Civil Liberties: First Amendment Freedoms

“...all through the years we have had to fight for civil liberty, and we know that there are times when the light grows rather dim, and every time that happens democracy is in danger.”

—Eleanor Roosevelt (1940)

Democracy cannot exist without civil liberty—that is, without individual freedom. But, notice, democracy also cannot exist without some degree of authority—that is, without government. Striking the proper balance between freedom and authority is democracy’s constant challenge.

You Can Make a Difference

GANDHI CASES AND THE 1ST AMENDMENT: May seem to have little connection to one another. The first became apparent at Westfield High School in Massachusetts, when student members of a Bible club were suspended for attaching a religious message to campus cars that they distributed at school. School administrators believed the Constitution required them to censor the religious speech of students. The students, supported by the Justice Department and the American Civil Liberties Union, sued the school. A federal court ruled that the students’ free speech rights had been violated. The court noted that “At the heart of the school’s argument lies a widely held misconception of constitutional law that has infected our sometimes politically correct society: The Establishment Clause does not apply to private activity; it applies only to government action.” In other words, only school-sponsored religious speech is unconstitutional.

Chapter 19 in Brief

SECTION 1

The Unalienable Rights (pp. 537–538)

—The guarantees in the Bill of Rights reflect Americans’ long-held commitment to personal freedom as well as the principle of limited government.

—Individual rights are not absolute: they can be restricted when they come into conflict with the rights of others.

—The Bill of Rights restricts only the National Government, but the Due Process Clause of the 14th Amendment “nationalizes” most of those guarantees.

SECTION 2

Freedom of Religion (pp. 537–544)

—Free expression, including freedom of religion, is necessary to a free society.

—The Establishment Clause sets up what Thomas Jefferson called “a wall of separation between church and state.” The nature of this “wall,” particularly as it applies to education, remains a matter of continuing controversy.

—The Free Exercise Clause protects individuals’ right to believe—but not to do—whatever they wish.

SECTION 3

Freedom of Speech and Press (pp. 544–545)

—The 1st and 14th amendments’ guarantees of free speech and press protect a person’s right to speak freely and to hear what others have to say.

—These freedoms are not absolute: the Supreme Court has limited such expressions as sedition, speech and obscenity, but seldom allowed prior restraint of spoken or written words.

—The media also can be limited. Reporters do not have an unlimited right of confidentiality, and radio and television are subject to more regulation because they use the public airwaves.

—Symbols and commercial speech enjoy constitutional protection but can be limited under certain circumstances.

SECTION 4

Freedom of Assembly and Petition (pp. 555–556)

—The 1st Amendment guarantees the right to assemble peaceably and to petition the government for a redress of grievances.

—Government can reasonably regulate the time, place, and manner of assembly, but those regulations must be “content neutral.”

—The right of assembly does not give demonstrators a right to trespass on private property.

—The guarantee of freedom of assembly and petition carries with it a right of association.
The Unalienable Rights

Section Preview

Objectives
1. Explain how Americans’ commitment to freedom led to the creation of the Bill of Rights.
2. Understand the rights guaranteed by limited government are not absolute.
3. Show how federalism affects individual rights.
4. Describe how the 14th Amendment helps guarantee individual rights.

Why It Matters
The United States was founded, in part, to ensure individual rights against the power of government. However, these rights can be restricted when they come into conflict with the rights of others. The Due Process Clause of the 14th Amendment prevents the States from abridging rights guaranteed in the Constitution's Bill of Rights.

Political Dictionary
- Bill of Rights
- civil liberties
- civil rights
- alien
- Due Process Clause
- process of incorporation


Walter Ramette was a Jehovah’s Witness who told his children not to salute the flag, or to resist the pledge of allegiance. Toyosaburo Korematsu was a citizen of the United States interned by the Federal Government during World War II. Dollree Mapp was sentenced to prison for possessing “lewd and lascivious books.” Finally, Clarence Earl Gideon was jailed for breaking into and entering a poolroom. You will encounter these names over the next few pages. Each of them played an important part in building and protecting the rights of all Americans.

A Commitment to Freedom
A commitment to personal freedom is deeply rooted in America’s colonial past. Over many centuries, the English people had waged a continuing struggle for individual rights, and the early colonists brought a dedication to that cause with them to America. Their commitment to freedom took root here, and it flourished. The Revolutionary War was fought to preserve and expand those very rights the rights of the individual against government. In proclaiming the independence of the new United States, the founders of this country declared:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men...”

—Declaration of Independence

The framers of the Constitution repeated that justification for the existence of government in the preamble to the Constitution. The Constitution, as it was written in Philadelphia, contained a number of important guarantees. The most notable of these can be found in Article I, Sections 9 and 10, and in Article III. Unlike many of the first State constitutions, however, the framers’ product did not include a general listing of the rights of the people.

That omission raised an outcry. The objections were so strong that several States ratified the Constitution only with the understanding that such a listing would soon be added. The first session of the new Congress contained a demand with a series of proposed amendments. Ten of them, known as the Bill of Rights, were ratified by the States and became a part of the Constitution on December 15, 1791. Later amendments, especially the 13th and the 14th, have added to the Constitution’s guarantees of personal freedom.

The national Constitution guarantees both rights and liberties to the American people. The distinction between civil rights and civil liberties is at best murky. Legal scholars often disagree on the matter, and the two terms are quite often used interchangeably.

However, you can think of the distinction this way: In general, civil liberties are protections against government. They are guarantees of the safety of persons, opinions, and property from arbitrary acts of government. Leading examples of civil liberties include freedom of religion, freedom of speech and press, and the guarantees of a fair trial.

The term civil rights is sometimes reserved for those positive acts of government that seek to make constitutional guarantees a reality for all people. From this perspective, examples of civil rights include the prohibitions of discrimination on the basis of race, sex, religious belief, or national origin set out in the Civil Rights Act of 1964.

Limited Government
Government in the United States is limited government. The Constitution is filled with examples of this fact. Chief among them are its many guarantees of personal freedom. Each one of those guarantees is either an outright prohibition or a restriction on the power of government to do something.

All governments have and use authority over individuals. The all-important difference between a democratic government and a dictatorial one lies in the extent of that authority. In a dictatorial regime, the government’s powers are practically unlimited. The government regularly suppresses dissent, often harshly. In the United States, however, governmental authority is strictly limited. As Justice Robert H. Jackson once put the point:

“...if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or any other matter of opinion or force citizens to confess by word or act their faith therein.”

—West Virginia Board of Education v. Barnette, 1943

Rights Are Relative, Not Absolute
The Constitution guarantees many different rights to everyone in the United States. Still, no one has the right to do anything he or she pleases. Rather, all persons have the right to do as they please as long as they do not infringe on the rights of others. That is, each person’s rights are relative to the rights of every other person.

To illustrate the point: Everyone in the United States has a right of free speech, but no one enjoys absolute freedom of speech. A person can be punished for using obscene language, or for using words in a way that causes another person to commit a crime—for example, to incite or to desert from the military. The Supreme Court dealt with this point in a recent case, Morse v. Frederick, 2007. There, a 5–4 majority held that public school officials in Alaska had acted properly when they disciplined a student who had displayed a sticker that could be read to advocate the use of drugs.

Justice Oliver Wendell Holmes put the relative nature of each person’s rights this way:
inland. Many suffered economic and other hardships. In 1944, the Supreme Court reluctantly upheld the forced evacuation as a reasonable wartime emergency measure. Still, the relocation was strongly criticized over the years. In 1988, the Federal Government admitted that the wartime relocation had been both unnecessary and unjust. Congress voted to pay $20,000 to each living internee. It also declared: “On behalf of the nation, the Congress apologizes.”

Today’s war on terrorism has created a political climate not unlike that of the early days of World War II. Did the treatment of Japanese Americans then teach us something for today? Will the rights of Muslims and others of Middle Eastern descent be respected by government as it fights terrorism here and abroad?

Federalism and Individual Rights

Federalism is a complicated governmental arrangement. It produces any number of problems—including a very complex pattern of guarantees of individual rights in the United States.

The Bill of Rights

Remember, the first ten amendments were originally intended as restrictions on the new National Government, not on the already existing States. And that remains the fact of the matter today.

To illustrate this important point: The 5th Amendment says that no person can be charged with “a capital, or otherwise infamous crime” except by a grand jury. As a part of the Bill of Rights, this provision applies only to the National Government. The States are free to use the grand jury to bring accusations of serious crime—or, if they prefer, they can use some other process for that purpose. In fact, the grand jury is a part of the criminal

justice system in only about half of the States today; see pages 577–578 and 704.

