CHAPTER 15 Order and Civil Liberties

Learning Objectives

After reading this chapter, you should able to

* Define the key terms at the end of the chapter.
* Know how to differentiate between civil rights and civil liberties.
* Explain how the establishment clause of the First Amendment has been interpreted in cases involving the separation of church and state.
* Show how the free-exercise clause of the First Amendment has been applied to the issues of compulsory saluting of the flag and the use of drugs as a sacrament.
* Describe the two approaches developed by the Supreme Court for dealing with cases involving the free-expression clause of the First Amendment.
* Outline the evolution of the clear and present danger test.
* List the major exceptions to the First Amendment’s protection of freedom of speech.
* Discuss how prior restraint, libel, censorship, and shield laws affect freedom of the press in the United States.
* Explain how the Fourteenth Amendment has been used to extend the protections of the Bill of Rights to citizens in cases involving the states.
* Discuss where the Supreme Court found the right to privacy in the Constitution, and explain how this right has been applied in cases involving medical, sexual, and legal confidentiality.

# Order and Civil Liberties and the Challenge of Democracy

The opening vignette illustrates how the courts are asked to balance order and freedom. Under what conditions can speech or expression be censored to prevent unrest or disorder? Is criticism of the president likely to promote disorder? This chapter looks at how the courts have resolved conflicts among the three values that are so important to democratic politics—order, freedom, and equality. Court decisions involve a balancing act among these values. A review of the cases in this chapter may lead a person to conclude that not one of these values is ever preferred unconditionally over the others. The freedoms of speech, press, and assembly are all particularly important to the conduct of democracy, yet the Supreme Court has sometimes limited them, in the name of order, when exercising these freedoms would create a very serious danger. Furthermore, where certain types of expression are concerned—for example, obscenity—the Court has sometimes chosen to uphold the value of order by supporting community standards. On the other hand, the fact that the exercise of these freedoms may offer an affront to the majority and threaten to disrupt established patterns of social order is not always enough to convince the Court to restrict them.

Chapter Overview

## The Bill of Rights

In the American system, the values of freedom, equality, and order often conflict. In such cases, each side may claim that its view is rooted in the law. Disputes over issues involving such basic values are usually settled in the courts by our unelected judiciary. Conflicts often arise from different views on the rights of citizens, and a major source of people’s rights is in the Bill of Rights and the Fourteenth Amendment of the Constitution. The Constitution guarantees civil rights and civil liberties. A civil right declares what the government must do or provide; a civil liberty is a guarantee to individual citizens that acts as a restraint on government.

## Freedom of Religion

The First Amendment provides for freedom of religion, speech, press, and assembly. These protections of individual freedoms may conflict with the need for order—an example of the original dilemma of government discussed in Chapter 1. Freedom of religion is guaranteed in two clauses. The first, the establishment clause, forbids any law that would create an official religion; the second, the free-exercise clause, prevents the government from interfering with the practice of religion. The establishment clause erected “a wall of separation between church and state.” The government is also supposed to be neutral between religions and between the religious and the nonreligious. On certain issues, such as government aid to church-related schools, the Supreme Court has allowed what opponents have seen as violations of the establishment clause. Reasoning that textbook loans and transportation are aids to students, not churches, the Court has allowed some support to church schools. In 1971, the *Lemon* test put forth guidelines for determining constitutionality under the establishment clause. The Court loosened its application of the *Lemon* test by allowing public school teachers to provide government-mandated classes to disadvantaged youngsters in New York parochial schools. A 2002 decision upholding school voucher programs further weakened the standards outlined in *Lemon*. The Supreme Court has also relaxed restrictions on the use of public funding for Christmas displays. On the issue of school prayer, however, the Court has maintained a consistent position that public school prayer violates the establishment clause. In 2000, the Supreme Court struck down the practice of organized student-led prayer at public high school football games.

