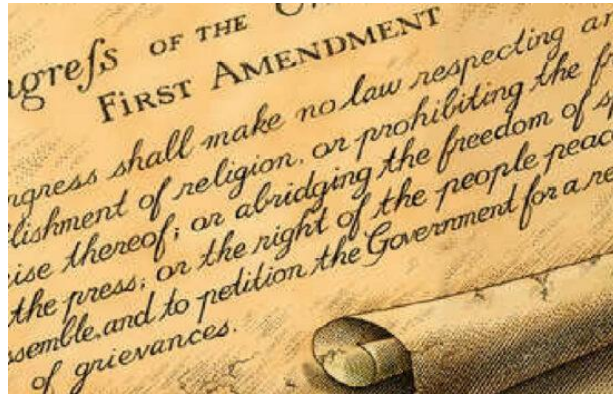


Civil Liberties concerning the First and Second Amendments



The clauses within the First Amendment deal with freedoms of expression, the most fundamental affirmations of American liberty. The First Amendment covers expressions of political beliefs and opinions.

One of the more difficult interpretations of the First Amendment is the balance between the rights of political expression versus the issue of national security. This is especially valid during wartime. The Espionage Act of 1917 was passed during World War I. The Act covered several issues but in particular it made it a crime to interfere with military recruitment.

In 1917, Charles Schenck and Elizabeth Baer printed and distributed antiwar leaflets to young men hoping that they would not comply with the military draft. Schenck and Baer were convicted under the Espionage Act and a unanimous court ruled against the defendants in the case of **Schenck v. United States**, arguing that the restrictions on expression under the Espionage Act were permissible.

In its decision, the court established the clear and present danger test, evaluating whether restrictions on political speech are legitimate. **Clear and Present Danger** is the legal standard that speech posing an immediate and serious threat to national security is **not** protected by then First Amendment. There are limits on free speech, for example the First Amendment does not protect someone who shouts "fire."

Schenck v. United States, a version of the case can be opened at the link <https://www.oyez.org/cases/1900-1940/249us47>

Another important case was seen in 1969 with **Brandenburg v. Ohio**. Clarence Brandenburg was the leader of the KKK in Ohio and an admitted member of the American Nazi Party. He was filmed at a rally stating, “ *If our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some vengeance taken.*” The Supreme Court overturned Brandenburg’s case. Their decision created two tests for acceptable restrictions on political speech:-

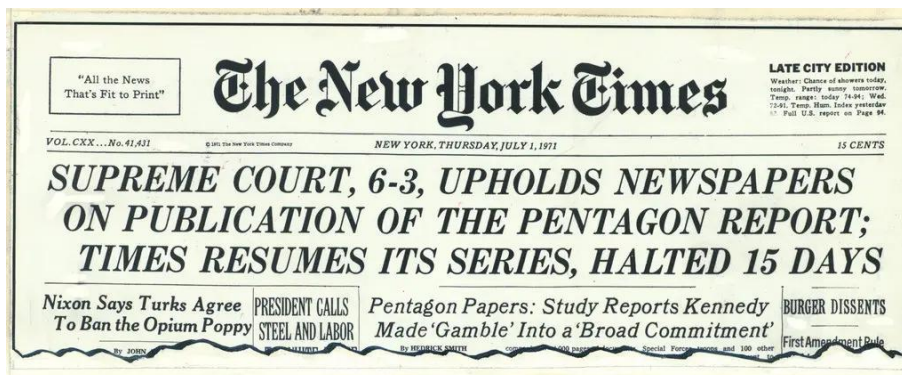
*It must be “directed to inciting or producing imminent lawless action
and
it must me likely to incite or produce such action.”*

The case looks closely at the difference between advocacy and incitement to action. While people can advocate for just about anything under the protection of the First Amendment, incitement is not protected if the action is imminent and lawless.

The Press and National Security

Freedom of speech and expression also applies to the press. **Prior Restraint**, *the suppression of material prior to publication*, occurs when the government censors or suppresses material before it is published. The permissibility of prior restraint was raised when the Nixon administration tried to prevent both the *New York Times* and the *Washington Post* from publishing classified materials, classed as high-level decision-making on the part of U.S. officials in conducting the Vietnam War. These classified materials were critical of the government’s actions.

