

Questions on Supreme Court Rulings

ABRAMS V. US (1919)

Full case can be reviewed here: <https://supreme.justia.com/cases/federal/us/250/616/case.html>

The details of this case involve a group of Russian defendants, living in the United States, who had published and distributed documents critical of the United States and its war efforts against Germany. This case revolved around the fact that the Espionage Act of 1917 made it a criminal offense to urge curtailment of production of the materials necessary to the war against Germany with intent to hinder the progress of the war. The defendants admitted their activities and argued that the First Amendment protected their right to publish and distribute their statements.

From the decision:

"It seems to me that this statute must be taken to use its words in a strict and accurate sense. They would be absurd in any other. A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet, even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime. I admit that my illustration does not answer all that might be said, but it is enough to show what I think, and to let me pass to a more important aspect of the case. I refer to the First Amendment to the Constitution, that Congress shall make no law abridging the freedom of speech."

To which statute is Justice Holmes referring in this statement? [The Espionage Act of 1917]

Why would no one consider it a crime if a patriot thought we were wasting too much money on aeroplanes or cannons and advocated curtailment?

"But, as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country."

To which exception to free speech does Justice Holmes refer in this statement? (Incitement)

What types of damage could be done by prohibiting criticism of war efforts or efforts to change the mind of the country?



"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises."

Why would someone want to persecute another for expressing opinions?

What does Justice Holmes mean by saying that allowing opposition by speech means you think speech "impotent," that you do not care for the result, or that you doubt your power or premises?

"But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution."

The phrase "time has upset many fighting faiths" has become very famous. What did Justice Holmes mean by this and how does this phrase apply today?

Justice Holmes says that "the ultimate good desired is better reached by free trade in ideas" and that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Discuss what these statements mean to you.

SCHENCK V. US (1919)

<https://supreme.justia.com/cases/federal/us/249/47/case.html>

This is the famous "fire in a crowded movie house" case, but it actually dealt with defendants who distributed fliers to draft-age men, urging resistance to induction. They were convicted of an attempt to obstruct the draft, but the decision was later overturned.

From the decision:

"We admit that, in many places and in ordinary times, the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the 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."

Which recognized free speech exception is the equivalent of "shouting fire in a theater and causing a panic?" (Incitement) [The 5 exceptions are True Threats, Harassment, Obscenity, Incitement, and Defamation.]

"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."

What is meant by the phrase "clear and present" danger? What types of speech would not meet the standard of presenting a "danger" that is "clear" and "present?"

WHITNEY V. CALIFORNIA (1972)

Full case here: <https://supreme.justia.com/cases/federal/us/274/357/case.html>

Miss Whitney was convicted of the felony of assisting in organizing the Communist Labor Party of California, of being a member of it, and of assembling with it. These acts were held to constitute a crime because the party was formed to teach criminal syndicalism (i.e., advocating unlawful acts of force and violence as a means of effecting political change).

From the decision:

"But, although the rights of free speech and assembly are fundamental, they are not, in their nature, absolute. Their exercise is subject to restriction if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic, or moral."

What does Justice Brandeis mean when he says that the right of free speech is not "absolute?"

Do you consider protection from "serious injury" (political, economic or moral) to be a reasonable limit on the right of free speech? Why do you think this decision refers to injury to the State rather than to an individual?

"Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary. They valued liberty both as an end, and as a means. They believed liberty to be the secret of happiness, and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed



silence coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

Why do Supreme Court Justices refer to the founders in their decisions?

What did Justice Brandeis mean by saying that "deliberative forces should prevail over the arbitrary?"

What did Justice Brandeis mean by saying that the founders "valued liberty both as an end, and as a means?"

Why did Justice Brandeis state that liberty is the "secret of happiness" and "courage" the "secret of liberty?"

Why would discussion be futile without freedom of speech and assembly?

What do you think of this statement: "it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones?"

According to Justice Brandeis, the Founders "eschewed silence coerced by law—the argument of force in its worst form." What did he mean by that and do you agree?

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. 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. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it."

What did Justice Brandeis mean when he said that the founders "did not exalt order at the cost of liberty?"

The following phrase from Justice Brandeis' opinion has become very famous: "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." Why do you think this phrase is so often quoted and what does it mean to you?

Why does Brandeis think it is imperative that "authority is to be reconciled with freedom?"

US V. SCHWIMMER (1929)

Full case here: <https://supreme.justia.com/cases/federal/us/279/644/case.html>

This case involved a Hungarian citizen who wanted to become an American citizen, and was willing to take an oath of allegiance with one reservation: she was a pacifist and would refuse to fight for the United States.

From the decision:

Ms. Schwimmer lost, and was not allowed to become a citizen. However, the case is most famous for the dissenting opinion by Justice Holmes: "Some of her answers might excite popular prejudice, but, if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought -- not free thought for those who agree with us, but freedom for the thought that we hate."

Why did Justice Holmes conclude that the Constitution protects "the thought that we hate?" Do you agree that it is important to allow freedom for "the thought that we hate?" Why or why not?

WEST VIRGINIA STATE BOARD OF EDUCATION V. BARNETTE (1943)

Full case here: <https://supreme.justia.com/cases/federal/us/319/624/>

This case involved students who were Jehovah's Witnesses and who refused to salute the flag because it was against his religion to pledge to symbols, including symbols of political institutions. However, the students argued that being required to salute the flag violated their freedom of speech, not their freedom of religion.

