

VOLUME II: CIVIL RIGHTS AND LIBERTIES

CHAPTER 1:

CONSTITUTIONAL SOURCES OF CIVIL RIGHTS AND LIBERTIES

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NOTES ON EXCERPTED CASES:

Ex Parte Milligan (1866). Lambdin P. Milligan, a civilian residing in Indiana, was an active collaborator with the Confederacy. In 1864, he was arrested and tried for treason by a military commission established by order of President Lincoln. Milligan was convicted and sentenced to death, but the sentence was not carried out. In 1866, some time after hostilities had ceased, the Supreme Court reviewed the conviction. Its

landmark decision in *Ex parte Milligan* was a ringing endorsement of civil liberties. The Supreme Court took note of the fact that the civilian courts were open and operating in Indiana when Milligan was arrested and tried by the military. In ordering Milligan's release, the Court condemned Lincoln's directive establishing military jurisdiction over civilians outside of the immediate war area. It strongly affirmed the fundamental right of a civilian to be tried in a regular court of law, with all the procedural safeguards that characterize the criminal process. It must be remembered that this strong assertion of constitutional principles occurred a year after the close of the Civil War and the assassination of Abraham Lincoln. Viewed in this light, *Ex parte Milligan* may be more aptly described as an admission of judicial weakness during time of war than as a bold pronouncement of constitutional limits on presidential power.

Boumediene v. Bush (2006). The Supreme Court reviewed the Military Commissions Act (MCA), passed in response to the *Hamdan* decision in an effort to prevent enemy combatants held outside of the United States from obtaining writs of habeas corpus to challenge their detention. Here the Court held that because procedures specified in the Detainee Treatment Act of 2005 were not adequate substitutes for the writ of habeas corpus, the MCA, in stripping the courts of jurisdiction to hear habeas petitions operated as an unconstitutional suspension of the writ.

District of Columbia v. Heller (2008). At the time this case came before the Supreme Court, the District of Columbia "generally prohibit[ed] the possession of handguns," and it was a crime "to carry an unregistered firearm, and the registration of handguns [was] prohibited." In effect, there was a general prohibition on the possession of firearms, even within one's home for personal use. The law was a total ban on the possession of firearms in the home. Dick Heller, a D. C. special police officer authorized to carry a handgun while on duty at the Federal Judicial Center, applied for a registration certificate for a handgun that he wished to keep at home. The District of Columbia refused to provide a registration certificate. Heller filed a lawsuit in the Federal District Court for the District of Columbia seeking, on Second Amendment grounds, to enjoin the city from enforcing the prohibition. The Court held that the "District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his."

McDonald v. City of Chicago (2010). Otis McDonald, along with others, challenged a Chicago ordinance that stated "[n]o person shall ... possess ... any firearm unless such person is the holder of a valid registration certificate for such firearm." The ordinance also prohibited "registration of most handguns, thus effectively banning handgun possession by almost all private citizens who reside in the City." The City of Chicago enacted "its handgun ban to protect its residents 'from the loss of property and injury or death from firearms'." After the Supreme Court announced its decision in *District of Columbia v. Heller*, McDonald filed a lawsuit against the City of Chicago seeking a declaration, or declaratory judgment, that the handgun ban and other related ordinances violated the Second and Fourteenth Amendments to the United States Constitution.

McDonald argued that “the handgun ban left [him] vulnerable to criminals,” and presented statistical data showing that the City of Chicago’s “handgun murder rate actually increased since the ban was enacted and that Chicago residents face one of the highest murder rates in the country.” The Court stated, “. . . it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.” Therefore, the Supreme Court held for the first time in our nation’s history that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right to keep and bear arms for the purpose of self-defense, making such right “fully applicable to the States.”

The Slaughterhouse Cases (1873). Here a narrowly divided Supreme Court upheld Louisiana’s grant of a monopoly in the slaughtering business in and around New Orleans. Although officially designated as “An Act to Protect the Health of the City of New Orleans...,” the law was not in any meaningful sense a health measure. Its only apparent effect was to deprive more than a thousand persons of their alleged right to engage in the slaughtering trade. A number of these persons filed suit, maintaining that the State had conferred “odious and exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans.” In rejecting this contention, the Supreme Court in an opinion by Justice Miller, narrowly interpreted Fourteenth Amendment restrictions on state authority. Miller virtually read out of the Fourteenth Amendment the provision that: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...” This language, he said, extended only to rights held by Americans as citizens of the nation, as distinguished from their rights as state citizens. In addition to this restrictive view of the Privileges and Immunities Clause, Justice Miller also found no deprivation of rights under the Due Process and Equal Protection Clauses. He identified the central purpose of the Fourteenth Amendment as the protection of the civil rights of former slaves, although he was unwilling to say that no one else was entitled to this protection. In a strong dissenting opinion, Justice Field took issue with Miller’s narrow interpretation of the Privileges and Immunities Clause: “The privileges and immunities designated,” he maintained, “are those which of right belong to the citizens of all free governments.” While agreeing with Field’s position regarding the broad protection that should be afforded by the Privileges and Immunities Clause, Justice Bradley went one important step further, by expressing the view that “a law which prohibits a large class of citizens from adopting a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property.”

The Civil Rights Cases (1883). In adopting the Civil Rights Act of 1875, Congress attempted to eradicate racial discrimination in “places of public accommodation,” including hotels, taverns, restaurants, theaters and “public conveyances.” In these cases, the Supreme Court struck down the key provisions of this act, ruling that the Fourteenth Amendment limited Congressional action to the prohibition of official, state-sponsored discrimination as distinct from discrimination practiced by privately owned places of public accommodation.

