Text of the First Amendment

Adopted in 1791, the First Amendment provides in pertinent part: "Congress shall make no law abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

A literal reading of the First Amendment would hold that only Congress is subject to its prohibitions. It is clear today, however, that First Amendment guarantees extend to all federal governmental action. Thus, in the famous Pentagon Papers case, in which the Department of Justice unsuccessfully sought injunctive relief to prevent publication by leading newspapers of classified material involving the Vietnam War, the First Amendment was applied as a limit against federal judicial and executive action. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

A literal reading would also contend that the states are not bound by the guarantees of the freedom of expression. While James Madison proposed a restriction on such state action as part of the Bill of Rights, this was not adopted. Furthermore, *Barron v. Baltimore*, 32 U.S. 243 (1833) held that the Bill of Rights applied only against the federal government. But in *Gitlow v. New York*, 268 U.S. 652 (1925) the Supreme Court simply assumed that freedom of speech and of the press "are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." Subsequently, all the guarantees of the First Amendment have been held to be binding on the states. The mantel of protection afforded freedom of expression against state action by the Fourteenth Amendment has been treated as equivalent to that applicable to federal action under the First Amendment.

But what is the scope of the constitutional protection afforded freedom of expression? Justice Black, a consummate textualist, argued that the First Amendment is framed in absolute terms and that the First Congress did all of the balancing of interests required when they framed the Amendment. But notwithstanding this inspiring tribute to absolutism, it doesn't take a course in constitutional law to realize that government in fact imposes a myriad of restraints on speech and press – obscenity and libel law, prohibitions on perjury, blackmail, commercial fraud, and on solicitations and incitement to illegal conduct. As Justice Holmes wrote in *Schenck v. United States*, 249 U.S. 47 (1919), "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."

How are the absolutist words of the First Amendment and the fire metaphor of Justice Holmes to be reconciled? Consider again the First Amendment's text. The constitutional guarantee protects against an "abridging" of the "freedom of speech." Not every restriction on speech necessarily constitutes an abridgement. Nor does the phrase "the freedom of speech or of the press" necessarily mean that all variants of the spoken or written word are protected. Of course, even this more modest approach to the language of the First Amendment presents its own analytical problems. What communication should be subsumed under the phrase, "the freedom of speech or of the press"? One approach to these problems of interpretation would be to consider the scope of protection envisioned by those who wrote, defended, and enacted the First Amendment.

That requires a richer understanding of the history of speech and press freedoms, the subject of the next assigned reading.

Source: Excerpted from Jerome A. Barron & C. Thomas Dienes, *First Amendment in a Nutshell* (St. Paul, MN: West Publishing Co., 5th ed. 2018), pp. 3-5.