

# **Law Week 2023 – Cornerstones of Democracy**

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## **Introduction**

Thank you for participating in this educational and impactful program for Sonoma County high school students. This year's theme is **Cornerstones of Democracy**. The Law Week Committee has selected several highly relevant topics and carefully curated the following curriculum to help you prepare for your classroom presentations and discussions. Your role as a presenter is to talk about the law and guide a meaningful discussion by asking neutral questions.

Each of you has been assigned a classroom at a specific high school. The schedule you were provided has contact information for the teacher. Please contact your assigned teacher prior to the presentation (this is also a good time to find out about class size, and any other specifics of interest to you).

Be creative and interactive with your presentations. The legal summaries, discussion questions, and exercises found throughout the written materials are just suggestions. Once you are in contact with the teacher, feel free to create whatever format you think will be most engaging.

You will have approximately 1 hour to present and engage in discussions. Time available may change at each location. Please verify the time available to speak when you contact the teacher.

You should plan to spend a little time, at either the beginning or the end of the presentation, discussing the legal profession and your personal careers.

**These materials are presented in an outlined format, but you need not follow that order. Please take what you wish, adapt it to fit your presentation, and supplement if you so desire.**

**Note that the first section has also been provided to you in PowerPoint format with embedded media, in the event you would like to present a visual introduction to "Civility." If so, please coordinate with the teacher in advance to make sure the classroom is properly equipped.**

On behalf of the Law Week Committee, including Dale Miller, Beki Berrey, Regan Masi, Jack Sanford, Walter Rubenstein, Gina Fortino Dickson, Bryan Coryell, Monica Lehre, Orchid Vaghti, and William LaBarge, we would like to thank all of you for participating in Law Week 2023.

*- Andrew Spaulding and Carmen Sinigiani, 2023 Law Week Co-Chairs*

Finally, the Law Week Committee extends a very special thanks to Susan Demers at the Sonoma County Bar Association and Rebecca Gallagher at the Sonoma County Office of Education for their extraordinary work behind the scenes to make Law Week happen.

## 1. CIVILITY: HOW TO HAVE A CIVIL CONVERSATION ABOUT POLITICS

*One of our Cornerstones of Democracy is the concept of Civility. We each have first amendment protections, like the freedom of expression and freedom of speech but fundamentally, how can this work if we don't agree?*

### **What is civility?**

- Formal politeness and courtesy in behavior or speech
- Professional, ethical, respectful and courteous interactions
- Treating others with dignity, respect, politeness and consideration

**\*Discussion Question: What do you think are the most important characteristics of civility?**

### **Why is it important to be civil?**

- Civility helps people feel acknowledge and appreciated, which makes them open to feedback and alternate opinions
- Civility is deemed the essential glue that holds society together, by showing others friendship, altruism, responsibility, dignity, and justice
- One day you may be the one with the alternative position and you will want others to treat you the same

**Civil Discourse** is the engagement in discourse (conversation) intended to enhance understanding. Civil discourse exists as a function of freedom of speech. It is discourse that "supports, rather than undermines the societal good.

**Civil discourse** means being respectful of the other person and his or her views. Each person in a civil discourse is entitled to his/her own opinions and is entitled to be treated with respect and dignity.

### **Basic aspects of civil discourse**

- Listen to understand
- Identify the similarities in your perspectives
- Isolate where the differences lie

- Seek to understand the other perspectives
- Seek out those who have different perspectives (Attorneys are trained to do this)

**What is consensus?** Consensus is a general agreement reached by a group.

For example, a group of people going to a movie may have several ideas on which movie to see, when they can come to an agreement despite their differing preferences, that is consensus.

In political boards and commissions, a body will have differing ideas and votes on how to address an issue. Once that issue has been decided by the vote, it is important for the entire body, even though some voted against it, to support the decision or the consensus of the body.

**Diversity:** the practice or quality of including or involving people from a range of different social and ethnic backgrounds and of different genders, sexual orientations, etc.

It is important to utilize diversity when discussing challenging issues, and to celebrate and acknowledge differences.



**Equity:** the quality of being fair and impartial.

**Inclusion:** the practice or policy of providing equal access to opportunities and resources for people who might otherwise be excluded or marginalized, such as those who have physical or intellectual disabilities and members of other minority groups.

**\*Discussion Questions:**

**What do diversity, equity and inclusion mean to you?**

**Why do you think diversity, equity and inclusion are important components of civil discourse?**

**Confirmation Bias:** What is it and what to watch out for?

Confirmation bias occurs when we only consider the facts and ideas that support what we already believe. This bias can lead us to make poor decisions because it distorts the reality from which we draw evidence.



