Civil Liberties and Citizenship

Key Terms:

. civil liberties; Bill of Rights; incorporation doctrine; due process; selective incorporation; First Amendment; "establishment" clause; conscientious objectors; "free exercise" clause; *Lemon* test; "clear and present danger" test; "bad tendency" test; "hate crime"; speech codes; prior restraint; *Miller* test; libel; slander; symbolic speech; *Texas v. Johnson*; commercial speech; shield laws; search warrant; probable cause; balancing test; preferred freedoms; indictment; substantive due process; procedural due process; Fourth Amendment; exclusionary rule; *Mapp v. Ohio*; *Terry v. Ohio*; Burger Court; "good faith" exception; Fifth Amendment; Miranda v. Arizona; Rehnquist Court; *Gideon v. Wainwright*; Warren Court; Sixth Amendment; Eighth Amendment; *Roe v. Wade*; *jus sanguinis; jus soli*;

.

Relevant Supreme Court Cases:

. *Baker v. Carr; Barron v. Baltimore; Collin v. Smith; County of Allegheny v. American Civil Liberties Union; Cruzan v. Director, Missouri Department of Health*; *Edwards v. Aguillard; Engel v. Vitale; Escobedo v. Illinois; Everson v. New Jersey; Gideon v. Wainwright; Gitlow v. New York; Griswold v. Connecticut; Hazelwood School District v. Kuhlmeier; Lemon v. Kurtzman; Lynch v. Donelly; Mapp v. Ohio; Miller v. California; Miranda v. Arizona; NAACP v. Alabama; Near v. Minnesota; New York Times v. United States; New York Times v. Sullivan; Osborne v. Ohio; Palko v. Connecticut; Roe v. Wade; Roth v. United States; Schenck v. United States; School District of Abington Township v. Schempp; Santa Fe Independent School District v. Doe; Sherbert v. Verner; Terry v. Ohio; Texas v. Johnson; Tinker v. Des Moines Independent Community School District; United States v. O'Brien; Wallace v. Jaffree; West Virginia Board of Education v. Barnette; Westside Community Schools v. Mergens; Wisconsin v. Yoder*

I. The Bill of Rights

. A. Civil liberties are individual legal and constitutional protections against the government. They are essential for democracy.

.

. 1. Americans' civil liberties are set down in the Bill of Rights, but the courts are the final arbiters of these liberties because they determine what the Constitution means in the cases that they decide.

.

. a. Although the original Constitution had no bill of rights, the states made it clear that adding one was a condition of ratification. In fact, it was the promise to amend the Constitution to include a bill of rights, as well as the publication of the *Federalist Papers*, that significantly aided in the ratification of the Constitution.

.

. b. The first ten amendments (ratified in 1791) comprise the Bill of Rights. They were written to restrict the powers of the federal government (every state constitution had its own bill of rights).

. c. The Bill of Rights was passed at a period of history when British abuses of the colonists' civil liberties were still a recent and bitter memory.

2. Political scientists have found that the American people are supporters of rights, in theory, but their support often falters when it comes time to put those rights into practice.

3. Cases become particularly difficult when liberties are in conflict (such as free press versus a fair trial or free speech versus public order) or where the facts and interpretations are subtle and ambiguous

B. The Bill of Rights was written to restrict the powers of the *federal* government (every state constitution had its own bill of rights). The courts are the final interpreter of the content and scope of our civil liberties, in particular, the United States Supreme Court.

1. In *Barron v. Baltimore* (1833), the Court ruled that the Bill of Rights restrained only the national government, not states and cities.

2. The Incorporation Doctrine provides the rationale for the process by which fundamental freedoms have been applied against state action through interpretation of the Fourteenth Amendment.

a. The Fourteenth Amendment (ratified in 1868) included guarantees of privileges and immunities of citizens, due process of law, equal protection of the law, and explicitly applied these guarantees against the states.

b. It was not until *Gitlow v. New York* (1925) that the Court relied on the Fourteenth Amendment to find that a state government must respect some First Amendment rights.

C. The "Incorporation Doctrine."

1. As noted above, the Bill of Rights was intended to limit the powers of the national government to prevent infringement upon individual civil liberties.

2. *Gitlow v. New York* (1925). The Supreme Court, in upholding the New York convictions of socialist Benjamin Gitlow for advocating the violent overthrow of the government, noted that the states were not completely free to limit political expression. In *Gitlow*, the Court announced that freedoms of speech and press "were fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states."

Due process: The constitutional guarantee that "no person shall be deprived of life, liberty, or property without due process of law." While the specific requirements of due process vary with Supreme Court decisions, the essence of the idea is that people must be given adequate notice and a fair opportunity to present their side in a legal dispute, and that no law or government procedure should be arbitrary or unfair.

a. *Gitlow* was the first step in the judicial development of the incorporation doctrine, the protection of civil liberties from state infringement. The incorporation doctrine is the principle in which the Supreme Court has held that most, but not all, of the specific guarantees in the Bill of Rights limit state and local

governments by making those guarantees applicable to the states through the due process clause of the Fourteenth Amendment.

. b. *Near v. Minnesota* (1931). The first case in which the Supreme Court found that a state law violated freedom of the press as protected by the First Amendment. Struck down case imposing prior restraint of articles dealing with public corruption. Prior restraint refers to a government's censorship of material before it is published.

. 3. Selective Incorporation. A judicial doctrine whereby most, but not all, of the protections found in the Bill of Rights are made applicable to the states via the Fourteenth Amendment.

.

