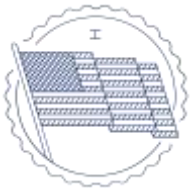

Scholar Exchange: First Amendment — Speech and Press

Briefing Document

INTERACTIVE CONSTITUTION RESOURCES

- Resources for the First Amendment Speech and Press

INTRODUCTION

Big Questions

- What was the Founding generation's vision for the First Amendment's protection of free speech and a free press?
- What are some of the key periods in history that have tested the nation's commitment to free speech?
- How has the Supreme Court interpreted the First Amendment's commitment to free speech and a free press over time?
- How does the Supreme Court analyze free speech and free press cases today?

Big Idea

Today, the Supreme Court protects free speech rights more strongly than at any time in our nation's history—and American free speech protections are among the strongest in the world. Generally speaking, the government may not jail, fine, or punish people or organizations based on what they say or write, and the Court protects speech unless it is likely to cause immediate lawless action. (A standard rarely met in practice.) At the same time, there are certain contexts when the government has more leeway to regulate speech—for instance, with low-value speech like defamation or when speakers (like public school students) have a special relationship with the government.

FIRST AMENDMENT TEXT: A BRIEF INTRODUCTION

Let's begin, as we always do when interpreting the Constitution, with the Constitution's text.

The First Amendment's Text**: "Congress shall make no law . . . abridging the freedom of speech, or of the press…"** There are a few things worthy of note here:

"Congress"—but covers more than Congress. The First Amendment says "Congress." But the Supreme Court has long held that speakers are protected against all government agencies and officials: Congress, the President, and other parts of the government.

"No law"—the Supreme Court has never said that the free speech right is absolute. Example: Perjury laws punish speech, but no one questions their validity. Example: Regulations that keep people from yelling out while a court is in session. Example: Student discipline for profanity in schools.
"Freedom of speech": What *is* covered? The Supreme Court has interpreted "speech" and "press" broadly as covering not only talking, writing, and printing, but also broadcasting, using the Internet, and other forms of expression. The freedom of speech also applies to symbolic expression, such as displaying flags, burning flags, wearing armbands, and the like.

What *isn't* covered? The First Amendment does not protect speakers against private individuals or organizations, such as private employers, private colleges, or private landowners. The First Amendment restrains only the government.

What's the broader vision? The Supreme Court has frequently declared that the very core of the First Amendment is that the government cannot regulate speech based on its content. Thus, the Supreme Court has held that restrictions on speech because of its content—that is, when the government targets the speaker's message—generally violate the First Amendment.

Laws that prohibit people from criticizing a war, opposing abortion through speech or expression, or advocating high taxes are examples of unconstitutional content-based restrictions. Such laws are thought to be especially problematic because they distort public debate and contradict a basic principle of self-governance: that the government cannot be trusted to decide what ideas or information "the people" should be allowed to hear. The Court fears that the government will target particular messages and attempt to control thoughts on a topic by regulating speech.

What is the standard legal test for determining whether the government has violated the First Amendment's protection of free speech?

It comes from a case called *Brandenburg v. Ohio (1969).*

This case provides us with a very speech-protective test! Generally speaking, the government may not punish speech unless it is directed to incite and likely to incite imminent lawless action. Under this test, the government always loses. Finally, when first ratified, the First amendment, like the rest of the Bill of Rights, only applied to the national government.

So, this meant if your home state punished you for criticizing the Governor, the First Amendment didn't protect you. And many of the Southern states in pre-Civil War America did just that—outlawing abolitionist speech.

We needed the Fourteenth Amendment—ratified after the Civil War and designed, in part, to curb state abuses—to reach state laws. Because of the Fourteenth Amendment, you have the right under the U.S. Constitution to criticize your Governor or your state representative.

The fancy word for this is **"incorporation."** But that just means that free speech protections apply as much to the President and Congress as they do to the Governor or state legislature.

FOUNDING STORIES: ALIEN & SEDITION ACTS

Can the government throw you in jail for criticizing its policies? This may seem like a simple question with a simple answer. And so it is today.

If our First Amendment means anything, it must mean that we can freely criticize the President, Congress, and the Supreme Court—to say nothing of our Governor, Mayor, state legislator, and town council member. However, we haven't always stayed true to this core principle—and generations of Americans have had to fight for their right to speak freely.

