Required Court Cases

Engel v. Vitale

Wisconsin v. Yoder

Schenck v. U.S. Tinker v. Des Moines

New York Times v. U.S.

First Amendment Rights

STUDENTS WILL KNOW THAT:

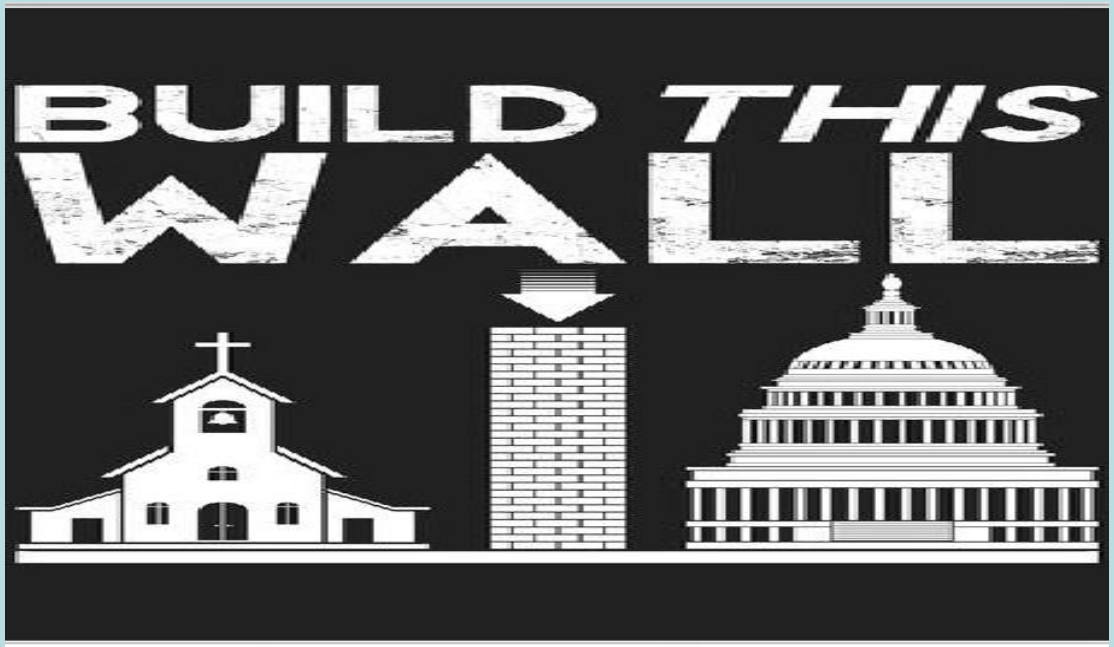
1. The interpretation and application of the First Amendment's establishment and free exercise clauses reflect an ongoing debate over balancing majoritarian religions practice and free exercise, as represented by such cases as:
   - *Engel v. Vitale* (1962), which declared school sponsorship of religious activities violates the establishment clause
   - *Wisconsin v. Yoder* (1972), which held that compelling Amish students to attend school past the eighth grade violates the free exercise clause
2. The Supreme Court has held that symbolic speech is protected by the First Amendment, demonstrated by *Tinker v. Des Moines Independent Community School District* (1969), in which the court ruled that public school students could wear black armbands in school to protest the Vietnam War
3. Efforts to balance social order and individual freedom are reflected in interpretations of the First Amendment that limit speech, including:
   - Time, place, and manner regulations
   - Defamatory, offensive, and obscene statements and gestures
   - That which creates a "clear and present danger" based on the ruling in *Schenck v. United States* (1919)
4. The Supreme Court has on occasion ruled in favor of states' power to restrict individual liberty; for example, when speech can be shown to increase the danger to public safety
5. In *New York Times Co. v. United States* (1971), the Supreme Court bolstered the freedom of the press, establishing a "heavy presumption against prior restraint" even in cases involving national security

1st Amendment - Freedom of Religion

TWO CLAUSES THAT YOU MUST KNOW

- **The Establishment Clause**
  - The Separation of Church and State
  - "Congress shall make no law respecting the **establishment** of religion…"
  - *Engle v. Vitale, 1962*

- **The Free Exercise Clause**
  - Free to practice your religion
  - "… or prohibiting the **free exercise** thereof"
  - *Wisconsin v. Yoder, 1972*