. a. Doctrine of selective incorporation was first set forth in *Palko v. Connecticut* (1937).

.

. b. Although upholding the Connecticut murder conviction of Frank Palko, the Supreme Court established that some protections found in the Bill of Rights are absorbed into the concept of due process as provided for in the Fourteenth Amendment because they are so fundamental to our notions of liberty and justice that they cannot be denied by the states. Examples are:

. (1) Freedom of speech, press, assembly and religion.

.

. (2) Protection against unreasonable searches and seizures. (Fourth Amendment)

. (3) Protection against self-incrimination and the right to counsel and trial by an impartial jury in a public and speedy trial.

. c. Not all of the Bill of Rights guarantees are extended to the states through incorporation, such as the Third Amendment prohibition against the quartering of troops.

.

. d. At the present time, only the Second, Third, and Seventh Amendments and the grand jury requirement of the Fifth Amendment have not been applied specifically to the states.

II. Freedom of Religion

. A. The First Amendment guarantees the great freedoms of religion, speech, press, and assembly.

.

. B. The First Amendment includes two statements about religion and government, commonly referred to as the "establishment clause" and the "free exercise clause."

. C. These freedoms sometimes conflict, but establishment and free exercise cases usually raise different kinds of conflict.

D. The "establishment clause" of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." This clause means that the federal government cannot set up a church; nor can it pass laws that aid one religion, aid all religions, or favor one religion over another.

1. This clause clearly prohibits an establishment of a national church in the United States (a reaction to the religious persecutions that had convinced many colonists to move to America).

2. Debate still continues over what else the First Congress may have intended for the establishment clause.

a. Thomas Jefferson argued that the First Amendment created a "wall of separation" between church and states, which would prohibit not only favoritism but any support for religion at all.

b. Proponents of aid to parochial schools (known as parochiaid) argue that it does not favor any particular religion; opponents claim that the Roman Catholic church gets most of the aid.

c. In *Lemon v. Kurtzman* (1971), the Supreme Court declared that aid to church-related schools must:

(1) have a secular purpose;

(2) cannot be used to advance or inhibit religion; and

(3) should avoid excessive government "entanglement" with religion.

d. In *Westside Community Schools v. Mergens* (1990), the Supreme Court upheld the 1984 Equal Access Act, which made it unlawful for any public high school receiving federal funds to keep student groups from using school facilities for religious worship if the school opens its facilities for other student meetings.

e. School prayer is possibly the most controversial religious issue.

(1) In 1962 and 1963, the Supreme Court ruled that voluntary recitations of prayers or school-organized Bible reading, when done as part of classroom exercises in public schools, violated the establishment clause (*Engel v. Vitale* and *School District of Abington Township, Pennsylvania v. Schempp*).

(2) In *Engel* and *Abington*, the Court observed that "the place of religion in our society is an exalted one, but in the relationship between man and religion, the State is firmly committed to a position of neutrality." The Supreme Court in Engel held that prayers done as classroom exercises in public schools was unconstitutional.

(3) In *Santa Fe Independent School District v. Doe* (2000) the Supreme

Court (in a 6-3 opinion), held that a District's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause.

(4) A majority of the public has never favored the Court's decisions on school prayer. Nonetheless, the Supreme Court has ruled that government aid to church-related schools is permitted when the aid is for a non-religious purpose.

(5) During the 1980s, the Supreme Court upheld the constitutionality of the displaying of Christmas nativity scenes and Hanukkah menorahs on public property.

3. In a number of cases, the Supreme Court tried to define the grounds for conscientious objectors. Conscientious objectors are individuals whose religious beliefs would not permit them to serve in the armed forces.

a. Since the Civil War, draft laws have provided for conscientious objector status.

b. In 1965 the Supreme Court ruled that "sincere and meaningful" objection to a war on religious grounds did not require belief in a supreme being.

c. Later the court would send the following messages:

(1) Conscientious objector status can be applied to those who are opposed to war for reasons of conscience. Religious belief is not required

(2) The Constitution does not permit conscientious objection to particular wars.

4. The "free exercise" clause of the First Amendment provides that Congress shall make no law "prohibiting the free exercise" of religion. It protects the right of individuals to worship or believe as they wish, or to hold no religious beliefs. Additional "free exercise" cases involved the Jehovah's Witnesses, Amish, and Seventh Day Adventists.

a. In the famous *Gobitis* case in 1940, the Court ruled that Jehovah's Witness children could not be excused from saluting the flag.

b. Three years later in *West Virginia Board of Education v. Barnette*, a similar case involving children of Witnesses, the Court held for their refusal since the salute was a "form of utterance," and no official could prescribe what is orthodox in "politics, nationalism, religion, or other matters of opinion."

c. In 1972, the Court held that Amish parents could not be forced to violate their faith by sending their children to public school after eighth grade.

d. In *Sherbert v. Verner*, the Court held that a state could not deny unemployment compensation to a woman who refused to take a job requiring that she work,

against her beliefs, on the Sabbath.

e. The "free exercise clause" include religions which practice animal sacrifices, the religious use of peyote and other drugs, refusal to salute the American flag, and whether Amish children must attend school.

E. Government aid to church-related schools has become one of the most contentious issues in this area of church-state relations.

1. In *Everson v. New Jersey* (1947) the court held that bus fare reimbursements to parents of both private and public school students was a matter not of religion, but of safety.

2. Since *Everson*, more than two-thirds of the states have enacted various kinds of aid to parochial schools, from school lunches to driver education.

