Chapter 4

Civil Liberties: Protecting Individual Rights

**Chapter Outline**

I. The Constitution: The Bill of Rights and the Fourteenth Amendment

A. Selective Incorporation of Free Expression Rights

B. Selective Incorporation of Fair Trial Rights

II. Freedom of Expression

A. The Early Period: The Uncertain Status of the Right of Free Expression

B. The Modern Period: Protecting Free Expression

1. Free Speech

2. Free Assembly

3. Press Freedom and Prior Restraint

4. Libel and Slander

5. Obscenity

III. Freedom of Religion

A. The Establishment Clause

B. The Free-Exercise Clause

IV. The Right to Bear Arms

V. The Right of Privacy

A. Abortion

B. Sexual Relations among Consenting Adults

VI. Rights of Persons Accused of Crimes

A. Suspicion Phase: Unreasonable Search and Seizure

B. Arrest Phase: Protection against Self-Incrimination

C. Trial Phase: The Right to a Fair Trial

1. Legal Counsel and Impartial Jury

2. The Exclusionary Rule

D. Sentencing Phase: Cruel and Unusual Punishment

E. Appeal: One Chance, Usually

F. Crime, Punishment, and Police Practices

VII. Rights and the War on Terrorism

A. Detention of Enemy Combatants

B. Surveillance of Suspected Terrorists

VIII. The Courts and a Free Society

**Learning Objectives**

Having read the chapter, you should be able to do each of the following:

1. Explain why issues of constitutional individual rights or civil liberties have become more complex in contemporary times.
2. Detail the development of selective incorporation as it relates to the Fourteenth Amendment and what it means for individual rights in the states.
3. Trace the evolution of the Supreme Court’s interpretation of the right of free expression through both the early and modern periods. Important concepts such as prior restraint, libel, and slander should also be understood. Discuss the extension of its guarantees to state governments through the Fourteenth Amendment.
4. Outline the historical development of the federal judiciary’s application of due process protections.
5. Review key Supreme Court decisions relating to the right of privacy.
6. Discuss the significance of the establishment and free exercise clauses in relation to freedom of religion.
7. Explain how the rights of the accused have been protected through Supreme Court rulings. Detail the protections encountered at various stages of the criminal justice system, from the suspicion phase through appeal.
8. Describe the changes that the war on terrorism has brought to the protection of individual rights.
9. Summarize the role of the courts in a free society.

**Chapter Summary**

The Bill of Rights was added to the Constitution shortly after its ratification. These amendments guarantee certain political, procedural, and property rights against infringement by the national government.

The guarantees embodied in the Bill of Rights originally applied only to the national government. Under the principle of selective incorporation of these guarantees into the Fourteenth Amendment, the courts extended them to state governments, though the process was slow and uneven. In the 1920s and 1930s, First Amendment guarantees of freedom of expression were given protection from infringement by the states. The states continued to have wide discretion in criminal proceedings until the early 1960s, when most of the fair-trial rights in the Bill of Rights were given federal protection.

Freedom of expression is the most basic of democratic rights. People are not free unless they can freely express their views. Nevertheless, free expression may conflict with the nation’s security needs during times of war and insurrection. The courts at times have allowed government to limit expression substantially for purposes of national security. In recent decades, however, the courts have protected a wide range of free expression in the areas of speech, press, and religion. They have also established a right of privacy, which in some areas, such as abortion, remains a source of controversy and judicial action.

Due process of law refers to legal protections that have been established to preserve individual rights. The most significant form of these protections consists of procedures or methods (for example, the right of an accused person to have an attorney present during police interrogation) designed to ensure that an individual’s rights are upheld. A major controversy in this area is the breadth of the exclusionary rule, which bars the use in trials of illegally obtained evidence.

The war on terrorism that began after the attacks on September 11, 2001, has raised new issues of civil liberties, including the detention of enemy combatants, the use of harsh interrogation techniques, and warrantless surveillance. The Supreme Court has not ruled on all such issues but has generally held that the president’s war-making power does not include the authority to disregard provisions of statutory law, treaties (the Geneva Conventions), and the Constitution.

Civil liberties are not absolute but must be judged in the context of other considerations (such as national security or public safety) and against one another when different rights conflict. The judicial branch of government, particularly the Supreme Court, has taken on much of the responsibility for protecting and interpreting individual rights. The Court’s positions have changed with time and conditions, but the Court is usually more protective of civil liberties than are elected officials or popular majorities.