**How to frame or characterize a disagreement?**

The way we characterize a disagreement or a discussion in our mind can have a profound effect on how we interpret another person's words and actions.

Instead of thinking "this is a stupid idea" try to think "this is a different idea" or "this is an interesting perspective."

**\*Further Discussion Questions:**

**What actions did you hear about that you think you can implement in your discussions?**

**Are there any tensions or areas of disagreement that we need to talk or think more about?**

## 2. WHAT DOES IT MEAN TO HAVE A CONSTITUTIONAL DEMOCRACY?

*More broadly, a Cornerstone of Democracy is how our specific government is structured. We have what is known as a Constitutional Democracy. Our structure provides a mechanism to ensure that our freedoms, like the freedom of expression, are maintained. It is also geared towards economic stability as a constitutional democracy provides a way to enforce our rights.*

**Democracy:** Government by the people, either directly or through representatives elected by the people. (Black's Law Dictionary, 9<sup>th</sup> Ed.)

**Republic:** A system of government in which the people hold sovereign power and elect representatives who exercise that power. (Black's Law Dictionary, 9<sup>th</sup> Ed.)

Modernly, the concept of "democracy" can include a republican form of government – representatives elected by the people to exercise the people's sovereign power. But in the Founders' time, the concepts of democracy and republic were distinct from each other. As James Madison explained, "In a democracy, the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents. A democracy, consequently, will be confined to a small spot. A republic may be extended over a large region." (The Federalist Papers: 14.)

### **\*Discussion Questions:**

**Why would a democracy (a *pure* democracy) "be confined to a small spot"?**

**Why can a republic, in contrast, "be extended over a large region"?**

**Who holds the sovereign power in a *pure* democracy?**

**Who holds the sovereign power in a republic?**

**What form of government is the United States?**

**If the United States is a democracy, how do the people govern? Directly or through representatives?**

**U.S. Constitution:** The fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties. (Black's Law Dictionary, 9<sup>th</sup> Ed.)

**\*Question: What are the 3 branches of government?**

- Legislative – makes laws (Congress, comprised of the House of Representatives and Senate)
- Executive – carries out laws (President, Vice President, Cabinet (heads of 15 executive departments), and most federal agencies)
- Judicial – evaluates laws (Supreme Court and other courts)

**Checks and Balances:** To be sure that one branch does not become more powerful than the others, the Government has a system called checks and balances. Through this system, each branch is given power to check on the other two branches. For example, the President has the power to veto a bill sent from Congress, which would stop it from becoming a law.

Do you know...

Which branch of government sets the national budget? (President submits a budget to Congress)

Which branch of government prosecutes crimes? (Legislative Branch makes laws, but Executive Branch enforces laws)

Which branch of government adjudicates controversies? (Judicial Branch)

In theory, is any branch of government more powerful than the other two? How about in practice? In practice, can one branch be considered the most powerful? (*Arguably, Executive branch.*)

What individual civil rights and civil liberties does the U.S. Constitution guarantee?

- *1<sup>st</sup> Amendment: freedom of speech, assembly, religion, right to petition gov't*
- *4<sup>th</sup> Amendment: freedom from unreasonable search & seizure*
- *5<sup>th</sup> Amendment: right to due process*
- *6<sup>th</sup> Amendment: right to jury and speedy & public trial*
- *8<sup>th</sup> Amendment: right to be free from cruel and unusual punishment*

**\*Discussion Question: Of the civil rights guaranteed in the U.S. Constitution, which of the Amendments we just discussed would you say is the most important for maintaining a constitutional democracy? (1<sup>st</sup> Am. freedom of speech, assembly, petition the gov't.)**

The U.S. Constitution directs that members of the House of Representatives shall be elected every second year, members of the Senate shall be elected every sixth year, and the President shall be elected every 4<sup>th</sup> year.

**\*Further Discussion Questions:**

**Why did the Founders set out these periodic elections?**

**What if a party, or a candidate, lost an election and didn't cede power?**

**What if instead of periodic elections, we only held elections when an office holder resigned or died? Wouldn't we have a more "stable" government?**

**Economic Stability:** Academic scholars find that "by far the best guarantor of democratic stability is a high level of economic development." (José Alemán & David D. Yang, A Duration Analysis of Democratic Transitions and Authoritarian Backslides, 44 COMP. POL. STUD. 1123, 1136 (2011).note 70, at 1137.)

So far, we've agreed that the U.S. is a democracy. If we want to distinguish the type of democracy, we could say that U.S. is democratic republic, yes? Can we also say we're a constitutional democracy?

Based on our discussion, we've decided that a constitutional democracy is a system in which:

1. Representatives elected to govern could be removed from office at the will of a majority of voters participating in regularly scheduled and periodic elections;  
and
2. Individuals are guaranteed certain rights equal to all other individuals.

