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First 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.

"It is by the goodness of God that in our country we have those three unspeakable precious things: freedom of speech, freedom of conscience, and the prudence never to practice either of them." -- Mark Twain

The Meaning of Freedom

The English Colonists had a strong tradition of individual rights that the English people had won over time.
They fought to preserve and expand those rights in the Revolutionary War

THE CONSTITUTION & BILL OF RIGHTS

- The Articles of Confederation in 1781 (the first form of the Constitution) contained no guarantee of freedom of expression.
- Also, the Federal government was given very little power.

The new Constitution, in 1787, gave vast powers to central government.

- The battle over the ratification of the Constitution lasted two years.
- A huge debate arose between Jefferson and Hamilton over the role of government.

The Constitution, originally had no Bill of Rights. It simply stated how government was to be run.

- Many states would only ratify the Constitution if a Bill of Rights was added to it
- The Bill of Rights –the first ten amendments to the Constitution –was added on December 15, 1791, and the Constitution was finally ratified.
- James Madison wrote the original First Amendment

What did First Amendment mean originally?

- At least the right to be free from prior restraint or licensing
- No punishment for people after publication of information criticizing the government
- But did it imply a Right to know? or a Right to speak?

The rights are relative, not absolute

- meaning everyone has individual rights, but not at the expense of other peoples rights
- You have the right to free speech—but not if that speech damages or endangers another person
- You have the right to freedom of religious expression—but not if it endangers another person or interferes with their right to freedom of religious expression.

For the most part, the freedom regular citizens have extends to the Press/Media

- The Court has found that the Media can be restricted more than the average citizen due to their scope
- The Court has variously ruled that members of the media are not protected from being forced to testify in court and to reveal their sources

Over the years, the Court has ruled that some forms of freedom of speech are not protected. They include:

- **Libel**—the false and malicious use of printed words
- **Slander**—the false and malicious use of spoken words
- **Obscenity**—very hard to define
- **Seditious speech**—advocating the overthrow of the government by force

First Amendment theories

Weighted or preferred-position balancing

- Instead of a case-by-case approach, the scales are weighted in favor of free expression.
- Presumes that government action limiting speech is unconstitutional, therefore government has burden of proof to show that censorship is justified because of other important values or constitutional protections.

Meiklejohnian theory

- Free speech is protected not as an end in itself but as a means to self-government, to the functioning of our democracy.
- Such speech is absolutely protected, while other expression not related to self-governing is not absolute.

Marketplace of ideas

- This metaphor was introduced into Supreme Court doctrine by Justice Oliver Wendell Holmes in 1919 when he said society's ultimate good "is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."
- This metaphor is the model most called upon by the Supreme Court in the resolution of free-expression cases.
- Justices have used it to bolster free expression in virtually every area of First Amendment jurisprudence: prior restraint, libel, invasion of privacy, pornography, access, advertising, picketing, expressive conduct, broadcasting, and cable regulation. The usage has increased dramatically since the 1970s.
- The Court has repeatedly said the primary purpose of the FA is to protect an uninhibited marketplace where differing ideas can clash.
- Yet, the Justices have made virtually no effort to extrapolate on the metaphor or why they believe it works.
- They seem to have accepted without question that the metaphor is effective because they believe the rationale upon which it is based is sound.

The Supreme Court in 1919 with Justice Holmes seated second from right in the bottom row (with the big moustache).

Access theory

- Jerome Barron at Georgetown argued in mid-60s that under 1st Amendment, people have right of access to mass media, particularly as media became more concentrated in the hands of conglomerates and wealthy broadcasters and publishers.
- Idea was shot down by Supreme Court in 1974 case, Miami Herald v. Tornillo, in which Chief Justice Burger held that under 1st Amendment, government had no right to force newspaper to publish views or ideas of citizens.

Self-realization/self-fulfillment theory (Liberty Theory)

- Speech is important to an individual regardless of its impact on politics or its benefit to society at large
- Individual realization of character and potential as a human being means the right to form your own beliefs/opinions and the right to express those belief/opinions.
- The purpose of society is to promote welfare of individual (Aristotle, John Locke).

The meaning of freedom

Three topics are at the heart of the struggle.

- The power of the state to limit criticism or published attacks on the government
- The power of the state to use taxation to censor the press
- The power of the government to forbid publication of ideas or information it believes to be harmful

Freedom to criticize government

- This is at the center of our political philosophy today.
- However, the government, and the court, has limited the kind of criticism allowed (see Bretton Barber case below)

In a victory for students' free speech rights, a federal judge has ruled that the Dearborn teenager who was prohibited from wearing a t-shirt with a picture of President Bush that reads, "International Terrorist" must be allowed to wear the shirt to school.

The American Civil Liberties Union of Michigan filed the lawsuit in federal court last February against the Dearborn Public Schools for violating the First Amendment rights of the student.

"The court's decision reaffirms the principle that students don't give up their right to express opinions on matters of public importance once they enter school," said Kary Moss, Executive Director of the ACLU of Michigan. "Schools are not speech-free zones."

In granting the order, Judge Patrick J. Duggan noted that "there is no evidence that the t-shirt created any disturbance or disruption" in the school and that "the record?does not reveal any basis for [the assistant principal's] fear aside from his belief that the t-shirt conveyed an unpopular political message."

Judge Duggan further rejected the school district's argument that the schoolyard is an inappropriate place for political debate. As he wrote in the decision, "In fact, as [the courts] have emphasized, students benefit when school officials provide an environment where they can openly express their diverging viewpoints and when they learn to tolerate the opinions of others."

Bretton Barber, a senior at Dearborn High School, wore the t-shirt to express his concern about the President's policies on the potential war in Iraq. School administrators asked him to remove the t-shirt, turn it inside out, or go home. The school's justification was that the shirt might cause a disruption despite the fact that he wore the shirt for three hours without incident.

