7

Individual Liberties

"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."

—Justice Oliver Wendell Holmes's dissent in *United States v. Schwimmer*, 1929

Essential Question: How do Supreme Court decisions on the First and Second Amendments and the relationship of those amendments to the Fourteenth Amendment reflect a commitment to individual liberties?

Americans have held liberty in high regard since lost liberties initiated the break from Great Britain. The original Constitution includes a few basic protections from government—Congress can pass no bill of attainder and no ex post facto law, and *habeas corpus* cannot be suspended in peacetime. Article III guarantees a defendant the right to trial by jury. However, the original Constitution lacked many fundamental protections, so critics and Anti-Federalists pushed for a bill of rights to protect **civil liberties**—those personal freedoms protected from arbitrary governmental interference or deprivations. The United States has struggled to fully interpret and define phrases such as "free speech," "unreasonable searches," and "cruel and unusual punishments."

Citizens and governmental officials often differ on where the line should be drawn between government's pursuit of order and the individual's right to freedom. When this conflict occurs, citizens can challenge government in court—appeal a conviction or criminal procedure ruling or sue the government to stop or reverse a state action that violates provisions in the Constitution.

As you read in Chapter 6, it's a somewhat complicated path from the initial challenge in court up to the highest court in the land. When the Supreme Court makes a civil liberties ruling—that flag burning cannot be criminalized or that an all-out ban on citizen-owned handguns is unreasonable—it sets a general standard, or precedent, shaping policy. In making such rulings, the Court articulates its reasoning in its majority opinion, written by a chosen justice, or judge, after deciding the case. And for the more complicated decisions, the Court will develop "tests" so government can consider what state action is acceptable and when it crosses a constitutional line. Lower courts, too, can use these precedents as guidance when citizens challenge similar, future cases.

BIG IDEA: Governmental laws and policies balancing order and liberty are based on the U.S. Constitution and have been interpreted over time. As you read this chapter, pay close attention to the balance the Court found between order and individual liberties as it interpreted the First and Second Amendments.

Protections in the Bill of Rights

As you read in Chapter 1, the Constitution includes a Bill of Rights—the first ten amendments—designed specifically to guarantee individual liberties and rights. These civil liberties include protections of individuals, protections of their opinions and the right to express them, and protections of their property. Specifically, individuals were protected *from the government*, from the "misconstruction or abuse of its powers," according to the Preamble to the Bill of Rights that was sent out to the states for ratification in 1789.

Over the years, the provisions in the Bill of Rights have been interpreted by the Supreme Court in an effort to balance individual rights and public safety and order. Eight of the fifteen Supreme Court cases that you need to know for the AP exam are tied to the Bill of Rights, as the chart below shows, as well as to the Fourteenth Amendment. You will read about each of the cases in depth in this chapter and the next.

MUST-KNOW SUPREME COURT CASES AND RELEVANT AMENDMENTS

Must-Know Supreme Court Cases	Ruling	Amendment
Schenck v. United States (1919)	Speech representing "a clear and present danger" is not protected. (See page 240.)	First
Tinker v. Des Moines Independent Community School District (1969)	Students in public schools are allowed to wear armbands as symbolic speech. (See page 243.)	First
New York Times Co. v. United States (1971)	The government cannot exercise prior restraint (forbid publication ahead of time). (See page 250.)	First
Engel v. Vitale (1962)	School-sponsored religious activities violate the establishment clause. (See page 254.)	First
Wisconsin v. Yoder (1972)	Requirements that Amish students attend school past the eighth grade violate the free exercise clause. (See page 257.)	First

MUST-KNOW SUPREME COURT CASES AND RELEVANT AMENDMENTS		
McDonald v. Chicago (2010)	The right to keep and bear arms for self-defense in one's home applies to the states. (See page 264.)	Second
Gideon v. Wainwright (1963	States must provide poor defendants an attorney to guarantee a fair trial. (See page 284.)	Sixth
Roe v. Wade (1973)	The right of privacy extends to a woman's decision to have an abortion, though the state has a legitimate interest in protecting the unborn after a certain point and protecting a mother's health. (See page 287.)	The First, Third, Fourth, Fifth, and Ninth amendments have been interpreted as creating "zones of privacy."

A Culture of Civil Liberties

The freedoms Americans enjoy are about as comprehensive as those in any Western democracy. Anyone can practice or create nearly any kind of religion. Expressing opinions in public forums or in print is nearly always protected. Just outside the Capitol building, the White House, and the Supreme Court, ever-present protestors criticize law, presidential action, and alleged miscarriages of justice without fear of punishment or retribution. Nearly all people enjoy a great degree of privacy in their homes. Unless the police have "probable cause" to suspect criminal behavior, individuals can trust that government will not enter unannounced. When civil liberties violations have occurred, individuals and groups such as the American Civil Liberties Union (ACLU) have challenged them in court. Both liberals and conservatives hold civil liberties dear, although they view them somewhat differently.

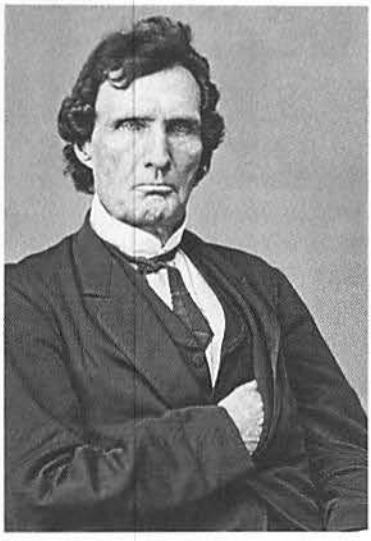
At the same time, however, civil liberties are limited when they impinge on the public interest, another cherished democratic ideal. **Public interest** is the welfare or well-being of the general public. For example, for the sake of public interest, the liberties of minors are limited. Their right to drive is restricted until they are teenagers (between 14 and 17 years old, depending on their state), both for their safety and the safety of the general public. And although people generally have the right to free speech, what they say cannot seriously threaten public safety or ruin a person's reputation with untruthful claims. In the culture of civil liberties in the United States, then, personal liberties have limits out of concern for the public interest.

Selective Incorporation

All levels of government adhere to most elements of the Bill of Rights, but that wasn't always the case. The Bill of Rights was ratified to protect the people from the *federal* government. The First Amendment states, "Congress shall make no law" that violates freedoms of religion, speech, press, and assembly. The document then goes on to address additional liberties Congress cannot take away. Most states had already developed bills of rights with similar provisions, but states did not originally have to follow the national Bill of Rights because it was understood that the federal Constitution referred only to federal laws, not state laws. Through a process known as **selective incorporation**, the Supreme Court has ruled in landmark cases that state laws must also adhere to selective Bill of Rights provisions through the Fourteenth Amendment's due process clause.

Due Process The right to **due process** dates back to England's Magna Carta (1215), when nobles limited the king's ability to ignore their liberties. Due process ensures fair procedures when the government burdens or deprives an individual. It prevents arbitrary government decisions to avoid mistaken or abusive taking of life, liberty, or property (including money) from individuals without legal cause. Due process also ensures accused persons a fair trial. Due process is a fundamental fairness concept that ensures a legitimate government in a democracy. The due process clause in the **Fifth Amendment** establishes that no person shall be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment The ratification of the **Fourteenth Amendment** (1868) in the aftermath of the Civil War strengthened due process. Before the war, Southern states had made it a crime to speak out against slavery or to publish antislavery materials. Union leaders questioned the legality of these statutes. During Reconstruction, Union leaders complained that Southerners denied African Americans, Unionists, and Republicans basic liberties of free speech, criminal procedure rights, and the right to bear arms. They questioned whether the losing rebel state governments would willingly follow the widely understood principles of due process, especially toward freed slaves. Would an accused black man receive a fair and impartial jury at his trial? Could an African American defendant refuse to testify in court, as whites could? Could the Southern states inflict the same cruel and unusual punishments on freed men that they had inflicted on slaves? To ensure the states followed these commonly accepted principles in the federal Bill of Rights and in most state constitutions, the House Republicans drafted the most important and far-reaching of the Reconstruction Amendments, the Fourteenth, which declares that "all persons born or naturalized in the United States ... are citizens" and that no state can "deprive any person of life, liberty, or property, without due process of law. . . ."



Source: *Library of Congress*

Speaker of the House Thaddeus Stevens (left) and Massachusetts Senator Charles Sumner crafted and led passage of the Fourteenth Amendment to, in part, ensure newly freed African Americans due process of law.

Early Incorporation The first incorporation case used due process to evaluate issues of property seizure. In the 1880s, a Chicago rail line sued the city, which had constructed a street across its tracks. In an 1897 decision, the Court held that the newer due process clause compelled Chicago to award just compensation when taking private property for public use. This ruling incorporated the "just compensation" provision of the Fifth Amendment, requiring that the states adhere to it as well.

Later, the Supreme Court declared that the First Amendment prevents states from infringing on free thought and free expression. In a series of cases that addressed state laws designed to crush radical ideas and sensational journalism, the Court began to hold states to First Amendment standards. Benjamin Gitlow, a New York Socialist, was arrested and prosecuted for violating the state's criminal anarchy law. The law prevented advocating a violent overthrow of the government. Gitlow was arrested for writing, publishing, and distributing thousands of copies of pamphlets called the *Left Wing Manifesto* that called for strikes and "class action ... in any form."

In one of its first cases, the ACLU appealed his case and argued that the due process clause of the Fourteenth Amendment compelled states to follow the same free speech and free press ideas in the First Amendment as the federal government. In *Gitlow v. New York* (1925), however, the Court actually enhanced the state's power by upholding the state's criminal anarchy law and

Gitlow's conviction because Gitlow's activities represented a threat to public safety. Nonetheless, the Court did address the question of whether or not the Bill of Rights did or could apply to the states. In the majority opinion, the Court said, "For present purposes, we may and do assume that freedom of speech and of the press . . .are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." In other words, Gitlow's free speech was not protected because it was a threat to public safety, but the Court did put the states on notice.

The Court applied that warning in 1931. Minnesota had attempted to bring outrageous newspapers under control with a public nuisance law, informally dubbed the Minnesota Gag Law. This statute permitted a judge to stop obscene, malicious, scandalous, and defamatory material. A hard-hitting paper published by the unsavory J.M. Near printed anti-Catholic, anti-Semitic, anti-Black, and anti-labor stories. Both the ACLU and Chicago newspaper mogul Robert McCormick came to Near's aid on anti-censorship principles. The Court did too. In *Near v. Minnesota* it declared that the Minnesota statute "raises questions of grave importance . . . . It is no longer open to doubt that the liberty of the press . . . is within the liberty safeguarded by the due process clause of the Fourteenth Amendment. . . ." In this ruling, through the doctrine of selective incorporation, the Court imposed limitations on state regulation of civil rights and liberties. (For another case demonstrating limitations on state regulations, see *McDonald v. Chicago* on pages 264-266.)