The story of the First Amendment as we know it today—the one that protects "uninhibited, robust, and wide-open" debate, as the Supreme Court celebrated in *New York Times Company v. Sullivan* (1964)—begins with our nation's first battle over free speech rights after the ratification of the Constitution and with a trio of famous Founders, John Adams, Thomas Jefferson, and James Madison.

The flashpoint? The Alien and Sedition Acts.

Let's rewind to 1798. The Alien and Sedition Acts were passed by the Adams Administration (and the Federalist Congress). They attacked the core of free speech and a free press—the right to criticize the government. Adams and the Federalists didn't; they were rejected free speech, however, but believed that limitations were necessary to preserve the nation.

The atmosphere of partisan politics was particularly fraught in the 1790s, with the rise of the partisan press and the arrival of rival political parties, and the key issue they divided over was the war between Britain and France, our former ally until Washington signed the Jay Treaty in 1794. That conflict pushed the Adams administration to pick sides despite Washington's policy of neutrality and while they never entered the war, a "Quasi War" started with France between 1798 and 1800 following the so-called "XYZ Affair," in which documents showed that French leadership tried to bribe the American ambassadors and emissaries to France. It was an undeclared war that mostly involved the respective navies--Adams pushed for greater funding for the navy--and in the middle of this conflict, Jeffersonian Republicans maintained their support for France and with it, their criticism of the Adams administration for siding with Britain and monarchy against the liberal revolutionary France.

Furthermore, they stacked the deck against the political opposition, criminalizing criticism of Federalist President Adams, but not Vice President—and leader of the political opposition—Thomas Jefferson.

Thomas Jefferson and James Madison fought back. The Virginia and Kentucky Resolutions of 1798 were Democratic-Republican responses to the Alien and Sedition Acts. Drafted in secret by Jefferson and Madison, the resolutions condemned the Alien and Sedition Acts as unconstitutional.

What was the federal government's chief violation? It violated our nation's commitment to free speech.

Madison argued that this exercise of **"power . . . ought to produce universal alarm, because it is levelled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deem, the only effectual guardian of every other right."** Because of the importance of communicating thoughtful opinion, Madison believed that freedom of speech and of the press was central to the survival of the republic.

While the Supreme Court never ruled on the Alien and Sedition Acts, Thomas Jefferson defeated John Adams in the election of 1800, and once in office President Jefferson allowed the acts to expire and pardoned those still in jail for committing offenses under the acts. The Supreme Court would later realize Jefferson's (and Madison's) vision of robust First Amendment rights in the twentieth century.

FOUNDING STORIES: FREE SPEECH AND THE ABOLITIONISTS

Free speech was central to the push to end slavery.

While we think of abolitionists—those leading the fight against slavery—as heroes today. They were extremely unpopular in their own time. And not just in the South. National leaders from the North explicitly denounced them as dangerous and disloyal instigators of Civil War. They were seen as rabble-rousers—sowing discord and threatening violence among white Americans.

Now, why did so many people denounced the abolitionists—or worse? What were they afraid of? They were afraid of the effects of the abolitionist message. Many feared slave revolts throughout the South. And this led many to believe that abolitionist expression was different. That it must be restricted or banned. That's why before the Civil War, we had laws in states like North Carolina and Alabama banning expression with a tendency to incite violence or insurrection. That's why Missouri banned anti-slavery speeches or expression. And that's why states across the South strictly limited abolitionist meetings. And when abolitionist groups tried to mail their materials throughout the country in the 1830s, Southern states (especially South Carolina) responded by destroying the mail and preventing it from being delivered. And—with the support of Andrew Jackson—Congress passed the Post Office Act, asking postmasters to support local censorship laws.

Even in Philadelphia, an 1835 mass meeting resolved that, actions of the abolitionists, **"in organizing societies, maintaining agents, and disseminating publications intended to operate upon the institutions of the South" are "unwise, dangerous, and deserving emphatic reprehension and zealous opposition."**

And political and community leaders often organized mobs to suppress abolitionist meetings and expression—sometimes leading to violence and even death. Again, and perhaps most famously, the death of Illinois printer Elijah Lovejoy in Illinois in 1837. We had mob violence throughout the West and South and riots in NYC and Philadelphia.

And in Boston—which brings us to one of the most famous speeches in favor of free speech ever given: Frederick Douglass's *A Plea for Free Speech in Boston* (1860).

