

'Falsely Shouting Fire': The Free Press and the Courts

Overview

In this lesson, students learn about how the U.S. Supreme Court has interpreted freedom of expression, particularly freedom of the press, throughout the 20th century and into the early 21st century. First, students read about how the Supreme Court has interpreted and defined freedom of the press with its main rulings starting with the period of World War I. Next, they work in small groups to evaluate three fact situations in which someone or some organization has violated a law that restricts First Amendment freedom of expression. This lesson is Part 2 of a two-part lesson sequence that began with Part 1: [Why We Have Freedom of the Press](#). Both Parts 1 and 2 may also be done independently of one another.

Standards and Topics

- **CCSS.ELA-LITERACY.RH.11-12.2:** Determine the central ideas or information of a primary or secondary source; provide an accurate summary of how key events or ideas develop over the course of the text.
- **CCSS.ELA-LITERACY.RH.11-12.4:** Determine the meaning of words and phrases as they are used in a text, including analyzing how an author uses and refines the meaning of a key term over the course of a text (e.g., how Madison defines *faction* in *Federalist* No. 10)..
- **CCSS.ELA-LITERACY.SL.11-12.1.B:** Work with peers to promote civil, democratic discussions and decision-making, set clear goals and deadlines, and establish individual roles as needed.
- **CCSS.ELA-LITERACY.SL.11-12.4:** Present information, findings, and supporting evidence, conveying a clear and distinct perspective, such that listeners can follow the line of reasoning, alternative or opposing perspectives are addressed, and the organization, development, substance, and style are appropriate to purpose, audience, and a range of formal and informal tasks.

Topics: free press, freedom of the press, freedom of expression, World War I, U.S. Supreme Court, First Amendment

Objectives

Students will be able to:

- Explain the meanings of key phrases like “clear and present danger” and “safety valve” in the context of First Amendment.
- Show how the U.S. Supreme Court has interpreted freedom of the press over time.
- Prepare and present arguments about how far First Amendment protection should go in controversies brought before the U.S. Supreme Court.

Materials

- [Handout A – ‘Falsely Shouting Fire’: The Free Press and the Courts](#) (one per student)
- [Handout B – Who’s Afraid of the First Amendment?](#) (one per group of four students each)
- [Slide Pack for ‘Falsely Shouting Fire’](#)

Procedure

I. Focus Discussion

- A. Ask students: *How would you define freedom of the press today?* (Accept reasonable responses. If following from Part 1, this serves as a recap. If using this lesson independent of Part 1, look for the definition of information that is published and presented independent of the government's influence.)
- B. Tell students: *Today, you're going to learn about how the U.S. Supreme Court has interpreted the idea of a free press. You're going to see whether or not the press is absolutely free to publish whatever it wants, and whether First Amendment protections are absolute.*

II. Reading – ‘Falsely Shouting Fire’: The Free Press and the Courts

- A. Distribute [Handout A - ‘Falsely Shouting Fire’: The Free Press and the Courts](#) to each student. Give students time to complete the reading.
 1. Allow students to work in pairs to discuss and answer the Writing & Discussion questions, or have each students write answers for homework.
- B. Conduct a whole-class discussion using the **Writing & Discussion** questions or assign the questions for assessment (see Part IV).
 1. What does the “clear and present danger” test mean? (*The court examines whether or not an action of a speaker or publisher causes “substantive evil” to closely follow in time.*)
 2. What are the circumstances under which a person may not be able to speak or publish information freely, according to the Supreme Court? (*During wartime, if the writing advocates overthrow of the government, generally if the writing presents a clear and present danger to public order and safety.*)
 3. Of all the reasons for protecting and preserving freedom of the press, which one do you think is most important? Why? Provide evidence from the text. (*Accept reasonable responses.*)

III. Activity: Who’s Afraid of the First Amendment?

- A. Divide the class into groups of four or five students each. Distribute the [Handout B - Who’s Afraid of the First Amendment?](#) to each group. Review the instructions and answer any questions that students may have.
 1. Make sure every group understands that its task is to evaluate each of the three fact situations on Handout B, first to determine why the action or actions the defendants took in each case were illegal; then to determine if the actions should be allowed under the First Amendment, anyway (i.e., that the law described in each fact situation should be found unconstitutional).
- B. Each group should select a chairperson who will keep the group’s discussion on task and moving through the questions on Handout B. Each group should also select one reporter who should be prepared by the group to answer any of the questions from Handout B in the whole-class discussion.