It is appropriate that the Court emphasized the First Amendment freedoms early on in the incorporation process. The basic American idea that free religion, speech, and press should be protected from all governments dates back to the founding. In creating the Bill of Rights in 1789, James Madison and others had strongly supported an early draft that stated, "No state shall infringe on the equal rights of conscience, nor the freedom of speech, or of the press." It was the only proposed amendment directly limiting states' authority. As biographer Richard Labunski reveals, Madison called it the most valuable amendment on the list because it was "equally necessary that [these rights] should be secured against the state governments."

In case after case, the Court has required states to guarantee free speech, freedom of religion, fair and impartial juries, and rights against self-incrimination. Though states have incorporated nearly all rights in the document, a few rights in the Bill of Rights remain denied exclusively to the federal government but not yet denied to the states.

RIGHTS NOT YET INCORPORATED

- Third Amendment protections against quartering troops in homes
- Fifth Amendment right to a grand jury indictment in misdemeanor cases
- Seventh Amendment right to jury trials in civil cases
- Eighth Amendment protection against excessive bail

The First Amendment: Free Speech and Free Press

Once the Court, through the incorporation doctrine, had required states and localities to follow the First Amendment, it took two generations of cases to define "free speech" and "free press." When does one person's right to free expression violate others' right to peace, safety, or decency? Free speech is not absolute, but both federal and state governments have to show substantial or **compelling governmental interest**—a purpose important enough to justify the infringement of personal liberties—to curb it.

The creators of the First Amendment meant to prevent government censorship. Many revolutionary leaders came to despise the accusation of seditious libel—a charge that resulted in fines and/or jail time for anyone who criticized public officials or government policies. Because expressing dissent in assemblies and in print during the colonial era led to independence and increased freedoms, the members of the first Congress preserved this right as the very first of the amendments.

The Court has not made much distinction between "speech" and "press" and ordinarily provides the same protective standards for both rights. "Speech" includes an array of expressions—actual words, the lack of words, pictures, and actions. An average citizen has as much right to free press as does a professional journalist. The First Amendment does not protect all speech, however, especially speech that invites danger, that is obscene, or that violates an existing law.

The government also has no prerogative of **prior restraint**—the right to stop spoken or printed expression in advance—first declared in *Near* and later reaffirmed in *New York Times v. United States* (see page 250). Governments cannot suppress a thought from entering the marketplace of ideas just because most people see the idea as repugnant or offensive. A government that can squelch ideas is one that violates the very essence of a free democracy. The Court, however, has never suggested that its reverence for free expression means that all expression should be tolerated at all times under all conditions. In addition to what the federal government prevents on the airwaves (see Chapter 16), there are exceptions that allow state and federal governments to limit or punish additional forms of speech.

Balancing National Security and Individual Freedoms

The Supreme Court continually interprets provisions of the Bill of Rights to balance the power of government and the civil liberties of individuals, sometimes recognizing that individual freedoms are of primary importance, other times finding that limitations to free speech can be justified, especially when they are needed to maintain social order. (For more on national security and other individual freedoms protected in the Bill of Rights, see page 28.)

Clear and Present Danger The first time the Court examined a federal conviction on a free speech claim was in ***Schenck v. United States* (1919)**. This case helped establish that limitations on free speech may be warranted during wartime.

MUST-KNOW SUPREME COURT DECISIONS: *SCHENCK V. UNITED STATES* (1919)

The Constitutional Question Before the Court: Does the government's prosecution and punishment for expressing opposition to the military draft during wartime violate the First Amendment's free speech clause?

Decision: No, for *United States*, 9:0.

Facts: As the United States entered World War I against the Central Powers, including Germany, the 1917 Sedition and Espionage Acts prevented publications that criticized the government, that advocated treason or insurrection, or that incited disloyal behavior in the military. A U.S. district court tried and convicted Charles Schenck, the secretary of the Socialist Party, when he printed 15,000 anti-draft leaflets intended for Philadelphia-area draftees. In an effort to dissuade people from complying with the draft, he argued in his pamphlet that a mandatory military draft, or conscription, amounted to involuntary servitude, which is denied by the Thirteenth Amendment. The government was very concerned at the time about the Socialist Party, German Americans, and those who questioned America's military draft and war effort.

Schenck appealed the guilty verdict from the district court. On hearing the case, the Supreme Court drew a distinction between speech that communicated honest opinion and speech that incited unlawful action and thereby represented a "clear and present danger." In a unanimous opinion delivered after the war's end, the Court upheld the government's right to convict citizens for certain speech. Schenck went to prison, as did defendants in five similar cases. The **clear and present danger test** became the balancing act between competing demands of free expression and a government needing to protect a free society.

Reasoning: The Court arrived at its opinion through recognizing that the context of an expression needs to be considered to determine its constitutionality. At other times, under other circumstances, the pamphlet or circular might have been allowed. But during wartime and because of the immediate actions the pamphlet could lead to, the harm from the circular overrode Schenck's right to publish and distribute it.

The Court's Majority Opinion by Mr. Justice Oliver Wendell Holmes:
In impassioned language, [the pamphlet] intimated that conscription was despotism in its worst form, and a monstrous wrong against humanity in the interest of Wall Street's chosen few . . . . It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy . . . . Of course, the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out . . . .

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. It does not even protect a man from an injunction against uttering words that may have all the effect of force . . . . 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.

Since *Schenck*: Justice Holmes famously reconsidered and redefined his views in a similar case that arrived in the Court soon after *Schenck*. In *Abrams v. United States*, an appeal by Russian immigrants convicted under the same law as Schenck had been, the Court decided once again—mainly for the same reason—to uphold convictions. Holmes, however, voted this time to overturn the conviction and wrote a dissenting opinion declaring the Court should uphold such convictions only if the speech "produces or is intended to produce clear and imminent danger that it will bring about . . . substantive evils." Decades later, the Court ruled in *Brandenburg v. Ohio*—an appeal of a convicted Klansman accused of inciting lawlessness at a rally—that such speech could be punished only if it is meant to incite or produce "imminent lawless action and is likely to . . . produce such action." The clear and present danger standard did not prevent all forms of speech nor was the claim always a justification for criminal charges.

Political Science Disciplinary Practices: Explain Reasoning, Similarities, and Differences

A number of Supreme Court cases have established a "test"—a set of criteria to determine whether speech is protected or not. Like other Supreme Court opinions, however, the tests are always being interpreted and reinterpreted over time.

Apply: Complete the following activities focusing on *Schenck v. United States*.

1. Explain the reasoning behind the Supreme Court's decision. Take into account the context in which the pamphlet was published.
2. Describe the "clear and present danger" the pamphlet was seen to create. What practical effect on the United States would that danger have had if it were realized?
3. Explain how later Court decisions reinterpreted or refined the "clear and present danger" test for protected or unprotected speech. In other words, how were the opinions in *Schenck* similar to and different from those in *Abrams* and *Brandenburg*?

Free Speech and the Cold War Congress's attempts to suppress speech temporarily subsided but rose again during Cold War threats. In 1949, President Truman's justice department convicted 11 Communist Party leaders under the 1940 Smith Act—a law that made advocating the overthrow of any government in the United States a criminal act. After a nine-month trial, the jury convicted the Communists. But later the Court drew a line between advocating a government change in the abstract versus calling for actual illegal action to cause an overthrow. The Court did not toss out the Smith Act, but it overturned these convictions and weakened the Justice Department's efforts to prosecute Communists for expressing unpopular ideas.

Vietnam War Era As the Court softened its restrictions on free speech, Americans became more willing to protest. The 1960s witnessed a revolution in free expression. As support for the Vietnam War waned, young men burned their draft cards to protest the military draft. Congress quickly passed a law to prevent the destruction of these government-issued documents.

David O'Brien burned his Selective Service registration card in front of a Boston courthouse and was convicted for that action under the Selective Service Act, which prohibited willful destruction of draft cards. He appealed to the Supreme Court, arguing that his protest was a symbolic act of speech that government could not infringe. The Court, however, upheld his conviction and sided with the government's right to prevent this behavior in order to protect Congress's authority to raise and support an army. O'Brien was disrupting the draft effort and publicly encouraging others to do the same. Others continued to burn draft cards, but after *United States v. O'Brien* (1968), this symbolic act was not protected.

Symbolic Speech

As David O'Brien learned, people cannot invoke **symbolic speech** to defend an act that might otherwise be illegal. For example, a nude citizen cannot walk through the town square and claim a right to symbolically protest textile sweatshops after his arrest for indecent exposure. Symbolic speech per se is not an absolute defense in a free speech conflict. That said, the Court has protected a number of symbolic acts or expressions.

In April 1968, Paul Robert Cohen wore a jacket bearing the words "F — the Draft" while walking into a Los Angeles courthouse. Local authorities arrested and convicted him for "disturbing the peace . . . by offensive conduct." The Supreme Court later overturned the conviction in *Cohen v. California* (1971). As opposed to its stance on the act of burning a draft card in *O'Brien*, the Court declared the state could not prosecute Cohen for this expression. The phrase on the jacket in no way incited an illegal action. "One man's vulgarity is another's lyric," the majority opinion stated.

Along similar reasoning, the Court struck down both state and federal statutes meant to prevent desecrating or burning the U.S. flag in *Texas v. Johnson* (1989) and *United States v. Eichman* (1990), respectively. The Court

found that these laws serve no purpose other than ensuring a government-imposed political idea—reverence for the flag.

Time, Place, and Manner Regulations In evaluating regulations of symbolic expression, the Court looks primarily at whether the regulation suppresses the content of the message or simply regulates the accompanying conduct. Is the government ultimately suppressing what was being said, or the time, place, or manner in which it was expressed? Compare the *Cohen* and *O'Brien* rulings. In both cases, someone expressed opposition to the Vietnam-era draft. O'Brien burned a government-issued draft card. The Court didn't protect the defendant's speech but rather upheld a law to assist Congress in its conscription powers. Cohen publicly expressed dislike for the draft with an ugly phrase printed on his jacket, but he did nothing to incite public protest and did not actually refuse to enlist, so the Court protected the speech.

Time, place, and manner regulations must be tested against a set of four criteria.

TIME, PLACE, AND MANNER TEST

1. The restriction must be *content-neutral.* That is, it must not suppress the content of the expression.
2. The restriction must serve a *significant government interest.* In the *O'Brien* case, the Court ruled that the burning of a draft card was disrupting the government's interest of raising an army.
3. The restriction must be *narrowly tailored.* That is, the law must be designed in the most specific, targeted way possible, avoiding spillover into other areas. For example, the law upheld in *O'Brien* was specifically about burning draft cards, not other items, such as flags, whose burning might express a similar message.
4. There must be adequate *alternative ways of expression.* The court can suppress expression on the basis of time, place, and manner if there are other times, places, and manners in which the idea can be expressed.