Frederick Douglass's *A Plea for Free Speech in Boston*

On December 3, 1860, Frederick Douglass and a group of fellow abolitionists met at the Tremont Temple Baptist Church in Boston for a discussion centered around the following question: "How Can Slavery Be Abolished?"

They scheduled this meeting on the one-year anniversary of John Brown's death. It occurred at a time of great peril for the nation. One month earlier, Abraham Lincoln was elected as the first anti-slavery President in American history. But following Lincoln's election, South Carolina quickly declared its intention to secede from the Union. And many assumed that other Southern States would soon follow suit.

In this context, the Boston abolitionist meeting was greeted by a violent mob. The mob took the stage and shut down the meeting.

Six days later, Douglass delivered a previously scheduled lecture at Boston's Music Hall. Following his prepared remarks, Douglass ended with an admonition to his audience—and to the nation—about the importance of free speech and the exchange of ideas in a democratic society.

Douglass noted the location of the speech—Boston, noting that **"[n]owhere more than" in Boston "have the principles of human freedom been expounded."**

- It was the birthplace of the American Revolution.
- And it was often at the vanguard of the push for freedom.
- And even there, **"the moral atmosphere [wa]s dark and heavy."**
- Even there, an abolitionist meeting might be shut down by a mob.

Douglass then celebrated the value of free speech. He explained its importance to the Founders:

> **"No right was deemed by the fathers of the Government more sacred than the right of speech. It was in their eyes, as in the eyes of all thoughtful men, the great moral renovator of society and government."**

On this view, free speech was the key to bringing change to American society. For Douglass, it was key to challenging the status quo, ending slavery, and advancing a vision of freedom and equality for African Americans.

Douglass then explained why free speech was essential to liberty:

> **"Liberty is meaningless where the right to utter one's thoughts and opinions has ceased to exist. That, of all rights, is the dread of tyrants. It is the right which they first of all strike down. They know its power. Thrones, dominions, principalities, and powers, founded in injustice and wrong, are sure to tremble, if men are allowed to reason of righteousness, temperance, and of a judgment to come in their presence."**

Free speech is how those without power can challenge those in power. It's also essential to ending slavery:

> **"Slavery cannot tolerate free speech. Five years of its exercise would banish the auction block and break every chain in the South. They will have none of it there, for they have the power. But shall it be so here?"**

And Douglass reminded his audience that we must grant free speech rights even to speech that we hate—speech that we think is dangerous. In Boston, some supported the abolitionists, but some also questioned why the abolitionists needed to speak, fearing that their speech might cause a violent response:

> **"Even here in Boston, and among the friends of freedom, we hear two voices: one denouncing the mob that broke up our meeting on Monday as a base and cowardly outrage; and another, deprecating and regretting the holding of such a meeting, by such men, at such a time. We are told that the meeting was ill-timed, and the parties to it unwise."**

But now is the time to defend this right—and for this important cause:

> **"Why, what is the matter with us? Are we going to palliate and excuse a palpable and flagrant outrage on the right of speech, by implying that only a particular description of persons should exercise that right? Are we, at such a time, when a great principle has been struck down, to quench the moral indignation which the deed excites, by casting reflections upon those on whose persons the outrage has been committed? After all the arguments for liberty to which Boston has listened for more than a quarter of a century, has she yet to learn that the time to assert a right is the time when the right itself is called in question, and that the men of all others to assert it are the men to whom the right has been denied?"**

Free speech isn't need for those with power and for those with popular ideas. It's there for the speech that challenges you:

> **"It would be no vindication of the right of speech to prove that certain gentlemen of great distinction, eminent for their learning and ability, are allowed to freely express their opinions on all subjects – including the subject of slavery. Such a vindication would need, itself, to be vindicated. It would add insult to injury. Not even an old-fashioned abolition meeting could vindicate that right in Boston just now. There can be no right of speech where any man, however lifted up, or however humble, however young, or however old, is overawed by force, and compelled to suppress his honest sentiments."**

And free speech is important not only for the speaker, but for the audience. It's there to ensure that the audience can hear all ideas that are worth being heard and so that the audience can make up their minds based on the arguments advanced by each side:

> **"Equally clear is the right to hear. To suppress free speech is a double wrong. It violates the rights of the hearer as well as those of the speaker. It is just as criminal to rob a man of his right to speak and hear as it would be to rob him of his money."**

I still believe that Boston will do the right thing, but we shouldn't give any concessions to the enemy.We must boldly defend free speech for everyone.

