

# **CIVIL LIBERTIES AND CIVIL RIGHTS**



## **UNIT 2**

# PAY ATTENTION



# **CHAPTER 14**

# **CIVIL LIBERTIES**

# **LESSON 9**

**440-450**

## **Incorporation; Freedom of Religion**

# **DIFFERENCE BETWEEN CIVIL LIBERTIES AND CIVIL RIGHTS?**

## **CIVIL LIBERTIES**

- **Definition – legal and constitutional rights that protect individuals from arbitrary *acts of government***
- **Freedoms that are guaranteed -- either by law, constitution, or judicial interpretation**
- **Involve basic freedoms (e.g. speech and religion)**
- **The freedoms of conscience, religion, and expression, for example, which are secured by the First Amendment**

# DIFFERENCE BETWEEN CIVIL LIBERTIES AND CIVIL RIGHTS?

## CIVIL RIGHTS

- Definition – policies designed to protect people against arbitrary or discriminatory *treatment by government officials or individuals*
- Include laws prohibiting racial, gender, physical, and religious discrimination
- Protected by the due process and equal protection clauses of the Fifth and Fourteenth Amendments and by the civil rights laws of national and state governments

# **BASIS OF OUR CIVIL LIBERTIES – PROTECTED RIGHTS IN THE ORIGINAL CONSTITUTION**

- ***Writ of habeas corpus***
  - Directs any official having a person in custody to produce the prisoner in court and to explain to the judge why the prisoner is being held; Can only be suspended during times of rebellion (Civil War)
  - Person has the right to know why he or she is being imprisoned
- ***Ex post facto laws***
  - Latin for “after the fact”
  - Punishes a person for something that was not a crime when he did it (retroactive punishment); May not be passed by Congress
- **Bills of attainder**
  - An act that punishes a person without benefit of trial
  - May not be passed by Congress

# BILL OF RIGHTS AND THE STATES

## BILL OF RIGHTS

- Added to the original Constitution to appease states
- Rights of the individuals and states listed to protect them from the federal government
- Bill of Rights only applied to the federal government and did not include protections against state governments (*Barron v. Baltimore, 1833*)
  - Feeling was that people could protect themselves against the state governments that were in their own backyards, but they needed additional protection against a new, powerful, and distant national gov't

# **SELECTIVE INCORPORATION**

- **The process by which provisions of the Bill of Rights are brought within the scope of the Fourteenth Amendment and so applied to state and local governments.**

# SELECTIVE INCORPORATION

## Modifying Effect of the 14<sup>th</sup> Amendment

- The due process clause has been used to apply some of the provisions of the Bill of Rights to the states.
- This clause bans states from denying life, liberty, or property without due process of law.
- The “total incorporation” view would apply all of the provisions of the Bill of Rights to the states. It argues for nationalization (or federalization) of the Bill of Rights.
- The “selective incorporation” view would apply only some of these provisions, and would do so on a case-by-case basis.
- The important case here: *Gitlow v. New York*, 1925.
  - States may not deny free speech and press. These were protected by 14<sup>th</sup> Amendment Due Process Clause.

# SELECTIVE INCORPORATION

## Modifying Effect of the 14<sup>th</sup> Amendment

- **Subsequent cases federalized parts of the Bill of Rights:**
  - **1<sup>st</sup> – Assembly, Petition, Religion**
  - **2<sup>nd</sup> – Right to Bear Arms**
  - **4<sup>th</sup> – Search and Seizure protections**
  - **5<sup>th</sup> – Self-Incrimination, Double Jeopardy**
  - **6<sup>th</sup> – Right to Counsel, Right to Bring Witnesses, Right to Confront Witnesses**
  - **8<sup>th</sup> – Protection against Cruel and Unusual Punishment**
- **All provisions of the Bill of Rights except Amendment 3, Amendment 7, and the Grand Jury requirement of the 5<sup>th</sup> Amendment have been federalized.**