FREEDOM OF RELIGION - THE ESTABLISHMENT CLAUSE

- **No Government "Establishment of Religion"**
  - **A "wall of separation" - Separation of church and state (words of Jefferson; it is implied within 1st Amendment, but not stated – kind of like "fair trial")**
- **Basic meaning of establishment clause: government may not establish an official religion.**
  - **"Accomodationist View": Government should bend a bit and allow a certain degree of church/state blending (allowing nativity scenes on city property, and allowing a non-denominational prayer in public school)**
  - **"Separationist View": Government should allow virtually no blending of church and state. There should be a "wall of separation" between the two.**

***Lemon v. Kurtzman*: Established a 3-part test (the Lemon test) to determine the constitutionality of a statute or practice:**

1. **Laws should have a secular (non-religious) purpose**
2. **Laws should be neutral toward religion (neither advance nor inhibit religion)**
3. **Laws should not be entangled with religion**

If any is present, the statute or practice is unconstitutional

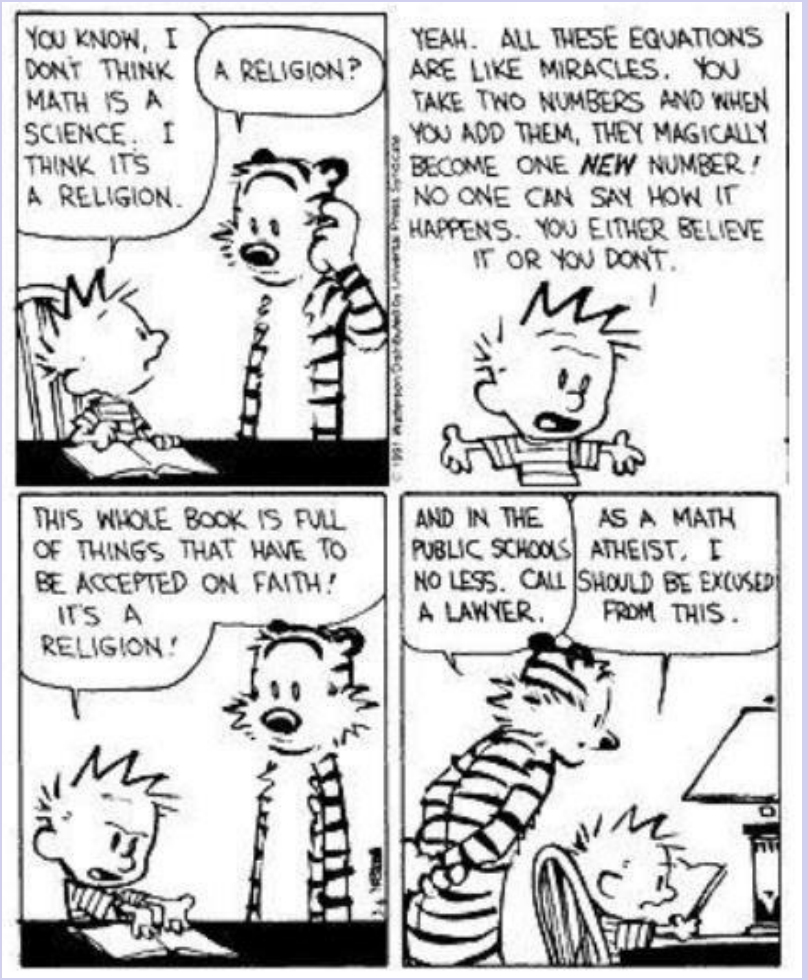
SCHOOLS AND RELIGION

ACTIVITIES NOT PERMITTED:

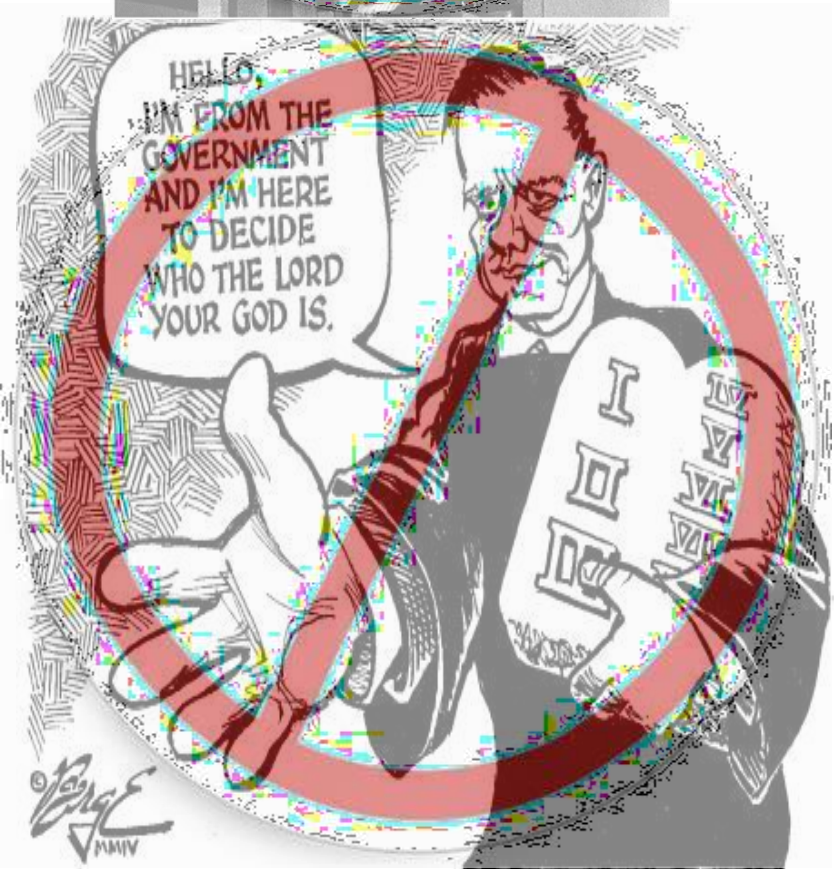
- State-sponsored, recited prayer in public school is unconstitutional
- Teacher-led prayer is unconstitutional
- School-led prayer for any event is unconstitutional
- Devotional Bible-reading in public school Graduation prayers is unconstitutional
- Prohibiting the teaching of evolution in public school is unconstitutional
- Posting of the 10 Commandments in public school is unconstitutional
- Student-led prayer using PA system is unconstitutional
- Requiring all students to say the pledge is unconstitutional
- State money to pay for Bibles, chapels, field trips, etc. for private schools is unconstitutional

ACTIVITIES PERMITTED:

- Moment of silence in public school is constitutional (as long as the purpose is not stated as being for prayer).
- Purchasing textbooks, lunches, bus transportation for private schools is constitutional
- Allowing students to meet on campus for religious groups (such as Christian Club) is constitutional
- Use of public school building by religious groups is constitutional
- Voluntary after-school Bible study in public school is constitutional
- Released time for students is constitutional
- Public money to private schools as long as it does not violate the Lemon Test



Engle v. Vitale (1962)



Issue: Does the recitation of a prayer in public schools violate the Establishment Clause of the First Amendment?

Majority: The Court ruled that the school-sponsored prayer was unconstitutional because it violated the Establishment Clause. The prayer was a religious activity composed by government officials (school administrators) and used as a part of a government program (school instruction) to advance religious beliefs. The Court rejected the claim that the prayer was nondenominational and voluntary. "There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings. . . in the Regents' prayer is a religious activity," Justice Black wrote. "We think that by using its public school system to encourage recitation of the Regents' Prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause."

FREEDOM OF RELIGION – FREE EXERCISE CLAUSE

- **Provides Freedom of Worship**
- **Religious practices that have been restricted:**
  - **Polygamy (*Reynolds v. U.S.*)**
  - **Drug use (*Oregon v. Smith*)**
  - **Not vaccinating children of Christian Scientists before they enter school**
  - **Not paying Social Security taxes (Amish)**
  - **Wearing a Jewish skullcap (Yarmulke) in the military**
- **Religious practices that have been permitted:**
  - **Not saluting flag in public school (Jehovah's Witnesses)**
  - **Not sending children to school past the 8th Grade for Amish (*Wisconsin v. Yoder, 1972*)**
  - **Animal Sacrifice (Santeria case)**
- **Article 6 bans religious tests/oaths as qualifications to hold public office.**

Wisconsin v. Yoder (1972)

Issue: Under what conditions does the state's interest in promoting compulsory education override parents' First Amendment right to free exercise of religion?

