

President's Message

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First Amendment in the News

The First Amendment has been in the news recently, particularly after President Obama expressed disagreement¹ with the Supreme Court's decision in *Citizens United v. Federal Election Commission*² during his State of the Union Address. Therefore, I thought this might be a good time to note a few of the highlights in the history of free

speech jurisprudence.³ The language of the First Amendment is simple: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people to assemble, and to petition the Government for redress of grievances." Of all the freedoms the First Amendment protects, the Court's greatest struggles are over what speech may be regulated.

Most of us hold as true the proposition attributed to Voltaire: "While I do not agree with a word you say, I will fight to the death for your right to say it."⁴ Thomas Jefferson wrote, "We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of the judge."⁵

The most often misquoted judicial pronouncement on the First Amendment is that you can't shout "Fire!" in a crowded theater. Actually, you can, if there is indeed a fire. What Justice Oliver Wendell Holmes Jr. wrote was, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."⁶ He stated for the first time the "clear and present danger" test for speech that the state can restrict. Justice Holmes also later wrote 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."⁷ This language introduced the concept of "marketplace of ideas" into the analysis of free speech. Further support for the proposition that debate is good comes from Justice Louis Brandeis: "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."⁸

However, "fighting words," defined as "those which by their very utterance inflict injury or tend to incite an immediate breach of peace," are not protected speech, because, according to the Supreme Court,

such words 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."⁹ The Court later limited the scope of the doctrine of "fighting words" when Justice William O. Douglas wrote that the "function of free speech ... 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."¹⁰ The Court has also ruled that speech advocating the use of force or crime is not protected if (1) the advocacy is "directed to inciting or producing imminent lawless action," and (2) the advocacy is also "likely to incite or produce such action."¹¹ Where the line is drawn is the sticking point.

The Supreme Court will further define the limits of First Amendment protection in the coming term. In *Humanitarian Law Project v. Holder*, the Court will consider the following question: "Whether 18 U.S.C. 2339B(a)(1), which prohibits the knowing provision of "any * * * service, * * * training, [or] expert advice or assistance," 18 U.S.C. 2339A(b)(1), to a designated foreign terrorist organization is unconstitutionally vague."¹² In *Christian Legal Society v. Martinez*, the Court will decide "[w]hether a public university violates the First Amendment by creating a program through which public funds, use of the school's name and logo, and other modest benefits are made available [only] to student groups that agree to open their membership to 'any student ... regardless of their status or beliefs,' JA-221 ¶18, thus ensuring that all students have equal access to all school-funded and school-recognized groups." And, in *John Doe No. 1 v. Reed*, the Court will rule on the following issue: "Does the Public Records Act violate petitioner's First Amendment right to anonymous speech by allowing inspection of referendum petitions upon which



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signers have publicly disclosed their names and addresses to referendum sponsors, signature gatherers, members of the public and government.”¹³

This Supreme Court term will be important for the First Amendment. **TFL**



Endnotes

¹The President said, “With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections.” Available at www.whitehouse.gov/the-press-office/remarks-president-state-union-address.

²Slip Op. 08-205, 558 U.S. ____ (2010). This column should be taken neither as an endorsement nor criticism of the opinion. I purposefully haven’t read it yet.

³This does not pretend to be a comprehensive review

of cases involving the First Amendment or free speech.

⁴There is much disagreement as to whether Voltaire made this statement. It is more likely that Evelyn Beatrice Hall, who wrote under the pseudonym of Stephen G. Tallentyre, made this remark as a summation of Voltaire’s views on freedom of thought and expression in her work *The Friends of Voltaire* (1906).

⁵Quoted by Charles A. Beard, *The Great American Tradition*, THE NATION, July 7, 1926, Vol. 123, p. 8.

⁶*Schenk v United States*, 249 U.S. 47 (1919).

⁷*Abrams v. United States*, 250 U.S. 616 (1919), dissenting opinion.

⁸*Whitney v. California*, 274 U.S. 357 (1929).

⁹*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

¹⁰*Terminiello v. Chicago*, 337 U.S. 1 (1949).

¹¹*Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹²See Petition of the United States for Writ of Certiorari, *Eric H. Holder Jr., Attorney General, et al., v. Humanitarian Law Project, et al.*, No. 08-1498, and *Humanitarian Law Project v. Eric H. Holder Jr., Attorney General, et al.*, No. 09-89.

¹³See Brief of Respondent Sam Reed, No. 09-559.