**Focus and Main Points**

The author focuses on civil liberties issues in this chapter. He examines a range of specific individual rights and their evolution over time. These rights include freedom of speech, religion, and privacy. However, these rights are constantly being balanced against competing individual rights and society’s collective interests, making these increasingly complex and important in contemporary American politics. The main points of this chapter are as follows:

* *Freedom of expression is the most basic of democratic rights, but like all rights, it is not unlimited*.
* *“Due process of law” refers to legal protections (primarily procedural safeguards) designed to ensure that individual rights are respected by government*.
* *Over the course of the nation’s history, Americans’ civil liberties have been broadened in law and more fully protected by the courts*. Of special significance has been the Supreme Court’s use of the Fourteenth Amendment to protect individual rights from action by state and local governments.
* *Individual rights are constantly being weighed against the demands of majorities and the collective needs of society*. All political institutions are involved in this process, as is public opinion, but the judiciary plays a central role and is the institution that is normally most protective of civil liberties.

**Major Concepts**

Bill of Rights

The first ten amendments to the Constitution, which set forth basic protections for individual rights of free expression, fair trial, and property.

civil liberties

The fundamental individual rights of a free society, such as freedom of speech and the right to a jury trial, which in the United States are protected by the Bill of Rights.

clear-and-present-danger test

A test devised by the Supreme Court in 1919 in order to define the limits of free speech in the context of national security. According to the test, government cannot abridge political expression unless it presents a clear and present danger to the nation’s security.

symbolic speech

Action (for example, the waving or burning of a flag) for the purpose of expressing a political opinion.

prior restraint

Government prohibition of speech or publication before the fact, which is presumed by the courts to be unconstitutional unless the justification for it is overwhelming.

due process clause (of the Fourteenth Amendment)

The clause of the Constitution that has been used by the judiciary to apply the Bill of Rights to the actions of state governments.

selective incorporation

The process by which certain of the rights (for example, freedom of speech) contained in the Bill of Rights become applicable through the Fourteenth Amendment to actions by the state governments.

imminent lawless action test

A legal test that says government cannot lawfully suppress advocacy that promotes lawless action unless such advocacy is aimed at producing, and is likely to produce, imminent lawless action.

libel

Publication of material that falsely damages a person’s reputation.

slander

Spoken words that falsely damage a person’s reputation.

establishment clause

The First Amendment provision stating that government may not favor one religion over another or favor religion over no religion, and prohibiting Congress from passing laws respecting the establishment of religion.

Lemon test A three-part test to determine whether a law relating to religion is valid under the religious establishment clause. To be valid, a law must have a secure purpose, serve neither to advance nor inhibit religion, and avoid excessive government entanglement with religion.

free-exercise clause

A First Amendment provision that prohibits the government from interfering with the practice of religion or prohibiting the free exercise of religion.

right of privacy

A right implied by the freedoms in the Bill of Rights that grants individuals a degree of personal privacy upon which government cannot lawfully intrude. The right gives individuals a level of free choice in areas such as reproduction and intimate relations.

procedural due process

The constitutional requirement that government must follow proper legal procedures before a person can be legitimately punished for an alleged offense.

exclusionary rule

The legal principle that government is prohibited from using in trials evidence that was obtained by unconstitutional means (for example, illegal search and seizure).

Practice Exam

(Answers appear at the end of this chapter.)

**Multiple Choice**

1. The Bill of Rights was enacted in \_\_\_\_\_\_\_\_.

a. 1776

b. 1781

c. 1787

d. 1789

e. 1791

2. Which test did the Supreme Court justices devise for free speech in *Schenck v. United States* (1919)?

a. undue burden test

b. clear and present danger test

c. imminent lawless action test

d. free liberty test

e. None of these answers is correct.

3. In 1925, the Supreme Court justices first ruled that the Fourteenth Amendment applied to the states in

a. *Gitlow v. New York*.

b. *New York Times Co. v. United States*.

c. *Texas v. Johnson*.

d. *Roth v. United States*.

e. *New York Times Co. v. Sullivan*.