3. In *Lemon v. Kurtzman* (1971), the Supreme Court declared certain types of state aid to parochial schools, saying the statute must meet three tests to pass constitutional muster. The "Lemon Test" must meet the following criteria:

a. It must have a secular purpose.

b. Its primary effect cannot be either to advance or inhibit religion.

c. It cannot foster "excessive governmental entanglement with religion."

4. In 1983 the Court appeared to reverse itself, upholding a Minnesota law giving all taxpayers a deduction for tuition, transportation, texts, and other instructional material, even though the law mainly benefited parents with children in religious schools.

5. In 1985, though, the court said that public funds could not be used to pay special education teachers for children in religious schools.

6. In 1990 in the *Mergens* case, the Court held that the school could not use the Constitution to deny a student Bible study group an opportunity to use facilities after school.

a. The case became one of freedom of association.

b. Justice Sandra Day O'Connor noted a distinction between government speech endorsing religion (which the establishment clause forbids), and private speech endorsing religion (which free speech and free exercise clauses protect).

7. The Court decided in 1993 that government funds could pay for an interpreter for a deaf student at a parochial school.

8. In 1994 the Court determined that the creation of a special school district in New York for an orthodox Hasidic Jewish community was a violation of the constitutional separation of church and state.

9. Later the court concluded that the First Amendment did not permit prayers at graduation ceremonies because they might persuade or compel a student to participate in a religious exercise.

F. Fundamentalist Christians

1. Conservative religious groups devote much of their time and energies to the issues of school prayer and creation science.

2. They lost some court battles to create a more conservative agenda, but won others.

a. The Supreme Court rejected attempts to legalize school prayer by making it voluntary (*Wallace v. Jaffree*, 1985) and to mandate the teaching of creation science as an alternative to Darwinian theories of evolution (*Edwards v. Aguillard*, 1987).

b. Recent Supreme Court rulings brought some lowering of the "wall of separation," as when the Court held that religious scenes could be set up on public property (*Lynch v. Donelly*, 1984 and *County of Allegheny v. American Civil Liberties Union*, 1992).

G. The First Amendment also guarantees the free exercise of religion.

1. The free exercise of religious beliefs sometimes clashes with society's other values or laws, as occurred when the Amish refused to send their children to public schools.

2. The Supreme Court has consistently maintained that people have an absolute right to believe what they want, but the courts have been more cautious about the right to practice a belief, (but in *Wisconsin v. Yoder*, 1972, the Court did allow Amish parents to take their children out of school after the eighth grade).

III. Freedom of Expression

A. Does "no law" in the First Amendment really mean "no law"? The courts have frequently wrestled with the question of whether freedom of expression (like freedom of conscience) is an absolute.

1. Supreme Court Justice Hugo Black believed that the words "no law" literally meant that Congress shall make no laws abridging the fundamental rights of the First Amendment.

a. The courts have often ruled that there are instances when speech needs to be controlled, especially when the First Amendment conflicts with other rights (as when Justice Oliver Wendell Holmes wrote in 1919 that "the most stringent protection of free speech would not protect a man in falsely shouting ‘fire' in a theater and causing a panic.")

b. In their attempts to draw the line separating permissible from impermissible speech, judges have had to balance freedom of expression against competing

values like public order, national security, and the right to a fair trial.

2. The courts have also had to decide what kinds of activities constitute speech (or press) within the meaning of the First Amendment.

a. Certain forms of nonverbal communication (like picketing, wearing an arm band, and burning the U.S. flag) are considered symbolic speech, and are protected under the First Amendment.

b. Other forms of expression are considered to be action, and are not protected.

c. As a general rule, it is easier for the government to control or limit action, rather than to attempt to limit or control freedom of expression.

3. When does speech lose its protections?

a. The clear and present danger test, devised by Justice Oliver Wendell Holmes, says that "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils that Congress has a right to prevent." "Clear and present danger" test: A test established by the Supreme Court (*Schenck v. United States*, 1919) to define the point at which speech loses First Amendment protection. The question is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

b. Later, in *Gitlow v. New York* (1925), the Court applied a "bad tendency" test. "Bad tendency" test: A test established by the Supreme Court in which it ruled that some speech could be prohibited if it threatened the overthrow of the government or in other ways injured the public welfare.

c. During the New Deal and World War II, the courts shifted back to clear and present danger.

d. In a major draft card burning case over the Vietnam War, (*United States v. O'Brien*, 1968), the Supreme Court did not recognize the practice as a form of symbolic speech as the defendant hoped, saying that a limitless variety of conduct can not be labeled as speech. But see *Texas v. Johnson* (1989).

e. "Politically Correct" Speech. In *R.A.V. v. St. Paul* (1992), the Supreme Court ruled unconstitutional a Minnesota law seeking to prohibit "hate crimes.""Hate crime" law: A law that seeks to prohibit speech or action aimed at persons because of their race, religion, or gender.

(1) The Court decision had an impact on college campuses.

(A) Students began to complain that virulent racist and anti-gay taunting began to reappear.

(B) Colleges began to abandon their speech codes. "Speech codes" are codes established on some college campuses prohibiting students from making racist or sexist remarks.

(2) In *Wisconsin v. Mitchell* (1993), the Supreme Court ruled unanimously that states could not impose stiffer sentences on "hate crimes" without violating the First Amendment. The court also ruled that a judge could consider whether a defendant was motivated by racial or religious prejudice.

B. Prior restraint — refers to a government's censorship of material before it is published.

1. The Supreme Court has generally struck down prior restraint of speech and press (*Near v. Minnesota*, 1931), although the writer or speaker could be punished for violating a law or someone's rights after publication.

