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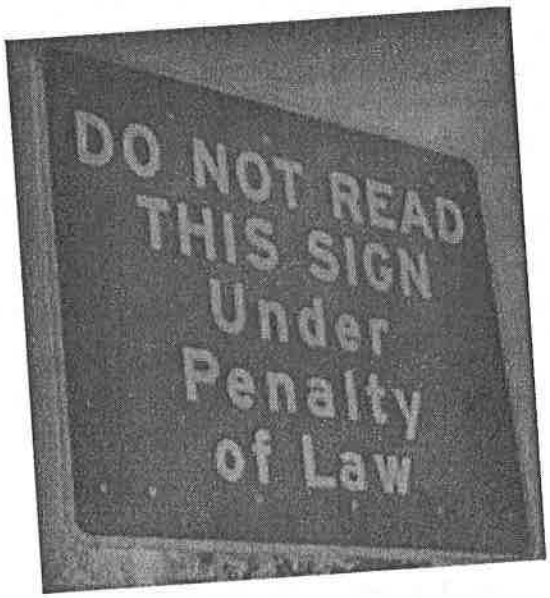

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LESSON FOUR

WHAT ARE THE ORIGINS OF THE RELIGION CLAUSES OF THE FIRST AMENDMENT?

A. What Major Factors Led to the Sentiment[1] That There Should Be a Constitutional Amendment Which Protected Religious Freedom?

There were three major factors which led to increased sentiment for religious freedom.

1. Established Religion in America

One factor which led to the sentiment for religious freedom in America was the colonists' experience with established religion. An established religion in the American colonies meant that the government of a colony supported one or more particular religions or denominations. Much of the support was financial. Taxes were imposed and used to pay for church buildings and the salaries of clergymen. The particular beliefs of that religion were thus advocated and upheld.

Established religion in America could be traced to Europe. The Roman Catholic church was dominant in most of the European countries for centuries, but during the 16th century a schism in the church, known as the Reformation, led to the formation of several Protestant churches. Many countries came to support one of these new Protestant religions as their official religion. For example, the Anglican church became dominant in England and the Lutheran church in Sweden; the Catholic church, however, remained dominant in Spain and France.

The new state-supported Protestant religions were just as protective of their new-found influence and power in government as the Catholic church had been. They instituted many of the same discriminatory practices; for example, persecuting others for having different beliefs.

It was to escape religious persecution that many people came to America. Those people who came wanted to practice religion as they saw fit. It is ironic, then, that in some of the American colonies one religion became dominant, often with little toleration for disagreement with its views and practices.

The most powerful established churches were in some areas of New England, such as the Puritans in Massachusetts and Connecticut, and in the colony of Virginia which had a strongly established Anglican church.

Over the years the governments in different colonies began to support more than one religion. Thus an established religion came to mean in some instances aid to more than one denomination or sect. For example,

1. An attitude, thought, or judgment prompted by feeling.

while the Puritans were at first dominant in Massachusetts, later the Anglicans came to receive state support as well.

Around the time of the adoption of the Constitution, six states still provided for state support to religion: three New England states (Connecticut, Massachusetts and New Hampshire) and Georgia, Maryland and South Carolina.

2. Sentiment for Toleration

Another factor leading to increased sentiment for an amendment protecting religious freedom was the colonists' realization that toleration was necessary for a peaceful society.

Roger Williams, a Cambridge-educated Nonconformist,[1] immigrated to Massachusetts from England around 1631. At that time, the dominant religion in the Massachusetts Bay Colony was Puritanism. Williams attacked some of the beliefs and practices of the Puritans. He believed that the church and the state (government) should be kept separate and apart and that Puritans should not force others to conform to their views. Williams' views led to his banishment from the Massachusetts Bay Colony in 1635.

