

CIVIL LIBERTIES

OVERVIEW:

CIVIL LIBERTIES ARE RESTRICTIONS ON GOVERNMENT ACTION;

CIVIL RIGHTS ARE CLAIMS UPON STATE ACTION--THAT GOVERNMENT IS REQUIRED TO ACT IN RESPONSE TO LEGAL OR MORAL CLAIMS BY CITIZENS.

I. CIVIL LIBERTIES

A. "NEGATIVE FREEDOMS":

(FREEDOM FROM GOVERNMENT PROSCRIPTIONS)

1. FOUR "SUBSTANTIVE" FREEDOMS

a. RELIGION

i.) ESTABLISHMENT

ii.) FREE EXERCISE

b. SPEECH

c. PRESS

d. ASSEMBLY

2. PROCEDURAL FREEDOMS

a. NO UNREASONABLE SEARCH AND SEIZURE

(MUST SHOW PROBABLE CAUSE)

b. NO SEIZURE OF PROPERTY WITHOUT *DUE PROCESS* OF LAW

c. RIGHTS OF THE CRIMINALLY ACCUSED

i. A SPEEDY AND PUBLIC TRIAL

ii. IMPARTIAL JURY (FAIR TRIAL)

iii. CONFRONT THE ACCUSERS

iv. RIGHT TO COUNSEL

v. CITIZENS CANNOT BE FORCED TO TESTIFY AGAINST THEMSELVES

B. HISTORICALLY, THE BILL OF RIGHTS WERE SEEN AS BINDING ON THE FEDERAL GOVERNMENT ONLY

1. *BARRON V. BALTIMORE* (1833)

- a. BARRON CLAIMED STATE VIOLATED HIS FIFTH AMENDMENT PROTECTION AGAINST BEING DEPRIVED OF HIS PROPERTY W/O DUE PROCESS AND JUST COMPENSATION**
- b. WRITING FOR THE COURT, JUSTICE JOHN MARSHALL HELD THAT THE CONSTITUTION'S GUARANTEES ONLY APPLIED TO FEDERAL GOVERNMENT ACTION AND NOT ACTION BY INDIVIDUAL STATES.**

2. THIS GAVE RISE TO THE NOTION OF "DUAL CITIZENSHIP" WHEREBY A PERSON WAS SEPARATELY A CITIZEN OF THE UNITED STATES AND OF THE STATE THEY RESIDED IN--SO CITIZENS OF DIFFERENT STATES COULD HAVE VASTLY DIFFERENT SETS OF PROTECTED RIGHTS (E.G. SLAVERY)

3. THE FOURTEENTH AMENDMENT

- a. OSTENSIBLY GUARANTEES CITIZENS A SINGLE NATIONAL CITIZENSHIP AND PROTECTION AGAINST STATE INFRINGEMENT OF RIGHTS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES.**
- b. LARGELY IGNORED BY THE STATES--WHO WERE SUPPORTED BY THE DECISIONS OF THE UNITED STATES SUPREME COURT.**

i. *THE SLAUGHTERHOUSE CASES* (1883)

REJECTED CLAIM OF UNCONSTITUTIONAL DEPRIVATION OF PROPERTY BY STATES

ii. *PLESSY V. FERGUSON* (1896)

ESTABLISHED THE "SEPARATE BUT EQUAL" DOCTRINE IN PUBLIC ACCOMMODATIONS

4. SELECTIVE INCORPORATION

RATHER THAN HOLDING THAT THE 14TH AMENDMENT BOUND THE STATES TO THE ENTIRE BILL OF RIGHTS, THE COURT *SELECTIVELY INCORPORATED* CONSTITUTIONAL

PROTECTIONS AGAINST STATE ACTION ON A CASE BY CASE BASIS FOR SPECIFIC RIGHTS.

a. TAKING OF PROPERTY WITHOUT JUST COMPENSATION

CHICAGO, BURLINGTON & QUINCY RAILROAD V. CHICAGO (1897)

b. FREEDOM OF SPEECH

GITLOW V. NEW YORK (1925)

