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Free Speech

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

-- First Amendment to the U.S. Constitution

When Congress adopted the Bill of Rights in 1789, the first of the ten amendments prohibited the federal government from interfering with the rights of the people in four broad areas: religion, speech, the press and assembly. Many consider this section of the Constitution the cornerstone of our democracy. Some scholars have argued that the foundation for all other freedoms are those guaranteeing free speech and a free press.

The concept behind that view is that access to information by the public is the basis for a functioning democracy. James Madison, the fourth president of the United States, said it this way in 1822: "Knowledge will forever govern ignorance. And a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or perhaps both."

What this means is that a free people must have full access to information about their government, and that they must be allowed to share this information with others. In practice, "the press," or as we know it today, the news media, are the agents of the people in acquiring and distributing that information. The First Amendment guarantees access to information and guarantees the right to distribution information.

When the Bill of Rights was adopted, though, freedom of speech was a new concept. The prevailing view then was that all it protected was freedom to speak or publish. It was simply the absence of censorship before speaking or publishing -- but there could be government punishment afterward for what was known as "seditious libel." Seditious libel was a legal tool used to stifle criticism of the government.

Congress passed the Alien and Sedition Act in 1798, defining as criminal "any false, scandalous and malicious" writing or utterances against the government, Congress or the President. Libertarian thought emerging after the turn of the century eventually led to the overturn of the act, although through much of the 19th century similar laws were used to suppress the speech of abolitionists, religious minorities, suffragists, pacifists and labor organizers.



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During that time, the First Amendment wasn't a significant tool in the legal arsenal of free speech advocates. From the adoption of the Bill of Rights in 1789 through 1925, the Supreme Court cited the Bill of Rights to outlaw government action in only 15 cases. It wasn't until well into the 20th century that the First Amendment came alive, becoming a major tool in affirming and expanding free speech and a free press.

Perhaps the most significant case in this new wave of court decisions was *N.Y. Times v. Sullivan* almost 50 years ago, which in effect ended the concept of seditious libel. In it, the Supreme Court ruled that the First Amendment's intent was to allow the media to examine and criticize public figures such as government officials, and that the only exception would be if there was a showing of actual malice or careless disregard of the truth on the part of the media.

Another landmark case followed in 1971, ending government control of records about the Vietnam War. Known as the Pentagon Papers case, it established the right of the press to publish classified government documents as long as it did not damage "the nation or its people," as one justice phrased it. An earlier case, *Near v. Minnesota* in 1931, eliminated the federal government's general right of "prior restraint" to prevent publication.

While the courts were injecting new life and meaning into the First Amendment during the 1960s and 1970s, Congress was moving on the same front. The federal Freedom of Information Act (FOIA) was passed in 1966, the culmination of a 10-year-long campaign by the American Civil Liberties Union. The FOIA made all government records open to the public unless specifically exempted. Nine categories of information were exempted, but that left most federal documents accessible.

It was this act that ushered in a new era of freedom of information. It also opened a new area of conflict that continues to this day, making the First Amendment the center of a large share of constitutional questions that now come before the federal courts.

The states followed the federal example set by the FOIA and by 1979, all 50 states had adopted similar laws, some even more encompassing. All states now require at least some of their agencies to conduct their business in public. Oregon was one of the first states to enact open records and open meetings laws, in 1973. (See **Oregon Blue Book** for more information on Oregon's statutes.)

Although the battles over free speech rights were fought on behalf of the public, opinion polls show that a majority of Americans still know little about the First Amendment. A large majority say they would accept more restrictions on speech and press rights in other words, they would approve some censorship by the government.



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The battle to defend and expand these rights has fallen largely to the news media. These include newspapers and other print publications, broadcast organizations and Internet publishers. Journalists see themselves as representing the larger public in their battles with government over First Amendment rights. The news media are principally interested in access to government information, and most of their court challenges involve situations where agencies refuse to provide that access. (Please see the Resources sidebar for a listing of sites dedicated to freedom of information issues)

A newer player, Privacy, has now entered the fray, creating a flurry of new challenges to First Amendment rights. A right to privacy is not specified by name in the Constitution, although it has often been cited by philosophers and politicians. Finally, in a series of Supreme Court decisions beginning in 1965, privacy emerged as a right. It is seen as having roots in the Fourth Amendment, which prohibits unreasonable searches and seizures; the Fifth Amendment, which bans self-incrimination; and the Fourteenth Amendment, which prohibits the states from depriving "any person of life, liberty, or property, without due process of law."