Williams then went to Rhode Island and in 1636 founded Providence, a colony which adopted a policy of tolerating all religions. Religious toleration was also practiced by William Penn and the Quakers in Pennsylvania. Yet toleration was not the rule in all the colonies. Often conflicts developed between different denominations wishing to believe and practice religion in their own ways.

After years of social disharmony caused by religious conflicts, the colonies gradually came to realize that toleration of religious differences was an important key to peaceful living.

3. Separation of Church and State

Seeing the bitterness that was created by having established religions and a lack of toleration for religious differences, many people in America came to believe that the state should not be involved in the support of any religion. Many colonists began to work aggressively toward a legislative separation of church and state.

In Virginia the fight for the separation of church and state took a dramatic turn prior to the Constitutional Convention of 1787. In 1784 Virginia had debated a bill on whether to extend an assessment (tax) to support religion. James Madison attacked the proposed assessment in a paper called *Memorial and Remonstrance Against Religious Assessments*. In it, he argued against any state involvement with religion and recom-

1. A member of a Protestant denomination dissenting from the Church of England (the Anglican Church). The principal Nonconformist denominations are the Baptists, Congregationalists, Methodists, Presbyterians, Quakers, and Unitarians.

mended toleration for different religions. The bill to impose the tax did not pass. In 1786 the Statute of Religious Freedom was passed in Virginia which provided for the free exercise of religion. This document became a foundation for the religious freedoms adopted in the U.S. Constitution.

Activity for Lesson Four

Be prepared to discuss the answers to the following questions in class. Outlining the information may help you highlight key points from the reading.

1. Explain the meaning of established religion. Can you think of any arguments which favor it? What arguments are there against it?

2. What do you think the word *sentiment* means as it is used in the expression "a sentiment for toleration"?

3. How did Roger Williams, William Penn, and James Madison each contribute to toleration of religious differences in America?

4. What is the significance of James Madison's *Memorial and Remonstrance Against Religious Assessments*?

5. What was Virginia's Statute of Religious Freedom and how did it affect the U.S. Constitution?

6. Should American society be tolerant of all religions? Why or why not?

LESSON FIVE

THE FIRST AMENDMENT TODAY – RELIGION

A. Who Is Prevented from Violating the First Amendment?

The Bill of Rights was designed to place limits on government action, not on private action. This means that the government cannot do certain things to its citizens. For example, the government cannot establish a religion or prevent the free exercise of religion. The government cannot abridge freedom of speech or of the press. But which "government" is prevented from violating the Bill of Rights—the federal government or state or local governments?

The First Amendment begins, "Congress shall make no law...." Under the Constitution, Congress is a part of the federal government, so it is not surprising that for almost a century after the adoption of the Constitution, the Supreme Court took the position that the Bill of Rights was a limitation only on the federal government, not on state or local governments. The Supreme Court's view that the Bill of Rights applied only to the federal government was first announced in 1833 in a case called *Barron v. The Mayor and City Council of Baltimore.*[1] In *Barron*, the Supreme Court ruled that the Bill of Rights limited federal government action but not the actions of state governments.

B. Why Does the First Amendment Now Apply to State and Local Governments?

During the twentieth century the Supreme Court has changed the position it held since *Barron*. In 1925, in *Gitlow v. New York*,[2] the court ruled that the First Amendment placed limits on state and local governments just as it did on the federal government. What had changed since the *Barron* case? Why was the First Amendment now interpreted differently?

One thing which had changed was the passage of the Fourteenth Amendment to the Constitution in 1868 following the Civil War. One part of that amendment made blacks, many of them former slaves, citizens of the United States. Another part of the Fourteenth Amendment stated:

1. 32 U.S. (7 Pet.) 242. Barron owned a very successful deep-water wharf where ships could dock to load and unload cargo. The City Council of Baltimore passed several laws requiring city improvements which changed the course and direction of the water. As a result, Barron's wharf was no longer in deep water and boats could not use it. Barron sued the city, citing his Fifth Amendment rights ("...[P]rivate property [shall not] be taken for public use without just compensation."), and won $4,500. On appeal, this decision was reversed. Barron then took the case to the U.S. Supreme Court which upheld the appeals court's decision stating that the rights contained in the Bill of Rights applied only to the federal government, not to the state governments; therefore, his Fifth Amendment rights had not been violated.