The question of "place" and "manner" became key aspects of a landmark case involving free speech in schools.

MUST-KNOW SUPREME COURT DECISIONS: *TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT* (1969)

The Constitutional Question Before the Court: Does a public school ban on students wearing armbands in symbolic, political protest violate a student's First Amendment freedom of speech?

Decision: Yes, for Tinker, 7:2

Facts: In December of 1965 in Des Moines, Iowa, Mary Beth Tinker, her brother

John F. Tinker, their friend Christopher Eckhardt, and others developed a plan for an organized protest of the U.S. conflict underway in Vietnam. They planned to wear black armbands for a period of time as well as have two days of fasting. The school administrators learned of the organized protest and predicted it would become a distraction in the learning environment they had to maintain. They also believed it might be taken as disrespectful by some students and become, at minimum, a potential problem. School principals met and developed a policy to address their concerns. When the Tinkers and other students arrived to school wearing the armbands, principals instructed the students to remove them. The students, with support from their parents, refused. The school then suspended the students until they were willing to return without wearing the bands. The Tinkers and the others sued in U.S. district court on free speech grounds and eventually appealed to the Supreme Court.

Reasoning: Noting that the record or facts showed no disruption took place, the Court ruled in favor of the students who challenged the suspension, declaring that the students' right to political, symbolic speech based on the First Amendment overrode the school administrators' concern for *potential* disorder. The decision protected this speech because the suspension failed the content-neutral criterion of the time, place, and manner test: it was intended to quiet the students' anti-war message to avoid possible disruptions.

The Court's Majority Opinion by Mr. Justice Abe Fortas: 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. This has been the unmistakable holding of this Court for almost 50 years . . . .

Our problem involves direct, primary First Amendment rights akin to "pure speech" . . . .

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students. . . .

Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school, as well as out of school, are "persons" under our Constitution . . . In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

Concurring opinions separated themselves from some parts of the majority opinion. Justice Potter Stewart questioned the assumption that children's First Amendment rights are equal to those of adults. Justice Byron White noted the distinction between words and behaviors and the effect of expression on a valid government interest.

Concurring Opinion by Mr. Justice Potter Stewart: Although I agree with much of what is said in the Court's opinion, and with its judgment in this case, I cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are coextensive with those of adults.

Concurring Opinion by Mr. Justice Byron White: While I join the Court's opinion, I deem it appropriate to note, first, that the Court continues to recognize a distinction between communicating by words and communicating by acts or conduct which sufficiently impinges on some valid state interest; and, second, that I do not subscribe to everything the Court of Appeals said about free speech in its opinion in *Burnside v. Byars* . . . a case relied upon by the Court in the matter now before us.

Justice Hugo Black issued a strong dissent, questioning the authority of courts to decide how students will spend their time in school and worrying about how the Court might be fostering an era of permissiveness. Justice John Marshall Harlan II also dissented, noting that he would rather the burden of proof be on the complainants to prove that the school was trying to prevent expression of an unpopular opinion while allowing the expression of a more popular one.

Dissenting Opinion by Mr. Justice Hugo Black: The crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech—"symbolic" or "pure"—and whether the courts will allocate to themselves the function of deciding how the pupils' school day will be spent. While I have always believed that, under the First and Fourteenth Amendments, neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases . . . .

If the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary."

Since *Tinker*: The Tinkers' war protest was a brand of political speech. A different brand of speech was at the center of another case involving a school suspension, settled in 1986. High school student Matt Fraser gave a speech to a student assembly at his Bethel, Washington, school that showcased

student government candidates. In introducing his friend, Fraser delivered a speech riddled with sexual innuendo that caused a roaring reaction and led the school to suspend him. Fraser challenged his suspension. The Court, after fully analyzing Fraser's sexually suggestive language, upheld the school's punishment (*Bethel School District v. Fraser*, 1986). The Court considered the *Tinker* precedent, but unlike the speech in *Tinker*, the speech in this case had no real political value and was designed to entertain an audience of high school students. Students still do not shed their rights at the schoolhouse gates, but neither are they entitled to lewd or offensive speech.

A similar case reached the Court in 2007 *(Morse v. Frederick)*. In Alaska, a student body gathered outside a school to witness and cheer on the Olympic torch as runners carried it by. In a quest for attention, one student flashed a homemade sign that read "BONG HITS 4 JESUS" as the torch passed the school. The student was suspended, and he lost his appeal challenging the suspension. The Court ruled that even though the event took place off of school grounds, it was school-sponsored and therefore a matter for school officials to decide, and the school was reasonable to see his sign as promoting illegal drug use.

Political Science Disciplinary Practices and Reasoning Processes: Explain Complex Similarities and Differences

Concurring and dissenting opinions clearly show that cases are not black and white, that there are more than two possible positions on a controversial matter. Concurring opinions show that while a justice voted with the majority, he or she did so for reasons other than or in addition to those articulated in the majority opinion. More than one dissenting opinion shows that there are different grounds on which to disagree with the majority opinion. When you are developing your own arguments, be aware of the multitude of possible positions on your topic and be ready to address them.

Apply: Complete the following activities.

1. Explain the facts, majority decision, and reasoning in the *Tinker* case.
2. Explain the constitutional principle under consideration in this case.
3. Explain three points Justice Fortas made in the majority opinion.
4. Identify unique points Justices White and Black made in their opinions.
5. Justice White mentions one case on which the *Tinker* case was decided, *Burnside v. Byars*. Explain the role of precedents in determining the Court's opinions. What similar kinds of evidence can you use as you develop your own arguments?
6. Explain what the Supreme Court defined as the line between individual freedom and public order in *Tinker*.
7. Explain the similarities and differences of the outcome in *Tinker* with the outcomes of *Bethel School District v. Fraser* and *Morse v. Frederick*.

Source: *Granger, NYC*

Writing the majority opinion in the *Tinker* case, Justice Abe Fortas stated that schools could forbid conduct that would "materially and substantially interfere with the requirements of appropriate discipline" but not activities that merely create "the discomfort and unpleasantness that always accompany an unpopular viewpoint."

Obscenity

Some language and images are so offensive to the average citizen that governments have banned them. Though obscenity is difficult to define, two trends prevail regarding **obscene speech**: the First Amendment does not protect it, and no national standard defines what it is.

In the 19th century, some states and later the national government outlawed obscenity. Reacting to published birth control literature, postal inspector and moral crusader Anthony Comstock pushed for the first national anti-obscenity law in 1873, which banned the circulation and importation of obscene materials through the U.S. mail. Yet the legal debate since has generally been over state and local ordinances brought before the Supreme Court on a case-by-case basis. The Court has tried to square an individual's right to free speech or press and a community's right to ban filthy and offensive material.

A Transformational Time From the late 1950s until the early 1970s, the Supreme Court heard several appeals by those convicted for obscenity. In *Roth v. United States* (1957), Samuel Roth, a long-time publisher of questionable books, was prosecuted under the Comstock Act. He published and sent through the mail his *Good Times* magazine, which contained partially airbrushed nude photographs. On the same day, the Court heard a case examining a California obscenity law. The Court upheld the long-standing view that both state and federal obscenity laws were constitutionally permissible because obscenity is "utterly without redeeming social importance." In *Roth*, the Court defined speech as obscene and unprotected when "the average person, applying contemporary community standards," finds that it "appeals to the prurient interest" (having lustful or lewd thoughts or wishes).

The new rule created a swamp of ambiguity that the Court tried to clear during the next 15 years. Before Roth finished his prison term, the law was on his side. The pornography industry grew apace during the sexual revolution of the 1960s and 1970s. States reacted, creating a battle between those declaring a constitutional right to create or consume risqué materials and local governments seeking to ban smut. The Court struggled to determine this balance. In his frequently quoted phrase from a 1964 case regarding how to distinguish acceptable versus unacceptable pornographic expression, Justice Potter Stewart said, "I know it when I see it." Although the Court could not reach a solid consensus on obscenity, from 1967 to 1971 it overturned 31 obscenity convictions.

Defining Obscenity The conflict continued in ***Miller v. California* (1973)**. After a mass mailing from Marvin Miller promoting adult materials, a number of recipients complained to the police. California authorities prosecuted Miller under the state's obscenity laws. On appeal, the justices reaffirmed that obscene material was not constitutionally protected, but they modified the *Roth* decision saying in effect that a local judge or jury should define obscenity by applying local community standards. Obscenity is not necessarily the same as pornography, and pornography may or may not be obscene. The following year, the Court overturned Georgia's conviction of a theater owner for showing the film *Carnal Knowledge*. The Court has heard subsequent cases dealing with obscene speech, but the Miller test—a set of three criteria that resulted from the *Miller* case—has served as the standard in obscenity cases.

THE MILLER TEST

- The average person applying contemporary community standards finds it appeals to the prurient interest.
- It depicts or describes, in a patently offensive way, sexual conduct specifically defined by state law.
- It lacks serious literary, artistic, political, or scientific value.

Free Press

"Our liberty depends on the freedom of the press," Thomas Jefferson wrote, "and that cannot be limited without being lost." Centuries later, President Donald Trump often referred to the press as "the enemy of the people." A free press had become an important topic during Trump's presidential campaign. He repeatedly complained about "fake news," and at a campaign rally in February 2016 he said, "I'm going to open up our libel laws so when they [the press] write purposely negative and horrible and false articles, we can sue them and win lots of money." Could he win those lawsuits? His past efforts, as well as the standards for freedom of the press, say no.

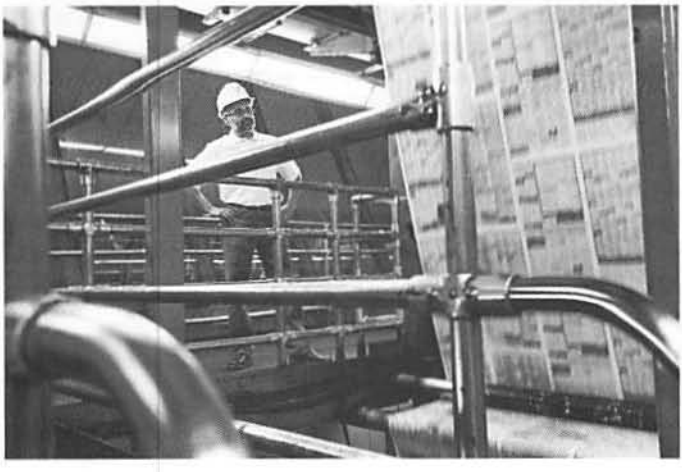
Libelous or Defamatory Language A charge of **libel** refers to false statements in print that defame someone, hurting their reputation. Much negativity

can be printed about someone of a critical, opinionated, or even speculative nature before it qualifies as libel. American courts have typically allowed for a rather high standard of defamation before rewarding a suing party. The main decision that defined the First Amendment's protection of printed speech against the charge of libel was *New York Times v. Sullivan* (1964). In 1960, a civil rights group, including Martin Luther King Jr., put an ad in the *New York Times* entitled "Heed their Rising Voices," which included some inaccuracies and false information about a Montgomery, Alabama, city commissioner, L. B. Sullivan. Sullivan sued for libel in an Alabama court and won $500,000 in damages. The *Times* appealed, arguing that the First Amendment protected against slight mistakes and these should differ from an intentional defamation. The Supreme Court sided with the newspaper. Uninhibited debate "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," the Court noted. The fear of an easy libel suit would stifle robust debate and hard reporting. Even false statements, therefore, must be protected "if the freedoms of expression are to have the 'breathing space' that they need . . . to survive."