Also, based on our discussion, we've decided that we can lose a constitutional democracy by:

1. Allowing our individual rights to be eroded;
2. Not participating in the electoral process;
3. Permitting parties or representatives that have lost elections to not cede power;  
and
4. Losing our "high level of economic development."

### 3. ELECTION INTEGRITY AND THE ROLE OF THE COURTS

*Another Cornerstone of Democracy is Election Integrity. Fundamentally, without trust in the election process, our democracy will fail. Free and fair elections are a foundational component of political freedom. There is more to democracy than free and fair elections, but there can be no democracy without them.*

“Any election that is based on the democratic principles of universal suffrage and political equality as reflected in international standards and agreements and is professional, impartial, and transparent in its preparation and administration throughout the electoral cycle.” (Kofi Annan Foundation 2012.)

#### **Law in the United States:**

The Elections Clause (Article I, Section 4, Clause 1 of the U.S. Constitution) is the primary source of constitutional authority to regulate elections for the U.S. House of Representatives and U.S. Senate. The Clause directs and empowers states to determine the “Times, Places, and Manner” of congressional elections, subject to Congress’s authority to “make or alter” state regulations. It grants each level of government the authority to enact a complete code for such elections, including rules concerning public notices, voter registration, voter protection, fraud prevention, vote counting, and determination of election results. Whenever a state enacts a law relating to a congressional election, it is exercising power under the Elections Clause; states do not have any inherent authority to enact such measures.

**Cornerstone of Democracy:** A cornerstone of democracy for election integrity is for each branch of government to be independent. When there are disputes between parties over election results the recourse is to seek resolution in the judicial branch.

**Electoral integrity is essential** to ensure accountability to the public. To ensure confidence in the election results. Without accountability, the government lacks necessary legitimacy. Citizens need to believe that any changes to electoral processes are real and deserve the public confidence. Election officials, judges and courts must have independence that is respected by politicians and the public.

## **2020 PRESIDENTIAL ELECTION**

The presidential election of 2020 was disputed on alleged various grounds of fraud or deviation of process. President Trump had a right to seek relief by going to (state and federal) court. Some 62 cases were filed. Overall, the courts denied the claims or dismissed the actions on procedural or lack of evidence basis. Other than apparent pressure on state officials (particularly in Georgia) the judicial branch was left to independently function. Other attempts were made demanding recounts, sometimes by non-governmental agencies (private consultant companies).

### **Changes in State Laws:**

Over the last few election cycles the electoral process has undergone stress from various political spectrums. Over a broad scope many states have enacted new laws, some to **expand** voting access and some of a **restrictive** nature. According to the Brennan Justice Center, as of December 2022 more than half of the states have enacted new election laws. Some of the new laws are an outgrowth from the Covid pandemic period. Others resulted from political concerns.

- “At least 8 states enacted 11 restrictive voting laws. Overall, 408 restrictive bills were considered by lawmakers in 39 states.”
- “At least 12 states and Washington DC enacted 23 laws that expanded access to voting. Overall, at least 638 expansive bills were considered in 44 states and Washington DC this year.”

**Restrictive voting legislation** is legislation that would make it harder for eligible voters to vote. Examples include restrictions on the process of voting by mail and voter identification requirements.

Laws are classified as **expansive** if it makes it easier to vote compared to existing state laws. For example, making it easier to use mail in voting, including more drop off boxes.

### **Election Interference Laws:**

Legislation can be considered interference if it opens the door to partisan interference in elections or threatens the people and the processes that constitute the administration structure of the election.

- “At least 7 states enacted election interference laws. Overall, lawmakers in at least 27 states introduced 151 election interference bills this (last) year. ”

For example, state legislatures enacted laws that imposed new criminal or civil penalties on election officials. Another area was creating new resources for prosecuting election related crimes. In Florida, new resources were created under the state control as opposed to a county prosecutor level. County Prosecutors are independent from those offices controlled by the governor or legislatures of a particular state.

### **The Electoral Count Act (1887)**

The Electoral Count Act of 1887 was passed by Congress as a response to the election in 1876 between Democrat Samuel Tilden and Republican Rutherford B Hayes. Tilden won the popular vote. However, there were contested election results from Florida, South Carolina, and Louisiana. The three states each sent multiple competing electoral returns. (Electors in the modern sense). Congress had no way, based on the constitution as it was written, to resolve this issue. Congress created a commission to resolve the matter and ultimately a political compromise was reached that gave the presidency to Rutherford Hayes.

There is a movement in Congress to update and clarify the Act. Given that the Constitution grants the state legislature the power to set up election procedures, the United States Supreme Court, in general, is reluctant to get involved with state laws.