2. 268 U.S. 652. Gitlow had urged, in writing, the overthrow of the government through mass strikes and mass action. He was convicted under a New York State statute which made it illegal to advocate the forceful overthrow of the government. Gitlow argued that the statute violated his First Amendment right to free speech. The Supreme Court ruled that the statute did not violate the First Amendment's guarantee of free speech and that Gitlow could be convicted and sent to prison. Even though Gitlow did not successfully demonstrate that his First Amendment rights had been violated, this was one of the early cases in which one of the rights in the Bill of Rights was made applicable to the states.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

This last clause, known as the Due Process Clause, meant that the First Amendment's guarantee of freedom of speech and of the press applied to the states as well as to the federal government. In other decisions, the court ruled that the Due Process Clause meant that other parts of the First Amendment, like freedom of religion, as well as other parts of the Bill of Rights, also applied to the states.

C. What Does *An Establishment of Religion* Mean?

According to the Constitution, federal, state, and local governments cannot pass laws concerning "an establishment of religion." But what does an establishment of religion mean? Let's look at two opinions: the first by Justice Hugo Black and the second, a dissent (a minority opinion which, unlike a majority opinion, does not become law), by Justice William Rehnquist.

1. JUSTICE HUGO BLACK — THE "WALL OF SEPARATION"

In *Everson v. Board of Education of the Township of Ewing* (Lesson Three, Case 1) Justice Hugo Black wrote a decision for the court explaining the Establishment Clause of the First Amendment. The decision concluded that the First Amendment requires a "wall of separation" between church and state. The following part of that decision has been frequently quoted:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of [Thomas] Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."(330 U.S. at pp. 15–16).

The Supreme Court sometimes uses three tests to determine whether or not a statute violates the Establishment Clause. (These tests were discussed by the court in a case called *Lemon v. Kurtzman, Superintendent of Public Instruction of Pennsylvania.*[1]) First, a statute must have a secular (worldly) rather than a religious purpose.[2] Second, the "principal or primary effect [of the statute] must be one that neither advances nor inhibits religion."[3] Third, "the statute must not foster 'an excessive government entanglement with religion.'"[4]

2. JUSTICE WILLIAM REHNQUIST — REJECTION OF THE "WALL OF SEPARATION" DOCTRINE

In a dissent in *Wallace, Governor of Alabama v. Jaffree,*[5] Justice William Rehnquist criticized and rejected the view that the Establishment Clause meant a wall of separation between church and state. First, Justice Rehnquist criticized, as historically inaccurate, the view that the Founding Fathers wanted to create a wall of separation between church and state. Justice Rehnquist argued that James Madison, the person most responsible for guiding the Bill of Rights through Congress, did not advocate the position that there should be a wall of separation between church and state. Similarly, other persons who debated the issue of a Bill of Rights did not advocate the wall of separation between government and religion.

Second, he stated that the Establishment Clause means only that the government cannot establish a national religion and cannot prefer one religion or denomination over another. He said in *Wallace v. Jaffree*:

> It would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations....The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers [of the Constitution] intended to build the "wall of separation" that was constitutionalized in *Everson*. (472 U.S. at p. 106)

Third, Justice Rehnquist criticized the three-part test in *Lemon* as unworkable and not easily applied in specific cases. As to the first test in *Lemon*, that the law must have a secular purpose, Justice Rehnquist argued that a legislature could always give a secular reason for its action

1. 403 U.S. 602 (1971)
2. Ibid, p. 612
3. Ibid, p. 612
4. Ibid, p. 613
5. 472 U.S. 38 (1985)

and a court could not ignore that reason in deciding if the statute violated the First Amendment. On the other hand, any aid to children attending religious schools, whether in the form of bus transportation or books means, in effect, assistance to a religious school. Thus, the secular purpose requirement of *Lemon* would really mean the end of any aid to pupils attending religious schools.

