NEWSPAPERS IN EDUCATION
THE OKLAHOMAN

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Bar Association

Oklahoma Bar Association
Law-Related Education Committee
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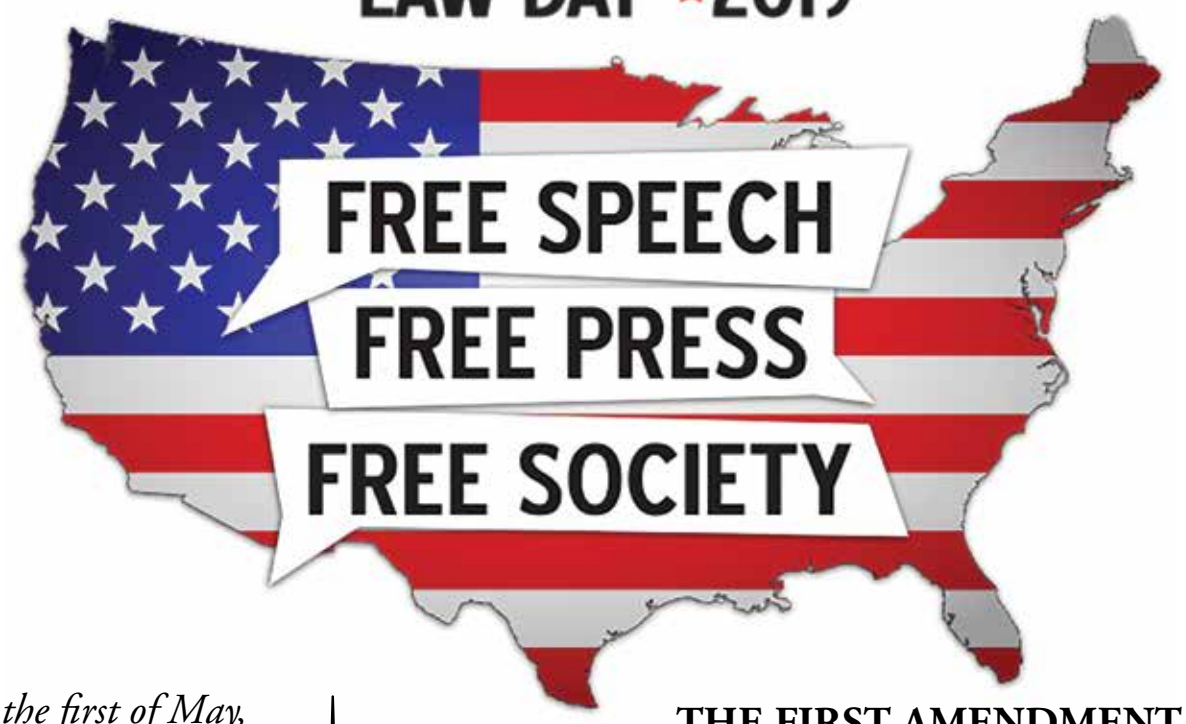
Law Day Committee

LAW DAY ★2019



Every year around the first of May, Oklahomans join with all Americans to observe Law Day in celebration of our nation's great heritage of liberty, justice and equality under the law. As Americans, we are proud to be a free nation and know the law safeguards our rights and freedoms. This year, we are focusing on the protections afforded to us in the First Amendment. This amendment contains some of the most widely known, yet complicated, protections. It includes the rights of free speech and expression, free press, free assembly and the right to petition the government. A quarter century beyond its 200th anniversary, the First Amendment is one of the oldest and arguably one of the most important freedoms enjoyed by Americans. The First Amendment was adopted into the Bill of Rights on Dec. 15, 1791, along with nine other amendments.

Introduction

The jurisprudence, or philosophy of law, behind the First Amendment began to take form in the 20th century. However, discussions surrounding the common law protection for freedom of speech began as early as the 18th and 19th centuries.

