The Nature and Scope of Individual Rights
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The Nature and Scope of Individual Rights

Emerging Debates in Constitutional Law

Robin D. Barnes

CAROLINA ACADEMIC PRESS
Durham, North Carolina
To Denise and Muhammad —
for their courage and honor
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Acknowledgments

This book developed as a result of teaching numerous advanced constitutional law courses to students eager to understand the policies driving laws that govern privacy and individual rights. I wish to honor all of the great legal and political theorists, philosophers, journalists, and poets whose work served to prod me toward greater substantive coverage of the most controversial subjects in the book. Some have passed away, while others (whether on speaking tours or chained to their computers) seem to be changing interpretive paradigms and rearranging the terms of debate throughout the world. In particular, I’d like to thank Lani Guinier, Kathryn Abrams, Pierre J. Schlag and Patricia Joyce Williams.

To every author who said yes to my request to reprint edited excerpts of their published work for this edition, I send a special note of appreciation and acknowledgement. Your willingness to share the fruits of your own hard work and commitment have enabled me to assemble a vivid, albeit complex, portrayal of American law and policy.

Over the years, students have read and commented upon several earlier versions of this text to my amusement and delight. Numerous research assistants have tinkered with the chapters, indices or tables of cases, and gathered permission to reprint forms from the far corners of the earth, on top of countless other small tasks that contributed to the finished project. I offer heartfelt thanks to each. I also wish to thank my administrative assistant, the University of Connecticut, and production managers at Carolina Academic Press for their generous support and patience.
Introduction

Constitutional law is an enormous field, and casebooks devoted to the entire field often sacrifice depth for coverage. Unlike traditional material on civil or political rights, this casebook is about emerging debates in the areas of life that have been deemed a matter of personal, autonomous choice. Designed for use in upper-level seminars, the material leads students to the core of the fundamental rights debate. With an intense focus upon issues pertaining to substantive due process, information privacy, and their impact on social and political freedom, ordered liberty is shown to be a vital founding principle.

Many find the study of personal liberties to be complex and exciting. Where else do we passionately discuss concepts like justice and neutrality with a straight face? Within this paradox is one overriding pedagogical reality: whereas there may be a broad range of choice in how to approach substantive areas of law, ignoring them because they generate controversy is no longer an option. Few subjects provide as much grist for the analytic mill as the study of individual rights. These topics stimulate heated dialogue that transcends the limits of critical legal reasoning on multiple levels; I appreciate the long-cherished notions of academic freedom that make this possible.

This book describes the institutions where lawyers are trained and where justice is meted out as it summarizes historic and contemporary critiques of legal institutions. The comparison renders a bird's eye view of the social and political theories that encourage us to think of the United States as the greatest and oldest living democracy. The text illustrates the extent to which we've formulated laws and legal remedies that are consistent with our highest ideals of liberty, autonomy, and governance for the general welfare.

In areas specific to individual rights, the text highlights notable trends in judicial reasoning. Key issues surrounding the rights of terminally ill patients have emerged with the general transfer of decision-making power from families to the state. Re-emergence of the death penalty, victims' advocates, conscientious and other objections to military conscription, technologies affecting the abortion debate, and use of affirmative defenses for marital rape illustrate interesting developments in the area of consent.

Exploring the Court's most recent patterns of regulating intimate relations suggests a shift toward redefining the limits of familial privacy and the concept of fundamental liberty in the areas of marriage and procreation. Transformation of the social order, linked to evolving scrutiny of the marital contract, demonstrates that the role of marriage as a social institution is changing course. With that reality, we find a re-emergence of early theories rejecting traditional monogamous relationships.

The absence of a coherent linkage between actual legislation and a corresponding state interest raises clear obstacles to gender neutrality and justice in the criminal prosecution of many statutory rape cases. Trends related to those charged with crimes rang-
ing from incest and trafficking in child pornography, to the mandatory reporting of
movement and location of convicted sex offenders present additional areas where the
law operates without an obvious correlation between means and ends.

The legacy of group rights established at the nation’s founding is documented in its
historical context by examining the social and legal doctrines that developed through-
out the 20th century. This legacy is the primary obstacle to full recognition of the rights
of individuals today. Significant developments in constitutional doctrine can be traced
to meaningful attempts to transform what should have rightfully begun as a contractual
or employment relationship, rather than a property right at the nation’s founding, into a
contractual or labor relation among equals.

Developments in the law and science related to gay, lesbian, bi-sexual, and transgen-
dered people are viewed in light of congressional actions that attempt to neutralize their
social impact. The historical defense of gender roles is featured as less interesting in the-
ory, than for its impact as a subtext in debates about modern family life.

Restrains on civil liberties since September 11, 2001, and the passage of the USA
PATRIOT Act are discussed in relation to congressional activity leading up to its pas-
sage. Changes in foreign and domestic surveillance policies, aided by new telecommu-
nications technology and practices, have wholly altered the debate surrounding privacy
rights, rendering much of our traditional privacy law obsolete.

Examining individual rights within analytic paradigms that are rarely embraced by
American jurists provides an exceptional opportunity to evaluate intricate connections
between law and social scientific theory, and their nascent influence on global public
policy initiatives. Re-shaping the role of lawyers and the nature of their legal training
have become central to developing the complex range of domestic policies and practices
necessary for a coherent response to imminent demands for global standards and com-
pliance in areas involving individual rights and liberties.
CONSTITUTION
OF THE UNITED STATES OF AMERICA

Select Passages

PREAMBLE
We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution of the United States of America.

ARTICLE I

Section 2
[3] Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

Section 8
[1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.
[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.
[16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

Section 9
[1] The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

ARTICLE IV

Section 1
Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.
Section 2
[1] The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.
[2] A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.
[3] No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3
[1] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the consent of the Legislatures of the States concerned as well as of the Congress.
[2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States: and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

AMENDMENT I [1791]
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition for redress of grievances.

AMENDMENT II [1791]
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.

AMENDMENT III [1791]
No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV [1791]
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 issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT IX [1791]
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X [1791]
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
AMENDMENT XIII [1865]

Section I
Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2
Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV [1868]

Section 1
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2
Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

AMENDMENT XV [1870]

Section 1
The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2
Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIX [1920]

Section 1
The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Section 2
Congress shall have power to enforce this article by appropriate legislation.