IV. Assessment/Closure

- A. Lead a whole-class discussion on the questions from Handout B, starting with Situation 1. Each group's reporter should be ready to answer either or both of the questions about Situation 1. Anyone from another group may ask additional questions of any group that is reporting, and the reporter may seek help from their fellow group members.
- B. Repeat Part IV(A) above for Situations 2 and 3.
- C. [Using the slide pack](#), debrief after discussion of each fact situation with the following facts. Each fact situation describes a real case that the Supreme Court of the United States (SCOTUS) has decided in the past.
 1. **Show Slide 1 for Situation 1:** *Yates v. United States* (1957). In a 6-1 decision, SCOTUS reversed the convictions for all of the 14 Communist Party officials and remanded (sent back) the case for a retrial. However, SCOTUS did not find the Smith Act unconstitutional. Rather, the court simply found that "organizing," which was prohibited under the Smith Act, meant literally creating a new organization, not taking part in an existing organization. Also, the court distinguished between advocacy of overthrow of a government as an "abstract principle" (a legal activity) and advocacy of "concrete steps" toward overthrow of a government (an illegal activity).
 - a. The Smith Act has been amended but never declared unconstitutional. However, it has not been used after 1961 in any significant case.
 2. **Show Slide 2 for Situation 2:** *Brandenburg v. Ohio* (1969). A unanimous SCOTUS held that Ohio law violated the KKK speaker's right to freedom of speech under the First Amendment. The decision of the court overturned the "clear and present danger" test from 50 years before in *Schenck v. United States* (1919). In its place, the court applied an "imminent lawless action" test: Advocacy of criminal activity is not protected under the First Amendment if (1) the speaker intends to bring about criminal activity, and (2) the criminal activity would be imminent (almost immediate) and likely to take place. Here, what the KKK speaker said was too vague and indeterminate to constitute imminent lawless action.
 - a. The unanimous decision was *per curiam*, which means there was no designated author of the opinion. (For an explanation of why the decision was *per curiam*, see Wermiel, "SCOTUS for Law Students" in the Source List.)
 - b. Students may be interested to know that Justice Thurgood Marshall, the first African American justice on the Supreme Court, was part of this unanimous decision.
 3. **Show Slide 3 for Situation 3:** *Holder v. Humanitarian Law Project* (2010). In a 6-3 decision, SCOTUS held that the law was constitutional as it applied to the nonprofit organization, the Humanitarian Law Project. Even providing advice to terrorist organizations on peaceful conflict resolution is the same thing as providing material support to terrorist organizations. The law prohibited "training," "expert advice or assistance," "service," and "personnel," all of which are specific enough and not vague.
- B. Have each student write answers to the **Writing & Discussion** questions after having done the reading, activity, and debriefing. Look for answers that use the text and the activity discussions as evidence.

Source List

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

Croddy, Marshall, et al. *The Challenge of Information*. Los Angeles: Constitutional Rights Foundation, 1998.

Gammon, Katharine. "Freedom of the Press." *LiveScience*, Purch, 29 June 2012, www.livescience.com/21312-freedom-of-the-press.html.

Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

Omachonu, John O. "Safety Valve Theory." *The First Amendment Encyclopedia*, The John Seigenthaler Chair of Excellence in First Amendment Studies, www.mtsu.edu/first-amendment/article/1014/safety-valve-theory.

Thomson, Alexander. "Smith Act of 1940." *The First Amendment Encyclopedia*, The John Seigenthaler Chair of Excellence in First Amendment Studies, www.mtsu.edu/first-amendment/article/1048/smith-act-of-1940.

Wermiel, Stephen. "SCOTUS for Law Students: Lessons from History for Rulings after Justice Scalia's Death." *SCOTUSblog*, 15 Mar. 2016, www.scotusblog.com/2016/03/scotus-for-law-students-lessons-from-history-for-rulings-after-justice-scalias-death/.

Yates v. United States, 354 U.S. 298 (1957).

'Falsely Shouting Fire': The Free Press and the Courts

Among the three branches of government in the United States system, the judicial branch interprets the law. The highest court in the nation is the Supreme Court of the United States. Its judgments, called **holdings**, are the final word on what government actions are or are not allowed under the U.S. Constitution.

