Lesson 16

SUBSTANTIVE AMENDMENTS: AMENDMENTS I AND II

Lesson Objectives

When you complete Lesson 16, you will be able to:

- Explain the purpose of the Establishment of Religion Clause of the First Amendment, the restrictions that it places on Congress, and cite the Supreme Court's three approaches to the Establishment of Religion Clause.
- Understand the difference between separating religion from politics and separating church from state.
- Explain the Free Exercise of Religion Clause and the four related key issues.
- Outline the principles and exceptions of the Freedom of Speech Clause.
- Describe the history of and debate regarding the Freedom of the Press Clause.
- Discuss the purpose of the Freedom of Assembly and Petition Clause.
- Understand the Founding generation's concerns about standing armies and the difference between a standing army and a militia.
- Understand the purpose of the Second Amendment and to which government it applies.

Part 1:
Amendment I

Establishment of Religion
Amendment I

Free Exercise of Religion
Amendment I

Freedom of Speech and Freedom of the Press
Amendment I

Freedom of Assembly and Petition
Amendment I

Establishment of Religion — Amendment I

Essay by John Baker (pp. 302–307)

The First Amendment was not created to divorce religion from politics. In reality, the Northwest Ordinance of 1787 stated that religion was "necessary" for good government and human happiness. George Washington asked for God's blessing during his First Inaugural Address and reiterated the importance of religion in fostering the morality needed for good government during his Farewell Address in 1796. The Framers saw religion as beneficial to government and designed the Establishment of Religion Clause to protect the free exercise of religion.

Because six of the 13 colonies had established state churches, the wording of the Establishment of Religion Clause would prohibit Congress from establishing a national church but would not interfere with the states' ability to establish churches. The House and the Senate each proposed different wording to prohibit an established national church and protect the individual right to the free exercise of religion. The word "respecting" was a vital inclusion in the final version because it forbade Congress from either creating a national religion or disbanding any state's church. The Founders did not view established churches on the state level as violating free exercise of religion. In fact, religious freedom and toleration flourished throughout early America.

Despite the text of the amendment, the Supreme Court ruled in *Cantwell v. Connecticut* (1940) that the First Amendment applied to the states as well as to Congress. Since then, contemporary constitutional law on the Establishment Clause has been incoherent. There are several schools of thought on the clause—the separationist view, the no-coercion view, and the endorsement view—which have not been reconciled.

In *Everson v. Board of Education of Ewing* (1947), the Supreme Court argued that the purpose of the Establishment Clause was to create a "wall of separation," "high and impregnable," between church and state. The "wall of separation" language is from one of Thomas Jefferson's private letters to the Danbury Baptist Association in Connecticut in 1802, but the letter is silent as to the height and impenetrability of such a wall. To enforce the strict separation of religion and government, the Court crafted a three-part test—the "*Lemon* test" set out in *Lemon v. Kurtzman* (1971)—to determine violations of the Establishment Clause: (1) the law must have a secular purpose; (2) the primary effect must neither advance nor inhibit religion; and (3) the law must not foster an excessive entanglement of religion with government. If a law fails one prong, it fails the test and therefore is an establishment of religion. The *Lemon* test is rarely used today.

Contrary to the separationist view, Justice William Rehnquist in *Wallace v. Jaffree* (1985) argued that the Establishment Clause prohibits government from coercing people to practice or support religion but does not demand that religion be totally separate from government.

In *Lynch v. Donnelly* (1984), Justice Sandra Day O'Connor argued that the clause forbids the state to endorse one religion above all others. If a reasonable observer would view the state action as sending a message to non-adherents that they are not full members of the community, then the state has endorsed a religion and therefore has violated the Establishment Clause.

The Supreme Court's incoherence on the Establishment Clause became especially apparent in 2005 when the Court held a display of the Ten Commandments to be unconstitutional in Kentucky but constitutional in Texas.

Before You Read

Ask: What role does the government play in the religious lives of U.S. citizens? (Answers will vary. Students may mention the idea of a "wall of separation" between church and state. They may also mention that Americans worship freely without government interference.)

Active Reading

Ask: What two specific actions by government does the Establishment of Religion Clause prohibit? (Congress is not allowed to establish an official national religion or to dissolve a state establishment of religion. The Founders did not view state establishments of religion as a violation of the Establishment Clause.)