### **Electoral College**

The United States Electoral College is the group of presidential electors required by the Constitution to form every four years for the sole purpose of appointing the president and vice president. Each state and the District of Columbia appoints electors pursuant to the methods described by its legislature, equal in number to its congressional delegation (representatives and senators). Federal office holders, including senators and representatives, cannot be electors. Of the current 538 electors, an absolute majority of 270 or more electoral votes is required to elect the president and vice president. If no candidate achieves an absolute majority there, a contingent election is held by the House of Representatives to elect the president and by the Senate to elect the vice president..

### **CASES ADDRESSING THE ELECTORAL PROCESS:**

In *Rucho v. Common Cause* [139 S. CT 2484 (2019)] the Supreme Court held that partisan gerrymandering claims are beyond the reach of federal courts. **Gerrymandering** is when a state legislature or special commission, set up by the legislature or governor, draws electoral maps. Often they are drawn in such a way that they disempower certain groups. Each section allocates the number of representatives on the state level and federal level (House of Representatives, not Senators). Large groups are placed into one geographical section thus getting only one representative. The group in power generally will divide up

its set into as many small groups to get more representation. These maps are referred to as Gerrymandering since they wind up with oddly shaped districts.

On December 7, 2022, in the US Supreme Court, ***Moore v. Harper*** [142 S.Ct. 1089 (2022)] was argued. The case is about a legal theory called the independent state legislature theory. The theory is that when it comes to making state laws that apply to federal election laws for casting of ballots, "only " the state legislatures have the power to set the rules. The claim is that the legislature' s power is exclusive and can ignore its own state constitution and its own state North Carolina Supreme Court regarding fair districting requirements.

The case came out of litigation in North Carolina over how districts were being drawn in the 2010's and 2020's. The issue arose as to whether the legislature was subject to court review. In effect if the state Supreme Court did not have jurisdiction over election laws, then, considering Rauch for the federal jurisdiction, the legislature was free to draw electoral maps that did disempower minority particular groups. Federal courts still could try to intervene. However, this would be disruptive and undermine Federalism. If this theory were to prevail then the checks and balances between the branches of government would be upended. A state constitution gives rise to the legislature and the courts of that state. It is illogical then that a legislature could ignore its own governing principles. Further, if such a theory would prevail then it might be possible for a state legislature to override the popular vote of its own citizens. This would possibly resemble the electoral count issue in a new form, with the legislature deciding which electors are sent to Washington without a true reflection of the vote and more important without a judicial check.

This case should be decided by June. It appears that the court even with its tilt to conservative principles will strike down the theory.

#### 4. FREEDOM OF THE PRESS AND AN INFORMED PUBLIC

*Another Cornerstone of Democracy is the Freedom of the Press.*

*“Whenever the people are well-informed, they can be trusted with their own government.”*

-Thomas Jefferson

The freedom of the press, protected by the First Amendment, is critical to a democracy in which the government is accountable to the people. A free media functions as a watchdog that can investigate and report on government wrongdoing. It is also a vibrant marketplace of ideas, a vehicle for ordinary citizens to express themselves and gain exposure to a wide range of information and opinions. (American Civil Liberties Union)

#### **The First Amendment of the U.S. Constitution:**

*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.* (U.S. Const. Amend. I.)

**“Free press”** means the right of individuals to express themselves through publication and dissemination of information, ideas, and opinions without interference, constraint, or prosecution by the government.

#### **Historical Background of the First Amendment:**

Before the Declaration of Independence, all printed materials in the American colonies were regulated by the British King and enforced by colonial governors. These regulations were often arbitrary, inconsistent, and subject to change at the whim of an agent of the King. The British used these regulations to control information and suppress the truth about conditions in the American colonies. Controlling the press was a tool used by the English to perpetuate English rule of the American colonies and avoid any challenge to its rule. American colonists were criminally prosecuted for publishing any information that was considered critical of the British. Before the Declaration of Independence, there were only two newspapers in New York City and they were tightly controlled by the British.

A free press was so important to the framers of the constitution that it is enshrined in the First Amendment.

**Important Distinction -- who “Freedom of the Press” applies to:** The Constitution prevents the government from abridging freedom of the press. The Constitution does not prevent non-government actors (businesses, private citizens, etc) from restraining or censoring information.

- For example, social media companies like Twitter and Facebook can freely decide to censor certain material from its platform. A newspaper like the Press Democrat can freely decide to not publish opinion articles or letters to the editor. Comments sections on newspaper websites are regulated and censored for inappropriate/offensive comments without implicating the First Amendment because newspapers are private companies, i.e. not the government.

