

# ***First Amendment: Freedom of Expression***

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# NJ Student Learning Standards for Social Studies (2020)

- 6.1.8.CivicsPI.3.b: Evaluate the effectiveness of the fundamental principles of the Constitution (i.e., consent of the governed, rule of law, federalism, limited government, separation of powers, checks and balances, and individual rights) in establishing a federal government that allows for growth and change over time.
- 6.1.8.CivicsPI.3.c: Distinguish the powers and responsibilities of citizens, political parties, interest groups, and the media in a variety of governmental and nongovernmental contexts.
- 6.1.8.CivicsHR.3.a: Explain how and why constitutional civil liberties were impacted by acts of government during the Early Republic (i.e., Alien and Sedition Acts).
- 6.3.8.CivicsDP.2: Make a claim based on evidence to determine the extent and the limitations of First Amendment rights (e.g., U.S. Supreme Court decisions).
- 6.3.8.CivicsPR.5: Engage in simulated democratic processes (e.g., legislative hearings, judicial proceedings, elections) to understand how conflicting points of view are addressed in a democratic society.

# First Amendment

“Congress shall make no law  
...abridging the freedom of speech, or of  
the press, or the right of the people to  
peaceably assemble, and to petition the  
Government for a redress of  
grievances.”

# *What is freedom of expression?*

The First Amendment prohibits the Congress (that is, the national government—extended to state and local governments through the 14<sup>th</sup> Amendment) from interfering with:

- an individual's ability to express views freely
- the ability of the press to write and publish (no censorship)
- individuals' ability to assemble (meet with) others
- petition the government (send letters, emails, phone calls, meet in person, lobby, protest peacefully)

# *Why was freedom of expression so important to the founders?*

- Freedom of expression prevents the government from punishing people for expressing their opinions.
- The ability of individuals to join together to petition or protest grievances against the government is critical to maintaining a free society.
- The press was not free from censorship in Britain or the British colonies (See *Crown v. Zenger* (1735)). A free media functions as a watchdog that can investigate and report on government wrongdoing. The right to report news or circulate opinion without censorship from the government came to be seen as “one of the great bulwarks of liberty”.

# What are the benefits of freedom of expression?

Free expression:

- Allows robust discussions and elections
- Provides a marketplace of ideas
- Advances knowledge and individual development
- Permits peaceful social change.

# Should freedom of expression ever be limited?

Although the language of the First Amendment is absolute, the right to free speech has been limited by the U.S. Supreme Court :

- for national security
- libel and slander (written or spoken statements intended to damage a person's character or reputation that are presented as facts but are untrue)
- pornography
- commercial speech.

# National Security: Wikileaks

- To some Julian Assange is a hero to others he is a traitor.
- Listen to four-minute podcast on NPR radio at <https://www.npr.org/2019/04/12/712659290/how-much-did-wikileaks-damage-u-s-national-security> or go to other sources to learn about the impact of Wikileaks
- Did Wikileaks damage national security? What do you think?
- How can we balance the need for the public to know about what their government is doing and the need for the government to maintain military and diplomatic secrecy?

# National Security: Free Press

## The Sedition Act of 1798

- made it a crime for American citizens to "print, utter, or publish . . . any false, scandalous, and malicious writing," in anticipation of an expected war with France.
- Used against Democratic-Republican newspapers criticizing the actions of the Federalists in power.
- Repealed after the election of 1800 changed parties.
- The U.S. government publicly repented and repaid the fines imposed.

# National Security: Free Press

## The Espionage Act of 1917

- made it a crime in wartime to make false statements with intent to interfere with the military effort, to cause or attempt to cause disloyalty or refusal of duty in the armed forces, or to obstruct military recruitment and enlistment efforts.

## The Sedition Act of 1918

- made it a crime to “incite, provoke or encourage resistance to the United States” or to conspire to urge curtailment of munitions production with intent “to cripple or hinder the United States in the prosecution of the war.”
- Antiwar journalists and were arrested during World War I and during the Red Scare and their convictions were upheld (*Schenck v. U.S.*, 1919 and *Abrams v. U.S.*, 1919 ).
- Congress repealed the Sedition Act of 1918 on December 13, 1920. The Espionage Act of 1917 remains in effect.