Write About It

Have students research one of the state establishments of religion during the Founding era. Ask each student to write a few pages on his or her findings and share them with the class.

Check Understanding

Tell students that the Founders supported the separation of church and state. They therefore opposed any use of the federal government's coercive power to require citizens to join a specific religious sect. For example, the Founders would have been opposed to a law that required people to attend certain religious services every week or face a penalty. However, the Founders did not support the separation of religion and politics. They realized that religion was necessary for morality and that morality was needed in politics; thus, they did not oppose government endorsement or encouragement of religion for the ultimate purpose of encouraging citizens and politicians to be moral.

Free Exercise of Religion — Amendment I

Essay by Thomas Berg (pp. 307–311)

The Free Exercise of Religion Clause forbids Congress from prohibiting individuals from freely exercising their religion. The boundaries of this right are debated. The narrower interpretation treats religious activity as a type of free speech or some other constitutional right. The broader interpretation sees the right of free exercise as independently valuable. The tension between the broad and narrow interpretations plays out in four key issues relating to the Free Exercise of Religion Clause.

First, what is included in the "exercise" of religion? Is it a right to believe or a freedom to act in a manner consistent with those beliefs? Narrowly interpreted, the First Amendment protects belief, meaning the holding of certain opinions, but not actions motivated by that belief. Under the broader interpretation of the amendment, actions motivated by belief are protected. The Supreme Court initially adopted a narrow reading of the clause and ruled that the First Amendment protects belief but not action: For instance, polygamy is not protected by the First Amendment. In later rulings, the Court has adopted the broader interpretation, ruling that the amendment protects religiously motivated actions.

Second, if the First Amendment protects belief and action, can a religious belief exempt one from complying with general law? Many states, for instance, accommodated Quakers by allowing them to testify by an affirmation rather than swearing an oath, which would have violated a tenet of their faith. Supporters of the narrower interpretation of the Free Exercise of Religion Clause argue that specific statutory exemptions are permissible but not required. Supporters of the broader interpretation argue that exemptions from the law are appropriate and necessary responses to conflicts between legal and religious duties (so long as the religious activity does not harm public peace or others' rights).

Accommodations to or exemptions from general laws point to philosophical differences about the relationship between civil government and religion. Theorists such as John Locke argued that religious belief does not remove the obligation under the law and that exemptions are therefore not required. On the other hand, early Americans saw religion as a duty to God. In a conflict between religion and civil government, an exemption from the law is necessary. A separate question is: Who provides the exemption, the legislature or the court?

Third, should exemptions from general laws be made on the grounds of secular beliefs in addition to religious ones? The Founders used the term "conscience," which some have argued encompasses philosophical and religious beliefs.

The final issue is the question of what constitutes a violation of the right to practice religion freely. Is withholding a benefit equivalent to a violation of one's freedom of conscience? Does industrial development in ceremonial areas considered sacred by Native Americans interfere with their freedom to practice their religion? These are complex issues that are unlikely to be settled soon.

Before You Read

Ask: Are there limits to a citizen's free exercise of religion? (Answers will vary. Some students may mention that religious practices should not violate state or federal laws or harm individuals or society. Other students may say that all citizens should be completely free to practice any religion they choose and that the government should never interfere with this freedom.)

Research It

The Founders saw religion as important to maintaining free government. Have students research a Founder's public speeches or proclamations about religion and explain that Founder's view. Students may use textbooks, other books, or online resources. Ask students to share their findings with the class.

Discussion Question

Should people be excused from obeying certain laws because of their religious beliefs or practices? Why or why not? (Answers will vary. Some students may say that it is okay to make exceptions in certain cases, such as excusing people from work on certain days so they can go to church or excusing people from military service. Others may argue that state and federal laws should apply to all citizens equally. It also raises the question: Should everyone be entitled to an exemption? For instance, if members of a new religious group claim that taking illegal drugs is part of their belief system, should they be exempt from drug laws?)

Freedom of Speech and Freedom of the Press — Amendment I

Essay by Eugene Volokh (pp. 311–316)

Freedom of speech and freedom of the press are important but not well-defined provisions of the Constitution. The Framers certainly recognized the importance of such freedoms as vital to the advancement of truth, science, morality, and arts in general, but few Founding-era courts discussed the scope of these rights.