As to the third prong of the *Lemon* test, no excessive entanglement between government and religion, Rehnquist argued that that test itself requires the government to monitor and watch closely any aid to religious schools so that the rule itself forces excessive entanglement of the government in religion.

D. What Does the Free Exercise of Religion Mean?

The First Amendment says that government cannot pass a law which prohibits the free exercise of religion. Not every religious freedom is permitted by the First Amendment, however. For example, in 1905 the Supreme Court upheld a Massachusetts law requiring an adult to be vaccinated, against the argument that his liberty under the Constitution was being violated.[1] The Supreme Court has also upheld statutes which permitted judges to authorize blood transfusions for children even though their parents objected on religious grounds.[2]

How does the Supreme Court determine if the Free Exercise Clause of the First Amendment is being violated? The Supreme Court gave one answer in *Wisconsin v. Yoder*, (see Lesson One, Case 1). In that case, Amish parents refused to permit their children to attend a public high school. The Amish wanted to live apart from the general society, devote their lives to religion, and live a life of simple farming without everyday conveniences and comforts like cars and television.

The Supreme Court said that in order to determine if this religious practice could continue, two questions had to be asked. The first was whether the state requirement (compulsory school attendance to age 16) interfered with the Amish's free exercise of religion? The second was whether, on balance, the state interest in compulsory education was greater than the individual right to the free exercise of religion.

In *Yoder* the Supreme Court ruled that the Wisconsin statute violated the free exercise of religion, and the Amish were allowed to keep their children out of the public high school.

1. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)
2. *Jehovah's Witnesses in the State of Washington v. King County Hospital Unit No. 1*, 278 Federal Supplement 488 (United States District Court for the Western District of Washington [June 8, 1967], affirmed without opinion by the United States Supreme Court, 390 U.S. 598 [1968])

LESSON SIX

WHAT ARE THE ORIGINS OF THE FREEDOM OF EXPRESSION CLAUSES IN THE FIRST AMENDMENT?

A. The English Origins

The American struggle for freedom of expression (speech and the press) had its roots in England. During the 17th and 18th centuries the government of the king sought to suppress any criticism of its actions. To aid in the suppression of criticism, the English Parliament passed the Licensing Act of 1662. This act authorized royal officials to investigate and seize printed works which criticized the government. Also during the 17th century, any work that was to be published in England had to be licensed beforehand. If a publication did criticize the government, it was considered seditious[1] libel which could be punished by imprisonment.

One person who suffered greatly from the English government's attacks on free expression was John Lilburne. He was charged with printing seditious books. In 1637, in a proceeding before a body known as the Court of Star Chamber,[2] he refused to give any evidence which might incriminate himself or to take an oath prior to being questioned. Because he refused to take the oath, he was punished by being fined, whipped, dragged through the streets, and forced to stand in a pillory (a wooden frame with holes for the head and hands) for some time. Subsequently, in 1638, the Court of Star Chamber ordered him imprisoned and placed in solitary confinement. He stayed there until 1640 when he was ordered released from prison. After a few years the House of Lords vacated (lifted) his sentence as illegal and gave him money to make amends.

John Lilburne's case represents one example in the continuing struggle in England and America to establish the right of citizens to freely express their thoughts—even to the extent of criticizing the government.

The case also represents the establishment in English Law of the right not to incriminate oneself. (We will learn more about this right in Chapter Three.) Following the Lilburne case, other rights of persons accused of committing crimes, such as the right to a public trial, were made a part of English law and, in America, became part of the Sixth Amendment.

