

FIRST AMENDMENT FREEDOMS - FREEDOM OF SPEECH

FREEDOM OF SPEECH

The definition of freedom of speech has changed dramatically over the years, with an ever-increasing emphasis on protection of free speech, often at the expense of other liberties and rights. Until recently, especially during times of war and crisis when national security is at stake, the government has passed laws that control free speech.

The most famous Supreme Court case that resulted from restrictions imposed during World War I was *Schenck v. United States*. Charles Schenck, a socialist who mailed circulars to young men urging them to resist the military draft, was convicted of violating the Espionage Act. The Supreme Court upheld his conviction, with Oliver Wendell Holmes writing the precedent-setting opinion that any language that directly caused an illegal act was not protected by the First Amendment. Holmes distinguished between language that was merely critical of the government and that which was directly a "clear and present danger" to national security. The "clear and present danger" test became a standard by which to balance national security and freedom of speech.

By the late 1950s, with McCarthyism (Red Scare) subsided and a new Supreme Court under the direction of Earl Warren, the Court leaned more and more toward freedom of speech. No laws were passed restricting speech during the Vietnam War, and the *Brandenburg v. Ohio* case established that speech would have to be judged as inciting "imminent" unlawful action in order to be restricted. The case involved a Ku Klux Klan leader convicted of attempting to incite mob action when he said "We'll take the (expletive deleted) street later." The conviction was overturned by the Supreme Court because Brandenburg did not call for an "imminent" action.

- The Clear and Present Danger Test
 - *Schenck v. United States*, 1919
 - Created precedent that 1st Amendment guarantees of free speech are not absolute; Public authorities could limit free speech
 - Speech may be restricted when it incites violent action (imminent threat such as falsely shouting "Fire" in crowded theater)
 - *Brandenburg v. Ohio*, 1969
 - SC limited the clear and present danger test by ruling that the government could punish the advocacy of illegal action only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"

NON-PROTECTED SPEECH

Today, the following forms of speaking and writing are not granted full constitutional protection:

- Supreme Court holds that all speech is protected unless it falls into one of the four narrow categories – libel, obscenity, fighting words, and commercial speech.
- Libel and slander
 - Libel is a written defamation that falsely attacks a person's good name and reputation
 - Slander is a spoken defamation that falsely attacks a person's good name and reputation
 - *New York Times v. Sullivan* (1964) – Supreme Court established the guidelines for libel cases
 - Public officials and public figures must first prove "actual malice"
 - State laws may allow private persons to collect damages without proving actual malice
 - Limits on student speech
 - *Bethel v. Fraser* (1986) – school can suspend a student from school for making a speech full of sexual innuendos
- Obscenity and pornography
 - *Miller v. California* (1973) gave constitutional definition of obscenity – 1) Appeals to prurient interest in sex, 2) Patently offensive, and 3) Must lack **serious** literary/artistic/political/scientific value.
 - Sexually explicit materials about or aimed at minors are not protected by the First Amendment
- Fighting words
 - Governments may punish certain well-defined and narrowly limited classes of speech that by their very utterance inflict injury or tend to incite an immediate breach of peace
 - Burning of a cross
 - In 2003 SC ruled that a Virginia law that prohibited the burning of a cross with an intent to intimidate did not violate the First Amendment
- Commercial speech
 - Commercial speech (such as advertising) is more restricted than are expressions of opinion on religious, political, or other matters
 - The Federal Trade Commission (FTC) decides what kinds of goods may be advertised on radio and television and regulates the content of such advertising

PROTECTED SPEECH

- Prior restraint
 - Blocking speech before it is given
 - Such action is presumed by courts to be unconstitutional
 - *New York Times v. United States* (1971) – In the Pentagon Papers case, the court refused to impose prior restraint: the revelations may have embarrassed the government, but they did not endanger national security
- Certain forms of symbolic speech are protected
 - *Tinker v. Des Moines* (1969) – wearing black armband at school at protest Vietnam War
 - *Texas v. Johnson* (1989) – flag burning