The free-exercise clause also gives rise to conflicts when the practice of a certain religion leads a person to do what is forbidden by law or to refuse to do what is required by law. A person may not be forced to take a job that requires him or her to work on the Sabbath, but the Court has forbidden participation in traditional religious rituals that involve the use of illegal drugs. The Court reasoned that religious beliefs are inviolate, but antisocial actions in the name of religion are not protected by the Constitution. The perceived narrowing of the range of the free expression of religion led Congress to pass the Religious Freedom Restoration Act which required the government to meet strict scrutiny before interfering with religious practices. The Court quickly ruled the popular act unconstitutional, noting that Congress could not change the Constitution.

## Freedom of Expression

Freedom of expression, including freedom of speech and freedom of the press, provides a right to unrestricted discussion of public affairs, yet these rights have never been absolute. Initially, the First Amendment clauses seemed aimed at preventing prior restraint. As the First Amendment speech doctrines developed, justices argued that speech creating a “clear and present danger” can be limited. “Symbolic speech” and “fighting words” may receive even less protection, though the Supreme Court has ruled that flag burning is a constitutionally protected form of expression. Obscenity—although hard to define—is not protected by the Constitution, and the Court agreed that the government can regulate the distribution of obscene materials. The Court has also affirmed a broad latitude for freedom of speech in cyberspace. Yet in 1999, a federal court issued a permanent injunction closing a website of some antiabortion advocates who threatened doctors performing abortions.

Freedom of the press, including the ability to collect and report information without government interference, is crucial in a free society. Print media defend this freedom as absolute, although electronic media have had to accept some government regulation. Individuals may sue the media for libel, but public figures must show that there is malice involved when publishers print false statements about them. Basically, freedom of the press means freedom from prior restraint. The Court has been reluctant to limit freedom of the press in order to ensure a fair trial. However, reporters are not protected from the demands of law enforcement and may be required to reveal their sources. Only in the most extreme and compelling cases has prior restraint been considered justified, as, for example, when publishing certain material might mean nuclear annihilation.

The First Amendment also provides the right to peaceably assemble and to petition the government for redress of grievances. This right has merged with freedom of speech and freedom of the press under the general heading of freedom of expression.

## The Right to Bear Arms

The Second Amendment’s guarantee of the right to keep and bear arms is a source of great controversy. Advocates of gun control see the guarantee as a collective one, centered on the right of states to maintain militias. Opponents of gun control argue that the amendment protects the individual’s right to own guns. In the 2008 ruling of *District of Columbia* v*. Heller*, the Supreme Court absolutely established the right of individuals to own guns for self-defense and struck down a citywide ban on handguns in Washington, D.C., and around the country. Federal gun restrictions were allowed to stand.

## Applying the Bill of Rights to the States

The Bill of Rights was created to put limits on the power of the national government. Initially, its provisions did not apply to states. Under the Fourteenth Amendment, however, nearly all of the items in the Bill of Rights have gradually been extended to all levels of government. The Fourteenth Amendment guarantees people due process of law. The Court has interpreted this provision to mean that, in criminal proceedings, defendants in both state and national cases must be told about their constitutional rights, including their right to remain silent and their right to an attorney. The Court still allows jury size in trials to vary from state to state, however. The right to an attorney is considered fundamental, while the right to trial by a jury of a certain size is not. In one of the important cases of 2000, the court reaffirmed that *Miranda* had a constitutional rule, which Congress could not undermine through legislation. The Fourth Amendment provides people with freedom from unreasonable searches and seizures. The exclusionary rule, which disallows the use of evidence obtained illegally, helps to ensure this right, though this rule has been weakened in recent years. Interpretation of the exclusionary rule continues to divide the Court and serves as an example of the conflict between freedom and order.

## The Ninth Amendment and Personal Autonomy

The Ninth Amendment left open the possibility that there were other rights, not enumerated, that might also be free from government interference. In the 1960s and 1970s, the Supreme Court used the Ninth Amendment as the basis for asserting that people have a right to privacy and that that right allows individuals to make their own choices about birth control and abortion. The appointment of conservative justices under Presidents Reagan, George H. W. Bush, and George W. Bush placed gay rights and abortion rights in question, but President Clinton’s more liberal appointees seem more likely to support those unenumerated rights. The discovery of new rights under the Ninth Amendment creates a difficulty for democracy. It removes questions about value conflicts from the arena of democratic politics and puts them under the protection of the Constitution and the unelected judicial branch.