The Modifying Effect of the 14th Amendment

Again, the provisions of the Bill of Rights apply against the National Government, not against the States. This does not mean, however, that the States can deny basic rights to the people.

In part, the States cannot do so because each of their own constitutions contains a bill of rights. In addition, they cannot deny basic rights because of the 14th Amendment’s Due Process Clause. It says:

“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”

—United States Constitution

The Supreme Court has often said that the 14th Amendment’s Due Process Clause creates this. No State can deny to any person any right that is “basic or essential to the American concept of ordered liberty.”

But what specific rights are “basic or essential”? The Court has answered that question in a long series of cases in which it has held that most (but not all) of the protections in the Bill of Rights are also covered by the 14th Amendment’s Due Process Clause, and so apply against the States. In deciding those cases, the Court has engaged in what has come to be called the process of incorporation. It has incorporated—merged, combined—most of the guarantees in the Bill of Rights into the 14th Amendment’s Due Process Clause.

The Court began that historic process in Gitlow v. New York in 1925. That landmark case involved Benjamin Gitlow, a communist, who had been convicted in the State courts of criminal anarchy. He had made several speeches and published a pamphlet calling for the violent overthrow of government in this country.

On appeal, the Supreme Court upheld Gitlow’s conviction and the State law under which he had been tried. In deciding the case, however, the Court made this crucial point: Freedom of speech and press, which the 1st Amendment says can never be denied by the National Government, are also “among the fundamental personal rights and liberties protected by the Due Process Clause of the 14th Amendment from impairment by the States.”

Soon after Gitlow, the Court held each of the 1st Amendment’s guarantees to be covered by the 14th Amendment. It struck down State laws involving speech (Fiske v. Kansas, 1927; Stromberg v. California, 1911), the press (Near v. Minnesota, 1931), assembly and petition (De Jonge v. Oregon, 1937), and religion (Cantwell v. Connecticut, 1940). In each of those cases, the Court declared a State law unconstitutional as a violation of the 14th Amendment’s Due Process Clause.

In the 1960s, the Court extended the scope of the 14th Amendment’s Due Process Clause even
further. The key cases are set out in the table at left. Due Process now covers nearly all of the guarantees set out in the Bill of Rights. In effect, the Supreme Court has "nationalized" them by holding that the Constitution guarantees them against the States through the 14th Amendment. You will look at each of the guarantees until are involved here shortly—the 14th Amendment rights in this chapter and the others in Chapter 10.

### The 9th Amendment

As you know, the Constitution contains many guarantees of individual rights. However, nowhere in the Constitution—and, indeed, nowhere else—will you find a complete catalog of all of the rights held by the American people.

The little-noted 9th Amendment declares that there are rights beyond those set out in so many words in the Constitution.

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."—United States Constitution

Over the years, the Supreme Court has found that there are, in fact, a number of other rights "retained by the people." They include the guarantee that an accused person will not be tried on the basis of evidence unlawfully gained, and the right of a woman to have an abortion without undue interference by government.

### Freedom of Religion

In the early 1830s, a Frenchman, Alexis de Toqueville, came to this country to observe life in the young United States. He later wrote that he had searched for the greatness of America in many places; in its large harbors and its deep rivers, in its fertile fields and its boundless forests, in its rich mines and its vast world commerce, in its public schools and its institutions of higher learning, and in its democratic legislature and its matchless Constitution. Yet it was not until he went into the churches of America, that Toqueville said he came to understand the genius and the power of this country.

**Freedom of Expression**

A free society cannot exist without rights of free expression, without what has been called a "free trade in ideas." Freedom of expression is protected in the 1st Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."—United States Constitution

Additionally, as you know, the 14th Amendment's Due Process Clause protects these freedoms from the arbitrary acts of States or their local governments.

It is not surprising that the Bill of Rights provides first for the protection of religious liberty. Religion has always played a large and important role in American life. Many of the early colonies, and many later immigrants, came here to escape persecution for their religious beliefs.

The 1st and 4th amendments set out two guarantees of religious freedom. These guarantees prohibit (1) an "establishment of religion" (the Establishment Clause, and (2) any arbitrary interference by government in "the free exercise" of religion (the Free Exercise Clause).
The Supreme Court did not hear its first Establishment Clause case until 1947. A few earlier cases did involve government and religion, but none of them involved a direct consideration of the "wall of separation."

The most important of those earlier cases was Pierce v. Society of Sisters, 1925. There, the Court held that a religious school in Oregon could not be compelled to accept non-religious students.

In striking down the law, the Court did not address the Establishment Clause question. Instead, it found the law to be an unreasonable interference with the liberty of parents to direct the upbringing of their children—and so it conflicted with the Due Process Clause of the 14th Amendment.

Religion and Education

The High Court’s first direct ruling on the Establishment Clause came in Everson v. Board of Education, a 1947 case often called the New Jersey School Bus Case. There the Court upheld a New Jersey law that provided for public, tax-supported busing of students attending any school at the State, including parochial schools.

Critics had attacked the law as a support of religion. They maintained that it relieved parochial schools of the need to pay for busing and so freed their money for other, including religious, purposes. The Court disagreed; it found the law to be a safety measure intended to benefit children, no matter what schools they might attend. Since that decision, the largest number of the Court’s Establishment Clause cases have involved, in one way or another, religion and education.

Released Time

"Released time" programs allow public schools to release students during school hours to attend religious classes. In McCollum v. Board of Education, 1948, the Court struck down the released time program in Champaign, Illinois, because the program used public facilities for religious purposes.

In Zorach v. Clauson, 1952, however, the Court upheld New York City’s released time program. It did so because the New York program required that the religious classes be held in private places, for example, in private homes.

Prayers and the Bible

The Court has now decided seven major cases involving the recitation of prayers and the reading of the Bible in public schools. In Engel v. Vitale, 1962, the Court outlawed the use, even on a voluntary basis, of a prayer written by the New York State Board of Regents. The prayer read:

"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country."

—Brevard prayer

In striking down the prayer, the Supreme Court held that:

"[T]he constitutional prohibition against laws respecting an establishment of religion must at least mean that, in this country, it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the government."

—James Hugo L. Black, Justice of the Court

The High Court extended that holding in two 1963 cases. In Abington School District v. Schempp, it struck down a Pennsylvania law requiring that each school day begin with readings from the Bible and a recitation of the Lord’s Prayer. In Murray v. Curlett, the Court. The Court found violations of “the command of the First Amendment that the government maintain strict neutrality, neither aiding nor opposing religion.”

Since then, the Supreme Court has found unconstitutional:

- a Kentucky law that ordered the posting of the Ten Commandments in all public school classrooms, Stone v. Graham, 1980;
- Alabama’s “moment of silence” law, Wallace v. Jaffree, 1985, which provided for a one-minute period of silence for “meditation or voluntary prayer” at the beginning of each school day;
- the offering of prayer as part of a public school graduation ceremony, in a “Rhode Island case, Lee v. Weisman, 1992;

To sum up these rulings, the Court has held that public schools cannot sponsor religious exercises. It has not held that individuals cannot pray when and as they choose in schools or in any other place. Nor has it held that students cannot study the Bible in a literary or historical context in the schools.

These rulings have stirred strong criticism. Many individuals and groups have long proposed that the Constitution be amended to allow voluntary prayer in the public schools. Despite these decisions, both organized prayer and Bible readings are found in a great many public school classrooms today.

Student Religious Groups

The Equal Access Act of 1984 declares that any public high school that receives federal funds (nearly all do) must allow student religious groups to meet in the school on the same terms that it sets for other student organizations.

The Supreme Court has found the law does not violate the Establishment Clause in a case from Nebraska, Westside Community School District v. Mergens, 1990. There, several students had tried to form a Christian club at Omaha’s Westside High School. The students had to fight the school board in the federal courts in order to win their point.

The High Court has recently gone much further than it did in Mergens—in a case from New York, Good News Club v. Milford Central School, 2001. There, a school board had refused to allow a group of grade-school students to meet, after school, to sing, pray, memorize scriptures, and hear Bible lessons. The school board based its action on the Establishment Clause. The Court, however, held that the board had violated Good News Club members’ 1st and 14th amendments rights to free speech.

Evolution

In Everson v. Arkansas, 1968, the Court struck down a State law forbidding the teaching of the
scientific theory of evolution. The Court held that the Constitution allows the preference of a religious doctrine or the prohibition of a theory which is deemed antithetical to a particular dogma. . . . The State has no legitimate interest in protecting any or all religions from views distasteful to them."