B. Attacks on Free Expression in the Colonies

The methods used by the government to suppress criticism and dissent in England were also used in the American colonies. Persons who printed attacks upon the government were subject to fines and imprisonment.

1. Sedition is stirring up rebellion against the government.
2. The Star Chamber was an English court of law during the 1500s and 1600s. It tried persons too powerful to be brought before the ordinary, common-law courts. The Star Chamber consisted of men from the King's Council, a group of royal advisers. It passed judgment without trial by jury. Today the term *star chamber* refers to an unregulated, secret meeting of any court of justice or official body.

The case of John Peter Zenger was important to the struggle for freedom of the press and freedom of expression in America. Zenger was a German immigrant to the American colonies who became a publisher in New York. Zenger printed works attacking the government of England, and, more particularly, England's representative, the governor of the colony of New York. In 1735, Zenger was tried for seditious libel. The jury found him not guilty. It stated that truth was a defense and said that the jury was able to determine whether or not the evidence presented at the trial was valid.

The Zenger case was important for two reasons. First, it was an example of freedom of the press. This case led to a firm belief in the colonies that freedom of the press and freedom of expression were rights which the government could not take away, particularly as relations with England deteriorated.

Second, the doctrine that truth was a defense became an accepted part of the defense in lawsuits charging a person with slander or libel. Ordinarily, if a person falsely called another person a thief, the statement would be slander if spoken or libel if written. The injured person could sue the speaker or writer for making the false and defamatory statement and could receive compensation (money) for his/her injured reputation. On the other hand, if the person who uttered or published the statement that the other person was a thief could defend the action by asserting and proving that the statement was true, then the allegedly injured person could not recover any money damages.

After the Zenger trial, the dominant issue with respect to freedom of expression continued to be the right or, rather, the absence of the right to criticize the government. Nevertheless, it was no longer the fact that criticism could be stopped before it was published. The right to print matter without prior restraint was supported by the English jurist William Blackstone. In his *Commentaries on the Laws of England* (1765–69) thirty years after the Zenger case, he advocated the position that there could not be an order preventing a work from being published; however, once the work was published, the publisher was accountable for any libel or wrongful criticism contained in it.

C. The Constitutions of the States

By the start of the American Revolution in 1776, the principles of freedom of speech and of the press had become a part of the liberties which Americans felt belonged to them. In 1776 Virginia adopted a state constitution which began with a Declaration of Rights that included freedom of the press. The Constitution of Pennsylvania contained provisions for freedom of the press, freedom of speech, and the right to petition for redress of grievances. The Massachusetts Constitution, adopted in 1780, provided protection for freedom of speech and of the press.

D. The Road to the First Amendment: What Were the Major Steps in Placing the First Amendment into the U.S. Constitution?

The members of the Constitutional Convention of 1787 agreed on a proposed constitution. After that, it was necessary for the thirteen states to ratify (approve) it. Each state had its own convention to approve or reject the federal constitution. There was a major difficulty at these state conventions, however—the proposed constitution had no bill of rights, and many states which had their own bills of rights would not confirm a federal constitution which did not.

There were several major steps in placing the First Amendment into the Constitution. First, some of the delegates to the state conventions called for a bill of rights. Some (delegates to conventions in Maryland, Massachusetts, New Hampshire, South Carolina, New York, North Carolina, Pennsylvania, and Virginia) urged various amendments to the proposed constitution, some of which became part of the Bill of Rights.

James Madison, the "Father of the Constitution," and a representative of the U.S. Congress for his home state of Virginia, announced that he favored amendments. In Congress, on June 8, 1789, Madison proposed several amendments to the Constitution (one of which was to become the First Amendment).

The House of Representatives (on August 24, 1789) and the Senate (on September 9, 1789) approved some of these amendments. Then, on September 25, 1789, the Congress of the United States approved a Bill of Rights containing the First Amendment. The final step was to forward the First Amendment and the other amendments to the states for ratification.