Key Terms and Cases

## Terms

civil liberties

civil rights

establishment clause

free-exercise clause

strict scrutiny

free-expression clauses

prior restraint

clear and present danger test

fighting words

public figures

bills of attainder

ex post facto laws

obligation of contracts

*Miranda* warnings

exclusionary rule

good faith exception

## Cases

*Lemon* v*. Kurtzman*

*Lynch* v. *Donnelly*

*Sherbert* v. *Verner*

*Employment Division* v*. Smith*

*Gitlow* v*. New York*

*Brandenburg* v*. Ohio*

*Tinker* v*. Des Moines Independent County School District*

*Cohen* v*. California*

*Reno* v. *ACLU*

*Miller* v*. California*

*New York Times* v*. Sullivan*

*New York Times* v*. United States*

*District of Columbia* v*. Heller*

*Palko* v*. Connecticut*

*Gideon* v*. Wainwright*

*Miranda* v*. Arizona*

*Mapp* v*. Ohio*

*Griswold* v*. Connecticut*

*Roe* v*. Wade*

*Lawrence and Garner* v*. Texas*

# Research and Resources

This chapter deals mostly with the protection and extension of civil liberties as a result of Supreme Court decisions. The text describes the Court’s recent discovery of a right to privacy. In the 1970s, Congress also took some measures to protect two individual rights not explicitly specified in the Constitution, namely the right to privacy and the right to information. Congress passed a pair of acts known as the Privacy Act and the Freedom of Information Act. The first of these grants all individuals access to information the government keeps about them; the second gives people the right to see much of the information collected by the government. This section of the study guide outlines methods for using these acts.

If you have used government documents, you have no doubt been amazed by the range of subjects they cover. Published government documents are only the tip of the information iceberg. The government collects information on practically everything, and much of that material is in file drawers and computers in Washington rather than published in government documents. How do you get information that is gathered, but not published, by the government? What rights do you have to it?

Answers to these questions are found in the Freedom of Information Act (FOIA). The FOIA, first passed in 1966, marked a revolution in government record handling. The act shifted the burden of proof. Formerly, the person requesting information had been required to convince the government that the material should be provided; now the government must provide information unless it can give a specific reason under the statute why the information should be denied. One Food and Drug Administration official reported that as a result of the FOIA, his agency “went from a situation in which about l0 percent of our records were disclosed before the act to a situation where now we estimate about 90 percent of the categories of records we have are disclosed.”

The FOIA applies to information held by the administrative agencies of the government (including the executive office of the president), but it does not apply to records held by Congress, the courts, or state governments (virtually every state has its own act governing availability of public records). In 1974, the FOIA was amended, speeding and easing the process of gaining access to records.

What sort of information may come to light under the FOIA? Here are some examples.

* FBI reports on high-profile deceased individuals at <<http://foia.fbi.gov/room.htm>>
* Records of regulatory agencies concerning pollution control programs (Environmental Protection Agency)
* FBI files on UFOs at <<http://foia.fbi.gov/unusual.htm>>
* Consumer complaints registered with the Fair Trade Commission

Under statute, nine categories of information may be denied you, including agency personnel records; material on criminal investigations that might be an invasion of personal privacy, deprive a person of the right to a fair trial, or compromise a confidential source; and properly classified national defense or foreign policy secrets. For information on how to file a FOIA request, try the Department of Justice site at <[http://www.usdoj.gov/04foia/index.html](http://www.aclu.org/library/foia.html)>.

The FOIA protects your access to government materials, but under its provisions, you may be denied information of a sensitive or personal nature about individuals. You do have a right to obtain personal information about yourself, however. Under the Privacy Act, if you are a U.S. citizen, you are entitled to access government records kept about you. The government will have records on you in the following instances:

* You have ever applied for a federal grant or loan, including student aid.
* You have ever worked for a federal agency or government contractor or were a member of the armed forces.
* You were ever arrested by your local police and fingerprinted, and the FBI has a record of the arrest.
* You have ever traveled abroad, and the Department of State has a file on your conduct abroad.
* You have ever received Medicare or Social Security benefits.

