

## CHAPTER 5 CIVIL LIBERTIES

### Narrative Lecture Outline

#### **Civil Liberties**

Civil liberties are the personal rights and freedoms that the federal government cannot abridge, either by law, constitution, or judicial interpretation. Thus, they place limitations on the power of government to restrain or dictate how individuals act. In most cases of civil liberties, the issues are complex. There is often a conflict between individuals or groups attempting to exercise rights and government seeking to control the exercise of some rights in the interests of the rights of others and to keep order. The courts decide how to balance these differing interests.

#### **The First Constitutional Amendments: The Bill of Rights**

In 1787, most state constitutions had explicit protections for personal liberties and rights. As the Constitution passed through ratification debates, many people argued that the national constitution should also include those protections. The most notable group making this argument was the Anti-Federalists. By 1789, the Congress had considered and passed ten amendments, the Bill of Rights. The proposed Bill of Rights was sent to the states for ratification and was approved in 1791.

The Bill of Rights consists of the first ten amendments to the Constitution and includes specific guarantees such as free speech, free press, and religion.

#### **The Incorporation Doctrine: The Bill of Rights Made Applicable to the States**

The Bill of Rights was designed to limit the powers of the national government. The Supreme Court supported this idea in *Barron v. Baltimore* (1833). However, in 1868, the Fourteenth Amendment was added to the Constitution and its language suggested that the protections of the Bill of Rights might also be extended to prevent state infringement of those rights. The amendment begins: "No state shall....deprive any person, of life, liberty, or property without due process of law." The Supreme Court did not interpret the Fourteenth Amendment to protect individuals from state action until 1925.

In 1925, the Court ruled in *Gitlow v. New York* that states could not abridge free speech due to the Fourteenth Amendment's Due Process Clause. This was the first step in the development of the incorporation doctrine whereby the Court extended Bill of Rights protections to restrict state actions. Six years later, the Court incorporated freedom of the press in *Near v. Minnesota* (1931). They ruled that a state law violated freedom of the press and that the Fourteenth Amendment Due Process Clause extended the Bill of Rights protections to the state.

Not all of the Bill of Rights have been incorporated. For example, the Second and Third Amendments have not been incorporated. The argument for selective incorporation has been that certain rights are fundamental, and they are the rights that need to be protected from national and state interference.

## **Selective Incorporation and Fundamental Freedoms**

The Supreme Court clarified its stand on selective incorporation in *Palko v. Connecticut* (1937). In *Palko*, the Court ruled that the Fifth Amendment Double Jeopardy Clause did not bind the state. Only rights that are truly fundamental to our notions of liberty and justice that they cannot be denied without compelling reason are subject to the Due Process Clause. This is a high burden of proof.

## **First Amendment Guarantees: Freedom of Religion**

The colonists had an intense dislike and distrust of established, official religion. Many of the colonists had come to the New World to avoid religious persecution and wanted to avoid the same problems in their new country. The First Amendment has two clauses that guarantee religious freedoms: the Establishment Clause and the Free Exercise Clause.

These rights, like all of the rights in the Bill of Rights, are a matter of balance and are not absolute. In 1940, the Court ruled that freedom to believe is absolute, but freedom to act can, and sometimes must, be subject to regulation in a case about Mormon polygamy.

## **The Establishment Clause**

The Establishment Clause prohibits government from establishing a national religion. Thomas Jefferson referred to this as a “wall of separation” between church and state. The Court has interpreted this clause in a variety of ways. The key issue seems to be: How high is the wall of separation? Can one hop over it, or is it a total and impermeable wall? Or is it something in between?

The Court has allowed such practices as public funding of interpreters for the deaf in religious schools and some use of public funding for special education in religious schools. But the hot issue has been school prayer.

In *Engel v. Vitale* (1962), the Court first ruled that a 22 word, nondenominational prayer drafted by the school board was unconstitutional. In 1992, the Court ruled that saying prayers at a middle school graduation was unconstitutional. Finding the balance between church and state has been difficult and there have been a number of efforts by the Court to come up with a workable way to deal with these issues.

In *Lemon v. Kurtzman* (1971), the Court heard a case challenging direct state aid to pay teacher salaries in parochial schools. They devised the Lemon Test that a law or practice must pass to be deemed constitutional. To be constitutional, a law must:

- 1) have a secular purpose;
- 2) have a primary effect that neither advances nor prohibits religion;  
and
- 3) not foster excessive government entanglement with religion.