Justice Abe Fortas, Opinion of the Court

The Court found a similar law to be unconstitutional in 1978. In Edwards v. Aguillard, it voided a 1981 Louisiana law that provided that whenever teachers taught the theory of evolution, they also had to offer instruction in "creation science."

Aid to Parochial Schools

Most recent Establishment Clause cases have centered on this highly controversial question: What forms of State aid to parochial schools are constitutional? Several States give help to private schools, including schools run by church organizations, for transportation, textbooks, laboratory equipment, standardized testing, and much else. Those who support this kind of aid argue that parochial schools enroll large numbers of students who would otherwise have to be educated at public expense. They also point out that the Supreme Court has held that parents have a legal right to send their children to those schools (Pierce v. Society of Sisters). The State has no legitimate interest in protecting any or all religions from views distasteful to them."}

The Lemon Test

The Supreme Court has been picking its way through cases involving State aid to parochial schools for several years. In most of these cases, the Court has applied a three-pronged standard, the Lemon test: (1) The purpose of the aid must be clearly secular, not religious (2) its primary effect must neither advance nor inhibit religion and (3) it must avoid an "excessive entanglement of government with religion."

The test stems from Lemon v. Kurtzman, 1971. There, the Supreme Court held that the Establishment Clause is designed to prevent three main evils: "sponsorship, financial support, and active involvement of the sovereign in religious activity." In Lemon, the Court struck down a Pennsylvania law that provided for reimbursements (financial payments) to private schools to cover their costs for teachers' salaries, textbooks, and other teaching materials in non-religious courses.

The Court held that the State program was of direct benefit to the parochial schools, and so to the churches sponsoring them. It also found that the Pennsylvania program required such close State supervision that it produced an excessive entanglement of government with religion.

On the other hand, a number of State aid programs have passed the Lemon test over the past 30 years. Thus, the Court has held that a State can give aid to private schools if it knows what it costs them to administer the State's standardized tests, Committee for Public Education and Religious Liberty v. Regan, 1980. Public funds cannot be used to pay any part of the salaries of parochial school teachers, however, including those who teach only secular courses. In Grand Rapids School District v. Ball, 1985, the Court said that the way a teacher presents a course cannot easily be checked.

In Bowen v. Kentucky, 1988, the Court upheld a controversial federal statute, the Adolescent Family Life Act of 1981. That law provides for grants to both public and private agencies dealing with the problems of adolescent sex and pregnancy. Some of the grants were made to religious groups that oppose abortion, prompting the argument that those groups use federal money to teach religious doctrine.

The Supreme Court found the law's purpose—"the social and economic problems caused by teenage sexuality, pregnancy, and parenthood"—to be a legitimate one. Even though some grants pay for counseling that "happens to coincide with the religious views" of some groups, this does not by itself mean that the federal funds are being used with "a primary effect of advancing religion," according to the Court.

Additional Lemon Test Cases

In a 1993 Arizona case, Zobel v. Catalina Footpath School District, the Court said that the use of public money to provide an interpreter for a deaf student who attends a Catholic high school does not violate the Establishment Clause. The Constitution, said the Court, does not lay down an absolute barrier to placing a public employee in a religious school.

In another recent case, from Louisiana, Mitchell v. Helms, 2000, the Supreme Court upheld a federal law under which some material and equipment, including computer hardware and software, are loaned to public and private schools. Two facts were key to the Court's ruling: that those items (1) are loaned, not given to parochial schools, and (2) can be used only in "secular, neutral, and nonideological" programs.

In 1971, the Court struck down a New York law that reimbursed parents for the tuition they paid to religious schools. Committee for Public Education and Religious Liberty v. Nyquist. But in Mueller v. Allen, 1983, the Court upheld a Minnesota tax law that really accomplishes the same end.

The Minnesota law gives parents a State income tax deduction for the costs of tuition, textbooks, and transportation. Most public school parents pay little or nothing for those items, so the law is of particular benefit to parents with children in private, mostly parochial, schools. The Court found that the law meets the Lemon test, and it relied on this point: The tax deduction is available to all parents with children in school, and they are free to decide which type of school their children attend.

The High Court went much further in Zobrest v.Serialization-Harris. In 2002, there, it upheld Ohio's experimental "school choice" plan. Under that plan, parents in Cleveland can receive vouchers (grants for tuition payment) from the State and use them to send their children to private schools. Nearly all families who take the vouchers send their children to parochial schools. The Court found, 5–4, that the Ohio program is not intended to promote religion but, rather, to help children from low-income families.

Other Establishment Clause Cases

Most church-state controversies have involved public education. Some Establishment Clause cases have arisen elsewhere, however.

Seasonal Displays

Many public organizations sponsor celebrations of the holiday season with street decorations, programs in public schools, and the like. Can these publicly sponsored observances properly include expressions of religious belief?

In Lynch v. Donnelly, 1984, the Court held that the city of Pgh, Pennsylvania, could include the Christian nativity scene in its holiday display, which also featured nonreligious objects such as candy canes and Santa's sleigh and reindeer. That ruling, however, left open this question: What about a public display made up only of a religious symbol?
The Court faced that question in 1989. In County of Allegheny v. ACLU, it held that the county’s seasonal display “endorsed Christian doctrine,” and so violated the 1st and 16th amendments. The country had placed a large display celebrating the birth of Jesus on the grand staircase in the county courthouse, with a banner declaring “Glory to God in the Highest.”

At the same time, the Court upheld another holiday display in Pittsburgh v. ACLU. The city’s display consisted of a large Christmas tree, an 18-foot menorah, and a sign declaring the city’s dedication to freedom.

Chaplains

Daily sessions of the houses of Congress and most of the state legislatures begin with prayer. In Congress, and in many States, a chaplain paid with public funds offers the opening prayer. The Supreme Court has ruled that this practice, unlike prayers in the public schools, is constitutionally permissible. The ruling was made in a case involving Nebraska’s one-house legislature, Marsh v. Alabama, 1883.

The Court rested its distinction between school prayers and legislative prayers on two points. First, prayers have been offered in the nation’s legislative bodies “from colonial times through the founding of the Republic and ever since.” Second, legislators, unlike schoolchildren, are not “susceptible to religious indoctrination or peer pressure.”

The Ten Commandments

Public displays of the Ten Commandments have sparked controversy in several places in recent years. As you know, the High Court decided in its first case on the matter, Stone v. Graham, in 1980. It ruled on two other similar cases in 2005.

In Van Orden v. Perry, the Court held that the Ten Commandments monument located on the grounds of the Texas State Capitol in Austin does not violate the 1st and 14th Amendments. The Court’s 5-4 majority found that the monument (1) was erected in 1961 as part of a private group’s campaign against juvenile delinquency, (2) is set among 37 other historical and cultural markers, and (3) had gone unchallenged for 40 years. In short, the Court found the monument’s overall message to be secular rather than religious and therefore acceptable.

In McCurry County v. ACLU of Kentucky, a differently divided 5-4 majority ruled that the display of the Ten Commandments in Kentucky county courthouses was unacceptable. They were, said the Court, an impermissible endorsement of religion by government. Framed copies of the Commandments were first posted in county courthouses in 1991. Copies of other nonreligious documents, including the Bill of Rights, were added to the display some years later, but only after the original displays’ content had been challenged. The Supreme Court found that the original displays had a clear religious purpose. The later additions were merely “a sham,” an attempt to mask that unconstitutional religious purpose.

The Free Exercise Clause

The second part of the constitutional guarantee of religious freedom is set out in the Constitution’s Free Exercise Clause, which guarantees to each person the right to believe whatever he or she chooses to believe in matters of religion. No law and no other action by any government can violate that absolute constitutional right. It is protected by both the 1st and the 14th amendments.

No person has an absolute right to act as he or she chooses, however. The Free Exercise Clause does not give anyone the right to violate criminal laws, harm property, or otherwise threaten the safety of the community.

The Supreme Court laid down the basic framework of the Free Exercise Clause in the first case it heard on the issue, Reynolds v. United States, 1879. Reynolds, a Mormon, had two wives. That practice, polygamy, was allowed by his church, but it was prohibited by federal law in any territory of the United States.

Reynolds was convicted under the law. On appeal, he argued that the law violated his right to the free exercise of his religious beliefs. The Supreme Court disagreed. It held that the 1st Amendment does not forbid Congress the power to punish those actions that are “violation of social duties or subversion of good order.”

Limits on Free Exercise

Over the years, the Court has approved many regulations of human conduct in the face of free exercise challenges. For example, it has upheld laws that require the vaccination of schoolchildren, Jacobson v. Massachusetts, 1905; laws that forbid the use of poisonous snakes in religious rites, Brun v. North Carolina, 1949; and laws that require businesses to be closed on Sundays (“blue laws”), McGowan v. Maryland, 1961.

