



The Struggle for Civil Liberties

Part II

Those in power need checks and restraints lest they come to identify the common good as their own tastes and desires, and their continuation in office as essential to the preservation of the nation.

William O. Douglas (1898-1980)
US Supreme Court Justice



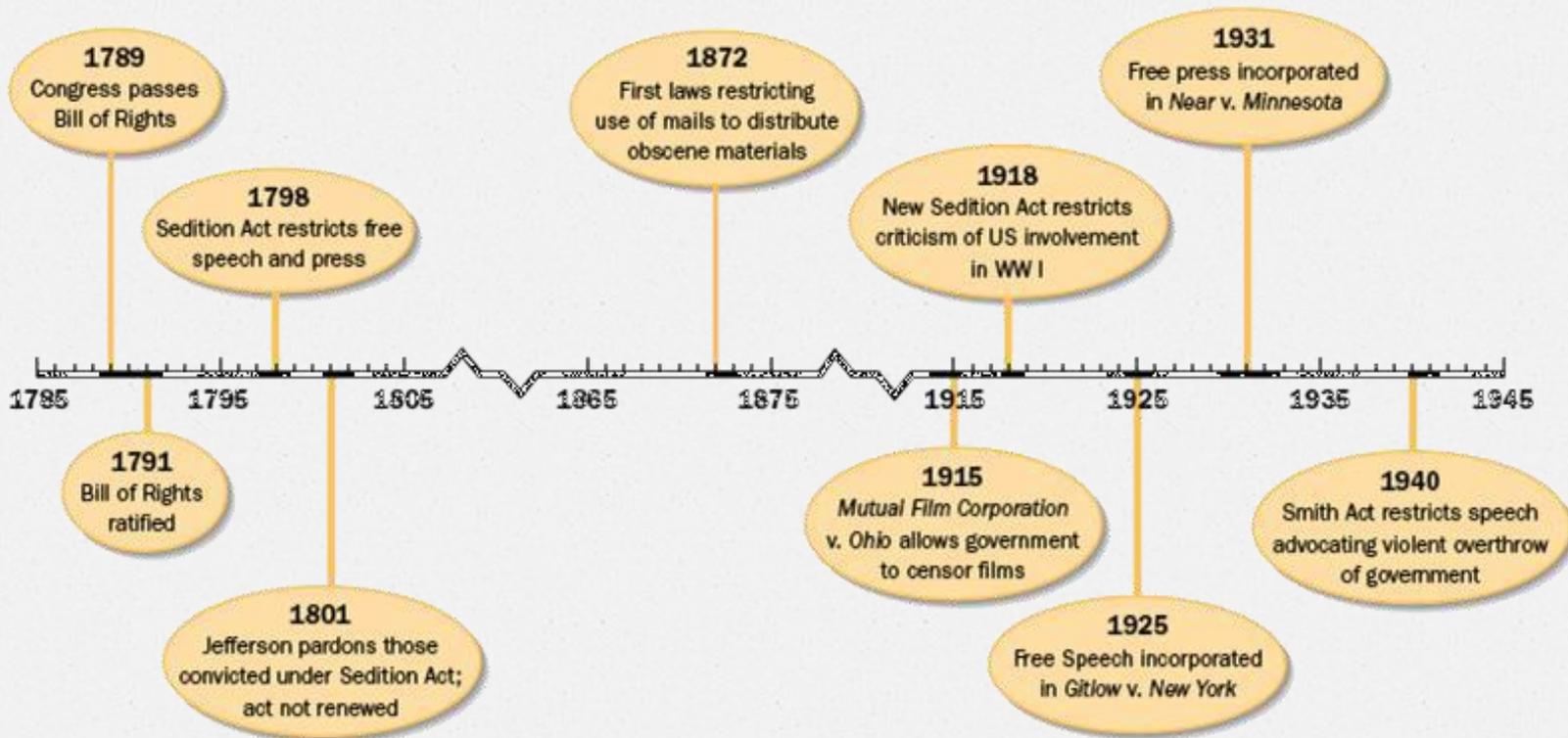
Freedom of Expression

- o Congress shall make no law... abridging the freedom of speech, or of the press; or the right of people peaceably to assemble...
- o three liberties closely intertwined