Majority: The Supreme Court held that the Free Exercise Clause of the First Amendment, as incorporated by the 14th Amendment, prevented the state of Wisconsin from compelling the respondents to send their children to formal secondary school beyond the age of 14.

The Court ruled that the families' religious beliefs and practices outweighed the state's interests in making the children attend school beyond the eighth grade. The Court first satisfied itself that, according to expert testimony in the record, the requirement to send their children to school beyond the eighth grade would actually interfere with well-established and deeply held religious convictions.

The Court then rejected the state's arguments for overriding the parents' religious beliefs. The Court commented that an additional one or two years of high school (until the required age of 16) would not produce enough educational benefits for the Amish to constitute a "compelling government interest."

Is this legally allowed in public?
Should it be allowed if it is legal?

Supporter of the Westboro Baptist Church picketing the funeral of a soldier who died in Iraq

Is this what our Founders meant by giving individuals "freedom of speech" and "right to assemble" under the 1st Amendment?

Arm bands? Yes (*Tinker v. Des Moines*)

Flag burning? Yes (*Texas v. Johnson*)

Bong hits? No (*Morse v. Frederick*)

IS ALL SPEECH FREE?

You are not free to publish obscene materials. You are not free to lie or slander others nor can you write falsely (libel). There are numerous court precedents that define when and where our free speech can and cannot be limited.

Schenck v. United States, 1919

- **Ruled that the First Amendment guarantees are not absolute and must be considered in the light of the setting in which supposed violations occur**
- **Established the clear and present danger test; Created a precedent that 1st Amendment guarantees of free speech are not absolute and dangerous speech can be limited**
- **"…Free speech would not protect a man in falsely shouting fire in a theater"**
- **Speech may be restricted when it incites violent action (imminent threat to society)**

Brandenburg v. Ohio, 1969

- **SCOTUS limited the clear and present danger test**
- **Ruled that the government could punish the advocacy of illegal action only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"**

Schenck v. United States (1919)

Issue: Did Schenck's conviction under the Espionage Act for criticizing the draft violate his First Amendment free speech rights?

Majority: Justice Oliver Wendell Holmes delivered the unanimous opinion for the Court in favor of the United States. Holmes accepted the possibility that the First Amendment did not only prevent Congress from exercising prior restraint (preemptively stopping speech). He said that the First Amendment could also be interpreted to prevent the punishment of speech after its expression.

Yet, according to Holmes, "the character of every act depends upon the circumstances in which it is done." In the context of the U.S. effort to mobilize for entry into World War I, the Espionage Act's criminalization of speech that caused or attempted to cause a disruption of the operation of the military was not a violation of the First Amendment. According to Holmes, "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."

Holmes held that some speech does not merit constitutional protection. He said that statements that create a "clear and present danger" of producing a harm that Congress is authorized to prevent, fall in that category of unprotected speech. Just as "free speech would not protect a man in falsely shouting fire in a theatre and causing a panic," the Constitution does not protect efforts to induce the criminal act of resisting the draft during a time of war.

NON-PROTECTED SPEECH

Supreme Court holds that all speech is protected unless it falls into one of the four narrow categories:

1. **Libel and slander**
2. **Obscenity and pornography**
3. **Commercial speech**
4. **Fighting words**

NON-PROTECTED SPEECH

- **Libel and slander**
  - **Libel is a written defamation that falsely attacks a person's good name and reputation**
  - **Slander is a spoken defamation that falsely attacks a person's good name and reputation**
  - **Limits on student speech**
    - ***Bethel v. Fraser (1986)* – school can suspend a student from school for making a speech full of sexual double entendres or innuendos.**
- **Obscenity (i.e. pornography)**
  - ***Miller v. California* (1973) gave constitutional definition of obscenity**
    1. **Appeals to prurient interest in sex,**
    2. **Patently offensive, and**
    3. **Must lack <u>serious</u> literary/artistic/political/scientific value.**
    - **If not meeting all three criteria, then not obscene**
  - **Sexually explicit materials about or aimed at minors are not protected by the First Amendment**
- **Commercial speech**
  - **Commercial speech (such as advertising) is more restricted than are expressions of opinion on religious, political, or other matters.**
  - **The Federal Trade Commission (FTC) decides what kinds of goods may be advertised on radio and television and regulates the content of such advertising.**
- **Fighting words**
  - **Governments may punish certain well-defined and narrowly limited classes of speech that by their very utterance inflict injury or tend to incite an immediate breach of peace**

ESSENTIAL QUESTION CFU

What is a modern-day example of "clear and present danger"?

