Freedom of Speech

The **most famous limit** on free speech is the **clear and present danger test.** In the case of *Schenck v. United States* (1919), Justice Oliver Wendell Holmes argued that a person may not falsely scream "fire!" in a crowded theater, because doing so would likely result in panic. The Court has also ruled that there is no constitutional protection for false defamatory speech (called *slander* when it is spoken and *libel* when it is in a more permanent form, such as print), obscenity, or speech intended to incite violence.

Since the 1940s, the Court has followed the **preferred position doctrine** in determining the limits of free speech. The doctrine reflects the Court's belief that freedom of speech is fundamental to liberty; therefore, any limits on free speech must address severe, imminent threats to the nation. They must also be limited to constraining those threats; any restriction that fails to meet this test would probably be overturned by the Supreme Court. The Court continues to protect offensive but nonthreatening speech such as flag burning (usually undertaken by protesters, who burn the flag as a symbolic indication that the country has failed to protect American values such as democracy and freedom for all).

Important Cases

Schenck v. United States (1919). This case, decided by Chief Justice Oliver Wendell Holmes, established that speech which evokes "a clear and present danger" is not permissible. He famously used the example of someone falsely yelling "fire!" in a crowded theater as an example of prohibited speech.

Gitlow v. New York (1925). This case created the "Bad Tendency Doctrine," which held that speech could be restricted even if it only has a tendency to lead to illegal action. Though this element of the decision was quite restrictive, Gitlow also selectively incorporated freedom of speech to state governments.

Tinker v. Des Moines (1969). Students in an Iowa school were suspended for wearing black armbands to protest the Vietnam war. The Court ruled that this suspension was unconstitutional, and that public school students do not "shed their constitutional rights at the schoolhouse door."

Bethel School District v. Fraser (1986). This case gave public school officials the authority to suspend students for speech considered to be lewd or indecent.

Hustler Magazine v. Falwell (1988). In this much-publicized case, the Court held that intentional infliction of emotional distress was permissible First Amendment speech—so long as such speech was about a public official, and could not reasonably be construed to state actual facts about its subject.

Texas v. Johnson (1989). *Johnson* established that burning the American flag is an example of permissible free speech, and struck down numerous anti-flag burning laws.

Morse v. Frederick (2007). This case was known as the "Bong Hits 4 Jesus" case, in which the Supreme Court limited students' free speech rights. The justices ruled that Frederick's free speech rights were not violated by his suspension over what the majority's written opinion called a "sophomoric" banner.

Citizens United v. Federal Election Commission (2010). The case established that corporations have a First Amendment right to expressly support political candidates for Congress and the White House.

Freedom of the Press

On occasion the government has tried to control the press, usually claiming national security interests. This occurred during the 1990 Persian Gulf War, when the Pentagon limited media access to the war zone and censored outgoing news reports. The media objected to these limitations. Such conflicts usually end up in the courts, where judges are forced to weigh conflicting national interests: the need to be informed versus security concerns. A previous similar case involved the Pentagon Papers (1971), a secret report on American involvement in Vietnam. The report was leaked to the *New York Times*, which published excerpts from the report. The government tried to halt further publication, claiming that national security was at stake. In that case, the Court rejected the government's efforts to prevent publication (called **prior restraint**), ruling that the public's need to be well informed outweighed the national security issues raised. The Pentagon Papers case demonstrates the preferred position doctrine.

An even more contentious issue involves the media's responsibility to reveal the sources of their information. The Supreme Court has ruled that reporters are not exempt from testifying in court cases and that they can be asked to name their sources. Reporters who refuse to do so, as many have, can be jailed. A number of states have enacted **shield laws** to protect reporters in state cases, but in other states and in federal cases reporters have no such protection.

As mentioned above, libel and obscenity are not protected by the First Amendment. In the case of *Miller v. California* (1973), the Court established a **three-part obscenity test:**

- Would the average person, applying community standards, judge the work as appealing primarily to people's baser sexual instincts?
- Does the work lack other value, or is it also of literary, artistic, political, or scientific interest?
- Does the work depict sexual behavior in an offensive manner?

Important Cases

Near v. Minnesota (1931). *Near* established that state injunctions to prevent publication violate the free press provision of the First Amendment and are unconstitutional. This case is important in that it selectively incorporates freedom of the press and prevents prior restraint.

New York Times v. Sullivan (1964). If a newspaper prints an article that turns out to be false but that the newspaper thought was true at the time of publication, has the newspaper committed libel? This case said no.

New York Times v. U.S. (1971). When Defense Department employee Daniel Ellsburg leaked some confidential files indicating that the war in Vietnam was going poorly, the government sought to prevent the publication of these "Pentagon Papers" by the New York Times. In this case, the Court held that executive efforts to prevent the publication violated the First Amendment were forbidden.

Hazelwood School v. Kuhlmeier (1988). In *Hazelwood*, the Court held that school officials have sweeping authority to regulate free speech in student run newspapers.