The most prominent debate on freedom of the press concerned the Sedition Act of 1798, wherein Congress made it a crime to publish writings intended to defame the government, Congress, or the President or to incite unrest in the country. The debate turned on whether government (1) could prevent the publication of works that would violate the Sedition Act or (2) could merely punish people for publishing such works after the fact.

John Marshall, a Federalist Congressman, argued that freedom of the press meant that one could publish freely without first obtaining permission, but the Freedom of the Press Clause did not protect against criminal prosecution after publication. James Madison did not agree with this view. He argued that penalties imposed after publication would restrict freedom of the press every bit as much as laws allowing prior restraint would.

Federalist supporters of the Sedition Act argued that freedom of the press does not extend to seditious speech against the government, because seditious speech destroys confidence in government. By contrast, the Republicans argued that freedom of speech necessarily covers speech that criticizes the government.

The consensus on the original meaning of the Freedom of Speech Clause is also unsettled. For instance, does the clause protect anonymous political speech? Some, including Justice Clarence Thomas, point to the Founders' use of anonymous speech as proof that anonymous political speech is protected. Justice Antonin Scalia, however, disagreed in *McIntyre v. Ohio Elections Commission* (1995).

Contemporary jurisprudence on the Freedom of Speech and Freedom of the Press Clauses does not reference their original meaning. Rather, the Supreme Court has developed its own set of categories of protected and unprotected speech and press. First, the guarantees in the Freedom of Speech and Freedom of the Press Clauses protect individuals against the actions of government, not against the actions of private individuals. Second, they apply to both the state and federal levels. Third, they cover speakers and writers, regardless of medium (book, magazine, or Internet) or membership with an institutional press. (Radio and television receive less constitutional protection.) Fourth, the Freedom of Speech Clause covers expressive actions, such as carrying a flag or wearing a symbol, and actions that are necessary for a person to deliver an effective talk, such as buying a podium and microphone. Fifth, both political speech and speech about science, religion, art, and a variety of other topics are protected. Sixth, free speech extends to all viewpoints, even ones that most of society considers evil.

The Court recognizes some limitations on freedom of speech and press, including speech inciting individuals to break the law; obscene works; threats of violence; fighting words, which are personal insults directed toward a specific individual that are likely to cause a fight; speech owned by others that may violate intellectual property laws; and certain types of commercial advertising such as misleading statements.

Before You Read

Ask: What does "freedom of speech" mean? (American citizens may speak their opinions freely without being punished for their opinions.) Ask: What does freedom of the press mean? (Freedom of the press safeguards the ability to write and publish one's opinions freely. It is not limited to an institutional press such as a news agency. It is an individual right.)

Active Reading

Ask: What types of media are protected by freedom of speech today? (The Founders understood freedom of speech to cover political speech. The modern Supreme Court considers freedom of speech to cover books, newspapers, movies, the Internet, and—to a lesser extent—radio and television.) What types of statements made by an individual might not be protected by freedom of speech? (statements that an individual knows are untrue, statements that are meant to provoke people to commit crimes, statements that contain threats of violence, and certain insults provoking a fight)

Make an Inference

Say: Imagine if a political party in the government could control the ability of individuals and institutions to write or publish. Ask: What would newspapers and news broadcasts cover? What could individuals freely discuss in writing? (Answers will vary. Sample answer: Whichever party was in power would be able to determine what news would be covered. Individuals would likewise be limited as to what they could publish. If the other party came to power, the news coverage would reflect the change in power.)

Freedom of Assembly and Petition — Amendment I

Essay by David Bernstein (pp. 316–318)

The Freedom of Assembly and Petition Clause ensures the right to assemble peacefully and to "petition the Government for a redress of grievances." Current jurisprudence wrongly considers these two rights to be forms of free speech, but the First Amendment distinguishes these rights from each other and from the Free Speech Clause.

As the 1774 Declarations and Resolves of the First Continental Congress reveal, the right to petition was a more robust right than the right to free speech. The first formal recognition of the right to petition is in the Magna Carta. In 1642, Massachusetts became the first colony to grant this right to citizens; by the time of the Revolution, five other colonies had likewise guaranteed this right. Petitions were the primary avenue for citizens to communicate with local governing bodies and assemblies. The assemblies thoroughly reviewed these petitions and responded to them.