Should America limit speech (think about hate speech)?

PROTECTED SPEECH

- **Prior restraint**
  - Blocking speech before it is given.
  - Such action is presumed by courts to be unconstitutional.
  - In the Pentagon Papers case (*New York Times v. U.S.*), the court refused to impose prior restraint: the revelations may have embarrassed the government, but they did not endanger national security.
- **Symbolic speech**
  - *Tinker v. Des Moines (1969)* – wearing black armband at school at protest Vietnam War
  - *Texas v. Johnson (1989)* – flag burning

Flag burning is constitutionally protected as symbolic speech. Do we have too many rights when it comes to freedom of speech?

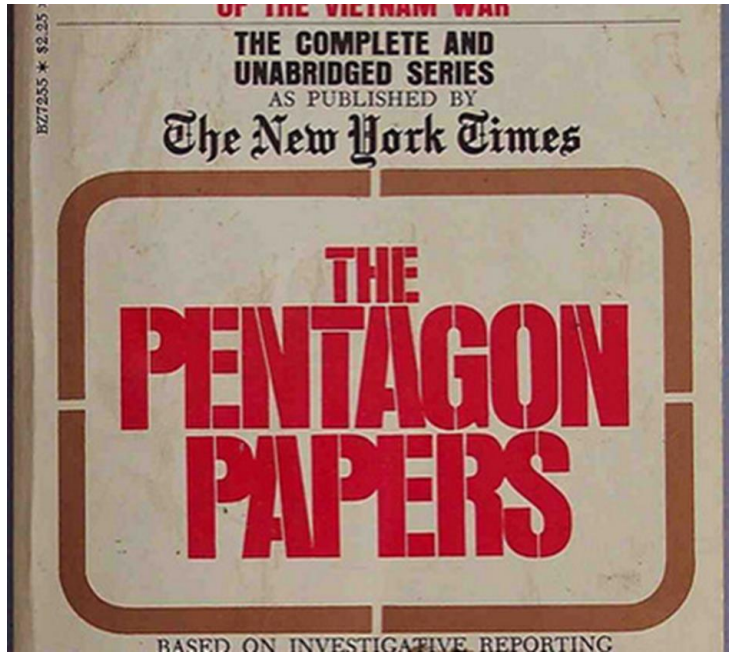
EXAMPLE OF PRIOR RESTRAINT

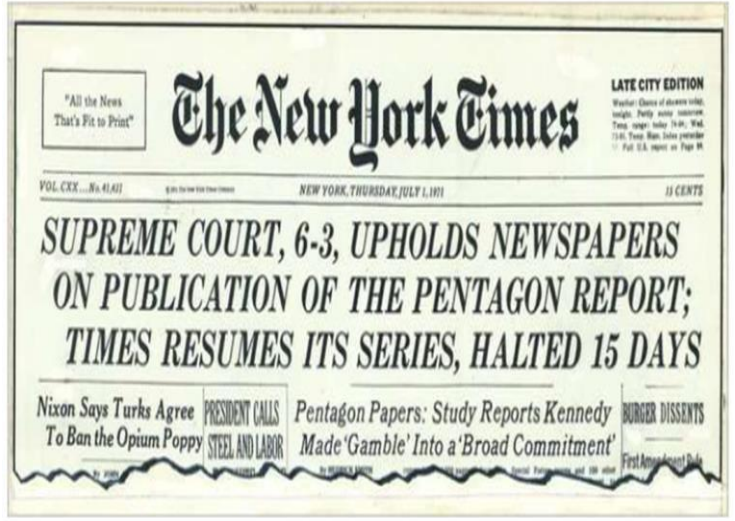
In the famous case of *New York Times v. United States* (1971), the U.S. government sought a court order to keep the newspaper company, New York Times, from printing "The Pentagon Papers." These documents entailed U.S. secret missions and involvement in the Vietnam War, which were stolen and leaked to the press.

The Nixon Administration, battling the Watergate Scandal at the same time, tried to prevent (prior restraint) the documents from being published.

