Civil Liberties in Real Life

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Seven Studies

Edited by

Timothy C. Shiell

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This book is dedicated to students of civil liberty—young and old, those sympathetic to robust civil liberty and those unsympathetic, experts and novices, one and all.

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CHAPTER ONE

INTRODUCTION

TIMOTHY C. SHIELL

Introduction

It is essential to a healthy democracy that citizens both understand and exercise civil liberties *and* that government promote their understanding and protect their exercise. However, too many people—whether citizens or agents of government—have a weak grasp of the nature and importance of civil liberties. This deficit in knowledge and appreciation is evidenced in many surveys on the First Amendment in general as well as specific First Amendment rights. The First Amendment Center of the Freedom Forum Institute, which has done First Amendment surveys for more than twenty years, found in its 2019 survey that many misconceptions about the First Amendment remain prevalent.[1] For example, 16 percent (wrongly) believe the right to bear arms is guaranteed by the First Amendment; 65 percent (wrongly) believe private social media companies violate users' First Amendment rights when they ban users based on objectionable content they post; and 29 percent believe the First Amendment protects expression that should be suppressed. Similarly, the Foundation for Individual Rights in Education, which has done numerous surveys about freedom of expression in higher education, has found tepid support for free speech amongst students and publicizes a list of "red light" and "yellow light" policies at hundreds of campuses that suppress free speech.[2] Given the importance of

1. "State of the First Amendment Survey," https://www.freedomforuminstitute.org/first-amendment-center/state-of-the-first-amendment/.

2. For examples of tepid student support for free speech, see FIRE's 2019 "Student Attitudes Association Survey" at https://www.thefire.org/research/publications/student-surveys/student-attitudes-association-survey/ To see FIRE's list of red and yellow light policies, visit their "Spotlight Database" at https://www.thefire.org/resources/spotlight/

civil liberties and the complexities and debates surrounding them, this is unfortunate and unsettling. This book aims to promote greater understanding of and appreciation for civil liberties through a multi-disciplinary look at a variety of major civil liberty topics. This chapter introduces the reader to the complex nature of civil liberty and the key themes explored in the individual chapters.

What is Civil Liberty?

The core of civil liberty is described in standard dictionary definitions. Consider three examples. *Merriam-Webster* defines civil liberty as: "A freedom from arbitrary governmental interference (as with the right of free speech) specifically by denial of governmental power and in the U.S. especially as guaranteed by the Bill of Rights —usually used in plural."[3] The *Cambridge Dictionary* defines civil liberty as "the right of people to basic freedoms and to live without the government becoming involved in private matters."[4] The *Oxford Advanced American Dictionary* defines it as "the right of people to be free to say or do what they want while respecting others and staying within the law."[5] As a starting point, then, one can describe civil liberty in general as a right protecting citizen liberties or freedoms from illegitimate or unjustified government restrictions or intrusions.

Some of the most widely and easily recognized examples of civil liberty in the U.S. are the five freedoms identified in the First Amendment to the U.S. Constitution: freedom of religion, freedom of speech, freedom of the press, freedom of assembly, and the right to petition government for a redress of grievances. However, the Bill of Rights identifies further civil liberties such as the Second Amendment right to bear arms and multiple Fourth, Fifth, and Sixth Amendment rights to due process of law.

We begin to see some of the complexity in civil liberty when we consider examples like freedom of association. Freedom of association—argued by some to be our "first freedom"[6]—is protected under the First Amendment even though the First Amendment does not mention it. Freedom of association was adopted into the First Amendment family when the U.S. Supreme Court ruled in *NAACP v. Alabama* (1958) that freedom of association is an essential part of freedom of speech because in many

3. https://www.merriam-webster.com/dictionary/civil%20liberty
4. https://dictionary.cambridge.org/us/dictionary/english/civil-liberty
5. https://www.oxfordlearnersdictionaries.com/us/definition/american_english/civil-liberty
6. Luke C. Sheehan, *Why Associations Matter: The Case for First Amendment Pluralism* (Lawrence: University Press of Kansas, 2020).

cases people can engage in effective speech only when they join with others. Freedom of association also is closely related to freedom of assembly: both protect the individual's right to join with, or decline to join with, other individuals in public or private collective action. Most of the major Supreme Court decisions explicitly addressing freedom of association involve non-religious or quasi-religious organizations such as civil rights or civic-minded groups, but religious associations are common and highly valued associations. In practice, however, the court has addressed religious liberty cases primarily through the First Amendment's free exercise clause or free speech clause. An interesting new twist emerged with the court's decisions in *Burwell v. Hobby Lobby* (2014) holding that the 1993 Religious Freedom Restoration Act (RFRA) (which was held to be constitutional as applied to federal law but not as applied to state law[7]) exempted a closely held for-profit corporation from the contraceptive mandate in the federal Affordable Care Act since there was a less restrictive way for the government to achieve its purpose.

Many contemporary cases involving freedom of association are challenging because a state public accommodation or anti-discrimination law conflicts with a central tenet of an association. In *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston* (1995) the court held that a Massachusetts law prohibiting discrimination based on sexual orientation did not trump the right of the private organizers of the Boston St. Patrick's Day parade to exclude gay pride messages contradicting the association's message. In *Boys Scouts of America v. Dale* (2000) the court held that a New Jersey antidiscrimination law could not compel the group to allow a gay man to be an assistant scoutmaster. On the other hand, in *Christian Legal Society v. Martinez* (2010), the court held that a public university can require a student association to follow its non-discrimination policy and thereby force the association to accept as voting members and leaders even students who reject fundamental tenets of the organization.[8]

The right to privacy is another important and complicated category of civil liberty in the 21st century that is not explicitly mentioned in the Bill of Rights. A right to privacy is implicit in the First Amendment (privacy of beliefs), Third Amendment (privacy of the home against housing soldiers), Fourth Amendment (privacy of the person and possessions against unreasonable searches), and Fifth Amendment (privacy of personal information protected by the right to not self-incriminate). It was first

7. *City of Boerne v. Flores* (1997).

