Chapter 6

The Right to Freedom of Speech

Free speech is our most fundamental—and our most contested—right. It is an essential freedom because it is how we protect all of our other rights and liberties. If we could not speak openly about the policies and actions of government, then we would have no effective way to participate in the democratic process or protest when we believed governmental behavior threatened our security or our freedom. Although Americans agree that free speech is central to democratic government, we disagree sharply about what we mean by speech and about where the right begins and ends. Speech clearly includes words, but does it also include conduct or symbols? Certainly, we have the right to criticize the government, but can we also advocate its overthrow? Does the right to free speech allow us to incite hate or use foul language in public?

The framers of the Bill of Rights understood the importance of free expression and protected it under the First Amendment: "Congress shall make no law. . . . abridging the freedom of speech." Both English history and their own colonial past had taught them to value this right, but their definition of free speech was much more limited than ours. Less than a decade after the amendment's ratification, Congress passed the Sedition Act of 1798, making it a crime to criticize the government. Many citizens believed government could forbid speech that threatened public order, as witnessed by numerous early nineteenth-century laws restricting speech against slavery. During the Civil War, thousands of antiwar protestors were arrested on the theory that the First Amendment did not protect disloyal speech. Labor unrest in the 1800s and 1890s brought similar restraints on the right of politically unpopular groups, such as socialists, to criticize government's failure to protect working people from the ills of industrialization and economic depression.

Freedom of speech did not become a subject of important court cases until the twentieth century when the Supreme Court announced one of the most amous principles in constitutional law, the clear and present danger test. The test was straightforward: government could not restrict speech unless it posed a known, immediate threat to public safety. The standard sought to balance the need for order with the right to speak freely. At its heart was the question of proximity, or closeness, and degree. If speech brought about an action that was dangerous under the immediate circumstances, such as falsely yelling "fire" in a crowded theater, then it did not enjoy First Amendment protection.With this case, *Schenck v. United States* (1919), the Court began a decades-long process of seeking the right balance between free speech and public safety.

The balance, at first, was almost always on the side of order and security. Another case decided in 1919, *Debs v. United States*, illustrates how restrictive the test could be. Eugene Debs was a labor leader from Indiana who had run for President four times as the candidate of the Socialist Party of America, once

"The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty."

—Pennsylvania Constitution (1790)

"The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

—Justice Oliver Wendell Holmes, Jr., *Schenck v. United States* (1919)

polling more than one million votes. At a June 1918 rally in Chicago, while U.S. troops were fighting in World War I, he told the working-class crowd, "You need to know you are fit for something better than slavery and cannon fodder." He was sentenced under an existing federal statute to twenty years in prison for inciting disloyalty and obstruction of military recruitment, which the Supreme Court upheld.

For the next five decades, the Court wrestled with the right balance between speech and order. Much of what defined freedom of speech emerged from challenges to the government's ability to regulate or punish political protest. Each case brought a new set of circumstances that allowed the justices an opportunity to modify or extend the clear and present danger test. Many decisions recognized the abstract right of individuals to speak freely, but each one hedged this right in important ways. Always in the background were conditions that pointed to disorder, dissension, and danger—the Great Depression, World War II, and the Cold War, among them—so the justices were cautious in expanding a right that would expose America to greater threats. These cases, however, gradually introduced a new perspective on the value of free speech in a democracy, namely, the belief that truth is best reached by the free trade in ideas.

The belief that society is best served by a marketplace of ideas open to all opinions, no matter how radical, ultimately prevailed. In 1927, the Court had endorsed what came to be called the bad tendency test: if officials believed speech was likely to lead to a bad result, such as urging people to commit a violent act, it was not protected under the First Amendment even if no violence occurred. By 1969, however, similar facts produced a different outcome. Ku Klux Klan members in Ohio invited a television station to film their rally. Waving firearms, they shouted racist and anti-Semitic slurs and threatened to march on Congress before their leader was arrested and later convicted under a state law banning speech that had a tendency to incite violence. The Supreme Court overturned his conviction in *Brandenburg v. Ohio* and established the rule still in effect today: the First Amendment protects the right to advocate the use of force or violence, but it does not safeguard speech likely to incite or produce an immediate unlawful act. The Brandenburg test has allowed Nazis to march, Klan members to hold rallies, and other extremist groups to promote views far outside the mainstream of public opinion.With few exceptions—fighting words and obscenity, for example—government today cannot regulate the content of speech.

Even as society was coming to accept a wide range of political ideas, opposition to an unpopular war raised other questions about the limits and forms of free speech. By the mid- to late 1960s, the Vietnam War divided Americans.

Although many citizens supported the use of U.S. troops to stop communism in Asia, a growing minority, including many draft-age young people, took to the streets to oppose the war. The protestors did not limit their efforts to antiwar speeches; they also wore shirts with obscene slogans, burned draft cards, and desecrated American flags. Using these symbols to protest, they argued, was a form of free speech. Soon, the Supreme Court faced the question squarely in a case involving a youthful protestor from the nation's heartland: is symbolic speech—messages using symbols or signs, not words—protected by the First Amendment?