In the case of **New York Times Co. v. United States** (1971), which will also be known as the **Pentagon Papers case**, there was no majority opinion. Six justices issued concurring opinions agreeing that the government did **not** demonstrate a sufficient interest in national security to justify prior restraint. The opinions made a limited exception for matters that constitute a threat to national security.



New York Times v. United States: <https://www.oyez.org/cases/1970/1873>

Facts	The U.S. Government sought to prevent the <i>New York Times</i> from publishing papers stolen from the Pentagon that were critical of the decision-making of officials during the Vietnam war.
Issue	Did the government's attempt to prevent publication (prior restraint) of the Pentagon Papers violate the First Amendment's guarantee of freedom of the press?
Decision and Holding	The <i>New York Times</i> won. The government does not have the power to censor most material before it is published.
Reasoning	Freedom of the press is a cornerstone of democracy, and the government's attempt to use prior restraint to prevent publication of the documents violated the guarantee of freedom of the press.

Symbolic Speech

The Supreme Court has protected the political expression of spoken and printed words and has extended these protections to **symbolic speech** – *the protected expression in the form of images, signs, and other symbols that are used as forms of political expression.*

Note: These forms of political expression, similar to those of other forms, are **not** absolute.

The case of *Tinker v. Des Moines Independent Community School District* was decided in 1969. John and Mary Beth Tinker and Christopher Eckhardt wore black armbands to their public school in protest to the Vietnam War.



Their school administrators adopted a policy that students who wore the armbands would be told to take them off, and if they refused, they would be suspended until they returned to school without their armbands.

The students wore their armbands to school on December 16th and 17th and were suspended, not returning to school until after New Year's Day.

The majority opinion of the Court was that such restrictions were not necessary to preserve the school's ability to carry out its academic mission. Because the armbands did not cause a disruption in school, it was protected by the First Amendment. There was a dissenting opinion by Justice Black who believed that the armbands caused students to disobey the administration which then harmed education. The activity caused a disruption and made it harder for other students to learn.

Tinker v. Des Moines Independent Community School District (1969)

<https://www.oyez.org/cases/1968/21>

Facts	John and Mary Beth Tinker wore armbands to school to protest the Vietnam War. They were suspended under a rule that prohibited the wearing of armbands in school.
Issue	Did the rule prohibiting armbands infringe in the Tinkers' right to freedom of symbolic speech under the First Amendment?
Decision and Holding	The Tinkers won. The school district violated the plaintiffs' free speech rights by suspending them from school.
Reasoning	Students do not leave their constitutional rights at the schoolhouse gates. Schools may not ban speech unless it substantially disrupts the educational process. The First Amendment protects symbolic speech as applied to the states through the due process clause of the Fourteenth Amendment.

What is to be noted is that school officials can restrict students' rights of expression if the conduct occurs on school grounds or under school supervision and if it violates or disrupts the mission of the school.

A Supreme Court case that did support a student's rights outside of school, especially when the speech was not part of a school-sanctioned event, was seen with **Mahanoy Area School District v. B.L.** The court ruled that the school district had violated the rights of the student Brandi Levy when it suspended her for vulgar posts she made on social media after she did not make the varsity cheerleading team. The Court ruled that Levy's off-campus speech did not cause a substantial disruption to the educational process or threaten others and was therefore protected by the First Amendment.

Restrictions on Free Speech

The balance between free speech and safety was the issue in the case of **Counterman v. Colorado**. In 2014, Billy Raymond Counterman send a slew of disturbing messages to a Facebook user, some of which included that he was watching her and he wanted her dead. The recipient blocked him but continued to get messages from him through other accounts. A complaint with law enforcement was filed and in 2016 Counterman was arrested. A jury found him guilty of stalking and the Colorado Court of Appeals confirmed his conviction. Counterman then appealed to the Supreme Court.

The Supreme Court had to consider if his actions were a "true threat" and therefore not protected under the First Amendment. The Court had to look into his mental condition and verify that he understood the statements as threatening and that he was acting recklessly. The Court overturned the lower courts decisions arguing that the standard of considering the speaker's mental state in determining a "true threat" balances the need to protect free speech with the need for public safety.

Another important issue today is **cyberbullying**. In this instance, it is important to keep in mind that the free speech rights of school children can be more restricted than that of adults.

