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THE FIRST AMENDMENT--FREEDOM OF SPEECH

> 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.

Why was the First Amendment adopted? What is the policy behind the constitutional guaranty of freedom of expression?

Underlying the First Amendment is a belief that freedom of expression is fundamental to a democratic system of government. Free expression promotes individual self-fulfillment, provides for the attainment of truth and the generation of new ideas through free discussion and debate, and assures peaceful reform, hence a stable government.

The ideals that are implicit in the free speech guaranty of the First Amendment are perhaps best expressed by Mr. Justice Brandeis in his often-quoted concurring opinion in *Whitney v. California.*[1]

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberate forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions

1. 274 U.S. 357 (1927).

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> are subject. But they knew that order could not be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law--the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

The First Amendment, together with the other Amendments in the Bill of Rights, became a part of the United States Constitution in 1791. Until the end of World War I, however, the courts seldom ruled on an issue of freedom of expression. With America's entry into the First World War, Congress, prompted by prevailing hysteria, enacted a series of laws imposing restrictions on speech. The constitutional questions that these laws raised required the Supreme Court to rule on them. In 1918, with the case of *Schenck v. United States*,[2] the Supreme Court began developing its freedom of expression doctrine.

An early milestone in the development was the Court's ruling that freedom of speech and freedom of the press are protected from state action as well as that of the federal government. In *Gitlow v. New York*,[3] the Court said, "For present purposes we may and do assume that freedom of speech and of the press, which are protected by the First Amendment from

2. 249 U.S. 47 (1919).

3. 268 U.S. 652 (1925).

abridgment by Congress, are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states."

In addition to federal security legislation, the states, between 1900 and 1930, passed many laws designed to control *seditious speech* that was considered dangerous to the existence of government. Typical of such laws were those restricting labor activities and those that attempted to control anarchy and criminal syndicalism, doctrines that advocated the violent overthrow of the government. In 1940, Congress passed the Alien Registration Act (known as the Smith Act), which declared it unlawful for any person knowingly or willingly to advocate or teach the necessity or desirability of overthrowing the government.

With these and many similar laws on the books, it is no surprise that, since 1918, the Supreme Court has been faced with continuous appeals challenging the laws as violations of the First Amendment. For each of these laws presents a direct conflict with the terms of the First Amendment's guaranty that "Congress shall make no law...abridging the freedom of speech, or of the press...."

While several justices have vigorously argued that these words grant an absolute freedom, the position of the majority of the Court has always been that this important freedom must be balanced against the interests of the government in preserving itself from destruction and in preserving the public safety and welfare. The difficult problem for the court has been to devise tests and standards to aid in striking the proper balance.

In resolving many constitutional conflicts, the Court balances the

competing interests. Some justices have favored using this approach for the First Amendment as well. However, the majority of the Court has always considered these freedoms to be more important than others granted by the Constitution and has given them a preferred position. Thus, in any balancing of interests, the scales are initially tipped against any governmental restrictions on them. The government must overcome a presumption that the speech is protected.

CLEAR AND PRESENT DANGER TEST

An often-used test that embodies this concept is the *clear and present danger test.* This test has been used in cases where the Court has been required to balance the need of free speech against the government's need to protect itself from subversion or from breaches of the peace. The test, which was developed in a number of early cases dealing with *sedition,* was first articulated in *Schenck v. U.S.*[4] by Mr. Justice Holmes:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils that Congress (or a state legislature) has the right to prevent.

When the Court upheld the prosecution of Communists under the Smith Act in *Dennis v. U.S.*,[5] the test was restated as follows:

> In each case, courts must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of speech as is necessary to avoid the danger.

4. *Supra,* note 2.

5. 341 U.S. 494 (1951).

In *Yates v. U.S.*,[6] the Court made it clear that the Smith Act does not prohibit mere advocacy and teaching of forcible overthrow as an abstract principle unless it is accompanied by the urging of action for forcible overthrow of the government. Thus, *clear and present danger* is limited to incitement of others to commit a criminal act.

In *Brandenburg v. Ohio*,[7] the Court narrowed the scope further by emphasizing the imminence of the danger.