The Bill of Rights went into effect on December 15, 1791, when Virginia became the last of the thirteen states to ratify their addition to the United States Constitution.

ACTIVITY 1 FOR LESSON SIX

Explain the significance of the following act and the following persons in relation to the First Amendment.

1. Licensing Act of 1662

LESSON SEVEN

THE FIRST AMENDMENT TODAY–FREEDOM OF EXPRESSION

A. Application of the Free Expression Clauses of the First Amendment

As discussed in Lesson Five, for almost one hundred years the First Amendment was considered applicable only to the federal government. In the twentieth century, however, the Supreme Court has ruled that the First Amendment applies to the states as well. The Supreme Court's view that the First Amendment applied to the states began with *Gitlow v. New York* (see Lesson Five, part B) and continued in other cases.

B. What is the Meaning of the Last Three Free Expression Clauses of the First Amendment — Free Speech, Free Assembly, Freedom to Petition for Redress of Grievances?

1. JUSTICE HUGO BLACK AND THE ABSOLUTE GUARANTEE OF FREE SPEECH

Justice Hugo Black served as a Justice of the Supreme Court from 1937 to 1971. He came to be regarded as a champion of First Amendment rights. His position was that the First Amendment gave an absolute guarantee against government efforts to limit freedom of speech whatever the speech might be. Thus, even if a speaker spoke derogatory words which incited a crowd against him, the government's duty was to protect the speaker, not punish him for his words. (See *Feiner v. People of the State of New York*, Activity 2 for Lesson Seven, Case 1.)

2. A CASE INVOLVING FREE SPEECH, FREE ASSEMBLY, AND THE RIGHT TO PETITION FOR REDRESS OF GRIEVANCES

In *Edwards v. South Carolina* (Lesson One, Case 2), groups of black high school and college students went to the South Carolina State House grounds in Columbia, South Carolina. Their purpose was to protest segregation and discrimination against blacks. They carried placards with anti-segregation and anti-discrimination messages. After they had walked peacefully through the State House grounds for 30 to 45 minutes, they were told to disperse within 15 minutes or they would be arrested.

When the students did not disperse, they were arrested and charged with breach of the peace. They were convicted and their convictions were affirmed by the South Carolina Supreme Court. They then asked the Supreme Court of the United States to review their case.

The Supreme Court reversed their convictions. It ruled that the prosecutions and convictions violated their rights to free speech, free assembly, and the freedom to petition for redress of grievances. The court stated:

> ...[A]nd it is clear to us that in arresting, convicting, and punishing the petitioners under the circumstances disclosed by this record, South Carolina infringed the petitioners'

constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances.

. . . . .

The circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine [original] and classic form. The petitioners felt aggrieved by laws of South Carolina which allegedly "prohibited Negro[1] privileges in this State." They peaceably assembled at the site of the State Government and there peaceably expressed their grievances "to the citizens of South Carolina, along with the Legislative Bodies of South Carolina."

. . . . .

The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views. (372 U.S. at pp. 235 and 237)

3. SYMBOLIC SPEECH

Sometimes peoples' actions communicate their ideas just as their spoken and written words do. Wearing a campaign button during an election or gesturing to show approval or disagreement can be actions that communicate ideas. This type of communication is known as *symbolic speech* and, as a type of speech, it can be protected under the First Amendment.

For example, in *Spence v. Washington*[2] a college student in Seattle attached a peace symbol to a U.S. flag. He hung the flag upside down from the window of his private apartment to protest U.S. military action in Cambodia during the Vietnam War and the killing of four students by the National Guard at Kent State University.

He was convicted of violating a state statute which made it a crime to place a mark or picture on a flag. His conviction was overturned by the Supreme Court of the United States for violating the First Amendment. In its decision, the court stated, "We are confronted...with a case of prosecution for the expression of an idea through activity." (418 U.S. at p. 411)

In *Spence*, the Supreme Court concluded that the First Amendment protects actions that express an idea just as it protects what people say and write. The Supreme Court has also said that the First Amendment protects persons from being compelled to perform acts that express ideas which they may or may not share.