State funding of teacher salaries failed this test and was ruled unconstitutional. In 1980, the Court ruled that posting the Ten Commandments in public schools also violated the Constitution because it had no secular purpose.

However, since 1980, the Court has lowered the wall a bit. The Court has ruled that student religious groups may use public school property for Bible studies and other religious purposes as long as the students had a choice whether or not to participate and there were nonreligious options. The Court has also allowed public school teachers to offer remedial education to disadvantaged students in religious schools. The tendency of the Court to lower the wall between church and state is continuing with mostly 5-4 majorities. However in 2000, the Court ruled that student led, student initiated prayer at high school football games violated the Establishment Clause. In 2002, the Court ruled (5-4) that governments can give parents money to send their children to private or religious schools in *Zelman v. Simmons-Harris*. The current test seems to be ‘avoiding excessive entanglement of church and state.’

In 2005, the Court ruled that the Lemon test was still valid in a case about a privately donated courthouse display that included historical documents and the Ten Commandments. The Court ruled, 5-4, that this display violated the Establishment Clause. However, with the addition of two new justices, including a new Chief Justice, it will be interesting to see what happens next.

### **The Free Exercise Clause**

"Congress shall make no law....prohibiting the free exercise thereof (religion)" is designed to prevent the government from interfering with the practice of religion. But again, this freedom is not absolute. Several religious practices have been ruled unconstitutional including:

- snake handling
- use of illegal drugs
- polygamy

Practices by fringe or unpopular religious groups are most likely to be banned. In general, when secular law conflicts with religious practice, the free exercise of religion is often denied. One can believe whatever they want, but practice can be regulated. In contrast, the Court ruled that an Afro-Cuban religion known as Santeria could sacrifice animals during religious services despite a local ordinance prohibiting such practices.

The Court has ruled that Catholic, Protestant, Jewish, and Buddhist prisoners must be allowed to hold religious services. But in 1987, the Court ruled that Islamic prisoners could be denied the same right for security reasons.

## **First Amendment Guarantees: Freedom of Speech, Press, and Assembly**

A democracy depends on a free exchange of ideas, and the First Amendment is designed to protect such exchanges. The Constitutional clause that "Congress shall make no law...abridging the freedom of speech, or of the press," however, has not been interpreted as an absolute ban on government regulation. Once again, it has been a search for balance. Generally, the right to thought is highly protected, words are somewhat protected, and actions are most likely to be regulated.

This general attitude seems to be under assault at present. There are increased calls for regulation of the airwaves stemming from Janet Jackson's "wardrobe malfunction" and other high-profile incidents. Reality TV shows, such as *The Real World* and *Survivor*, have been attacked by members of Congress as playing to the lowest common denominator. Rap lyrics have been criticized for vulgarity, advocating violence, and the denigration of women. TV shows and music now have ratings that highlight their content and a number of people are calling for further regulations. According to the Court in 1942, the First Amendment did not protect obscenity, libel, lewdness, and fighting words since they are not essential to the flow of ideas necessary in a democracy and are of slight social value. Any benefit they might conceivably offer is outweighed by the social interest in order and morality. Aren't these issues just extensions of that ruling? Or do they go further?

In addition, the presidential campaigns and many college campuses have established specially designated protest zones, usually far away from the action that the protesters wish to protest. This is a limit on rights to speech and assembly. So what is the history of these rights and the current state of freedom of the press, speech, and assembly?

### **The Alien and Sedition Acts**

The Alien and Sedition Acts were passed in 1798 to ban any political criticism by the Jeffersonian Democratic-Republicans of the Federalist Congress. The Acts made criticism of the government a criminal offense. These acts expired before the Supreme Court could rule on their constitutionality.

### **Slavery, the Civil War, and Rights Curtailment**

The public outcry over the Alien and Sedition Acts forced the government out of the business of curtailing speech for a while. Some states made disseminating positive information about slavery a punishable offense in the North and in the South anti-slavery rhetoric was made unlawful. Southern postal workers often refused to deliver abolitionist newspapers in the South.