From the decision:

"As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."

Justice Jackson states that, "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters" and that "compulsory unification of opinion achieves only the unanimity of the graveyard" and gives several examples of force being used to impose opinions. Do you think that such coercive efforts are always doomed to fail? What would be your response if another person or a government agency attempted to impose required opinions or views on you?

“There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.”

Where does the phrase “consent of the governed” come from? (Declaration of Independence)
What does that phrase mean to you?

Explain this phrase: “Authority here is to be controlled by public opinion, not public opinion by authority.”

"The case is made difficult not because the principles of its decision are obscure, but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous, instead of a compulsory routine, is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great."

Justice Jackson says: “The case is made difficult not because the principles of its decision are obscure, but because the flag involved is our own.” Why does this make the case more difficult? Is it difficult to reason effectively on topics that are personally emotional or that “hit close to home?”

What does Justice Jackson mean when he says that, “We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes?”

Why does Justice Jackson say: "But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order?"

The following quote from this court case has become very famous: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." Why do you think people consider them so important?

Justices Black and Douglas also said, of this case: "Words uttered under coercion are proof of loyalty to nothing but self-interest." What do they mean by that statement?

TERMINIELLO V. CITY OF CHICAGO (1949)

Full case here: <https://supreme.justia.com/cases/federal/us/337/1/case.html>

This case involved a priest who was charged with creating a "breach of peace" under an ordinance that banned speech which "stirs the public to anger, invites dispute, brings about a condition of unrest or creates a disturbance."

From the decision:

Justice Douglas stated that, " The vitality of civil and political institutions in our society depends on free discussion. ~~As Chief Justice Hughes wrote in De Jonge v. Oregon, it~~ [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes."

How do you think independent speech and diversity of ideas is handled in totalitarian regimes? Can you find examples?

"Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."

Why would a function of free speech be to "invite dispute?" Do you think this is what the founders intended? Why or why not?

How could creating unrest, dissatisfaction or anger be "best serving" the purpose of free speech? What do you think would be an example of "serious substantive evil" that would rise far above "public inconvenience, annoyance, or unrest?"

Do you agree with Justice Douglas that restricting freedom of speech would lead to "standardization of ideas either by legislatures, courts, or dominant political or community groups?" What would such standardization look like? Do you think such standardization already exists?

POLICE DEPARTMENT OF CITY OF CHICAGO V. MOSLEY (1972)

Full case here: <https://supreme.justia.com/cases/federal/us/408/92/case.html>

This case struck down a Chicago ordinance that prohibited all picketing within 150 feet of schools, except picketing related to a strike at the school.

From the decision:

"To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

How does free speech contribute to the "continued building of our politics and culture? How does it assure self-fulfillment for each individual?

Do you agree that debate on public issues should be “uninhibited, robust, and wide-open?” Why or why not? What might happen if debate on public issues were inhibited or restricted?

“Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an “equality of status in the field of ideas,” and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.”

Why must government not grant a forum to “acceptable” views while denying the same forum to “less favored or more controversial views?”

This idea has been called “content neutrality.” What does it mean to remain “neutral?”

Content-based discrimination means that government (or a representative of government, like a public school) would not allow anyone to discuss certain topics in certain places. Viewpoint-based discrimination would mean that certain topics are allowed to be discussed, but only if the speaker holds certain acceptable views. Can you think of any examples of this?

[One example might be allowing discussion of abortion, but not allowing the pro-choice side to speak.]

“The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”

This quote by Justice Thurgood Marshall has become very famous: “Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” What does this quotation mean to you? What does it tell you about the relationship between citizens and the government in America?

TEXAS V. JOHNSON (1989)

Full case here: <https://supreme.justia.com/cases/federal/us/491/397/case.html>

This case dealt with a member of the Revolutionary Communist Party who set fire to an American flag (while chanting anti-American slogans) at the Republican National Convention. No one was hurt, but some witnesses said they were extremely offended. This case invalidated existing state prohibitions on desecrating the American flag and decided that this action in these circumstances constituted expressive conduct protected by the First Amendment.

From the decision:



Justice Brennan: "The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea, we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether"[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."

Can you think of some other conduct that might be considered "speech?"

"[T]he flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas."

Do you agree that saluting a flag is a form of speech? If so, what would a person be "saying" by saluting the flag?

"Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in "America." We have not automatically concluded, however, that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred."

Why would "context" matter in terms of concluding what someone is trying to express?

Can you think of an example where burning a flag would not be a way of protesting?

"Thus, we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

Do you agree that not every expression of a provocative idea will incite a riot? What do you think should happen to someone whose exercise of free speech *does* cause an actual riot?

"Johnson was prosecuted because he knew that his politically charged expression would cause 'serious offense.' If he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law: federal law designates burning as the preferred means of disposing of a flag 'when it is in such condition that it is no longer a fitting emblem for display,' and Texas has no quarrel with this means of disposal. The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others."

Do you think offending other people is always wrong? What if some people are offended very easily? Should you edit what you say so as not to cause any offense to anyone? Is that possible?

The following statement from this flag-burning case has become very famous: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

What does this statement mean to you? Can you think of any ways this statement would affect free speech in your school or college? What about in your family or among your friends? If



government cannot prohibit the expression of offensive ideas, is there anything anybody can do about it?