For example, in *West Virginia State Board of Education, et al. v. Barnette*,[3] a West Virginia school regulation required that school children salute the flag. If a child refused to salute, he or she could be expelled from school, considered "unlawfully absent," and could be found to be delinquent. The child's parents could then be prosecuted, fined, and jailed.

1. *Negro* was a commonly used term at the time but is no longer appropriate for referring to persons of African heritage.
2. 418 U.S. 405 (1974)
3. 319 U.S. 624 (1943)

A group of persons belonging to the religion known as Jehovah's Witnesses sought to enjoin (stop) enforcement of the regulation requiring that school children salute the flag. They argued that the regulation, which forced their children to express something they might not wish to express, violated their First Amendment guarantee of freedom of speech. A three-judge federal court agreed with this argument and granted the injunction.

The West Virginia State Board of Education appealed the case to the Supreme Court of the United States. The Supreme Court agreed with the lower court and affirmed the decision that the regulation could not be enforced. It said:

> To sustain [uphold] the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.
>
> . . . . .
>
> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control. (319 U.S. at pp. 634 and 642)

4. LIMITS ON FREE SPEECH

The Supreme Court has never held that free speech has no limits. But justices of the Supreme Court and legal scholars have argued for many years about what those limits are. Three areas of free speech on which some limits do apply are national security, fighting words, and obscenity.

a. National Security

At the time of America's entry into World War I in 1917, some Americans believed that other American citizens were a threat to national security. During the World War I era and continuing through World War II and the Cold War, both the federal and state governments passed laws designed to check and control persons who, by written or spoken word, advocated violence against the government and its citizens.

Schenck v. United States[1] in 1919 was one of the first cases dealing with laws passed in the name of national security during the World War I era. Schenck and another person named Baer were convicted of violating the Espionage Act of June 15, 1917,[2] because they distributed leaflets urging men to resist the draft and not to fight. Schenck and Baer took their case to the Supreme Court, arguing that convicting them violated the First Amendment's guarantee of freedom of speech.

1. 249 U.S. 47 (1919)
2. The Act made it illegal, among other things, to cause or attempt to cause insubordination in the military.

The Schenck case caused the Supreme Court to establish a "clear and present danger" test to determine whether a speaker or writer could be punished for what s/he said or wrote. The Court said that the purpose of the test was to determine whether there was a clear and present danger that the words spoken or written by a person would cause actions that the government had a right to prevent (in this case, resistance to the draft or refusal to fight). Specifically, the court said:

> ...[T]he character of every act depends upon the circumstances in which it is done....The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic....The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. (249 U.S. at p. 52)

Using this clear and present danger test, the Court ruled that Schenck's and Baer's convictions were valid.

Since 1919, as could be expected, judges have differed over the meaning of the clear and present danger test. In 1951 the Supreme Court heard the case of *Dennis v. United States*[1] in which several persons had been convicted of seeking to overthrow the United States government by force and violence (a violation of the Smith Act). The persons convicted argued that their right to freedom of speech had been violated by their prosecution. In *Dennis*, the Supreme Court took the position that clear and present danger meant a balancing test between the right to free speech and the need to preserve the government.

In 1969, in *Brandenburg v. Ohio*,[2] the Supreme Court changed and limited the clear and present danger test.

Brandenburg, a leader in the Ku Klux Klan (a white extremist organization), was arrested after a Klan rally on a farm in Hamilton County, Ohio. At the rally a wooden cross had been burned while derogatory remarks were made about blacks and Jews. One person also spoke of the white race taking some "revengeance" and of marching on Congress and then, in separate groups, into Florida and Mississippi. All of these actions and most of the speech were filmed by a reporter who had been invited to

1. 341 U.S. 494 (1951)
2. 395 U.S. 444 (1969)

the rally. This film was subsequently introduced into evidence at Brandenburg's trial.