8. The Christian Legal Society required members to sign and live by a statement of religious faith that excluded non-Christians as well as Christians who practiced or supported homosexuality from the organization.

defended as a fundamental right by Samuel Warren and Louis Brandeis in the *Harvard Law Review* in 1890[9] and is evidenced in cases such as *Meyer v. Nebraska* (1923) (privacy of a parent and educator to instruct in foreign language) and *Pierce v. Society of Sisters* (1925) (privacy of a parent and educator to parochial education). In striking down state bans on the right of married couples to contraception, *Griswold v. Connecticut* (1963) explicitly created a more general right to privacy from the "penumbra and emanations" of Bill of Rights freedoms. The more general right to privacy established in *Griswold* was later used by the Supreme Court to create, amongst other things, constitutional privacy rights to the possession of pornography in one's home in *Stanley v. Georgia* (1969), abortion in *Roe v. Wade* (1973), gay sex in *Lawrence v. Texas* (2003), and same-sex marriage in *Obergefell v. Hodges* (2015). However, not every claimed right to privacy is held to be so "fundamental to ordered liberty" as to warrant constitutional protection. In *Washington v. Glucksburg* (1997), the court declined to recognize physician-assisted suicide as a constitutional right.

The changes in the constitutional status of freedom of association and the right to privacy also can be used to illustrate a second complication in civil liberty: it has both legal and ethical dimensions. Law—whether legislative, judicial, or executive—often changes due to ethical considerations. Ethical opposition to the passage and enforcement of the Sedition Act of 1798 contributed to the election of Thomas Jefferson as President in 1800 and demise of the Sedition Act. As will be discussed further, a little over a hundred years later, the belief that overbroad and unduly vague legal suppression of political dissenters by state governments was wrong led the Supreme Court to begin a century-long process of strengthening legal protections for free speech. Whether a civil liberty that is recognized as a moral right becomes a constitutional right hinges on whether the court finds the right so fundamental to ordered liberty that it deserves the highest level of judicial protection called "strict scrutiny." Strict scrutiny requires that the law be justified by a compelling state interest, be narrowly tailored to achieve the compelling interest, and use the least restrictive means to achieve the interest. Unsurprisingly, there are competing explanations for what makes a liberty fundamental.

The debate over which liberties are fundamental is perhaps best illustrated in the Supreme Court's recognition of the right to property as a fundamental right in *Lochner v. New York* (1905) being abandoned in *West Coast Hotel Co. v. Parrish* (1937). A transition from heightened protection

9. Samuel Warren and Louis Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 193-220.

for property rights to heightened protection for other rights was made explicit in *United States v. Carolene Products* (1938) in which the court upheld a federal law regulating "filled" milk (imitation or adulterated milk). The decision indicated it would now use the weaker "rational basis" test for judging economic legislation but would use strict scrutiny in cases in which a law conflicted with Bill of Rights protections, the political process was closed or malfunctioning, or a law adversely affected "discrete and insular minorities."[10]

A third wrinkle in civil liberty concerns its relationship with civil rights. Although both provide moral and legal protections for individuals, civil liberty can be characterized as a "negative liberty," that is, a right that restricts the authority or extent of government; whereas civil rights can be characterized as a form of "positive liberty," that is, a right that extends or expands the authority or extent of government.[11] For example, the right to freedom of expression is a civil liberty that limits government restrictions on the expression of private organizations and individuals, whereas the right to equal access to public accommodations provided by private businesses is a civil right that extends or expands government authority or power over private organizations and individuals.

Civil liberties and civil rights also are different insofar as civil liberties generally are constitutionally enforceable against state action but not against private actors, whereas civil rights are generally constitutionally enforceable against state action and private actors. For example, the free speech clause applies to public universities but not to private professional sports corporations such as the National Football League or National Basketball Association. Courts have repeatedly struck down numerous public university speech restrictions—such as hate speech codes—as unconstitutionally overbroad and unduly vague, but the NFL and NBA can enforce similarly restrictive policies on owners and players. On the other hand, rights protected by the Civil Rights Act of 1964 generally are applicable to private actors as well as state actors. Neither a public university

10. The new application of strict scrutiny for certain classes of non-economic rights was announced in the now famous "footnote four." For an interesting argument challenging the conventional view of the history and significance of footnote four, see Felix Gilman, "The Famous Footnote Four: A History of the *Carolene Products* Footnote," *S. Texas Law Review* 46 (2004-2005): 163-245.

11. Isaiah Berlin first introduced negative and positive liberty at an October 1958 lecture at Oxford University that was later published by Oxford at the Clarendon Press. The two concepts also appeared in Berlin's *Four Essays on Liberty* (1969) and re-issued in *Liberty* (2002).

nor a private sports corporation (such as the NFL or NBA) can discriminate on the basis of religion or race in their employment practices.

Civil liberties and civil rights also can be contrasted through their legal foundations. In the U.S., many civil liberties are rights protected in the Bill of Rights (such as freedom of religion, freedom of association, right to due process, right to bear arms, and right to not incriminate oneself), whereas civil rights typically are protected by the Fourteenth Amendment's Equal Protection Clause and the Civil Rights Act of 1964 banning unfair or unequal treatment based on race, religion, sex, etc. (such as the right to non-discrimination and equal opportunity in education and employment).