The standard to prove libel is therefore high. The suing party must prove that they were damaged and that the offending party knowingly printed the falsehood and did so maliciously with intent to defame. Public officials are less protected than lay people and cannot recover damages for defamatory falsehoods relating to their official conduct unless they can prove actual malice—that is, reckless disregard for the truth. The Court later broadened the category of "public figure" to include celebrities such as movie stars, top athletes, and business leaders.

New York Times v. Sullivan and subsequent decisions have generally ruled that to win a libel suit in a civil court, the suing party must prove that the offending writer either knowingly lied or presented information with a reckless disregard for the truth, that the writer did so with malicious intent to defame, and that actual damages were sustained.

Prior Restraint Though the special circumstances of a school environment were a key factor in the *Tinker* decision, the Court also ruled that the school



Source: *Thinkstock*

The *New York Times*, founded in 1851, has the largest circulation of any newspaper in the United States and is considered authoritative for its journalistic standards.

administration could not ban armbands protesting the war in Vietnam on the grounds that they could *possibly* cause a disruption. In a similar way, neither can the government prevent something true from being published, even if it was obtained illegally and conveys government secrets that could *possibly* endanger national security.

MUST-KNOW SUPREME COURT CASES: *NEW YORK TIMES V. UNITED STATES* (1971)

The Constitutional Question Before the Court: Can the executive branch block the printing of reporter-obtained classified government information in an effort to protect national secrets without violating the First Amendment's free press clause?

Decision: No, for *New York Times*, 6:3.

Before *New York Times v. United States*: In the selective incorporation case of *Near v. Minnesota* (1931), the Supreme Court ruled that a state law preventing the printing of radical propaganda violated freedom of the press.

Facts: Daniel Ellsberg, a high-level Pentagon analyst, became disillusioned with the war in Vietnam and in June of 1971 released a massive report known as the Pentagon Papers to the *New York Times*. (The case also included the *Washington Post* since it, too, had been given the document.) The seven-thousand-page top-secret document— which unlike today's easily released digital content had to be photocopied—told the backstory of America's entry into the Vietnam conflict and revealed government deception. These papers put the government's credibility on the line and, President Nixon claimed, hampered the president's ability to manage the war. Nixon's lawyers petitioned a U.S. district court to order the *Times* to refrain from printing in the name of national security. "I think it is time in this country," Nixon said of Ellsberg and the *Times*, "to quit making national heroes out of those who steal secrets and publish them in the newspaper." The lower court obliged and issued the injunction (order), and armed guards arrived at the newspaper's office to enforce the injunction.

The *Times* appealed, and the Supreme Court ruled in its favor. The ruling assured that the hasty cry of national security does not justify censorship in advance and that the government does not have the power of prior restraint of publications. Even Nixon's solicitor general, the man who argued his side in the Supreme Court, later said the decision "came out exactly as it should." This decision was "a declaration of independence," claimed *Times* reporter Hedrick Smith, "and it really changed the relationship between the government and the media ever since."

The Court ruled on the newspaper's right to print these documents, not on Ellsberg's right to leak them. In fact, Ellsberg was later indicted under the 1917 Espionage Act in his own trial.

Reasoning: In a rare instance, the Court in this case did not fully explain its ruling with a typical majority opinion. Instead, it issued a *per curiam* opinion, which is a judgment issued on behalf of a unanimous court or the court's majority without attribution to a specific justice. It relied heavily on the reasoning in previous cases. The judgment overruled the lower court's injunction and prevented the executive branch from stopping the printing.

Per Curiam Opinion: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan* . . . (1963); *see also Near v. Minnesota* (1931). The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe* (1971). The District Court for the Southern District of New York, in the *New York Times* case, and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit, in the *Washington Post* case, held that the Government had not met that burden. We agree.

Several justices issued separate opinions, both concurring and dissenting.

Concurring Opinions: Justices issuing or joining with concurring opinions stressed the absolute nature of the First Amendment and the vague nature of the term "security." Justice Hugo Black, for example, in an opinion with which Justice William O. Douglas joined, wrote the following:

Mr. Justice Black: Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says, but rather means that the Government can halt the publication of current news of vital importance to the people of this country. In seeking injunctions against these newspapers, and in its presentation to the Court, the Executive Branch seems to have forgotten the essential purpose and history of the First Amendment. . . . . The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.

Dissenting Opinions: Chief Justice Warren Burger wrote a dissenting opinion with which Justices John Harlan and Harry Blackmun joined. The dissent focused in part on the hurried nature of the proceedings, making it difficult to assess the security risk the Pentagon Papers really posed. They also supported the idea that there were exceptions to the absolute superiority of the First Amendment, though they did not argue that this case qualified as one those exceptions.

Mr. Justice Warren Burger: In these cases, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government, and, specifically, the effective exercise of certain constitutional powers of the Executive. Only those who view the First Amendment as an absolute in all circumstances—a view I respect, but reject—can find such cases as these to be simple or easy . . . . Of course, the First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout "fire" in a crowded theater if there was no fire.

Political Science Disciplinary Practices and Reasoning Processes: Explain Reasoning, Similarities, and Differences

In another concurring opinion, Justice William Brennan noted that the executive branch "is endowed with enormous power in the two related areas of national defense and international relations." Given this relatively unchecked power, he reasoned that in these areas "the only effective restraint upon executive policy and power . . . may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For, without an informed and free press, there cannot be an enlightened people."

Apply: Complete the following activities.

1. Explain the reasoning behind Justice Brennan's views that an "enlightened citizenry" can protect the democratic values of our government.
2. Explain the role of the press in creating that citizenry.
3. Explain how the judgment in *New York Times v. The United States* balances claims for individual freedom with concerns for national security.
4. Read about the case *Near v. Minnesota* (1931) and the Court's decision at Oyez.com or supremecourt.gov, and then explain the similarities and differences between the opinions in *Near* and those in the *New York Times* case.
5. Explain the ways in which Justice Burger and those who joined his dissent differ from the other justices on the nature of the First Amendment.
6. Explain the impact that this decision might have had on (1) the credibility of the government, (2) the outcome of the Vietnam War, and (3) the legal standing of whistleblowers today. Do research if necessary.

The First Amendment: Church and State

The First Amendment also guarantees freedom of religion. The founders wanted to stamp out religious intolerance and outlaw a nationally sanctioned religion. The Supreme Court did not address congressional action on religion for most of its first century, and it did not examine state policies that affected religion for another generation after that. As the nation became more diverse and more secular over the years, the Supreme Court constructed what Thomas Jefferson had called a **"wall of separation"** between church and state. In this nation of varied religions and countless government institutions, however, it is easy for church and state to encroach on each other. Like other interpretations of civil liberties, those addressing freedom of religion are nuanced and sometimes confusing. More recently, the Court has addressed laws that regulate the teaching of evolution, the use of school vouchers, and the public display of religious symbols.

Freedom of Religion

Both James Madison and Thomas Jefferson led a fight to oppose a Virginia tax to fund an established state church in 1785. Madison argued that no law should support any true religion nor should any government tax anyone, believer or nonbeliever, to fund a church. During the ratification battle in 1787, Jefferson wrote Madison from Paris and expressed regret that the proposed Constitution lacked a Bill of Rights, especially an expressed freedom of religion. The First Amendment allayed these concerns because it reads in part, "Congress shall make no law respecting an *establishment* of religion, or prohibiting the *free exercise* thereof." In 1802, President Jefferson popularized the phrase "separation of church and state" after assuring Baptists in Danbury, Connecticut, that the First Amendment builds a "wall of separation between church and state." Today some citizens want a stronger separation; others want none.

Members of the First Congress included the **establishment clause** to prevent the federal government from establishing a national religion. More recently, the clause has come to mean that governing institutions—federal, state, and local—cannot sanction, recognize, favor, or disregard any religion. The **free exercise clause** prevents governments from stopping religious practices. This clause is generally upheld, unless an unusual religious act is illegal or deeply opposes the interests of the community. Today, these two clauses collectively mean people can practice any religion they want, provided it doesn't violate established law or harm others, and the state cannot endorse or advance one religion over another. The Supreme Court's interpretation and application of the establishment clause and free exercise clause show a commitment to individual liberties and an effort to balance the religious practice of majorities with the right to the free exercise of minority religious practice.

Mormons brought the first freedom of religious exercise issue to the Supreme Court in 1879. Under President Ulysses S. Grant, the federal government pushed to end Mormon polygamy common in the Utah Territory. U.S. marshals rounded up hundreds of Mormons who had violated a congressional anti-polygamy law. George Reynolds, secretary to Mormon leader Brigham Young, brought a test case that argued the free exercise clause prevented such law. The Mormons lost, and the Court said the federal government could limit religious practices that impaired the public interest.

The Court Erects a Wall In the 1940s, New Jersey allowed public school boards to reimburse parents for transporting their children to school, even if the children attended parochial schools—those maintained by a church or religious organization. Some argued this constituted an establishment of religion, but in *Everson v. Board of Education* (1947), the Court upheld the law. State law is not meant to favor or handicap any religion. This law gave no money to parochial schools but instead provided funds evenly to parents who transported their children to the state's accredited schools. Preventing payments to parochial students' parents would handicap them. Much like fire stations, police, and utilities, school transportation is a nonreligious service available to all taxpayers.

Though nothing changed with *Everson*, the Court did signal that the religion clauses of the First Amendment applied to the states via the Fourteenth Amendment in the incorporation process. The Court also used Jefferson's phrase in its opinion and began erecting the modern wall of separation.