> **"I have no doubt that Boston will vindicate this right. But in order to do so, there must be no concessions to the enemy. When a man is allowed to speak because he is rich and powerful, it aggravates the crime of denying the right to the poor and humble."**

> **"The principle must rest upon its own proper basis. And until the right is accorded to the humblest as freely as to the most exalted citizen, the government of Boston is but an empty name, and its freedom a mockery. A man's right to speak does not depend upon where he was born or upon his color. The simple quality of manhood is the solid basis of the right – and there let it rest forever."**

FOUNDING STORIES: FREE SPEECH IN WWI

The First Amendment as we know it today didn't begin to emerge until key dissents by Justices Oliver Wendell Holmes and Louis Brandeis in the early twentieth century, and a strong free speech majority didn't emerge on the Supreme Court until the 1960s.

To understand this story, let's move to the World War I era.

Throughout American history, free speech has often been attacked during times of war. Like the Adams Administration, Woodrow Wilson's administration passed new laws that criminalized core First Amendment speech—in this instance, speech criticizing World War I.

These laws were directed at socialists, pacifists, and other anti-war activists. Congress passed the Espionage Act shortly after the U.S. entered the war. The Act made it a crime to convey information intended to interfere with the war effort. The Sedition Act imposed harsh penalties for a wide range of dissenting speech, including speech insulting or abusing the U.S. government, the flag, the Constitution, or the military.

The Wilson Administration argued that these Acts were essential to the war effort and prosecuted thousands of anti-war activists under their various provisions. And while modern scholars view these Acts as violating core free speech protections, the Supreme Court at that time did uphold these convictions.

One of the most famous prosecutions under the Sedition Act was that of Eugene V. Debs, who was a pacifist labor organizer and one of the founders of the International Workers of the World.

Debs had run for president as a socialist in 1900, 1904, 1908, and 1912.

After delivering an anti-war speech in June 1918, Debs was arrested, tried, and sentenced to 10 years in prison under the Sedition Act. The case eventually reached the Supreme Court, with the Court upholding his conviction in a unanimous decision written by Justice Holmes. According to the Supreme Court, Debs couldn't speak his conscience when it came to the war.

Or consider the famous case—*Schenck v. United States* (1919).

During World War I, the defendants were charged with mailing printed circulars designed to obstruct the military draft in violation of the Espionage Act of 1917. The Espionage Act made it illegal to convey information with the intent of interfering with the operation of the U.S. armed forces or obstructing military recruitment.

Writing for a unanimous Court, Justice Oliver Wendell Holmes upheld the defendants' convictions and ruled that the Espionage Act did not conflict with the First Amendment.

In his opinion, Holmes established the **"clear and present danger test."** Under this test, the Court must ask the following question when evaluating a free speech challenge: Were the words used **"in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent?"**

It was, as Holmes wrote, **"a question of proximity and degree," famously explaining, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."**

The *Schenck* decision was one of the Supreme Court's most important early free speech cases—the source of the Court's famous "clear and present danger test." While the First Amendment protects free speech rights, *Schenck*'s "clear and present danger test" is a key reminder that these rights aren't absolute.

However, the Supreme Court reversed course in future decades, increasingly protecting free speech over time—following a series of famous dissents by Justice Oliver Wendell Holmes and Justice Louis Brandeis in the 1910s and 1920s.

FOUNDING STORIES: *NEW YORK TIMES V. SULLIVAN* AND THE CIVIL RIGHTS MOVEMENT

Free speech rights were also essential for the Civil Rights Movement. Consider the landmark case of *New York Times v. Sullivan* (1964). *Sullivan* is one of the most powerful statements of broad free speech rights in American history. It was a defamation case decided in the throes of the Civil Rights Movement that was then surging throughout the United States in 1964.

The New York Times published a full-page advertisement on behalf of African Americans and clergymen in Alabama who were then combatting the Jim Crow laws. The ad accused various Alabama officials of violence and other wrongdoing, but many specific statements were conceded afterward to have been false.

The question, which endures to this day, is how much falsity does the First Amendment tolerate in the context of political speech and public officials?