Despite these conceptual and legal differences, civil liberties and civil rights are conceptually and empirically connected too.[12] Consider a few of their empirical connections. Advocates for historically marginalized groups such as the abolitionist Frederick Douglass and the National Association for the Advancement of Colored People (NAACP) effectively exercised their speech, press, association, assembly, and petition liberties to achieve more equal civil rights best illustrated by the passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act. On the flip side, having more equal civil rights enables advocates for historically marginalized groups to exercise their civil liberties more effectively. For example, following the Fifteenth Amendment's ban on discrimination in voting rights on the basis of "race, color, or previous condition of servitude" during the Reconstruction Era and the Voting Rights Act of 1965 outlawing Jim Crow restrictions on voting that discriminated against black voters, African Americans in many states or municipalities helped elect political leaders interested in protecting their rights and improving their conditions.

It is important to understand the conjunction of civil liberty and civil rights because it is not enough to say a minority, such as people of color, has a constitutional right to vote when federal or state government allow public and private actions suppressing the right. Civil liberties are substantive, are real, only when they are equally applied to everyone. This connection enabled the NAACP to successfully litigate for desegregation starting in higher education cases such as *Murray v. Maryland* (1936) (desegregated University of Maryland's Law School) and *State ex rel. Gaines v. Canada* (1938) (desegregated University of Missouri's Law School), culminating in *Brown v. Board of Education* (1954) (desegregated public schools). The "separate but equal" education permissible under *Plessy v. Ferguson* (1896*)* was not in fact equal education or equal opportunity in

12. Timothy C. Shiell, *African Americans and the First Amendment: The Case for Liberty* and *Equality* (Albany: State University of New York Press, 2019).

education. *Brown*'s companion case, *Bolling v. Sharpe* (1954) (desegregated Washington, D.C.'s public schools), further emphasized the point by applying the right to equal opportunity in education to the federal government as well as state government[13] Thus, even though civil liberties can conflict with civil rights in specific cases—such as when the free speech clause protects racist speech—many scholars have noted that civil liberty and civil rights are "not separable" in practice[14] and "pose no threat to civil rights."[15]

Nan Hunter provides a powerful explanation for these connections between civil liberty and civil rights: both support anti-orthodoxy and inclusion.[16] For example, freedom of speech and freedom of religion resist orthodoxy because both exist to protect dissent and protest from suppression by the ruling orthodoxy. This is evident in each of the four "standard' justifications for free speech: truth, democracy, self-realization, and a balance between social and political stability and change.[17] No orthodoxy holds all the truth, so dissent should be protected to discover and correct its errors. Democratic government requires informed citizens, so dissent should be protected to provide citizens with the arguments and evidence on all sides of the political field. People have legitimate different life plans and goals, so dissent should be protected for individuals and groups to pursue and attain self-realization. Finally, protecting dissent provides a balance between stability and change that enables societies to grow peacefully rather than pursue change through violence and rebellion. The fact that free speech protects dissent makes it inclusive in nature: dissenters as well as assenters are included in the social and political environments. Similarly, civil rights by their very nature are opposed to orthodoxy and exclusion. Civil rights, as exemplified in Civil Rights Act and Voting Rights Act provisions in areas such as voting, education, and employment exist to protect racial, political,

13. Since the Fourteenth Amendment's Equal Protection clause used to desegregate public schools in *Brown* relied on the Fourteenth Amendment Equal Protection Clause but that clause only applies to states, the court held in *Bolling* that public school segregation was unconstitutional under the Fifth Amendment Due Process Clause. In effect, the court ruled that the equal protection clause is intricately tied to the due process clause.

14. Carey McWilliams, "The Witch Hunt and Civil Rights," *Nation* (June 28, 1952): 651.

15. Henry Louis Gates, Jr., "Let Them Talk," *New Republic* (September 20, 1993): 37.

16. Nan Hunter, "Escaping the Expression-Equality Conundrum: Toward Anti-Orthodoxy and Inclusion," *Ohio State Law Journal* 61 (2000): 1671-1724.

17. Thomas I. Emerson, *Toward a General Theory of the First Amendment* (New York: Random House, 1966) and *The System of Free Expression* (New York: Random House, 1970).

religious, ethnic and other minorities from being excluded from social and political environments. By virtue of being included, their dissents against any orthodoxy of the majority race, political perspective, religion, or ethnicity can become fuel for progress in social and political conditions.

The Evolution of Civil Liberty

Scholars who study the history of ideas have shown how many concepts, including political concepts, evolve as societies change.[18] For example, the concept of "liberalism" has evolved in the U.S. to mean a political orientation supporting robust civil liberties but allowing for more restrictions on economic liberty whereas the rest of the world still mostly associates "liberalism" with a defense of both robust civil and economic liberties. In the U.S., the latter is now characterized as "libertarianism" and associated with "classical liberalism."[19] The idea of civil liberty has evolved too. To illustrate some of the changes, consider two examples from U.S. history addressed by chapters in the book: freedom of speech and freedom of religion.

The free speech clause in the First Amendment to the U.S. Constitution states: "Congress shall make no law…abridging the freedom of speech…." Although the text has never been changed, our ideas about what legal protections for freedom of speech should be enforced in the U.S. have expanded dramatically since the nation's founding through two developments: incorporation (application of the Bill of Rights to state government as well as the federal government) and definitional change (changes in the legal doctrines determining what counts as speech and where the line between protected and unprotected speech is).