Prayer in Public Schools In their early development, public schools were largely Protestant institutions; as such, many began their day with a prayer. But the Court outlawed the practice in the early 1960s in its landmark case, ***Engel v. Vitale* (1962)**. A year later, in *School District of Abington Township, Pennsylvania* v. *Schempp,* the Court outlawed a daily Bible reading in the Abington schools in Pennsylvania and thus in all public schools. In both cases, the school had projected or promoted religion, which constituted an establishment.

MUST-KNOW SUPREME COURT CASES: *ENGEL V. VITALE* (1962)

The Constitutional Question Before the Court: Does allowing a state-created, nondenominational prayer to be recited voluntarily in public schools violate the First Amendment's establishment clause?

Decision: Yes, for Engel et al., 6:1

Before *Engel*: Since the days of one-room schools, many public schools across the United States started the school day with a prayer. In the 1950s, the state of New York tried to standardize prayer in its public schools by coming up with a common, nondenominational prayer that would satisfy most religions. The State Board of Regents, the government body that oversees the schools, did so: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." Each school day, classes recited the Pledge of Allegiance followed by this prayer, which teachers were required to recite. Students were allowed to stand mute or, with written permission, to depart the room during the exercise.

Facts: In 1959, the parents of ten pupils organized and filed suit against the local school board because this official prayer was contrary to the beliefs, religions, or religious practices of both themselves and their children. Lead plaintiff Stephen Engel and the others argued the prayer—created by a state actor and recited at a state-funded institution where attendance was required by state law—violated the establishment clause. The respondent, William Vitale, was the chairman of the local Hyde Park, New York, school board.

Reasoning: The majority reasoned that since a public institution developed the prayer and since it was to be used in a public school setting with mandatory attendance, the Regents Board had made religion its business, a violation of the establishment clause. Because of the Fourteenth Amendment and incorporation, states as well as the federal government are forbidden from officially backing any religious activity. They also noted that including the word "God" was denominational—not all religions believe in God. Further, they explained that even though participation was voluntary, students would likely feel reluctant not to take part in a teacher-led activity.

The Court's Majority Opinion by Mr. Justice Black: 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. . . .

The petitioners contend . . . the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State. We agree with that contention, since we think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that, in this country, it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government . . . .

One of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. . . .

It is true that New York's establishment of its Regents' prayer as an officially approved religious doctrine of that State does not amount to a total establishment of one particular religious sect to the exclusion of all others—that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago. To those who may subscribe to the view that, because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment:

"[I]t is proper to take alarm at the first experiment on our liberties. . . ."

Justice Douglas agreed with the majority but made the point that children may feel like a "captive" audience, even though they were technically free to leave the room.

Concurring Opinion by Mr. Justice Douglas: The point for decision is whether the Government can constitutionally finance a religious exercise. Our system at the federal and state levels is presently honeycombed with such financing [with government-paid clergymen for the House and Senate and a Supreme Court Crier, all who offer prayers at the opening of each session]. Nevertheless, I think it is an unconstitutional undertaking whatever form it takes . . . for, in each of the instances given, the person praying is a public official on the public payroll, performing a religious exercise in a governmental institution . . . .

It is said that the element of coercion is inherent in the giving of this prayer. . . . Few adults, let alone children, would leave our courtroom or the Senate or the House while those prayers are being given. Every such audience is in a sense a "captive" audience . . . A religion is not established in the usual sense merely by letting those who choose to do so say the prayer that the public school teacher leads. Yet once government finances a religious exercise, it inserts a divisive influence into our communities.

Justice Stewart dissented, noting Mr. Douglas's point that the Supreme Court itself begins with a pronouncement of "God save the United States and this Honorable Court" and that Congress opens with a prayer as well. He disagreed that the Regents' prayer established a preferred religion, arguing that it provided students the opportunity to share "in the spiritual heritage of our Nation . . . ."

> **Dissenting Opinion by Mr. Justice Stewart:** The Court today decides that, in permitting this brief nondenominational prayer, the school board has violated the Constitution of the United States. I think this decision is wrong . . . . With all respect, I think the Court has misapplied a great constitutional principle. I cannot see how an "official religion" is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation . . .
>
> I do not believe the State of New York has [established an "official religion"] in this case. What [it] has done has been to recognize and to follow the deeply entrenched and highly cherished spiritual traditions of our Nation.

Since *Engel*: The Court has since ruled against student-led prayer at official public school events. In the 1980s, Alabama created a policy to satisfy community wishes without violating the 1960s' precedents. The state provided that schools give a moment of silence at the beginning of the school day to facilitate prayer or meditation. In a 1985 ruling, however, the Court said this constituted an establishment of religion. The Court left open the possibility that an undefined, occasional moment of silence might pass constitutional muster.

Political Science Disciplinary Practices and Reasoning Processes: Explain Reasoning, Similarities, and Differences

Justice Black quoted James Madison, the author of the First Amendment, in the majority opinion: "[I]t is proper to take alarm at the first experiment on our liberties." Madison's words following that quote help explain why: "We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle."

Apply: Complete the following tasks.

1. Explain the point Justice Black made in the Court's majority opinion when he quoted Madison's admonition to be alarmed.
2. Explain Justice Douglas's elaboration of the majority opinion, especially the role of public money.
3. Explain how Justice Stewart in his dissent justified an intermingling of religion and government. What did he mean by "the spiritual heritage of our Nation"?

The Lemon Test In 1971, the Court created a measure of whether or not the state violated the establishment clause in ***Lemon v. Kurtzman***. Both Rhode Island and Pennsylvania passed laws to pay teachers of secular subjects in religious schools with state funds. The state mandated such subjects as English and math and reasoned that it should assist the parochial schools in carrying out a state requirement. In trying to determine the constitutionality of this statute, the Court decided these laws created an "excessive entanglement" between the state and the church because teachers in these parochial schools may improperly involve faith in their teaching. In the unanimous opinion, Chief Justice Warren Burger further articulated Jefferson's "wall of separation" concept, and "far from being a 'wall,'" the policy made a "blurred, indistinct, and variable barrier." To guide lower court decisions and future controversies that might reach the High Court, the justices in the case of *Lemon v. Kurtzman* developed the Lemon test to determine excessive entanglement.

THE LEMON TEST
To avoid an excessive entanglement, a policy must
• have a secular purpose that neither endorses nor disapproves of religion
• have an effect that neither advances nor prohibits religion
• avoid creating a relationship between religion and government that entangles either in the internal affairs of the other

Education and the Free Exercise Clause In 1972, the Court ruled that a Wisconsin high school attendance law violated Amish parents' right to teach their own children under the free exercise clause. The Court found that the Amish's alternative mode of informal vocational training paralleled the state's objectives. Requiring these children to attend high school violated the basic tenets of the Amish faith because it forced their children into unwanted environments.

MUST-KNOW SUPREME COURT DECISIONS: *WISCONSIN V. YODER* (1972)

The Constitutional Question Before the Court: Does a state's compulsory school law for children aged 16 and younger violate the First Amendment's free exercise clause for parents whose religious beliefs and customs dictate they keep their children out of school after a certain age?

Decision: Yes, for Yoder, 7:0

Facts: A Wisconsin statute required parents of children aged 16 and under to send their children to a formal school. Three parents in the New Glarus,

Wisconsin, school system—Jonas Yoder, Wallace Miller, and Adin Yutzy—had teenagers they did not send to school. Yoder and the others were charged, tried in a state criminal court, found guilty, and fined $5.00 each. The parents appealed the case to the state supreme court, arguing their religion prevented them from sending their children to public schools at their age. That court agreed. The state then appealed to the Supreme Court, hoping to preserve the law and its authority to regulate compulsory school attendance.

These same children had attended a public school through eighth grade. Their parents felt an elementary education suitable and necessary, but they refused to enroll their 14- and 15-year-olds in the public schools. Amish teens are meant to develop the skills for a trade, not continue learning subjects that do not have a practical application. Also, the parents did not want their children exposed to divergent values and practices at a public high school. The parents argued that the free exercise clause entitled them to this practice and this decision.

The state invoked the legal claim of *parens patriae*—parental authority—claiming it had a legal responsibility to oversee public safety and health and to educate children to age 16. Those who skipped this education would become burdens on society.

Reasoning: The Court found making the Amish attend schools would expose them to attitudes and values that ran counter to their beliefs. In fact, the Court also said that forcing the Amish teens to attend would interfere with their religious development and integration into Amish society. Further, the Court realized that stopping schooling a couple of years early and continuing informal vocational education did not make members of this community burdens on society.

The Court declared in this case that the free exercise clause overrode the state's efforts to promote health and safety through ensuring a full, formal education. In a rare instance, Justice William O. Douglas voted with the majority but wrote a partial dissenting opinion, excerpted below. Justices William Rehnquist and Lewis Powell did not participate.

The Court's Majority Opinion by Mr. Justice Burger: Formal high school education beyond the eighth grade is contrary to Amish beliefs not only because it places Amish children in an environment hostile to Amish beliefs, with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor. Once a child has learned basic reading, writing, and elementary mathematics, these traits, skills, and attitudes admittedly fall within the category of those best learned through example and "doing," rather than in a classroom. And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. In short, high school attendance with teachers who are not of the Amish

faith— and may even be hostile to it—interposes a serious barrier to the integration of the Amish child into the Amish religious community. Dr. John Hostetler, one of the experts on Amish society, testified that the modern high school is not equipped, in curriculum or social environment, to impart the values promoted by Amish society.

Justice Douglas, while agreeing with the majority, believed the views of a mature 16-year-old should be taken into account.

A Partial Dissenting Opinion by Mr. Justice Douglas: If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views. . . . As the child has no other effective forum, it is in this litigation that his rights should be considered. And if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents' religiously motivated objections.

Political Science Disciplinary Practices: Understanding Opposing Views

While the majority opinion becomes the lasting legacy of a Supreme Court case, knowing the arguments the opposing side made can help clarify the Court's decision. Here is how the Court summarized the state's position.

The State advances two primary arguments in support of its system of compulsory education. It notes, as Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions.

However, the evidence adduced [cited] by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests. Respondents' experts testified at trial, without challenge, that the value of all education must be assessed in terms of its capacity to prepare the child for life. It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith. . . . The State attacks respondents' position as one fostering "ignorance" from which the child must be protected by the State. No one can question the State's duty to protect children from ignorance, but this argument does not square with the facts disclosed in the record. Whatever their idiosyncrasies as seen by the majority, this record strongly shows that

the Amish community has been a highly successful social unit within our society, even if apart from the conventional "mainstream." Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms. The Congress itself recognized their self-sufficiency by authorizing exemption of such groups as the Amish from the obligation to pay social security taxes.

Apply: Complete the following tasks.

1. Explain the First Amendment principle at issue in this case.
2. Identify the public policy or law the citizens challenged in this case.
3. Explain the Court's reasoning described in the majority opinion.
4. Interpret the Court's response to the state's two primary arguments by identifying the kind of evidence the Court relied on to address the state's arguments.
5. Explain the unique point Justice Douglas made in his partial dissent.