To obtain information under the Privacy Act, follow the procedures sketched out by the FOIA. You can adapt the model to reflect the fact that you are using the provisions of the Privacy Act of 1974, 5 U.S.C. 552a.

For printed information on these two laws, see *A Citizen’s Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records*, published by the Government Printing Office.

# Using Your Knowledge

1. Follow the process sketched out in the Research and Resources section to prepare a request for information obtainable under the Freedom of Information Act or the Privacy Act.

2. Visit the FBI’s electronic reading room, and browse the files for well-known people such as Mickey Mantle, Elvis Presley, John Wayne, and Jackie Robinson. What kinds of information were collected?

Sample Exam Questions

Multiple-Choice Questions

1. What entity was the Bill of Rights supposed to limit?

a. federal government

b. U.S. Constitution

c. Congress

d. state governments

e. the president

2. Which of the following is another term for civil liberties?

a. positive rights

b. fighting words

c. certiorari

d. nolo contendre

e. negative rights

3. If people possess rights, what do governments possess?

a. might

b. powers

c. restraint

d. values

e. justice

4. Which clause has erected “a wall of separation between church and state”?

a. exclusionary clause

b. supremacy clause

c. contingency clause

d. establishment clause

e. free-exercise clause

5. What aspect of the Court’s decision on religion was emphasized in *Agostini* v*. Felton*?

a. privacy

b. neutrality

c. freedom

d. order

e. free exercise

6. The free-exercise clause of the First Amendment

a. permits all beliefs and practices of all religions.

b. allows government to overrule states in times of dire emergency.

c. may, in rare cases, allow the government to compel belief.

d. protects belief and practice of Christianity only.

e. permits all beliefs but allows for the limitation of antisocial religious practices.

7. What term do we use to describe censorship before publication?

a. exclusion

b. strict scrutiny

c. prior restraint

d. ex post facto

e. stare decisis

8. Our government needs the doctrine of strict scrutiny to

a. subject religious practices to careful inspection.

b. conform with constitutional limits on search and seizure.

c. represent a compelling state interest if religious practice is restricted.

d. stop speeches or acts that careful inspection reveals to be obscene.

e. rarely use the power of the Supreme Court to challenge laws passed by legislatures.

9. Why did the Supreme Court reverse the decision in *Brandenburg* v*. Ohio*?

a. It pleased the public.

b. Evidence had been gathered illegally.

c. There was no evidence that the danger was real.

d. No crimes had been committed.

e. It was politically advantageous to do so.

10. The Second Amendment

a. entitles citizens to own any type of weapon

b. places the burden of enforcement of weapons regulations at the federal level

c. mentions the need for a well-regulated militia

d. mentions the need for state or federal licensing restrictions on weapons

e. none of the above

11. Which of the following upholds the idea that “undifferentiated fear of apprehension of disturbance is not enough to overcome the right to freedom of expression”?

a. *Cohen* v*. California*

b. *Palko* v*. Connecticut*

c. *Tinker* v*. Des Moines Independent County School District*

d. *Sherbert* v. *Verner*

e. *Gideon* v*. Wainwright*

12. In which case(s) did the U.S. Supreme Court declare that the First Amendment protects the publication of all statements, even false ones?

a. *Sherbert* v. *Verner*

b. *Slaughterhouse* cases

c. *Barron* v*. Baltimore*.