> The constitutional guaranties 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 action.

Moot Court Suggestion

Have the class conduct a moot court according to the plan described in the Teaching Methods Unit.[8] Assign *Feiner v. New York*[9] and *Dennis v. U.S.*[10] as precedents, and have the class apply their holdings to the fact situation in *Brandenburg v. Ohio*.[11]

TIME, PLACE AND MANNER RESTRICTIONS

As described above, speech alone can be restricted only under very

6. 354 U.S. 298 (1957).

7. 395 U.S. 444 (1969).

8. See p. 322.

9. 340 U.S. 315 (1951).

10. *Supra*, note 5.

11. *Supra*, note 7.

narrowly defined circumstances. Speech accompanied by some other activity can be restricted more justifiably. For example, an individual making a speech on a street corner is more likely to be free from governmental regulation than a number of persons who are parading on the same sidewalk. In the latter case, there is a conflict between the right to express one's views in public places and the multitude of statutes designed to keep streets and sidewalks open and safe for traffic, to limit noise and inconvenience to the public, and to preserve order. These statutes are often referred to as *time, place and manner restrictions.*

In determining the validity of such restrictions, the Court must balance the interests to decide whether the regulation is a reasonable limitation on freedom of speech. We have already noted the Court's tendency to accord free speech a higher degree of protection in this balancing process than it would other constitutional rights.

In *Talley v. California,*[12] a city ordinance that prohibited the distribution of leaflets in public unless they showed the name and address of the publisher was held invalid. The Court felt that such an identification requirement by its very nature has a *chilling effect* on freedom of expression. In addition, it found no public interest was being furthered by this requirement.

A statute that prohibits use on a public street of a sound truck that amplifies its message to a "loud and raucous volume" is valid. Even though the truck was delivering a message of public interest, the

12. 362 U.S. 60 (1960).

community's interest in order and tranquility outweighed it.[13] However, a ban on sound trucks must be a reasonable restriction on *time, place and manner*, and cannot be applied in situations where the operation does not create a nuisance.

The Court requires that any statutory delegation of regulatory power to local officials must be reasonably related to some legitimate governmental interest, must be applied in a nondiscriminatory manner, and must not give any discretionary power to the administering official. Thus an ordinance requiring a permit for any distribution of leaflets is invalid since it is not limited to leafleting which might disrupt public order or create litter in the streets.[14] Moreover, the ordinance must not give the police the power to censor any idea with which they disagree.

The Court has struck down several attempts by local officials to inhibit freedom of expression by arbitrarily invoking a disturbing-the-peace statute. For example, suppose that a group of civil rights demonstrators, peaceably assembled at the state capitol to express their grievances, are arrested for refusing to obey a police order to disperse. If there has been no sign of violence and police protection is ample, the conviction will be held invalid.[15]

The result was the same where a civil rights leader was arrested for disturbing the peace after telling a group of demonstrators to go sit in

13. Kovacs v. Cooper, 336 U.S. 77 (1949).

14. Lovell v. City of Griffin, 303 U.S. 444 (1938).

15. Edwards v. South Carolina, 372 U.S. 229 (1963).

at segregated lunch counters. In *Cox v. Louisiana,*[16] there was no boisterous or violent conduct or use of indecent language, and the mere expression of unpopular views was held not to be enough to constitute a breach of the peace.

The Court may also protect freedom of speech by striking down a statute that gives enforcement officials unfettered discretion to regulate speech rather than providing clearly defined standards. Thus, a city ordinance that gives local officials power to deny parade permits based on their judgment of how the parade will affect community "welfare" or "morals" is unconstitutional. The same is true of an ordinance that makes it a crime for a person to remain on the street after the police have requested him to move. Such statutes provide no clear standards for enforcement; they leave the determination of what conduct will be prohibited to the opinion of the local police.[17]

Moot Court Suggestion

Have the class conduct a moot court according to the plan described in the Teaching Methods Unit. Assign *Cox v. Louisiana*[18] and *Brown v. Louisiana*[19] as precedents, and have the class apply their holdings to the fact situation in *Adderley v. Florida.*[20]

16. 379 U.S. 536 (1965).

17. Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

18. *Supra,* note 16.

19. 383 U.S. 131 (1966).

20. 385 U.S. 39 (1966).

SYMBOLIC SPEECH AND *SPEECH PLUS*

Another problem for the Supreme Court has been to determine how broadly it should define *speech*. Some acts, such as wearing a black armband as a war protest, are so *closely akin to free speech* that they are regarded as *symbolic speech*. Such an act enjoys the same degree of protection under the First Amendment as pure speech. In *Tinker v. School District*,[21] the Court held that school regulations that prohibit a student from this form of expression are invalid so long as the expression does not substantially interfere with school work. Likewise, in *Schacht v. U.S.*,[22] the Court struck down a federal statute that prohibited an actor's wearing an army uniform during a dramatic performance that tended to discredit the armed forces.

However, in other cases where *conduct* has been used to express an idea, the Court has distinguished between *symbolic speech* and *speech plus*, additional conduct that is subject to regulation. For example, in *U.S. v. O'Brien*,[23] the Court upheld a statute that prohibits burning draft cards. It stated that when speech and non-speech elements are combined in the same course of conduct, government regulations are valid only if the government can show a *compelling governmental interest*, unrelated to the suppression of free expression.

21. 393 U.S. 503 (1969).

22. 398 U.S. 58 (1970).

23. 391 U.S. 367 (1968).

UNPROTECTED SPEECH

There are some forms of expression that are not protected by the First Amendment at all. These may be prohibited by federal or state law. As noted by the Supreme Court in *Chaplinsky v. New Hampshire:*[24]

> ...it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous...."

Also included is speech that is used as the instrumentality for committing a crime. Fraudulent statements that cheat someone out of his property, such as false advertising, are other examples of unprotected speech.

The basic reason that these types of speech are not protected by the First Amendment is that, by their very utterance, they cause injury either to a person or society. Any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Outlined and discussed below are the three principal classifications of speech that a state or federal government may regulate without violating the First Amendment.

Obscenity

A traditional assumption in the law has been that obscenity is not a form of expression that is protected by the free speech and press guaranties of the Constitution. Until recently, there was no serious question that states could prohibit and punish the publication or distribution of

24. 315 U.S. 568 (1942).

obscene matter. A state could do so as a proper exercise of its police power to protect the moral well-being of its citizens. Anti-obscenity laws have been deemed necessary for several reasons, among them: to prevent an erosion of community standards and morals; to prevent immoral thoughts and desires in individuals; to prevent the stimulation of illegal or undesirable behavior; to prevent the arousal of feelings of disgust and revulsion, which is the effect of obscenity on many people; and to protect children from adverse effects of obscenity.

It was not until 1957, in *Roth v. United States*,[25] that the Supreme Court first dealt directly with the question of whether state and federal anti-obscenity statutes are unconstitutional. In that case, the Court reaffirmed the idea that "obscenity is not within the area of constitutionally protected speech or press." The basis of the Court's decision was that obscenity is "utterly without redeeming social importance."

The main problem for the Supreme Court in *Roth* and more recent cases has been that of defining obscenity. What distinguishes literature and art, which are protected forms of expression, from obscenity, which is not protected? Where does a judge, jury or law enforcement agency draw the line between desirable control and curtailment of free expression? No one has yet defined obscenity to general satisfaction. At present, the Court requires that three elements be established in each case for material to be deemed obscene: (1) the dominant theme of the material taken as a whole must appeal to a prurient interest in sex; (2) the material must be patently offensive and affront contemporary community standards

25. 354 U.S. 476 (1957).

relating to the description of or representation of sexual matters; and (3) the material must be utterly without redeeming social value.

If one of the three elements is not established with respect to certain allegedly obscene material, then the standard is not met and the material cannot be suppressed. For instance, suppose that a book publisher is on trial for the crime of publishing and distributing obscene matter. The book involved contains titillating descriptions of sexual activity and little else. If the jury decides that the book is not patently offensive according to contemporary community standards, then the publisher is not guilty even though the jury, at the same time, decides that the book appeals mainly to a prurient interest in sex and has no redeeming social value.