A State can require religious groups to have a permit to hold a parade on the public streets, Cox v. New Hampshire, 1941; and organizations that enlist children to sell religious literature must obey child labor laws, Prince v. Massachusetts, 1944. The Federal Government can draft those who have religious objections to military service,Welsh v. United States, 1975.

The Court has also held that the Air Force can deny an Orthodox Jew the right to wear his yarmulke (skull cap) while on active duty, Goldstein v. Weinberger, 1986. The U.S. Forest Service can allow private companies to build roads and cut timber in national forests that Native Americans have traditionally used for religious purposes, Lyng v. Northwest Indian Cemetery Protective Association, 1988.

In 1990, the Court upheld a State’s denial of unemployment benefits to a man who had been fired by a private drug counseling group because he had smoked pot in violation of that State’s drug laws—even though the man had done so as part of a ceremony conducted by his Native American Church, Oregon v. Smith. However, Congress reacted to that decision by passing the Religious Freedom Restoration Act of 1993. In effect, that law permits the use of peyote and other controlled substances when that use occurs as part of a legitimate religious ceremony.

Most recently, the High Court has said that a State that provides financial aid to students who attend its public colleges and universities does not have to make that help available to those students who are studying to become ministers, Locke v. Davey, 2004.

Free Exercise Upheld

Over time, however, the Court has also found many actions by governments to be incompati-

The Court did so for the first time in one of the landmark Due Process cases cited earlier in this chapter, Cantwell v. Connecticut, 1940. In that case, the Court struck down a law requiring a person to obtain a license before soliciting money for a religious cause. The Court reaffirmed that holding in an Ohio case, Watchtower Bible and Tract Society v. Village of Stratton, 2002.
The Supreme Court has decided a number of cases in a similar way. Thus, Amish children cannot be forced to attend school beyond the 8th grade, because that 20th-century Amish "self-sufficient agrarian lifestyle is threatened by modern education." Wisconsin v. Yoder, 1972. On the other hand, the Amish, who provide support for their own people, must pay Social Security taxes, as all other employees do. United States v. Leis, 1982.


The Court has often held that "only those beliefs rooted in religion are protected by the Free Exercise Clause." Sherbert v. Verner, 1963. This leaves open the perplexing question of what beliefs are "rooted in religion"? Clearly, religions that seem strange or even bizarre to most Americans are entitled to constitutional protection as are the more traditional ones. For example, in Laderman v. Atlanta, City of Hialeah, 1993, the High Court struck down a Florida city's ordinance that outlawed animal sacrifice as part of any church services.

The Jehovah's Witnesses have carried several important religious freedom cases to the Supreme Court. Perhaps the stormiest controversy resulting from these cases arose out of the Witnesses' refusal to salute the flag.

The Witnesses refuse to salute the flag because they see such conduct as a violation of the Bible's commandment against idolatry. In Manville Paper Company v. Gobitis, 1949, the Court upheld a Pennsylvania school board regulation requiring students to salute the flag at the beginning of each school day. Walter Gobitis instructed his children not to do so, and the school expelled them. He went to court, basing his case on the constitutional guarantee.

Gobitis finally lost in the Supreme Court, which declared that the board's rule was not an infringement of religious liberty. Rather, the Court held that the rule was a lawful attempt to promote patriotism and national unity.

Three years later, the Court reversed its decision. In West Virginia Board of Education v. Barnette, 1943, it held that the compulsory flag-salute law unconstitutional. Justice Robert H. Jackson's words on page 533 are from the Court's unanimous opinion in that case. So these:

"We believe that patriotism will not flourish if patriotic ceremonies and observances are voluntary and spontaneous, instead of a compulsory routine, in order to make an unflattering estimate of the appeal of our institutions to free minds." —Opinion of the Court

The 1st Amendment guarantees religious freedom has been a binding force in this country for more than two centuries. It is a key element of the boldest political experiment the world has ever known. Today, however, there are disturbing signs in the United States that religious liberty—the freedom to believe or not to believe and to practice one's faith openly and freely without government interference—is in danger. People undermining religious liberty include both those who seek to establish in law a "Christian America" and those who seek to exclude religion from public life entirely.

...Religion has become a source of divisiveness as people and societies resort to violence over issues of conscience and belief like abortion, school prayer, and public school curricula... The situation is made more complicated by the fact that the religious composition of the United States is becoming more diverse than ever. Along with many groups of Christians and Jews, this country is now home to growing numbers of Muslims, Hindus, Buddhists, and other believers... Religious diversity was made possible by the 1st Amendment. Now, ironically, religious diversity makes the 1st Amendment more necessary and urgent than at any time in our history... As [scholar] Charles Haynes notes: "...An American is not defined by race or ethnicity, but by a commitment to the democratic first principles in our framing documents. Because of our exploding religious diversity, there is an urgent need for all citizens to rethink our shared commitment to the guiding principles of religious liberty. These principles of the 1st Amendment provide a civic framework for living with our deepest differences..." Religious freedom is at the heart of this country's experiment with democracy. The continuing controversies are proof of continued passion for liberty of conscience, even as debates rage about whether religion receives sufficient attention from the media, educators, and the government. Disputes involving religious liberty reflect America's ambivalence about the limits of individual liberty. At present, the country's internationally recognized commitment to tolerance of all cultures and faiths is being tested and torn. The question to be answered is whether we can sustain this commitment into the next century.

Section 2: Assessment
Key Terms and Main Ideas
1. Explain the Establishment Clause. Give an example of an Establishment Clause issue that does not involve education.
2. Why don't school or parochial schools often pose a constitutional problem?
3. What is the Lemon test?
4. Explain the Free Exercise Clause. Give an example of a Supreme Court ruling that limits free exercise of religion.

Critical Thinking
5. Predicting Consequences: How do you think the guarantees of religious freedom ratified in 1789 affected the growth and development of the United States? Is it possible that the guarantees were effective in serving the purpose of their framers?

Go Online
For: An activity on political philosophers
Web Code: rps-3582

Progress Monitoring Online
For: Self Quiz with vocabulary practice
Web Code: rps-3582

Analyzing Primary Sources
1. What defines an American, according to this report?
2. Describe recent changes in the nation's religious makeup identified in this report.
3. What benefits do the authors see in disputes that involve "issues of conscience"? What potential dangers do they see in such disputes?
Freedom of Speech and Press

Section Preview

Objectives

1. Explain the importance of the two basic purposes of the guarantees of free expression.

2. Summarize how the Supreme Court has limited seditionary speech and obscenity.

3. Analyze the issues of prior restraint and press confidentiality, and describe the limits the Court has placed on the media.

4. Define symbolic and commercial speech; describe the limits on their exercise.

Why It Matters

The freedom to express ideas freely and to hear the ideas of others is fundamental to American democracy. However, some limitations on freedom of expression have been upheld by the Supreme Court. These include restrictions on certain kinds of speech, such as sedition and obscenity, and on speech in certain circumstances, such as when broadcast over the public airwaves.

Political Dictionary

- libel
- slander
- sedition
- seditionary speech
- prior restraint
- shield law
- symbolic speech
- picketing

Think about this child's verse for a moment: “Sticks and stones may break my bones, but names will never hurt me.” That rhyme says, in effect, that acts and words are separate things, and that acts can harm but words cannot.

Is that really true? Certainly not. You know that words can and do have consequences, sometimes powerful consequences. Words, spoken or written, can make you happy, sad, bored, informed, or entertained. They can also expose you to danger, deny you a job, or lead to other serious consequences.

Free Expression

The guarantees of free speech and press in the 1st and 14th amendments serve two fundamentally important purposes:

1. To guarantee to each person a right of free expression, to the spoken and the written word, and by all other means of communication, as well as and

2. To guarantee to all persons a full, wide-ranging discussion of public affairs.

That is, the 1st and 14th amendments give to all people the right to have their say and the right to hear what others have to say.

The American system of government depends on the ability of the people to make sound, reasoned judgments on matters of public concern. Clearly, people can best make such judgments when they know all the facts and can hear all the available interpretations of those facts.

As you examine the Constitution's 1st and 14th amendments here, keep two other key points in mind: First, the guarantees of free speech and press are intended to protect the expression of unpopular views. Clearly, the opinions of the majority need little or no constitutional protection. These guarantees serve to ensure, as Justice Oliver Wendell Holmes put it, “freedom for the thought that we hate.” (Dissenting Opinion, Schenck v. United States, 1919).

