

## CHAPTER 4

### *Civil Liberties and Public Policy*



#### CHAPTER OUTLINE

- I. Politics in Action: Free Speech on Campus (pp. 101–102)
  - A. The University of Wisconsin case represents the complex controversy that shapes civil liberties.
  - B. **Civil liberties** are individual legal and constitutional protections against the government.
  - C. Americans' civil liberties are set down in the **Bill of Rights**, the first ten amendments to the Constitution.
- II. The Bill of Rights—Then and Now (pp. 103–105)
  - A. The **First Amendment** is the source of Americans' freedom of religion, speech, press, and assembly.
  - B. The Bill of Rights and the States
    - 1. **Barron v. Baltimore** determined that the Bill of Rights restrained only the national government.
    - 2. **Gitlow v. New York** relied on the **due process clause** of the **Fourteenth Amendment** to rule that a state government must respect some First Amendment rights.
    - 3. The **incorporation doctrine** is a legal concept under which the Supreme Court has nationalized the Bill of Rights by making most of its provisions applicable to the states through the Fourteenth Amendment.
- III. Freedom of Religion (pp. 105–110)
  - A. The **Establishment Clause** dictates that "Congress shall make no law respecting an establishment of religion." (**Lemon v. Kurtzman**, **Zelman v. Simmons-Harris**, **Engel v. Vitale**, and **School District of Abington Township, Pennsylvania v. Schempp**)
  - B. The **Free Exercise Clause** prohibits the abridgment of the citizens' freedom to worship, or not to worship, as they please.
- IV. Freedom of Expression (pp. 111–119)
  - A. **Prior Restraint**, or governmental actions that prevent material from being published (censorship), has been consistently struck down by the Supreme Court (**Near v. Minnesota**).
  - B. Free Speech and Public Order: the right to protest has been protected to varying extent depending on the political climate (**Schenck v. United States**).
  - C. Free Press and Fair Trials
    - 1. Press coverage may interfere with a fair trial.

2. Reporters do not always like to open their files to the courts; shield laws may protect reporters from revealing their sources. (*Zurcher v. Stanford Daily*)
  - D. Obscenity has not been regarded as a fully constitutionally protected area of free speech and press, but remains controversial. (*Roth v. United States* and *Miller v. California*)
  - E. **Libel** and Slander:
    1. The Supreme Court has held that statements about public figures are libelous only if made with malice and reckless disregard for the truth (*New York Times v. Sullivan*).
  - F. **Symbolic Speech** is an action that does not consist of speaking or writing but that expresses an opinion (*Texas v. Johnson*).
- V. Commercial Speech (pp. 119–120)
- A. **Commercial Speech** is restricted far more extensively than other expressions of opinion.
  - B. Regulation of the Public Airwaves
    1. The Federal Communications Commission regulates the content, nature, and very existence of radio and television broadcasting (*Miami Herald Publishing Co. v. Tornillo* and *Red Lion Broadcasting Co. v. Federal Communication Commission*).
- VI. Freedom of Assembly (pp. 121–122)
1. Right to Assemble: The right to gather together in order to make a statement.
  - B. Right to Associate: The right to associate with people who share a common interest, including an interest in political change (*NAACP v. Alabama*).
- VII. Right to Bear Arms (pp. 122–123)
- A. Many communities have passed restrictions on handguns.
  - B. *District of Columbia v. Heller* (2008) held that the Second Amendment protects an individual right to possess a firearm.
- VIII. Defendants' Rights (pp. 123–133)
- A. Interpreting Defendants' Rights
  - B. Searches and Seizures
    1. Before making an arrest, police need **probable cause** to believe that someone is guilty of a crime.
    2. The Fourth Amendment forbids **unreasonable searches and seizures**.
    3. The Constitution requires that probable cause exist before issuing a **search warrant**.
    4. The **exclusionary rule** prevents illegally seized evidence from being introduced in the courtroom (*Mapp v. Ohio*).
  - C. **Self-incrimination**: The **Fifth Amendment** forbids self-incrimination and *Miranda v. Arizona* set guidelines for police questioning.
  - D. The Right to Counsel: The **Sixth Amendment** ensures the right to counsel and *Gideon v. Wainwright* extended this right to those who can not afford counsel.
  - E. Trials: Most cases are settled through **plea bargaining**.