Prior restraint refers to a government's censorship of material before it is published. Prior to the restraint being exercised, the government must demonstrate a compelling reason for the censorship BEFORE any restraint may be imposed.

2. There are exceptions to the general doctrine that prohibits prior restraint:

a. In *Hazelwood School District v. Kuhlmeier* (1988), the Supreme Court permitted prior restraint of a high school newspaper, finding that it was not a public forum and could be regulated in "any reasonable manner" by school officials.

b. Many argue that government should sometimes limit individual behavior on the grounds of national security.

(1) The courts have been reluctant to issue injunctions prohibiting the publication of material even in the area of national security.

(2) In the famous *"Pentagon Papers"* case (*New York Times v. United States*, 1971) the Supreme Court ruled against prior restraint, which allowed publication of the papers. The Nixon administration was unable to obtain an injunction against the *Times* that would have prohibited publication of secret documents pertaining to American involvement in the Vietnam War.

C. Obscenity

1. Court rulings on obscenity have been numerous and somewhat inconsistent.

a. A 1957 case, *Roth v. United States*, is the first time that the Supreme Court held that obscenity is not within the area of constitutionally protected speech.

(1) Material that is "utterly without redeeming social importance" is not protected.

(2) Brennan further said that obscenity could be judged based on "whether to

the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

b. Justice Potter Stewart pointed up the problem of defining pornography in a case involving "hard-core" pornography. He added: "but I know it when I see it."

c. The practical effect of all of these cases was to remove almost all restrictions on content as long as the slightest "social value" could be demonstrated.

2. In *Miller v. California*, (1973) the Supreme Court ruled that decisions regarding whether or not material was obscene should generally be made by local communities, with some guidelines provided by the Court itself about how to make such judgments.

a. Court, drawing on precedent cases, says that local communities could set their own standards. No national standards. *"Miller Test"* is as follows:

(1) Whether the average person, "applying contemporary community standards," would find that the work, taken as a whole," appeals to prurient interest." Prurient: tending to excite lust or lewdness.

(2) Whether the work depicts "in a patently offensive way" sexual conduct prohibited by state law.

(3) Whether the work as a whole "lacks serious literary, artistic, political, or scientific value."

b. Burger says that it is not realistic or constitutionally sound to read the First Amendment as requiring people in Maine or Mississippi to accept the public depiction of conduct found tolerable in Las Vegas or New York.

3. A series of cases beginning in 1987 rules that limits can be placed on communities.

a. "Reasonable person" rules replace "community standards." No nationwide consensus exists that offensive material should be banned.

b. The proper inquiry, White wrote for the majority, is not whether an ordinary member of the community would find value in the material, but whether a "reasonable person" would find such value.

4. The Court clarified things further in other laws.

a. Drive-in theaters could not be prevented from showing nude films.

b. Pornography could not be banned as discrimination against women as sex objects, but nude dancing does not have First Amendment protection.

c. The Court struck down congressional efforts to bar "indecent speech" on dial-a-porn numbers, but upheld the publication of an illustrated version of the

President's Commission on Obscenity and Pornography report.

d. The courts have consistently ruled that states may protect children from obscenity *(Osborne v. Ohio*, 1991); adults often have legal access to the same material.

e. The Supreme Court, in *Reno v. American Civil Liberties Union* (1997), rules that the Communications Decency Act (Internet) was unconstitutionally vague.

D. Libel (the written publication of statements known to be false that are malicious and tend to damage person's reputation) and slander (spoken defamation, i.e., oral publication) are not protected by the First Amendment.

1. Libel and slander involve freedom of expression issues that involve competing values:

a. If public debate is not free, there can be no democracy.

b. Conversely, some reputations will be unfairly damaged in the process.

2. The 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*, 1964)

a. The right to criticize the government (which the Supreme court termed "the central meaning of the First Amendment") is not libel or slander.

b. In 1984, General William Westmoreland (former Commander of U.S. troops is Vietnam) dropped his suit against CBS in return for a mild apology; he realized that it would be impossible to prove that the network had been intentionally malicious, even though he was able to show that CBS had knowingly made factual errors.

3. Private persons only need to show that statements about them were defamatory falsehoods and that the author was negligent.

E. Symbolic Speech. Symbols, signs, and other methods of expressions by conduct protected by the First Amendment are called symbolic speech.

1. The Court set aside a Massachusetts judge's sentence of six months in jail given to a man for wearing an American flag patch on his jeans. The Court held the law vague.

2. Right of high school students to wear black armbands to protest the Vietnam War was upheld in *Tinker v. Des Moines Independent Community School District* (1969).

a. The court found that schools were not totalitarian enclaves, and school officials do not possess absolute authority over students.

b. Students don't leave their constitutional rights outside the door when they enter school.

c. The doctrine of symbolic speech is not precise: burning a flag is protected

speech, but burning a draft card is not (*Texas v. Johnson*, 1989, and *United States v. O'Brien*, 1968).

. F. Commercial speech (such as advertising) is more restricted than are expressions of opinion on religious, political, or other matters.

. 1. The content and nature of radio and television broadcasting are regulated by the Federal Trade Commission (FTC) which decides what kinds of materials may be advertised. "Joe Camel" example.

. 2. Although commercial speech is regulated more rigidly than the other types of speech, the courts have been broadening its protection under the Constitution; in recent years, the courts have struck down many restrictions (including restraints against advertising for professional services and for certain products such as condoms) as violations of freedom of speech.