During the Civil War, Lincoln suspended the free press and arrested editors critical of him. The Congress changed the jurisdiction of the Supreme Court to prevent a ruling on Lincoln's actions during the war. Prosecutions for sedition were common in the early 1900s, culminating in the state level anti-communist hysteria of the 1910s.

### **World War I and Anti-Governmental Speech**

The next national efforts to restrict speech occurred in 1917 with the passage of the Espionage Act. Nearly 2,000 Americans were convicted under its

provisions. In 1919, one such case—*Schenck v. U.S.*—ruled that distributing leaflets opposing the draft was unconstitutional during time of war because it posed a "clear and present danger" to the republic.

In 1969, the Court devised another test called the "direct incitement" test, stating that advocacy of illegal action can only be abridged if there is a likelihood of imminent harm. This makes it more difficult for the government to punish speech. However, since the passage of the Patriot Act and the Military Commissions Act, these rights seem to be becoming more circumscribed.

### **Protected Speech and Publications**

**Prior Restraint**—The Court rarely allows prior restraint. In *NYT v. United States* (1971), the Court ruled that the publication of the top-secret Pentagon Papers could not be blocked.

**Symbolic speech**—symbols, signs, and other methods of expression. The Court has upheld as constitutional a number of actions including:

- flying a communist red flag
- wearing black armbands to protest the Vietnam war
- burning the American flag

**Hate Speech, Unpopular Speech, and Speech Zones**—this is the new frontier. Many groups that used to champion free speech now wish to suppress hateful speech. Campus speech codes, city ordinances, and the Communications Decency Act are just a few examples. In late 2002, Justice Clarence Thomas announced that there was no symbolic speech entailed in cross burning, instead it was purely hate speech designed to terrorize and therefore not protected by the Constitution. Speech has also come under attack since 9-11. Several commentators have lost their jobs after they criticized the president or U.S. foreign policy, and many professors have been threatened or censored by university administrators for controversial comments.

### **Unprotected Speech and Publications**

#### **Libel and Slander**

Libel is a written statement that defames the character of a person and slander is a spoken defamation. False and libelous statements are not restrained by the courts but they can be actionable after the fact. In the U.S., the standards of proof for libel are quite high. One must prove that the statements were untrue in order to win a libel suit.

Public persons find it even more difficult to prove libel or slander. *New York Times v. Sullivan* (1964) was the first major libel case considered by the Supreme Court. The Court ruled that when public figures are the object of a possibly libelous statement, they must prove "actual malice," which is a much higher standard. In 1991, the Court ruled that "knowledge of falsity" and "reckless disregard of the truth" must be proved in public figure libel cases. This means that public figures are rarely able to win libel cases.

The Court also protects parody. In the case of *Hustler Magazine v. Falwell*, the Court ruled that even savage parodies were constitutionally protected because this was part of the free flow of ideas.

### **Fighting Words**

The Court has ruled on numerous occasions that if speech disturbs the peace or causes a fight by its very utterance, that speech is not protected (Chaplinsky, 1942). Fighting words include profanity, threats, and obscenity. They do not have to be spoken. The seminal case here is the case in 1968 of a t-shirt that had the slogan “Fuck the Draft. Stop the War” on it. This was not deemed protected speech by lower courts but the Supreme Court ruled that forbidding the use of certain words was tantamount to limiting ideas and reversed the lower court decision in 1971.

### **Obscenity and Pornography**

In general, obscenity and pornography are not protected speech. The problem comes with defining obscenity and pornography. The Court has issued a number of rulings on this, among them are:

- *Roth v. U.S.* (1957)—utterly without redeeming social value and if applying contemporary community standards wholly appeals to the prurient interest.
- *Miller v. California* (1973)—patently offensive sexual conduct and lacking serious literary, artistic, political, or scientific value (the LAPS test). Miller also said community standards were local not national.

Justice Potter Stewart once said he couldn't define obscenity, but "I know it when I see it." The ambiguity of definition still exists and is becoming even more problematic with the Internet.

### **Congress and Obscenity**

In recent years, Congress has taken on two high-profile issues related to obscenity: 1) federal funding for the arts, and 2) Internet pornography. The Court agreed with Congress that decency could be used in decisions on funding the arts but so far has ruled that limits on Internet porn, even when the protections are aimed solely at minors, violate free speech. The latest ruling, in 2004, the Court struck down a congressional law to limit cyberporn and continues to block enforcement of the Children's Internet Protection Act.