While Congress readily included the right to petition in the Bill of Rights, the right to assembly was more controversial. Several viewed the right to assemble as an adjunct right rather than an independent one. The right was included in the Bill of Rights as a separate right because the right to assemble encompassed the right of the people to assemble to alter the structure of the government.

The right to petition does not guarantee that the government will respond in any particular way or at all. The judiciary is the only branch with a duty to respond to petitions. The executive arguably has an obligation to respond, but the presence of unaccountable administrative agencies complicates this. In the legislature, hearing and ruling on petitions was once a vital task for the House of Representatives. Committees would consider petitions and then report to Congress, resulting in a bill to consider the issue or a rejection of the petition. Although Congress refused to consider petitions regarding slavery, Members did consider petitions about other highly controversial issues.

Today, Congress treats petitions in a *pro forma* manner, and citizens rely on the modern democratic system to voice their opinions. The Supreme Court considers the right to petition and the right to assemble to be forms of free speech—more specifically, a right to expressive association.

Before You Read

Ask: What are petitions? (Petitions are formal written requests to an authority such as a government; people sign them to protest or to give an opinion about a specific issue.) How would you exercise your right to Assemble? (Answers will vary. Students may mention attending a rally or holding a political meeting.)

Active Reading

Ask: How has Congress handled petitions in the past? (Congress took petitions very seriously. The House of Representatives heard petitions on the floor. Committees were given the responsibility of reviewing, considering, and reporting on petitions. The government typically responded to all petitions.) What types of petitions would Congress not consider? (petitions regarding the abolition of slavery)

Discussion Questions

Petitions are no longer used as a primary means for U.S. citizens to communicate with the government. Do you think the American government should treat petitions as seriously as it did during colonial times? Why or why not? (Answers will vary. Students who think petitions should be taken seriously may point out that petitions would allow citizens to communicate directly with officials in the various branches of government. Petitions are addressed to all of the people's representatives, not just the petitioner's individual Member of Congress. Students who do not think petitions should be taken as seriously will likely argue that the ability to e-mail, call, or write freely to their Members is more effective than formal petitioning.)

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 16, Part 1. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. Freedom of religion is guaranteed by the
   a. First Amendment.
   b. Second Amendment.
   c. Third Amendment.
   d. Ninth Amendment.

2. The First Amendment does *not* guarantee
   a. Freedom of speech.
   b. Freedom of petition.
   c. Freedom from unreasonable searches.
   d. Freedom of assembly.

3. The Freedom of Speech Clause can be applied only to restrict the actions of
   a. private employers.
   b. churches.
   c. property owners.
   d. government officials.

4. _____ argued that the freedom of the press guarantee did not stop authorities from laying charges after publications had been released.
   a. James Madison
   b. John Marshall
   c. Thomas Jefferson
   d. John Adams

5. The first colony to grant its citizens the right to petition was
   a. Delaware.
   b. Pennsylvania.
   c. Vermont.
   d. Massachusetts.

Fill in the blank: Write the correct word or words in each blank.

1. According to the exceptions to freedom of speech protection, commercial advertising that is _____ is not protected. **(misleading)**

2. The law passed by Congress in the late 1700s that made it a crime to defame Congress, the President, or the government was the _____. **(Sedition Act)**

Short Answer: Write out your answer to each question.

1. In *Everson v. Board of Education of Ewing* (1947), the Supreme Court focused on which phrase from Thomas Jefferson's letter to the Danbury Baptists? **(wall of separation between church and state)**

2. Since *Everson v. Board of Education of Ewing* (1947), the Supreme Court has developed what three different and conflicting views regarding the Establishment of Religion Clause?
   - **Separationism**
   - **Coercion**
   - **Endorsement**

3. What is the small set of rather narrow exceptions to the modern legal doctrine of free speech protection?
   - **Incitement**
   - **False statements of fact**
   - **Obscenity**
   - **Child pornography**
   - **Threats**
   - **Fighting words**
   - **Speech owned by others**

4. In 1840, the House had a "gag rule" against petitions about what subject? **(slavery)**

5. The right to petition, along with the right to assemble peaceably, became less important as what happened? **(as modern democratic politics gradually replaced petitioning and public protests as the primary means for constituents to express their views to their representatives)**

True / False: Indicate whether each statement is true or false.

