

**CIVIL LIBERTIES AND THE FIRST AMENDMENT:
FREEDOM OF RELIGION AND SPEECH
Class Notes**

I. Civil Liberties

- A. Definition: fundamental individual rights, such as freedom of speech and religion, protected by law against unwarranted governmental or other interference.
- B. Problems: balancing rights of the individual with the needs or welfare of society at large; when personal rights of one infringe or violate the rights of another

II. The First Amendment Liberties – The Debate Over Freedom of Religion

Congress shall make no laws respecting an establishment of religion or prohibiting the free exercise thereof

A. Establishment Clause

- 1. Government cannot promote religion
- 2. Prohibits the establishment of state sponsored religion ex: Anglican Church in England
- 3. 1st Amend does not specifically call for a “separation of church and state” or “A Wall of Separation”
>>> statement originally written by Thomas Jefferson

B. Free Exercise Clause

- 1. Protects religious beliefs and practices
- 2. Congress cannot pass laws prohibiting any individuals or groups from practicing a religion
- 3. 14th Amend - guarantees that state governments cannot pass such laws either
- 4. Does not exempt individuals from laws that bind others >>> Constitution protects all religious beliefs, but not all religious action. EX: human sacrifice, polygamy

III. Key Freedom of Religion Cases

- A. *Reynolds v. United States* (1878) – Reynolds a Mormon argued polygamy was protected by the Free Exercise clause; SCOTUS ruled that polygamy and religious belief and duty not protected.
- B. *West Virginia Board of Education v. Barnett* (1943) - Jehovah’s witness in WVA said saluting flag against their rel.; SC agreed; 1st Amendment Freedom of Speech protected students from being forced to salute the flag/say pledge
- C. *Engel v. Vitale* (1962) - SCOTUS ordered end to state-sponsored/teacher-led, mandatory prayer in public school as a violation of establishment clause
- D. *Abington School District v. Schempp* (1963) – SCOTUS ruled state-sponsored devotional Bible reading in public school violates the establishment clause
- E. *Lemon v. Kurtzman* (1971) - established a three part test for determining a violation of the establishment clause re: aid to church-supported schools
 - 1. The policy’s purpose must be secular, not religious
 - 2. The policy’s primary effect must neither advance nor inhibit religion
 - 3. The policy must avoid “excessive government entanglement” w/ religion
- F. *Oregon Employment Division v. Smith* (1990) - The state could deny unemployment benefits to a person fired for violating a state prohibition on the use of peyote, even though the use of the drug was part of a religious ritual

IV. The First Amendment Liberties - Freedom of Speech

Free Speech "is freedom for the thought we hate." --- Justice Oliver Wendell Holmes

- A. The Supreme Court distinguishes THREE categories of free speech protected by 1st Amendment:
1. **Pure Speech** - verbal expression of thought and opinion before an audience that has chosen to listen (at home or in front of a crowd; only limited govt. control; EX: campaign rally)
 2. **Speech Plus** - actions such as parading, demonstrating or picketing to communicate a set of ideas in which the audience may be hostile (may be subject to restrictions >>> ex: cannot block sidewalks, obstruct traffic, endanger public safety); KKK rallies & marches? Pro-lifers protesting at abortion clinics?
 3. **Symbolic Speech** - using symbols such as the American flag or a draft car to express one's opinion
- B. Speech not granted full protection by the Constitution
1. **Libel** - published or broadcast report falsely injuring person's good name or character. Different standard for public officials and celebrities >>> *Hustler Magazine v Farwell*
 2. **Slander** - verbally maligning someone's good name or character (FYI)
 3. **"Fighting Words"** - clear invitation to a brawl or violence
 4. **Hate Speech** - speech that attacks a person or group on the basis of race, religion, gender, or sexual orientation.
 5. **Obscenity** - indecency, lewdness, or offensiveness in behavior, expression or appearance; hard to define; EX: art >>> Mapplethorpe Exhibit in Cincinnati; music

V. Key Freedom of Religion Cases

- A. *Scheck v US* (1919) - upheld Espionage Act during WWI limiting speech if words present "clear & present danger" (speech that would bring about substantive evils that Congress has a right to limit)
- B. *Brandenburg v. Ohio* (1971) - 1st & 14th Amends protected speech advocating violence at KKK rally unless it calls for "imminent lawless action."
- C. *Tinker v. Des Moines* (1969) – SCOTUS upheld students to wear armbands protesting Vietnam as symbolic speech protected by the first amendment; schools may forbid conduct that interferes with appropriate discipline and operation of the school
- D. *Texas v. Johnson* (1989) – SCOTUS invalidated state laws prohibiting flag desecration; flag burning is protected symbolic speech under the 1st amendment