The U.S. Supreme Court first addressed incorporation in *Barron v. Baltimore* (1833). In that case, John Barron sued the city for loss of income to his shipping business caused by a city public works project altering the

18. Historian Arthur O. Lovejoy is credited with initiating the systematic study of the history of ideas after he started at John Hopkins University in 1910. His magnum opus was *The Great Chain of Being: A Study of the History of an Idea* first published in 1936 by Harvard University Press. Philip P. Wiener's five-volume *Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas* published in 1973 by Charles Scribner and Sons is one of the most ambitious attempts to survey the history of ideas.

19. Tianyi Ding, "From political philosophy to free speech: Speaker David Boaz traces the roots of liberalism at UC Berkeley," *The Weekender*, Oct. 28, 2018. https://www.dailycal.org/2018/10/26/political-philosophy-free-speech-speaker-david-boaz-traces-roots-liberalism-uc-berkeley/

course of streams emptying into Baltimore Harbor that rendered his wharf unusable. Barron claimed he was due compensation for his business losses under the just compensation clause in the Fifth Amendment. However, Chief Justice John Marshall, writing for the court, held that the text of the first ten amendments did not indicate any intention to apply them to state governments, and therefore the court could not apply them to the States. Although the case did not hinge on the First Amendment, the decision rejected incorporation for the entire Bill of Rights. This meant state governments could continue to restrict freedom of expression within whatever limits existed under state constitutions and legislation.

The Supreme Court did not incorporate anything in the Bill of Rights until it ruled in *Gitlow v. New York* (1925) that the free speech clause applied to state government due to the equal protection clause of the Fourteenth Amendment. However, the court did not incorporate the Bill of Rights generally—as Justice Hugo Black later argued it should.[20] Rather, the court selectively incorporated the free speech clause in that case and later incorporated other rights in individual decisions over time.[21] Some examples include freedom of the press incorporated in *Near v. Minnesota* (1931); freedom of assembly in *DeJonge v. Oregon* (1937); the right to a public trial in *In re Oliver* (1948); the right against unreasonable search and seizure in *Mapp v. Ohio* (1961); the right to petition government in *Edwards v. South Carolina* (1963); the prohibition on double jeopardy in *Benton v. Maryland* (1969), and more recently, the right to bear arms in *McDonald v. Chicago* (2010).

It must be pointed out that incorporating the free speech clause did not protect Gitlow's speech. Rather, the court upheld his conviction because the majority believed government may punish speech such as Gitlow's that advocated the unlawful overthrow of the government. Thus, the majority upheld the constitutionality of the New York statute, making it a crime to advocate the duty, need, or appropriateness of overthrowing government by force or violence.

To find Gitlow innocent, the justices would have had to incorporate the free speech clause *and* support stronger protections for free speech. However, the *Gitlow* decision employed the speech-restrictive "bad

20. Justice Black advocated "total incorporation" of the specific enumerated rights of the first eight amendments in *Adamson v. California*, 332 U.S. 46 (1947) and *Duncan v. Louisiana*, 391 U.S. 145 (1968).

21. Some of the Bill of Rights have not been incorporated such as the right to an indictment by a grand jury in *Hurtado v. California*, 110 U.S. 516 (1884) and the right to a jury trial in civil cases in *Minneapolis and St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916).

tendency test." The bad tendency test enabled government to suppress or punish virtually any "radical" speech or criticism of government. The test was inherited from the colonial era and the highly influential legal *Commentaries* of the eminent English jurist William Blackstone.[22] According to Blackstone, government should not impose prior restraints on speech or press, but it may impose criminal penalties for speech or press that had a tendency to undermine government or morals or cause harm. Some courts also required the accused to have intended the harm, but this provided little protection for defendants in actual practice because judges typically presumed even remote and speculative danger proved guilt.[23] Some cases in which the bad tendency test was applied include *People v. Croswell* (1804) convicting the defendant for criticisms of President Thomas Jefferson; *Commonwealth v. Morris* (1811) convicting the defendant for criticism of a sheriff; and *Updegraph v. Commonwealth* (1824) convicting the defendant of blasphemy. Initially, even truth was not a defense: Massachusetts, for example, did not make truth a defense against libel until 1855. The presumed bad tendency of abolitionist speech during the antebellum era led to its being banned by Southern states, silenced in Congress by a gag rule from 1836 to 1844, and subject to considerable suppression in the North.[24] The bad tendency test was used to uphold convictions for speech and press supporting labor rights, women's rights, minority rights, and anti-war speech.[25] The Supreme Court developed several tests in addition to the bad tendency test but did not explicitly reject it until *Brandenburg v. Ohio* (1969) replaced it with the "incitement to imminent lawless action" test.

Incorporation had to be supplemented by speech protective legal doctrines and tests to give the free speech clause substantive meaning in real life. Free speech and press did not have any meaningful constitutional protection for U.S. citizens until the Supreme Court struck down state restrictions on speech and press through the newly created speech-protective doctrines of overbreadth and void-for-vagueness in *Stromberg v. California*

22. Sir William Blackstone's *Commentaries on the Law of England* were published between 1765 and 1769 and are available at https://avalon.law.yale.edu/subject_menus/blackstone.asp

23. Timothy J. O'Neill, "The Bad Tendency Test," in David Schultz and John R. Vile, *The Encyclopedia of Civil Liberties in America* (London and New York: Routledge, 2015), 61.