Shelley v. Kraemer (1948). This case arose when an African-American couple, the Shelleys, bought a home that was covered by a restrictive covenant; three-fourths of the homes in the same neighborhood were also covered by restrictive covenants. Kraemer, a neighborhood resident, sued to prevent the Shelleys from taking possession of their property. The trial court denied Kraemer's request and held that the covenant was faulty because not all of the property owners in the neighborhood had signed it. The Missouri Supreme Court reversed that decision, ruling that the agreement was valid and that Shelley's Fourteenth Amendment right to equal protection of the law was not violated. The United States Supreme Court sided with the Shelleys. Chief Justice Fred Vinson, writing for a unanimous Supreme Court, observed that "the rights to acquire, enjoy, own, and dispose of property" were among the civil rights protected by the Fourteenth Amendment. Indeed, according to Vinson, the framers of the Fourteenth Amendment considered property ownership a necessary prerequisite for the realization of other civil rights and liberties. Vinson acknowledged that there was no state action involved in the restrictive covenants and that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." Thus, on their own, the restrictive covenants did not violate the Equal Protection Clause. For the covenants to have their discriminatory impact, however, judicial enforcement was necessary. According to Vinson, the actions of state courts and state judges are state action within the meaning of the Fourteenth Amendment. Therefore, the state violated Shelley's right to equal protection of the law by enforcing the restrictive agreements.

Barron v. Baltimore (1833). There is little doubt that, at the time of its ratification in 1791, the Bill of Rights was widely perceived as imposing limitations only on the powers and actions of the national government. This is suggested by the first clause of the First Amendment, which begins, "Congress shall make no law. ..." The Court held as much in 1833 in the case of *Barron v. Baltimore*, when it refused to permit a citizen to sue a local government for violating his property rights under the Just Compensation Clause of the Fifth Amendment. The case stemmed from an incident in which the city of Baltimore diverted the flow of certain streams, causing silt to be deposited in front of John Barron's wharf, making it unusable. Barron brought suit in state court, claiming that since the City's action amounted to a taking of private property, he was entitled to "just compensation" under the Fifth Amendment to the U.S. Constitution. The trial court agreed and awarded Barron forty-five hundred dollars. After a state appellate court reversed this judgment, Barron appealed to the U.S. Supreme Court on a writ of error. Speaking for the Court, Chief Justice John Marshall said: "We are of the opinion, that, the provision in the Fifth Amendment to the Constitution, declaring that private property shall not be taken for public use without just compensation is intended solely as a limitation on the power of the United States, and is not applicable to the legislation of the states."

Chicago, Burlington and Quincy R.R. Co. v. Chicago (1897). Here a conservative Supreme Court concerned about protecting private enterprise against a rising tide of government interventionism held that the Due Process Clause of the Fourteenth Amendment imposed on state and local governments the same obligation to respect

private property that the Fifth Amendment imposed on the federal government. The Court said that when a state or local government takes private property under its power of eminent domain, it must provide just compensation to the owner. Thus the Court had “incorporated” the Just Compensation Clause of the Fifth Amendment into the Due Process Clause of the Fourteenth Amendment.

Palko v. Connecticut (1937). In this case the Supreme Court refused to incorporate the Double Jeopardy Clause of the Fifth Amendment into the Due Process Clause of the Fourteenth. To merit incorporation, said Justice Benjamin N. Cardozo, a provision of the Bill of Rights must be essential to “a scheme of ordered liberty.” Cardozo’s majority opinion suggested that the First Amendment freedoms which had been previously incorporated, represented “the matrix, the indispensable condition, of nearly every other form of freedom.” The Double Jeopardy Clause, in Cardozo’s view, lay on “a different plane of social and moral values.”

Adamson v. California (1947). In *Hurtado v. California* (1886) the Supreme Court held that the grand jury requirement of the Fifth Amendment was not an essential element of due process and therefore did not have to be followed in state prosecutions. In *Twining v. New Jersey* (1908), the Court held that the Fifth Amendment protection against compulsory self-incrimination did not have to be honored in state criminal trials. The Court revisits this question in the instant case. The student should pay close attention to the different theories of Fourteenth Amendment due process espoused in the various opinions in this case. Although agreeing that the challenged procedure would be a violation of the Self-Incrimination Clause, the Court concluded that the 14th Amendment did not make the Self-Incrimination Clause binding on the state courts. The Court’s highly selective approach to incorporation of the Bill of Rights drew the particular ire of Justice Black, who complained that selective incorporation permitted the Court to act in a manner inconsistent with the ideal of the rule of law: “To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written constitution.”

Rochin v. California (1952). Rochin was convicted for possession of narcotics after the police had his stomach pumped to retrieve capsules he had swallowed to avoid arrest. Having granted cert, the Supreme Court unanimously reversed Rochin’s conviction. Writing for the Court, Felix Frankfurter concluded that the officers’ conduct in the case “shocked the conscience” and was therefore invalid under the Due Process Clause of the 14th Amendment. In concurring opinions, Justices Black and Douglas objected to the broad due process approach and argued that the case should be governed by the Self-Incrimination Clause of the Fifth Amendment, which should be enforceable against the state via the 14th Amendment. Arguing for “total incorporation” of the Bill of Rights into the 14th Amendment, Douglas wrote: “If it is a requirement of due process for a trial in the federal courthouse, it is impossible for me to say that it is not a requirement of due process for a trial in the state courthouse.”