Defamation: Libel and Slander

An untrue expression that harms a person's reputation, a defamation of character, can either be written – which is **libel** or spoken which is **slander**.

Libel: *an untrue written statement that injures a person's reputation*

Slander: *an untrue spoken expression that injures a person's reputation*

To win a libel case in the United States is quite difficult. The aggrieved party must show that the statements were made with the knowledge that they were untrue. For public and famous figures, the standard is even higher. The plaintiff must show that the statements were made with malice or reckless disregard for the truth.

In 1964, in ***New York Times v. Sullivan***, the Supreme Court placed significant barriers on the ability of public officials to successfully sue for libel. In a lower court, a Montgomery, Alabama official won a \$ 500,000 lawsuit against the *New York Times* for a full-page ad they published accusing Alabama officials of using excessive force during student protests.

Even though some of the content was false, the Supreme Court, in an unanimous ruling, held that factual inaccuracies were not themselves sufficient to win a libel suit against a public official unless it could be demonstrated that they were published with “actual malice,” meaning that the publishers knew the statements were untrue, or that they were published with “reckless disregard for the truth.”

Discriminatory Speech

Some states have used their powers over **intrastate** commerce to pass laws attempting to regulate discriminatory speech.

The Colorado Anti-Discrimination Act (CADA) prohibits public businesses from discriminating against certain customers on the basis of special characteristics, including sexual orientation. The legislation was challenged when Lorie Smith, the owner of 303 Creative, LLC., a wedding web design business, opposed the creation of websites for same-sex marriages based on her religious beliefs.

In ***303 Creative LLC v. Elenis*** decided in 2023, the Supreme Court held that the First Amendment prohibits states from compelling people to create “expressive designs” that convey a message contrary to their beliefs or that is preferred by the state.

In **303 Creative LLC v. Elenis** (2023), the Supreme Court ruled 6-3 that Colorado couldn't force a website designer (Lorie Smith) to create websites for same-sex weddings if it violated her religious beliefs, because the custom websites are "expressive speech" protected by the First Amendment, not just a commercial service.

The decision allows businesses offering custom, expressive services to decline creating messages they disagree with, but doesn't broadly permit refusing service based on a customer's identity; it hinges on compelled speech, not discrimination against the person, meaning she still must serve people of any sexual orientation for non-expressive goods/services.

Key Aspects of the Decision:

Compelled Speech: The Court found that creating a custom wedding website is like writing a speech or creating art, and forcing Smith to design one for a same-sex wedding would compel her to express a message she disagrees with, violating her free speech rights.

Narrow Ruling: The decision is narrow, applying specifically to custom, original expressive works, not standard products or services.

Distinction from Discrimination: The ruling doesn't mean businesses can refuse service to LGBTQ+ individuals; it means they can refuse to create a specific *message* that conflicts with their beliefs, even if the customer is LGBTQ+.

The "Expressive Activity" Line: A key debate moving forward will be defining what constitutes "expressive activity" versus a standard commercial transaction.

Hate Speech in the Community and on College Campuses

This subject goes back a long way in U.S. history, especially with the KKK and cross-burning. The Supreme Court has overturned ordinances banning cross burning as unconstitutional, stating “ *The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.*” However, in permitting such speech, the Court also notes that individuals can be legitimately arrested and prosecuted for committing other crimes, such as arson or making terroristic threats.

Many college campuses have instituted hate speech codes for student conduct. Other schools have “Free-Speech Zones” where students can protest and exercise their free speech rights. Some of the policies have been challenged in federal court, but the Supreme Court has yet to issue a decision directly addressing their constitutionality.

In a 2024 poll, 68% of college students believed that universities should protect free speech, and 67% said that speech should be protected even if its upsetting. 86% said their colleges should make them feel safe in expressing their opinions on issues of global importance.

Obscenity and Pornography

The Supreme Court has upheld restrictions on obscenity and pornography, although it has not always been clear what constitutes an obscene statement or publication.

In ***Roth v. United States*** (1957), the Court defined the standard for judging obscenity as “*whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to an excessively sexual interest.*”

In ***Miller v. California*** (1973), the Supreme Court attempted to clarify the definition of obscenity. The Miller test sets out three criteria that all must be met for material to be considered obscene.

First, the material must be “patently offensive.”