# FREEDOM OF RELIGION - THE ESTABLISHMENT CLAUSE

- **No Government “Establishment of Religion”**
  - A “wall of separation” - Separation of church and state (words of Jefferson; it is implied within 1<sup>st</sup> amendment, but not stated – kind of like “fair trial”)
- **Basic meaning of establishment clause: government may not establish an official religion.**
  - “Accommodationist View”: Government should bend a bit and allow a certain degree of church/state blending (allowing nativity scenes on city property, and allowing a non-denominational prayer in public school)
  - “Separationist View”: Government should allow virtually no blending of church and state. There should be a “wall of separation” between the two.

# FREEDOM OF RELIGION - THE ESTABLISHMENT CLAUSE

- ***Lemon v. Kurtzman***: Established a 3-part test to determine if a statute or practice violates the establishment clause:
  1. **Non-Secular (Religious) Purpose**
  2. **Advances or Inhibits Religion**
  3. **Excessive Entanglement with Government**
- **If any is present, the statute or practice is unconstitutional**

# FREEDOM OF RELIGION - THE ESTABLISHMENT CLAUSE

## Key rulings:

- *Engle v. Vitale, 1962*: no state-sponsored, recited prayer in public school. No teacher-led prayer.
- No devotional Bible-reading in public school.
- Moment of silence in public school is constitutional (as long as the purpose is not stated as being for prayer).
- State laws may not prohibit the teaching of evolution in public school.
- State laws that require the posting of the 10 Commandments in public school are unconstitutional.
- Released time for students is constitutional. Allowing students to meet on campus for religious groups (such as Christian Club) is constitutional.
- Christmas displays in town squares are constitutional as long as they include some secular content.
- Constitutional forms of state aid to private schools: textbooks, classrooms, lunches, bus transportation.
- Unconstitutional forms of state aid to private schools: field trips, teacher salaries, counseling services, remedial instruction.

# FREEDOM OF RELIGION – FREE EXERCISE CLAUSE

- **Provides Freedom of Worship**
- **Religious practices that have been restricted:**
  - Polygamy (*Reynolds v. U.S.*)
  - Drug use (*Oregon v. Smith*)
  - Not vaccinating children of Christian Scientists before they enter school
  - Not paying Social Security taxes (Amish)
  - Wearing a Jewish skullcap (Yarmulke) in the military
- **Religious practices that have been permitted:**
  - Not saluting flag in public school (Jehovah's Witnesses)
  - Not sending children to school past the 8<sup>th</sup> Grade (Amish)
  - Animal Sacrifice (Santeria case)
- **Article 6 bans religious tests/oaths as qualifications to hold public office.**

# **LESSON 10**

**450-455**

## **Freedom of Speech, Press, and Assembly**

# FREEDOM OF SPEECH – HISTORIC TEST

- **The Clear and Present Danger Test**

- *Schenck v. United States, 1919*

- Created a precedent that 1<sup>st</sup> Amendment guarantees of free speech are not absolute; Public authorities could limit free speech
- Speech may be restricted when it incites violent action (imminent threat to society such as falsely shouting “Fire” in crowded theater)

- *Brandenburg v. Ohio, 1969*

- SC limited the “clear and present danger” test by ruling that the government could punish the advocacy of illegal action only if “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”

# **NON-PROTECTED SPEECH**

**Supreme Court holds that all speech is protected unless it falls into one of the four narrow categories:**

- 1. Libel and slander**
- 2. Obscenity and pornography**
- 3. Fighting words**
- 4. Commercial speech**

# NON-PROTECTED SPEECH

- **Libel and slander**
  - **Libel is a written defamation that falsely attacks a person's good name and reputation**
  - **Slander is a spoken defamation that falsely attacks a person's good name and reputation**
  - ***New York Times v. Sullivan (1964)* - Supreme Court established the guidelines for libel cases**
    - **Public officials and public figures must first prove "actual malice"**
    - **State laws may allow private persons to collect damages without proving actual malice**
  - **Limits on student speech**
    - ***Bethel v. Fraser (1986)* – school can suspend a student from school for making a speech full of sexual double entendres or innuendos.**