Second, some forms of expression are not protected by the Constitution. No person has an unbridled right of free speech or free press. Many reasonable restrictions can be placed on those rights. Think about Justice Holmes's comment about restricting the right to shout “Fire!” in a crowded theater. Or consider this restriction: No person has the right to libel or slander another. Libel is the false and malicious use of printed words; slander is the false and malicious use of spoken words.

Similarly, the law prohibits the use of obscene words, the printing and distributing of obscene materials, and false advertising. It also condemns the use of words to prompt others to commit a crime—for example, to riot or to attempt to overthrow the government by force.

Seditious Speech

Sedition is the crime of attempting to overthrow the government by force or to disrupt its lawful activities by violent acts. Seditious speech is the advocating, or urging, of such conduct. It is not protected by the 1st Amendment.

The Alien and Sedition Acts

Congress first acted to curb opposition to government in the Alien and Sedition Acts of 1798. Those acts gave the President the power to deport undesirable aliens and made “any false, scandalous, and malicious” criticism of the government a crime. These laws were meant to silence the opponents of President John Adams and the Federalists.

The Alien and Sedition Acts were undoubtedly unconstitutional, but that point was never tested in the courts. Some 25 persons were arrested for violating them; of those, ten were convicted. The Alien and Sedition Acts expired before Thomas Jefferson became President in 1801, and he soon pardoned those who had run afoul of them.

The Sedition Act of 1917

Congress passed another sedition law during World War I as part of the Espionage Act of 1917. That law made it a crime to encourage disloyalty, interfere with the draft, obstruct recruiting, incite insubordination in the armed forces, or hinder the sale of government bonds.

The act also made it a crime to “willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States.”

More than 2,000 persons were convicted for violating the Espionage Act. The constitutionality of the law was upheld several times, most importantly in Schenck v. United States, 1919. Charles Schenck, an officer of the Socialist Party, had been found guilty of obstructing the war effort. He had sent fiery leaflets to some 13,000 men who had been drafted, urging them to resist the call to military service.

The Supreme Court upheld Schenck's conviction. The case is particularly noteworthy because the Court's opinion, written by Justice Oliver Wendell Holmes, established the "clear and present danger" rule.

Words can be weapons... The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

—Opinion of the Court
In short, the rule says that words can be outlawed. Those who utter them can be punished when the words they use trigger an immediate danger that criminal acts will follow.

The Smith Act of 1940

Congress passed the Smith Act in 1940, just over a year before the United States entered World War II. The law is still on the books. It makes it a crime for anyone to advocate the violent overthrow of the government of the United States, to distribute any material that teaches or advises violent overthrow, or to knowingly belong to any group with such an aim.

The Court upheld the Smith Act in Dennis v. United States, in 1951. Eleven Communist Party leaders had been convicted of advocating the overthrow of the Federal Government. On appeal, they argued that the law violated the 1st Amendment's guarantee of freedom of speech and press. They also claimed that no act of theirs constituted a clear and present danger to the country. The Court disagreed, and modified Justice Holmes' doctrine on the question: "An attempt to overthrow the government by force, even though doomed from the start because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent."

—Chief Justice Fred M. Vinson, Opinion of the Court

Later, however, the Court modified that holding in several cases. In Yates v. United States, 1957, for example, the Court overturned the Smith Act convictions of several Communist Party leaders. It held that merely to urge someone to believe something, in contrast to urging that person to do something, cannot be made illegal. In Yates and other Smith Act cases, the Court upheld the constitutionality of the law, but interpreted its provisions so that their enforcement became practically impossible.

Obscenity

The 1st and 14th amendments do not protect obscenity, but in recent years the Court has had to wrestle with these questions: What language and images in printed matter, films, and other materials are, in fact, obscene? What restrictions can be properly placed on such materials?

Congress passed the first of a series of laws to prevent the mailing of obscene matter in 1873. The current law upheld by the Court in Roth v. United States, 1957, excludes "every obscene, lewd, lascivious, or filthy" piece of material from the mails. The Court found the law a proper exercise of the postal power (Article I, Section 8, Clause 7), and so not prohibited by the 1st Amendment. Roth marked the Court's first attempt to define obscenity.

Today, the leading case is Miller v. California, 1973. There, the Court laid down a three-part test to determine what material is obscene and what is not.

A book, film, recording, or other piece of material is legally obscene if (1) "the average person applying contemporary [local] community standards" finds that the work, taken as a whole, "appeals to the prurient interest"—that is, tends to excite lust; (2) "the work depicts or describes, in a patently offensive way, a sexual activity or a sexual perversion"; and (3) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

A sampling of Supreme Court decisions involving the law illustrates how varied were the so-called adult book stores and similar places shows how blurry the problem can be. Most of what those stores sell cannot be mailed, sent across State lines, or imported—at least not legally. Still, those shops are usually well-stocked.

The 1st and 14th amendments do not prevent a city from regulating the location of "adult entertainment establishments," said the Court in Young v. American Mini Theaters, 1976. In City of Renton v. Playtime Theatres, Inc., 1986, the Court ruled that a city could decide to bar the location of such places within 1,000 feet of a residential zone, church, park, or school. But a city cannot prohibit live entertainment in any and all commercial establishments, according to Schad v. Borough of Mount Ephraim, 1981 (a case that involved nude dancing in adult book stores).

In City of Erie v. Pap's A.M., 2000, the Court upheld the power of cities to ban taverns, bars, and similar places that feature nude dancing. It found Erie's city ordinance constitutional because that law is not aimed at limiting free expression; instead, it limits the means of expression—that is, nude (as distinguished from other forms of dancing).

In the most recent case in this area of the law, the High Court upheld a federal statute concerned with public libraries and the Internet. That law, the Children's Internet Protection Act, says that those public libraries that receive federal money—nearly all of them do—must use filters to block their computers' access to pornographic sites on the Internet, United States v. American Library Association, 2003.

Prior Restraint

The Constitution allows government to punish some utterances after they are made. But, with almost no exceptions, government cannot place any prior restraint on spoken or written words. Except in the most extreme situations, government cannot curb ideas before they are expressed.

Near v. Minnesota, 1931, is a leading case in point. The Supreme Court struck down a State law that prohibited the publication of any "malicious, scandalous, and defamatory" periodical. Acting under that law, a local court had issued an order forbidding the publication of the Saturday Press. That Minneapolis paper had printed several articles charging public corruption and attacking "graffiti" and "street gangsters."

The Court held that the guarantee of a free press does not allow a prior restraint on publication, except in such extreme cases as wartime, or when a publication is obscene or incites its readers to violence. The Court said that even "indefensible" proposals of scandal, and anti-Semitism enjoy this constitutional protection.

The Constitution does not forbid any and all forms of prior censorship, but "a prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutionality," Nebenka Press Association v. Stuart, 1971. The Court has used that general rule several times—for example, in the famous Pentagon Papers Case, New York Times v. United States, 1971.

In that case, several newspapers had obtained copies of a set of classified documents, widely known as the Pentagon Papers. Officially titled History of U.S. Decision-Making Process on Viet Nam Policy, these documents had been stolen from the Defense Department and then leaked to the press.

To this case a judge had held that the media was not to report certain details of a matter that the Court held the judge was in error, and the case was overturned.
The Media
The First Amendment stands as a monument to the central importance of the media in a free society. That raises this question: To what extent can the media—both print and electronic—be regulated by government? Confidentiality Can news reporters be forced to testify before a grand jury in court, or before a legislative committee? Can these government bodies require journalists to name their sources and reveal other confidential information? Many reporters and news organizations insist that they must have the right to refuse to testify, the right to protect their sources. They argue that without this right, they cannot assure confidentiality, and therefore many sources will not reveal information needed to keep the public informed.

Both state and federal courts have generally rejected the media argument. In recent years, several reporters have refused to obey court orders directing them to give information, and they have gone to jail, thus testifying to the importance of these issues.

In the leading case, Branzburg v. Hayes, 1972, the Supreme Court held that reporters “like other citizens, must respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.” If the media are to receive any special exemptions, said the Court, they must come from Congress and the state legislatures.

To date, Congress has not acted on the Court’s suggestion, but some 30 states have passed so-called shield laws. These laws give reporters some protection against having to disclose their sources or reveal other confidential information in legal proceedings in those states.

Motion Pictures
The Supreme Court took its first look at motion pictures early in the history of the movie industry. In 1915, in Mutual Film Corporation v. Ohio, the Court upheld a state law that banned the showing of any film that was not of a “moral, educational, or harmless and amusing character.” The Court declared that “the exhibition of moving pictures is a business, pure and simple,” and “not . . . part of the press of the country.” With that decision, nearly every state and thousands of communities set up movie review (really movie censorship) programs. The Court reversed itself in 1952, however. In Burstyn v. Wilson, a New York censorship case, it found that “liberty of expression by means of motion pictures is guaranteed by the 1st and 14th amendments.”

