

CIVIL LIBERTIES NOTES

DEFINITION:

Civil Liberties are “freedoms of citizens that government may not infringe upon.” In other words, government may not limit these freedoms in any way. However, despite the definition, government must and does limit these freedoms every single day in order to protect society. (Example: people have freedom of speech, but they cannot be allowed to shout ‘FIRE!’ in a crowded theater).

The real question is where exactly government should draw the specific line between what is allowed versus what must be limited in order to protect society and maintain order. This line is constantly changing in reaction to events like 9/11, and often we must await the results of a trial to see where the dividing line is at this time & place.

SOURCES OF CIVIL LIBERTIES

The US Constitution, as originally written, contains very few guarantees of civil liberties. One civil liberty listed in the US Constitution is *Habeas Corpus*, which requires police to either charge a criminal suspect with a crime or release him. Another civil liberty is that *Ex Post Facto* laws are prohibited (no retroactive laws can be passed). The Constitution also prohibits *Bills of Attainder* (laws passed by a legislature designed to specifically punish someone).

Most of our civil liberties come from the Bill of Rights, the name given to the first ten amendments to the Constitution. These were added to the Constitution to satisfy the demands of the Anti-Federalists who wanted more specific guarantees of states’ rights and individual liberties. (See the “Amendments” handout for a list of these).

Rulings by the US Supreme Court are the other major source of our civil liberties. Cases such as *Roe v. Wade* and *Miranda v. Arizona* have given the people civil liberties not specifically mentioned in the Constitution. The civil liberties defined in these cases were the result of the Supreme Court’s “interpretation” of the Constitution, rather than the written word of the Constitution.

FREEDOM OF SPEECH

The Freedom of Speech, contained in the 1st Amendment, is the heart of the democratic process. Society has a deep interest in preserving free speech, but government must limit it in some circumstances to protect public safety and order.

The amount of restrictions the government places on speech depends on the type of speech under consideration. “Pure Speech” (someone verbally expressing their opinion) has very few restrictions placed on it. “Speech Plus” (speech expressed as part of a parade or protest march) can have additional restrictions placed on it because of the greater chance of group violence. Symbolic Speech (expressing one’s opinion through the use of symbols) is considered a form of free speech and is protected by the Constitution.

The US Supreme Court has developed some guidelines for drawing the line between permissible and impermissible speech. The “Clear & Present Danger” doctrine, based on the case *Schenk v. the US*, says that government can limit speech, especially during a war or national emergency, if the speech presents a “clear and present danger” to the United States. However, people are usually not prosecuted unless the speech is likely to incite violence. The “Least Restrictive Means” doctrine says that in cases where the government must limit free speech to protect society, it must do so in the least restrictive way possible.

Some types of speech are NOT protected by the Constitution, and the government can and does prohibit them. For instance, people may not commit “defamation of character,” which

is purposely harming someone by ruining their reputation with lies. It is not a criminal offense, but victims of defamation can sue the defamer. “Seditious speech” is calling for the violent overthrow of government authority and is also not protected. Finally, speech that results in the disturbance of the peace, such as “fighting words,” “hate speech,” and the “heckler’s veto” are not protected forms of speech. Police will make an on-the-spot judgment whether the speech in question is disturbing the peace at that particular time and place. Their judgment can be tested later in court.

FREEDOM OF THE PRESS

The government has placed additional restrictions on Freedom of the Press because of the ability of modern media to influence so many people. For instance, governments often try to censor material that they consider obscene or pornographic. The US Supreme Court has called for the use of “community standards” in deciding what is or isn’t obscene. However this may cause legal confusion because what is considered obscene in one place may not be considered obscene in another.

The Freedom of the Press sometimes clashes with Rights of the Accused in a criminal trial. Trials are usually open to the public and are occasionally televised. But if pre-trial publicity interferes with the right of an accused person to get a fair trial, the judge may put a “gag order” on the press to silence it or may move the trial to a new location.

The internet poses a special problem because it is a relatively new medium and courts have not yet developed a large base of case law. In general, the courts have treated the internet somewhere between speech and press.

One thing the government cannot do is “prior restraint,” which is censoring something before it is even published.

FREEDOM OF RELIGION

There are two important parts to our Freedom of Religion found in the 1st Amendment: the “Establishment Clause” and the “Free Exercise Clause.”

The Establishment Clause creates a “wall of separation” between church and state. It prevents any government from selecting an official religion, giving aid to religion, forcing people to believe or not believe in religion, or granting preference to one religion over another. This is the clause that prohibits teacher-led prayers in public schools, government financial aid to churches, religious monuments on government property, replacing the teaching of evolution with religious theories, etc. However, it does allow those activities, like school vouchers or bus transportation, that have a legitimate secular purpose and that pass the “Lemon Test” for excessive church-state entanglement.

The Free Exercise Clause prevents the government from interfering with religious beliefs in any way. However, religious practices can be limited if the government has a “compelling reason” to do so in order to protect the public’s welfare, and if the limits meet the “least restrictive means” doctrine. For example, courts have ruled that laws prohibiting the past Mormon practice of polygamy are constitutional. On the other hand, Native Americans are allowed to use otherwise illegal hallucinogenic drugs as part of their religious ceremonies because there was no “compelling reason” to stop them. Churches that try to breach the wall of separation between church and state and become overly active in political matters can theoretically have their tax exempt status revoked.

OTHER CIVIL LIBERTIES

(See Chapter 4 in the textbook, and the Constitutional Amendments handout.)