There is now substantial support among lawyers, writers, artists, commentators and other authorities for the proposition that obscene matter should not be controlled, that it is a form of expression protected by the free speech and press guaranties of the First Amendment. In recent years, the puritanical notions have waned in the light of studies, surveys and arguments suggesting that obscenity's effect on morality and crime is not as serious as was traditionally believed.

The justices of the Supreme Court are not unanimous in their views on obscenity. Mr. Justice Douglas, one of the dissenters in *Roth*, vigorously protested the majority's holding:

> The test of obscenity the Court endorses today gives the censor free range over a vast domain. To allow the state to step in and punish mere speech or publication that the judge or the jury thinks has an undesirable impact on thoughts but that is not shown to be a part of unlawful action is drastically to curtail the First Amendment. As

> recently stated by two of our outstanding authorities on obscenity, 'The danger of influencing a change in the current moral standards of the community, or of shocking or offending readers, or of stimulating sex thoughts or desires apart from objective conduct, can never justify the losses to society that result from interference with literary freedom.' Lockhart and McClure, *Literature, The Law of Obscenity and the Constitution*, 38 Minn. L. Rev. 295, 387."

Nevertheless, it is still the law that obscenity is not constitutionally protected.

Defamation

The word *defamation* means injuring a person's character, fame or reputation by making false statements about him. It includes libel (written defamatory statement) and slander (spoken defamatory statement).

A person whose reputation has been harmed as a result of false statements made by another may sue the other person and recover money for the harm caused. The person who makes a defamatory statement cannot defend himself on the ground that he is exercising his right of free speech. The law looks upon the loss of reputation as similar to the loss of an arm or leg and requiries the inflictor of such loss to make comparable reparation. The injury results from the communication itself, and, in this sense, a defamatory statement more closely resembles an *act* than an expression that is protected by the First Amendment. Thus, it is not unconstitutional for a state to make rules and laws that tend to restrict the publication of defamatory statements.

A major exception to the rule that libel and slander are not protected speech relates to criticism of official conduct. In *New York Times v.*

Sullivan,[26] the Supreme Court held that the First Amendment "prohibits a public official from recovering damages for 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." This means that a public official, such as a mayor, governor, senator, etc., may not sue a newspaper for publishing an untrue statement concerning the performance of his duties unless he shows that the newspaper printed the false statement with *actual malice*, i.e., with knowledge that the statement was false or with reckless disregard for whether it was false or not. Thus, honest error on the critic's part is protected as much as wholly truthful criticism.

The principle underlying the Court's decision in *New York Times* is that "debates on public issues should be uninhibited, robust and wide open," and such debate "may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials. ...[E]rroneous 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,' *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963)...."

Speech Used as the Instrumentality for Committing a Crime

Speech in this class has been characterized as involving more than speech; it may be termed a *verbal act* and may, as such, be subjected to

26. 376 U.S. 255 (1964).

public authority without infringing upon the First Amendment guaranty. The three broad categories of speech used as a criminal instrumentality are speech used as an instrument of coercion, e.g., blackmail, extortion; speech used as an instrument or element of fraud, e.g., intentionally filing a false income tax return; and speech used to communicate information needed to carry on criminal activities, e.g., bookmaking and other illegal gambling activities.

CONCLUSION

The First Amendment guaranty of free speech protects persons from excessive governmental regulation. Over the years, the cases in which this freedom has been disputed have resulted essentially in three degrees of Supreme Court protection. First, as a general rule, the Court accords a high degree of protection to the individual's right to free speech, including various forms of *symbolic speech*. The Court will uphold government restriction on the speech when it creates a *clear and present danger* of inciting imminent lawless action.

Second, in some cases the Court focuses on the conduct accompanying the speaker's speech, such as parading in a congested area or burning a draft card. If the government can show a compelling state interest, beyond its interest in suppressing the speech itself, the Court allows the restriction on the individual's freedom of speech.

In the third category, the Court has held that some speech is not protected under the First Amendment. The question in these cases is whether the speech falls within the unprotected area. If it does, the government can prohibit it by statute and punish any violators.