### **Freedoms of Assembly and Petition**

The freedom to assemble has always been predicated on the idea of peaceable assembly. This is a balance between the right of the people to express dissent and the right of government to keep the peace, particularly in times of war. Traditionally, during war times all civil liberties have been more at risk—or at

least the courts have tended to allow government more leeway to abridge liberties during war for national security reasons.

### **The Second Amendment: The Right to Keep and Bear Arms**

The Second Amendment states "A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." This amendment has been hotly contested in recent years particularly since the 1999 shootings at Columbine High School. The Court has not incorporated this right, nor have they heard many cases about it. One of the key issues regarding the amendment is the meaning of 'well regulated militia.'

In response to organized crime, Congress passed the National Firearms Act in 1934 that imposed taxes on sawed off shotguns and automatic weapons. In *U.S. v. Miller* (1939), the Supreme Court unanimously upheld the law. That was the last time the Court directly addressed the Second Amendment. The Brady Bill, passed in 1993 after the attempted assassination of President Ronald Reagan and the serious wounding of his press secretary James Brady, imposed a five-day mandatory waiting period on the purchase of handguns. In 1994, despite extensive lobbying by the National Rifle Association, Congress passed the Violent Crime Control and Law Enforcement Act that, among other things, banned the manufacture, sale, transport, and possession of 19 different kinds of assault rifles. While neither of the laws has come before the Court on Second Amendment issues, the Court did rule 5-4 in 1997 that the Brady Bill provision requiring state officials to run background checks violated state sovereignty. Since that time, school shootings have made gun control a more popular issue but it appears to be waning now.

### **The Rights of Criminal Defendants**

The rights of criminal defendants (aka due process rights) are the Fourth, Fifth, Sixth, and Eighth Amendments and their procedural guarantees. These rights have been under attack in recent years due to a strong movement in favor of "victim's rights," plus society has favored "law and order" issues and candidates in recent years.

### **The Fourth Amendment and Searches and Seizures**

The purpose of the Fourth Amendment was to deny the national government the power to make general searches such as those used in England against religious and political dissenters in the Seventeenth and Eighteenth centuries. The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall be issued, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The language is still vague but provides some protection. The Court has interpreted the Fourth Amendment to allow the police to conduct a warrantless search in certain limited circumstances. The police may search, without a warrant:

- the person arrested
- things in plain view of the accused

- places or things that are in the immediate control of the accused
- “stop and frisk” individuals under reasonable suspicion (a lower standard than probable cause)
- with consent, no warrant is needed and consent may be given by roommates and other household occupants
- drunk drivers
- open fields

In general, the police may search without a warrant any place that does not have a reasonable expectation of privacy.

Cars have been a thorny issue since they are mobile. The Court has gotten progressively more lenient in car searches. Today, even the belongings of passengers can be searched without probable cause.

But in most cases, the police need to obtain a warrant from a neutral and detached magistrate. A warrant must specify the place to be searched and the object of the search, or they are not legal and the evidence obtained must be excluded from trial.

Generally, your home is presumed to be private and a warrant is therefore necessary prior to a search. In 1995, the Court ruled unanimously that police must knock and announce before entering a house or apartment to conduct a search though they leave room for “reasonable exceptions.” In 2001, the Court ruled that the use of thermal imaging of a home without a warrant was unacceptable to look for marijuana hotheouses. However, low-flying aircraft, helicopters, and binoculars have been ruled constitutional in the search for drugs since they do not use technology but only human eyesight. However, in 2006, the Court ruled 5-4 that if police have a valid warrant but don’t knock, any evidence seized can still be used in trial.

Drug testing and DNA sampling have brought a new series of problems. The Court ruled that mandatory drug and alcohol tests of employees involved in accidents were constitutional in 1989. And in 1995, the Court upheld random drug testing in high school athletes. In 2002, the Court ruled that mandatory drug testing of all high schoolers who participated in extracurricular activities ranging from Future Farmers of America and band to football and field hockey was constitutional. The Court has also allowed taking DNA samples from convicted felons without permission or warrant.