. G. Radio and television stations are subject to more restrictions than the print media justified by the fact that only a limited number of broadcast frequencies are available).

. 1. The Federal Communications Commission (FCC) regulates the broadcast frequencies of both radio and television.

. 2. A licensed station must comply with regulations that include provisions for a certain percentage of broadcast time for public service, news, children's programming, political candidates, or views other than those its owners support.

. H. Free speech and public order

. 1. War often brings government efforts to enforce censorship.

. a. In *Schenck v. United States* (1919), Justice Oliver Wendell Holmes declared that government can limit speech if it provokes a clear and present danger of "substantive evils that Congress has a right to prevent."

. b. Free speech advocates did little to stem the relentless persecution known as McCarthyism during the "cold war" of the 1950s, when Senator Joseph McCarthy's unproven accusations that many public officials were Communists created an atmosphere in which broad restrictions were placed on freedom of expression.

. c. By the 1960s, the political climate had changed:

. (1) The Court narrowed the interpretation of the Smith Act so that the government could no longer use it to prosecute dissenters.

. (2) Waves of protest over the Vietnam War and unrest over political, economic, racial, and social issues expanded the constitutional meaning of free speech.

. 2. Today, courts are very supportive of the right to protest, pass out leaflets, or gather

signatures on petitions (as long as it is done in public places).

I. Free press versus free trial

1. The Bill of Rights is a source of potential conflicts between different types of freedoms: the Constitution clearly meant to guarantee the right to a fair trial as well as the right to a free press, but a trial may not be fair if pretrial press coverage makes it impossible to select an impartial jury.
2. Journalists seek full freedom to cover all trials: they argue that the public has a right to know.

a. Although reporters want trials to be open to them, they sometimes defend their right to keep some of their own files secret in order to protect a confidential source.

b. A few states have passed shield laws which gives reporters the right to withhold information from the courts. Shield laws are designed to protect reporters in situations where they need to protect a confidential source; but in most states, reporters have no more rights than other citizens once a case has come to trial.

c. The Supreme Court has ruled that (in the absence of shield laws) the right to a fair trial preempts the reporter's right to protect sources and has sustained the right of police to obtain a search warrant to search the files of a student newspaper. A "search warrant" is a document signed by a judicial officer authorizing law enforcement officers to search a specific location. The warrant can be issued only on "probable cause" that the materials to be seized are in the specific location to be searched. Most searches in the United States take place *without* a search warrant and are within common law exceptions to the warrant requirement. Probable cause is said to exist where there are reasonable grounds to make or believe that a crime has occurred or is about to occur and that a particular individual is responsible.

d. The Court has revoked gag orders imposed by lower courts (forbidding the press to report details of a case), but a 1979 case also permitted a closed hearing on the grounds that pretrial publicity might compromise the defendant's right to a fair trial.

J. Freedom of assembly — the basis for forming interest groups and political parties, for picketing and protesting in groups

1. Two facets of the freedom of assembly:

a. Right to assemble — the right to gather together in order to make a statement

(1) Within reasonable limits (called time, place, and manner restrictions), freedom of assembly includes the rights to parade, picket, and protest. While cities may require permits to use public grounds, they may not use their licensing power to suppress free speech. Freedom of assembly DOES NOT permit groups to demonstrate at any time, at any place, or in any manner that they wish.

(2) The Supreme Court has generally upheld the right of any group — no matter how controversial or offensive — to peaceably assemble on public property.

(3) A case in point would be a Nazi group's attempt to march through a largely Jewish community, Skokie, Illinois, in 1977. (*Collin v. Smith*)

(A) The ACLU went to court to defend the Nazi group's First Amendment rights.

(B) The Court eventually let stand a lower court ruling that held that Skokie's ordinance violated the First Amendment. The Supreme Court let stand a lower court ruling that no community could use its power to grant parade permits to stifle free expression or freedom of assembly.

(4) In 1995, in *Hurley v. Irish American GLIB Association*, the Supreme Court ruled (9-0) that private sponsors of a St. Patrick's Day parade in Boston had a right to exclude gay marchers since the parade was private expression.

b. Right to associate — freedom to associate with people who share common interest

(1) The right to associate includes the right to meet with people who want to create political change.

(2) In 1958, the Court ruled that requiring an organization to turn over its membership lists was an unconstitutional restriction on freedom of association. (*NAACP v. Alabama*).

K. Preferred Freedoms and the Balancing Test

1. Justice Black took the view that there are "absolutes" in the Constitution that cannot be diluted by judicial decision. (Douglas was also in this camp.) Black also held that obscenity and libel fit this "absolutes" category.

2. In contrast, the majority of the Court held that the First Amendment needs to be balanced. The "balancing test" is a view that First Amendment rights must be balanced against the competing needs of the community to preserve order and to preserve the state.

3. Justice Harlan Fiske Stone placed speech and religion in a "preferred position" to order."Preferred freedoms" are those basic freedoms, such as freedom of speech and religion, which, in the view of some members of the Supreme Court, should take precedence over other needs.

IV. Defendant's Rights

A. Interpreting defendants' rights

1. Most of the remaining rights in the Bill of Rights concern the rights of people accused of crimes.

a. These rights were originally intended to protect the accused in political arrests and trials.

b. Today, the protections in the Fourth, Fifth, Sixth, and Eighth Amendments are primarily applied in criminal justice cases.