Source: Shutterstock

Amish families, such as this one in Pennsylvania, wear simple clothing, use horses and buggies rather than cars, and value manual labor. The Amish parents involved in *Wisconsin v. Yoder* believed that sending their children to high school would endanger their families' salvation.

Contemporary First Amendment Issues

Real and perceived excessive entanglements between church and state have continued in issues that make the news today. Can government funding go to private schools or universities at all? Does a display of religious symbols on public grounds constitute an establishment of religion? As with so many cases, it depends.

Public Funding of Religious Institutions Many establishment cases address whether or not state governments can contribute funds to religious institutions, especially Roman Catholic schools. Virtually every one has been

struck down, except those secular endeavors that aid higher education in religious colleges, perhaps because state laws do not require education beyond the twelfth grade and older students are not as impressionable.

Vouchers Supporters of private parochial schools and parents who pay tuition argue that the government should issue vouchers to ease their costs. Parents of parochial students pay the same taxes as public school parents while they also ease the expenses at public schools. A Cleveland, Ohio, program offered as much as $2,250 in tuition reimbursements for low-income families and $1,875 for any families sending their children to private schools. The Court upheld the program largely because the policy did not make a distinction between religious or nonreligious private schools, even though 96 percent of private school students attended a religious-based school. This money did not go directly to the religious schools but rather to the parents for educating their children.

Religion in Public Schools Since the *Engel* and *Abington* decisions, any formal prayer in public schools and even a daily, routine moment of silence are violations of the establishment clause. The Court has even ruled against student-led prayer at official public school events. However, popular opinion has never endorsed these stances. Gallup consistently found that strong majorities of American citizens still approved of a form of daily prayer in public schools, though the size of that majority is shrinking. In 2014, Gallup found that 61 percent of Americans supported allowing daily prayer, down from 70 percent in 1999.

Students can still operate extracurricular activities of a religious nature provided these take place outside the school day and without tax dollars. The free exercise clause guarantees students' rights to say private prayers, wear religious T-shirts, and discuss religion. Public teachers' actions are more restricted because they are employed by the state.

Religious Symbols in the Public Square A Rhode Island town annually adorned its shopping district with Christmas decor, including a Christmas tree, a Santa's house, and a nativity scene. Plaintiffs sued, arguing that the nativity scene created government establishment of Christianity. In *Lynch v. Donnelly* (1984), the Court upheld the city's right to include this emblem because it served a legitimate secular purpose of depicting the historical origins of the Christmas holiday. In another case in 1989, the Court found the display of a crèche (manger scene) on public property, when standing alone without other Christmas decor, a violation because it was seen as a Christian-centered display. "Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community," the Court wrote, while it signals that adherents are favored insiders.

Ten Commandments In 2005, the Court ruled two different ways on the issue of displaying the Ten Commandments on government property. One case involved a large outdoor display at the Texas state capitol. Among 17 other monuments sat a six-foot-tall rendering of the Ten Commandments.

The other case involved the Ten Commandments hanging in two Kentucky courthouses, accompanied by several historical American documents. The Court said the Texas display was acceptable because of the monument's religious and historical function. It was not in a location that anyone would be compelled to be in, such as a school or a courtroom. And it was a passive use of the religious text in that only occasional passersby would see it. The Kentucky courtroom case brought the opposite conclusion because an objective observer would perceive the displays as having a predominantly religious purpose in state courtrooms—places where some citizens must attend and places meant to be free from any prejudice.

SELECTED SUPREME COURT FIRST AMENDMENT RULINGS (NON-REQUIRED CASES)	
Case	**Ruling**
Reynolds v. United States (1879)	Government can limit religious practices that impair the public interest.
Gitlow v. New York (1925)	Upheld New York's criminal anarchy law but put states on notice that some rights in the Bill of Rights could protect citizens from state action.
Near v. Minnesota (1931)	Court followed through on *Gitlow*, preventing states from violating free press rights against printing obnoxious material and thus beginning the incorporation process.
New York Times v. Sullivan (1964)	To win a libel lawsuit, the accusing party must prove defendant issued intentional falsehoods, with malicious intent, and caused actual damage.
Lemon v. Kurtzman (1971)	States cannot have an excessive entanglement of church and state.
Miller v. California (1973)	States can prohibit obscene speech that lacks literary, artistic, political, or scientific value.
Bethel v. Fraser (1986)	Schools can punish speech that administrators find lewd or offensive.

The Second Amendment

Interpretations of the Second Amendment, like those of the First Amendment, represent a commitment to individual liberties. The Second Amendment is strongly tied to the gun debate. A careful reading of the provision—"A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed"—sheds light on why the policy has been so controversial. The precise meaning is difficult to ascertain in today's world. Was the amendment written to protect the state's right to maintain a militia or the citizen's unfettered right to own a firearm? Gun control advocates might point out these state militias were "well regulated" and thus

subject to state requirements such as training, occasional military exercises, and limitations on the type of gun possessed. The concern at the time was about the federal government imposing its will on or overthrowing a state government with a standing federal army. The original concern was not with the general citizenry's right to gun ownership. Today's gun advocates, however, supported by recent Supreme Court decisions, argue that the amendment guarantees the personal right to own and bear arms because each citizen's right to own a firearm guaranteed the state's ability to have a militia. Similarly, gun rights proponents argue that the "right of the people" clause means the same as it does with other parts of the Bill of Rights.

Federalism and Gun Policy

Recall that the Bill of Rights was originally created to limit the federal government. States made their own gun-related laws for years and still do today. A handful of national gun laws exist based on the commerce clause. However, as you will read in the *McDonald* case, states must follow the Second Amendment because of selective incorporation.

Federal Policy Gun laws, such as defining where people can carry, fall within the police powers of the state as explained in Chapter 2. Not until 1934, in an era of bootleggers and gangsters, did Congress pass a national statute about possession of guns. The National Firearms Act required registration of certain weapons, imposed a tax on the sale and manufacture of certain guns, and restricted the sale and ownership of high-risk weapons such as sawed-off shotguns and automatic machine guns. The law was challenged not long after Congress passed the bill. The Supreme Court upheld the law because the Second Amendment did not protect ownership of sawed-off shotguns because such weapons were never common in a "well-regulated militia."

Increased urban crime, protest, and assassinations in the 1960s influenced the passage of the Gun Control Act of 1968. Along with other anti-crime bills that year, the act sought safer streets. It ended mail-order sales of all firearms and ammunition and banned the sale of guns to felons, fugitives from justice, illegal drug users, people with mental illness, and those dishonorably discharged from the military. In reality, the law's effect was to punish those who owned a gun or used it illegally more than prevent the purchase or possession of guns.

The gun debate came to the forefront again after a mentally disturbed John Hinckley shot President Ronald Reagan in 1981. Reagan survived as did his press secretary James Brady, but Brady suffered a paralyzing head wound. His wife and a coalition organized to prevent handgun violence pushed for legislation that became the Brady Handgun Violence Prevention Act in 1993. This law established a five-day waiting period for purchases of handguns to allow for a background check and for a potential cooling-off period for any buyer motivated by immediate impulse, anger, or revenge. The law expired in 1998, but a similar policy that establishes the National Instant Criminal Background Check System

has gone into effect. The Brady Campaign to Prevent Gun Violence reported that the initial Brady law prevented the sale of guns to more than two million people.

The law, however, has several loopholes. Private gun collectors can avoid the background check when purchasing firearms at private gun shows, and some guns can be purchased via the Internet without a background check. Federal law and 28 states still allow juveniles to purchase long guns (rifles and shotguns) from unlicensed dealers, and the national check system has an insufficient database of non-felon criminals, domestic violence offenders, and mental health patients.

States and Localities Meanwhile, states have increasingly passed laws to allow for ease in gun possession. The National Rifle Association (NRA) and Republican-controlled legislatures have worked to pass a number of state laws to enable citizens to carry guns, some concealed, some openly. The NRA has also fought in the courts against laws restricting gun ownership. Among the two most noted cases are *District of Columbia v. Heller* (2008) and ***McDonald v. Chicago*** **(2010)**.

MUST-KNOW SUPREME COURT DECISIONS: *MCDONALD V. CHICAGO* (2010)

The Constitutional Question Before the Court: Does the Second Amendment apply to the states, by way of the Fourteenth Amendment, and thus prevent states or their political subdivisions from banning citizen ownership of handguns?

Decision: Yes, for McDonald, 5:4

Before *McDonald*: The Second Amendment prevents the federal government from forbidding people to keep and bear arms. In 2008, gun rights advocates and the National Rifle Association challenged a law in the District of Columbia, the seat of the federal government, which effectively banned all handguns, except those for law enforcement officers and other rare exceptions. In the case of *District of Columbia v. Heller*, the Court ruled that the Second Amendment applied and that the district's handgun ban violated this right. Because the Bill of Rights was intended to restrain Congress and the federal government, not the states, this ruling applied only to the federal government and did not incorporate the Second Amendment to state governments. Any existing state laws preventing handguns were not altered by this precedent—until Otis McDonald came to court.

Facts: Citizens in both Chicago and in the nearby suburb of Oak Park challenged policies in their cities that were similar to the ones struck down in Washington. Chicago required all gun owners to register guns, yet the city invariably refused to allow citizens to register handguns, creating an effective ban. The lead plaintiff, Otis McDonald, pointed to the dangers of his crime-ridden neighborhood and how the city's ban had rendered him without self-defense, and he argued that the Second Amendment should have prevented this vulnerability. His attorneys also attempted to take the *Heller* decision further, extending its holding to the state governments via the Fourteenth Amendment's due process clause.

Reasoning: In a close vote, the Court applied the Second Amendment to the states via the Fourteenth Amendment's due process clause, arguing

that, based on *Heller,* the right to individual self-defense is at the heart of the Second Amendment. The majority also noted the historical context for the Fourteenth Amendment and asserted that the amendment sought to provide a constitutional foundation for the Civil Rights Act of 1866. The selective incorporation doctrine has encouraged the Court to require state governments and their political subdivisions to follow most parts of the Bill of Rights. The ruling in *McDonald* highlighted yet another right that the states and their municipalities could not deny citizens.

Justice Samuel Alito wrote the Court's majority opinion; Justices Antonin Scalia and Clarence Thomas wrote concurring opinions.

Majority Opinion by Mr. Justice Alito: Self-defense is a basic right, recognized by many legal systems from ancient times to the present, and the *Heller* Court held that individual self-defense is "the central component" of the Second Amendment right . . . .[T]he Court found that this right applies to handguns because they are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family." . . . It thus concluded that citizens must be permitted "to use [handguns] for the core lawful purpose of self-defense.". . . *Heller* also clarifies that this right is "deeply rooted in this Nation's history and traditions. . . ."