Brandenburg was convicted of violating the Ohio Criminal Syndicalism statute which made it a crime to teach or advocate the forceful and violent reform of the government.

The Supreme Court reversed Brandenburg's conviction stating that there was a difference between advocating force or violence and inciting people to the immediate use of force or violence. The court further stated that mere advocacy of force or violence was protected by the First Amendment while incitement to immediate violence was not. Since the Ohio statute punished mere advocacy, it violated the First Amendment.

This distinction between advocacy and incitement was not made in the *Schenck* case in 1919. Neither was it made in the *Dennis* case in 1951. In *Dennis*, however, the Court did recognize that a balance should be struck between the First Amendment rights of the individual and the safety of the government. *Brandenburg* in 1969 represents a change or modification of the Court's view of the clear and present danger test. Although it still concluded that there are times when a speaker may be punished for his or her words, it recognized a difference between merely advocating violence against the government and inciting people to it.

b. Fighting Words

A second type of speech the Supreme Court has said is not protected by the First Amendment is the use of fighting words. These are words which can be expected to provoke a hostile reaction in a reasonable person.

In *Chaplinsky v. New Hampshire* (see Lesson Three, Case 3) the Supreme Court discussed the type of speech not protected by the First Amendment. It stated that lewd, obscene, profane, libelous, and fighting words were not protected. Specifically, the court stated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. (315 U.S. at pp. 571–72)

c. Obscenity

As the quotation in *Chaplinsky* states, lewd and obscene remarks or conduct are not protected by the Constitution.

C. FREEDOM OF ASSOCIATION

People often band together to express similar views or to participate in a common form of worship. Because associating with others who share the same views can involve freedom of religion or freedom of expression, the Supreme Court has stated that there is an implied right to freedom of association in the First Amendment.

The National Association for the Advancement of Colored People (NAACP) was organized under the laws of the State of New York. Its stated objective was and is to seek equality of rights and to eliminate racial prejudice. The NAACP opened a branch office in Alabama in 1918. In 1956 the Attorney General of Alabama sought to prohibit the NAACP from operating within the state because, he stated, the NAACP had failed to comply with Alabama law in order to do business in Alabama. A court ordered the NAACP, among other things, to produce its membership lists. When it did not, the Alabama Circuit Court issued an order holding the NAACP in contempt and fining it $100,000. The Supreme Court of Alabama then refused to review the contempt judgment.

The Supreme Court of the United States agreed to review the case. The court stated that the Alabama order holding the NAACP in contempt for failure to turn over its membership lists was a violation of freedom of association guaranteed by the First Amendment. The court stated that the NAACP had demonstrated that disclosure of its membership lists would expose its members to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[1]

D. FREEDOM OF THE PRESS

The case of *Near v. Minnesota* (see Lesson Three, Case 4) established the principle that the government could not prevent the publication of a newspaper. Prevention of publication, known as prior restraint, is prohibited by the freedom of the press clause of the First Amendment. But the fact that a government official or judge cannot prevent a newspaper from being published except in very extraordinary circumstances[2] does not mean that a newspaper can publish anything regardless of the truth. Newspapers and other publications are still subject to the libel laws.

Libel, broadly defined, is a written and false statement which injures a person's character or reputation. For example, it would be libel to print falsely that an honest person is a thief. Where a public official is accused in print, however, the official must show that the publication was done with malice. The term malice applied to libel laws means that the defamatory material was published with knowledge that it was false, or with complete disregard of whether it was false, in order to do harm to another.[3]

1. *National Association for the Advancement of Colored People v. Alabama ex rel. Patterson, Attorney General*, 357 U.S. 449 at p. 462 (1958)
2. It is said that a publication of troop movements in time of war could be stopped.
3. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)