Compulsory drug testing of pregnant women is the new frontier. In 2001, the Court ruled 6-3 that it was unconstitutional to test women for cocaine while giving birth and then turn them over to police.

### **The Fifth Amendment and Self-Incrimination**

The Fifth Amendment states that "No person shall be...compelled in any criminal case to be a witness against himself." So criminals cannot be required to take the stand in a trial nor can their failure to do so be construed as guilt.

In 1966, the Supreme Court ruled that “voluntary” confessions had not always been voluntary and they set standards for determining if a confession had been coerced or was truly voluntary. In *Miranda v. Arizona*, the defendant was questioned for hours until he confessed and was never informed of his right to an attorney. He appealed based on the Fifth Amendment saying his confession had been coerced. The Court agreed. Chief



Justice Earl Warren wrote that the police have a tremendous advantage in interrogations and criminal suspects must be given greater protection. The Miranda confession was ruled inadmissible. The Court provided guidelines for the police, ruling that all suspects must be read their rights—hence the Miranda warnings we have all heard on TV cop shows.

The Rehnquist Court was more tolerant of forced confessions and employed a more flexible standard to allow their admissibility. In 1991, the Court ruled that a coerced confession does not automatically invalidate its admission if it is a harmless error and other evidence is sufficient to convict. The long-term viability of the Miranda rule was questionable, particularly after lower court rulings admitting confessions without the benefit of a Miranda warning.

In 2000, Chief Justice Rehnquist wrote an opinion reaffirming the central holding of Miranda that defendants be read their rights. The Court further stated that without Miranda warnings no admission could be trusted to be truly voluntary. This seems to be a sea change in the Court's interpretation of both Miranda and of the wider issue of voluntary confessions. However, the Court also ruled that if a defendant tells police he knows his rights, he cannot later claim that evidence should be excluded because he wasn't Mirandized.

The Fifth Amendment also has a double jeopardy clause that protects people from being tried twice for the same crime.

### **The Fourth and Fifth Amendments and the Exclusionary Rule**

In *Weeks v. United States* (1914), the Supreme Court adopted the Exclusionary Rule that bars the admission of illegally obtained evidence at trial. So the Exclusionary Rule is a judicially created remedy to deter police from violating the Fourth and Fifth Amendment rights of suspects. Congress and the Supreme Court in recent years have chipped away at the Exclusionary Rule. There are now a number of “good faith exceptions” allowing the use of tainted evidence. Simple errors on warrants no longer totally invalidate a search, and as long as there is no police misconduct, evidence is generally admissible even without a proper warrant.

### **The Sixth Amendment and Right to Counsel**

The Sixth Amendment guarantees a right to counsel. In the past, this meant suspects could hire an attorney. Since most of the accused are poor, they often did not have counsel. Congress required federal courts to provide attorneys for indigent suspects, and in 1932, the Supreme Court ruled that free lawyers must be provided in all death penalty cases. The Court also began to piece-meal expand the right to free counsel, but in such a way that many states were confused about when it was necessary.

So the Court clarified itself in the case of *Gideon v. Wainwright* (1963). In *Gideon*, a poor man was accused of a crime and denied a lawyer. In prison, Gideon drafted an *in forma pauperis* petition to the Supreme Court asking for an appeal. The Court accepted the case and ruled unanimously that a lawyer was a necessity in criminal court, not a luxury. The state must provide a lawyer to poor defendants in felony cases. Gideon was granted a new trial with a lawyer and set free. In 1972, the Court extended the right to free counsel for offenses less serious than felonies. And in 1978, clarified further by ruling that the right to counsel is constitutionally required where a prison or

jail term is imposed. In 2002, the Rehnquist Court revisited the issue and in a 5-4 decision ruled that a suspended sentence for a minor crime that could result in imprisonment cannot be imposed unless the defendant had a lawyer, even if the sentence wasn't ever going to be served.

### **The Sixth Amendment and Jury Trials**

The Sixth Amendment provides for a speedy and public trial by an impartial jury. The Supreme Court has ruled that jury trials must be available if a prison sentence of six months or more is possible.

Jury selection has become quite a tricky issue though. The definition of "impartial jury" has changed dramatically over the years. And today, no group can be systematically excluded from serving as women and African Americans once were. The Supreme Court also has ruled that lawyers cannot choose a jury on the basis of gender even using preemptory challenges because it violates the Equal Protection Clause.