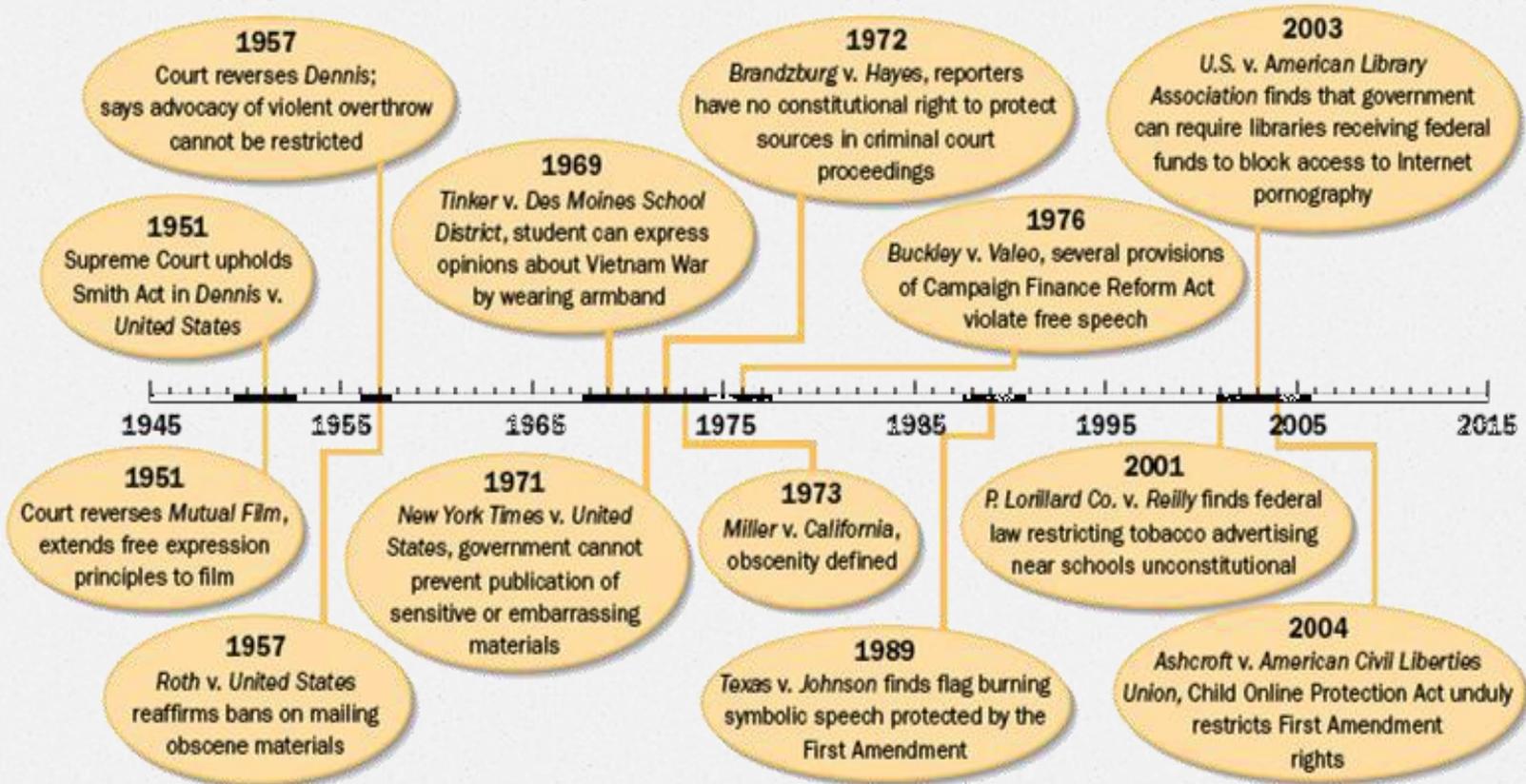


Timeline: Milestones in Free Expression (Speech and Press)





Timeline: Milestones in Free Expression (Speech and Press)