Duncan v. Louisiana (1968). Here the Supreme Court made the right of trial by jury applicable to defendants in state criminal cases. In a concurring opinion joined by Justice Douglas, Justice Black expressed his satisfaction with what the Court had done under the mantle of selective incorporation: “I believe as strongly as ever that the Fourteenth Amendment was intended to make the Bill of Rights applicable to the States. I have been willing to support the selective incorporation doctrine, however, as an alternative, although perhaps less historically supportable than complete incorporation. ... [T]he selective incorporation process has the virtue of having already worked to make most of the Bill of Rights protections applicable to the States.”

QUESTIONS FOR THOUGHT AND DISCUSSION:

1. Which is more valued in our society, freedom or equality? How does this affect the development of constitutional law?
2. To what extent is constitutional freedom limited to the protection of the individual from government? To what extent is it the guarantee that the individual be able to realize his or her potential as a human being?
3. What is *substantive*, as distinct from *procedural*, due process?
4. Is the rational basis test a form a substantive due process?
5. Is the incorporation of the First Amendment a form of substantive due process?
6. Under what circumstances might the *failure* of government to take action constitute a denial of due process of law?
7. Why should the federal courts be authorized to grant writs of *habeas corpus* to review state criminal convictions?
8. Would the Supreme Court uphold an act of Congress making it a crime for private citizens to possess any and all handguns? How would you view the constitutional question involved?
9. Would the Privileges and Immunities Clause of the Fourteenth Amendment be a sounder basis than the Due Process Clause for the incorporation of the Bill of Rights? Why did the Supreme Court rely on the Due Process Clause in its incorporation decisions?
10. Can you think of a situation in which the constitutional ideals of individual freedom and equality under the law are in conflict? In such cases, which value should prevail?
11. Consider the various Supreme Court perspectives on the concept of liberty. Which perspective resonates with you?

12. Consider the controversial issue of whether “enemy combatants” captured as a part of the “war on terrorism” and incarcerated at the American naval base at Guantanamo Bay, Cuba should be allowed access to the writ habeas corpus and the United States federal courts. Should these individuals be allowed access to the federal courts? Use the relevant provision(s) of the Constitution to support your position.

MULTIPLE CHOICE QUESTIONS:

- c 1. Paraphrasing _____, the Declaration of Independence (1776) declares the “unalienable” rights of man to be “life, liberty and the pursuit of happiness.”
- a. Thomas Hobbes
 - b. Jean-Jacques Rousseau
 - c. John Locke
 - d. Adam Smith
- d 2. The Framers of the Constitution were heavily influenced by the theory of _____, in which rights are seen as inherently belonging to individuals.
- a. divine right
 - b. inherent powers
 - c. primogeniture
 - d. natural rights
- c 3. Article III, Section 3 of the Constitution provides that “Treason against the United States, shall consist only in levying War against them, or in adhering to their enemies, giving them _____.”
- a. Information
 - b. Munitions or Plans of War
 - c. Aid and Comfort
 - d. none of the above
- c 4. To protect citizens against unwarranted prosecution for treason, the Constitution specifies that “No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same Overt act, or on _____ in open Court.”
- a. Indictment
 - b. Conviction
 - c. Confession
 - d. none of the above
- d 5. The writ of _____ enables a court of law to review a custodial situation and order the release of an individual who is found to have been illegally held in custody.
- a. certiorari
 - b. assistance
 - c. mandamus
 - d. none of the above

- b 6. A(an) _____ is a legislative act that imposes punishment upon a person without benefit of a trial in a court of law.
- a. *corpus delecti*
 - b. bill of attainder
 - c. writ of prohibition
 - d. none of the above
- c 7. Historically, the _____ Clause was an important source of litigation in the federal courts. In modern times, it is seldom interpreted to impose significant limits on the states in the field of economic regulation.
- a. Commerce
 - b. Full Faith and Credit
 - c. Contract
 - d. Ninth Amendment
- c 8. In *The Federalist* No. 84, _____ argued that since the Constitution provided for limited government through enumerated powers, a Bill of Rights was unnecessary.
- a. John Jay
 - b. John Adams
 - c. Alexander Hamilton
 - d. none of the above
- a 9. The Second Amendment refers to the keeping and bearing of arms in the context of _____.
- a. a well regulated militia
 - b. personal safety and protection
 - c. a rebellion or invasion
 - d. none of the above
- b 10. The _____ Amendment prohibits military authorities from quartering troops in citizens' homes without their consent.
- a. Second
 - b. Third
 - c. Fourth
 - d. none of the above
- a 11. The Fifth Amendment requires the federal government to obtain a (an) _____ from a _____ before trying someone for a felony.
- a. indictment; grand jury
 - b. conviction; petit jury
 - c. warrant; judge or magistrate
 - d. subpoena; judge or magistrate

- d 12. The Fifth Amendment protects people against arbitrary use of _____, the power of government to take private property for public use.
- a. sovereign immunity
 - b. the writ of attachment
 - c. fee simple
 - d. eminent domain
- a 13. The Seventh Amendment guarantees the right to a jury trial in federal civil suits “at common law” where the amount at issue exceeds _____.
- a. twenty dollars
 - b. one hundred dollars
 - c. one thousand dollars
 - d. one million dollars
- d 14. In its most generic sense, _____ refers to the exercise of governmental power under the rule of law with due regard for the rights and interests of individuals.
- a. eminent domain
 - b. sovereignty
 - c. civil liberty
 - d. due process
- c 15. The ratification of the _____ Amendment in _____ provided an opportunity for the Supreme Court to reconsider the relationship between the Bill of Rights and state and local governments.
- a. 11th; 1798
 - b. 12th; 1804
 - c. 14th; 1868
 - d. 16th; 1913
- b 16. The process of selective incorporation of the Bill of Rights into the 14th Amendment began in 1897 in _____.
- a. *Hurtado v. California*
 - b. *Chicago, Burlington and Quincy Railroad v. Chicago*
 - c. *The Slaughterhouse Cases*
 - d. *Twining v. New Jersey*
- c 17. In *Palko v. Connecticut* (1937) the Supreme Court refused to incorporate the _____ Clause of the Fifth Amendment into the Due Process Clause of the Fourteenth Amendment.
- a. Due Process
 - b. Public Use
 - c. Double Jeopardy
 - d. Just Compensation