- F. **Cruel and Unusual Punishment**
  - 1. The **Eighth Amendment** forbids cruel and unusual punishment.
  - 2. Almost all of the constitutional debate over cruel and unusual punishment has centered on the death penalty (*Gregg v. Georgia* and *McClesky v. Kemp*).
- IX. The Right To Privacy (pp. 133–137)
  - A. Is There a **Right to Privacy**?
  - B. Controversy over Abortion
    - 1. *Roe v. Wade* defined the conditions under which abortions are allowed.
    - 2. *Planned Parenthood v. Casey* permitted more regulation of abortions.
- X. Understanding Civil Liberties (pp. 137–138)
  - A. Civil Liberties and Democracy
  - B. Civil Liberties and the Scope of Government
- XI. Summary (pp. 138–139)

## LEARNING OBJECTIVES

*After studying Chapter 4, you should be able to:*

- 1. Understand the constitutional basis of civil liberties and the Supreme Court's role in defining them.
- 2. Discuss the religious liberties guaranteed in the First Amendment.
- 3. Explain the nature of and the issues involving freedom of expression, freedom of assembly, and the right to bear arms in America.
- 4. Identify the rights of individuals accused of crimes.
- 5. Evaluate and discuss the issue of the right to privacy.
- 6. Understand the impact of civil liberties on democracy and the scope of government.

*The following exercises will help you meet these objectives:*

Objective 1: Understand the constitutional basis of civil liberties and the Supreme Court's role in defining them.

- 1. Define the term "civil liberties."

2. What was the most important difference between the Supreme Court's decision in *Barron v. Baltimore* and the one in *Gitlow v. New York*?
3. Explain the importance of the Fourteenth Amendment.
4. What is the incorporation doctrine?

Objective 2: Discuss the religious liberties guaranteed in the First Amendment.

1. List four Supreme Court cases concerning the establishment clause and comment on the significance of each.
  - 1.
  - 2.
  - 3.
  - 4.
2. Compare and contrast the Supreme Court case of *Employment Division v. Smith* (1990) with the Religious Freedom Restoration Act of 1993.

Objective 3: Explain the nature of and the issues involving freedom of expression, freedom of assembly, and the right to bear arms in America.

1. Define the term "prior restraint."

2. List and explain the significance of three Supreme Court cases concerning free speech and public order.
  - 1.
  - 2.
  - 3.
3. What is a shield law?
4. How did the Supreme Court define obscenity in the case of *Miller v. California*?
5. How are the standards for winning libel lawsuits different for public figures and private individuals?
6. Define the term "symbolic speech."
7. Who regulates commercial speech?
8. What is the function of the Federal Communications Commission (FCC)?
9. Explain the two facets of the freedom of assembly.
  - 1.
  - 2.
10. Explain the Supreme Court ruling in *District of Columbia v. Heller* (2008).

Objective 4: Identify the rights of individuals accused of crimes.

1. Draw a diagram of the criminal justice system as a series of funnels.
2. How are the following terms interrelated: probable cause, unreasonable search and seizure, search warrant, and exclusionary rule?
3. What are the three guidelines for police questioning of suspects as set forth in *Miranda v. Arizona* (1966)?
  - 1.
  - 2.
  - 3.
4. What is the significance of the Supreme Court case of *Gideon v. Wainwright* (1963)?
5. What are the pros and cons of plea bargaining?

6. List and explain the importance of three Supreme Court cases concerning the death penalty.
  - 1.
  - 2.
  - 3.

Objective 5: Evaluate and discuss the issue of the right to privacy.

1. Explain how the Constitution implies a right to privacy.
2. List and explain the importance of four Supreme Court cases concerning abortion.
  - 1.
  - 2.
  - 3.
  - 4.

Objective 6: Understand the impact of civil liberties on democracy and the scope of government.

1. In your opinion are the rights guaranteed in the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments more beneficial to criminals or to society at large?
2. In what ways do civil liberties limit the scope of government? In what ways do they expand the scope of government?





## KEY TERMS AND CASES

*Identify and describe: key terms*

civil liberties

Bill of Rights

First Amendment

Fourteenth Amendment

due process clause

incorporation doctrine

establishment clause

free exercise clause

prior restraint

libel

symbolic speech

commercial speech

probable cause

unreasonable searches and seizures

search warrant

exclusionary rule

Fifth Amendment

self-incrimination

Sixth Amendment

plea bargaining

Eighth Amendment

cruel and unusual punishment

right of privacy

*Identify and describe: key cases*

*Barron v. Baltimore* (1833)

*Gitlow v. New York* (1925)

*Lemon v. Kurtzman* (1971)

*Zelman v. Simmons-Harris* (2002)

*Engel v. Vitale* (1962)

*School District of Abington Township, Pennsylvania v. Schempp* (1963)

*Near v. Minnesota* (1931)