Very few local movie review boards still exist. Most movie-goers now depend on the film industry’s own rating system and on the comments of movie critics.

Radio and Television
Both radio and television broadcasting are subject to extensive federal regulation. Most of this regulation is based on the 1934 Federal Communications Act, which is administered by the Federal Communications Commission. As the Supreme Court noted in Red Lion Broadcasting Co. v. FCC, 1969:

“Of all forms of communication, it is broadcasting that has received the most limited 1st Amendment protection.”

The Court has several times upheld this wide-ranging federal regulation as a proper exercise of the commerce power. Unlike newspapers and other print media, radio and television use the public’s property—the public airwaves—to distribute their materials. They have no right to do so without the public’s permission in the form of a proper license, said the Court in National Broadcasting Co. v. United States, 1943.

The Court has regularly rejected the argument that the 1st Amendment prohibits such regulations. Instead, it has said that regulation of this industry actually implements the constitutional guarantee. In Red Lion Broadcasting Co. v. FCC, 1969, the Court held that there is no “unbridgeable 1st Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.” However, “this is not to say that the 1st Amendment is irrelevant to broadcasting. But . . . it is the right of the viewers and the listeners, not the right of the broadcasters, which is paramount.”

Congress has forbidden the FCC to censor the content of programs before they are broadcast. However, the FCC can prohibit the use of indecent language, and it can take violations of this ban into account when a station applies for the renewal of its operating license, according to FCC v. Pacifica Foundation, 1978.

In several recent decisions, the Supreme Court has given the growing cable television industry broader 1st Amendment freedoms than those enjoyed by traditional television:

United States v. Playboy Entertainment Group, 2001, is fairly typical. There, the Court struck down an attempt by Congress to force many cable systems to limit sexually explicit channels to late-night hours. The Court agreed that shielding children from such programming is a worthy goal, nevertheless, it found the 1996 law to be a violation of the 1st Amendment.

Symbolic Speech
People also communicate ideas by conduct, by the way they do a particular thing. Thus, a person can “say” something with a facial expression or a shrug of the shoulders, or by carrying a sign or wearing an armband. This expression by conduct is known as symbolic speech. Clearly, not all conduct amounts to symbolic speech. If it did, murder or robbery or any other crime could be excused on grounds that the person who committed the act meant to say something by doing so.

Just as clearly, however, some conduct does express opinion. Take picketing in a labor dispute as an example. Picketing involves parading of a business site by workers who are on strike. By their conduct, picketers attempt to inform the public of the controversy, and to persuade others not to deal with the firm involved. Picketing is, then, a form of expression. If peaceful, it is protected by the 1st and 14th amendments.

The leading case on the point is Thornhill v. Alabama, 1940. There, the Court struck down a State law that made it a crime to loiter about or to picket a place of business in order to influence others not to trade or work there. Picketing that is “set in a background of violence,” however, can be prevented. Even peaceful picketing can be restricted if it is conducted for an illegal purpose, such as forcing someone to do something that is itself illegal.
Other Symbolic Speech Cases

The Supreme Court has been sympathetic to the symbolic speech argument, but it has not given blanket 1st Amendment protection to that means of expression. As a sampling, note these cases:

United States v. O’Brien, 1968, involved four young men who had burned their draft cards to protest the war in Vietnam. A court convicted them of violating a federal law that makes that act a crime. O’Brien appealed, arguing that the 1st Amendment protects “all modes of communication of ideas by conduct.” The Supreme Court disagreed. Said the Court: “We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”

The Court also held that acts of dissent by conduct can be punished if: (1) the object of the protest (here, the war and the draft) is within the constitutional powers of the government; (2) whatever restriction is placed on expression is no greater than necessary in the circumstances; and (3) the government’s real interest in the matter is not to squelch dissent.

Using that three-part test, the Court has sometimes denied claims of symbolic speech. Thus, in Virginia v. Black, 2003, it upheld a State law that prohibits the burning of a cross as a form of intimidation—a threat that can make a person fear for his or her safety. But the Court also made this point: Those who burn crosses at rallies or parades as acts of political expression (acts not aimed at a particular person) cannot be prosecuted under the law.

Tinker v. Des Moines School District, 1969, on the other hand, is one of several cases in which the Court has come down on the side of symbolic speech. A small group of students in the Des Moines public schools had worn black arm- bands to publicize their opposition to the war in Vietnam. The school suspended them for it.

The Court ruled that school officials had overstepped their authority and violated the Constitution. Said the Court: “It can hardly be argued that other students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

In Buckley v. Valeo, 1976, the Court found that campaign contributions are “a symbolic expression of support” for candidates, and therefore the making of those contributions is entitled to constitutional protection. Both federal and State laws regulate campaign contributions, but the fact that in politics “money is speech” greatly complicates the whole matter of campaign finance regulation (see Chapter 7).

FLag Burning

Burning the American flag as an act of political protest is expressive conduct protected by the 1st and 14th amendments—so a sharply divided Court has twice held. In Tinker v. Johnson, 1989, a 5-4 majority ruled that State authorities had violated a protestor’s rights by prosecuting him under a law that forbids the “desecration of a venerated object.” Johnson had set fire to an American flag during an anti-Reagan demonstration at the Republican National Convention in Dallas in 1984. Said the Court:

If there is a bedrock principle underlying the 1st Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive. . . . We do not comport the flag by punishing its desecration, for in doing so we abridge the freedom that this cherished symbol represents."

—Justice William J. Brennan Jr.

The Court’s decision in Johnson set off a flood of criticism around the country and prompted Congress to pass the Flag Protection Act of 1989. It, too, was struck down by the Court, 5 to 4, in United States v. Eichman, 1990.

The Court based its decision on the same grounds as those set out a year earlier in Johnson.

Commercial Speech

Commercial speech is speech for business purposes—the term refers most often to advertising. Until the mid-1970s, it was thought that the 1st and 14th amendments did not protect such speech. In Riggle v. Virginia, 1973, however, the Supreme Court held unconstitutional a State law that prohibited the newspaper advertising of abortion services. The following year, in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, it struck down another Virginia law forbidding the advertisement of prescription drug prices.

Not all commercial speech is protected, however. Thus, government can and does prohibit false and misleading advertising, and the advertising of illegal goods or services.

In fact, government can even forbid advertising that is neither false nor misleading. Thus, in 1975, Congress banned cigarette ads on radio and television. In 1986, it extended the ban to include chewing tobacco and snuff.

In most of its commercial speech cases, the Court has struck down arbitrary restrictions on advertising. Thus, in 44 Liquormart, Inc. v. Rhode Island, 1996, the Court voided a State law that prohibited ads in which liquor prices were listed. In Greater New Orleans Broadcasting Ass’n v. United States, 1999, it struck down a federal law that prohibited casino advertising on radio or television.

Most recently, the Court dealt with limits on smokeless tobacco and cigar advertising. Massachusetts had barred outdoor ads for these commodities within 1000 feet of any school or playground. The Court held that a violation of the 1st and 14th amendments’ guarantee of free speech, P. Lorillard Co. v. Reilly, 2001.

One of the Court’s first commercial speech cases had an interesting twist. In Woosley v. Maynard, 1977, the Court held that a State cannot force its citizens to act as “mobile billboards.” At least, a State cannot do so when the words used conflict with its citizens’ religious or moral beliefs. The Maynards, who were Jehovah’s Witnesses, objected to the New Hampshire State motto on their automobile license plates. The words Live Free or Die clashed with their belief in everlasting life, and so they covered those words with tape. For this, Maynard was arrested three times. On appeal, the Supreme Court sided with Maynard.

Section 19-3: Assessment

Key Terms and Main Ideas

1. Compare Rid with slander.
2. Why does the government restrict seditious speech?
3. (a) Define prior restraint. (b) How has the Supreme Court usually dealt with prior restraint cases?
4. In what way is picketing symbolic speech?
5. Identifying Critical Issues: Do you think journalists should have the right to protect their sources? Describe any situation in which this right would benefit the public and one instance where it might be harmful.
6. Identifying Central Issues: The Constitution makes a general effort to protect the expression of unpopular views.