The Burger Court found that the government couldn't show the papers endangered national security enough to justify prior restraint.

New York Times v. U.S. (1971)



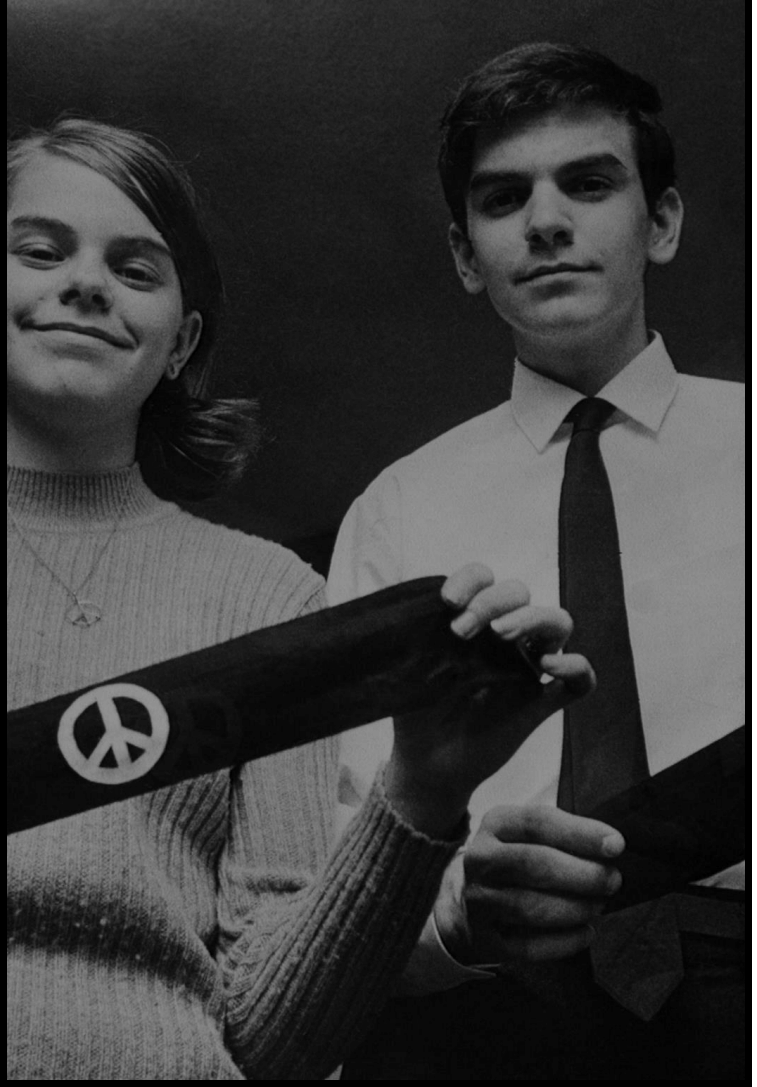


Issue: Did the government's efforts to prevent two newspapers from publishing classified information given to them by a government leaker violate the First Amendment protection of freedom of the press?

Majority: The Supreme Court ruled, 6–3, for the newspapers. The Court issued a short majority opinion not publicly attributed to any particular justice—called a *per curiam* (or "by the Court") opinion—and each of the six justices in the majority (Justices Black, Douglas, Stewart, White, Brennan, and Marshall) wrote a separate concurring opinion. Chief Justice Burger and Justices Harlan and Blackmun each filed a dissenting opinion. It is one of the few modern cases in which each of the nine Justices wrote an opinion.

Per Curiam

The Court reaffirmed its longstanding rule that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." "The Government thus carries a heavy burden of showing justification for the imposition of such a restraint." The *per curiam* opinion concluded, without analysis, that "the Government had not met that burden" in these cases.



What about symbolic speech?

Tinker v. Des Moines (1969)

Issue: Does a prohibition against the wearing of armbands in public school, as a form of symbolic speech, violate the students' freedom of speech protections guaranteed by the First Amendment?

Majority: The justices said that students retain their constitutional right to freedom of speech while in public schools. They said that wearing the armbands was a form of speech, because they were intended to express the wearer's views about the Vietnam War. The Court said, "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate...."