# NON-PROTECTED SPEECH

- **Obscenity (i.e. pornography)**

- ***Miller v. California* (1973) gave constitutional definition of obscenity**
  1. Appeals to prurient interest in sex,
  2. Patently offensive, and
  3. Must lack serious literary/artistic/political/scientific value.
  - If not meeting all three criteria, then not obscene
- **Sexually explicit materials about or aimed at minors are not protected by the First Amendment**

# NON-PROTECTED SPEECH

- **Fighting words**
  - Governments may punish certain well-defined and narrowly limited classes of speech that by their very utterance inflict injury or tend to incite an immediate breach of peace
- **Commercial speech**
  - Commercial speech (such as advertising) is more restricted than are expressions of opinion on religious, political, or other matters.
  - The Federal Trade Commission (FTC) decides what kinds of goods may be advertised on radio and television and regulates the content of such advertising.

# PROTECTED SPEECH

- **Prior restraint**

- Blocking speech before it is given.
- Such action is presumed by courts to be unconstitutional.
- In the Pentagon Papers case (*New York Times v. U.S.*), the court refused to impose prior restraint: the revelations may have embarrassed the government, but they did not endanger national security.

- **Symbolic speech**

- *Tinker v. Des Moines (1969)* – wearing black armband at school at protest Vietnam War
- *Texas v. Johnson (1989)* – flag burning

# FREEDOM OF THE PRESS

## CONTROVERSIAL AREAS

- **Executive Privilege**
  - Right of presidents to withhold information from the courts.
  - *U.S. v. Nixon (1974)*: A President generally does have executive privilege, but not in criminal cases. Even the President is not above the law.
- **Shield laws**
  - Protect reporters from having to reveal their sources.
  - The press claims that without them, their sources would “dry up,” and they would be unable to provide information to the public.

# FREEDOM OF THE PRESS

## CONTROVERSIAL AREAS

- Courts have protected press's right to publish
  - The 1966 Freedom of Information Act
    - Liberalized access to non-classified government records
    - Electronic Freedom of Information Act of 1996 requires most federal agencies to put their files online and to establish an index of their records - NASA a leader (UFO documents!)
  - Student Press
    - *Hazelwood v. Kuhlmeier (1988)*
    - High school newspaper was not a public forum and could therefore be restricted just as other high school activities could be restricted by school authorities

# FREEDOM OF ASSEMBLY

## PUBLIC FORUMS AND TIME, PLACE, AND MANNER REGULATIONS

- **Governments may not specify what can or cannot be said, but they can make reasonable time, place, and manner regulations for the holdings of assemblies, protests, or gatherings**
- **Police must have right to order groups to disperse (public order)**
- **Problem of “heckler’s veto” : if govt. restricted assembly every time an opposing group claimed that there might be “violence or disorder” there would be very few assemblies. Courts are therefore reluctant to impose prior restraint.**
- **The extent to which governments may limit access depends on the kind of forums involved:**
  - **Public forums (historically associated with free exercise such as streets, parks)**
  - **Limited public forums (public property such as city hall or schools after-hours)**
  - **Nonpublic forums (libraries, courthouses, government offices) - can not interfere with normal activities in order to stage a public protest**
- **Civil disobedience is not a protected right**

# **LESSON 11**

## **456, 458-467**

# **Rights of Criminal Suspects**

# FOURTH AMENDMENT RIGHTS

- **The Constitution forbids only "unreasonable" searches and seizures**
- **A police search without consent is constitutionally unreasonable unless it has been authorized by a valid search warrant**
  - **Ex: police use of sobriety checkpoints in enforcing drunk driving laws**
- **The constitutional requirements of a specific search warrant**
  - **Must describe what places are to be searched**
  - **Must describe what things are to be seized**