Freedom of Expression: Essential to a Free Society

- o Self- expression enables individuals to realize their full potential as a human beings and should not be subordinated to any other goals of society.
- o vital to the attainment and advancement of knowledge
- o necessary to our system of self-government ... enlightened citizenry must have access to all information, ideas and points of view
- o provides a check against possible government corruption and excess





Freedom of Expression and Majoritarian Democracy

- o Madison and **tyranny of the majority**: Place free speech outside the reach of powerful majorities.
- o John Stuart Mill: In the free exchange of ideas, truth would eventually triumph over error.
- o But what of vicious or offensive speech?
 - o Mill states that even if such ideas were built on error, only by allowing them to be expressed can their proponents be denied the privilege of false martyrdom.
 - o example: racial hatred / prejudice





Freedom of Expression: Political Speech

- *Abrams v. US* (1919): upheld 1918 amendment to the Espionage Act of 1917, which made it a criminal offense to urge curtailment of production of materials necessary to war against Germany with intent to hinder the progress of the war
- *Gitlow v. New York* (1925): held that 14th amendment extends the reach of limitations on national government authority set forth in the 1st amendment to the states and established the standard to which a state or the national government would be held when it criminalized speech or writing (selective incorporation)



Freedom of Expression: Political Speech

- incorporation of freedom of speech
 - *Schenck v. US* (1919): censorship only when speech poses a *clear and present danger*
 - *Brandenburg v. Ohio* (1969): danger must be immediate





Freedom of Expression: Actions and Symbolic Speech

- Speech mixed with conduct may be restricted if the restrictions on conduct do not restrict speech.
- Symbolic expressions may also receive less protection from the Court.
- *Texas v. Johnson* (1989): flag desecration falls under free expression protections



Freedom of Expression: Freedom of the Press

- o Court has made it clear that it **will not tolerate prior restraint of speech**.
- o **prior restraint**: censorship imposed, usually by a government, on expression before the expression actually takes place
- o *Near v. Minnesota* (1931): recognized freedom of the press by roundly rejecting prior restraints on publication, a principle that was applied to free speech generally in subsequent cases

The worst
part of
censorship
is [REDACTED]



Freedom of Expression: Freedom of the Press

- Prohibition of prior restraint on publication remains the core of freedom of the press.
- *NY Times Co. v. Sullivan* (1971): *Pentagon Papers* case ... Supreme Court ruled that US government could not block the publication of then-classified Department of Defense documents illegally furnished to the Times by anti-war activists ... *NY Times* and *Washington Post* could publish without risk of government censorship or punishment
- *Nebraska Press Association v. Stuart* (1976): Court ruled in favor of press's right to cover trial.





Freedom of Expression: Freedom of Association

- Considered inseparable from freedom of speech and assembly.
- *Dennis v. US* (1951): Ruled that Dennis (General Secretary of the Communist Party USA) did not have the right under the 1st amendment to exercise free speech, publication and assembly, if the exercise involved the **creation of a plot to overthrow the government.**
- *NAACP v. Alabama* (1958): Ruled that Alabama's demand for the **NAACP's membership lists** had violated the right of due process guaranteed by the 14th amendment.





Freedom of Expression: Freedom of Association

Boy Scouts of America v. Dale (2000): BSA expelled Scoutmaster James Dale, who had made his homosexuality public. Court held that the constitutional right to freedom of association allows a private organization like the BSA to exclude a person from membership when *the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.*



Boy Scouts of America v. Dale



Freedom of Expression: Higher Education

- o American college campuses have become an important battleground in the continuing struggle over the meaning of free speech.
- o Two-thirds of colleges and universities have banned a variety of forms of speech or conduct that creates or fosters an **intimidating, hostile or offensive environment** on campus.
- o Some have created **free speech zones**.
 - o These restrict the time, place or manner of speech by forcing people into these zones.
 - o Implies that speech can be limited on other parts of campus.