GITLOW, AN ANARCHIST, PUBLISHED MATERIAL URGING THE OVERTHROW OF THE GOVERNMENT; (WHILE GITLOW WAS CONVICTED, THE COURT HELD THAT THE FIRST AMENDMENT APPLIED TO STATES AS WELL AS THE FEDERAL GOVERNMENT)

c. FREEDOM OF PRESS

NEAR V. MINNESOTA (1931)

NEAR PUBLISHED SLANDEROUS, RACIST, ANTI-SEMITIC, ANTI-CATHOLIC MATERIAL.

d. NOTE: THE COURT REJECTED AN ATTEMPT TO INCORPORATE THE CONSTITUTIONAL PROSCRIPTION AGAINST DOUBLE JEOPARDY THROUGH THE 14TH AMENDMENT IN THE CASE OF *PALCO V. CONNECTICUT (1937)*

PALCO WAS ORIGINALLY CONVICTED OF SECOND DEGREE MURDER. CONN. PRESSED FOR A NEW TRIAL AND CONVICTED ON FIRST DEGREE CHARGES. PALCO ARGUED DOUBLE JEOPARDY (BEING TRIED TWICE FOR THE SAME CRIME). THE COURT REJECTED THE CLAIM OF PALCO, WHO WAS EVENTUALLY EXECUTED.

C. A CASE STUDY: FREEDOM OF SPEECH

1. "CLEAR AND PRESENT DANGER" TEST

JUSTICE OLIVER WENDELL HOLMES OPINION IN *SCHENCK V. UNITED STATES (1919)*.

WWI RESISTERS SENT CIRCULARS TO MEN DRAFTED BUT NOT YET ENLISTED ASSERTING THAT CONSCRIPTION VIOLATED THE 13TH AMENDMENT. THE RESISTERS WERE CHARGED UNDER THE ESPIONAGE ACT OF 1917. THEY DID NOT SPECIFICALLY ADVOCATE VIOLENCE OR OVERTHROW OF THE

GOVERNMENT, THOUGH THE COURT ASSERTED THAT THE CIRCULAR'S PURPOSE WAS OBVIOUS

- a. FIRST AMENDMENT'S GUARANTEE OF FREE SPEECH NOT ABSOLUTE
- b. DETERMINATION OF PROTECTED SPEECH BASED ON CONTEXT, NOT CONTENT

(HOLMES: CAN'T SHOUT FIRE IN A CROWDED THEATER);

- c. WHERE WORDS CREATE A "CLEAR AND PRESENT DANGER OF THAT THEY WILL BRING ABOUT THE SUBSTANTIVE EVILS THAT CONGRESS HAS A RIGHT TO PREVENT," SPEECH IS UNPROTECTED BY THE FIRST AMENDMENT.

2. SUBSEQUENT MODIFICATIONS OF CLEAR AND PRESENT DANGER

- a. HOLMES DISSENT IN *ABRAMS V. UNITED STATES* (1919)

FIVE DEFENDANTS (ALL RUSSIAN BORN) WERE CONVICTED OF ADVOCATING THE CURTAILMENT OF WEAPONS PRODUCTION NECESSARY TO THE WAR AGAINST GERMANY UNDER OUTLAWED BY THE SEDITION ACT OF 1918, WHICH AMENDED THE ESPIONAGE ACT OF 1917. THEY PRINTED 5000 CIRCULARS SUPPORTING THE RUSSIAN REVOLUTION AND DISTRIBUTED THEM IN NEW YORK CITY ON AUGUST 22, 1918, DROPPING THEM FROM A BUILDING WHERE ONE OF THEM WORKED AS WELL AS DISTRIBUTING THEM SECRETLY ABOUT THE CITY. THEY WERE SENTENCED TO 20 YEARS IMPRISONMENT.

HOLMES DESCRIBES THE DEFENDANTS AS "PUNY ANONYMITIES"; HE SUGGESTS THAT ONLY AN "IMMINENT THREAT OF IMMEDIATE INTERFERENCE" THAT REQUIRES AN IMMEDIATE CHECK TO "SAVE THE COUNTRY" CAN BE REGULATED.

NOTE: HOLMES ALSO DISSENTED IN *GITLOW*.