4. Which amendment guarantees freedom of assembly?

a. Fifth

b. Second

c. Eighth

d. First

e. Third

5. In \_\_\_\_\_\_\_\_, the Supreme Court justices required the states to furnish attorneys for poor defendants in all felony cases.

a. *Mapp v. Ohio* (1961)

b. *Miranda v. Arizona* (1966)

c. *Benton v. Maryland* (1969)

d. *Gideon v. Wainwright* (1963)

e. *Duncan v. Louisiana* (1968)

6. In 2007, the Supreme Court reversed an earlier ruling by determining that bans on partial-birth abortion were constitutional. One cause of this shift was the replacement of Justice Sandra Day O’Connor with

a. William Rehnquist.

b. Felix Frankfurter.

c. Anthony Kennedy.

d. Ruth Bader Ginsberg.

e. Samuel Alito.

7. Of the following nations, which has the largest rate of incarceration?

a. Japan

b. Great Britain

c. United States

d. Russia

e. China

8. Which Supreme Court case dealt with the publication of the “Pentagon Papers”?

a. *Schenck v. U.S.*

b. *Fiske v. Kansas*

c. *New York Times Co. v. United States*

d. *Gitlow v. New York*

e. *Gideon v. Wainwright*

9. What happened in *Engel v. Vitale* (1962)?

a. The Supreme Court justices upheld the constitutionality of vouchers.

b. The Supreme Court justices upheld the detention of enemy combatants by the government.

c. The Supreme Court justices ruled unconstitutional the reciting of prayers in the public schools.

d. The Supreme Court justices ruled unconstitutional the reciting of the Pledge of Allegiance in public schools.

e. None of these answers is correct.

10. Which of the following statements is true?

a. Since *Roe v. Wade*, public opinion on abortion has not changed greatly.

b. Since *Roe v. Wade*, public opinion on abortion has changed dramatically.

c. A much higher percentage of Americans oppose the decision in *Roe v. Wade* now than did when it was rendered.

d. Since the decision, public opinion has changed dramatically; a much higher percentage of Americans now support the decision.

e. Discernible opinions about the abortion issue are difficult to identify in polls.

11. \_\_\_\_\_\_\_\_ has executed more prisoners in the past 25 years than any other state.

a. New York

b. California

c. North Dakota

d. Texas

e. Tennessee

12. The \_\_\_\_\_\_\_\_ Amendment prohibits “cruel and unusual punishment.”

a. Second

b. Third

c. Seventh

d. Eighth

e. Twelfth

13. Which 1973 Supreme Court case stated that obscenity must be defined by “contemporary community standards”?

a. *Roth v. United States*

b. *Ashcroft v. Free Speech Coalition*

c. *Engel v. Vitale*

d. *Van Orden v. Perry*

e. *Miller v. California*

14. Which of the following is a real-world example of an action that the Supreme Court decided was a protected form of symbolic speech?

a. the burning of a draft registration card by a Vietnam War protester

b. blocking the entrance of an abortion clinic

c. a newspaper publication of the “Pentagon Papers”

d. the burning of the American flag in public

e. the advocation of the overthrow of the U.S. government in a peaceful public assembly

15. What was the constitutional justification of selective incorporation by the Supreme Court?

a. Fourteenth Amendment equal protection clause

b. Fourteenth Amendment due process clause

c. Fifth Amendment due process clause

d. First Amendment freedom of expression

e. First Amendment freedom of assembly

16. England’s Glorious Revolution in 1689 focused primarily on the issue of

a. Parliamentary intrusions into personal privacy.

b. freedom of the press.

c. judicial activism.

d. religion.

e. unlawful arrests.

17. “You have the right to remain silent....Anything you say can and will be used against you in a court of law....You have the right to an attorney.” This is called the \_\_\_\_\_\_\_\_ warning.

a. Miranda

b. Escobedo

c. Gideon

d. Mapp

e. Dickerson

18. \_\_\_\_\_\_\_\_ is a written attack on a person’s reputation.

a. Libel

b. Slander

c. Obscenity

d. Libel, slander, and obscenity are all terms for written attacks on a person’s reputation.

e. None of these answers is correct.

19. Which of the following is true of the USA Patriot Act of 2001?

a. Government was granted more leeway in its wiretapping activities.

b. Authorities were granted more discretion and a lower burden of proof when seeking to wiretap a suspected terrorist.

c. Government was granted enhanced investigative powers.

d. It has led to a reduction of America’s constitutional protections.

e. All these answers are correct.

