

Background on the First Amendment

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 people peaceably to assemble, and to petition the government for a redress of grievances.

These 45 words – the First Amendment to the United States Constitution – embody some of our most important ideas about the meaning of liberty. Isidore Starr, a nationally recognized leader in the fields of law-related and citizen education, has described the importance of the First Amendment: “Remove the First Amendment from the United States Constitution and you strike out the very means of testing the other rights and of protesting abuses of government.”*

The First Amendment includes six clauses that cover five basic areas: freedom of religion, freedom of speech, freedom of the press, freedom of assembly and the right to petition the government for redress of grievances. It may be helpful to briefly define each of these rights.

Here is an acronym to assist students in remembering the five areas:

Grievances

Religion

Assembly

Speech

Press

Freedom of Religion

Two clauses in the First Amendment deal with freedom of religion, and both have given rise to many court cases and controversies. The first, called the “establishment clause,” is the provision that Congress shall make no law respecting an establishment of religion.” This clause is the basis for our doctrine of separation of church and state. Many of the controversies surrounding this clause have involved education. For example, may tax money be used to support religious schools? May schools allow time for prayer or meditation during the school day? May prayers be said at graduation?

* Isidore Starr, *The Idea of Liberty: First Amendment Freedoms* (St. Paul, MN: West Publishing, 1978), p. 5

The second clause related to religion is called the "free exercise clause." It protects the individual's right to believe – or not to believe- as he/she wishes. The free exercise clause has been especially important in protecting the rights of religious minorities whose practices might otherwise be suppressed by the majority. For example, Moslems, Buddhists, members of the Unification Church, Jehovah's Witnesses, the Amish, the Mormons, Baha'is and Seventh Day Adventist have used the First Amendment guarantee to protect their rights. Members of religious groups more numerous in the United States, such as Protestants, Catholics and Jews, have also used the free exercise clause, as have people who do not hold religious beliefs.

At times, the two clauses related to religious freedom have been in conflict. For example, in 1983 the Supreme Court heard a case involving use of state funds to hire a chaplain to offer a prayer at the opening of state legislative sessions. While some people challenged the use of state funds as a violation of the establishment clause, others argued that the prayer represented an exercise of the legislators' free exercise rights.

Freedom of Speech

Freedom of speech is regarded by many as the cornerstone of a democratic system. It allows the free exchange of ideas necessary for effective decision-making and protects the minority from complete domination by the majority. Some symbolic speech – actions taken to convey a message – is also protected. The 1989 Supreme Court decision on American flag burning is an example of protecting such symbolic speech, as in the famous Tinker case, which involved high school students' wearing black armbands to protest the war in Vietnam.

Freedom of speech is not without limits, however. For example, the First Amendment does not protect speech that incites someone to commit a crime. Some issues that have arisen around the freedom of speech include the conflict between free speech and public safety, the extent to which freedom of speech is protected in schools – both for teachers and students – and to what extent obscene or pornographic speech is protected.

Freedom of the Press

Thomas Jefferson emphasized the importance of this freedom when he said, "Were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I would prefer the latter." Freedom of the press is yet another cornerstone of American democracy. Like freedom of speech, freedom of the press allows divergent viewpoints to be heard. It is designed to protect the public's "watchdog," charged with monitoring government activities, discouraging government from operating in secrecy and from controlling the information citizens receive.

Issues related to freedom of the press are similar to those surrounding freedom of speech – issues related to individual privacy, libel, “fighting words,” product advertising, obscenity and endangering national security. In recent years the conflict between the rights of the press and the rights of the accused to a fair trial has been confronted in a number of cases. The rights of high school student journalists have also been weakened.

Freedom of Assembly

The right “peaceably to assemble” is bound up with the freedom of speech. The right to say what one wishes to an empty auditorium lacks a key ingredient – the audience. The right to hear a speaker is a key ingredient of the First Amendment. Freedom of assembly is also related to freedom to petition. A large group marching down a street with signs espousing their cause may carry a more forceful message than one person’s letter to a public official. However, the possibility of conflict arising when groups confront one another has led to some limitations on the right to assembly. For example, cities may require a permit for parades or certain kinds of public meetings. This allows the city to take such precautions as providing police protection.