# National Security: Free Press

## The Pentagon Papers:

- Defense Dept. staffer Daniel Ellsberg gave the *New York Times* copies of a secret government report on American involvement in the Vietnam War.
- In 1971, the U.S. government attempted to cease publication of the Pentagon Papers as the war in Vietnam continued.
- The Supreme Court found the action an unconstitutional prior restraint (*New York Times v. U.S.*, 1971)
- Years later Ellsberg explained that he was trying to help bring an end to the war. Listen to NPR podcast at <https://www.npr.org/2018/01/19/579101965/daniel-ellsberg-explains-why-he-leaked-the-pentagon-papers>

# Defamation: Free Press

- A Minneapolis newspaper, *The Saturday Press*, accused local officials of being implicated with gangsters.
- Minnesota officials sought a permanent injunction against the newspaper on the grounds that it violated the Public Nuisance Law because it was malicious, scandalous, and defamatory.
- The U.S. Supreme Court held in *Near v. Minnesota* (1931) that such a prior restraint on publication violated the First Amendment and established the principle that with some narrow exceptions, the government could not censor or otherwise prohibit a publication in advance, even though the communication might be punishable after publication in a criminal or other proceeding. In some situations, such as when speech is obscene, incites violence, or reveals military secrets, the government might be able to justify a prior restraint.

# The scope of Free Speech

- Clarence Brandenburg, a leader in the Ku Klux Klan, delivered a speech in Hamilton County, Ohio, where he called for “revengeance” [a sic] against Jews and African Americans. He was convicted under two Ohio laws, one of which punished the advocacy of “the duty, necessity, or propriety of crime [or] violence...as a means of accomplishing industrial or political reform.”
- The U.S. Supreme Court struck down the Ohio law as unconstitutional in *Brandenburg v. Ohio* (395 U.S. 444, 1969)
- The Court reasoned that government cannot punish speech advocating illegal action unless it is “directed at inciting or producing imminent lawless action,” and is “likely to incite or produce such action.”
- What if Brandenburg had said “NOW is the time to take revengeance” instead of “It's possible that revengeance may have to be taken”? Would this have met the court’s test?

# Hate Speech

- In 2003, Barry Black and others convicted under a Virginia statute making it illegal to burn a cross in public with the intent to intimidate others. The conviction was upheld by a split U.S. Supreme Court. The Court clarified that a hate crime the speaker “need not actually intend to carry out the threat” for a hate crime to occur. (*Virginia v. Black*, 538 U.S. 343)
- Hate speech is any form of expression through which speakers intend to vilify, humiliate, or incite hatred against a group or a class of persons on the basis of race, religion, skin color sexual identity, gender identity, ethnicity, disability, or national origin.
- Although hate speech is outlawed in most Western European countries, it is protected speech in the U.S. unless it is direct, personal, and either truly threatening or violently provocative.
- What is the difference between inflammatory speech (*Brandenburg*) and hate speech (*Black*)? The cross burning was directed personally, against a race, and was intended to intimidate.

# Free Speech in School: *Tinker*

- Although K-12 schools may impose rules for safety and to ensure that the environment is conducive to learning, the Supreme Court has affirmed that students do not lose their constitutional rights “at the schoolhouse gate.”
- In 1969, Mary Beth Tinker and two other public school pupils in Des Moines, Iowa, were suspended from school for wearing black armbands to protest the government's policy in Vietnam in violation of a school regulation banning the wearing of armbands.
- The students were not disruptive, and did not impinge upon the rights of others.
- The Supreme Court held a prohibition against expression of opinion, without any evidence that the rule is necessary to avoid substantial interference with school discipline or the rights of others, not permissible under the First and Fourteenth Amendments. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

# Hypothetical

- Thinkalot Intermediate School has 750 bright, engaged students.
- A group of 50 students at the school wanted to protest the war in Iraq by placing banners in the hallways and refusing to speak in class.
- Classes proceeded as usual. There were no demonstrations and no threats of violence.
- The principal spoke with the students in private and asked them to stop their silent protest.
- The students shook their heads “no” and continued with the silence for the entire week.
- The students were suspended.

