The First Amendment Project

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.

Overview

- Words are a powerful tool with which one can pursue truth, improve the human condition, and expand the soul. Tyrants and authoritarians throughout history have imprisoned, tortured, and killed their subjects in order to maintain control over words and the ideas they may foster. The history of free speech in the United States is less bloody, but still complicated with sedition acts, protests, flag burnings, uncountable court rulings, and fiery debates over the limits of the First Amendment. Regardless, if We The People are to govern ourselves, then we must have these rights, even if and when they are abused by a vocal minority.
- The First Amendment was developed from the idea of natural (or "inalienable") rights: the rights possessed by all humans simply because they are human. This concept is the product of multiple strands of thought formed over the centuries in which there are universal moral principles applicable to all cultures that cannot taken away by government action. Tyrannical governments may infringe upon a person's natural rights, but they cannot erase them.
- Indeed, natural law and natural rights are vital threads woven into the fabric of Western civilization, including in the written works of St. Thomas Aquinas, Thomas Hobbes, John Locke, Jean Jacques Rousseau, and the Marquis de Condorcet.
- William Blackstone, writing in *Commentaries on the Laws of England* (1979), observed, "The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature: being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free-will. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish" (p. 121).
- Condensing this rich historical tapestry into a single document, the Declaration of Independence proclaims the "self-evident" truths that "all men are created equal" and entitled to "life, liberty, and the pursuit of happiness."

- The Declaration's assertions of principle informed the United States Constitution, a remarkable and egalitarian blueprint for self-government.
- The First Amendment of the Constitution was passed by Congress on September 25, 1789, and ratified into the Bill of Rights on December 15, 1791.
- It is important to note that the Bill of Rights is a restraint on the power of government. Government does not grant an individual these rights, as they are intrinsic to every human being regardless whether government exists. Indeed, government's primary responsibility is the protection of a citizen's rights.
- The First Amendment provides for what has become known as the five freedoms: the freedoms of speech, press, religion, petition, and assembly. The rights espoused in the First Amendment are essential as they consider issues of conscience, thought, and expression.
- The Supreme Court interprets the extent of the protections afforded to these rights. Even though only Congress is explicitly mentioned, the High Court has interpreted the First Amendment as applying to the entire federal government.
- Additionally, the Court has interpreted the **Due Process Clause** of the Fourteenth Amendment as protecting the rights guaranteed by the First Amendment from interference by state governments, local governments, and public institutions such as public schools, universities, and libraries.
- Private companies and individuals are not explicitly bound by the First Amendment, but the tradition of free expression has become a significant foundation of American society.
- John Philpot Curran declared in 1790: "The condition upon which God hath given liberty to man is eternal vigilance; which condition if he break, servitude is at once the consequence of his crime and the punishment of his guilt" (Curran, 1811, p. 236). The phrase was later erroneously attributed to Thomas Jefferson, but, regardless of its origins, "eternal vigilance is the price of liberty" has become a watchword for those who champion the principles enshrined in the First Amendment.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

- Congress is forbidden from promoting one religion over another or establishing a national religion.

    - **Why this is important**: "These Clauses embody an understanding, reached in the 17th century after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens, permits those citizens to 'worship God in their own way,' and allows all families to 'teach their children and to form their characters' as they wish" (*Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), p. 718).

- **Historical context**: Religious strife in England had been a cause for numerous cases of instability, including the Puritan Revolution, the English Civil War, and the dictatorship of Oliver Cromwell. The final establishment of the Church of England as the official national religion in 1660 was seen as a move to unite the people and restore social harmony. However, the Stuart monarchy's repression of the Catholic Church and dissenting Protestant faiths soon followed. The Crown encouraged Catholics, Puritans, and other Protestants to emigrate to the New World. Religious tensions grew in the colonies, however, and the Founders were quick to see toleration in matters of faith was necessary for social stability.
- **How this is accomplished**: Two clauses allow the conditions in which individuals can follow their consciences in matters of faith and worship. The **Establishment Clause** prohibits Congress from passing legislation to establish an official state religion or preferring one religion over another. This enforces Thomas Jefferson's idea of "a wall of separation between Church and State" (1802). The Establishment Clause secures religious liberty for all, believers and non-believers alike.

- Congress is forbidden from restricting an individual's religious practices.