- a 18. In 1848, a delegation of women, including the famous suffragist _____, met at Seneca Falls, New York to address the “social, civil, and religious conditions and rights of woman.”
- a. Elizabeth Cady Stanton
 - b. Sarah Miles Standish
 - c. Elizabeth Jane Parker
 - d. Sarah Baker Worthington
- a 19. Like the Thirteenth and Fourteenth Amendments, the Fifteenth Amendment was an outgrowth of _____.
- a. the Civil War
 - b. the Industrial Revolution
 - c. Shays’ Rebellion
 - d. the Spanish-American War
- d 20. Although formally granted the right to vote by the Fifteenth Amendment, many Black Americans were still effectively disenfranchised by practices such as _____.
- a. literacy tests
 - b. white primaries
 - c. poll taxes
 - d. all of the above
- a 21. In 1970, Congress passed a measure lowering the voting age from twenty-one to eighteen in both state and federal elections. The Supreme Court, however, declared this measure unconstitutional in _____.
- a. *Oregon v. Mitchell*
 - b. *Massachusetts v. Laird*
 - c. *Kissinger v. Halperin*
 - d. *Texas v. Johnson*
- a 22. In *Breedlove v. Suttles* (1937), the Supreme Court ruled that _____, in and of themselves, did not violate the Fourteenth or Fifteenth Amendments.
- a. poll taxes
 - b. literacy tests
 - c. white primaries
 - d. grandfather clauses
- d 23. The Supreme Court refused to entertain a claim brought on behalf of Joshua DeShaney against a publicly funded social agency because, in the stated view of the majority, no _____ was demonstrated.
- a. knowledge by social workers of the violent tendencies of Joshua’s father
 - b. indication of previous injury to Joshua
 - c. inattention by social workers
 - d. required element of state action

- b 24. In *The Federalist* No. 84, _____ argued that since the Constitution provided for limited government through enumerated powers, a Bill of Rights was unnecessary.
- a. Franklin
 - b. Hamilton
 - c. Jay
 - d. Jefferson
- a 25. Reference to unenumerated rights is found in the _____ Amendment.
- a. Ninth
 - b. Tenth
 - c. Seventh
 - d. Second
- c 26. The two aspects of constitutional rights include _____ and _____.
- a. liberty and privacy
 - b. equality and privacy
 - c. liberty and equality
 - d. none of the above
- d 27. In *Chicago, Burlington & Quincy R. Co. v. McGuire* (1911), Justice _____ stated, "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."
- a. Louis D. Brandeis
 - b. Thurgood Marshall
 - c. Anthony Kennedy
 - d. Charles Evans Hughes
- c 28. _____ of the Constitution provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."
- a. Article III, Section 1
 - b. Article III, Section 2
 - c. Article III, Section 3
 - d. None of the above
- a 29. In _____, the Supreme Court upheld the treason conviction of a German-American who sheltered one of the Nazi saboteurs.
- a. *Haupt v. United States* (1947)
 - b. *Cramer v. United States* (1945)
 - c. *Ex Parte Bollman* (1807)
 - d. none of the above

- c 30. _____ enables a court to review a custodial situation and order the release of an individual who is found to have been illegally incarcerated.
- a. Writ of Mandamus
 - b. Bills of Attainder
 - c. *Habeas corpus*
 - d. Ex Post Facto laws
- a 31. In _____, the Court invalidated a law that prohibited members of the Communist Party from serving as officers in trade unions, saying that Congress had inflicted punishment on “easily ascertainable members of a group.”
- a. *United States v. Brown* (1965)
 - b. *American Communications Association v. Douds* (1950)
 - c. *United States v. Lovett* (1946)
 - d. *Nixon v. Administrator of General Services* (1977)
- a 32. The _____ Amendment protects freedom of speech and freedom of the press, often referred to jointly as freedom of expression.
- a. First
 - b. Second
 - c. Third
 - d. Fourth
- b 33. The Supreme Court decided in _____, that the Second Amendment protects a *personal* right to keep and bear arms.
- a. *Lewis v. United States* (1980)
 - b. *District of Columbia v. Heller* (2008)
 - c. *United States v. Miller* (1939)
 - d. *United States v. Cruikshank* (1875)
- b 34. In _____, the Supreme Court under Chief Justice Warren expanded the scope of Fourth Amendment protection to include wiretapping, an important tool of modern law enforcement.
- a. *Griswold v. Connecticut* (1965)
 - b. *Katz v. United States* (1967)
 - c. *Gideon v. Wainwright* (1963)
 - d. none of the above
- d 35. In _____, the Supreme Court said that the Seventh Amendment does not provide the right to a jury trial where Congress “has created a ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.”
- a. *Colgrove v. Battin* (1973)
 - b. *Curtis v. Loether* (1974)
 - c. *Stack v. Boyle* (1951)
 - d. *Thomas v. Union Carbide* (1985)