# What do you think?

Based on the *Tinker* decision, should the students be suspended or is their action within the protection of the first amendment?

- Does the refusal to speak in school interfere with the rights of other students?
- Does it interrupt class routine or interfere with the educational process?
- Are there less disruptive ways for the students to make their views known?

# Free Press in School: *Hazelwood*

- The Hazelwood School District wanted to restrict the publication of an article about teen pregnancy in school newspaper.
- In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Supreme Court held that schools may restrict what is published in student newspapers if the papers have not been established as public forums.
- School officials can censor school-sponsored publications if their decision is “reasonably related to a legitimate pedagogical purpose.” This means school officials must show that they have a reasonable educational reason for censoring the material.
- New Jersey enacted legislation in 2021 to protect the press freedom of students at public schools and public institutions of higher education, making it the 15th state to adopt legislation prohibiting the censorship of student journalists except in narrow circumstances.

# *Social Media*

- Private online platforms and social media sites, such as Facebook and Twitter, are not held to the same standards as print media
- Social media sites are free to set their own practices and rules on what we post or see
- Do Facebook, Twitter and other online platforms have an obligation to only allow postings that are truthful and do not promote violence?
  - Former President Trump was suspended from Twitter because he violated the platform's policy against promoting violence
  - Rep. Marjorie Taylor Greene (R-GA), who promoted viral conspiracy theories like Qanon, was suspended from Twitter and from Facebook for posting misinformation about Covid-19 vaccines.
- Should the federal government regulate private online platforms as they do print media?

# *The right to assemble peacefully and petition the government*

- The right to join with fellow citizens in protest or peaceful assembly is critical to a functioning democracy and at the core of the First Amendment.
- Traditional public forums include public parks, sidewalks and areas that have been traditionally open to political speech and debate.
- The government may, however, subject speech to reasonable, content-neutral restrictions on its time, place, and manner.
- Freedom of assembly may be limited by ordinances prohibiting blocking sidewalks or streets or may require a permit. And if the assembly turns violent, law enforcement may step in to help get things back under control.

# *Why is the right to assemble peacefully important?*

The right to assemble is of significant importance to U.S. society as it gives all citizens the freedom to have a voice and freely associate with one another in public under a common cause or shared value.

“The right of peaceful assembly plays an important role in mobilizing the population, permitting the formulation and expression of grievances and aspirations, facilitating the celebration of events and, importantly, influencing public policies.”

Michelle Bachelet, United Nations High Commissioner for Human Rights  
June 29, 2020, Report on Impact of new technologies on the promotion and protection of human rights in the context of assemblies, including peaceful protests

# *The right to assemble peacefully*

- In 1961, nearly 200 other African-American high school and college students peacefully assembled at the Zion Baptist Church in Columbia, South Carolina. They planned to march six blocks to the state capital to protest segregation and racial discrimination. A crowd was gathering.
- When the students failed to obey an order to disperse they were arrested and convicted of breach of peace.
- The U.S. Supreme Court held in *Edwards v. South Carolina* 372 U.S. 229 (1963) that the state infringed the students' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances.

# *The scope of peaceful assembly*

- In 1977, a group of neo-Nazis applied for a permit to march in the heavily Jewish community of Skokie, Illinois. Two weeks later, the Skokie Board of Commissioners passed an ordinance requiring marchers to post a \$350,000 insurance bond and banning distribution of printed materials that promote hatred of groups of people, or marching in military style uniforms.
- The Nazi group argued that these laws were unconstitutional violations of the First Amendment.
- The case eventually went to the Supreme Court, which ruled in *National Socialist Party of America v. Village of Skokie* (1977) that the Nazi Party could not be prohibited from marching peacefully because of the content of their message.

# *What do you think?*

- Do you agree with the Supreme Court decisions (Brandenburg and Skokie) that the First Amendment protects individuals' rights to express their views, even if those views are considered extremely offensive by most people?
- The Supreme Court has stated that the government cannot punish speech unless it is “directed at inciting or producing imminent lawless action,” and is “likely to incite or produce such action.” When should law enforcement become involved to prevent violence? When does a “peaceful protest” become a “riot”?