A survey of the contemporaneous history also demonstrates clearly that the Fourteenth Amendment's Framers and ratifiers counted the right to keep and bear arms among those fundamental rights necessary to the Nation's system of ordered liberty . . . .

After the Civil War, the Southern States engaged in systematic efforts to disarm and injure African Americans. . . .These injustices prompted the 39th Congress to pass the Freedmen's Bureau Act of 1866 and the Civil Rights Act of 1866 to protect the right to keep and bear arms. Congress, however, ultimately deemed these legislative remedies insufficient, and approved the Fourteenth Amendment. Today, it is generally accepted that that Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act. . . . In Congressional debates on the proposed Amendment, its legislative proponents in the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection. Evidence from the period immediately following the Amendment's ratification confirms that that right was considered fundamental.

Justice Stephen Breyer wrote a dissent with which Justices Ruth Bader Ginsburg and Sonia Sotomayor joined. Associate Justice John Paul Stevens also wrote a dissent.

Dissenting Opinion by Mr. Justice Stevens: I do not mean to deny that there can be significant practical, as well as esthetic, benefits from treating rights symmetrically with regard to the State and Federal Governments . . . In a federalist system such as ours, however, this approach can carry substantial costs. When a federal court insists that state and local authorities follow its dictates on a matter not critical to personal liberty or procedural justice, the latter may be prevented from engaging in the kind of beneficent "experimentation in things social and economic" that ultimately

redounds to the benefit of all Americans. . . . The costs of federal courts' imposing a uniform national standard may be especially high when the relevant regulatory interests vary significantly across localities, and when the ruling implicates the States' core police powers.

Furthermore, there is a real risk that, by demanding the provisions of the Bill of Rights apply identically to the States, federal courts will cause those provisions to "be watered down in the needless pursuit of uniformity . . ." When one legal standard must prevail across dozens of jurisdictions with disparate needs and customs, courts will often settle on a relaxed standard. This watering-down risk is particularly acute when we move beyond the narrow realm of criminal procedure and into the relatively vast domain of substantive rights. So long as the requirements of fundamental fairness are always and everywhere respected, it is not clear that greater liberty results from the jot-for-jot application of a provision of the Bill of Rights to the States. Indeed, it is far from clear that proponents of an individual right to keep and bear arms ought to celebrate today's decision.

Political Science Disciplinary Practices: Understanding Opposing Views

Later in his dissent, Justice Breyer succinctly stated a key controversy in this case.

[I]n evaluating an asserted right to be free from particular gun-control regulations, liberty is on both sides of the equation. Guns may be useful for self-defense, as well as for hunting and sport, but they also have a unique potential to facilitate death and destruction and thereby to destabilize ordered liberty. *Your* interest in keeping and bearing a certain firearm may diminish *my* interest in being and feeling safe from armed violence. And while granting you the right to own a handgun might make you safer on any given day . . . it may make you and the community you live in less safe overall, owing to the increased number of handguns in circulation. It is at least reasonable for a democratically elected legislature to take such concerns into account in considering what sorts of regulations would best serve the public welfare.

Apply: Complete the following tasks.

1. Explain how the majority in *District of Columbia v. Heller* balanced the equation to which Justice Breyer referred in his dissent.
2. Explain the similarities and differences of the *Heller* and *McDonald* cases.
3. Identify the historic period to which Justice Alito referred in the majority opinion, and explain the reasoning behind referring to this period.
4. Explain the impact of the *McDonald* ruling on the selective incorporation doctrine.
5. Explain how, according to Justice Stevens in his dissent, a uniform, nationwide application of the Second Amendment might "water down" the right to bear arms.

After *Heller* and *McDonald* The *Heller* and *McDonald* decisions partially govern gun policy in the United States, but the Court has done little to define gun rights and limits since. It declined to hear cases on assault weapons bans from Maryland and from a Chicago-area municipality. The Court has also declined to rule on a restrictive California limitation on who may carry concealed guns.

Congress is typically at loggerheads in both a bipartisan and bicameral manner when it comes to gun policy. After each nationally notable homicide or massacre, the discussion about the Second Amendment becomes loud and intense, but little national law changes. Republicans tend to fiercely defend citizens' rights to own and carry guns, while Democrats tend to seek stronger restrictions on sale, ownership, and public possession. The U.S. House of Representatives has recently been friendly to pro-gun legislation—bills supporting concealed carry reciprocity (the right for a legally registered gun-owner to carry a concealed gun in another state that allows concealed carry) and protecting veterans' rights to carry—while the Senate, even with Republicans in the majority, has been reluctant to pass such legislation. Presidential policy has shifted with changes in office. After a deranged young man shot and killed 20 schoolchildren and 6 adults in Newtown, Connecticut, President Barack Obama issued an executive order to keep guns out of the hands of mentally disabled Social Security recipients. In other words, those tagged as mentally unstable by the Social Security Administration would be flagged and seen on the national background registry. President Donald Trump, a pro-gun advocate, reversed the order in 2017.

POLICY MATTERS: *RECENT STATE POLICY AND SECOND AMENDMENT RIGHTS*

Though attempts to hone gun policy continue with little success at the federal level, most gun policy and efforts to balance order and freedom with respect to the Second Amendment are scattered among varying state laws and occasional lower court decisions.

About 33,000 American deaths result from handguns each year; roughly one-third are homicides and two-thirds are suicides. In 2014, about 11,000 of the nearly 16,000 homicides in the United States involved a firearm. In addition to the thousands of single deaths, an uptick in mass shootings has brought attention to the issue of accessibility to weapons. With shootings at Virginia Tech (2007), Newtown (2012), Charleston (2015), Orlando (2016), San Bernardino (2017), Las Vegas (2017), and Parkland (2018), activists and experts on both sides of the gun debate push for new legislation at the state level in hopes of solving a crisis and preventing and protecting future would-be victims.

According to a count by the Law Center to Prevent Gun Violence, located in San Francisco, more than 160 laws that restrict gun use or ownership were passed in 42 states and D.C. after the Newtown massacre. These include broadening the legal definition of assault weapons, banning sales of magazines that hold more than seven rounds of ammunition, and including additional dangerous people on

the no-purchase list. By another expert's estimate, as G. M. Filisko reports in the *American Bar Association Journal*, about 9 states have made more restrictive laws, and about 30 have passed more pro-Second Amendment legislation. Those laws include widening open-carry and increasing the number of states that have reciprocity in respecting out-of-state permits. In 2009, only two states had permitless carry. North Dakota became the twelfth state to pass an open-carry law in 2017, sometimes called "constitutional carry" by its advocates.

One study found that mass shootings—defined as those in which four or more people died—account for only about 0.13 percent of gun deaths, but a single mass shooting leads to a 15-percent increase in the number of state firearms bills introduced the following year. The type of laws passed depends on the party in power. Republican pro-Second Amendment civil liberties bills increased more permissive laws by 75 percent in states where Republicans dominate, but in Democrat-controlled states researchers found no significant increase in new restrictive laws enacted.

After the Las Vegas shooting in 2017, which resulted in a new record number of deaths in such modern shootings, many people have focused on banning bump stocks, a device that essentially turns a semiautomatic rifle into an automatic one. New policies on both sides of the gun argument will continue to come and go with public concern over the issue, as legislatures design and pass them, and as courts determine whether they infringe on citizens' civil liberties.

REFLECT ON THE ESSENTIAL QUESTION

Essential Question: *How do Supreme Court decisions on the First and Second Amendments and the relationship of those amendments to the Fourteenth Amendment reflect a commitment to individual liberties?*

On separate paper, complete a chart like the one below to gather details to answer that question.

Cases that protect civil liberties	Cases that protect national security and social order

THINK AS A POLITICAL SCIENTIST: *INTERPRET* SNYDER V. PHELPS

When you interpret information, you attempt to understand and explain the meaning of an idea or event in context. You consider the time period in which the author created the work and the place where it was created. You use critical thinking skills and prior information to help you interpret and understand the overall meaning of the work. Similarly, to understand an event, you analyze the facts as you understand them and interpret them according to such factors as the politics and social trends of the day, as well as other related events that may have happened around the same time or that may have engendered or resulted from the event you are studying.

In legal proceedings, courts analyze events and claims to interpret the law. Supreme Court justices must be able to examine the facts of each case—time, place, and extenuating circumstances—and interpret them in the context of existing law to reach complex decisions on how a given law is or should be carried out.

Practice: In 2006, a young U.S. Marine named Matthew Snyder was killed in a noncombat-related accident in Iraq. Later, Westboro Baptist Church of Topeka, Kansas, picketed Snyder's funeral as part of the church's ongoing protest of the U.S. military's increasing tolerance of homosexuality among its personnel. Matthew Snyder's father, Albert Snyder, sued the church, its pastor Fred Phelps, and two members of Phelps's family for, among other things, defamation and intentional infliction of emotional distress. Use the Internet to research the events and decisions involved in this case since it first went to trial in 2007. Then write an interpretation of the Supreme Court's ruling in *Snyder v. Phelps*.

KEY TERMS AND NAMES

civil liberties/233
clear and present danger test/240
compelling governmental interest/239
due process/236
Engel v. Vitale (1962)/254
establishment clause/253
Fifth Amendment/236
Fourteenth Amendment/236
free exercise clause/253
Lemon v. Kurtzman (1971)/257
libel/248
McDonald v. Chicago (2010)/264
Miller v. California (1973)/248
New York Times v. United States (1971)/250
obscene speech/247
prior restraint/239
public interest/235
Schenck v. United States (1919)/240
selective incorporation/236
symbolic speech/242
Tinker v. Des Moines Independent Schools (1969)/243
wall of separation/252
Wisconsin v. Yoder (1972)/257

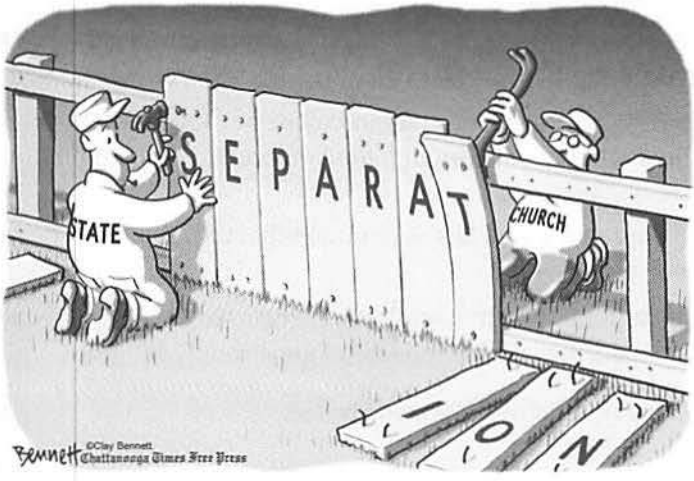
1. Which of the constitutional provisions is at issue in *Schenck v. United States*?
   (A) The necessary and proper clause in Article I
   (B) First Amendment free speech and free press rights
   (C) Congress's power to declare war in Article I
   (D) Fourteenth Amendment due process clause

2. What was the effect of the opinion in *Schenck v. United States?*
   (A) People can say or express anything as long as the nation is not at war.
   (B) During wartime, no person can criticize the U.S. government.
   (C) Free speech in the United States was expanded.
   (D) As long as speech does not present a clear and present danger, it is allowed.