- b. THE PREFERRED POSITION STANDARD

- i. PREVIOUS CASES HAD ASSUMED REGULATIONS WERE VALID IF THEY WERE REASONABLE

- ii. THE PREFERRED POSITION STANDARD SHIFTS THE BURDEN OF PROOF ONTO THE GOVERNMENT TRYING TO RESTRICT SPEECH
- iii. THOUGH ADVOCACY OF THE PREFERRED POSITION OF THE FIRST AMENDMENT CAN BE TRACED AT LEAST BACK TO LETTERS BETWEEN THOMAS JEFFERSON AND THOMAS PAINE IN 1788, IT WAS NOT SUPPORTED BY A MAJORITY OF THE SUPREME COURT UNTIL THE CASE OF *THOMAS V. COLLINS* (1945)
- c. BALANCING OF THE STATE'S INTERESTS V. THE FIRST AMENDMENT
- d. IN SUM, TODAY, VIOLATIONS OF THE FIRST AMENDMENT ARE LIKELY TO BE OVERTURNED UNLESS THE STATE CAN SHOW PROBABLE IMMINENT SERIOUS HARM.

D. OTHER LIMITS TO THE FREEDOM OF SPEECH

1. COMMERCIAL SPEECH:

- a. FIRST RECOGNIZED AS CONSTITUTIONALLY PROTECTED BY THE COURT IN THE 1976 CASE *VIRGINIA PHARMACY BOARD V. VIRGINIA CONSUMER COUNCIL* (REGARDING THE LEGALITY OF PHARMACY ADS FOR PRESCRIPTION DRUG PRICING)
- b. "INTERMEDIATE SCRUTINY" (PHRASE USED BY JUSTICE BLACKMUN TO IMPLY A DILUTION OF THE PRINCIPLES OF *VIRGINIA PHARMACY* EMBODIED IN THE FOUR STEP ANALYSIS OF *CENTRAL HUDSON GAS CO. V. PUBLIC SERVICE COMMISSION* (1980)
 - i. SPEECH MUST CONCERN LAWFUL ACTIVITY AND NOT BE MISLEADING
 - ii. THE GOVERNMENT MUST SHOW A SUBSTANTIAL INTEREST
 - iii. DOES THE REGULATION DIRECTLY ADVANCE THE GOVERNMENT'S INTEREST
 - iv. IS THE REGULATION NO MORE EXTENSIVE THAN NECESSARY TO SERVE THAT INTEREST

2. OBSCENITY

- a. FOR YEARS THE COURT STRUGGLED WITH DEFINING OBSCENITY. SAID ONE JUSTICE: I CAN'T DEFINE IT, BUT I KNOW IT WHEN I SEE IT.
- b. UNDER THE BURGER COURT, A THREE-PRONGED TEST WAS ESTABLISHED IN THE CASE OF *MILLER V. CALIFORNIA* (1973)
 - i. WOULD THE AVERAGE PERSON, APPLYING CONTEMPORARY COMMUNITY STANDARDS, FIND THE WORK, TAKEN AS A WHOLE, APPEALING TO THE PRURIENT INTEREST IN SEX.
 - ii. DOES THE WORK DEPICT OR DESCRIBE IN A PATENTLY OFFENSIVE WAY, SEXUAL CONDUCT DEFINED BY APPLICABLE STATE LAW.
 - iii. TAKEN AS A WHOLE, DOES THE WORK LACK SERIOUS LITERARY, ARTISTIC, POLITICAL OR SCIENTIFIC VALUE.

3. LIBEL (WORDS THAT INJURE A PERSON OR THEIR REPUTATION)

- a. TEST FROM *NEW YORK TIMES V. SULLIVAN* (1964)
STATEMENTS ABOUT PUBLIC OFFICIALS MUST
 - i. INJURE
 - ii. BE FALSE
 - iii. MADE WITH MALICE (KNOWLEDGE OF FALSITY OR "RECKLESS DISREGARD" OF WHETHER IT WAS TRUE)
- b. THE COURT EXTENDED THE TIMES HOLDING TO COVER PUBLIC FIGURES AS WELL IN *CURTIS PUBLISHING CO. V. BUTTS* (1967)
- c. PRIVATE INDIVIDUALS MAY HAVE MORE RECOURSE AGAINST LIBEL, DEPENDING ON STATE LAWS. SEE *GERTZ V. ROBERT WELCH, INC.* (1974)

4. FIGHTING WORDS/HOSTILE AUDIENCE