Freedom of Assembly and Association

The First Amendment protects the right of people to assemble peacefully. That right does not extend to violent groups or to demonstrations that would incite violence. Furthermore, the government may place reasonable restrictions on crowd gatherings, provided such restrictions are applied equally to all groups. Demonstrators have no constitutional right, for example, to march on and thereby close down a highway. They may not block the doorways of buildings. In short, crowd gatherings must not unnecessarily disrupt day-to-day life. That is why groups must apply for licenses to hold a parade or street fair.

The Court has also ruled that the combined rights of freedom of speech and freedom of assembly imply a **freedom of association**. This means that the government may not restrict the number or type of groups or organizations people belong to, provided those groups do not threaten national security.

Important Cases

Thornhill v. Alabama (1940). Labor unions have been controversial since the dawn of the industrial revolution—did their strikes constitute a form of unlawful assembly? In *Thornhill*, the Court held that strikes by unions were not unlawful.

Cox v. New Hampshire (1941). When a group of Jehovah's Witnesses were arrested for marching in New Hampshire without a permit, they claimed that permits themselves were an unconstitutional abridgment of their First Amendment freedoms. In *Cox*, the Court held that cities and towns could legitimately require parade permits in the interest of public order.

Lloyd Corporation v. Tanner (1972). This case allowed the owners of a shopping mall to throw out people protesting the Vietnam War. The key element here is that malls are private spaces, not public. As a result, protesters have substantially fewer assembly rights in malls and other private establishments.

Boy Scouts of America v. Dale (2000). Private organizations' First Amendment right of expressive association allows them to choose their own membership and expel members based on their sexual orientation even if such discrimination would otherwise be prohibited by anti-discrimination legislation designed to protect minorities in public accommodations. As a result of this case, the Boy Scouts of America were allowed to expel any member who was discovered to be homosexual.

Freedom of Religion

The Constitution guarantees the right to the free exercise of religion, meaning that the government may not prevent individuals from practicing their faiths. This right is not absolute, however. Human sacrifice, to give an extreme example, is not allowed. The courts have ruled that polygamy is not protected by the Constitution, nor is the denial of medical treatment to a child, regardless of individual religious beliefs. However, the Court has ruled that Jehovah's Witnesses cannot be required to salute the American flag and that Amish children may stop attending school after the eighth grade. In all cases, the **Court weighs individual rights to free religious exercise against society's needs.**

The Constitution also prevents the government from establishing a state religion (the Establishment Clause). The Establishment Clause has been used to prevent school prayer, government-sponsored displays of the Christmas nativity, and state bans on the teaching of evolution (because such bans were religiously motivated). However, the wall between church and state is not rock solid. The Court has allowed government subsidies to provide some aspects of parochial education (such as lunches, textbooks, and buses). It has also allowed for tax credits for non-public school costs. In

deciding whether a law violates the Establishment Clause, the Court uses a three-part test, called the **Lemon test** after the case *Lemon v. Kurtzman* (1971):

- Does the law have a secular, rather than a religious, purpose?
- Does the law neither promote nor discourage religion?
- Does the law avoid "excessive entanglement" of the government and religious institutions?

Important Cases

Engel v. Vitale (1962). This landmark case prohibited state-sponsored recitation of prayer in public schools.

Abington School Dist. v. Schempp (1963). Given the Court's ruling in *Engel*, it's not surprising that in *Abington* they decided that the Establishment Clause of the First Amendment forbids state-mandated reading of the Bible, or recitation of the Lord's Prayer in public schools.

Epperson v. Arkansas (1968). In line with the Establishment Clause, *Epperson* prohibited states from banning the teaching of evolution in public schools.

Lemon v. Kurtzman (1971). This case dealt with state laws intending to give money to religious schools or causes. The Court held that in order to be consistent with the Establishment Clause, the money had to meet three qualifications: (1) it must have a legitimate secular purpose, (2) it must not have the primary effect of either advancing or inhibiting religion, and (3) it must not result in an excessive entanglement of government and religion. These qualifications are known as the "Lemon Test."

Wisconsin v. Yoder (1972). This case dealt with the Amish community's desire to pull their children from public school before the age of 16 so that they could help with farm and domestic work. The Court sided with the Amish and held that parents may remove children from public school for religious reasons.

Employment Division v. Smith (1990). This case determined that the state could deny unemployment benefits to a person fired for violating a state prohibition on the use of peyote, even though the use of the drug was part of a religious ritual. In short, states may accommodate otherwise illegal acts done in pursuit of religious beliefs, they are not required to do so.

The Rights of the Accused

Rights granted to the accused are a fundamental protection against governmental abuse of power. Many of the these rights are found in the Fifth Amendment. Without them, the government could imprison its political opponents without trial or could guarantee conviction through numerous unfair prosecutorial tactics. However, these rights are also controversial. Anti-crime organizations and politicians frequently decry these protections when arguing that it is too difficult to capture, try, and imprison criminals. These accusations have grown louder and more frequent since the 1960s, when the Warren Court (the Supreme Court under Chief Justice Earl Warren) greatly expanded those protections that are granted to criminal defendants.