# FOURTH AMENDMENT RIGHTS

- **The Exclusionary Rule**

- ***Mapp v. Ohio (1961)* - The Supreme Court ruled that evidence obtained unconstitutionally cannot be used in court against person from whom it was seized**
- **Adopted mainly to prevent police misconduct**
- **Not used if:**
  - **There would be “inevitable discovery” of the evidence (*Nix v. Williams*)**
  - **Police operate “in good faith” that the warrant was valid (*U.S. v. Leon*)**

# FIFTH AMENDMENT RIGHTS

- **Due Process Rights**

- **When govt. denies life, liberty or property, it must use fair procedures:**

- **Observe Bill of Rights**

- **Provide reasonable notice**

- **Provide chance to be heard**

# FIFTH AMENDMENT RIGHTS

- **Due Process Rights**

- Procedural due process refers to the methods by which a law is enforced; pertains not to the law itself, but to the way in which the law is applied
- Examples of violations of procedural due process:
  - Illegal Searches.
  - Unfair Court Procedures.
- Substantive due process places limits on what a government may do; pertains to the content of the law
- Examples of violations of substantive due process:
  - Ban on all abortions within a state.
  - County ordinance banning all firearms.
- Example of distinction between procedural and substantive: a law prohibits possession of narcotics (substantive) and police must generally obtain a warrant before conducting a search for narcotics in one's home (procedural).

# FIFTH AMENDMENT RIGHTS

- **No Self-incrimination - the right to remain silent**
  - You have the right to remain silent
    - You do not have to testify against yourself; “I plead the 5<sup>th</sup>”
    - Designed so that the burden is on the government to prove guilt
- **The Miranda Warning**
  - *Miranda v. Arizona* (1966) - Supreme Court announced that no conviction could stand if evidence introduced at the trial had been obtained by the police during "custodial interrogation" unless suspects have been:
    - Notified that they are free to remain silent
    - Warned that what they say may be used against them in court
    - Told that they have a right to have attorneys present during questioning
    - Informed that if they cannot afford to hire their own lawyer, attorneys will be provided for them
    - Permitted to terminate any stage of the police interrogation

# FIFTH AMENDMENT RIGHTS

- **Double jeopardy**

- Fifth amendment prevents individual from being tried again (if found innocent)
  - Still can be tried by both federal and state governments for the same offense (or by two states)
  - Double jeopardy does not forbid civil prosecution after acquittal in a criminal trial

- **Grand Jury Indictment**

- Grand jury indictment is necessary in order to require anyone to stand trial for a serious crime
- Grand jurors are concerned with whether there is enough evidence to warrant a trial
- Plea bargaining - pleading guilty to a lesser offense in return for not having to stand trial for a more serious charge (about 90% of cases end in a plea deal)

# SIXTH AMENDMENT RIGHTS – “FAIR TRIAL”

- **The Right to counsel**
  - Judges have an obligation to ensure that all persons subject to any kind of custodial interrogation are represented by lawyers
  - Right to counsel extends to all hearings for all offenses for which an accused could be deprived of liberty
  - In *Gideon v. Wainwright* (1963), the United States Supreme Court ruled that the Sixth Amendment right-to-counsel provision applies to those accused of major crimes under state laws

# **SIXTH AMENDMENT RIGHTS – “FAIR TRIAL”**

- **Government is obligated to give the defendant a speedy trial**
- **Government is obligated to give the defendant a public trial**
- **An impartial jury consists of persons who represent a fair cross-section of the community**
- **Defendant has the constitutional right to obtain witness in his/her favor**
  - **Constitution gives accused persons the right to be confronted with the witnesses against them**