24. Michael Kent Curtis, *Free Speech, "The People's Darling Privilege"* (Durham: Duke University Press, 2000).

25. David M. Rabban, *Free Speech in Its Forgotten Years* (Cambridge: Cambridge University Press, 1997).

(1931) and *Near v. Minnesota* (1931) and used the "clear and present danger" test (first articulated by Justice Oliver Wendell Holmes, Jr. to convict a World War I dissenter in *Schenk v. United States* (1918)) for the first time to strike down a state speech restriction in *Herndon v. Lowry* (1937). Let us briefly consider each case.

California, like most other states at the time, had enacted laws to suppress and punish communist and other dissident political speech. Its "Red Flag Law," enacted in 1919, was intended to suppress display of the (red) communist flag. The law prohibited the display of "a red flag, banner or badge" in any public place or meeting place or public assembly. An anticommunist group persuaded a local sheriff to search a youth summer camp that the group suspected had communist sympathizers. The search turned up a red flag and led to the arrest and conviction of Yetta Stromberg, a college student teaching at the camp. Her conviction was reversed only when the U.S. Supreme Court held that the Red Flag Law was void-for-vagueness. Its meaning and application were too unclear for ordinary citizens to have a reasonable understanding of what was protected and unprotected expression, and because its overbroad language empowered government to punish red flag holders even when their red flag, banner, or badge did not represent a symbol of opposition to established government or serve as a stimulus to anarchistic action.

In 1925, Minnesota enacted a "gag law" authorizing permanent legal injunction against anyone who created a "public nuisance" by publishing, selling, or distributing a newspaper, magazine, or other periodical publication found to be "obscene, lewd, and lascivious" or "malicious, scandalous and defamatory." J.M. Near published *The Saturday Press* newspaper, a "scandal sheet" filled with anti-Catholic, anti-Semitic, anti-Black and anti-labor diatribes as well as false accusations against elected officials. Near was arrested and convicted of violating the gag law. However, the U.S. Supreme Court overturned his conviction when it held that Minnesota's "gag rule" was an unconstitutional prior restraint of the press. In other words, the court ruled that government may prosecute and punish proven defamation after publication, but government may not ban publication in anticipation of it being defamatory. The decision gave teeth to the presumption, going back to Blackstone's *Commentaries*, against government licensing schemes designed to control or suppress information.

Angelo Herndon, a 19-year-old black communist labor organizer in Atlanta, Georgia, was convicted in 1932 of incitement to insurrection for possessing communist literature in his home after leading a biracial protest march to get city hall to provide relief to the poor during the worst time of

the Great Depression.[26] Herndon was convicted in a racist trial by an all-white jury who offered the "merciful" punishment of twenty years on a chain gang as opposed to the death sentence—never mind that no one lived longer than 10 years working on a Georgia prison chain gang. Herndon lost his first appeal to the Supreme Court in 1935 on a bizarre technicality, but he did get a second trial focused on the merits of his case at the Supreme Court in 1937. This time, the court ruled in his favor when two justices changed their vote after considering the case on its merits. Chief Justice Charles Evans Hughes writing for the majority used the clear and present danger test for the first time to protect expression. The Georgia incitement law was unconstitutional because it was, like California's Red Flag Law, overbroad and unduly vague.

That the Supreme Court incorporated the free speech clause and began using more speech-protective tests during the same time period was not coincidence. On the court, Justices Louis Brandeis and Oliver Wendell Holmes, Jr. led the revolution in free speech protection starting with a series of dissents in World War I cases that gradually became majority opinions in the 1930s. Off the court, activists such as Theodore Schroeder, scholars such as Zechariah Chafee, Jr., and organizations such as the Free Speech League and its successor American Civil Liberty Union led the fight to persuade Americans to support more robust legal protections for speech. The persuasiveness of their arguments (and other factors) meant that the initial constitutional protections for speech created by the Supreme Court in the 1930s were followed by further protections for speech throughout the 20th century.[27]

Geoffrey Stone attributes the court's continued expansion of constitutional protections for expression to the court learning numerous free speech "lessons."[28] Some of these lessons include the court coming to understand that, while government has a legitimate right to control its own messages (i.e., the government speech doctrine), it should not restrict the expressive content of others unless the expression constitutes a true threat, libel, sexual harassment, extortion or other narrowly defined category of illegal speech. It also realized a narrowly tailored content-neutral speech

26. For more details on the Herndon case, see Charles Martin, *The Angelo Herndon Case and Southern Justice* (Baton Rouge: Louisiana State University Press, 1976).
27. Philippa Strum, *Whitney v. California and American Speech Law* (Lawrence: University Press of Kansas, 2015); H.L. Pohlman, *Justice Oliver Wendell Holmes: Free Speech and the Living Constitution* (New York: New York University Press, 1991); and Rabban, *Free Speech in Its Forgotten Years*.
28. Geoffrey R. Stone, "Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century," *Pepperdine Law Rev.* 36 (2009): 273-99.

law restricting the time, place, and manner of expression that serves a significant government interest and leaves open ample alternative channels of communication can be justified. For example, restrictions on loud protests near schools and abortion clinics have been upheld respectively in *Grayned v. City of Rockford* (1972) and *Madsen v. Women's Health Center* (1994), but a city cannot ban all picketing near a school except labor picketing because that is not content neutral (*Police Department of Chicago v. Mosley* (1972) or require all door-to-door solicitors to have a permit from the mayor's office (*Watchtower Bible & Tract Society v. Stratton* (2002).

