

CHAPTER 5

Civil Liberties

REVIEWING THE CHAPTER

CHAPTER FOCUS

This chapter surveys quite a number of pressure points that have developed in the American political system regarding the liberties of individuals and the government's involvement in protecting or restricting those liberties. Included among these pressure points are national security, federal versus state enforcement of rights, First Amendment freedoms, and criminal law. After reading and reviewing the material in this chapter, you should be able to do each of the following:

1. Discuss the relationship of the Bill of Rights to the concept of democratic rule of the majority, and give examples of tension between majority rule and minority rights. Explain how the politics of civil liberties may at times become a mass issue, and offer several examples.
2. Describe the conflicts that have arisen between those who claim First Amendment rights and those who are in favor of sedition laws that might restrict freedom of speech. Explain how the Supreme Court attempts to balance competing interests. Describe the various tests that the Court has applied.
3. Explain how the structure of the federal system affects the application of the Bill of Rights. How has the Supreme Court used the Fourteenth Amendment to expand coverage in the federal system? Discuss changing conceptions of the due process clause of the Fourteenth Amendment.
4. List the categories under which the Supreme Court may classify "speech." Explain the distinction between protected and unprotected speech, and name the various forms of expression that are not protected under the First Amendment. Describe the test used by the Court to decide the circumstances under which freedom of expression may be qualified.
5. State what the Supreme Court decided in *Miranda v. Arizona*, and explain why that case illustrates how the Court operates in most such due-process cases.
6. Analyze why the resolution of civil liberties issues involves politics as well as law. Discuss the political factors that influence the Supreme Court when it decides fundamental civil liberties issues.

STUDY OUTLINE

- 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

- B. Civil rights v. civil liberties
 - 1. Liberties: protections against the abuse of government power
 - 2. Rights: protections against discrimination
 - 3. Sometimes the distinction can be blurred
- II. Rights in conflict: Bill of Rights contains competing rights
 - A. *Sheppard* case (free press versus fair trial)
 - B. *New York Times* and Pentagon Papers (common defense versus free press)
 - C. Kunz anti-Jewish speeches (free speech versus public order)
 - D. Struggles over rights show same pattern as interest group politics
 - 1. War is usually the crisis that has resulted in restrictions for some minorities
 - a) Sedition Act of 1789, during French Revolution
 - b) Espionage and Sedition Acts of World War I
 - c) Smith Act of World War II
 - d) Internal Security Act of 1950, Korean War
 - e) Community Control Act of 1954, McCarthy era
 - 2. Supreme Court has been called on to decide if limits were proper
- III. Culture conflicts
 - A. Original settlement by white European Protestants produced Americanism
 - B. Waves of immigration brought new cultures, conflicts
 - 1. Non-Christians offended by government-sponsored crèches at Christmas
 - 2. English speakers prefer monolingual schools
 - 3. Boy Scouts of America exclude homosexuals from being scout leaders
 - C. Differences even within given cultural traditions
- IV. Applying the Bill of Rights to the States
 - A. Originally, the Bill of Rights applied only to the federal government
 - 1. Affirmed by the Supreme Court in 1883 case
 - 2. Excepting some provisions in Article I, the Constitution was silent on what the states could not do
 - B. Changes in the post-Civil War era
 - 1. War amendments (13th, 14th and 15th) followed
 - 2. Fourteenth contained two critical clauses
 - a) The due process clause
 - b) The equal protection clause
 - 3. Court began (in 1897) to use these clauses to apply certain rights to state government
 - a) Process known as “incorporation”
 - (1) Application of some rights (but not all) to the states
 - (2) No clear answer to which rights are “fundamental”
 - b) Currently incorporated rights
 - c) Newly discovered (or created) rights tend to be automatically incorporated
- V. 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. The *Gitlow* case 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
 - (1) Public outrage and congressional action
 - (2) Supreme Court response and the need for an amendment
 - (3) Reluctance of Congress
- VI. Who is a person?
 - A. Corporations, etc., usually have same rights as individuals
 - 1. Boston bank, antiabortion group, California utility have speech rights
 - 2. More restrictions are allowed, however, on commercial speech
 - a) Regulation must be narrowly tailored
 - b) Or it must serve some clear public interest
 - 3. McCain-Feingold campaign finance reform law of 2002
 - a) Restrictions on “electioneering communications” that refer to candidates within 60 days of an election
 - b) Restrictions upheld despite legal challenges
 - 4. Young people may have fewer rights; Hazelwood; school newspaper can be restricted
- VII. 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 other 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 on these matters
 - (4) Recent controversy: school vouchers in Cleveland, OH
 - (a) State offered money to families (especially poor ones) whose students were attending failing schools
 - (b) Voucher could be used for another public school or a private school
 - (c) Court upheld the program as aid to families, not schools, or religion
 - 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

VIII. 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
 - (1) 1979 ruling: cannot search suitcase in car of arrested person
 - (2) 1981 ruling: cannot search “closed, opaque container” either

- (3) 1982 ruling: can search any place where there is probable cause to suspect the presence of contraband
 - (4) Further extensions of police power
 - (a) Can also search things people are carrying in car
 - (b) Car can be searched if “reasonable suspicion” develops during traffic violation stop
 - b) Court attempts to protect a “reasonable expectation of privacy”
 - c) Privacy in body and home but not from government supervisor or private employer
- C. Confessions and self-incrimination
 - 1. Constitutional ban originally against torture and “third degree” tactics by police
 - 2. Extension of rights in the 1960s
 - a) The *Miranda* case
 - (1) Confessions presumed involuntary unless informed of particular rights
 - (2) *Miranda* warnings now read by police
 - b) Applications of *Miranda*
 - (1) Right to a lawyer in police lineup
 - (2) Right to a lawyer in mental competence examinations
 - (3) Exclusion of confessions without lawyer present
 - (4) Confessions to undercover officer posing as cellmates permitted
 - (5) Exclusion of confessions which result from questioning before and after *Miranda* warnings are given
- D. Relaxing the exclusionary rule
 - 1. Positions taken on the rule
 - a) Any evidence should be admissible
 - b) Rule was useful, but had become too technical to be an effective deterrent
 - c) Rule a vital safeguard to essential liberties
 - 2. Courts have moved to adopt the second position
 - a) Limiting coverage
 - b) Allowing for exceptions. Examples:
 - (1) good faith exception
 - (2) public safety exception
 - (3) inevitable discovery exception
- 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
 - (1) May be held in secret
 - (2) Conviction based on a two-thirds vote of commission members
 - (3) Appeals to the secretary of defense and president (not civilian courts)
 - b) Potential uses and associated controversies
 - (1) Detainees in Guantanamo—Taliban regime, Afghanistan
 - (2) Detainees in Guantanamo—al Qaeda terrorist network
 - 3. Legal issues and developments
 - a) The Second World War position relating to “unlawful combatants”
 - b) Bush administration issue: neither combatants nor terrorists