- c 36. In _____, a case involving the prosecution of an organized crime figure, the Supreme Court said that the Eighth Amendment does not require that defendants be released on bail, only that, if the court grants bail, it must not be “excessive.”
- Trop v. Dulles* (1958)
 - Stack v. Boyle* (1951)
 - United States v. Salerno* (1987)
 - none of the above
- c 37. The _____ Amendment was included in the Bill of Rights as a solution to a problem raised by James Madison – namely, that the specification of particular liberties might suggest that individuals possessed only those specified.
- Seventh
 - Eighth
 - Ninth
 - Tenth
- a 38. In *Jones v. Alfred H. Mayer Company* (1968), the Supreme Court invoked the _____ Amendment in a decision upholding a provision of the Civil Rights Act of 1866.
- Thirteenth
 - Fourteenth
 - Fifteenth
 - Sixteenth
- b 39. The Privileges and Immunities Clause of _____, provides: “The Citizens of each State shall be entitled to all privileges and Immunities of Citizens in the several States.”
- Article IV, Section 1
 - Article IV, Section 2
 - Article IV, Section 3
 - Article IV, Section 4
- c 40. In _____, the Supreme Court ruled that the Privileges or Immunities Clause did not prohibit a state from denying a woman a license to practice law.
- Twining v. New Jersey* (1908)
 - Minor v. Happersett* (1875)
 - Bradwell v. Illinois* (1873)
 - none of the above
- a 41. The narrow view of the Equal Protection Clause adopted in *Plessy v. Ferguson* was repudiated by the Supreme Court in _____, where the Court invalidated compulsory racial segregation in public schools, and in a series of subsequent decisions in which the Court struck down other types of Jim Crow laws.

- a. *Brown v. Board of Education* (1954)
 - b. *Everson v. Board of Education* (1947)
 - c. *The Civil Rights Cases* (1883)
 - d. *Shelley v. Kraemer* (1948)
- b 42. The Supreme Court has adopted the doctrine of _____ as a method of deciding whether certain provisions of the Bill of Rights are applicable to the States.
- a. total incorporation
 - b. selective incorporation
 - c. incorporation plus
 - d. none of the above
- d 43. As of April 2010, the provisions of the Bill of Rights that had not been absorbed into the Fourteenth Amendment include the _____ Amendments.
- a. Second and Third
 - b. Seventh and Fifth Amendment grand jury clause
 - c. Eighth Amendment prohibitions against “excessive fines” and “excessive bail”
 - d. all of the above
- c 44. The Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments focus on the _____, which is arguably the most essential right in a democracy.
- a. right to run for elected office
 - b. right to trial by jury
 - c. right to vote
 - d. right to bear arms
- c 45. When a law or policy impinges on a right explicitly protected by the Constitution, such as the right to vote, it is subjected to _____ judicial scrutiny by the Supreme Court, also known as the compelling governmental interest test.
- a. minimal
 - b. intermediate
 - c. strict
 - d. none of the above

ESSAY QUESTIONS:

1. Describe the debate between the Federalists and the Antifederalists over the omission of a bill of rights from the original Constitution.
2. Explain the 14th Amendment state action doctrine. How did this doctrine figure into the Supreme Court’s decision in *DeShaney v. Winnebago Social Services*?
3. Discuss the origins and development of the doctrine of selective incorporation of the Bill of Rights.

4. What standards do courts employ in judging the constitutionality of laws that are alleged to infringe “fundamental rights”? Explain the approach taken by courts in such cases.
5. Enumerate the major provisions of the Bill of Rights that have been incorporated into the Fourteenth Amendment and thus made applicable to the states. What rationale has the Court articulated for determining whether a provision of the Bill of Rights should be made applicable to the states? Is this rationale clear? Convincing? Discuss.
6. Specifically, what does the “right to keep and bear arms” include? Is the exercise of the right limited to service in a “well regulated militia”?
7. Is the Ninth Amendment, in and of itself, a sufficient basis for the judicial invalidation of legislation?
8. Citing relevant cases, explain the distinction between *substantive* and *procedural* due process.
9. Which provision(s) of Bill of Rights is the most important to the individual citizen? Citing Supreme Court decisions, justify your answer.
10. The only crime the Framers saw necessary to include in the original Constitution was treason. Discuss the reasoning for its inclusion. Also, include in your response Supreme Court decisions in this area of constitutional law.

HYPOTHETICAL PROBLEM (FOR CLASSROOM DISCUSSION OR ESSAY EXAMINATION):

John Blueberry sued Ima Detecto, a local police detective, under 42 U.S.C.A. §1983, for violation of his constitutional rights. Plaintiff Blueberry alleged that Detecto’s negligence caused him to be arrested and jailed without probable cause. At a jury trial the evidence revealed that Detecto, who was assigned by a local police department to investigate instances of child abuse, received a written report from a youth services bureau that Blueberry’s young daughter had received serious burns. The detective learned that Blueberry was a single parent with custody of his daughter. At Deteco’s request, Blueberry came to her office for an interview. He denied any responsibility for the child being burned, explaining that the child’s burns occurred as a result of a hot water pipe that had broken. Blueberry agreed to take a polygraph examination, but failed to appear at the time the examination was scheduled. Without further investigation, Detective Detecto explained the situation to the county prosecutor, who advised her to file a criminal complaint for assault against Blueberry. Pursuant to her sworn complaint, Blueberry was arrested and taken to jail where he remained for several days until he could post a bond. At his trial, the prosecution failed to present evidence that Blueberry was responsible for the child’s injury. Detective Detecto, however, claimed she was entitled to qualified immunity with regard to the §1983 action. She contended that after receiving the report

of the child's injury, and after the father, who agreed to take a polygraph examination, failed to do so, she, as an experienced police detective, could reasonably have believed that she had probable cause to have Blueberry arrested. Based on this contention, Detective Detecto has moved the court for a directed verdict that she was not liable. What decision would the court likely reach? Why?