Specifically, L.B. Sullivan—the Public Safety Commissioner of Montgomery, Alabama, sued the *New York Times* for printing an ad that contained several minor factual inaccuracies criticizing the Commissioner's subordinates. The ad was placed by allies of Dr. Martin Luther King, Jr., in the Civil Rights Movement—criticizing Montgomery officials for violating the rights of African Americans. The *Times* had declined his written request to retract the ad, and so he brought a suit for libel under Alabama law. A jury awarded him $500,000 in damages—the highest libel award in Alabama's history. This was meant to chill speech advancing civil rights and attacking Jim Crow.

On appeal, the Supreme Court held unanimously for the newspaper. Justice William Brennan wrote the majority opinion for the Court.

The Court ruled that in order to survive a First Amendment challenge and win a defamation suit, a public official must show that the publisher knew a statement was inaccurate or false and was reckless in deciding to publish it without further investigation. The Court described this new standard as **"actual malice."**

This standard provides strong free speech protections for speech covering issues involving public officials—keeping a **"public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."**

Famous Quotes:

- *Sullivan* must be understood **"against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."**

- False **"statement is inevitable in free debate and [it] must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"**

MODERN FIRST AMENDMENT INTERPRETATIONS

The First Amendment now generally protects speech—including speech by political minorities and even hateful speech—against government regulation unless the speech **"is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."** (*Brandenburg v. Ohio*—1969).

In response to decisions like the *Debs* case upholding restrictions on speech (and decisions like *Schenck* (draft), *Abrams* (war), and *Whitney* (Communists), Justices Louis Brandeis and Oliver Wendell Holmes authored powerful opinions offering a robust vision of free speech protections. Their landmark opinions remain justly famous—and deeply influential.

"[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."— Justice Oliver Wendell Holmes in *United States v. Schwimmer* (1929).

"[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."—Justice Oliver Wendell Holmes in *Abrams v. United States* (1919). (*Abrams* came down the same year as *Schenck* and saw Holmes dissenting and seemingly taking a different position, now defending the speech of a communist printer prosecuted under the Sedition Act)

But Justice Louis Brandeis offered the most powerful vision of all in his concurring opinion in *Whitney v. California* (1927). There, Justice Brandeis managed to link many of the key theories of free speech underlying America's robust free speech tradition. American democracy requires free, liberty-loving citizens, committed to deliberation, republican citizenship, and the public good. **"If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."—**Justice Louis Brandeis in *Whitney v. California* (1927).

So, that's a bit about how we got from the Alien and Seditions Acts and World War I to today.

West Virginia State Board of Education v. Barnette **(1943)**

This landmark First Amendment case protected students from being required to salute the American flag or say the Pledge of Allegiance in public schools.

During World War II, the West Virginia legislature required all students to learn civics and the **"spirit of Americanism"** and in 1942, ordered that saluting the flag be mandated as part of that program.

The *Barnette* case involves Jehovah's Witnesses—a religious minority group who believes God's law to be superior to any man-made laws or government. So, they refused to salute the American flag.

West Virginia's law followed from the Supreme Court's decision in *Minersville School District v. Gobitis* (1940), which decided public schools could compel students to salute the flag and say the Pledge of Allegiance. This was an 8-1 decision, with only Harlan Fiske Stone dissenting. Following Gobitis, there was a flurry of violence against Jehovah's witnesses.

The Barnette children—Marie and Gathie—were Jehovah's Witnesses instructed by their parents to not salute the flag or say the pledge and were expelled for doing so. On Flag Day in 1943, the Court, in a 6-3 decision written by Justice Jackson, overruled *Gobitis*.

Gobitis was not wrong to see the flag as a national symbol, but Jackson did not think compulsion could bring about patriotism. Jackson cited history—the Romans driving out Christians, the Spanish inquisition—as evidence that coercion failed to unify opinion **("Compulsory unification of opinion achieves only the unanimity of the graveyard"**). Finally, Jackson also rejected the idea from *Gobitis* that such rules were about school discipline, and the Court should defer to school officials. Jackson insisted that, **"We apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization"** and argued patriotism flourished when ceremonies were "voluntary and spontaneous instead of a compulsory routine."