Crown v. John Peter Zenger

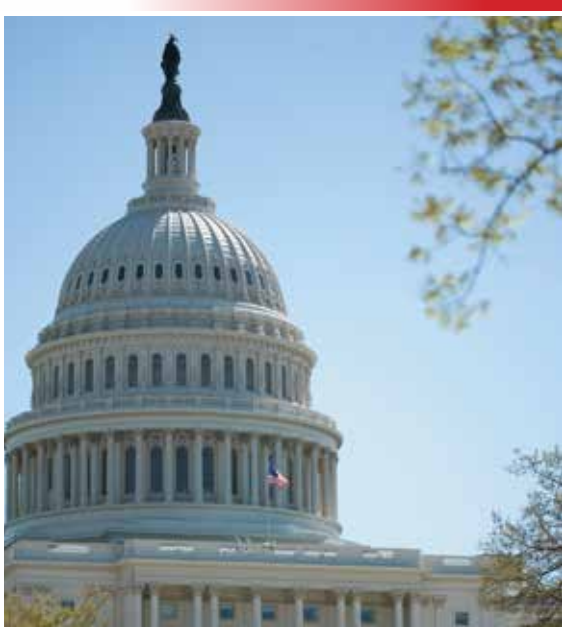
The *Crown v. John Peter Zenger* trial of 1735 played a significant role in the development of common law protection for free speech. New York's Chief Judge, Lewis Morris issued an opinion in the New York Gazette against Governor William Cosby and as a result, Cosby removed Morris from office. After his removal, Morris went on to found the first independent newspaper, the *New-York Weekly Journal*. Cosby made it his personal mission to try and have the *New-York Weekly Journal* shut down.

The *New-York Weekly Journal* used John Peter Zenger, a newspaper printer, to print their publication. Cosby filed a legal case against John Peter Zenger for seditious libel claiming that he was responsible for statements made in the *New-York Weekly Journal* because his company printed the paper. In the *Zenger* case, despite being asked only to consider whether or not Zenger was responsible for printing the libel comments, a New York jury returned a verdict of "not guilty" on the charge of seditious libel. This case did not establish any legal changes in the definition of seditious libel at that time, but it did influence the public's perception regarding libel charges and this case would influence protections that would be included in Bill of Rights over 50 years later.

THE FIRST AMENDMENT

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

The Bill of Rights



Madison's original draft of the Bill of Rights contained two proposed amendments dealing with freedom of speech. One proposed amendment read, "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, one of the great bulwarks of liberty, shall be inviolable." The other proposed amendment of Madison's read, "No state shall violate the equal rights of conscience, or of the press." However, Congress did not support Madison's efforts to apply free speech protections against the states, despite Madison's protests that the amendment was the "most valuable amendment on the whole list." In fact, freedom of speech guarantees would not be applied against the states until the 1920s through rulings made by the Supreme Court.

Sedition Act of 1798

Seven years after the adoption of the First Amendment, Congress passed the Sedition Act of 1798. The Sedition Act allowed individuals to be prosecuted for engaging in acts of speech or press that the government deemed malicious and posed an incredible threat to the First Amendment. The act was enforced against Republican papers in an effort to keep Jefferson's party from defeating the Federalists in the 1800 election. Jefferson won the election anyway, and the Sedition Act expired by its own terms in 1801 without ever being tested by the Supreme Court. Despite never reaching the Supreme Court, the approval of this act set off a lively debate on free speech issues and prompted both Madison and Jefferson to write discourses on freedom of speech and the press.

Although a few First Amendment cases, often involving obscenity, were decided by the federal courts in the 1800s, it was not until World War I that the Supreme Court really began to develop the First Amendment jurisprudence.

Freedom of Speech

The First Amendment protects against abridgements of the "freedom of speech." There are other forms of expression, outside

of written or oral communication, that have been taken before the court for consideration as being protected under the First Amendment. Generally speaking, if the regulated activity is not "speech" then it is not protected by the First Amendment and there is no need to extend the constitutional analysis further, but this is not always the case.

One example of taking other forms of expression into consideration occurred in 1968. The court considered the argument of David Paul O'Brien. O'Brien argued that it was a right protected by the First Amendment to burn his draft card on the steps of a Boston courthouse as a form of protesting U.S. involvement in the Vietnam War. The court agreed that O'Brien was engaged in an expressive activity that triggered a First Amendment analysis. The court noted, however, that O'Brien was punished for his "conduct" (the burning of the card) and not for what he was trying to say about the war. The court offered through the O'Brien case a test for analyzing future cases in which both speech and conduct elements are present:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The *O'Brien* test has been used by the court in a series of subsequent cases. In *Texas v. Johnson,* the Supreme Court considered another protest of U.S. policy, this time in the case of a man who burned a flag at a Republican National Convention. In a controversial 5-4 decision, the court overturned Johnson's conviction for flag burning, concluding the burning was "sufficiently imbued with elements of communication to implicate the First Amendment" and was, in fact, protected speech under the First Amendment. *Buckley v. Valeo* raised the issue of whether money (in the form of campaign donations or expenditures) can be considered a form of speech. The court concluded that it could, noting that modern campaigning is impossible without financial resources.