The first large-scale American demonstration against the Vietnam War occurred in November 1965 when more than 25,000 protestors converged on the nation's capital. Fifty Iowans made the long bus ride, and on the way home they decided to make their opposition known locally by wearing black armbands to work and school. One member of the peace contingent was Lorena Tinker, the wife of a Des Moines Methodist minister and mother of five children. Mary Beth Tinker, a thirteen-year-old eighth grader, followed her mother's suggestion and became one of a handful of local public school students who wore this symbol of protest to school. This act placed her in the middle of a national controversy about student rights and freedom of expression.

In many ways, Mary Beth was a normal eighth grader. She was a good student who enjoyed singing, spending time with her friends, and taking part in church activities.What made her different was a commitment to social justice, a passion encouraged by her parents, both of whom were known for their activism. Her parents wanted their children to share their moral and social values, and Mary Beth responded eagerly to their invitation to participate with them. By the time she became a teenager, she already had attended her first protest, accompanying her father to a rally about fair housing.

Mary Beth Tinker, her brother, John, and a handful of Des Moines students planned their demonstration for December 16, 1965. The students' aim was not to protest the war but to mourn its casualties, Vietnamese and American, and to show support for proposed peace talks. School officials, however, promised to suspend anyone who came to school wearing the armbands, and the school principal suspended Mary Beth and sent her home. She was one of five students suspended that day for wearing the offending cloth. Significantly, the school ban applied only to armbands, in other words, to students who opposed the Vietnam War; a number of students that day wore an array of other symbols, including the Iron Cross, a Nazi medal.

When the school board upheld the suspensions, the Tinkers persuaded the Iowa Civil Liberties Union to take the case to federal court. Two lower federal courts agreed with the school's action, rebuffing the argument that the policy violated the First Amendment guarantee of free speech. The Supreme Court decided otherwise. In its 7-to-2 decision, announced in February 1969, the justices held that the wearing of armbands is a symbolic act akin to "pure speech" and protected by the right to free expression. The protesting students posed no threat to the order required for effective instruction, nor did the wearing of armbands interfere with the school's educational mission. In this instance, the balance between order and liberty was weighted on the side of the First Amendment. Students and teachers, the Court concluded, do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

Symbolic speech has been the focus of some of our greatest constitutional drama.Words may be powerful and provocative, but symbols are often more

"Restriction of free thought and free speech is the most dangerous of all subversions. It is the one un-American act that could most easily defeat us."

—Justice William O. Douglas, "The One Un-American Act" (1953)

inflammatory because they are visual and evoke an emotional response. We live in an age when we use pictures and symbols to convey important messages, whether in politics or the marketplace. For these reasons, the Supreme Court's recognition of symbolic speech as a right protected by the First Amendment has been a significant development. Twenty-five years after Mary Beth Tinker put on her armband in remembrance of the war dead, Life magazine featured a handful of civil liberties cases to celebrate the bicentennial of the Bill of Rights. Mary Beth's case was included, even though the rights of students remained, and still are, more limited than those of adult citizens. But her actions as an eighth grader expanded our conception of constitutionally protected speech to include the symbols we use to express our convictions.

More than most other recent decisions, cases involving symbolic speech have revealed how contentious the right of free speech remains in our society. In 1989, the Supreme Court ruled that the First Amendment protected individuals who burned the American flag in protest. This decision was highly controversial, and it has resulted in numerous attempts to amend the Constitution to protect the flag and, in effect, limit speech in this circumstance. The outcome of this effort is uncertain, but the debate raises important questions: What role does this right play in our democracy? How does it contribute to our liberty as Americans?

The right to speak freely, without restraint, is essential to democratic government because it helps us develop better laws and policies through challenge, rebuttal, and debate.When we all have the ability to speak in the public forum, offensive opinions can be combated with an opposing argument, a more inclusive approach, a more effective idea. We tolerate offensive speech and protect the right to speak even for people who would deny it to us because we believe that exposing their thoughts and opinions to open debate will result in the discovery of truth. This principle is an old one in Western thought. U.S. Supreme Court Justice Oliver Wendell Holmes's dissent in *Abrams v. United States*, a 1919 case suppressing free speech, is a classic statement of this view: "The best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [the public's] wishes safely can be carried out."

Governmental actions to deny differing points of view, even distasteful or unpopular opinions, rob us of the range of ideas that might serve the interests of society more effectively. In a case decided almost a decade before *Tinker v. Des Moines*, the Supreme Court found this rationale especially applicable to the classroom. "The Nation's future," the justices wrote, "depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues." As a nation, we are willing to live with the often bitter conflict over ideas because we believe it will lead to truth and to improved lives for all citizens.We recognize that freedom of speech is the first freedom of democracy, as the English poet John Milton argued during his own seventeenth-century struggle to gain this right: "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties." The ability to speak freely allows us to pursue truth, to challenge falsehoods, to correct

mistakes—all are necessary for a healthy society.