More Jackson—Very Famous Quote: "**The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."**

More Jackson—Very Famous Quote: **"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 other matters of opinion, or force citizens to confess by word or act faith therein."**

As Justice Black and Douglas—two members who changed their minds since 1940—said in a concurring opinion**: "Words uttered under coercion are proof of loyalty to nothing but-self-interest. . . Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions."**

THE FIRST AMENDMENT'S INTERPRETATIONS TODAY

So, where do we stand today?
At its core, the First Amendment prevents the government from regulating speech based on its content. So, the government cannot keep people from criticizing a war or arguing for tax cuts. That is our right if we so choose.

Since 1925, the Supreme Court has ruled that the First Amendment's protection of a free speech and free press *does* apply to the states—realizing the vision of Fourteenth Amendment Framers like John Bingham, who sought to protect us from state abuses of fundamental rights like free speech. (Again, that's incorporation!) The First Amendment only restrains the government—not individuals or private organizations.

It covers more than just talking, writing, and printing. It also covers new technologies, such as movies, television, and the Internet, as well as symbolic speech like waving (or burning) flags and wearing armbands.

There are certain contexts when the government has more leeway to regulate speech—for instance, low value speech like defamation. Or when speakers have a special relationship to the government—for instance, public school students. Or when the regulation is content-neutral—for instance, to keep a protest from blocking traffic or to keep a party from playing its music too loud. (Known as "Time, Place, and Manner" restrictions).

But, at its core, the First Amendment today realizes the vision outlined by Jefferson, Madison, Brandeis, and Holmes enshrined by *Brandenburg v. Ohio*. **We generally protect speech unless it is direct to (and likely to) cause immediate lawless action**. That was Justice Brandeis's key lesson in *Whitney*. That's what the Supreme Court said decades later in *Brandenburg*.

Brandenburg v. Ohio (1969)

Brandenburg was a 1969 case that overruled *Schenck* and established the **"imminence" test**.

The facts of the case are worth noting. Brandenburg was a KKK leader who gave a speech in front of TV cameras in 1964 and was arrested under Ohio state law which made it illegal advocating "crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform." Cameras caught speeches and cross burning, including one speech threatening "**revengeance**" against Jews and African Americans. It said that "**Our President, Our Congress, our Supreme Court, continues to suppress the white, Caucasian race.**"

A march on Washington was planned.

The Court struck down the state law and prosecution under the "imminence" test, which looked at three elements: the intent to speak, the imminence of lawlessness, and the likelihood of lawlessness. And that is the lodestar of our First Amendment today.

Today, the Supreme Court protects free speech rights more strongly than at any time in our history—and American free speech protections are among the strongest in the world. What are the basic legal tests that the Supreme Court applies to free speech cases? In other words, what's the legal framework for analyzing free speech issues?

Big Idea: The government may not jail, fine, or punish people or organizations based on what they say or write, except in exceptional circumstances.

Today's Court-Centered First Amendment

The First Amendment tradition as we know it today—is a relatively new phenomenon. We've already reviewed the Alien and Sedition Acts and the World War I cases. It wasn't until 1925 that the Supreme Court held that the First Amendment limited state and local governments, as well as the federal government, such as in *Gitlow v. New York* (1925). And even then, the Court upheld the conviction in Gitlow.

But starting in the 1920s, the Supreme Court began to read the First Amendment more broadly, and this trend accelerated in the 1960s, culminating in *Brandenburg v. Ohio*—which sharply limited the government's ability to regulate speech. Again, today, the legal protection offered by the First Amendment is stronger than ever before in our history.

Limited Speech, Even Under the First Amendment

Are there times when the government can restrict speech under a less demanding standard? Yes! But our First Amendment protections aren't absolute.

Three Situations of Restricted Speech

1. **Low-Value Speech:** In some circumstances, the Supreme Court has held that certain types of speech are of only "low" First Amendment value, such as:
   - **Defamation:** False statements that damage a person's reputation can lead to civil liability (and even to criminal punishment), especially when the speaker deliberately lied or said things they knew were likely false. *New York Times Company v. Sullivan* (1964).
   - **True threats:** Threats to commit a crime (for example, **"I'll kill you if you don't give me your money**") can be punished. *Watts v. United States* (1969).
   - **"Fighting words":** Face-to-face personal insults that are likely to lead to an immediate fight are punishable. *Chaplinsky v. New Hampshire* (1942).
   - **Commercial advertising:** Speech advertising a product or service is constitutionally protected, but not as much as other speech. For instance, the government may ban misleading commercial advertising, but it generally can't ban misleading political speech. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (1976).