The right to confront witnesses is also part of the Sixth Amendment. In 1990, the Court ruled that this was not an absolute right. Young child abuse victims may testify by one-way, closed-circuit television for their protection, for example. The Court argued that the central premise of the clause was to ensure the reliability of testimony, not physical presence and that the protection of the child outweighed the right to confront witnesses.

### **The Eighth Amendment and Cruel and Unusual Punishment**

The Eighth Amendment prohibits cruel and unusual punishment and is most often used in arguing death penalty cases. The Supreme Court has changed its mind on the death penalty several times, and currently it is considered constitutional. Thirty eight states allow the death penalty at present. Some of the major death penalty cases were:

- *Furman v. Georgia* (1972)—the Court ruled that the death penalty constituted unconstitutional cruel and unusual punishment when it was imposed in an arbitrary manner.
- *Gregg v. Georgia* (1976)—Georgia rewrote their death penalty statute, and the new statute was ruled constitutional in a 7-2 decision.
- *McKleskey v. Kemp* (1987)—in a 5-4 ruling, the Court ruled that the death penalty—even when it appeared to discriminate against African Americans—did not violate the equal protection clause.
- *McKleskey v. Zant* (1991)—the Court made it more difficult for death row inmates to file repeated appeals.

In general, the current Court has been unwilling to overrule state decisions about the death penalty unless the perpetrator was 15 years old or younger at the time the crime was committed. However, in 2005, the Court ruled 5-4 that executing minors was unconstitutional.

In 2002, the Supreme Court ruled that mentally retarded convicts could not be executed because that violated the Eighth Amendment. This reversed a 1989 decision and threw out the laws of 20 states.

At the state level, the death penalty is becoming more controversial. In 2000, the governor of Illinois ordered a moratorium on executions, although generally a proponent

of the death penalty, due to a student research project at Northwestern University that led to the release of 13 men on death row due to wrongful convictions. DNA testing has brought release to a number of death row inmates (over 100) and some states, like Ohio, are now offering free DNA testing to death row inmates to ensure that no one is wrongly executed. Following these events, public support for the death penalty is at an all-time low.

The Court has also been hearing cases about lethal injection as a mode of execution. In 2006, they ruled unanimously that death-row inmates can challenge the procedures and drugs used for death by lethal injection.

### **The Right to Privacy**

Until now, the rights we have been discussing have been enumerated in the Bill of Rights explicitly. In contrast, the Supreme Court has also given protection to rights not specifically enumerated. The Court has ruled that though privacy is not specifically mentioned in the Constitution, the Framers expected some areas to be off-limits to government interference. The right to freedom of religion implies a right to exercise private, personal beliefs. The protection against unreasonable searches and seizures implies that persons should be secure and private in their homes. And Justice Louis Brandeis argued in 1928 that "the right to be left alone is the most comprehensive of rights and the right most valued by civilized men."

### **Birth Control**

Easy access to birth control has not always been the case. In particular, Connecticut had a law in the 1960s prohibiting the dissemination of information about and/or the sale of contraceptives. In 1965, the Court ruled on the constitutionality of this law in *Griswold v. Connecticut*. In *Griswold*, seven justices argued that the First, Third, Fourth, Fifth, and Fourteenth Amendments created zones of privacy including a married couple's right to plan a family. Later, the Court expanded the right to birth control to unmarried persons.

### **Abortion**

In the late 1960s, abortion was legal in some states. Women's rights advocates wanted a woman's right to decide about pregnancy and whether she would carry a baby to term to be a fundamental constitutional right. In 1973, the Court agreed in *Roe v. Wade*. Seven members of the Court relied on medical evidence and ruled that a Texas law prohibiting abortion violated a woman's constitutional right to privacy. Pregnancy was divided into trimesters in Justice Harry Blackmun's opinion. In the first trimester, a woman had an absolute right to an abortion. In the second trimester, the state's interest in the health of the mother must be taken into account. And in the third trimester, the state's interest in the safety of the fetus outweighed a woman's right to privacy. This ruling was highly controversial and ignited a firestorm of argument on all sides.

Since *Roe*, a number of other cases on abortion have been decided, in general they have limited abortion rights in some way. Congress has also worked to limit abortions.