Freedom of Expression: Attempts at Suppression

- o major exception to expansion of freedom of expression: periodic concern about **internal security and national defense**
- o French Revolution: *Free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write and print with freedom, but shall be **responsible for such abuses** of this freedom as shall be defined by law.*
- o Civil War: at least 300 recorded incidents of **press suppression** including banning papers from mail, disrupting telegraphic news, arresting and imprisoning editors and reporters, closing and ransacking newspaper offices, destroying presses and equipment, suspending publication, interfering with war reporting and war reporters

Freedom of Expression: Attempts at Suppression

- periodic concern about internal security and national defense
- WWI: **Palmer raids** (Attorney General dispatched national agents to raid the offices of radical and labor organizations throughout the country)
- Post-WWII: **Joseph McCarthy and HUAC** (House Un-American Activities Committee established in 1939 to seek out Nazis, reactivated to find Communists. Investigated government activities, individuals, youth organizations, etc. Many accused were blacklisted or lost their jobs, although most did not in fact belong to the Communist Party.)





Freedom of Expression: Attempts at Suppression

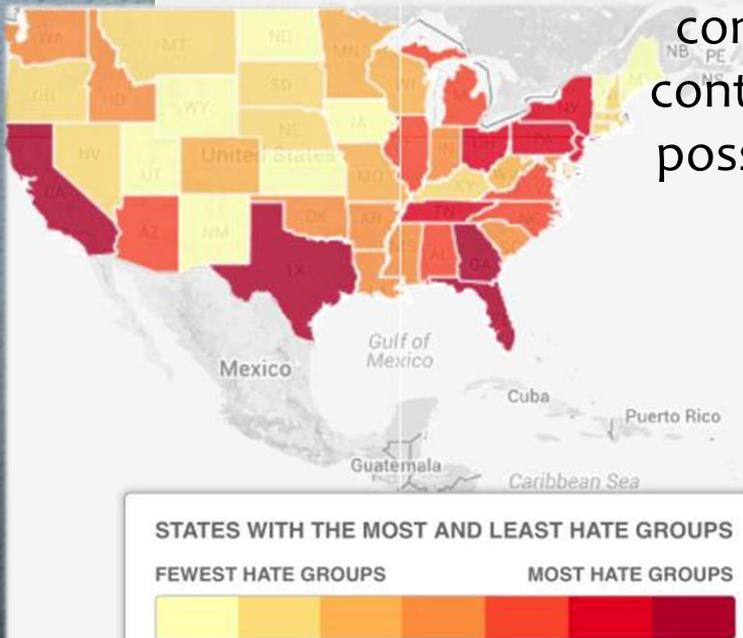
- o periodic concern about internal security and national defense
- o Post-September 11: The **USA Patriot Act** (Along with expanding the definition of terrorism, the act led to law enforcement agencies having more freedom when it came to searching phone, e-mail, medical, library and other records. Special courts can issue warrants that wouldn't otherwise be obtainable under Constitution.)





Freedom of Expression: Limitations by the Courts

Chaplinsky v. New Hampshire (1942): articulated the **fighting words doctrine** (some words constitute violent acts and are therefore not protected under the 1st amendment) ... Certain *well-defined and narrowly limited* categories of speech fall outside the bounds of constitutional protection. They neither contribute to the expression of ideas nor possess any *social value* in the search for truth.





Freedom of Expression: Limitations by the Courts

- o **commercial speech**: advertising or other speech made for business purposes may be regulated
 - o example: Cigarette ads on TV and radio forbidden.
- o **obscenity**: publicly offensive language or portrayals with no redeeming social value
 - o The courts have held that obscenity is not protected by the 1st amendment, but the definition of obscenity has been contested for half a century.
 - o *Redrup v. New York* (1967): Written materials neither sold to minors nor foisted on unwilling audiences are constitutionally protected ... *de facto* **ended censorship of written material**. After decision, Court reversed, without further opinion, scores of obscenity rulings involving paperback sex books.