3. Those who disagree with the views in the majority opinion in *Schenck* would likely celebrate the shaping of the Constitution in which free-speech ruling?
   (A) *Tinker v. Des Moines*
   (B) *Engel v. Vitale*
   (C) *United States v. Lopez*
   (D) *New York Times Co. v. United States*

4. With the variety of religious denominations and religions represented at a public high school, the administration has decided to bar students from wearing any religious symbols or garb that reflect a particular religious faith. Which of the following would be the best legal advice for school administrators?
   (A) This is a sound policy because of the decision in *Engel v. Vitale.*
   (B) This is an unsound policy based on the Constitution's free exercise clause unless the practice causes disruption.
   (C) This is an unsound policy because of the decision in *Wisconsin v. Yoder.*
   (D) This is an unsound policy based on the Constitution's reserved powers clause.

Question 5 refers to the cartoon below.



5. With which of the following statements would the cartoonist most likely agree?
   (A) The government should be able to impose religion on its citizens.
   (B) Elected officials cannot be religious.
   (C) There is a constant struggle to define the separation of church and state.
   (D) The government should provide more help to churches.

6. In what way do the decisions in *Engel v. Vitale* and *Wisconsin v. Yoder* differ?
   (A) One suggests a public policy creates an establishment of religion, while the other suggests a public policy denies a free exercise of religion.
   (B) One was decided on free speech grounds and one was decided on free press grounds.
   (C) One preserved the governmental policy and the other struck down a governmental policy.
   (D) One decision resulted from judicial activism and one resulted from judicial restraint.

7. What must a suing party prove to win a libel lawsuit?
   (A) A factual mistake was made in reporting.
   (B) The offending party acted maliciously and caused damages.
   (C) An unfair criticism of public officials was made.
   (D) His or her reputation was tarnished.

8. Which of the following is the most complete summary of the selective incorporation doctrine?

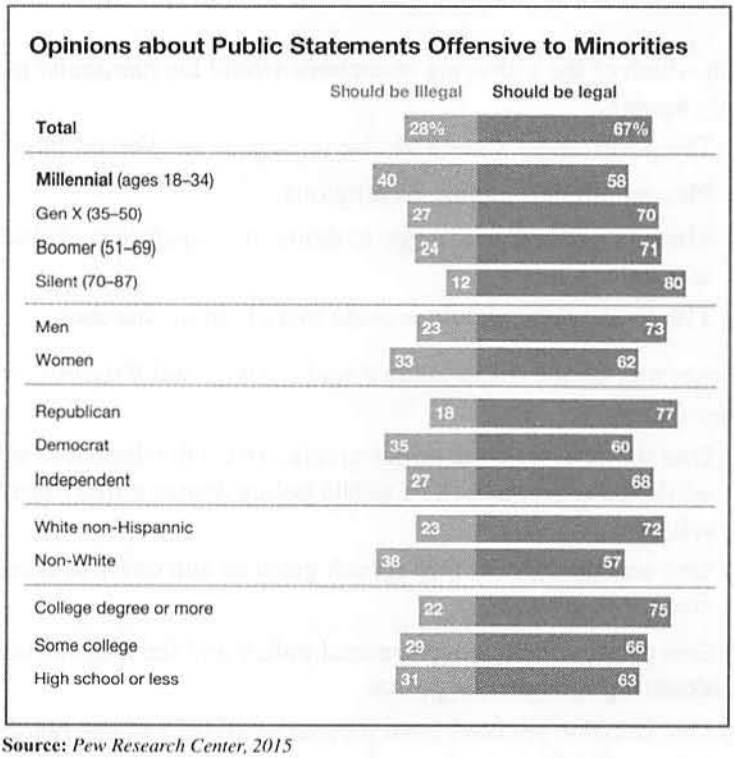
(A) The selective incorporation process and resulting law represent the primary intent of the framers of the Fourteenth Amendment.

(B) The Supreme Court has required states to apply certain rights in the Bill of Rights through the Fourteenth Amendment's due process clause.

(C) The Supreme Court has determined that citizens have the right to own firearms.

(D) A separation of church and state is required even in states where large majorities of the population are strongly religious.

Questions 9 and 10 refer to the graphic below.



Source: *Pew Research Center, 2015*

9. Which of the following constitutional issues is represented in the graphic?
   (A) Prior restraint
   (B) Clear and present danger
   (C) Free speech
   (D) Free exercise

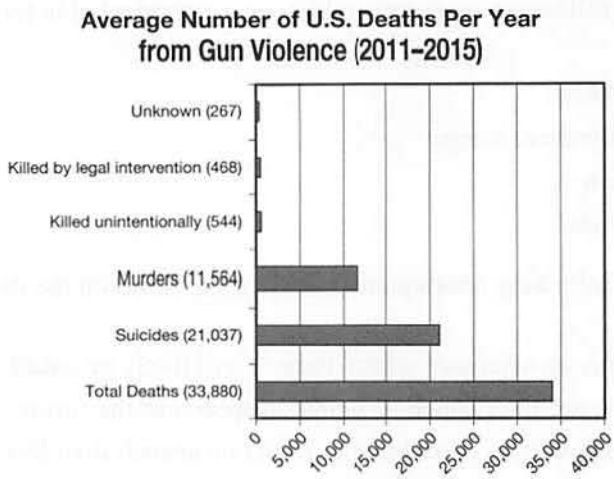
10. Which of the following consequences may occur based on the data in the graph?
   (A) Restrictions on offensive school speech will likely be eased.
   (B) Americans are likely open to limits on speech in the future.
   (C) Republicans will be more open to limits on speech than Democrats.
   (D) Men will be more likely than women to make offensive statements about minorities.

FREE-RESPONSE QUESTIONS

1. Read the following statement about the 2010 publication by WikiLeaks, under the direction of Julian Assange, of leaked information on State Department diplomacy efforts and intelligence. After reading it, respond to A, B, and C below.

> [S]everal members of Congress and the Obama Administration suggested that Assange should indeed face criminal prosecution for posting and disseminating to the media thousands of secret diplomatic cables containing candid—and often extremely embarrassing—assessments from American diplomats. Senate Minority Leader Mitch McConnell went so far as to label Assange a high-tech terrorist. "He has done enormous damage to our country and I think he needs to be prosecuted to the fullest extent of the law. And if that becomes a problem, we need to change the law," McConnell said on NBC's *Meet the Press* Sunday. Attorney General Eric Holder on Monday vowed to examine every statute possible to bring charges against Assange, including some that have never before been used to prosecute a publisher. And in the Senate, some members are already readying a bill that could lower the current legal threshold for when revealing state secrets is considered a crime.
>
> —Michael Lindenberger, *Time*, December 2010

   (A) Describe the constitutional principle at issue in this event and how the Supreme Court helped shape it.
   (B) In the context of this scenario, explain how the principle described in part A affects the behavior of the press.
   (C) In the context of this scenario, explain how the interactions among the three branches relate to the tension between public order and individual rights.



Sourse: *Brady Campaign*

2. Use the information in the graphic to answer the questions below.
   (A) Based on the data in the graph, identify the most common type of death from guns.
   (B) Describe a similarity or difference in the data presented in the chart, and draw a conclusion about how a gun-control interest group might use this information to promote its cause.
   (C) Explain how those protecting Second Amendment liberties might respond to this information.

3. On January 24, 2002, the Juneau [Alaska] School District sanctioned an outdoor event across the street from the high school—watching the Olympic torch as it passed by on its journey to Salt Lake City, where the winter games were going to be held. Just as the torch and camera crews passed by, student Joseph Frederick unfurled a 14-foot banner that said "BONG HITS 4 Jesus." Principal Deborah Morse confiscated the banner and suspended Frederick for ten days. Although he appealed his suspension, the Juneau School District upheld the suspension, arguing that the sign promoted illegal drug use and the school had a policy against displaying messages that promoted drug use. Frederick sued. A district court decided in favor of the principal. On appeal the Ninth Circuit Court decided that Frederick's constitutional right to free speech was abridged because the school had not shown the message was disruptive. The case reached the Supreme Court, which ruled 5:4 in *Morse v. Frederick* in 2007 that the school was within its rights to remove the banner and suspend Frederick. In the majority opinion, Justice Roberts argued that students' right to free speech in schools does not extend to pro-drug messages, because an important objective of the school was to discourage drug use.

(A) Identify a similarity between *Morse v. Frederick* (2002) and *Tinker v. Des Moines Independent School District* (1969).

(B) Based on the similarity identified in part A, explain why the facts of the *Morse v. Frederick* case led to a different holding than the holding in *Tinker*.

(C) Describe how the holding in *Morse v. Frederick* might affect (or not affect) the effort of high school students to hold an assembly on school grounds supporting the decriminalization of marijuana.

4. Develop an argument that explains whether or not hate speech—speech that offends or insults groups based on race, religion, sexual orientation, or disabilities—should be illegal in the United States.

In your essay, you must:

- Articulate a defensible claim or thesis that responds to the prompt and establishes a line of reasoning
- Support your claim with at least TWO pieces of accurate and relevant information:
  - At least ONE piece of evidence must be from one of the following foundational documents:
    - The First Amendment of the Constitution
    - The Fourteenth Amendment of the Constitution
  - Use a second piece of evidence from another foundational document from the list above or from your study of civil liberties
- Use reasoning to explain why your evidence supports your claim/thesis
- Respond to an opposing or alternative perspective using refutation, concession, or rebuttal

WRITING: *USE CONCESSION*

As you develop an argument, recognize opposing views that have been well reasoned. Doing so is called *conceding a point*, or *making a concession*. When you make a concession, you actually strengthen your own argument, because you not only show your fair-mindedness, but you also are ready to provide reasons why, despite a well-reasoned opposing view, you still believe your own position is more sound. You may find that using the words *although, though*, and *while* are especially useful in conceding a point. For example, you may write, "Although supporters of a hate speech ban point to other countries where the policy does not appear to significantly diminish individual rights, the Court has made clear that in the United States only certain classes of speech can be suppressed, and hate speech does not fall in those categories." The use of *although* puts the opposing view in a position subordinate to your view.