Over the course of U.S. history, the freedom of assembly (along with Amendments V, IX and XIV) has been used to protect Americans’ right to form or join any association or organization they desire. This “right of association” has also been the center of many court cases, including many involving membership in the Communist Party and the NAACP. Cases involving a school district or university that requires teachers to reveal what organizations they belong to have also generated controversy; such requirements have been found to be unconstitutional.

Right to Petition

The right to petition can be traced back to the Magna Carta, signed in 1215. Petitions also played a key role in the efforts of the American colonists to gain a response from the British king and Parliament. Today, the right to petition takes many forms – the traditional written document to which names are signed, lobbying government officials and conducting various kinds of mass demonstrations. Civil suits in courts are a form of petition. Issues related to the right to petition have primarily arisen when government officials perceived that the exercise of this right threatened public safety.

History of the First Amendment

The First Amendment – indeed the entire Bill of Rights – was not included in the Constitution when it was written in 1787. However, the issue of a listing of rights that could not be infringed upon by the new, stronger national government became a key in the ratification debates. Those supporting the

Constitution argued that many state constitutions already protected individual rights and that the failure to list the rights did not mean that they did not exist as natural rights, beyond government authority. Opponents, called the Anti-Federalists, disagreed. Remembering their experience as British colonists, the Anti-Federalists feared that the stronger national government would abuse individual rights.

To win ratification in Virginia (although the required nine states had already ratified the Constitution, ratification by Virginia and New York was considered critical to the success of the new government), James Madison pledged his support for adding a bill of Rights in 1789, within two months of the opening of the first Congress. The 10-amendment Bill of Rights was passed by Congress, ratified by the states and went into effect December 1791.

When the Bill of Rights – and indeed the larger Constitution – was adopted, it applied only to white propertied males. Furthermore, it only protected people from actions by the federal government. State governments could – and did – restrict freedom of expression and religion, as well as other rights. While the rights of African-American males protected in the Fourteenth and Fifteenth Amendments passed following the Civil War, in practice those rights took many more years to achieve. The rights of women have also expanded slowly with time, as have those of Native Americans.

It was not until 1925 that the Supreme Court began to apply the First Amendment to the states. This was done through a process called incorporation. The First Amendment rights were “incorporated” into the Fourteenth Amendment’s guarantee to due process: “nor shall any state deprive any person of...liberty...without due process of law.” The Fourteenth Amendment also provided equal protection of the law.

The groups and individuals who have been afforded the protection of the First Amendment have changed over time, as have the definition and limits the court have given the various rights. The history of the First Amendment is still being written.

The First Amendment at School

The Supreme Court has consistently held that young people, while at school, do have the protection of the First Amendment. However, the school is regarded as a special setting, in which the public has charged school officials with maintaining a safe environment conducive to learning. Several recent cases have signaled the Court’s willingness to allow school administrators to limit students’ rights in order to preserve such an environment.

One case, *New Jersey v. T.L.O.*, dealt with Fourth Amendment rights. In that case, the Court ruled that “strict adherence to the requirement that searches

be based on probable cause" is "unsuited to the school environment." The Court instead proposed a test of "reasonableness," which has been applied in subsequent First Amendment cases as well.

A second case, *Bethel School District No. 403 v. Frasier*, involved a student who made a nominating speech filled with sexual references. The student was disciplined. In this case, the Court held that sexual language could be defined as disruptive behavior in school, although it might be protected in other settings. The Court said school officials do have a responsibility to teach students "the boundaries of socially appropriate behavior."

A third relevant case is *Hazelwood School District v. Kuhlmeier*. In this case, the Court said that administrators may exercise "editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."

In a 1990 case, *Board of Education of Westside Community Schools v. Mergens*, the Court ruled that if high schools allow clubs not related to the curriculum, they could not discriminate against clubs with a religious orientation. The Court's ruling said "There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."