2. The language of the Bill of Rights is vague, and defendants' rights are not well defined.

3. The Supreme Court's decisions have extended most provisions of the Bill of Rights to the states as part of the general process of "selective incorporation."

B. Due process of law (rights of the criminal defendant) were greatly expanded by the Warren Court. The "Warren Court" is the description of the United States Supreme Court, led by Chief Justice Earl Warren) from 1953 to 1969 which became the symbol of judicial activitism and which handed down many landmark decisions on desegregation, civil rights, First Amendment freedoms, and the rights of criminal defendants

1. Before anyone can be brought to trial for a serious federal crime, there must be a grand jury indictment. An "indictment" is an accusation by a grand jury; i.e., a formal finding by that body, that there is probable cause (reasonable grounds to make or believe an accusation against a named person to warrant his/her criminal trial.

2. The history of liberty, according to Justice Felix Frankfurter, "is largely the history of observance of procedural safeguards."

a. The Fifth and Fourteenth amendments provide for due process to help protect individuals from the arbitrary power of the state. Due process is often divided into two categories:

(1) Substantive due process is the principle that laws must be reasonable.

(2) Procedural due process is the principle that laws must be administered in a fair manner.

b. Until 1937, the Supreme Court used the substantive due process concept and the Fifth and Fourteenth Amendments to protect business from regulation by Congress and the states. Since then, the Court has taken the view that Congress has the duty to regulate business in the public's interest.

3. In the area of civil rights and liberties, the Court has continued to apply substantive due process.

C. The Fourth Amendment is quite specific in forbidding unreasonable searches and seizures.

1. No court may issue a search warrant unless probable cause exists to believe that a

crime has occurred or is about to occur.

2. Warrants must specify the area to be searched and the material sought in the search.

3. Since 1914, the courts have used the "exclusionary rule" to prevent illegally seized evidence from being introduced in the courtroom. **Exclusionary rule**: A principle established by the Supreme Court that bars the government, both federal and state, from using illegally seized evidence in court.

a. In *Mapp v. Ohio* (1961), the Supreme Court ruled that the protection against unreasonable search and seizure applied to the state and local governments as well as the national government, thus nationalizing the exclusionary rule.

b. Critics of the exclusionary rule argue that its strict application may permit guilty persons to go free because of police carelessness or innocent errors (or "technicalities").

c. In 1969 the Court ruled that police lacking a search warrant must confine their search to the suspect and the immediate surroundings.

d. Automobiles have less protection. Police may search a car without a warrant if they have "probable cause" to believe it contains illegal articles. Their search may include the locked trunk.

(1) Police who stop a car for a traffic violation may order the occupants to get out.

(2) They may search a car and its contents if they lawfully arrest its occupants. However, unless they witness a crime, police officers cannot arrest a suspect without probable cause.

e. Prior to arrest, they may search, but are limited to an area where a suspect might reach for a weapon or evidence. In the landmark *Terry v. Ohio* case (1968) the court held that police could "stop and frisk" a suspect on the street without a warrant:

(1) If they are reasonably suspicious that the person is armed or dangerous.

(2) If they are acting on the tip of an informant the officer thinks is reliable.

f. Supporters of the exclusionary rule respond that the Constitution is not a technicality; defendants' rights protect the accused in a system whereby everyone is presumed to be innocent until proven guilty.

g. The Burger Court made some exceptions to the exclusionary rule. The "Burger Court" is the description given the United States Supreme Court from 1969 to 1986 (led by Chief Justice Warren Burger). It was expected that the "Burger Court" would become a conservative court under Warren Burger and reverse many of the liberal rulings of the earlier Warren Court. The assessment was

incorrect. Some exceptions to the exclusionary rule:

(1) Allowed the use of illegally obtained evidence when the evidence led police to a discovery that they would eventually have made without it.

(2) In *United States v. Leon* (1984) established a "good faith" exception which permitted evidence to be used if the police who seized it mistakenly thought they were operating under a constitutionally valid warrant.

(3) Allowed evidence illegally obtained from a banker to be used to convict one of his customers.

h. Warrantless searches are valid if probable cause exists, if the search is necessary to protect an officer's safety, or if the search is limited to material relevant to the suspected crime or within the suspect's immediate control.

D. The Fifth Amendment prohibits forced self-incrimination.

1. Suspects cannot be forced (compelled) to be a witness against themselves.

a. The burden of proof rests on the police and the prosecutors (the "government" or state), not the defendant.

b. This right applies to congressional hearings and police stations, as well as to courtrooms.

c. Suspects must testify if the government guarantees then immunity from prosecution.

2.*Miranda v. Arizona* (1966) set guidelines for police questioning of suspects. Before suspects are questioned, they must be given the following *Miranda warnings*:

a. their right to remain silent;

b. that what they say can be used against them in a court of law; and,

c. that they have a right to have a lawyer present during an interrogation, and that a lawyer will be provided if the accused cannot afford one.

3. The more conservative Supreme Court under Chief Justice Burger did not weaken the *Miranda* rulings, but the Rehnquist Court did begin to make exceptions: in 1991, the Court held that a coerced confession is "harmless error" if other evidence is sufficient for conviction. The "Rehnquist Court" is the description given the United States Supreme Court from 1986 to the present (led by Chief William H. Rehnquist). It is marked by its conservative rulings, cutting back on the rights of the accused and expanding the concept of federalism.

4. If law enforcement officials encourage persons to commit crimes (such as accepting bribes or purchasing illicit drugs) that they otherwise would not commit (entrapment),

convictions for these crimes will be overturned by the courts.