**\*Discussion Question: Is Freedom of the Press Absolute? Are there any justifiable reasons to limit Freedom of the Press?**

**Limitations on Freedom of the Press:** The freedom for U.S. citizens to publish information is not absolute. The government has been allowed to regulate the press under circumstances. The federal courts, and typically the U.S. Supreme Court, have reviewed laws that infringe on the First Amendment freedom of the press and decide whether the law is allowed. Many cases have dealt with the issue of when the government may regulate the press.

#### CASES ADDRESSING FREEDOM OF THE PRESS:

In *Schenck v. United States* (1919), a military draft was imposed during World War I. Schenck was a member of the Philadelphia Socialist Party that printed and distributed fliers encouraging men to ignore or disregard draft notices. Schenck was arrested for distributing the flyers on the grounds he was attempting to obstruct the military draft which was prohibited under the Espionage Act. The law made it a crime to publish “...disloyal, profane, scurrilous or abusive language about the form of government of the United States or the constitution of the United States or the military or naval forces of the United States or the flag.”

The Supreme Court ruled unanimously that the law was constitutional and justified under the circumstances of the war effort and the draft. The court said, "the words used [in the flyers] 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."

The *Schenck* case established the clear and present danger standard to determine if Free Press and Free Speech could be justifiably limited by the government under the constitution.

***Brandenburg v. Ohio*** 395 U.S. 444 (1969) modified the Clear and Present Danger standard.

In *Brandenburg*, the Supreme Court struck down Ohio's criminal syndicalism statute, because that statute broadly prohibited the mere advocacy of violence. Today, press freedom may be limited legally and constitutionally. The standard is now one of Imminent Lawless Action. This standard applies to free speech and press freedom. An extremely high standard.

***Near v. Minnesota, 283 U.S. 697 (1931)*** helped the Supreme Court define freedom of the press and the concept of prior restraint. When a Minneapolis newspaper editor attacked local officials by claiming in print that they were associated with gangsters, Minnesota officials obtained an injunction to keep him from publishing his paper under state law. The law said that anyone who published a "malicious, scandalous and defamatory" newspaper article was a nuisance and could be stopped from publishing such information.

The Supreme Court ruled that the law kept certain information from being published - a concept called prior restraint -- and violated the First Amendment. This case helped establish the principle that the government can't censor or prohibit a publication in advance, with a few exceptions, even though the communication might be actionable in a future proceeding.

***Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)***: In this case, a high school principal barred two articles from the school paper because he thought they were inappropriate. Students on the newspaper staff brought the case to court, saying the principal's actions violated their First Amendment rights.

In a 5-3 decision, the Court held that schools must be able to set high standards for speech disseminated under their supervision, and that schools had the right to refuse to support speech that was "inconsistent with the shared values of civilized social order." The Court said the educators didn't offend the students' First Amendment rights, as long as their actions were "reasonably related to legitimate pedagogical concerns."

***Branzburg v. Hayes, 408 U.S. 665 (1971)***: A reporter interviewed several drug users and wrote an article about it. He was called in twice to testify about his sources before state grand juries investigating drug crimes -- and refused. The question posed to the Supreme Court: Does forcing a reporter to testify before a grand jury violate his or her freedoms of speech and press?

The Supreme Court found that this so-called reporter's privilege doesn't apply if a reporter's confidential information was of a "compelling" and "paramount" state interest, couldn't be obtained any other way, and contained specific information about specific

crimes. Simply put, forcing a reporter to testify before a grand jury won't violate that reporter's first amendment rights. The fact that reporters receive information in confidence doesn't give them the right to withhold that information in a government investigation. Private citizens are often required to share information learned in confidence if called upon to testify in court, and thus, so are reporters.

**The California Shield Law and *Delaney v. Superior Court* (1990):** The California Shield Law protects journalist from being compelled to reveal sources, or other details of journalistic investigation even under oath or under subpoena.

The California Supreme Court held in *Delany v. Superior Court* (1990) that the shield law protected unpublished information to include the reporter's non-confidential eyewitness. The Shield law does not, however, prevent a journalist from disclosing information in a criminal case, if that information could be used to exonerate or otherwise help the defendant. To do so would place the shield law in conflict with a Criminal Defendant's right to a fair trial.

***New York Times Co. vs. United States*, 403 U.S. 713 (1971)**

In 1971, as the nation heatedly debated its involvement in the Vietnam War, the New York Times obtained a confidential copy of an internal Defense Department report that detailed government discussions about the war. These documents were called "the Pentagon Papers."

At the U.S. government's request, the New York Times was barred from publishing the documents, claiming that the publication of the documents would endanger national security. The Times argued that the prior restraint (preventing publication) violated the First Amendment.