d. *New York Times* v*. Sullivan*

e. *New York Times* v*. United States*

13. Which of the following cases extended the Sixth Amendment provision for a right to counsel to the states?

a. *Palko* v*. Connecticut*

b. *Near* v. *Minnesota*

c. *Mapp* v*. Ohio*

d. *Miranda* v*. Arizona*

e. *Gideon* v. *Wainwright*

14. What did the founding fathers mean for citizens to do with “the right of the people peaceably to assemble”?

a. rotect themselves against tyranny

b. petition the government

c. protest and help create new laws

d. participate and evaluate the role of government

e. inform others of their rights as free men

15. Which amendment was used by the Supreme Court to justify an unenumerated right of privacy?

a. First Amendment

b. Second Amendment

c. Sixth Amendment

d. Ninth Amendment

e. Fourteenth Amendment

16. What did *Roe* v*. Wade* settle for the nation as a whole?

a. upheld order over freedom

b. rejected all state regulation of abortion

c. permanently settled the abortion question

d. permitted unrestricted state regulation of abortion

e. allowed abortions during the first three months of pregnancy

17. Which case was used by the Supreme Court to protect the emotive and cognitive elements of speech?

a. *Cohen* v. *California*

b. *Palko* v*. Connecticut*

c. *Near* v*. Minnesota*

d. *Sherbert* v*. Verner*

e. *Gideon* v*. Wainwright*

18. Which of the following is the term to declare an action to be criminal after it has been performed?

a. nolo contendre

b. habeus corpus

c. ex post facto law

d. strict scrutiny

e. exclusionary rule

19. What do bills of attainder accomplish?

a. They ban homosexual marriage throughout the United States.

b. They eliminated income taxes until overturned by Sixteenth Amendment.

c. They allow bills to become law without the president’s signature.

d. They pronounce an individual guilty of a crime without a trial being held.

e. They permit criticism of public officials without fear of retaliation.

20. According to Justice Felix Frankfurter, what has the history of liberty been?

a. an observance of procedural safeguards

b. an observance of due process

c. a weakening of the establishment clause

d. a strengthening of the free-exercise clause

e. an erosion of the restrictions on religion

21. *Gideon* v. *Wainwright* concerns which amendment of the U.S. Constitution?

a. First Amendment

b. Fourth Amendment

c. Fifth Amendment

d. Sixth Amendment

e. Eighth Amendment

22. In 2000, Justice O’Connor sided with a coalition of liberal justices to strike down

a. *Roe* v*. Wade.*

b. the *Lemon* test.

c. the right to counsel.

d. a Nebraska law that banned partial birth abortion.

e. the clear and present danger test.

23. Concerning the exclusionary rule in the case of *Mapp* v*. Ohio*, the Supreme Court placed a premium on the value of

a. order.

b. equality.

c. freedom.

d. federalism.

e. free exercise of religion.

24. In what case did the U.S. Supreme Court declare that the creation and use of military commissions for the enemy combatants at Guantanamo Bay were unauthorized by Congress and violated international law?

a. *Knight* v*. United States*

b. *Hamdan* v*. Rumsfeld*

c. *Near* v*. Minnesota*

d. *Shadi* v*. Ashcroft*

e. *Lawrence and Garner* v*. Texas*

25. Before the Fourteenth Amendment was passed and applied to the states, the Constitution still barred both state and national governments from

a. passing ex post facto laws.

b. establishing an official religion.

c. denying citizens the right to a jury trial.

d. searching property without warrants.

e. denying the free exercise of religious practices.

Essay Questions

1. How does the Supreme Court balance the tension between freedom of speech and the value of order? How has this balance changed over time? Provide examples of cases that balance these competing values.

2. Where did the Supreme Court find the justification for the *Roe* v*. Wade* decision? Outline activities in this area that are currently enforced as legal, and those which are currently enforced as illegal.

3. Which amendments to the U.S. Constitution protect the rights of the accused? Please discuss them in detail.

4. Discuss the recent decision on the Second Amendment. Will this substantially change anything? Will it make the United States safer for citizens or more dangerous?

5. In deciding cases involving civil liberties, has the Supreme Court held freedom, equality, or order as an absolute value? Defend your answer by providing examples from cases discussed in this chapter.

Answers to Multiple-Choice Questions

1. a

2. e

3. b

4. d

5. b

6. e

7. c

8. c

9. c

10. c

11. c

12. d

13. e

14. b

15. d

16. e

17. a

18. c

19. d

20. a

21. d

22. d

23. c

24. b

25. a