E. Although the Sixth Amendment has always ensured the right to counsel in federal courts, this right was not extended (incorporated) to state courts until recently.

1. In 1932, the Supreme Court ordered states to provide an attorney for indigent defendants accused of a capital crime.

2. In *Gideon v. Wainwright* (1963), the Court extended the same right to everyone accused of a felony, ruling that defendants in all felony cases had a right to counsel, and if they could not afford to hire an attorney, one must be provided free of charge.

3. The Warren Court heard a number of landmark cases on the rights to trial:

a. In *Escobedo v. Illinois* (1966) a man was interrogated two different times in a killing.

b. He was refused a request to see his lawyer the second time and then confessed to the crime.

c. The Court reversed the *Escobedo* conviction on the grounds that the Sixth Amendment entitles a suspect counsel even during police interrogation once the "process shifts from investigatory to accusatory."

4. The Court in, *Argersinger v. Hamlin* (1972), later ruled that a lawyer must be provided for the accused whenever imprisonment could be imposed.

F. The Sixth Amendment ensures the right to a speedy trial and an impartial jury.

1. Most criminal cases (over 90 percent) are settled through plea bargaining rather than through trial by jury.

a. In plea bargaining, an agreement is made between a defendant's lawyer and a prosecutor to the effect that a defendant will plead guilty to a lesser crime or to fewer crimes and often results in greatly reduced punishment.

b. Critics believe that plea bargaining permits many criminals to avoid deserved punishment; however, it also saves the state time and money.

2. Neither the Constitution nor the Bill of Rights specifies the size of a jury; tradition has set jury size at twelve, but six jurors are sometimes used in petty cases.

3. Juries traditionally had to be unanimous in order to convict, but the Burger Court permitted states to use fewer than twelve jurors and to convict with less than a unanimous vote.

G. The Eighth Amendment forbids cruel and unusual punishment, but it does not define the phrase.

1. Most of the constitutional debate over cruel and unusual punishment has centered on the death penalty.

a. In 1968, the Court overturned a death sentence because opponents of the death penalty had been excluded from the jury at sentencing.

b. In *Furman v. Georgia* (1972), the Court overturned Georgia's death penalty law because its imposition was "freakish" and "random" in the way it was arbitrarily applied (particularly with regard to factors such as race and income).

c. In *Woodson v. North Carolina* (1976), the Court ruled against mandatory death penalties.

d. Finally, in *Gregg v. Georgia* (1976), the Court found that the death penalty is "an extreme sanction, suitable to the most extreme of crimes."

2. The Supreme Court has recently held that it was constitutionally acceptable to execute 16- or 17-years-olds or mentally retarded persons; has made it more difficult for death row inmates to force legal delays through writs of habeas corpus; and has allowed "victim impact" statements detailing the character of murder victims and their families' suffering to be used against a defendant.

V. The Right to Privacy

A. Privacy right first stated in *Griswold v. Connecticut* (1965) case about married couples being prescribed contraceptives through a Yale University professor and Planned Parenthood. (Connecticut law was against such practices.)

1. The court found no stated right to privacy, but said there were "various guarantees" in the Bill of Rights to "create zones of privacy." The right to privacy is generally attributed to the interpretation of the Ninth Amendment.

2. In *Griswold*, the Connecticut statute was ruled unconstitutional as a violation of marital privacy, a right that could be read into the "intent" of the Constitution. The right to privacy is NOT specifically stated in either the Constitution or the Bill of Rights.

3. Court also says that keeping the police out of the bedroom is "a right of privacy older than the Bill of Rights."

4. The Supreme Court later expanded the right of privacy to include the right of unmarried individuals to obtain contraceptives.

B. The most important application of privacy rights came in the area of abortion.

1. Americans are deeply divided on abortion: the positions of "pro-choice" and "pro-life" are irreconcilable (making abortion a politician's nightmare).

2. Supreme Court Justice Harry Blackmun's opinion in *Roe v. Wade* (1973) followed that of medical authorities in dividing pregnancy into three equal trimesters.

3. In *Roe v. Wade (1973*), the Court divided pregnancy into three stages. In the first trimester, a woman's right to privacy included an absolute right to an abortion free from state interference. (A state cannot forbid abortions during the first trimester of pregnancy). In the second and third trimesters, the state's interest in the health of the mother gave it the right to regulate abortions in certain cases.

4. *Roe* caused a furor that has never subsided, and numerous state and federal regulations were passed which prohibited the use of funds for abortions.

a. The Supreme Court has upheld a state law that prohibited the use of state funds or state employees to perform abortions.

b. The Court has also upheld laws requiring minors to obtain the permission of one or both parents or a judge before obtaining an abortion; and upheld a Department of Health and Human Services ruling that provided that family planning services that received federal funds could not provide women with any counseling regarding abortions. (former President Clinton lifted the ban on abortion counseling on his third day in office.)

5. In 1992, the Court changed its standard for evaluating restrictions on abortion from one of "strict scrutiny" of any restraints on a "fundamental right" to one of "undue burden" that permits considerably more regulation. In *Planned Parenthood v. Casey* (1992) the Supreme Court ruled that abortion restrictions could be imposed by states if they did not involve "undue burdens" on the women seeking abortions.

6. In 1994, the Supreme Court upheld a Florida state court's order of a 36-foot buffer zone around an abortion clinic to allow people to enter abortion clinics. In another 1994 case, the Court decided that abortion clinics can invoke the federal racketeering law to sue violent anti-abortion protest groups for damages. In 1994, Congress passed a law making it a federal crime to intimidate abortion providers or women seeking abortions. In 1997, the Court also upheld a 15-foot buffer zone. In another case, the Court decided that abortion clinics can invoke the federal racketeering law to sue violent anti-abortion protest groups for damages.