INTRODUCTION OF TOPIC IN LECTURE

How to Introduce the Constitutional Sources of Civil Rights and Civil Liberties:

Our civil rights and civil liberties are rooted in the Bill of Rights and other various amendments to the Constitution. However, many students have probably never seen the Bill of Rights. There will be some students that have seen the historical document on display in Washington, D.C. However, many students will have only seen the Bill of Rights reprinted in a textbook, as in this textbook for easy reference. Therefore, to generate a classroom discussion on the provisions of the Bill of Rights and the other constitutional amendments that protect civil rights, the instructor could use the following website to display the document to the students in the classroom:

<http://www.archives.gov/exhibits/charters/charters.html>

The link to this website is provided by the House of Representatives website under the educational resources section. There are three different documents that can be viewed, which include the Declaration of Independence, the Constitution of the United States, and the Bill of Rights. By clicking on the "Bill of Rights," you can view the text of the Bill of Rights, which can be enlarged by clicking on the document.

By clicking the "download high-resolution images" button, you can download a better quality image of the Bill of Rights, and the other constitutional amendments that protect civil rights. Each page can then be enlarged for better viewing. As the instructor goes through each amendment, the image could be a guide to the students.

QUESTIONS FOR WEBSITE

1. Briefly discuss the standards of review utilized by the Supreme Court in civil rights and civil liberties cases.

Sample Answer: The standards of review can be categorized as minimal scrutiny, heightened scrutiny, and strict scrutiny. Minimal scrutiny, the most lenient standard of judicial review, typically involves the application of the rational basis test. In *Massachusetts Board of Retirement v. Murgia* (1976), the Supreme Court said that a law that touches on a constitutionally protected interest must, at a minimum, be "rationally related to furthering a legitimate government interest." For example, a state law that prohibits performing surgery without a license impinges on constitutionally protected interests by depriving laypersons of their right to make contracts freely and

discriminating against those unable or unwilling to obtain a license. Yet the prohibition is a rational means of advancing the state's legitimate interests in public health and safety. In applying the rational basis test, courts begin with a strong presumption that the challenged law or policy is valid. The burden of proof is on the party making the challenge to show that the law or policy is unconstitutional. To carry this burden, the party must demonstrate that there is no rational basis for the law or policy. Since this is a difficult showing to make, application of the rational basis test usually leads to a judgment sustaining the constitutionality of the challenged law or policy.

When a law or policy impinges on a right explicitly protected by the Constitution, such as the right to vote, it is subjected to a more searching judicial scrutiny. This approach also applies in the case of unenumerated rights that the courts have identified as fundamental, such as the right of privacy, *Roe v. Wade* (1973), and the right of interstate travel, *Shapiro v. Thompson* (1969). Strict judicial scrutiny is also warranted in cases involving forms of discrimination, such as that based on race, that have been held to be "inherently suspect" (*Korematsu v. United States* [1944]). Under strict scrutiny, the ordinary presumption of constitutionality is reversed, which means, in effect, that the challenged law or policy is presumed to be unconstitutional. The burden shifts to the government to show that the law or policy furthers a compelling government interest. Moreover, the government must show that the law is narrowly tailored to achieve this interest. This is a heavy burden for the government to carry. Consequently, most laws subjected to strict judicial scrutiny are declared unconstitutional. However, the application of strict scrutiny is not necessarily tantamount to a declaration of unconstitutionality. For example, in *New York v. Ferber* (1982), the Supreme Court upheld a child pornography law that impinged on the First Amendment freedom of expression because, in the view of the Court, the law served a compelling interest in protecting children from the abuse typically associated with the pornography industry. More recently, in *Grutter v. Bollinger* (2003), the Court upheld an affirmative action policy at a state law school in which minorities were afforded preferential status in admissions. The Court sustained the policy against an equal protection challenge on the ground that it was necessary to achieve the law school's compelling interest in fostering student diversity.

The Supreme Court has developed an intermediate level of review, often referred to as heightened scrutiny. This standard has been most important in reviewing claims of gender-based discrimination under the Equal Protection Clause of the Fourteenth Amendment. Intermediate scrutiny is also applied in resolving First Amendment issues in the field of commercial speech, *Central Hudson Gas And Electric Corporation v. Public Service Commission of New York* (1980). As an intermediate standard of review, heightened scrutiny is less rigorous than strict scrutiny, but more demanding than the rational basis test. To survive judicial review under this approach, a policy must "serve important governmental objectives and must be substantially related to achievement of those objectives." In perhaps the best-known gender discrimination case, *United States v. Virginia* (1996), the Supreme Court employed intermediate scrutiny in striking down the Virginia Military Institute's policy of limiting admission to males. Looking at the cases in which the Court has employed heightened scrutiny, it is fair to say that as a standard of review, it is closer to strict scrutiny than to the rational basis test. Indeed, the Court recognized in the VMI case that in cases of intermediate scrutiny "the burden of

justification is demanding and it rests entirely on the State.” The challenged policy is presumed invalid unless the government can advance an “exceedingly persuasive” justification.

2. Briefly discuss the role state constitutions and courts play in protecting individual rights and liberties.

Sample Answer: Under our federal system of government, the highest court of each state possesses the authority to interpret with finality its state constitution and statutes. Since every state constitution contains language protecting individual rights and liberties, many state court decisions implicate both state and federal constitutional provisions. Under the relevant language of their constitutions and statutes, state courts are free to recognize greater (but not lesser) protections of individual rights than are provided by the U.S. Constitution as interpreted by the federal courts. For example, in *In re T. W.* (1989), the Florida Supreme Court struck down as a violation of the right of privacy a statute that required parental consent in cases where minors sought abortions. The constitutionality of a similar law had been upheld on federal grounds by the U.S. Supreme Court in *Planned Parenthood v. Ashcroft* (1983). In *T. W.*, the Florida Supreme Court made it clear that it was basing its decision on an amendment to the Florida constitution that (unlike the federal Constitution) explicitly protects the right of privacy. In *Goodridge v. Department of Public Health* (2003), the Massachusetts Supreme Court recognized the right to enter into same-sex marriage, a position that the federal courts (and most state courts) have thus far been unwilling to assume. These decisions, and numerous others like them, mean that a complete study of civil rights and liberties must encompass the provisions of state constitutions and the holdings of state courts.