# EIGHTH AMENDMENT RIGHTS

- **Bail**
- **The Death Penalty**
  - Eighth Amendment forbids the inflicting of cruel and unusual punishments
  - The death penalty is not considered cruel and unusual punishment in America
  - *Furman v. Georgia (1972)* - Court halted capital punishment until states could administer it in "consistent fashion" decision that ruled on the requirement for a degree of consistency in the application of the death penalty.
    - The case led to a *de facto* moratorium on capital punishment throughout the United States, which came to an end when *Gregg v. Georgia* was decided in 1976.
  - *Gregg v. Georgia (1976)* - The death penalty does not, automatically, violate the Eighth Amendment.
    - If the jury is furnished with standards to direct and limit the sentencing discretion, and the jury's decision is subjected to meaningful appellate review, the death sentence may be constitutional.
    - If, however, the death penalty is mandatory, such that there is no provision for mercy based on the characteristics of the offender, then it is unconstitutional.

# **CHAPTER 15**

# **CIVIL RIGHTS**

# **LESSON 12**

## **456-458, 479-495**

### **Civil Rights**

# EQUALITY

- **Civil rights are the constitutional rights of all persons, not just citizens, to due process and the equal protection of the laws: the constitutional right not to be discriminated against by governments or individuals because of race, ethnic background, religion, or gender.**

# EQUALITY

- **Civil Rights Act of 1964 - Ended segregation in public places and banned employment discrimination on the basis of race, color, religion, sex or national origin >> ended Jim Crow Laws**
  - **Title II (of Civil Rights Act of 1964): Places of public accommodation**
    - **Makes it a federal offense to discriminate against any customer or patron in a place of public accommodation because of race, color, religion, or national origin**
    - ***Heart of Atlanta Motel v. U.S. (1964)* - Congress has a right to regulate individual businesses in the interest of promoting interstate travel**
  - **Title VII (of Civil Rights Act of 1964): Employment**
    - **Makes it illegal for any employer in any industry affecting interstate commerce and employing 15 or more people to discriminate in employment practices against any person because of race, color, national origin, religion, or sex**

# EQUALITY

- **Civil Rights Act of 1968 (Fair Housing Act of 1968)**
  - Forbids owners to refuse to sell or rent to any person because of race, color, religion, national origin, sex (since 1978), handicap, or because a person has children (since 1988)
- **Americans with Disabilities Act, 1990**
  - Prohibits discrimination based on disability
  - Requires employers to provide reasonable accommodations to employees with disabilities
  - Requires facilities be made accessible to those with disabilities

# WOMEN'S RIGHTS

## First feminist wave

- **Struggle for suffrage – 19<sup>th</sup> Amendment, 1920**

## Second feminist wave: 1960-present

- **Rise of National Organization for Women (NOW), 1966 – dedicated to women's rights**
- **Other women's groups such as EMILY'S List, 1985 – pro-choice**
- **Legislation**
  - **Equal Pay Act of 1963**
  - **Title VII of Civil Rights Act of 1964 prohibited employment discrimination on the basis of sex**
  - **Proposal, ratification struggle, and defeat of ERA**
  - **Title IX of Education Act of 1972 prohibited gender discrimination in federally subsidized education programs, including athletics**

# PRIVACY RIGHTS - ABORTION

- Fundamental rights are those which are explicitly in the Constitution (Bill of Rights)
- Such rights also include those which are implicitly in the Constitution (travel, political association, privacy – *Griswold v. Connecticut, 1965*).
- Abortion Cases:
  - Prior to 1973: states set own abortion policies.
  - *Roe v. Wade, 1973*: established trimester guidelines. Based upon right of privacy implied in Bill of Rights.
  - *Webster v. Reproductive Health Services, 1987*: did not overturn *Roe*, but gave states more leeway in restricting abortion.
  - *Planned Parenthood v. Casey, 1992*: somewhat defined that leeway: states cannot impose an “undue burden” on a women’ s right to an abortion.