*Schenk v. United States* (1919)

*Zurcher v. Stanford Daily* (1976)

*Roth v. United States* (1957)

*Miller v. California* (1973)

*New York Times v. Sullivan* (1964)

*Texas v. Johnson* (1989)

*Miami Herald Publishing Co. v. Tornillo* (1974)

*Red Lion Broadcasting Co. v. Federal Communications Commission* (1969)

*NAACP v. Alabama* (1958)

*Mapp v. Ohio* (1961)

*Miranda v. Arizona* (1966)

*Gideon v. Wainwright* (1963)

*Gregg v. Georgia* (1976)

*McCleskey v. Kemp* (1987)

*Roe v. Wade* (1973)

*Planned Parenthood v. Casey* (1992)

*Compare and contrast:*

civil liberties and Bill of Rights

First Amendment and Fourteenth Amendment

*Barron v. Baltimore* and *Gitlow v. New York*

*Gitlow v. New York* and Fourteenth Amendment

establishment clause and free exercise clause

*Lemon v. Kurtzman* and *Zelman v. Simmons-Harris*

*Engel v. Vitale* and *School District of Abington Township, Pennsylvania v. Schempp*

prior restraint and *Near v. Minnesota*

*Roth v. United States* and *Miller v. California*

libel and *New York Times v. Sullivan*

*Texas v. Johnson* and symbolic speech

*Miami Herald Publishing Company v. Tornillo* and *Red Lion Broadcasting Company v. Federal Communications Commission*

probable cause, unreasonable searches and seizures, and search warrant

unreasonable searches and seizures and *Mapp v. Ohio*

unreasonable searches and seizures and exclusionary rule

Fifth Amendment and self-incrimination

Fifth Amendment and *Miranda v. Arizona*

Sixth Amendment and *Gideon v. Wainwright*

Eighth Amendment and cruel and unusual punishment

*Gregg v. Georgia* and *McCleskey v. Kemp*

right of privacy and *Roe v. Wade*

*Name that term:*

1. The legal doctrine through which the Bill of Rights has been made applicable to the states.

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2. This part of the First Amendment forbids the government from having an official church.

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3. A government's actions that prevent material from being published in the first place.

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4. This 1973 Supreme Court case attempted to clarify the meaning of obscenity by spelling out what would and would not be obscene.

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5. The publication of knowingly false or malicious statements that damage someone's reputation.

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6. Actions that do not consist of speaking or writing, but that express an opinion.

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7. This type of speech is restricted far more extensively than expressions of opinion on religious, political, or other matters.

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8. This case established the principle of "clear and present danger."

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9. This case upheld the right to associate.

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10. The Constitution requires that no court may issue one of these unless probable cause exists to believe that a crime has occurred or is about to occur.  
\_\_\_\_\_
11. This case extended the exclusionary rule to the states.  
\_\_\_\_\_
12. This case set strict guidelines for police questioning of suspects.  
\_\_\_\_\_
13. Most criminal cases are settled through this process.  
\_\_\_\_\_
14. Undefined by the Eighth Amendment, this has been the basis of the controversy over the death penalty.  
\_\_\_\_\_
15. This right is implied, but not directly stated, in the Bill of Rights.  
\_\_\_\_\_

## **USING YOUR UNDERSTANDING**

1. Select one of the Supreme Court cases discussed in this chapter that is of interest to you. Find and read the opinions presented in the case, including any dissenting opinions, and briefly describe what you found. Identify the social values that were in conflict in the case. Based on your understanding, state whether or not you are persuaded by the arguments presented in justification of the decision.
2. How have the terrorist attacks of September 11, 2001 affected civil liberties in the United States? List and explain the various restrictions put in place and laws passed by the government since September 11, 2001, such as the Patriot Act, that have had an impact on our personal freedoms. In your opinion, are these restrictions worth the tradeoff? Does the reality of international terrorism require a reevaluation of an unconditional commitment to civil liberties? In your opinion, how far should we go?