C. One of the most difficult issues facing our high-tech society is whether there is a right to choose to die or a right for parents to choose to allow their children to die.

1. Many of the issues surrounding birth and death were crystallized in two "Baby Doe" cases in the early 1980's; both involved seriously ill babies that needed surgery to survive.

2. Eventually, the Supreme Court affirmed parents' rights to make medical decisions for their children.

D. In cases involving modern medical science and civil rights, the courts have rendered confusing and conflicting rulings, such as who has custody of children produced by *in vitro* fertilization and artificial insemination, and who has custody of frozen embryos. Courts have awarded a woman some frozen embryos, but prohibiting her from implanting them.

E. In 1997, the Supreme Court ruled in that there is no constitutional right to physician-assisted

suicide and that states may prohibit it if they wish.

. F. Other right to privacy cases have been decided by the Supreme Court.

. 1. A bookie whose home was searched under a warrant was considered to have the privacy right to view pornographic films found in his home.

. 2. Press reporting under the First Amendment often conflicts with a person's right to be left alone.

. a. A landmark Supreme Court case involved the story of a family held hostage for nineteen hours by three escaped convicts, which was made into a book and a play. In the play, the family was portrayed as having been molested.

. b. Since the molestation did not occur, the family sued *Life* magazine, which published the work.

. c. The court said the magazine could not be held liable for an inadvertent error, only for a "calculated falsehood."

. 3. The court also upheld a judgment against a paper for invasion of privacy relating to the death of a West Virginia construction worker.

. 4. In another case, the court held that a man's privacy was not invaded when a television station reported the name of his raped and murdered daughter over the air because the name had been gleaned from public records.

. 5. In the early 1970s, Congress passed legislation protecting family credit reports, school records, and individual's government files.

. 6. The Supreme Court has declined to interpret the right to privacy to include the right to engage in homosexual conduct.

. 7. In *Cruzan v. Director, Missouri Department of Health* the Supreme Court rules that states can intervene to prevent a comatose person from being removed from life support.

VI. Understanding Civil Liberties

. A. American government is both democratic (because it is governed by officials elected by the people and answerable to them) and constitutional (because it has a fundamental organic law, the Constitution, that limits the things government can do).

. B. The democratic and constitutional components of government can produce conflicts, but they also reinforce one another.

. C. Civil liberties and democracy

. 1. Individual rights may conflict with other values:

. a. The rights guaranteed by the First Amendment are essential to a democracy.

b. Individual participation and the expression of ideas are crucial components of democracy, but so is majority rule, which can conflict with individual rights.

c. The rights guaranteed by the Fourth, Fifth, Sixth, and Eighth Amendments protect all Americans; but they also make it harder to punish criminals.

2. Ultimately, the courts decide what constitutional guarantees mean in practice: although the federal courts are the branch of government least subject to majority rule, the courts enhance democracy by protecting liberty and equality from the excesses of majority rule.

VII. Citizenship

A. The term "citizen" was not defined until the ratification of the Fourteenth Amendment, which says that "All persons born or naturalized in the United States... are citizens of the United States and of the State wherein they reside." The amendment rests on two legal rules:

1. *Jus soli* (right of soil), which confers citizenship by place of birth.

2. *Jus sanguinis* (right of blood), which recognizes citizenship based on that of the parents of the child. (Exception: children of high-ranking diplomats from other nations.)

3. Children of American parents who are born overseas also qualify if they meet the legal requirements.

4. Immigrants may be naturalized after living continuously in the United States for five years (or three years, if they are the spouse of a citizen). Children under age eighteen are naturalized when their parents qualify.

5. No state may deprive a person of citizenship. (This includes those who left the country to avoid being drafted to serve in Vietnam.) And, according to various Supreme Court decisions, the Congress may not do so by law. 6. In 1964 the Supreme Court held that naturalized citizens had the same rights as native-born Americans. In 1967 the Court said that Congress could not take away a person's citizenship unless he or she relinquished it.

B. A Nation of Immigrants

1. McCarran-Walter Act (1952) preserved 1920s quotas to curb the wave of immigration that followed World War I. (Opponents said the national origins quota system was designed to give preference to white, northern Europeans.)

2. In 1986, to stem the flow of illegals into the United States:

a. Congress legislated to punish employers who knowingly hired them.

b. The same law granted legal status to those arriving before January 1, 1982.

3. In 1990, Congress set a new annual ceiling of 675,000 immigrants beginning in 1994.

4. Political asylum was still possible if persons were judged to have a "well-founded fear of persecution" based on race, religion, nationality, or their political views.

C. Change, Citizen Action, and Dissent

1. In 1971 John Serrano, with parents of other Los Angeles school children, opposed the inequalities of public school funding in rich versus poor school districts. The California State Supreme Court in *Serrano v. Priest* agreed that financing schools via local property taxes "invidiously discriminates" against poor children.

2. In a 1973 case involving the San Antonio Independent School District, the U.S. Supreme Court ruled (5-4) that the Texas system did not violate the Fourteenth Amendment "merely because the burdens or benefits... fall unevenly depending on the relative wealth of the political subdivisions in which citizens live." In 1989, the Texas Supreme Court, in revisiting the issue, ruled unanimously that the system must be changed to handle the "glaring disparities" between rich and poor school districts.