20. The plain view doctrine

a. prevents police officers from entering a home to search for a suspect if that suspect is not in plain sight.

b. prevents admissibility of evidence found in plain view if that evidence does not relate to the same infraction.

c. allows admissibility of evidence found in open sight, even if it relates to a different infraction.

d. requires police to have a warrant to enter a home for a search and seizure.

e. allows evidence obtained through improper procedures to be admissible if the police were acting in good faith

**True/False**

1. Although the Constitution says that Congress shall pass “no law” restricting freedom of speech, the Supreme Court’s interpretation of the Constitution has specified instances in which congressional limitation of speech is lawful.

a. True

b. False

2. Prior restraint refers to the Fourth Amendment’s prohibition on unreasonable search and seizure by law enforcement officials.

a. True

b. False

3. The clear-and-present-danger test was developed by the Supreme Court in response to the Sedition Act of 1798.

a. True

b. False

4. Selective incorporation is the process by which the Fourteenth Amendment has been interpreted to protect liberties listed in the Bill of Rights from infringement by the states.

a. True

b. False

5. When the two conflict, the First Amendment’s free exercise clause takes precedence over the establishment clause.

a. True

b. False

6. The exclusionary rule holds that evidence obtained through unlawful search and seizure is inadmissible in court.

a. True

b. False

7. The Supreme Court has tended to be more protective of and sensitive to civil liberties than have elected officials or popular majorities.

a. True

b. False

8. The Supreme Court ruling in the *Roe v. Wade* abortion case derived from an earlier ruling upholding the right of privacy.

a. True

b. False

9. Since the 1980s, Supreme Court decisions have tended to weaken the protections of the exclusionary rule for defendants.

a. True

b. False

10. Amnesty International found that the United States ranks lowest in the number of people it places behind bars and in the length of sentences for various categories of crime.

a. True

b. False

**Essay**

1. What did the Supreme Court justices rule in the 2002 case from Cleveland, Ohio that addressed the issue of vouchers?
2. Since 1973, how have the Supreme Court justices addressed the issue of abortion and the law?
3. In the past two decades, how has the Supreme Court evolved in dealing with cases involving sexual relations among consenting adults?
4. What are the specific procedural protections in the U.S. Constitution?
5. What is racial profiling? Does this practice continue in the United States?

Answers to the Practice Exam

**Multiple Choice Answers**

* + 1. e 11. d
    2. b 12. d
    3. a 13. e
    4. d 14. d
    5. d 15. b
    6. e 16. d
    7. c 17. a
    8. c 18. a
    9. c 19. e
    10. a 20. c

Multiple Choice Explanations

1. The correct answer is (e). The Declaration of Independence was written in 1776, followed by the Articles of Confederation (1781), the Constitution (1787), and ratification of the Constitution (1789).
2. Justice Oliver Wendell Holmes, Jr. created the clear and present danger test (b) in this case. The imminent lawless action test replaced the clear and present danger test later in the twentieth century. The undue burden test deals with abortion and the right to privacy; the free liberty test is fictional.
3. The justices first invoked selective incorporation in *Gitlow v. New York* (a). *New York Times Co. v. United States* (1971) dealt with prior restraint and publication of the Pentagon papers. The issue in *Texas v*. *Johnson* (1989) was flag burning. *Roth v. United States* (1957) dealt with obscenity, and libel was the focus of *New York Times Co. v. Sullivan* (1964).
4. The correct answer is (a); and the First Amendment also guarantees freedom of religion and freedom of speech.
5. The Supreme Court justices used selective incorporation to make this requirement in *Gideon v. Wainwright* (d). The other cases dealt with differing constitutional issues: *Mapp* (illegally obtained evidence); *Miranda* (self-incrimination); *Benton* (double jeopardy); and *Duncan* (jury trial in criminal cases).
6. Frankfurter, Rehnquist, Kennedy, and Ginsberg all either served before or at the same time as Sandra Day O’Connor, who was replaced by Alito (e). O’Connor’s retirement left only one woman, Ginsberg, on the Supreme Court at that time. Ginsberg objected strongly to the opinion of the narrow majority (5-4) in this case.
7. The United States (c) is the world leader in the number of people it places behind bars. The United States is rivaled only by Russia in the proportion of its people in prison.
8. The correct answer is (c). The controversy over the *New York Times*’ publication of the “Pentagon Papers” was a landmark event during the Vietnam War.
9. The Supreme Court justices ruled that voluntary non-denominational school-sponsored prayers were unconstitutional in *Engel v. Vitale* (c).
10. Since *Roe* was promulgated in 1973, Gallup pollsters have determined that public opinion on abortion has not changed much (a).
11. About a third of all executions in the last quarter-century have taken place in Texas (d) alone.
12. Issues involving capital punishment are Eighth Amendment (d) matters.
13. The case that established this baseline test for obscenity is *Miller v. California*, so the correct answer is (e).
14. The Supreme Court has generally protected symbolic speech. In 1989 it ruled that the symbolic burning of the American flag is a lawful form of expression. Thus, the answer is (d).
15. When the Supreme Court justices applied the Bill of Rights to state governments, the Fourteenth Amendment due process clause (b) was the constitutional justification.
16. England’s Glorious—or Bloodless—Revolution of 1689 centered on religion (d) and resulted in the Act of Toleration, which gave members of all Protestant sects the right to worship freely.
17. The Miranda warning (a) was created in the aftermath of *Miranda v*. *Arizona* (1966). Miranda confessed to kidnapping and raping a young woman. His confession was invalidated by the Supreme Court because he had not been informed of his right to remain silent or have legal counsel present during interrogation.
18. The correct answer is (a). Libel is a written attack on a person, while slander is a spoken attack.
19. For all the reasons noted (e) and more, civil libertarians have been very critical of the Act since its passage in 2002.
20. The plain view doctrine affirms the admissibility of evidence found in plain sight even when the evidence relates to an infraction other than the one for which the individual was stopped (c).