The Supreme Court ruled 6-3 in favor of the Times. In dissent, Chief Justice Warren Burger noted that the "imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex, modern government." This case is extremely important to journalists, as the court recognized the need to find a balance between the right to a free press and the need for the government to protect national security. The ruling in favor of the press places even more responsibility on the Fourth Estate, challenging journalists to use their freedoms wisely in their role as gatekeepers for disseminating information to the public.

**In summary**, Freedom of the Press was very important to the drafters of the Constitution and it is still considered very important today. Constitutionally speaking, protections to the Press are greater now than at other points in our nation's history, but still the right to a free press is not absolute.

**\*Discussion Questions:**

**What is Freedom of The Press?**

- Where is the concept found?
- By what authority is it granted?

**If Journalism is Speech or Expression, why is a free press guaranteed by the First Amendment? Isn't Press Freedom assumed under guarantees to free speech?**

- Does the Press Clause imply that the Press is even "more free" or can be less restricted than those engaging in regular speech or expression?
- This question has not yet been completely fully by the Supreme Court.
- *"The Court has not yet squarely resolved whether the Press Clause confers upon the institutional press' any freedom from government restraint not enjoyed by all others."*(First National Bank of Boston et al. v. Bellotti, Attorney General of Massachusetts. (1978)

**Are high school students protected by freedom of speech?**

- When can the school principal stop students from publishing information?
- Why do you think this is allowed under certain circumstances?

**Do you think news reporters should be required by the government under certain circumstances to disclose their sources?**

- When do you think they should be required to disclose their sources?

**Do you think it is important for the media to consider the potential harm that could be done by publishing certain information?**

- What if the information they publish could put U.S. military personnel in danger?
- Do you think the government should be permitted to bar the publication of such information under these circumstances?

**Are social media companies like Twitter and Facebook allowed to censor what people post on their platforms?**

## 5. RIGHT TO PEACEFUL ASSEMBLY

*Another Cornerstone of Democracy is the Right to Peaceful Assembly. The First Amendment prohibits the government from abridging "the right of the people peaceably to assemble."*

Freedom of peaceful assembly is the individual right or ability of people to come together and collectively express, promote, pursue, and defend their collective or shared idea. We see it often in the news when there are protests.

### **Time, Place, and Manner:**

Time, place and manner restrictions are content-neutral limitations imposed by the government on expressive activity.

Such restrictions come in many forms, such as

- imposing limits on the noise level of speech,
- capping the number of protesters who may occupy a given forum,
- barring early-morning or late-evening demonstrations, and
- restricting the size or placement of signs on government property.

### **Four-part time, place, and manner test**

1. Does the regulation serve a significant (some cases say "important") governmental interest?
2. Is the government interest served by the regulation unrelated to the suppression of a particular message?
3. Is the regulation narrowly tailored to serve the government's interest?
4. Does the regulation leave open ample alternative means for communicating messages?

### **Different Levels of Scrutiny Depending on Nature of Restriction:**

Although content-based restrictions on speech in the public forum are subject to **strict judicial scrutiny** (usually a requirement that the restriction serve a compelling state interest and that there is no way of serving the interest that is less speech-restrictive), content-neutral restrictions on speech are subject to only **intermediate scrutiny**. In general, the government must show that the law serves an important objective (not involving the suppression of speech), that the law is narrowly tailored, and that there remain ample alternative means of communication.

There are many content-neutral justifications for restricting speech. For example:

- An anti-leafletting ban helps reduce litter (the Court overturned such a ban in *Schneider v. State*, 308 U.S. 147 (1939)).
- A ban on focused picketing outside private homes protects residential privacy (the Court upheld such a ban in *Frisby v. Schultz* (1988) 487 U.S. 474).
- A ban on soundtrucks at night that helps people get to sleep (the Court upheld such a ban *Kovacs v. Cooper* (1949) 336 U.S. 77--see also *Ward v. Rock Against Racism* (1989) 491 U.S. 781).

Useful Article from Northern California ACLU:

<https://www.aclu.org/press-releases/following-aclu-action-northern-california-high-school-students-win-first-amendment>

### **Sideshows – An example of non-political assembling for an illegal purpose**

Government treatment of sideshows is a modern example of time, place, and manner restrictions to the freedom to assemble. Can you assemble on a public intersection or vacant lot to show off vehicle stunts to a crowd of onlookers?