  - **Why this is important**: The Founders knew the State should not stand between the individual and his or her deity.
  - **Historical context**: As mentioned, members of certain European denominations wished to pursue spiritual truths wherever that search led them, but they were undergoing religious persecution from their monarchs.
  - **How this is accomplished**: The second religion clause, the **Free Exercise Clause**, prohibits the government from interfering with an individual's practice of their religion, regardless of whether the practitioners are in the majority or the minority. The Supreme Court has expressly stated that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection" (*Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707 (1981), p. 714). Furthermore, individuals may freely choose to not worship a higher power according to the dictates of their own conscience. Undeniably, the Free Exercise Clause guarantees religious liberty to all.

… or abridging the freedom of speech, or of the press;

- The Amendment guarantees the government shall not interfere in the rights of individuals to express themselves freely.

  - **Why this is important**: The ability for individuals to speak their minds without fear of government censorship or reprisal is essential for a republican, or

representative, form of government. This allows one to hear all sides of a topic and to make an informed judgement. The unsuppressed discussion and debate of the great issues of the day is the cornerstone of a healthy, free society.

In his work *Politics*, the Greek philosopher Aristotle observed, "speech serves to reveal the advantageous and the harmful, and hence also the just and the unjust. For it is peculiar to man as compared to the other animals that he alone has a perception of good and bad and just and unjust and the other things of this sort; and community in these things is what makes a household and a city" (Aristotle, 2013, 1253a: 11-12).

John Stuart Mill penned one of the most powerful defenses of free speech in his book *On Liberty*. The footnote to Chapter II offers a bold assertion as to what and who is entitled to freedom of expression: "If the arguments of the present chapter are of any validity, there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered. If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind" (2015, p. 18).

- **Historical context**: As part of a centuries-long process to gain authority at the expense of the Crown, the British Parliament enacted the English Bill of Rights in 1689, which affirmed, "That the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament" (1 Wm. & Mar., sess. 2, ch. 2, 1688). Local assemblies throughout the island nation followed suit in securing the privilege. In the American colonies, leaders recognized early the relationship between free speech and the political process and its importance as a foundational value of society. However, in contrast to the British notion, the prevailing view of popular sovereignty in the colonies and in the new republic meant that ultimate power resided with the people, not in legislative bodies. Thus, the concept of freedom of speech took on a uniquely American aspect in the United States.
- **How free speech is accomplished**: The Supreme Court has recognized in countless rulings that the protection of speech is essential to the successful function of the political process and the preservation of self-government. For example:

In 1927, Justice Louis Brandeis stated, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence" (*Whitney v. California*, 274 U.S. 357 (1927), p. 377). This has become known as the "counter-speech doctrine."

Citing Justice Brandeis twenty-three years later, Chief Justice Fred M. Vinson affirmed "the public has a right to every man's views and every man the

right to speak them" (*American Communications Association v. Douds*, 339 U.S. 382 (1950), p. 382).

Justice Thurgood Marshall echoed his two colleagues when he wrote, "The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin" (*Kleindienst v. Mandel*, 408 U.S. 753, 92 S. Ct. 2576 (1972), p. 775).

Unfortunately, the illegitimate "heckler's veto" has suppressed the speech of numerous Americans, including several recent cases on college campuses. The term, first coined by Harry Kalven Jr. in *Brown v. Louisiana*, 383 U.S. 131 (1966), refers to government acceptance of restrictions on controversial speech due to fears of expected or genuine hostile responses to that speech. Predictably, this acquiescence incentivizes opponents to continue using the heckler's veto rather than following Justice Brandeis's doctrine and engaging in more speech. Thus, discourse is coarsened and becomes potentially violent.

One should remember free speech rights are not absolute, and the time, place, and manner of speech may be restricted to the extent absolutely necessary for public safety. Additionally, the courts have recognized legitimate limits to speech that constitute libel, slander, or defamation; obscenity; pornography, fighting words; incitement to commit violence; and health and safety issues.

"Hate speech" is not a legal term with an exact definition. The general consensus is that hate speech constitutes those expressions that are offensive, repugnant, or hateful. However, these characterizations are subjective and depend on the sensibilities of the recipient of speech. Is the speech truly hateful and offensive, or does it merely run counter to the beliefs of the offended? Free-speech scholar Nadine Strossen (2020) observed that the term hate speech can be "deployed to stigmatize and to suppress widely varying expression" (p. 1). Who decides whether something is hate speech that ought to be regulated or a diverging idea that is in danger of being suppressed?

These issues are complex and worthy of judicious consideration. Nevertheless, freedom of speech belongs to every person within the jurisdiction of the United States.

- The Amendment further guarantees freedom of expression by prohibiting the government from restricting the press.