**True/False Answers**

1. a 6. a

2. b 7. a

3. b 8. a

4. a 9. a

5. b 10. b

**Essay Answers**

1. In *Zelman v*. *Simmons-Harris*, the Court’s majority upheld an Ohio law that allows students in Cleveland’s most challenged public schools to receive a tax-supported voucher to attend private or parochial school. The justices in the majority determined that the Cleveland voucher program did not violate the establishment clause because students had a choice between secular and religious education. The four dissenters in *Zelman* disagreed with the justices in the majority vehemently.
2. Since the *Roe v. Wade* decision, anti-abortion activists have sought to reverse or weaken the Court’s ruling. Attempts to pass a constitutional amendment that would ban abortions failed. In 1989, however, the Supreme Court justices upheld a Missouri law that prohibits abortions in Missouri’s public hospitals and by its public employees in *Webster v. Reproductive Health Services*. In 1992, the justices upheld the basic *Roe* precedent, but weakened it simultaneously in *Planned Parenthood v. Casey* by allowing states to impose regulations on the abortion procedure so long as they do not pose an “undue burden” on women seeking an abortion. Later, the Nebraska legislature passed a law banning so-called partial birth abortion, but the Supreme Court invalidated the law in *Stenberg v. Carhart* (2000). Subsequent to this decision, Congress passed a law in 2003 that banned partial birth abortion and made doctors criminally liable if they performed the procedure. In 2007, the Supreme Court voted to uphold this law; the shift resulted in large part from the replacement of Justice Sandra Day O’Connor with the more conservative Samuel Alito.
3. In *Bowers v. Hardwick* (1986), the Supreme Court justices ruled that states could prohibit sodomy, concluding that the right to privacy did not extend to homosexual acts among consenting adults. In 2003, however, the justices reversed this decision in *Lawrence v. Texas*. By a 6 to 3 vote, the justices concluded that a Texas sodomy law that prohibited consensual sex between adults of the same sex was unconstitutional because it violated privacy rights protected by the due process clause of the Fourteenth Amendment.
4. Although there are general protections in other amendments, the specific procedural protections in the U.S. Constitution are in the Fourth, Fifth, Sixth, and Eighth amendments. The Fourth Amendment prohibits the police from conducting searches and seizures unless they have probable cause to believe that a crime has been committed. The Fifth Amendment protects individuals against double jeopardy, self-incrimination, indictment for a crime except through grand jury proceedings, and loss of life, liberty, and property without due process of law. The Sixth Amendment provides the right to counsel, to confront witnesses, to receive a speedy trial, and to have a trial by jury in criminal cases. The Eighth Amendment protects against excessive bail or fines and prohibits the infliction of cruel and unusual punishment against those convicted of crimes.
5. Racial profiling is the assumption that certain groups are more likely to commit particular crimes. It is a common police practice that results in the unequal treatment of minorities. A recent study in Maryland revealed that although minority and white motorists are about equally likely to commit traffic infractions, minorities are much more likely to be stopped and searched.