## MULTIPLE CHOICE QUESTIONS

*Circle the correct answer:*

1. Americans' civil liberties are detailed in
  - a. the Declaration of Independence.
  - b. the Bill of Rights.
  - c. Article I of the Constitution.
  - d. no written document or law.
  - e. the Preamble to the Constitution.
2. Which of the following statements about the Bill of Rights is FALSE?
  - a. The Bill of Rights was written by the First Congress of the United States.
  - b. The Bill of Rights consists of the first ten amendments to the Constitution.
  - c. Most state constitutions did not have a bill of rights at the time of the Constitutional Convention.
  - d. Many states made adoption of a bill of rights a condition of ratification of the Constitution.
  - e. The Constitution of 1787 contained no bill of rights.
3. In literal terms, the First Amendment pertains to
  - a. the states.
  - b. Congress.
  - c. the courts.
  - d. all units of government.
  - e. All of the above
4. The significance of *Gitlow v. New York* (1925) was that
  - a. a provision of the Bill of Rights was applied to the states for the first time.
  - b. the national government was prevented from violating the Bill of Rights.
  - c. a state constitution had precedence over the United States Constitution within that state.
  - d. the Bill of Rights was interpreted as restraining only the national government and not cities or states.
  - e. the U.S. Constitution has precedence over the state constitution within the state.
5. Federal aid for parochial or private religious school raises questions about
  - a. the government's involvement in promoting, or favoring, particular religions.
  - b. violating the "wall of separation" between church and state.
  - c. the No Child Left Behind Act.
  - d. the conflict between evolution and creationism.
  - e. Both a and b

6. In 2005, the Supreme Court found that two Kentucky counties violated the establishment clause of the First Amendment by
  - a. establishing English as the "official first language of the state of Kentucky."
  - b. posting the Ten Commandments as a way of promoting religion.
  - c. banning "intelligent design" from the curriculum.
  - d. providing an "inefficient" system of public education.
  - e. requiring students to say the Pledge of Allegiance.
7. In regard to the free exercise clause, the Supreme Court has made each of the following rulings EXCEPT
  - a. polygamy may be justified for Mormons on religious grounds.
  - b. the Air Force can enforce its dress code even against religiously based dress choices.
  - c. Amish parents may take their children out of school after the eighth grade.
  - d. people could become conscientious objectors to war on religious grounds.
  - e. public schools cannot require Jehovah's Witnesses to attend flag saluting ceremonies.
8. Freedom of expression
  - a. has sometimes been limited when it conflicts with other rights and values.
  - b. is protected by the Fourth and Fifth Amendments.
  - c. is an absolute right protected by the First Amendment.
  - d. includes freedom of speech and press, but not actions.
  - e. would not protect a political rally to attack an opposition candidate's stand on issues.
9. In *Schenck v. United States* (1919), Justice Holmes said that speech can be restricted when it
  - a. is uttered by government officials in an effort to establish a religion.
  - b. provokes "a clear and present danger" to people.
  - c. advocates the violent overthrow of the United States.
  - d. is spoken rather than nonverbal or symbolic.
  - e. is expressed on private property.
10. The Supreme Court ruled in *Branzburg v. Hayes* (1972) that in the absence of shield laws,
  - a. the right of a free trial preempts the reporter's right to protect sources.
  - b. newspaper files are protected by the First Amendment.
  - c. reporters have more rights than other citizens.
  - d. judges can bar cameras from the courtroom.
  - e. None of the above

11. In *Miller v. California* (1971), the Court ruled that decisions regarding whether or not material was obscene should generally be made by
- a. Congress, through statutory law.
  - b. lower federal judges as they see fit, but in conformance with the First Amendment.
  - c. local communities, with some guidelines provided by the Court itself about how to make such judgments.
  - d. the Supreme Court itself, on a case-by-case basis.
  - e. individual persons in their own private lives.
12. Symbolic speech
- a. consists of speech criticizing the symbols of government.
  - b. cannot be prohibited because it is too vague for government to legislate against.
  - c. has been ruled as disruptive and as a criminal activity.
  - d. consists of action that expresses an opinion.
  - e. is prohibited under the First Amendment.
13. In *District of Columbia v. Heller* (2008) the Supreme Court
- a. held that the Second Amendment protects an individual's right to possess a firearm unconnected with service in a militia.
  - b. held that the Second Amendment protects an individual's right to use a firearm for traditionally lawful purposes.
  - c. held that a District of Columbia law requiring lawful firearms in homes to be disassembled or bound by a trigger lock was unconstitutional because it makes it impossible for citizens to use arms for the core lawful purpose of self-defense.
  - d. All of the above
  - e. None of the above
14. Unreasonable searches and seizures are specifically forbidden in the
- a. Sixteenth Amendment.
  - b. Fifth Amendment.
  - c. Second Amendment.
  - d. Tenth Amendment.
  - e. Fourth Amendment.
15. The exclusionary rule, which was applied to state governments, as well as the federal government in *Mapp v. Ohio* (1961), meant that
- a. federal agents may make arrests for state crimes.
  - b. state governments are excluded from prosecuting federal crimes.
  - c. searches by police could not be made without a legal search warrant.
  - d. probable cause must be established prior to arrest.
  - e. unlawfully obtained evidence could not be used in court.