Outside certain narrow categories of "low" value speech, most other content-based restrictions on speech are presumptively unconstitutional. Even entertainment, including violent video games, vulgarity, "hate speech" (bigoted speech about particular races, religions, sexual orientations, and the like), and blasphemy (speech that offends people's religious sensibilities) are protected by the First Amendment. The Supreme Court has generally been very reluctant to expand the list of "low" value categories of speech. (Think of the "crush videos" case about animal cruelty online in *United States v. Stevens*)

2. **Managerial Domains**: The government can restrict speech under a less demanding test when the speaker is in a special relationship to the government.

For example, the speech of government employees and of students in public schools can be restricted, even based on content, when their speech is incompatible with their status as public officials or students. So, with the goals of the government for that particular role or institution.

A teacher in a public school, for example, can be punished for encouraging students to experiment with illegal drugs, and a government employee who has access to classified information generally can be prohibited from disclosing that information. *Pickering v. Board of Education* (1968).

3. **Content-Neutral Speech:** The government can also restrict speech under a less demanding test when it does so without regard to the content or message of the speech.
   - **Time, Place, and Manner Regulations**: Content-neutral restrictions that serve legitimate governmental purposes, such as restrictions on noise, blocking traffic, and large signs (which can distract drivers and clutter the landscape), are generally constitutional as long as they are "reasonable." Example: A law prohibiting the posting of all signs on public utility poles.

But not all content-neutral restrictions are viewed as reasonable; for example, a law prohibiting all demonstrations in public parks would violate the First Amendment. *Schneider v. State of New Jersey* (1939).

THE FIRST AMENDMENT AND FREE SPEECH IN SCHOOLS

As we've already discussed, the government has more authority to restrict speech in schools than in many other contexts. At the same time, the First Amendment still applies in the school setting.

What has the Supreme Court said in this context?

Let's begin with the most famous school speech case, ***Tinker v. Des Moines Independent Community School District (1969).***

This landmark First Amendment case involved a group of high school students who wore black armbands to school in order to protest the Vietnam War. The students were disciplined by the school for wearing the armbands, and the students filed a lawsuit arguing that their armbands were a form of symbolic protest that should be protected under the First Amendment.

In a 7-2 decision, the Supreme Court held that the armbands represented expression that was protected under the First Amendment. The Court concluded that the students retained their First Amendment rights while at school as long as their speech (or expressive acts) did not "materially or substantially interfere" with the school's operation. In Tinker, there was no actual interference—the school only feared potential disruption. This wasn't enough to survive a First Amendment challenge.

Famous Quote: **"It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."**

At the same time, while *Tinker* is an important defense of free speech rights for students, it also emphasizes the limits of free speech rights in the school context—namely, schools may limit student speech when it **"materially or substantially interfere[s]"** with a school's operations and its central mission, teaching students.

However, in later cases, the Supreme Court has clarified some of the limits on student free speech rights in the school setting. For instance, consider ***Hazelwood School District v. Kuhlmeier* (1988).** This landmark Supreme Court decision held that public school student newspapers were subject to a lower level of First Amendment protection than independent student expression or newspapers established by the school official for student expression.

In 1983 in Hazelwood, Missouri, two articles of the student newspaper were censored by the principal for discussing divorce and teenage pregnancy.

In a 5-3 decision, the Supreme Court ruled that the principal could exercise what is known as **"prior restraint"** (meaning that printed material, be it a book or newspaper article, is censored before it is printed and according to another Supreme Court landmark case, this was one of the core evils the First Amendment was meant to address)—deciding before the fact that some articles or expression could not be printed or shared, so long as the censorship is **"reasonably related to legitimate pedagogical concerns."**

The Court decided that while *Tinker* dealt with the educators' ability to silence students' personal expression that happens to occur on the school premises, *Hazelwood* concerned the authority of educators over school-sponsored publications or newspapers and other expressive activities that students, parents, and members of the public might reasonably understand to be collective forums of the school for expression.

Famous Quote: **"A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school."** So, *Hazelwood* sets out limits on student speech—suggesting that constitutional rights are more limited in the school setting.

Two decades later, we saw a similar move by the Supreme Court in *Morse v. Frederick* (2007). The Court again upheld restrictions on student speech, this time deciding a principal's punishment of a student for holding a sign with the message "**Bong Hits for Jesus**" was appropriate even if it was meant to be a joke.

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