 9/11, expanded the ability of law enforcement and intelligence agencies to tap phones, monitor Internet traffic, and conduct other forms of surveillance in pursuit of terrorists.
 - 1. This shift toward order worries civil libertarians
 - 2. More than 150 communities denounce the act as an assault on civil liberties
 - F. The Supreme Court rejected President’s Bush position that war detainees in the war on terrorism designated as “enemy combatants” were not entitled to basic legal requirements and that his actions could not be reviewed in the courts.
- VI. The Ninth Amendment, which protects rights not specifically enumerated in the Constitution, has been used by the Supreme Court to define the limits of government encroachment on personal autonomy.
- A. In *Griswold v. Connecticut* (1965), the Court asserted that the Bill of Rights created a zone of privacy for the individual that gave the individual the right to make choices regarding sexual intercourse and reproduction.
 - B. In *Roe v. Wade* (1973), the Supreme Court ruled that a woman’s right to seek an abortion during the first three months of her pregnancy rests on the right to privacy protected by the Fourteenth Amendment.
 - 1. Dissenters argued that the majority opinion in *Roe v. Wade* had no basis in the Constitution.

2. In *Webster v. Reproductive Health Services* (1989), the Court upheld the constitutionality of a Missouri law that denied the use of public employees or facilities in the performance of an abortion unless the mother's life was in danger.
 3. In recent years, the Court has withdrawn the constitutional protection shrouding abortion rights and has cast the issue into the state legislative process.
 4. Currently, the Court is divided on the abortion issue.
- C. The right-to-privacy cases have opened up a wide variety of controversial social issues to be decided by the courts.
1. In 1986, the Supreme Court held that the Constitution does not protect homosexual relations between consenting adults; a recent decision reversed this ruling.
 2. Personal autonomy and sexual orientation cases have shifted to the political arena within the individual states. 35 states now bar the recognition of same-sex marriages.
 3. State courts and state legislatures have demonstrated their receptivity to positions that are probably untenable in the federal courts.