1. Under modern Supreme Court jurisprudence, the right to petition and the right of peaceable assembly have been almost completely collapsed into freedom of speech. **(True)**

2. Even before the incorporation of the religion clauses and without intervention by the federal courts, religious freedom and tolerance had spread throughout the United States. **(True)**

Part 2:
Amendment II

Right to Keep and Bear Arms — Amendment II

Essay by Nelson Lund (pp. 318–322)

Modern debates about the Second Amendment focus on whether it protects an individual's right to bear arms or the states' power to maintain militia organizations such as the National Guard. The Founders, however, thought the amendment's meaning was obvious and questioned whether it added anything to the Constitution.

To understand the Second Amendment, one must grasp the Founders' distrust of standing armies. Because most standing armies throughout history eventually had turned against the people, the Founders would form armies when necessary to respond to foreign invasion. Militias and civilian armies would respond to sudden emergencies.

The problem with militias was that they were poorly trained and inefficient compared to professional soldiers. Citizens might be reluctant to bear the costs for supplies and weaponry and spend the time for unpaid military training. Militia training would vary from state to state, leaving open the possibility that the combined forces might be too weak to defend the nation. Confronted with this dilemma and considering other options, the Constitutional Convention expected some kind of militia to exist and gave Congress the authority to regulate it.

Anti-Federalists objected to the federal government's control and wanted states to control the militia instead. They argued that states would find it difficult to defend themselves against federal oppression and pointed to European history as justification for their concerns. Federalists responded that, unlike Europeans, American citizens were armed and able to defend themselves against such acts. Implicit in this debate were two linked assumptions: The federal government had authority over the army and militia, but it had no power to disarm citizens. The Second Amendment, thus, was a statement of two well-understood, uncontroversial ideas.

Since the adoption of the Second Amendment, the traditional militia structure has been incorporated into the federal military structure, and Americans no longer fear the military as a tool of domestic oppression. Also, changes in weaponry mean that citizens no longer privately own the same weapons as would be used by the military. The weapons that an average 18th century citizen would own for hunting and self-defense were the same ones used in civil defense. Twenty-first century citizens do not privately own the same modern weaponry as used by the military.

Under current jurisprudence, courts are divided on the question of whether the Second Amendment is an individual right to bear arms or a corporate right of the community to maintain an armed militia. Moreover, the Second Amendment applies to the federal government but not the states; consequently, most gun-

control regulations are made at the state level. Apart from strict regulations in the District of Columbia, the federal government has done little to prevent civilians from owning and using firearms. In 2008, however, the Supreme Court ruled in *District of Columbia v. Heller* that the Second Amendment protects an individual right to bear arms, even among citizens in federal enclaves. Although the Supreme Court has ruled that other amendments in the Bill of Rights apply to the states, it is unclear whether the Court will apply the Second Amendment to state governments.

Active Reading

To ensure understanding, ask: What is a militia? (a body of citizens organized for military service) How is a militia different from a standing army? (An army is made up of professional soldiers. A militia is made up of civilians.)

Check Understanding

Remind students that the Founding Fathers did not attempt to solve the problem of whether the country should have state-controlled militias or a unified militia under federal control. Instead, they gave Congress the authority to regulate the militias as well as the Army and Navy. Ask: Why did Anti-Federalists object to this shift in power? (The Anti-Federalists feared that giving Congress the authority over militias removed the states' ability to defend themselves against an oppressive federal government.)

Write About It

Have the students read *District of Columbia v. Heller* (2008). What are the arguments for the Second Amendment as an individual right to bear arms and as a corporate right of the community to maintain a militia?

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 16, Part 2. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. Anti-Federalists wanted the militia to be controlled by
   a. the federal government.
   b. the Founders.
   c. the President.
   d. state governments.

2. Militias are different from armies mainly because people belonging to militias are not
   a. professional soldiers.
   b. loyal to one nation.
   c. citizens of a nation.
   d. supervised by officers.

3. After the Second Amendment was adopted, the traditional militia
   a. grew more powerful as the federal military weakened.
   b. came into disuse as the federal military grew.
   c. was disarmed by federal authorities.
   d. was forced to join the federal military.

Fill in the blank: Write the correct word or words in each blank.

1. The Founding generation mistrusted standing _____. **(armies)**

2. _____ argued that having the militia under federal control would prevent states from being able to defend themselves against federal oppression. **(Anti-Federalists)**

3. _____ argued that the American people could respond to military force if necessary because, unlike Europeans, they were armed. **(James Madison)**

Unit 6