The Court stressed that this does not mean that schools can never limit students' speech. If schools could make a reasonable prediction that the speech would cause a "material and substantial disruption" to the discipline and educational function of the school, then schools may limit the speech. In this case, though, there was not evidence that the armbands would substantially interfere with the educational process or with other students' rights.

FREEDOM OF THE PRESS - CONTROVERSIAL AREAS

- Executive Privilege
  - Right of presidents to withhold information from the courts.
    - *U.S. v. Nixon (*1974*):* A President generally does have executive privilege, but not in criminal cases. Even the President is not above the law.
- Shield laws
  - Protect reporters from having to reveal their sources.
  - The press claims that without them, their sources would "dry up," and they would be unable to provide information to the public.
- Courts have protected press's right to publish
  - The 1966 Freedom of Information Act
    - Liberalized access to non-classified government records
    - Electronic Freedom of Information Act of 1996 requires most federal agencies to put their files online and to establish an index of their records - NASA a leader (UFO documents!)
  - Student Press
    - *Hazelwood v. Kuhlmeier (1988)*
    - High school newspaper can be regulated by the school is the school has a legitimate pedagogical concern in regulating the newspaper.

FREEDOM OF THE PRESS

Commercial speech on radio and television are regulated by the FCC. The broadcast media has less freedom than does print media.

FREEDOM OF ASSEMBLY

PUBLIC FORUMS AND TIME, PLACE, AND MANNER REGULATIONS

- Governments may not specify what can or cannot be said, but they can make reasonable time, place, and manner regulations for the holdings of assemblies, protests, or gatherings
- Police must have right to order groups to disperse (public order)
- Problem of "heckler's veto": if govt. restricted assembly every time an opposing group claimed that there might be "violence or disorder" there would be very few assemblies. Courts are therefore reluctant to impose prior restraint.
- The extent to which governments may limit access depends on the kind of forums involved:
  - Public forums (historically associated with free exercise such as streets, parks)
  - Limited public forums (public property such as city hall or schools after-hours)
  - Nonpublic forums (libraries, courthouses, government offices) - can not interfere with normal activities in order to stage a public protest
- Civil disobedience is not a protected right

ESSENTIAL QUESTION CFU

What is prior restraint? What was the majority opinion of *New York Times v. United States*?

The Weather

Today—Partly cloudy, warm, humid, high in the 90s, with a 30 per cent chance of rain decreasing to 40 per cent tonight. Friday—Partly sunny. Temperature range: Today, 70-95. Yesterday, 70-90. Details, Page B2.

The Washington Post

Times Herald

FINAL

94th Year .... No. 208 THURSDAY, JULY 1, 1971 Phone 223-6000 10c

Court Rules for Newspapers, 6-3

Vote at 18 Ratified Into Law

Move by Ohio Enacts 26th Amendment

By Noel Epstein

The 26th amendment to the Constitution, giving those 18 to 21 years old the right to vote in all elections, became law last night as Ohio was the 38th state to ratify it.

The amendment potentially adds an estimated 11 million persons to state and local voter rolls for the 1972 elections. Eighteen-year-olds already had the vote in federal elections, under a 1970 amendment to the Voting Rights Act.

Both Democrats and Republicans expect the new voters to have a substantial impact on races across the

Decision Allows Printing of Stories On Vietnam Study

By John P. MacKenzie

The Supreme Court settled a historic confrontation between government and press by ruling yesterday that The Washington Post and The New York Times are free to publish their stories about the secret Pentagon report on how America went to war in Vietnam.

The decision, which rested on the Bill of Rights guarantee of a free press and the long-standing refusal of Congress to authorize court injunctions against newspapers, was by a 6to3 vote.

Deeply divided and venting their differences in nine separate opinions, the justices summed up their action by stating that the government had failed to meet its "heavy burden" of justifying prior restraints against the press in light of cherished First Amendment freedoms.

The court ordered the lifting "forthwith" of stays against both newspapers which have been in effect during most of the three weeks the battle has raged in the courts.

War File Articles Resumed

By Sanford J. Ungar and George Lardner Jr.

Newspapers throughout the nation, expressing satisfaction over the Supreme Court decision, rushed into print last night with articles based on the once-secret Pentagon papers on Vietnam.

In its own reaction to the court ruling, the Pentagon told

You say you don't know anything about the government? FALSE! Everyone knows something about the government (and the government knows something about everyone). What are the 3 most important ideas from this lesson?