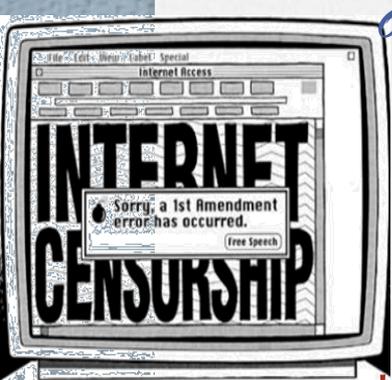
Freedom of Expression: Limitations by the Courts

- o obscenity
 - o *Miller v. California* (1973): Court redefined its definition of obscenity from that of *utterly without socially redeeming value* to **SLAPS test** (lacks serious literary, artistic, political or scientific value).
- o concerns about the **availability to minors** of sexually offensive material on the internet
- o **Communications Decency Act** (1996): first notable attempt by Congress to regulate pornographic material on the internet ... aka the **Great Cyberporn Panic of 1995**





Freedom of Expression: Limitations by the Courts



- o *Reno v. ACLU* (1997): first major Supreme Court ruling on the regulation of materials distributed via internet ... unanimously ruled that **anti-indecency provisions of the 1996 Communications Decency Act** violated 1st amendment's guarantee of freedom of speech
- o **libel**: false statement defaming another
- o *NY Times v. Sullivan* (1964): established **actual malice standard** that has to be met before press reports about public officials can be considered defamation and libel ... requires plaintiff in a defamation or libel case, if a public figure, to prove publisher of statement in question knew statement was false or acted in reckless disregard of its truth or falsity



Freedom of Expression: Limitations by the Courts

- o protecting sources
 - o Although many states have **shield laws** allowing reporters to protect their sources, there is **no such national law**.
 - o *Branzburg v. Hayes* (1972): invalidated the use of the 1st amendment as a defense for reporters summoned to testify before a grand jury, reporters do not have immunity when subpoenaed by court ... **only case in which Supreme Court has considered use of reporters' privilege**



"OF COURSE, YOU REALIZE THAT CONFIDENTIALITY RULES ARE IN A BIT OF A FLUX..."



Freedom of Expression: Balancing Doctrine

- Freedom of speech must be balanced against other competing interests.
- Circumstances matter.
- *Dennis v. US* (1951): used to reinterpret and place limits on the clear and present danger doctrine
- Many civil libertarians have fought against such codes, favoring the concept of free speech in a free society.
- The courts have generally sided with the civil libertarians on this issue.
- Supreme Court Justice Potter Stewart (1915-1985): *Censorship reflects a society's lack of confidence in itself. It is the landmark of an authoritarian regime.*





Freedom of Religion

- Framers did not support a national church or religion.
- Article VI provides that no religious test shall ever be required as a qualification to any office or public trust under the US.
- 1st amendment: part of the Bill of Rights that imposes a number of restrictions on the national government with respect to the civil liberties of the people, including freedom of religion, speech, press, assembly and petition

THE FIRST AMENDMENT
CONGRESS SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION, OR PROHIBITING THE FREE EXERCISE THEREOF; OR ABRIDGING THE FREEDOM OF SPEECH, OR OF THE PRESS; OR THE RIGHT OF THE PEOPLE PEACEABLY TO ASSEMBLE, AND TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES.



Freedom of Religion

- o guaranteed by two clauses:
 - o **establishment of religion clause**: denies government establishment of any single religious practice as superior
 - o **free exercise of religion clause**: protects the right of individuals to practice their religion without government interference

**"RELIGIOUS FREEDOM"
IS THE ABILITY
TO WORSHIP HOW
YOU CHOOSE ON
YOUR OWN TIME.
IT IS NOT
A FREE PASS
TO CONTROL OTHERS VIA
YOUR RELIGION.**



Freedom of Religion: The Establishment Clause

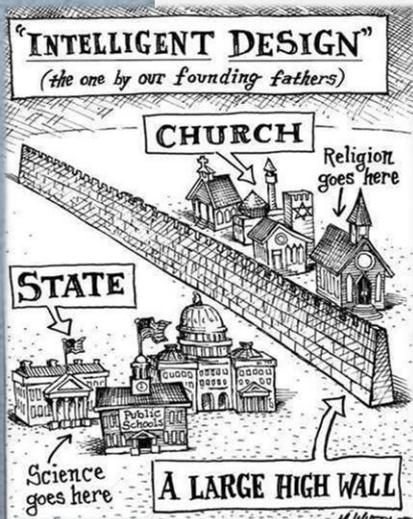
- o first clause in the 1st amendment

- o ...prohibits national government from establishing a national religion

- o separation of church and state doctrine: a wall should separate government from religious activity

- o Incorporation of this clause has been quite messy.