According to the Santa Rosa Press Democrat, the police arrested seven Sonoma County residents suspected of promoting and organizing unsanctioned sideshows in July of 2022, involving about 300 vehicles. These illegal gatherings are known for clogging intersections, disrupting residents and causing injuries. Local sideshows have been marred by gun violence, assaults, injuries and property damage along with pursuits involving police. <https://www.pressdemocrat.com/article/news/santa-rosa-police-arrest-7-suspected-promoters-of-july-sideshow-others-rem>

In October 2021, Gov. Gavin Newsom signed into law a bipartisan bill that defines sideshows as an event involving at least two vehicles that blocks traffic for the purpose of performing stunts, speed contests or reckless driving for an audience.

Santa Rosa Police Chief John Cregan identified sideshows as a top priority when he took over the department in July. And last October, the Santa Rosa City Council adopted an ordinance criminalizing participation in sideshow or street racing, whether as a driver, passenger, spectator or organizer. <https://www.kron4.com/news/bay-area/sideshow-participants-could-be-jailed-under-proposed-santa-rosa-ordinance/> and <https://www.kron4.com/news/bay-area/new-sideshow-ordinance-in-santa-rosa/>

#### **\*Discussion Questions:**

- **Are sideshows an example of appropriate time, place, and manner restrictions to the right to assemble? If yes, is this true even if the restrictions are absolute; meaning, no sideshows of any kind can take place?**
- **What about the “Peggy Sue Car Show & Cruise” at the Sonoma County Fairgrounds or the “Santa Rosa Tattoos & Blues Car Show” at the Flamingo?**

**Are these examples of “tame” sideshows? They adhere to time, place, and manner restrictions.**

- **Should spectators of side shows also be arrested?**
- **What if the sideshow took place on private land?**

**The Power of Sport and Protest:** (From 2023 American Bar Association Resources for Law Day. Video: <https://www.retroreport.org/video/all-in-the-game-the-black-athlete-in-america/> NOTE: *Some of the footage in these videos may be upsetting. Please view the videos ahead of time and discuss with the teacher to ensure their appropriateness for the students you are working with.*)

When N.F.L. players starting with Colin Kaepernick took a knee during the national anthem to protest police mistreatment of African-Americans, their actions ignited an uproar over injecting politics onto the playing field. Their protest had surprising ties to the silent black-power salute by two sprinters at the 1968 Olympics.

**\*Discussion Questions:**

- **What are some ways protests may look different depending on their setting and context?**
- **Do you think sporting events are appropriate platforms for protesting?**
- **Do you think athletes and celebrities have more power when protesting? Do you think they have a responsibility to protest certain injustices?**

**Protests for Racial Justice (5:16)** Introduces students to the findings of the Kerner Commission, a panel of experts President Lyndon Johnson convened to make policy recommendations following the protests, violence and disorder that occurred in over 150 cities in 1967. The commission recommended a series of sweeping changes, including reforms in policing tactics and efforts to reduce urban poverty. But Johnson largely ignored the findings of the study. Useful in helping students make connections between the 1960s and today, the video sets up an engaging class discussion on race, poverty and policing. <https://www.retroreport.org/education/video/protests-for-racial-justice-a-long-history/>

**\*Discussion Questions:**

- **What about the Kerner Report stands out to you today?**
- **Do protests come from “pent up frustration?”**
- **Do you think *any* of the original Kerner Report recommendations have been put into place?**
- **What exactly can protests accomplish when it comes to racial injustice? What limitations exist?**

## CASES ADDRESSING RIGHT TO PEACEFUL ASSEMBLY:

### *Schenck v. Pro-Choice Network of Western NY* (1997) 519 US 357

Facts of the case: This action was filed by the Pro-Choice Network of Western New York (PCN), on behalf of health care providers, to enjoin Schenck and others from continuously staging blockades and other disruptive illegal activities in front of abortion clinics. After its restraining order proved ineffective, a District Court issued a preliminary injunction creating "fixed buffer zones" which prohibited demonstrations within fifteen feet of entrances to abortion clinics, parking lots, or driveways. The court also created "floating buffer zones" prohibiting demonstrators from coming within fifteen feet of people or vehicles seeking access to the clinics. Following the Appellate Court's decision to uphold the District Court's ruling that the "buffer zones" were constitutional, the Supreme Court granted Schenck certiorari.

Question: Did either or both types of "buffer zones" violate Schenck's First Amendment right to freedom of speech.

Conclusion: The Court held that while the "fixed buffer zones" were constitutional, the "floating buffer zones" were not. It distinguished between the two types of "buffer zones." The Court supported the "fixed buffer zones" because they protected the government's interest in public safety, by preventing protesters from engaging in unlawful conduct (i.e. spitting on and shouting in clinic users' faces, blocking doorways), while still allowing them to be heard from a short distance. "Floating buffer zones," by contrast, were struck down by the Court since they imposed a greater burden on free speech than was required to protect the government's interest in public safety and free traffic flow. The Court found that forcing demonstrators to remain at least 15 feet away from the people they wished to communicate with would create an inordinate amount of dangerous confusion and congestion.