Free speech also reflects a commitment to individual freedom and autonomy, the right to decide for ourselves and to pursue our own destiny. Throughout our history, we have been so committed to individual choice that many foreign observers believe it is our most characteristic trait. We see it reflected daily in everything from advertising slogans—"Have It Your Way"— to fashion state-

ments, but fail to recognize how closely freedom is tied to the right to speak freely. Free speech guarantees us an individual voice, no matter how far removed our opinions and beliefs are from mainstream society. With this voice we are free to contribute as individuals to the marketplace of ideas or a marketplace of goods, as well as to decide how and under what circumstances we will join with others to decide social and governmental policies.

A commitment to free speech, of course, will not resolve all conflict, not if our history is any guide.The debate is most contentious during times of war or other moments when national security is at stake. Even then—perhaps especially then—we will continue to fight over words and symbols because they express our deepest hopes and our most worrisome fears. This contest over what speech is acceptable and what is not has been a constant theme of our past. Rarely do these struggles produce a neat consensus. More often, intemperate rhetoric and bitter division have been their legacy, and this angry clamor is one of the basic noises of our history.What makes the struggle to protect free speech worthwhile is its ability to serve as a lever for change.When we practice our right to speak openly, we are defining the contours of our democracy. It is messy work, but through it, we keep the Constitution alive and, with it, our dreams of a just society.

"Free Trade in Ideas"

Jacob Abrams was a Russian immigrant and anarchist convicted of violating the Sedition Act of 1918, which made it a crime to advocate anything that would impede the war effort during World War I. In 1917 Justice Oliver Wendell Holmes, Jr., had written the Court's opinion in Schenck v. United States, upholding similar convictions because Congress had a right to regulate speech that posed a "clear and present danger" to public safety. But by the time Abrams's appeal reached the Court in 1919, Holmes had modified his views. Disturbed by antiradical hysteria, he dissented from the majority's decision upholding Abrams's conviction in Abrams v. United States. His eloquent discussion of the connection between freedom of speech and the search for truth soon became the standard used by the Supreme Court to judge free speech cases until Brandenberg v. Ohio in 1972. The First Amendment, Holmes reasoned, protected the expression of all opinions "unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. . . .

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law abridging the freedom of speech." Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.

"Malicious Words" versus "Free Communication"

In response to fears about imminent wars with France in 1798, the Federalist-controlled Congress passed a series of four acts known collectively as the Alien and Sedition Acts. Section 2 of the Sedition Act made it a crime to make defamatory statements about the government or President. (Sedition is an action inciting resistance to lawful authority and tending to lead to the overthrow of the government.) The act was designed to suppress political opposition. Its passage by Congress reveals how limited the definition of the right of free speech was for some Americans only a few years after the ratification of the First Amendment.

Sec. 2. . . . That if any person shall write, print, utter, or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United Sates, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

James Madison, congressman from Virginia, and Thomas Jefferson, the sitting Vice President, secretly drafted resolutions protesting the Sedition Act as unconstitutional. The Virginia and Kentucky legislatures passed these resolutions in 1798. Both resolutions especially pointed to the act's violation of First Amendment protections, as seen in the Virginia Resolution here.

Resolved, . . . That the General Assembly doth particularly protest against the palpable and alarming infractions of the Constitution in the two late cases of the "Alien and Sedition Acts" passed at the last session of Congress; the first of which exercises a power no where delegated to the federal government, and which by uniting legislative and judicial powers to those of executive, subverts the general principles of free government; as well as the particular organization, and positive provisions of the federal constitution; and the other of which acts, exercises in like manner, a power not delegated by the constitution, but on the contrary, expressly and positively forbidden by one of the amendments thereto; a power, which more than any other, ought to produce universal alarm, because it is levelled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed, the only effectual guardian of every other right.

That this state having by its Convention, which ratified the federal Constitution,expressly declared, that among other essential rights, "the Liberty of Conscience and of the Press cannot be cancelled, abridged, restrained, or modified by any authority of the United States," and from its extreme anxiety to guard these rights from every possible attack of sophistry or ambition, having with other states, recommended an amendment for that purpose, which amendment was, in due time, annexed to the Constitution; it would mark a reproachable inconsistency, and criminal degeneracy, if an indifference were now shewn, to the most palpable violation of one of the Rights, thus declared and secured; and to the establishment of a precedent which may be fatal to the other.

The Sedition Act expired in 1801 but not until a number of the Federalists' opponents, including Congressman Matthew Lyon of Vermont, had been convicted of violating the law.Today, historians consider the Sedition Act to have been a gross misuse of government power. In 1798, the Kentucky Resolutions focused on the rights of states to determine the limits of free speech.

Resolved, that it is true as a general principle, and is also expressly declared by one of the amendments to the Constitution, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people;" and that no power over the freedom of religion, freedom of speech, or freedom of the press being delegated to the United States by the Constitution, nor prohibited by it to the States, all lawful powers respecting the same did of right remain, and were reserved to the States or the people: that thus was manifested their determination to retain to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use should be tolerated, rather than the use be destroyed.