The court decides cases appealed to it from lower courts. It interprets what the Constitution and other federal laws mean. Its decisions can actually overturn laws if they conflict with the Constitution. The court votes on each case and one justice is selected to write the court's opinion, stating the reasons for its decision. If some justices disagree with the opinion, they write dissenting opinions. The court rules on dozens of cases each year. The majority opinions in these cases set **precedents**, rules of law that lower courts must follow. Over time, these precedents have grown into a body of constitutional law.



Pixabay

During First World War, Congress passed several laws aimed at punishing those who made statements that interfered with the war effort. In a series of cases appealed by defendants convicted of writing articles against the war, the Supreme Court upheld these laws as not violating the First Amendment. In 1919, a unanimous court ruled in *Schenck v. U.S.* that the defendant's anti-draft pamphlet constituted a "clear and present danger" to the security of the United States.

In his opinion for the unanimous court in *Schenck*, Justice Oliver Wendell Holmes also famously wrote, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." This means that the circumstances under which words are said or published determines whether they really are a "clear and present danger" to the nation's security. Holmes described such a danger as an action of a speaker or publisher that causes "substantive evil" to closely follow.

One week after the court decided *Schenck*, the court unanimously held in *Frohwerk v. U.S.* that the defendants' editorials against the draft might "kindle a flame" of draft resistance. Because the U.S. was at war, the defendants' publishing in both these cases was not protected by the First Amendment. That was how circumstances determined the constitutionality of what was published.

In *Abrams v. U.S.*, several months after the *Frohwerk* decision, the court upheld the conviction of defendants who distributed leaflets supporting the Russian Revolution, which had taken place during the war. A court majority ruled the leaflets tended to undermine the war effort. But the *Abrams* case is known for the strong dissenting opinion of Justice Holmes and Justice Louis Brandeis in support of free expression. They argued that free expression could only be curtailed if it presented an "imminent . . . danger of immediate evil," which the "silly leaflet" did not. Over the course of the 20th century, the Supreme Court grew more protective of free expression, and the dissenting view in *Abrams* eventually became the majority view.

In the 1925 case of *Gitlow v. New York*, a socialist politician named Benjamin Gitlow was convicted under a New York state law for writing and publishing a document titled "Left Wing Manifesto." The law made it a crime to advocate for the overthrow of the government. Gitlow

argued that his writing only analyzed history. The Supreme Court upheld Gitlow's conviction, calling his writing a clear and present danger. But again Justices Holmes and Brandeis dissented, saying that Gitlow's writing was not a clear and present danger.

The court in *Gitlow* also ruled that the First Amendment's guarantees of freedom of speech and of the press applied to the states as well as the federal government. The court's decision rested on its interpretation of the due process clause of the 14th Amendment, adopted following the Civil War. This clause declared that no state could "deprive any person of life, liberty, or property, without due process of law. . . ." The court ruled that freedom of expression was one of the liberties protected by this amendment.

Since then, the Supreme Court has developed a large body of constitutional law on freedom of the press. The court has ruled that the First Amendment protects against almost all **prior restraints** on the press, or censorship of writings before they are even published. It also protects the press from being punished after the fact for what it prints. It has recognized that the threat of punishment — from imprisonment, fines, or even lawsuits — can stifle freedom of the press. Even so, the court has never declared freedom of the press to be absolute. It has placed limits on the press in certain specific areas, such as national security, obscenity, and libel. But the court has emphasized that freedom of the press is extremely important and cannot be limited in most cases.

In its many decisions, the Supreme Court has stated various reasons why freedom of expression is so important. A free press plays a vital watchdog role on government, exposing misdeeds, mistakes, and mishaps that officials would like to keep quiet. It also ensures that citizens have access to all points of view on issues and can make informed political decisions.

By letting every idea be examined and questioned, freedom of expression doesn't just help the democratic process; it helps scientists, inventors, and ordinary people find the truth. Scientists rely on the freedom to publish the results of research and experimentation without fear of suppression, either by the government or social forces. Only then can scientific ideas be tested and retested to confirm their validity. That is how ordinary people now understand that the earth revolves around the sun, that germs cause disease, and that vaccines can prevent the spread of disease — all having been, at first, unpopular scientific ideas.