16. Which of the following is TRUE about the Supreme Court's decision in *Miranda v. Arizona*?
- a. Miranda's innocence or guilt was not at issue; his rights had been violated, so his conviction was overturned.
  - b. The Court's decision greatly relieved members of police departments around the country.
  - c. The Court ruled that Miranda was innocent, and Miranda later became a famous public defender in the local courts.
  - d. The Court ruled that Miranda's constitutional rights had not been violated and that he could be legally executed.
  - e. The Court concluded that Miranda was innocent, overturned his conviction, and ordered him freed from prison.
17. Which of the following is NOT included in protections provided in the Sixth Amendment?
- a. The right to counsel
  - b. The right to confront witnesses
  - c. The right to a speedy trial
  - d. The right to a public trial
  - e. The right to remain silent
18. The vast majority of criminal cases in the United States are settled through/by
- a. the Supreme Court.
  - b. plea bargaining.
  - c. municipal and county courts.
  - d. district court.
  - e. the jury room.
19. In its 2008 ruling in *Boumediene v. Bush*, the Supreme Court
- a. held that foreign terrorism suspects held at Guantanamo Bay have constitutional rights to challenge their detention in U.S. court.
  - b. held that foreign terrorism suspects held at Guantanamo Bay do not have constitutional rights to challenge their detention in U.S. court.
  - c. overturned part of the Military Commissions Act that permitted the government to detain aliens indefinitely without prosecuting them in any manner.
  - d. held that "the laws and Constitution are designed to survive, and remain in force, in extraordinary times."
  - e. A, c, and d
20. The abortion decision in *Roe v. Wade* (1973) was justified by the Supreme Court largely on the grounds of
- a. the freedom of religion clause of the First Amendment.
  - b. the free exercise clause of the First Amendment.
  - c. the right of privacy implied in the Bill of Rights.
  - d. our constitutional right to life.
  - e. new advances in medical technology.

## TRUE/FALSE QUESTIONS

*Circle the correct answer:*

1. The legal constitutional protections against government are collectively referred to as civil rights. T / F
2. In 1833, in *Barron v. Baltimore*, the Supreme Court ruled that the Bill of Rights applied only to the national government. T / F
3. The legal concept under which the Supreme Court has nationalized the Bill of Rights is called the incorporation doctrine. T / F
4. In most cases, courts have ruled that teachers cannot discuss creationism as an alternative to evolution, but they can discuss "intelligent design." T / F
5. Prior restraint refers to unlawful arrest without probable cause. T / F
6. The publication of false or malicious statements that damage someone's reputation is called libel. T / F
7. The Supreme Court has permitted communities to use time, place, and manner restrictions to stifle free expression. T / F
8. *Mapp v. Ohio* (1961) incorporated the Fourth Amendment to the states. T / F  
Bloom's level: Knowledge
9. In the decades since the *Miranda* decision, the Supreme Court has made no exceptions to its requirements. T / F
10. The laws governing abortions for women under the age of 18 vary from state to state. T / F

## SHORT ANSWER/SHORT ESSAY QUESTIONS

1. What are civil liberties? What defines and protects civil liberties?
2. Why is free speech essential to democracy?
3. What is the incorporation doctrine? Which amendments have not been incorporated, or fully incorporated?
4. What is the principle of clear and present danger? How has the Court applied this principle to balance First Amendment rights with public order and national security?

5. What is meant by symbolic speech? Provide some examples and explain how the Supreme Court has balanced competing interests surrounding symbolic speech.

## ESSAY QUESTIONS

1. How would you characterize the first ten amendments to the Constitution? Why, taken together, are these so significant? Do you consider them too narrow, too broad, or about right? Explain.
2. Should public school children be forced to repeat the Pledge of Allegiance? Should public schools permit a recitation of the Pledge of Allegiance, even if it violates some students' religious beliefs?
3. In what ways has the U.S. government's detention of 1,200 persons following 9/11, and its subsequent detention and treatment of prisoners at Guantanamo Bay, Cuba, raised important questions about Bill of Rights protections for the criminally accused? Which amendments and civil liberties are at stake in these cases? What has the Court said, to date, about the government's actions?
4. Most modern, industrialized democracies (including all member nations of the European Union) have abolished the death penalty. Should the U.S. abolish the death penalty?
5. Your text, *Government in America*, notes, "civil liberties are both the foundation for and a reflection of our emphasis on individualism." What is meant by this statement? Do you agree or disagree, and why?