There always have been and will continue to be disagreements and controversies over what speech is protected, but it is indisputable that the free speech legal protections available today are dramatically stronger than the legal protections existing at the nation's founding or even a hundred years ago. The constitution did not protect citizens from state speech restrictions until 1925 (*Gitlow v. New York*), did not protect the speech of a political extremist until 1937,[29] high school students until 1969,[30] college students until 1972,[31] or commercial speech until 1976.[32]

Contemporary protections for free speech are not set in stone and should not be taken for granted. New expressive technologies raise new questions, and there always is potential for the Supreme Court to change direction (for better or worse) by chiseling away at precedents or directly overturning them. An example of the "chiseling away" technique is the court's narrowing of the fighting words doctrine. The fighting words restriction on speech was created in 1942 in a case involving a Jehovah's Witness convicted of directing epithets at a police officer,[33] but the court has never upheld another fighting words conviction.[34] Instead, the court has consistently whittled away at the doctrine through further decisions to the point that it has a very narrow scope.[35] An example of the "directly overturning

29. *Herndon v. Lowry*, 301 U.S. 242.
30. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503.
31. *Healy v. James*, 408 U.S. 169.
32. *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748.
33. *Chaplinsky v. New Hampshire*, 315 U.S. 568.
34. However, there have been a few state court convictions for fighting words. See *City of Little Falls v. Witucki* (MN 1980) and *State v. Nelson* (MN Ct. App., 2014).
35. The fighting words doctrine originally banned (i) words that by their very utterance inflict injury and (ii) speech that incites an immediate breach of the peace, but *Gooding v. Wilson* (1972) limited the doctrine to only incitement. *Hess v. Indiana* (1973) and *Eaton v. City of Tulsa* (1974) further narrowed the doctrine by holding the speech must almost certainly provoke a reasonable person to immediate

strategy" is the expanded protection for corporate political campaign spending. In 1990, the court upheld the Michigan Campaign Finance Act prohibition on corporations using treasury money to make independent expenditures to support or oppose candidates in elections on the ground that corporate wealth can unfairly influence elections;[36] however, the court reversed that decision in 2010 when it struck down the federal Bipartisan Campaign Reform Act's prohibition of all independent expenditures by corporations and unions as a violation of free speech.[37]

Freedom of religion under the First Amendment has two components: the "establishment clause" prohibiting government from "establishing" religion and the "free exercise clause" prohibiting government from interfering with religious practices. Like the free speech clause, the establishment and free exercise clauses originally were applied only to federal government. The establishment clause was understood to prohibit a national church, but not to prohibit a state supported church. State governments could "establish" religion within whatever parameters were acceptable within the state constitution and legislation. For example, New Hampshire did not abandon its establishment of Congregationalism until 1817; Connecticut until 1818; and Massachusetts until 1833. Again, many states or school districts required public school students to pray daily and engage in devotional (Protestant) Bible reading until the Supreme Court banned these practices in the 1960s.

The Supreme Court incorporated the free exercise clause in *Cantwell v. Connecticut* (1940). In an attempt to reduce or prevent fraudulent solicitation, Connecticut enacted a law requiring a solicitor to obtain a certificate from the secretary of the public welfare council to ensure the solicitor's cause was "a religious one or is a bona fide object of charity or philanthropy" and whether the solicitation "conforms to reasonable standards of efficiency and integrity." Newton Cantwell, a Jehovah's Witness, and his two sons went door-to-door in New Haven with books, pamphlets, and a phonograph attacking other Christian denominations, especially Catholicism. When they played a recording for two men who had consented to hearing it, the men wanted to assault them but restrained themselves. However, Cantwell was arrested later and convicted of failing to obtain the required certificate and for breach of the peace. Cantwell's two convictions were upheld until they reached the U.S. Supreme Court. The court held that the state law requiring a certificate to share one's religious

violent retaliation. *Cohen v. California* (1971) narrowed the doctrine to expression directed at an individual in a face-to-face encounter.

36. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652.

37. *Citizens United v. Federal Election Commission*, 558 U.S. 50.

beliefs in public spaces was unconstitutional because it allowed the state to arbitrarily determine what causes were "religious." Moreover, the court held that there was no breach of the peace because Cantwell acted peacefully and with the consent of the listeners. The recording offended the listeners, but Cantwell did not personally insult or assault them.

The court has expanded protections for free exercise of religion since 1940. Many of the cases—like Cantwell—involved Jehovah's Witnesses. Their aggressive proselytizing and refusal to pledge allegiance or salute the flag because they considered it idolatry made them targets for persecution and suppression. Many of these cases established major First Amendment precedents. Just three years after holding Jehovah's Witness public school children could be forced to salute the flag in *Minersville School District v. Gobitis* (1940), the court reversed itself in *West Virginia State Board of Education v. Barnette* (1943) holding that "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Although *Barnette* technically speaking was grounded in the free speech clause rather than the free exercise clause, it protects free exercise and is widely regarded as one of the court's most important First Amendment rulings. Decisions specifically grounded in the free exercise clause include decisions protecting religious practices of government employees in *Sherbert v. Verner* (1963), empowering parents to exempt their children from public schools for religious reasons in *Wisconsin v. Yoder* (1972), and protecting religious animal sacrifice in *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993).

On the other hand, the Supreme Court also has rejected some claims to free exercise when it has found a legitimate and sufficiently strong government interest in limiting a religious practice. Consider three well known examples. *Goldman v. Weinberger* (1986) upheld an Air Force ban on wearing religious headwear while on duty in a case in which an Orthodox Jewish officer who was a clinical psychologist argued for his right to wear a yarmulke while in uniform. In a case involving construction of a road through a national park considered sacred by Native Americans, the court held in *Lyng v. Northwest Protective Cemetery Association* (1988) that government need not consider religious impacts in its land use decisions. *Employment Division v. Smith* (1990) held that Native American use of peyote in religious ceremonies did not trump an otherwise legitimate criminal statute banning use of the hallucinogen.