### **Lloyd Corp., LTD v. Tanner Village** (1972) 407 US 551

Facts of the case: Donald Tanner was a Vietnam War protestor who was distributing anti-war handbills inside Lloyd Center Mall in Portland, Oregon. The handbills were unrelated to the operations of Lloyd Center. Lloyd Center was privately owned by Lloyd Corporation, which prohibited the distribution of handbills inside the mall. While distributing handbills, Tanner and other protestors were informed by mall security that they should stop their distribution or be subject to arrest. The protestors ended their distribution, left the mall, and filed suit against Lloyd Corporation in United States District Court for the District of Oregon alleging their First Amendment right to free speech had been violated. The District Court ruled in their favor. The United States Court of Appeals for the Ninth Circuit.

Question: Were Tanner and the other protestors' First Amendment right to free speech violated by Lloyd's refusal to allow them to distribute handbills on mall property?

Conclusion: No. In a 5-4 decision, the Court reversed the Ninth Circuit and held that Tanner was not entitled to distribute handbills within Lloyd Center. Writing for the majority, Justice Lewis F. Powell contrasted this case with *Amalgamated Food Employees Union v. Logan Valley Plaza*, which allowed protestors to picket a shopping center when their picketing was "directly related" to the shopping center and no "reasonable opportunities to convey their message...were available." Here, Tanner's were unrelated to the operations of the mall, and the protestors had an alternative on the sidewalks immediately outside the mall, which were owned by the City of Portland. Powell characterized equating public property with private property intended for public use – such as the mall – as "reach[ing] too far." Therefore, Tanner and the protestors did not have a First Amendment right to distribute their handbills within the mall.

From NorCal ACLU website:

### **Is all speech protected?**

The First Amendment protects your right to express your opinion, even if it's unpopular. You may criticize the President, Congress, or the chief of police without fear of retaliation. But this right doesn't extend to libel, slander, obscenity, "true threats," or speech that incites imminent violence or law-breaking. If you grab a megaphone during a riot and yell "shoot the cop" or "loot the shop," you may reasonably expect trouble.

In addition, the government typically can't stop you from talking generally about ideas or future events, including overthrowing the government or taking to the streets, but it may ban speech that's "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

### Logistics of a Peaceful Protest

#### **What if others react violently to what I say?**

If you are the organizer of a lawful protest, you can't be held responsible should people in attendance commit unlawful acts, as long as your words don't directly incite violence or law-breaking. You also are not liable for the way that counter-demonstrators react to your message. While counter-demonstrators do have a right to be present, it's the responsibility of the police to control the crowd.

#### **When do I need a permit?**

Whether you're marching on city hall, holding a candlelight vigil, or picketing outside a private business or residence you should check your local permit ordinance before you put on your marching shoes and pull out the megaphone.

### **While regulations vary, here are some guidelines:**

The government can't prohibit marches on public sidewalks or streets, or rallies in most public parks or plazas. But it can often require a permit to regulate competing uses of the area and to ensure you respect reasonable time, and place and manner restrictions.

You shouldn't need a permit for demonstrations that don't "realistically present serious traffic, safety, and competing-use concerns beyond those presented on a daily basis by ordinary use of the streets and sidewalks." If you hold a small rally in a public park or march on the sidewalk and obey traffic laws, you generally won't need a permit.

### **When can the city deny my permit?**

A municipality must have precise and specific standards for denying a permit. An ordinance with no standards, or with vague standards (such as "will not disturb others" or "in the public interest" or "in the interest of vehicular or pedestrian traffic safety"), gives individual officials too much discretion. Such an ordinance is unconstitutional and you can't be lawfully punished for violating it. If the government denies you a permit for expressive activity, it should tell you why it has done so.

### **Can the city tell me to change my route?**

The government may impose reasonable restrictions on the time, place, and manner of your event in order to reduce the amount of disruption it will cause. However, a demonstration should be allowed to take place within "sight and sound" of its intended audience. You can challenge efforts to re-route your march away from busy crowds or main streets or to dictate when it must start and end—because you can't communicate your message if there's nobody to hear it.

### **What if past marches have turned violent?**

The government can't deny a permit just because past demonstrations by your group or others ended in civil disobedience or a disorderly brawl. Likewise, officials can't ask you to promise that protesters will obey the law before agreeing to issue your permit.

### **Can the city ask me to cover the costs of my protest?**

Cities may charge for the actual costs of a demonstration, including the costs of processing permits, traffic control, certain narrow insurance requirements, and some clean-up costs, but you may challenge excessive fees.