# PRIVACY RIGHTS - HOMOSEXUALS

- ***Lawrence v. Texas* (2003)** – Court struck down Texas sodomy law through use of “liberty” part of 14<sup>th</sup> Amendment’s due process clause
- ***Obergefell v. Hodges* (2015)** – Same-sex couples right to marry is protected by the due process clause and the equal protection clause of the 14<sup>th</sup> Amendment
- **Most effective way to secure rights has been through litigation in the courts to gain protections against discrimination**

# VOTING RIGHTS – PROTECTING VOTING RIGHTS

- **After federal troops withdrew from the South in 1877, southern Democrats used social pressure, violence, and terrorist activities to keep African-Americans from voting**
- **Southern States created Jim Crow laws that made it difficult or impossible for African-Americans to vote; use of grandfather clause to keep white people voting**
- **Other devices used to keep African Americans from voting**
  - **White primary - Primary operated by the Democratic party in southern states that, before Republicans gained strength in the “one-party South,” essentially constituted an election; ruled unconstitutional**
  - **Racial gerrymandering - the drawing of election districts to ensure that African Americans would be a minority in all districts – unconstitutional (15<sup>th</sup> Amendment)**
  - **Poll tax**
  - **Registration requirements**
  - **Literacy tests**

# THE VOTING RIGHTS ACT OF 1965

- **Provisions**

- Requires that states that had a history of denying African-Americans the right to vote must clear any changes in any voting practice or laws that might result in dilution of voting power with the Department of Justice (some has since been struck down)
- Eliminated literacy tests
- Empowered federal officials to register voters
- Empowered federal officials to ensure that citizens could vote (w/ marshals)
- Empowered federal officials to count ballots
- Requires states to include ballots in languages other than English if a significant number of non-English speakers reside in an area

- **Effects**

- Huge increase in black turnout
- Large increase in number of black elected officials
- Forced white elected officials to take into account the needs of blacks

# ADDITIONAL DEVELOPMENTS

- ***Shaw v. Reno, 1993*** – majority-minority districts are **LEGAL**
  - Supreme Court announced that states may take race into account, they may not make race the sole reason for drawing district lines
- **Effect** – Major instrument for increasing the number of African American and other minority voters

# **LESSON 13**

## **496-500**

# **Education Rights**

# ***PLESSY V. FERGUSON (1896)***

- **The Court endorsed the SEPARATE-BUT-EQUAL doctrine**
- **Separate but equal always resulted in discrimination against African-Americans, leading to lawsuits challenging the doctrine**

# ***BROWN V. BOARD OF EDUCATION (1954)***

- The Court reversed its *Plessy* decision; segregation is itself discrimination (separate-but-equal unconstitutional)
- *Brown I* was the end of segregation
- *Brown II* was the process of integration
- Title VI of the Civil Rights Act of 1964 stipulates that federal dollars under any grant or project be withdrawn from a school that discriminates (Civil Rights Act of 1964 essentially ends Jim Crow laws)

# FROM SEGREGATION TO DESEGREGATION

- ***de jure* segregation – segregation imposed by law**
  - Supreme Court sustained the right of judges to order busing to overcome *de jure* segregation
  - *de jure* segregation doesn't exist in America today
- ***de facto* segregation – segregation resulting from economic or social conditions or personal choice**
  - The Court has refused to permit judges to order busing to overcome the effects of *de facto* segregation
  - *de facto* segregation still exists in America legally today (i.e. neighborhoods)

# THE AFFIRMATIVE ACTION CONTROVERSY

- **Affirmative action - policies requiring special efforts in employment, promotion, or school admissions on behalf of disadvantaged groups**
  - The goal of affirmative action is to move beyond equal opportunity toward equal results.
  - Some groups have claimed that affirmative action programs constitute “reverse discrimination.”
- **Constitutionality of affirmative action programs**
  - *University of California Regents v. Bakke (1978)*
    - Quotas cannot be used for admissions (cannot reserve seats for racial minority groups)
    - Affirmative action programs are not necessarily unconstitutional
- **Reaffirming the Importance of Diversity**
  - *Gratz v. Bollinger (2003)* – race cannot be used as a “bonus” point
  - *Grutter v. Bollinger (2003)* – race can be one of the factors to be considered in admissions