- o *Everson v. Board of Education* (1947): applied the establishment clause in the national Bill of Rights to state law through the due process clause of the 14th amendment





Freedom of Religion: The Establishment Clause

- o *McCullum v. Board of Education* (1948): Court ruled unconstitutional a public school system's involvement in the administration, organization and support of religious instruction classes during released time ... test of the separation of church and state with respect to education
- o *Zorach v. Clauson* (1952): upheld a school district allowing students to leave school for part of the day to receive religious instruction, by finding that it did not violate the establishment clause of the 1st amendment or the equal protection clause of the 14th amendment because instruction was not held within the school building and received no public funds



Freedom of Religion: The Establishment Clause

- o *Engel v. Vitale* (1962): unconstitutional for state officials to compose an official school prayer and encourage its recitation in public schools

- o *Lemon v. Kurtzman* (1971): the passing of any state laws that establish a religious body is a direct violation of the Constitution ... ruled Pennsylvania's 1968 Education Act unconstitutional for reimbursing private schools (mostly Catholic) for teachers' salaries ... established the **Lemon Test**



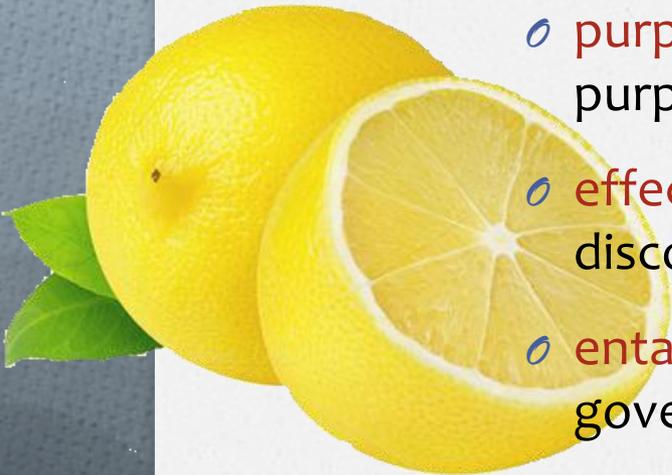
**7 STATES WHICH BAN ATHEISTS
FROM HOLDING PUBLIC OFFICE**

ARKANSAS, ARTICLE 19, SECTION 1
MARYLAND, ARTICLE 37
MISSISSIPPI, ARTICLE 14, SECTION 265
PENNSYLVANIA, ARTICLE 1, SECTION 4
SOUTH CAROLINA, ARTICLE 17, SECTION 4
TENNESSE, ARTICLE 9, SECTION 2
TEXAS, ARTICLE 1, SECTION 4



Freedom of Religion: The Establishment Clause

- *Lemon v. Kurtzman* (1971)
 - **the lemon test:** If any of the following prongs are violated, the government's action is deemed unconstitutional. In order for an institution to get aid from the government, the money...
 - **purpose prong:** ...cannot be used for religious purposes
 - **effect prong:** ...cannot encourage or discourage any religion
 - **entanglement prong:** ...cannot entangle government in religion





Freedom of Religion: The Establishment Clause

- o *Meek v. Pittenger* (1975): Public monies cannot be used for payment to religious-school teachers for curricular materials or for any other expense at such schools, except for textbooks and the cost of transporting students to school.
- o *Agostini v. Felton* (1997): not a violation of the establishment clause of the 1st amendment for a state-sponsored education initiative to allow public school teachers to instruct at religious schools so long as the material is secular and neutral in nature and no *excessive entanglement* between government and religion is apparent



Freedom of Religion: The Establishment Clause

- o *Zelman v Simmons-Harris* (2002): upheld an Ohio program that used school vouchers ... decided the program did not violate the establishment clause of the 1st amendment even if the vouchers could be used for private religious schools
- o *McCreary County, Kentucky, et al. v. ACLU* (2005): displaying framed copies of the Ten Commandments in courthouses and public schools violates the establishment clause because an observer would conclude that the government was endorsing religion