The establishment clause was incorporated seven years after *Cantwell* in *Everson v. Board of Education* (1947). A New Jersey school

district reimbursed costs of parents of public and private schooled children who used public transportation to get to and from school. Although the court majority held that these reimbursements did not violate the constitution because they were "separate and so indisputably marked off from the religious function," both the affirming and dissenting Justices held that the First Amendment requires a “wall of separation” between government and religion.

Since *Everson*, the Court has increased scrutiny of government entanglements with religion. It struck down mandatory prayer in public schools in *Engel v. Vitale* (1962) and mandatory devotional Bible reading in *Abington School District v. Schempp* (1963). *Lemon v. Kurtzman* (1971) created a three-part test determining when government crosses the line into “establishing” religion: (1) Does the law have a secular purpose? (2) Is the primary effect of the law to advance religion? (3) Does the law foster excessive government entanglement in religion? That is, a law without a secular purpose whose primary effect is to advance religion or foster excessive government entanglement with religion is presumptively unconstitutional. In *Allegheny County v. Greater Pittsburgh ACLU* (1989) the court addressed Christmas and Hanukkah holiday displays on public property in downtown Pittsburgh, holding that government displays of religious symbols that carry the imprimatur of government endorsement are unconstitutional but religious symbols on public property that lack such imprimatur are constitutionally permissible.

More recently, the Supreme Court has moved away from the Lemon Test to apply the more religion-protective “Endorsement Test” (government entanglement with religion is constitutionally permissible unless it constitutes government endorsement of religion) or “Coercion Test” (government entanglement with religion is constitutionally permissible unless it is coercive). The result is that the same or similar religious displays might be protected or unprotected under the establishment clause depending on crucial small differences in the facts, the interpretation of those facts by justices, and the test used. For example, the display of the Ten Commandments on government property has been found to be unconstitutional in *McCreary v. ACLU* (2005), a case involving displays in two Kentucky courthouses, but constitutionally permissible in *Van Orden v. Perry* (2005) because the Commandments were part of a larger display containing 17 monuments and 21 historical markers celebrating the “people, ideals, and events that compose Texan identity.”

In short, the meaning and enforcement of the establishment and free exercise clauses—like freedom of speech and other civil liberties—has evolved over time and will continue to change.

A final comment about the complexity of civil liberties: sometimes they work together and sometimes they conflict. Consider two cases in which civil liberties work together. The Cantwell case involving the prosecution of the Jehovah's Witness for playing an anti-Catholic recording to a consenting but offended audience—and any other case involving disputed religious expression such as *Barnette*—implicates both the free speech clause and the free exercise clause. *Edwards v. South Carolina* (1963), a peaceful civil rights protest march by high school students to the state capitol that resulted in their arrest for breach of the peace was held by the Supreme Court to infringe their rights to free speech, freedom of assembly, and right to petition government for a redress of grievances. An example in which civil liberties conflict is *Llyod v. Tanner* (1972) in which citizens wanted to protest the Vietnam War by distributing handbills in a privately owned and operated shopping mall. The owners' right to property conflicted with the protestors' right to assemble and speak. Although the mall owners won in that case, mall owners in California lost in a similar case, *Pruneyard Shopping Center v. Robins* (1980), because California had a law protecting free speech rights in parts of private malls regularly open to the public (subject to reasonable time, place, and manner restrictions) and the Supreme Court allows states to provide broader rights in their own constitutions than the federal Constitution so long as those rights do not infringe on any federal constitutional rights.

The Chapters

Before introducing the following chapters, I want to make two preliminary observations. First, they are multidisciplinary in the sense that they are written by authors trained and working in a variety of academic disciplines including political science, history, communication studies, literature, and women's and gender studies. This multidisciplinary approach is important because too many people wrongly assume civil liberty is a topic reserved for law or political science. To the contrary, civil liberty is relevant to every discipline. Valuing robust free speech is important to the academic enterprise supporting classroom and academic discussion and debate, and the competition of ideas sifts and winnows evidence to produce new discoveries and innovation in business, the sciences, and much more.

Second, the chapters address a wide variety of civil liberties rather than focus on a single civil liberty as many existing volumes do. Five chapters (Blakeman, Brooker, Orcholski, Thomas, and Reuter) address one or more aspects of the First Amendment; one chapter addresses the right to property (Hamilton); and the final chapter addresses the pedagogy of

teaching controversial civil liberty issues and the importance of free speech in the classroom (Legleitner). Having multiple disciplines and multiple topics enables readers, especially those studying civil liberty for the first time, to begin to understand the broad scope of civil liberty and consider some of the relationships between civil liberties.

In Chapter Two, John Blakeman addresses "spatial" dimensions of the establishment and free exercise clauses. His goal is not to defend or criticize any particular view of religious liberty or any particular judicial decision regarding religious liberty; rather, he aims to draw our attention to the role of space or location in which legal conflicts over religious liberty occur. Such spaces include religious displays on public property, government regulation of built or natural environments considered sacred, and attempts by religious groups to control political space (that is, government policy or law). He also addresses the metaphorical space religious groups seek to create to buffer themselves from government regulation or interference. Blakeman concludes his study with several questions for further research. Are there spaces that are not contested? If so, why? What leads a judge or justice to view a contested religious liberty space as protected or unprotected?