In *Doe v. Reed* (2010), the court considered whether the signing of a state referendum petition is "speech" within the meaning of the First Amendment and, if it is, whether the state's disclosure of the names of petition signers violates their First Amendment rights. Eight members of the court agreed that the signing of a referendum petition

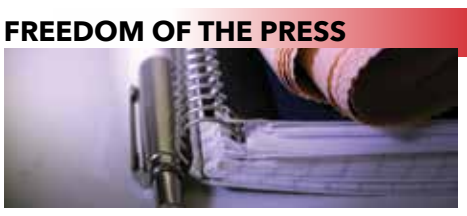
was "an expressive act" implicating the First Amendment. Justice Scalia disagreed and referred to the signing of a petition as a "legislative act" not protected by "the freedom of speech" protections. On the question of whether the signers of petitions generally have a First Amendment right to keep their identities private, eight members said no, though they indicated that "unique circumstances" surrounding particular referendum might create a right to anonymity. Justice Thomas dissented.

STUDENT SPEECH

The court tells us in *Tinker vs. Des Moines* that students do not "shed their constitutional rights when they enter the schoolhouse door." However, it is also the case that school administrators have a far greater ability to restrict the speech of their students than the government has to restrict the speech of the general public. Cases involving students' Freedom of Speech require a balance between legitimate protests and the need for schools to maintain focus on the students' education without interruption.

In *Tinker*, perhaps the best known of the court's student speech cases, the court found that the First Amendment protected the right of high school students to wear black armbands in a public high school, as a form of protest against the Vietnam War. The court ruled that this symbolic speech – "closely akin to pure speech" – could only be prohibited by school administrators if they could show that it would cause a substantial disruption of the school's educational mission.

FREEDOM OF THE PRESS



If there is anything that the framers clearly intended to prohibit by way of the First Amendment it was prior restraints in the form of licensing laws that existed in England. Licensing laws have rarely been an issue in the United States, but another form of prior restraint (that is, legal restraint before publication) that has received judicial attention is injunctions. The Supreme Court has said injunctions preventing the exercise of speech should be viewed very skeptically – they carry "a presumption of unconstitutionality."

In 1971, the Nixon administration went to court to stop publication of "the Pentagon Papers," a series of accounts based on a stolen, classified document titled, "The History of U.S. Decision Making on Vietnam Policy." The administration argued that the publication would threaten national security and create reluctance among other nations to work with the U.S. if their dealings could not be kept secret. Acting with unusual haste (the three dissenting justices called the court's action "irresponsibly feverish"), the court in *New York Times v. United States* concluded that a prior restraint on the publication of excerpts from the Pentagon Papers violated the First Amendment. Two concurring justices indicated that they might have upheld the injunction if it were supported by a narrowly drawn congressional authorization, but it was not.

In *U.S. v. Progressive*, the United States went to court to enjoin the publication of an article scheduled to appear in the left-wing magazine, *The Progressive*. The article, "The H-Bomb Secret: How We Got It and Why We're Telling It," was essentially a how-to-do-it account for anyone wanting to build an atomic bomb. Reasoning that the article presented a clear and present danger of speeding the efforts of foreign nations or terrorist groups interested in developing atomic weapons, a Wisconsin federal district judge issued an injunction against publication.

FREEDOM OF ASSOCIATION

In order to effectively exercise the right to free speech, or the right to peaceably assemble, people need to be able to find others that share similar views. The phrase "freedom of association" does not appear in the Constitution, although the First Amendment protects the right to peaceably assemble.

Nonetheless, the court has recognized two separate types of associations that are constitutionally protected: 1) intimate

association (protected as an aspect of the right of privacy) and 2) expressive association (protected as an aspect of the First Amendment's protection of free speech). Freedom of association cases are interesting in that they bring into conflict two competing views of the world: rights-oriented liberalism that holds that a person's identity comes from individual choices (and that government ought to create a framework of laws that remove barriers to choice) and communitarianism, that holds that a person's identity comes from the communities of which an individual is a part (and that communities are an important buffer between the government and the individual).

FREEDOM OF RELIGION

Two clauses of the First Amendment concern the relationship of government to religion: the Establishment Clause and the Free Exercise Clause. Although the clauses were intended by the framers to serve common values, there is some tension between the two. For example, some people might suggest that providing a military chaplain for troops stationed overseas violates the Establishment Clause, while others might suggest that failing to provide a chaplain violates the Free Exercise Clause rights of the same troops.