3. Briefly list and discuss the various rights included in the original unamended Constitution.

Sample Answer: **1. Trial by Jury:** Article III, Section 2, Clause 4 provides that “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.” The right to jury trial in criminal cases is reaffirmed in the Sixth Amendment; and the right to trial by jury in civil cases is enumerated in the Seventh Amendment.

2. Circumscribing the Crime of Treason: Under the English common law, treason was in a category by itself, because it was considered far worse than any felony. English kings had used the crime of treason to punish and deter political opposition. The Framers of the United States Constitution, aware of these abuses, sought to prohibit the federal government from using the offense of treason to punish political dissent. The Framers of the Constitution, having recently participated in a successful revolution, were understandably sensitive to the prospect that government could employ the crime of treason to stifle political dissent. Thus, they provided in Article III, Section 3 that “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.” To protect citizens against

unwarranted prosecution for treason, the Framers further specified that “[n]o Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”

3. Religious Tests for Public Office: Article VI of the Constitution provides, among other things, that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” This clause means, in effect, that personal views regarding religion may not officially qualify or disqualify one for public service. The prohibition against religious tests reflects the Framers’ commitment to the idea that government ought to be neutral with respect to matters of religion, a view that was strongly reinforced by adoption of the Establishment Clause of the First Amendment. Because the Religious Test Clause referred only to *federal* offices, states remained free to require religious tests as conditions of holding public office or securing public employment. At the time the U.S. Constitution was adopted, most states did have such requirements. The Supreme Court’s decision in *Cantwell v. Connecticut* (1940), applying the First Amendment’s Free Exercise Clause to the states by way of the Fourteenth Amendment, ultimately set the stage for the Supreme Court to review religious tests for *state* offices. In *Torcaso v. Watkins* (1961), the Court reviewed a provision of the Maryland constitution stating that “no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God...” The appellant, Torcaso, was denied a commission as a notary public because he refused to acknowledge the existence of God. Speaking for the Court, Justice Hugo L. Black concluded that the “Maryland religious test for public office unconstitutionally invades the appellant’s freedom of belief and religion and therefore cannot be enforced against him.”

4. Habeas Corpus: Article I, Section 9, of the Constitution states that “the Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Grounded in English common law, the writ of habeas corpus gives effect to the all-important right of the individual not to be held in unlawful custody. Specifically, habeas corpus enables a court to review a custodial situation and order the release of an individual who is found to have been illegally incarcerated. In adopting the habeas corpus provision of Article I, Section 9, the Framers wanted not only to recognize the right but also to limit its suspension to emergency situations. The Constitution is ambiguous as to which branch of government has the authority to suspend the writ of habeas corpus during emergencies. Early in the Civil War President Lincoln authorized military commanders to suspend the writ. Congress ultimately confirmed the president’s action through legislation, but in *Ex Parte Milligan* (1866), the Supreme Court held that only Congress can suspend the writ of habeas corpus. The writ of habeas corpus is an important element in modern criminal procedure. As a result of legislation passed by Congress in 1867 and subsequent judicial interpretation of that legislation, a person convicted of a crime in a state court and sentenced to state prison may petition a federal district court for habeas corpus relief. This permits a federal court to review the constitutional correctness of the arrest, trial, and sentencing of a state prisoner.

5. Ex Post Facto Laws: Article I, Section 9, of the Constitution prohibits Congress from passing *ex post facto* laws. Article I, Section 10, imposes the same prohibition on state legislatures. *Ex post facto* laws are laws passed after the occurrence of an act that

alter the legal status or consequences of that act. In *Calder v. Bull* (1798), the Supreme Court held that the *ex post facto* clauses applied to criminal but not to civil laws. According to Justice Samuel Chase's opinion in that case, impermissible *ex post facto* laws are those that "create or aggravate... [a] crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction." Retrospective laws dealing with civil matters are thus not prohibited by the *ex post facto* clauses. Judicial decisions relying on the Ex Post Facto Clause are uncommon today. But during its 1999 term, the Supreme Court handed down a ruling in this area. In *Carmell v. Texas* (2000), the Court reversed convictions on four sexual assault charges. The convictions were for assaults that occurred in 1991 and 1992, when Texas law provided that a defendant could not be convicted merely on the testimony of the victim unless he or she was under age 14. At the time of the alleged assaults, the victim was 14 or 15. The law was later amended to extend the "child victim exception" to victims under 18 years old. Carmell was convicted under the amended law, which the Supreme Court held to be an *ex post facto* law.

6. Bills of Attainder: Article I, Sections 9 and 10, prohibit Congress and the states, respectively, from adopting bills of attainder. A bill of attainder is a legislative act that imposes punishment on a person without benefit of a trial in a court of law. Perhaps the best known cases involving bills of attainder are the test oath cases of 1867. In *Ex parte Garland*, the Court struck down an 1865 federal statute forbidding attorneys from practicing before federal courts unless they took an oath that they had not supported the Confederacy during the Civil War. In *Cummings v. Missouri* (1866), the Court voided a provision of the Missouri Constitution that required a similar oath of all persons who wished to be employed in a variety of occupations, including the ministry. Cummings, a Catholic priest, had been fined \$500 for preaching without having taken the oath. The Court found that these laws violated both the bill of attainder and *ex post facto* provisions of Article I.