**THERE IS NO FREEDOM OF
RELIGION WITHOUT
FREEDOM FROM RELIGION.**



Freedom of Religion: The Establishment Clause

Van Orden v. Perry (2005): The establishment clause does not bar the Ten Commandments monument on the grounds of Texas' state capitol building because *simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the establishment clause.*





Freedom of Religion: The Free Exercise Clause

- o 2nd clause of the 1st amendment
- o ...prohibits national government from interfering with a citizen's right to practice his/her religion
- o ...seems to instruct states not to interfere with religious practices, including through education policy





Freedom of Religion: The Free Exercise Clause

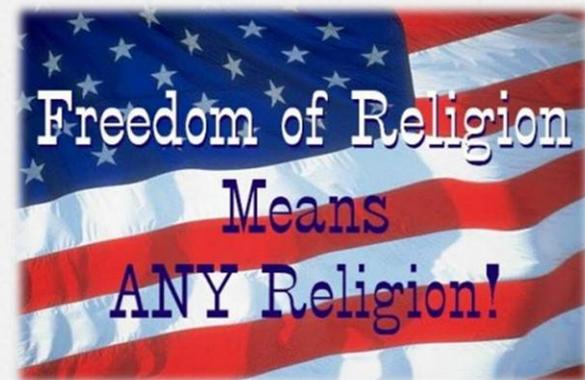
- *Wisconsin v. Yoder* (1972): Court found that Amish children could not be placed under compulsory education past 8th grade. The parents' fundamental right to freedom of religion was determined to outweigh the state's interest in educating its children.
- *Oregon v. Smith* (1990): Held that the state could deny unemployment benefits to a person fired for violating a state prohibition on the use of peyote, even though the use of the drug was part of a religious ritual. Although states have the power to accommodate otherwise illegal acts performed in pursuit of religious beliefs, they are not *required* to do so.





Freedom of Religion: The Free Exercise Clause

- o The Rehnquist Court brought a change in judicial interpretation.
- o *Rosenberger v. University of Virginia* (1995): held that University must provide a financial subsidy to a student religious publication on the same basis as other student publications





Freedom of Religion: The Free Exercise Clause

- o What happens when the establishment and free exercise clauses conflict?
- o *Wisconsin v. Yoder*: Did the Amish receive preferential treatment?
- o What about the armed services hiring chaplains for overseas members?
- o school choice debate
- o *Zelman v. Simmon-Harris*: found constitutional a small voucher program serving low-income families in Cleveland even though the vouchers were used for religious schools



Freedom of Religion: Prayer in Public Schools

- Since the early 1960s, the Court has **consistently ruled against nondenominational prayer or a period of silent prayer in the public schools.**
- *Engel v. Vitale* (1962)
- *Stone v. Graham* (1980)
- *Lee v. Weismann* (1992)
- *Santa Fe Independent School District v. Doe* (2000)
- Yet, continued attempts by religious conservatives to pass legislation supporting school prayer.





Freedom of Religion: Curriculum in Public Schools



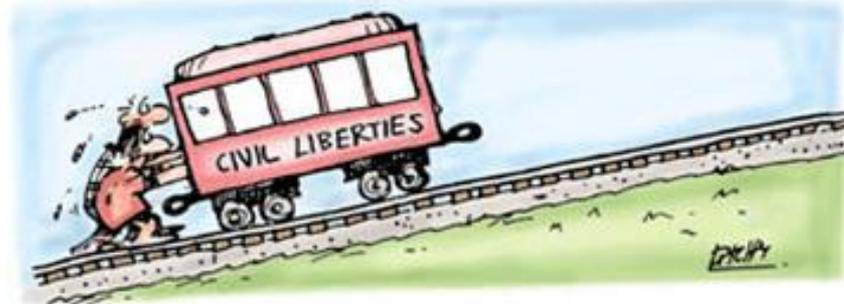
- Courts at all levels have **rejected the teaching of creationism** as an improper intrusion of religion into public education.
- In response, many religious activists have pushed **intelligent design as an alternative approach**.
- In *Kitzmiller v. Dover Area School District* (2005), the **Court rejected this attempt**.



continued in The Struggle for Civil Liberties Part III



Getting rid of civil liberties.



Bringing them back again.

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