- The Hyde Amendment passed by Congress and upheld twice by the Supreme Court bans the use of Medicaid funds for poor women's abortions.
- *Webster v. Reproductive Health Services* (1989)—the Court upheld fetal viability tests even though they would drastically increase the cost of abortions.
- Missouri refused to allow abortions in state-funded clinics or by state-funded doctors and nurses. The Court upheld this law.
- *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992)—Pennsylvania was allowed to limit abortions as long as they did not pose “an undue burden” on pregnant women and imposed a 24-hour waiting period for the procedures.
- The Court has upheld mandatory waiting periods in Mississippi.

Under President Bill Clinton, the ban on fetal tissue research was lifted, bans on abortions at military hospitals were lifted, the gag rule (a federal regulation barring clinics from discussing the procedure) was removed. And he lifted the restrictions on testing RU-486, the so-called French abortion pill. He also appointed pro-choice justices to the Supreme Court. However, the Republican Congress made repeated attempts to restrict abortion rights. And the election of a Republican president who has stated he is “pro-life” coupled with the Republican control of both houses of Congress after the 2002 election, meant that abortion rights were reduced again. Congress passed a law banning a specific type of abortion termed ‘partial birth abortion’ in 2003. Parental consent laws for minors have also been passed at the state level. The Court has generally said that parental consent is only constitutional if the law contains a judicial bypass procedure. It is unclear what effect the two new justices appointed in 2005 will have on this issue.

The battle continues. The uncertain status of abortion rights and privacy rights underscores the role of politics in civil liberties issues and how changes in the Court, the partisan make-up of Congress, and the beliefs of the president also play an important role in the changing nature of civil liberties.

### **Homosexuality**

The road to constitutional protections for homosexuality has been a long one. In 1986, the Court upheld a Georgia law against sodomy in a 5-4 decision in the case of *Bowers v. Hardwick*. However, in 1996, the Court ruled that a state could not deny rights to homosexuals simply on the basis of sexual preference. The Court also ruled that the Boy Scouts can legally exclude gays from the organization as scout masters. However, in 2003, the Court ruled that the right to privacy prevented a state from criminalizing private sexual behavior. This decision overturned laws in fourteen states. In 2003 in *Lawrence v. Texas*, the Court overturned *Bowers v. Hardwick*.

### **The Right to Die**

In 1990, the Court heard the case *Cruzan by Cruzan v. Director, Missouri Department of Health*. This case was about a comatose woman who was brain dead. Her parents wanted her feeding tube removed so she could die with dignity. The Bush (Sr.) administration and numerous anti-abortion groups filed briefs supporting the state against

the parents. In a 5-4 ruling, the Court rejected a right to privacy in such cases but argued that living wills, written when competent, were constitutional. In 1997, the Court ruled that there was no constitutional right to assisted suicide. And in 2001, in response to an Oregon law on assisted suicide, Attorney General John Ashcroft issued a legal opinion that assisted suicide is not a “legitimate medical purpose” and called for the revocation of physicians’ licenses if they assist in suicides. The licensing of professionals has traditionally been a state power, and Oregon filed a lawsuit to block Ashcroft’s interference. A federal judge ruled that Ashcroft had overstepped his mandate and held in favor of Oregon. The next attorney general, Alberto Gonzales, agreed with Ashcroft and tried again. This time the Supreme Court upheld the Oregon law by a 6-3 vote.

### Web Sites for Instructors

**American Civil Liberties Union (ACLU)** offers information on the entire Bill of Rights including racial profiling, women's rights, privacy issues, prisons, drugs, etc. Includes links to other sites dealing with the same issues.

[www.aclu.org](http://www.aclu.org)

**Cornell University Law School** offers the full text of the Bill of Rights and other constitutional documents.

[www.law.cornell.edu/constitution/constitution.billofrights.html](http://www.law.cornell.edu/constitution/constitution.billofrights.html)

**Findlaw** is a searchable database of SC decisions plus legal subjects, state courts, law schools, bar associations and international law.

[www.findlaw.com](http://www.findlaw.com)

**FLITE: Federal Legal Information Through Electronics** offers a searchable database of Supreme Court decisions from 1937-1975.