With the concept of privacy established as a constitutional right, it has led to a continuing series of challenges to the release of government records. Individuals have argued that release of the personal information violates their right to privacy. Many states have adopted statutes that exempt many categories of government records from public access laws, citing the right to privacy. It is perhaps the most active area of court challenges involving the First Amendment today.

There are other areas of conflict surrounding free speech and free press, many brought on by the Information Age. The arrival of digital wireless communication, chiefly through the Internet, is producing disputes over whether this latest new medium enjoys the same constitutional protection as speech or printed material. Similar disputes surfaced earlier because of radio and television communication using the public's airwaves, leading the government to assert a right to control broadcast content to some degree.

Other free speech issues that are the subject of ongoing legal disputes and legislative debate include:

- The right to picket (exercising free speech) in front of private property such as abortion clinics, versus the right to privacy for those utilizing that property.
- The right to collect petition signatures in public places, such as shopping malls, versus the rights of owners to control their property.
- The right to protest on public property against groups or issues, versus the right of government to keep the peace by dispersing protestors an explosive issue that has led to riots.



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- The right to exhibit, publish or view material considered obscene or pornographic by some (but protected by past court decisions) over new media such as the Internet. Particularly at issue is whether such censorship can take place at public institutions, such as libraries.
- The right of reporters to refuse to testify or provide evidence at trials, on the basis of confidentiality promised to their sources. Some reporters have been sentenced to jail for refusal.
- The right of student newspapers, at both high schools and colleges, to publish without censorship from administrators, in the wake of conflicting court decisions and laws.

The list could go on. Advocates of free speech see the attempt to regulate Internet content and the growing movement to protect privacy by restricting access to government information as the chief threats to the First Amendment. They argue that anyone should be allowed to gather information and speak freely, without government restriction, short of endangering national security or the safety of others (such as prohibitions on shouting "Fire!" in a crowded theater).

FREE SPEECH IN OREGON

The free speech guarantee in the Oregon Constitution is widely considered one of the nation's strongest, broader in scope than even the First Amendment to the U.S. Constitution since it specifies that no subject is off limits. It reads:

No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

-- Article 1, Section 8, Oregon Constitution

Over the past 50 years, the U.S. Supreme Court has given the states broad latitude to set their own laws regarding free speech. As a result, laws governing freedom of expression vary considerably from state to state.

With the clear language in Oregon's constitution guiding the legislature and the courts, this state is regarded as a model in the area of free speech. Still, there have been ongoing legal conflicts in Oregon over what is protected speech and what isn't. One of the most contentious areas of dispute has been over access to public records.

In 1973, the legislature passed laws requiring governmental bodies to conduct meetings in public sessions, and to allow access to city, county and state records. There were only 16 exemptions in the original law. Since then, however, the legislature has added more than 300



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new exemptions as both government agencies and private sector organizations pushed for confidentiality, often based on the argument of a right to privacy.

Some of the records now closed to the public include investigations of unsafe workplaces, government disciplinary files and unfair-labor-practice complaints. Journalists and other free speech advocates lobby at each session of the legislature to oppose more exemptions.

Another area of contention has been obscenity and pornography. In 1987, the Oregon Supreme Court ruled that an anti-obscenity statute violated the constitution. The case involved attempts to close an adult bookstore, and the ruling gave the green light to the exchange of obscene materials between consenting adults. But the court left open the possibility of laws to protect minors from pornography as well as other controls.

The right to petition, demonstrate and protest in public areas has also led to court contests in Oregon in recent years, as they have elsewhere in the United States. Freedom of expression on the Internet has also been the cause for legal action, the most recent involving a suit against a site that identified physicians who perform abortions. No clear resolution to these issues has yet emerged.

One other current area of contention has been over free speech rights for students. The U.S. Supreme Court's Hazelwood decision in 1988 gave school officials the right to censor school publications. Since then, a handful of states have adopted laws barring school censorship. Oregon is not one of them. A legal challenge to censorship in one Oregon school district failed, and attempts to pass bills barring administrators from censoring student newspapers did not come to a vote in the legislature.

All this has made Oregon a fertile breeding ground for change in the freedom of expression arena. The Oregon ACLU and several media-based coalitions are active in this area. For web sites to these organizations, check the Resources links on our Free Speech Issues page on our website (<http://aclu-or.org>).