7. The Contracts Clause: After the Revolutionary War, the thirteen states comprising the newly formed Union experienced a difficult period of political and economic instability. Numerous citizens, especially farmers, defaulted on their loans. Many were imprisoned under the harsh debtor laws of the period. Some state legislatures adopted laws to alleviate the plight of debtors. Cheap paper money was made legal tender; bankruptcy laws were adopted; in some states, creditors' access to the courts was restricted; some states prohibited imprisonment for debt. These policies, while commonplace today, were at that time anathema to the wealthy. Members of the creditor class believed that serious steps had to be taken to prevent the states from abrogating debts and interfering with contracts generally. It is fair to say that one of the motivations behind the Constitutional Convention of 1787 was the desire to secure overriding legal protection for contracts. Thus, Article I, Section 10, prohibits states from passing laws "impairing the Obligation of Contracts." The Contracts Clause must be included among the provisions of the original Constitution that protect individual rights. In this case, the right of individuals to be free from governmental interference with their contractual relationships.

4. Briefly discuss the importance of the state action doctrine within the context of the Fourteenth Amendment.

Sample Answer: Normally one thinks of the Fourteenth Amendment, as well as the provisions of the Bill of Rights, as placing constraints on government action. The Supreme Court has said on numerous occasions, the first being in *The Civil Rights Cases* (1883), that the prohibitions of the Fourteenth Amendment apply to state action but not to actions by private individuals or corporations. An action that is ostensibly private in nature, however, may be treated as “state action” within the purview of the Fourteenth Amendment if there is a “close nexus” between the state and the private actor. Thus, for example, the Supreme Court in 1944 invalidated the Texas Democratic Party’s whites-only primary election, even though the party was not, strictly speaking, an agency of the state in *Smith v. Allwright* (1944). Similarly, in *Shelley v. Kraemer* (1948), the Court held that a state court’s enforcement of a racially restrictive covenant with respect to the sale of private housing constituted state action in violation of the Fourteenth Amendment. However, in the 1989 case of *DeShaney v. Winnebago Social Services*, the Supreme Court, dividing 6 to 3, held that a social services agency, regardless of its prior knowledge of the danger, did not violate the Fourteenth Amendment by failing to protect young Joshua DeShaney from his abusive father. Writing for the majority, Chief Justice Rehnquist noted that the Court had previously recognized a state’s constitutional obligation to protect the safety and well being of those within its custody, including mentally retarded persons in state institutions. But this “affirmative duty to protect” did not arise “from the state’s knowledge of [Joshua’s] predicament or from its expressions of its intent to help him.” Since the state had no constitutional duty to protect Joshua from his father, its failure to do so, although calamitous, did not constitute a violation of the Due Process Clause. In a dissenting opinion, Justice Harry Blackmun excoriated the Court for its “sterile formalism.” Blackmun asserted that the “broad and stirring clauses of the Fourteenth Amendment” were “designed, at least in part, to undo the formalistic legal reasoning that infected antebellum jurisprudence.” Blackmun preferred a “sympathetic reading” of the Fourteenth Amendment that recognized that “compassion need not be exiled from the province of judging.”

5. Briefly discuss how Congress is empowered to promulgate various civil rights laws at the federal level and enforce those laws upon the states.

Sample Answer: Section 5 of the Fourteenth Amendment grants to Congress the power to enforce the broad provisions of Section 1 through “appropriate legislation.” Congress has relied on Section 5 in passing numerous civil rights laws, although the enforcement provisions of the Thirteenth, Fifteenth, and Nineteenth Amendments also provide constitutional support for federal civil rights legislation. In *The Civil Rights Cases*, the Supreme Court said that because the Fourteenth Amendment prohibits *state action* contrary to the principles of Section 1, Congress’s enforcement powers under Section 5 are limited to punishing state actions that contravene Section 1. It was for this reason that the Court struck down the Civil Rights Act of 1875. By prohibiting private discrimination, Congress had exceeded its enforcement powers under Section 5. In the Civil Rights Acts of 1870 and 1871, respectively, Congress provided criminal and civil penalties for civil rights violations perpetrated “under color of state law.” This language allowed individuals to be found liable for violating the civil rights of others, as long as

there was some element of state action supporting or condoning the violation. The Civil Rights Act of 1870, also known as the Enforcement Act, also contained a provision criminalizing conspiracies to deprive persons of their civil rights. The language of the statute did not indicate that such conspiracies had to involve unconstitutional state action, but in *United States v. Cruikshank* (1875), the Supreme Court indicated that in the absence of state action, the statute could not be constitutionally enforced against private conspiracies. Although that view still applies today, modern courts tend to be fairly liberal in finding an element of state action in such conspiracies.

In *South Carolina v. Katzenbach* (1966), the Court noted that “[t]he constitutional propriety of [legislation adopted under Section 5] must be judged with reference to the historical experience ... it reflects.” Thus the courts have afforded broad latitude to Congress in crafting measures to eliminate or remedy racial discrimination. However, in *City of Boerne v. Flores* (1997) a more conservative Supreme Court made clear that Congress may not use Section 5 to create new constitutional rights or alter the meaning of constitutional rights that have been defined through judicial interpretation. Similarly, in *United States v. Morrison* (2000), the Supreme Court struck down a provision of the federal Violence Against Women Act that allowed victims of gender-based violence to bring suits for damages in federal courts. The Court said that the provision was unconstitutional not only as a violation of the Commerce Clause but also insofar as it permitted suits in cases where the gender-based violence was purely private in character.