[www.fedworld.gov/supcourt/index.htm](http://www.fedworld.gov/supcourt/index.htm)

The **Gay and Lesbian Alliance Against Defamation (GLAAD)** advocates fair, accurate and inclusive representation in the media. Their Web site includes links to related issues as well as news and opinion.

[www.glaad.org](http://www.glaad.org)

The **Lambda Legal Defense Fund** offers extensive coverage of legal action related to gay, lesbian, bisexuals, the transgendered, and HIV-infected people’s rights.

[www.lambdalegal.org/cgi-bin/iowa/index.html](http://www.lambdalegal.org/cgi-bin/iowa/index.html)

The **Legal Information Institute** of Cornell University has an excellent site that offers extensive information about civil liberties. There is a section focused on the First Amendment with definitions, historical background, Supreme Court decisions, and links to numerous First Amendment related sites. There are also sites at LII for prisoners' rights, employment rights, and constitutional rights generally.

[www.law.cornell.edu/topics/first\\_amendment.html](http://www.law.cornell.edu/topics/first_amendment.html)

LII also offers Supreme Court opinions under the auspices of Project Hermes, the court's electronic-dissemination project. This archive contains (or will soon contain) all opinions of the court issued since May of 1990.

<http://supct.law.cornell.edu/supct/>

**Oyez-Oyez-Oyez** is a comprehensive database of major constitutional cases, including multimedia aspects such as audio.

<http://www.oyez.com/oyez/frontpage>

**Rominger Legal Services** provides U.S. Supreme Court links including history, pending cases, rules, bios, etc.

[www.romingerlegal.com/supreme.htm](http://www.romingerlegal.com/supreme.htm)

**U.S. Supreme Court Plus** has decisions from the current term as well as legal research, bios, basic Supreme Court information and more. Also offers a free e-mail notification service of Supreme Court rulings.

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### Web Activities for Classes

- 1) Have students explore the current docket of the Supreme Court (the easiest way is through *Oyez, Oyez* on the Internet). What civil liberty issues are going to be heard this term? How do you think they will be decided, and why? Follow the process until the rulings are made and see if you are right.
- 2) Have students explore controversial Web sites and discuss the issue of Internet free speech. Should there be controls? What kind of controls might be constitutionally acceptable? Has the Supreme Court dealt with this issue yet? If so, what was their ruling, and how does it affect the sites you looked at?
- 3) Have students explore the ACLU Web site. What issues is the ACLU currently sponsoring, and why? Are there any surprises here? Why or why not? Does the actual working of the ACLU differ from their expectations? Why or why not?
- 4) Have students go to [www.usdoj.gov](http://www.usdoj.gov) and find out what the Attorney General has to say about civil liberties. Is the issue of the Patriot Act addressed? If so, in what ways? Are there other issues related to civil liberties under consideration at the Department of Justice? What are they?

### General Class Activities and Discussion Assignments

- 1) Have students visit or call up a local branch of the American Civil Liberties Union. They should collect written information about ACLU activities and

issues. Find out what the ACLU does, and why. They could also visit ACLU Web sites to find out what activities are currently on the ACLU agenda. Have students compare what they find with information from the Department of Justice. Do they expect to find differences? Are there differences? Discuss.

- 2) Have students prepare a debate or write a paper on the following: Under former Chief Justice Rehnquist, the Court reduced many of the due process rights granted under the Warren and Burger Courts. Find out what the Roberts Court is doing on these issues. Find examples of how these rights have changed and why. What has the role of public and political opinion been in these changes?
- 3) Have students address the following:  
Find out if your campus has a "speech code." (If it doesn't, find a nearby college or university with one.) Would this code stand up to a constitutional test? Why or why not? According to your understanding of the First Amendment, are speech codes constitutional? Do some research at the campus newspaper and see if there was any controversy surrounding the adoption of the speech code and discuss it in class.

### **Possible Simulations**

- 1) Stage a debate about a civil liberties issue that is currently in front of the Court. Students should research the docket on the Web and be prepared to discuss the issue fully.
- 2) Using groups of nine, stage a number of Supreme Court conference sessions. Have students do research on "their" assigned justice (one should be Rehnquist, another O'Connor, and so on). They should also choose a case from the current docket and try to determine how the conference would go. What would the Court decide and why? What strategies could the justices use to marshal a majority, etc.?

### **Additional Sources**

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