Progress Monitoring Online

For: Test quiz with vocabulary practice
Web Code: msp-5515

Go Online

For: An activity on freedom of speech and press
Web Code: mol-5153

Civil Liberties: First Amendment Freedoms
Face the Issues

The Patriot Act

Background: Just 48 days after the terrorist attacks of 9/11, Congress passed and the President signed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism—the USA Patriot Act. That 342-page statute was reauthorized, with some modifications, in 2006. The law greatly broadened the powers of the government to combat domestic and international terrorism. Its major features deal with three subject areas: surveillance (the observation of persons and their communications, immigration, and money laundering). Several provisions raise significant civil liberties issues that, over time, will be tested in court.

Security Is the Priority

One lesson of 9/11 is that Americans must be wary of terrorists within our borders. The Patriot Act gives law enforcement agencies the tools they need to root out a sophisticated, mobile enemy. The Justice Department has often said that the Act has been vital in a number of successful operations to protect Americans from the deadly plots of terrorists.

Among many other things, the Act permits "snooping winetaps." Formerly, winetaps were allowed only on particular telephones—that is, on certain numbers known to be used by criminals. Today, many people use multiple phones, even disposable ones. Roving wiretaps authorize surveillance of all phones used by a particular person, wherever he or she might be.

Regal spying and harassment of antiwar and civil rights protesters by the FBI and the CIA in the 1960s and 1970s led Congress to enact barriers to prevent the sharing of information between law enforcement and intelligence agencies. Those barriers help to explain why this country failed to thwart the 9/11 attacks. Now, law enforcement and spy agencies can and do share data, greatly enhancing the security of the United States.

Defend Constitutional Freedoms

Yes, this country must be protected against both domestic and foreign radicals. But the misnamed Patriot Act threatens basic American freedoms. The original lengthy law was passed with few hearings, no committee report, and little public debate. Its renewal prompted strong opposition in 2005 and 2006.

Among many other things, the law undermines basic constitutional safeguards against unreasonable searches and seizures. It allows "sneak-and-peek searches" by federal agents who may enter a home or office when no one is present and conduct a secret search, usually taking photos as they do it. They need not notify the person who is the subject of the search until much later, and so continue their investigation unthwarted by the person's knowledge.

The American people have a right to hope and trust that the government uses its expanded powers solely to protect Americans against terrorism. However, hope and trust are not always enough. Shorn of the current administration's dedication to secrecy, many Americans are gravely concerned about what the future may bring.

Exploring the Issues

1. Why might the government need special powers to combat modern terrorism?
2. What are the drawbacks of passing a law without much debate?

For more information about the President's powers, view "President's Powers."

Freedom of Assembly and Petition

Section Preview

Objectives
1. Explain the Constitution's guarantees of assembly and petition.
2. Summarize how the government can limit the time, place, and manner of assembly.
3. Compare and contrast the freedom-of-assembly issues that arise on public versus private property.
4. Explore how the Supreme Court has interpreted freedom of association.

Why It Matters

The constitutional guarantees of assembly and petition protect Americans' rights to gather peacefully in order to express their views and to influence public policy, by such means as demonstrations and written petitions. There are time, place, and manner limitations on these freedoms, however.

A noisy street demonstration by gay rights activists, or by neo-Nazis, or by any number of other groups; a candlelight vigil of opponents of the death penalty; the pro-life faithful singing hymns as they picket an abortion clinic; pro-choice partisans gathered on the steps of the State capitol... these are commonplace events today. They are also everyday manifestations of freedom of assembly and petition.

The Constitution's Guarantees

The 1st Amendment guarantees

"... the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

—United States Constitution

The 14th Amendment's Due Process Clause also protects those rights of assembly and petition against actions by the States or their local governments.

Civil Liberties: First Amendment Freedoms
**Time-Place-Manner Regulations**

Government can make and enforce reasonable rules covering the time, place, and manner of assemblies. Thus, in *Grayned v. City of Rockford*, 1972, the Supreme Court has upheld a city ordinance that prohibits making a noise or causing any disorder or any other disturbance near a school if such action disrupts school activities. It has also upheld a state law that forbids parades near a courthouse when they are intended to influence court proceedings, in *Cox v. Louisiana*, 1965.

Rules for keeping the public peace must be more than reasonable, however. They must also be precisely drawn and fairly administered. In *Coates v. Cincinnati*, 1971, the Court struck down a city ordinance that made it a crime for “three or more persons to assemble” on a sidewalk or street corner “and there conduct themselves in a manner annoying to persons passing by, or to occupants of adjacent buildings.” The Court found the ordinance much too vague.

Government’s rules must be **content neutral**.

That is, while government can regulate assemblies on the basis of time, place, and manner, it cannot regulate assemblies on the basis of what might be said there. Thus, in *Forbush v. Nationalist Movement*, 1992, the Court threw out a Georgia county’s ordinance that levied a fee of up to $1,000 for public demonstrations.

The law was challenged by a white supremacist group seeking to protest the creation of a holiday to honor Martin Luther King, Jr. The Court found the ordinance not to be content neutral, particularly because county officials had unlimited power to set the exact fee to be paid by any group.

Notice that the power to control traffic or keep a protest rally from becoming a riot can be used as an excuse to prevent speech. The line between crowd control and thought control can be very thin, indeed.

**Public Property**

Over the past several years, most of the Court’s freedom of assembly cases have involved organized demonstrations. Demonstrations are, of course, assemblies. Most demonstrations take place in public places, on streets and sidewalks, in parks or public buildings, and so on. Demonstrations take place in these locations because it is the public that the demonstrators want to reach.

Demonstrations almost always involve some degree of conflict. Most often, they are held to protest something, and so there is an inherent clash of ideas. Many times there is also a conflict with the normal use of streets or other public facilities. It is hardly surprising, then, that the tension sometimes rises to a serious level.

Given all this, the Supreme Court has often upheld laws that require advance notice and permits for demonstrations in public places. In an early leading case, *Cox v. New Hampshire*, 1941, it unanimously approved a State law that required a license to hold a parade or other procession on a public street.

Right-to-demonstrate cases raise many basic and thorny questions. How and to what extent can government regulate demonstrators and their demonstrations? Does the Constitution require that police officers allow an unpopular group to continue to demonstrate when its activities have excited others to violence? When, in the name of public peace and safety, can police properly order demonstrators to disband?

**Gregory v. Chicago**

Gregory, *Chicago*, 1969, is an illustrative case. While under police protection, Dick Gregory and others had marched, while singing, chanting, and carrying placards, from city hall to the mayor’s home some five miles away. Marching in the streets around the mayor’s house, they demanded the firing of the city’s school superintendent and an end to de facto segregation in the city’s schools.

A crowd of several hundred people, including many residents of the all-white neighborhood, quickly gathered. Soon, the bystanders began throwing insults and threats, as well as rocks, eggs, and other objects. The police tried to keep order, but about an hour, they decided that serious violence was about to break out. At that point, they ordered the demonstrators to leave the area. When Gregory and the others refused to do so, the police arrested them and charged them with disorderly conduct.

The convictions of the demonstrators were unanimously overturned by the High Court. The Court noted that the marchers had done no more than exercise their constitutional rights of assembly and petition. Neighborhood residents and others, not the demonstrators, had caused the disorder. So long as the demonstrators acted peacefully, they could not be punished for disorderly conduct.

**Recent Cases**

Over recent years, many of the most controversial demonstrations have been those held by Operation Rescue and other anti-abortion groups. For the most part, the efforts of those groups have been aimed at discouraging women from seeking the services of abortion clinics, and those efforts have generated many lawsuits.

There have been two particularly notable cases to date. In the first one, *Madsen v. Women’s Health Services, Inc.*, 1994, the Supreme Court upheld a Florida judge’s order directing protesters not to block access to an abortion clinic. The judge’s order had drawn a 36-foot buffer zone around the clinic. The High Court found that to be a reasonable limit on the demonstrators’ activities.

The other major case is a more recent one, *Hill v. Colorado*, 2000. There, the Court upheld, 5-4, a State law that limits “sidewalk counseling” at clinics where abortions are performed. The statute creates an eight-foot buffer zone around anyone who is within 100 feet of the entrance to a health-care facility and wants to enter. No one may make an “unwanted approach” (define that buffer zone) to talk or do such other things as hand out a leaflet or wave a sign.

The Court found that the Colorado law does not deal with the content of abortion protestors’ speech. Instead, it is aimed at where, when, and how their message is delivered.

**Private Property**

What of demonstrations on private property—for example, at shopping centers? The Court has heard only a few cases raising this question. However, at least this much can be said: The rights of assembly and petition do not give people a right to trespass on private property, even if they wish to express political views.

Privately owned shopping centers are not public streets, sidewalks, parks, and other “places of public assembly.” Thus, no one has a constitutional right to do such things as hand out political leaflets or ask people to sign petitions in those places.