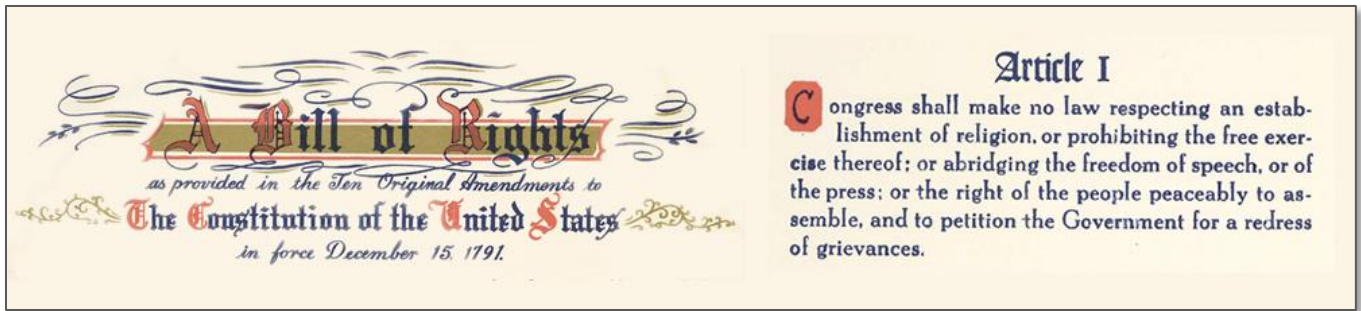
Further, freedom of speech and the press — along with other First Amendment freedoms of religion, peaceable assembly, and petition — serve as a "safety valve." People can vent their anger and frustration with government through protest while the likelihood that they will foment revolution or commit violent acts of rebellion is diminished. As Justice Brandeis wrote in his concurring opinion in the case of *Whitney v. California* (1927), "the path of safety [for society] lies in the opportunity to discuss freely supposed grievances and proposed remedies; and the fitting remedy for evil counsels is good ones."

Finally, freedom of expression helps people develop as individuals by allowing them to examine and express different thoughts and opinions. For all the reasons described above, U.S. courts have recognized that freedom of expression is one of the most basic rights of a free people.

Writing & Discussion

1. What does the "clear and present danger" test mean?
2. What are the circumstances under which a person may not be able to speak or publish information freely?
3. Of all the reasons for protecting and preserving freedom of the press, which one do you think is most important? Why? Provide evidence from the text.

Who's Afraid of the First Amendment?



Complete the chart for each of the following sets of facts.

Facts	Are the actions of the person(s) underlined in the facts allowed under the law described in the facts? Why or why not?	Whether or not their actions are illegal, should the First Amendment protect their actions? Why or why not?
<p>Situation 1</p> <p>The Smith Act was a federal law that made it unlawful to organize any group that advocates for the overthrow or destruction of any government in the United States by force. The law also criminalized printing, publishing, publicly displaying, or distributing any material that advocated the overthrow of any government in the United States by force. <u>Fourteen officials of the Communist Party USA</u> (CPUSA) were charged with violating the Smith Act by being members of the CPUSA in California. The 14 officials claimed that the CPUSA was engaged in discussion of “revolution” only and not in any active attempts to overthrow the government.</p>		

Situation 2

A state law in Ohio criminalized “syndicalism,” which it defined as the advocacy of violence or terrorism for political reform. A leader of the racist, white-power Ku Klux Klan organization in Ohio spoke to a crowd at a rally. He said that “it’s possible that there might have to be some revengeance [sic] taken” against the president, U.S. Congress, and U.S. Supreme Court for “suppressing” white people. He was later convicted under Ohio’s syndicalism law for what he said. He was fined \$1,000 and sentenced to prison for up to 10 years.

Situation 3

The USA PATRIOT Act (Patriot Act) makes it a crime to “provide material support” to groups that the U.S. government has designated as terrorist. Providing material support includes training, giving expert advice or assistance, service, and personnel. The Kurdistan Workers Party (KWP) is an organization that had used violence, including bombing, in an ongoing conflict between the Kurdish people and the nation of Turkey. The U.S. State Department designated the KWP as a terrorist organization. A nonprofit human-rights organization based in the United States sought to train the KWP in how to “peacefully resolve disputes.”