"I wore the shirt to spark discussion among the students on an issue I cared deeply about," Barber said. "I haven't decided when I'll wear the shirt again, but now I have the confidence of knowing that I have the right to wear it."
Andrew Nickelhoff, an ACLU of Michigan Cooperating Attorney who argued the case, called the ruling "an important civics lesson for students everywhere. This case teaches that the First Amendment protects our right to express our opinions, and that sometimes we must have the courage -- as Brett Barber did -- to defend our rights."

The Long History of Sedition

Alien and Sedition Acts of 1798

- Sedition law forbade false, scandalous and malicious publications against U.S. government, Congress and the president.
- Punished people who sought to stir up sedition or urged resistance to federal laws.
- President John Adams and newspaper editor Thomas Jefferson hotly debated this law
- 15 prosecutions under this law
- Adams may have lost re-election because of law.
- Sedition Act expired in 1801 and newly elected President Jefferson pardoned all persons convicted under it.

Sedition in World War I

- Unpopular war; More suppression of freedom of expression than at any other time in our history.
- 1917 Espionage Act approved by Congress and signed by Woodrow Wilson.
- Crime to willfully convey a false report with the intent to interfere with the war effort.
- Crime to cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the armed forces.
- Crime to willfully obstruct the recruiting or enlistment service of the United States.
- 1918 Sedition Act, an amendment of Espionage Act, was passed.
- Crime to attempt to obstruct the recruiting service.
- Crime to utter or print or write or publish disloyal or profane language intended to cause contempt of, or scorn for, the federal government, the Constitution, the flag or the uniform of the armed forces.
- 2,000 people prosecuted, 900 convicted under Espionage and Sedition Acts.
- Political repression continued after the war against labor leaders and aliens.

The Smith Act:

- 1940, second peacetime sedition law

Senator Joseph McCarthy, seen here covering the microphone, used the Smith Act and other tactics to pursue a witch hunt against communists imagined and real.

- Crime to advocate the violent overthrow of the government, to conspire to advocate the violent overthrow of the government, to organize a group that advocated the violent overthrow of the government or to be a member of a group that advocated the violent overthrow of the government.
- Aimed at Communist party of United States.
- 1951, ruled constitutional
- 1957, scope of law greatly narrowed; must be actual action aimed at the forcible overthrow of the government.

USA PATRIOT Act

- Passed as part of the 2001 anti-terrorism bill.
- Defines terrorism as “any attempt to intimidate or coerce a civilian population” or to change “the policy of the government by intimidation or coercion.”
- One section makes it a crime to provide “expert advice or assistance” to terrorists.

Reconciling sedition with the 1st Amendment

Clear and present danger test

- Articulated by Justice Oliver Wendell Holmes (1919).
- Socialist party authorized Charles Schenck, the general secretary of the organization, to publish 15,000 leaflets protesting U.S. involvement in World War I.
- Congress has the right to outlaw certain kinds of conduct that might be harmful to nation.

Clear and imminent danger test

- Justice Louis Brandeis (1927) articulated it in concurring opinion.
- Must be clear and imminent danger of a substantive evil that the state has a right to prevent before an interference with speech can be allowed.
- Never found way into opinion of court.

Clear and probable danger test

- Justice Marshall Harlan wrote that it was necessary to distinguish between abstract advocacy and incitement of unlawful conduct such as the forcible overthrow of the government.
- "The essential distinction is that those to whom the advocacy is addressed must be urged to do something now or in the future, rather than merely believe in something."

Imminent lawless action

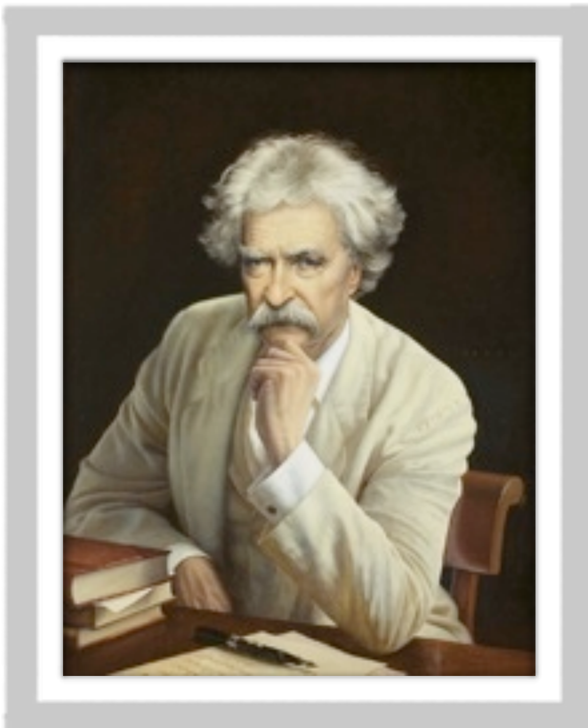
- Close to clear and imminent danger test
- "The constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such actions."
- 1969, sedition test in Brandenburg v. Ohio substantially curbed sedition prosecutions.
- ("abstract" threats don't count)

Blaming movies, video games and books

Brandenburg test makes it difficult, bordering on impossible, for a plaintiff to win a suit that alleges a play, book, song, movie or Web site was responsible for causing someone's illegal acts.

Prior restraint

- Also known as censorship
- Justice Charles Evan Hughes (1931) said prior restraint of Saturday Press was unconstitutional, but did not rule out use of prior restraint in all cases.
- Stands for the proposition that under American law prior restraint is permitted only in very unusual circumstances.
- It is the exception, not the rule.



As an active privilege, free speech ranks with the privilege of committing murder; we may exercise it if we are willing to take the consequences.

Mark Twain