

The Breakfast Club
Constitutional Minute for 7 February 2023
Right #3: Freedom of Speech

One thing should be obvious to even the most casual observer of America today: free speech is under relentless, nearly daily attack. Almost every day we see some new headline. Suppression of speech, whether the speech is verbal or symbolic, has taken so many forms and by so many governmental and business actors as well as individual citizens, that to take it all in can quickly become overwhelming.

Conservative college students across the country quickly learn that their viewpoints are not welcome in the classroom.ⁱ Two weeks ago, we saw that T-shirts proclaiming “Jesus saves” cannot be worn in some malls. Last week, a Mississippi school district tried to do the same thing with a student’s COVID mask, but the threat of a lawsuit caused them to reverse course.ⁱⁱ Speaking of religion, do you think twice about bringing up politics with people at church you don’t know well?ⁱⁱⁱ I’m not sure whether external censorship or our own self-censorship will have a greater detrimental effect in the long run.

We learned recently from Elon Musk that our wonderful federal government colluded with private media corporations to suppress certain opinions from being expressed and certain information being shared on their platforms. New York State recently passed a law requiring social media companies to report “hate conduct” (whatever that is) occurring on their platforms.^{iv} California has a similar law.^v Where is the outrage; where are the demonstrations?

America’s founders depended on free speech to spread their arguments concerning Parliament and the King. America’s pamphleteers and printers spread their message up and down the thirteen colonies. Without free speech we would still be speaking proper English.

The Founders great emphasis on freedom of speech makes the Alien and Sedition Acts of 1798 much harder to explain. Perhaps the expression “when the shoe is on the other foot” best captures Congress’s motivation to censor and suppress speech as our infant nation attempted to stay neutral in the on-again, off-again war between England (our ancestors) and France (our then recent saviors). Americans were equally split on the question of which country the Adams administration should support (even as both England AND France were both interdicting American shipping heading for their enemy’s ports). The Sedition Act made it illegal to make false or malicious statements about the Adams administration, specifically mentioning the President while conspicuously not mentioning the Vice-President. Criticism of Thomas Jefferson was therefore fair game, and certain “Adams-friendly” newspapers took great advantage of it (and we worry about the media today taking sides in political debate). Amazingly, the Supreme Court found the Sedition Act to be constitutional in *United States v Thomas Cooper*.^{vi} Congress set the Alien and Sedition Acts to expire on 3 March 1801. Why? Because the next day a new President and Vice President would be inaugurated; the Adams administration was only worried about criticism of *themselves*, not criticism of the government in principle.

The Alien and Sedition Laws would today seem more, well “alien” if it weren’t for the Wilson administration’s resurrection of them (as the Espionage and Sedition Acts) as the U.S. entered World War I.

So here it is: “Congress shall make no law ... abridging the freedom of speech.”

Once again, the vague language provided in the First Amendment has created a veritable playground for the courts; but there was very still little adjudication of free speech issues early on because Congress generally avoided the issue. One exception was the Comstock Act of 1873, which made it illegal to send “obscene, lewd or lascivious,” “immoral,” or “indecent” publications through the mail.^{vii} The Comstock Act was not successfully challenged in court until 1936.

The Free Speech landscape had changed drastically in 1925 when the Court “incorporated” the Free Speech Clause into the Due Process Clause of the 14th Amendment in *Gitlow v New York*,^{viii} creating an explosion of free speech cases based on state government actions, which continues today.

Although the Free Speech Clause was intended to only restrict government action, in the 1970s the Supreme Court began deciding that commercial “speech” could also be regulated to some extent.^{ix} Today, such regulations on commercial advertising are commonplace.

Also “mudding the water” concerning free speech was the Court’s invention of “symbolic speech,” i.e. “speaking” through actions rather than words.^x Over the years, the following types of symbolic speech are among those requiring protection:

- Wearing of black armbands (*Tinker v. Des Moines Independent Community School District, 1969*)
- Nude dancing (*California v. LaRue 1972*)
- Flag-burning (*Texas v. Johnson, 1989*)
- Burning a Cross (*R.A.V. v. City of St. Paul, 1992*)
- Political campaign contributions (*Citizens United, 2010*)

This essay would not be complete without also listing the types of speech the Court has said shall *not* be protected. These include:

- Speech presenting clear and present danger to national security or public safety;
- Speech soliciting crime or violence;
- “Fighting words;”
- Obscenity;
- Defamation.
-

I’ll let G. K. Chesterton,^{xi} the great Christian thinker, have the last word: “To have a right to do a thing is not at all the same as to be right in doing it.”

For further reading:

[Freedom of Speech and Press in Early American History: Legacy of Suppression, by Leonard Levy](#)

[James Madison and Freedom of Speech: Major Debates in the Early Republic, by Juhani Rudanko](#)

[The Intimidation Game: How the Left is Silencing Free Speech, by Kimberley Strassel](#)

[Why You Can't Stay Silent, A Biblical Mandate to Shape Our Culture, by Tom Minnery](#)

Next week: Right #4: Freedom of the Press.

Prepared by: Gary R. Porter, Executive Director, Constitution Leadership Initiative, Inc. for The Breakfast Club. Contact: gary@constitutionleadership.org; 757-817-1216

ⁱ <https://www.washingtontimes.com/news/2021/jun/17/cancel-culture-literally-prohibits-conservative-vo/>

ⁱⁱ <https://www.foxnews.com/media/third-grader-victorious-battle-school-jesus-loves-me-mask>

ⁱⁱⁱ <https://baptistnews.com/article/the-problem-with-not-talking-about-politics-at-church/>

^{iv} <https://www.nysenate.gov/legislation/bills/2021/A7865>

^v <https://www.breitbart.com/tech/2022/09/16/gavin-newsom-signs-california-social-media-censorship-bill-into-law/>

^{vi} <https://www.archives.gov/education/lessons/sedition-case>

^{vii} <https://mtsu.edu/first-amendment/article/1038/comstock-act-of-1873>

^{viii} <https://www.law.cornell.edu/supremecourt/text/268/652>

^{ix} <https://constitution.findlaw.com/amendment1/freedom-of-speech-for-corporations.html>

^x <https://mtsu.edu/first-amendment/article/1022/symbolic-speech>

^{xi} https://en.wikipedia.org/wiki/G._K._Chesterton