Second, It must be “utterly without redeeming social value” and

Finally, “contemporary community standards” must be applied, meaning that different places may have different standards.

The internet makes regulation of pornography challenging because of the difficulty of defining “community standards” for online material. In 1997, the Court struck down provisions of the Communications Decency Act of 1996, which was designed to protect minors from viewing obscene or pornographic material on the Internet. The Court held that restrictions in the act were too vague and restrictive and that they could have a “chilling effect on free speech.”

Child pornography, however, is not protected by the First Amendment and is subject to full restriction and criminalization.

Regulating Time, Place, and Manner

The First Amendment grants special protection to free speech in public, such as on sidewalks and public thoroughfares. Any government that tries to restrict speech in public forums faces a heavy burden. However, the government may impose reasonable restrictions on the time, place, or manner of protected speech.

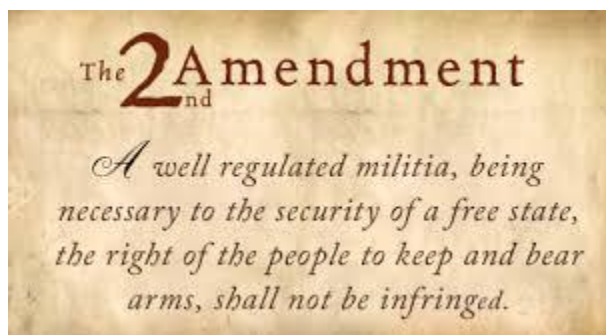
For example, cities may require protestors to apply for a permit in advance. The government may restrict time and place regarding noise levels or safety issues but the regulations cannot be based on the content of the speech. Such regulations must address a significant governmental interest.

Freedom of Assembly

The final two rights of the First Amendment, the right to peacefully assemble and to petition the government for redress of grievances have received little attention from the Supreme Court.

The right to peacefully assemble was the issue in the case of ***De Jonge v. Oregon*** in 1937. In this case the Court overturned an Oregon law under which a member of the Communist party had been convicted and sentenced to seven years in prison for holding a public meeting. In the majority opinion, quoting an earlier case, Chief Justice Charles Evan Hughes noted “*The very idea of a government, republican in form, implies a right on the part of citizens to meet peacefully for the consultation in respect to public affairs and to petition for a redress of grievances.*” The *De Jonge* decision affirms the right of groups, even unpopular ones, to meet and criticize the government.

The Second Amendment



Gun ownership by citizens is a huge topic in recent decades. The Supreme Court did not rule on laws prohibiting personal possession of firearms until 2008. In a 5-4 decision in the case of ***District of Columbia v. Heller***, the Court overturned a District of Columbia ban on individual handgun ownership. As the *Heller* case involved Washington, D.C., and not a state, it was decided based on the Second Amendment only.

Incorporation of the Second Amendment right to bear arms happened two years later, in ***McDonald v. Chicago*** when the Court (again splitting 5 to 4) overturned a Chicago ban on handgun ownership. The majority opinion stated that the right to bear arms is not less important than the other amendments in the Bill of Rights and that it was widely considered to be a fundamental right at the time it was ratified. Both Federalists and Antifederalists agreed that the right to bear arms was fundamental to the newly formed system of government.

***McDonald v. Chicago* (2010) - <https://www.oyez.org/cases/2009/08-1521>**

Facts	The City of Chicago banned handgun ownership, McDonald challenged the ban.
Issue	Did a ban on individual handgun ownership violate the Second Amendment?
Decision and Holding	McDonald won. Laws banning individual handgun ownership violate the Second Amendment.
Reasoning	An individual's right to bear arms for lawful purposes, including self-defense, is a fundamental liberty protected in the Bill of Rights and applied to the states through the due process clause of the Fourteenth Amendment

States maintain the authority to place reasonable restrictions on firearm ownership, and the Courts must decide if these restrictions are reasonable. In ***New York State Rifle & Pistol Association Inc. v. Bruen***, in 2022, the U.S. Supreme Court overturned a New York law that required a person to demonstrate a special need for self-protection before receiving an unrestricted concealed firearm permit. The Court stated that the New York law violated the Fourteenth Amendment's due process clause by preventing law-abiding citizens from purchasing guns. This emphasized the tradition of the right to carry a firearm for self-defense, although it stated that restrictions might be appropriate in "sensitive places."