    - **Why this is important**: In Federalist No. 84, Alexander Hamilton wrote that "the liberty of the press ought not to be restrained." James Madison, the primary editorial force behind the American Bill of Rights, believed free speech and a free press were not only God-given rights, but they also formed an essential foundation for people living in a free republic to rule themselves. He argued that if people were stripped of their right to openly discuss and debate their opinions on the government and on

public officials, then the reminder of their rights would similarly disappear, as no one would be able to speak out against injustice.

Additionally, a free and fair press was considered by the Framers to be a watchdog on the powerful; one able to monitor government activities, and expose corruption and falsehoods.

- **Historical context**: The Alien & Sedition Acts were a series of four laws passed by Congress and signed into law by President John Adams in 1798. The common view of the time was war between the United States and France was imminent, and these new laws prohibited speech deemed critical of the federal government, with the threat of criminal prosecution. They also included the power to deport foreigners and restrict their activities while in the country.

  Responding to the Acts, Madison authored the Virginia Resolution in 1800, which declared, "that the unconstitutional power exercised over the press by the 'sedition act,' ought 'more than any other, to produce universal alarm; because it is levelled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right'" (Madison, 1904, p. 393).

  President Thomas Jefferson, who opposed the Acts as unconstitutional, allowed them to expire in 1800 and 1801. While not able to rule on the constitutionality of the Acts prior to their end, the Supreme Court did recognize in 1964 they had "first crystallized a national awareness of the central meaning of the First Amendment" and that there was a "broad consensus" among the three branches of government that the Acts were unconstitutional (*N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), p. 273).
- **How this is accomplished**: The Supreme Court has ruled consistently that the right to receive information is a consequence of the constitutional right to speak. The First Amendment guarantees the same protections of free speech to an individual, or collection of individuals in form of a news outlet, who express themselves through publication and dissemination. At the same time, members of the media are not afforded any special rights or privileges over those enjoyed by all other citizens.

… or the right of the people peaceably to assemble,

- The First Amendment guarantees the right of citizens to assemble and associate peacefully and lawfully with whomever they please.

  - **Why this is important**: Since the adoption of the First Amendment, freedom of assembly has been recognized internationally as a human right. The ability for people to gather together and seek changes in the law is paramount. Furthermore,

an individual assembler does not need to be a member of any particular group, and the **Freedom of Assembly Clause** protects those who wish to assemble in private and with anonymity.

- **Historical context**: The right of assembly was first heard by the Supreme Court in *United States v. Cruikshank*, 942 U.S. 542 (1876). In their decision, the justices held that "the very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances" (p. 542).
- **How this is accomplished**: The Supreme Court has ruled in a historically consistent fashion on the right to peaceably assemble for lawful purposes. For example, the Court ruled in *DeJonge v. Oregon*, 299 U.S. 353 (1937) that "the right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental" (p. 364). By virtue of this decision, and several others, the Assembly Clause was formally linked with the liberty protected by the Due Process Clause of the Fourteenth Amendment. The freedom of assembly belongs to all.

… and to petition the Government for a redress of grievances.

- The Amendment guarantees the right of citizens to petition the government.
  - **Why this is important**: Citizens who have been wronged are guaranteed the right to seek relief through the courts or other government action.
  - **Historical context**: The Magna Carta was ratified by King John of England on June 15, 1215. This milestone document established the principle that no individual, not even a king, is above the law. Additionally, the origins of a right to petition can be found in chapter 61. From this modest beginning can be traced the rise of the British Parliament and the idea of "petition of right." The House of Commons grew to petition the King for a redress of grievances in exchange for exercising their legal duty to grant monies for the Crown's needs. In 1669, the Commons declared, "That it is the inherent right of every commoner in England to prepare and present petitions to the House of Commons in case of grievance, and the House of Commons to receive the same" (Kenyon, 1986, p. 423). Twenty years later, the English Bill of Rights asserted the right of the King's subjects to petition their monarch and "all commitments and prosecutions for such petitioning to be illegal" (1 Wm. & Mar., sess. 2, ch. 2, 1688).

    The United States Congress first began dealing with the right of petition on a significant scale in the early 1830s. In those days, abolitionists beseeched the government to end the practice of chattel slavery. Since then, lawmakers have received petitions for the repeal of the espionage and sedition laws and the draft laws, for the relief of military veterans, and for countless other grievances.

- **How this is accomplished**: The Supreme Court has expanded the language of "a redress of grievances" to the legislature to include all departments of government, be they legislative, executive, or judicial in nature. Similar to the right of assembly, the Court has recognized the right to petition to be a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. The right to petition for a redress of grievances extends to all.

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