Russell Brooker examines in Chapter Three how African Americans responded in a multitude of ways to the denial of their civil liberties from 1889 to 1929, the worst period of the Jim Crow Era. Drawing on African American books, articles, and speeches written during the era, Brooker presents evidence demonstrating that even though virtually all African Americans opposed their subordinated second-class citizenship under the thumb of Jim Crow laws, many of them found things they could still celebrate and reasons to hope for a better future. He concludes with a brief survey of contemporary African American attitudes toward their social, political, and economic status. Although those attitudes appear to be quite negative, Brooker suggests this lesson: Jim Crow was better than slavery, and today is better than Jim Crow. But all three—slavery, Jim Crow, and today—are far removed from the promise of American democracy.

In Chapter Four, Megan Marie Orcholski discusses the importance of civil liberties and their relationship to civil rights movements and the complexities that intersectionality introduces into the struggle for civil liberty and civil rights. She argues that Frances Beal's use of "enemyship" to contextualize and combat the marginalization of black women within the Civil Rights and Women's Liberation movements was and continues to be a powerful tool to unite disparate and historically competing groups against the normalization of unequal civil liberties and civil rights. After examining the rhetorical construction of enemies and enemyship, and how enemyship

is negotiated in the struggle for civil liberty, Orcholski draws several lessons from Beal's work relevant to contemporary civil liberty and civil rights struggles. First, it helps people recognize where there is a deficit in civil liberty and neglect of specific subgroups. Second, it provides insight into how to use enemyship effectively, that is, as a means to find the right balance between the opponent qua relatable fellow human and the opponent qua opponent. Third, it clarifies how groups can mobilize together to effect change while acknowledging struggles within the movement.

Queer J. Thomas addresses the role of "outspeech" (constitutionally protected sexual expression) in Chapter Five. He argues that the analysis and defense of outspeech is necessary to move sexual citizenship models away from the predominant but constricted neoliberal view. Using the example of contemporary sculptures by Charles Ray, he begins by conceptualizing heteronormativity and its close relationship to neoliberal elites who control the political economy and terms of sexual citizenship. Thomas moves on to analyze sexual regulation in light of neoliberalism's anti-statist stance, arguing that regulations that make queer sexualities invisible are viewed as separable from political economies, and sexual regulations that promote queer visibility frequently must be justified using political economy arguments and equality frameworks that privilege heteronormativity and further its hegemony. This chapter shines a light on the complexity of civil liberties by showing that freedoms cannot be evaluated in a vacuum, isolated from extant socio-political and economic realities in the democracies where liberties are espoused. He finishes by arguing the state should legitimize public sexual expression in order to make queer participation in neoliberal economies and democracies more meaningful and potentially beneficial for everyone.

In Chapter Six, Kathryn Nicole Reuter investigates the Food Not Bombs movement to show how organized acts of compassion to vulnerable populations are actually radical acts with the dangerous potential to transgress norms of social exclusion and division and lead the State to suppress civil liberties. She begins with an account of the government's aggressive policing of the Food Not Bombs movement in the late 1980s and throughout the 1990s that challenged government marginalization of homeless people. Arguing that homelessness is excluded from mainstream society, regarded as surplus, and neglected to the point of death, Reuter shows how Food Not Bombs' food sharing actions were suppressed despite their non-violent and humanitarian aims. She compares government interference with Food Not Bombs' support for homeless people with more recent government interference with water sharing and other humanitarian aid to (im)migrants at the Mexico-U.S. border. Like homeless people, these

(im)migrants are viewed as Other and a threat. Thus, support for homeless people and (im)migrants both have provoked debate about what is acceptable as an act of protest, particularly by whom and in what space. Reuter concludes the State is wrong to marginalize homeless people and (im)migrants and wrong to suppress expressive acts of solidarity, generosity, and mutual aid toward these marginalized people.

Andrew Hamilton takes readers in a new direction with a discussion of capitalism and the right to property in Chapter Seven. He focuses on an age-old quandary noticed by Plato: the conflict between wealth and virtue. The quandary seems to be even more troublesome in capitalism given its overarching profit motive and the toxic effects of luxury and consumerism. Both undermine the moral foundations necessary for the proper functioning of commercial society. Hamilton devotes most of the chapter to a study of the work of Daniel Defoe and Adam Smith illustrating the paradox and explaining their solutions to it. Both Defoe and Smith argue that wealth and virtue can be properly balanced via the mechanism of approbation; that is, they believe our desire for the approval of others will stimulate us to be honest, temperate, hard-working, and so forth. Yet Hamilton finishes by noting that the conditions under which personal virtue can effectively restrain profit-driven vice seem to be quite limited, and that our current system is not functioning properly (as evidenced by such facts as increasing economic inequality, incivility, political divisiveness, and general social ill-health). The reader is left with a profound question: how, if at all, can we re-establish the socio-ethical bonds necessary to a healthy commercial society?

The closing chapter by Rickie-Ann Legleitner also shifts the reader's focus: how do we effectively teach about civil liberties given their highly controversial nature? Drawing on the scholarship of teaching as well as her own classroom successes and failures, Legleitner offers a series of guidelines for keeping students engaged, open-minded, and motivated even when the subject matter and personal opinions can be divisive, uncomfortable or offensive, and emotionally driven. Her suggestions are not just "common sense" and many will challenge previous ways an instructor has conducted a class. In brief, she suggests that instructors: (1) collaboratively develop a classroom environment policy with each class, (2) admit their own subjectivity, (3) acknowledge but also dismantle their position of power, (4) note the learning process will involve moments of discomfort and their willingness to help students deal with those moments, (5) encourage and reward questions, (6) require reasoning and evidence while also validating student opinions, (7) guide student learning rather than