These comments are based on the leading case here, *Lloyd Corporation v. Tanner*, 1972. However, since that case the Court has held that a State supreme court may interpret the provisions of that State’s constitution in such a way as to require the owners of shopping centers to allow the reasonable exercise of the right of petition on their private property.

In that event, there is no violation of the property owners’ rights under any provision in the federal Constitution, *Pruitt v. Shopping Center*, 1980. In that case, several California high school students had set up a card table in the shopping center. They passed out...
Freedom of Association

The guarantees of freedom of assembly and petition include a right of association. That is, those guarantees include the right to associate with others to promote political, economic, and other social causes. That right is not set out in so many words in the Constitution. However, in National Association for the Advancement of Colored People v. Alabama, 1938, the Supreme Court said “it is beyond doubt that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the Constitution’s guarantee of free expression. The case just cited is one of the early right-to-associate cases. There, a State law required the Alabama branch of the NAACP to disclose the names of all its members in that State. When the organization refused a court’s order to do so, it was found in contempt of court and fined $100,000.

The Supreme Court overturned the contempt conviction. It said that it could find no legitimate reason why the State should have the NAACP’s membership list.

A more recent case bearing on freedom of association involved the Boy Scouts of America. In Boy Scouts of America v. Dale, 2000, it held that the Boy Scouts have a constitutional right to exclude gays from their organization. The High Court made that decision in a New Jersey case, noting that opposition to homosexuality is a part of the Boy Scout organization’s “expressive conduct”—that is, what they stand for.

The decision overturned a ruling by the New Jersey Supreme Court. That court had applied the State’s anti-discrimination law against the Scouts; it ordered a New Jersey troop to readmit James Dale, an Eagle Scout, whom the troop had dismissed when it learned he was gay.

The Court ruled that the Constitution’s guarantee of freedom of association means that a State cannot force an organization like the Boy Scouts to accept members when that action would contradict what the organization professes to believe.

Section 4 Assessment

Key Terms and Main Ideas

1. What does the right to assemble peaceably mean? Give two examples of peaceful assembly for political purposes.
2. Summarize briefly how the Supreme Court has limited the time, place, and manner of assembly.
3. How does the right of association extend the right of assembly?

Critical Thinking

4. Identifying Central Issues. Why are the freedom to assemble peacefully and the freedom of association central to an open, democratic society?
5. Formulating questions not as assembly is protected by the 1st Amendment. Suppose you are helping to organize a demonstration for a political cause. Make up three to five questions you should ask in order to determine if your demonstration would be considered constitutional by the Supreme Court.

Progress Monitoring Online

For: Self-quiz with vocabulary practice
Web Code: mgp-5178

Go Online

For: An activity on freedom of assembly and petition
Web Code: mgp-5156

Close Up

May Schools Ban Political Protests?

In order to educate students and also to ensure their safety, school officials need broad authority to control what goes on in schools. Recognizing this fact, the courts have granted schools flexibility in certain areas, such as censorship. Can schools prevent students from peacefully expressing opinions on controversial political issues?


In December 1965, a group of students and adults in Des Moines, Iowa, met to discuss ways of publicizing their opposition to the war in Vietnam and their support for a truce in the fighting. The group included 15-year-old high school student John Tinker, his sister Mary Beth Tinker, and his friend Christopher Eckhardt. The three students decided to wear black armbands through the end of the holiday season and to fast on two days.

The principals of the Des Moines schools learned of the plans to wear armbands. They met on December 14 and adopted a policy that any student wearing an armband would be asked to remove it. Anyone refusing to comply would be suspended.

On December 16, Mary Beth and Christopher wore their armbands to school. John wore his the following day. All were sent home and were suspended until they returned without the armbands. They did not return to school until January, when the planned time for wearing the armbands had expired. The students’ fathers sued in federal district court, seeking a court order to prevent enforcement of the school district’s ban on armbands. They also asked that the school district not be allowed to discipline the students for wearing them. The court found that the school authorities’ actions did not violate the Constitution. The court of appeals agreed with the district court, and the Tinkers appealed to the Supreme Court.

Arguments for Tinker

1. Wearing an armband to express an opinion is symbolic speech that is protected under the Free Speech Clause of the 1st Amendment.

2. Students do not lose their 1st Amendment rights when they are in school. School authorities may restrict speech or action that interferes with the work of the school but may not prohibit silent, passive expressions of opinion that create no such interference.

3. Schools may not limit expressions of opinion to avoid confrontation or disagreement among students over politically sensitive issues.

Arguments for Des Moines School District

1. States and school officials must have complete authority to control conduct in public schools in order to maintain discipline and good order.
2. The ban on armbands was reasonable because it was based upon fear of a disturbance in school.
3. The plaintiffs’ wearing of armbands distracted other students from their classroom and diverted them to the highly emotional subject of the Vietnam War. School have the right to adopt reasonable regulations to keep students focused on school subjects.

Decide for Yourself

1. Review the constitutional grounds on which each side based his arguments and the specific arguments each side presented.
2. Debate the opposing viewpoints presented in this case. Which viewpoint do you favor?
3. Predict the impact of the Court’s decision on other issues relating to students’ rights. (To read a summary of the Court’s decision, turn to pages 799–800.)
Assessment

Political Dictionary

Bill of Rights (p. 532)
Civil Liberties (p. 533)
Alien (p. 534)
Due Process Clause (p. 536)
Bill of Rights (p. 542)
Slander (p. 547)
Sedition (p. 547)
Shield law (p. 550)
Seditious speech (p. 547)
Prior restraint (p. 549)

Practicing the Vocabulary

Using Terms in Context

For each of the terms below, write a sentence that shows how it relates to this chapter:
1. Bill of Rights
2. Civil Liberties
3. Due Process Clause
4. Process of Incorporation
5. Establishment Clause
6. Free Exercise Clause
7. Prior restraint
8. Symbolic speech
9. Assembly
10. Right of association

Word Relationships

Three of the terms in each of the following sets of terms are related. Choose the term that does not belong and explain why it does not belong.

11. a. libel b. slander c. symbolic speech d. seditious speech
12. a. civil liberties b. shield law c. civil rights d. right of association
14. a. parochial b. picketing c. assembly d. symbolic speech

Critical Thinking

31. Face the Issues

Former Representative Bob Barr has said, "The 4th Amendment is a陌生 to the administration, but the amendment protects citizens and legal immigrants from government's monitoring them whenever it wants, without due process—and if that happens, it's the end of personal liberty." (a) Explain how the 4th Amendment is related to the Patriot Act. (b) How might supporters of the Patriot Act respond to Barr?

32. Determining Relevance

According to Justice Holmes, one of the most important protections offered by the Bill of Rights is protection of "thought that we hate." (a) Explain briefly what this protection means, and why it is so important. (b) From your knowledge of history or current affairs, discuss one example of a repressive government suppressing speech that it hates, and the repercussions that repression had.

33. Drawing Conclusions

Your school newspaper wants to publish an article critical of one board member's speech at a school board meeting. The principal has forbidden publication of the article because it is disrespectful, misrepresents the board member, and states a position that the school administration does not agree with. What constitutional issues does the principal's action raise? Explain how you think the Supreme Court would rule on each of these issues.

Participation Activities

36. Current Events Watch

"Thought that we hate" is an expression in other media. Find recent news articles on this topic. List the sorts of Internet speech some people think should be regulated, the practical difficulties of regulating them, and the 1st Amendment issues they raise.

37. Table Activity

Make a table of the important Supreme Court cases involving freedom of assembly. Include a very brief description of each case, indicate whether the issue was time, place, or manner of assembly, and give the Supreme Court's ruling.

38. It's Your Turn

Choose one of the controversial Supreme Court cases discussed in this chapter, and take a position on the issue. Prepare an argument (speech) that you would present to the Supreme Court—for the government or for the other party in the suit. Your argument should not only state and defend your position on the issue but also answer the opposing arguments. (Writing a Speech)

Analyzing Political Cartoons

Using your knowledge of American government and this cartoon, answer the question below.

34. (a) In the caption of this cartoon, what does "convinced by the evidence" mean? (b) How does that kind of conclusion affect the truth? (c) What do you think the cartoonist feels about the right of a free press versus the right to a fair trial?

Go Online

For: Chapter 19 Self-Test
Visit: PHSchool.com
Web Code: mza-3195

As a final review, take the McGraw's Chapter 19 Self-Test and receive immediate feedback on your answers. The test consists of 10 multiple-choice questions designed to test your understanding of the chapter content.