At an absolute minimum, the Establishment Clause was intended to prohibit the federal government from declaring and financially supporting a national religion, such as existed in many other countries at the time of the nation's founding. It is far less clear whether the Establishment Clause was also intended to prevent the federal government from supporting religion in general. Proponents of a narrow interpretation of the clause point out that the same Congress that proposed the Bill of Rights also opened its legislative day with prayer and voted to apportion federal dollars to establish Christian missions in the Indian lands. On the other hand, persons seeing a far broader meaning in the clause point to writings by Thomas Jefferson and James Madison suggesting the need to establish "a wall of separation" between church and state.

The Free Exercise Clause, on the other hand, generally tests when the government may enforce a law that burdens an individual's ability to exercise his or her religious beliefs. The big development in free exercise jurisprudence came in *Employment Division v. Smith* in 1990. Smith, who had been denied unemployment benefits because of his use of religious ingestion of peyote, a substance illegal under Oregon law, sued claiming Oregon violated the protections afforded to him under the Free Exercise Clause. The Supreme Court disagreed and found that because the Oregon law, which criminalized peyote use was constitutional, the Free Exercise Clause was not implicated. The implication was that generally applicable criminal law raises no free exercise issues.

Student Law Day Competition

In celebration of Law Day, students are invited to explore this year's theme Free Speech, Free Press, Free Society and submit their own Law Day project. The Law Day annual art and writing contest is open to Pre-K through 12th-grade students. Contest winners will be honored during a ceremony at the Oklahoma Judicial Center. More than $4,000 in prize money will be distributed to first- and second-place winners across various age groups and categories.

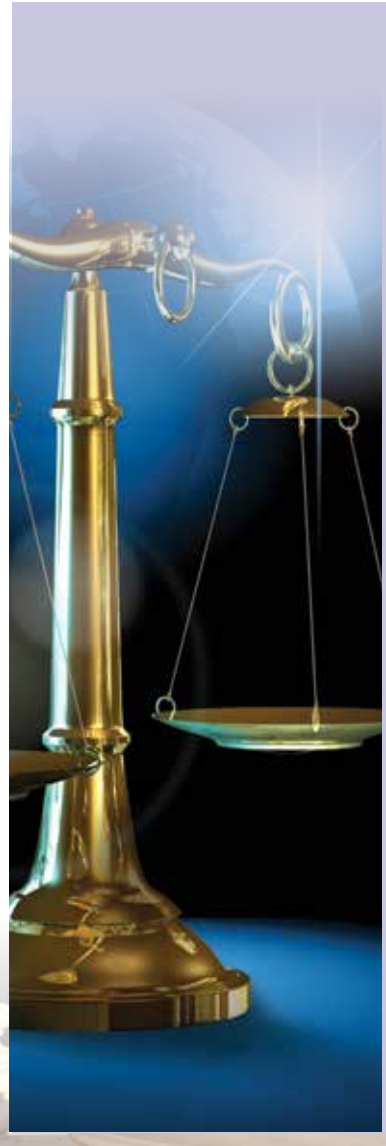
Submit your Law Day project by visiting,
https://www.okbar.org/lawday/contest/

HISTORY OF LAW DAY

The late Hicks Epton, a lawyer from Wewoka, Oklahoma, and a past president of the Oklahoma Bar Association conceived Law Day. President Dwight D. Eisenhower established Law Day nationally by presidential proclamation in 1958. On this occasion, he said, "It is fitting that the American people should remember with pride and vigilantly guard the great heritage of liberty, justice and quality under law. It is our moral and civil obligation as free men and as Americans to preserve and strengthen that great heritage."

The first of May was set aside in 1961 by a Joint Resolution of Congress as a "special day of celebration by the American people in appreciation of their liberties and the reaffirmation of their loyalty to the United States of America" and as an occasion for "rededication to the ideals of equality and justice under the laws."

Since the first observance, the American Bar Association, the national voluntary organization of the legal profession, has acted as the national sponsor of Law Day. State, county and local bar associations organize individual projects throughout the country.



WORD MATCH

Draw a line to match the word to its correct definition

Abridge	A cause for complaint due to real or perceived unfair treatment
Assemble	To meet together in a group, often purposefully
Bill of Rights	A measure passed or proposed by a legislative body through popular vote
Blasphemy	A warning or order
Concurring	Criticism of an individual
Defamation	Criticism of government
Dissented	Criticism of religion
Freedom	The first ten amendments to the US Constitution
Grievance	The power or right to act, speak or think without hindrance
Injunction	Theory or philosophy of law
Jurisprudence	To happen or occur at the same time
Petition	To hold an opinion that differs from the majority
Redress	To limit or deprive
Referendum	To make a formal request to an authority for a particular cause
Sedition	To remedy or set right