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*The U.S. Supreme Court and the First Amendment:  
Michael Les Benedict's Interpretations in "The Blessings of Liberty"*

**ABSTRACT:** *This essay outlines some of the major U.S. Supreme Court cases that have redefined how the First Amendment is interpreted and what having freedom of speech, press, assembly, and religion means. Based on Michael Les Benedict's examination of landmark Supreme Court cases in his work "The Blessings of Liberty," it guides the reader through major events in American history that intertwine with changing views of the First Amendment. It argues that each interpretation is a response to current events, technological advancements, and Civil Rights changes, but that no interpretation is irreversible.*

**KEYWORDS:** *modern history; United States (U.S.); U.S. Constitution; Bill of Rights; First Amendment; U.S. Supreme Court; justices; cases; Civil Rights; legal history*

*Introduction*

Just as society has changed since the 1791 ratification of the Bill of Rights – the ten amendments to the U.S. Constitution detailing American rights – interpretations of the First Amendment have changed with it. Although the amendment itself has remained literally unaltered, its interpretation throughout the years has adapted to social issues and current events. The First Amendment grants Americans the freedom of religion, speech, the press, assembly, and the right to petition. Yet various laws and Supreme Court cases have challenged – and at times succeeded in changing – the public definition of, for example, what it means to have freedom of speech. So, what is legally protected by the rights granted under the First Amendment, and what is not? Based on Michael Les Benedict's seminal study of landmark Supreme Court cases in his work *The Blessings of Liberty* (first published 1996),<sup>1</sup> this essay argues that, although the wording of the First Amendment itself remains unchanged, interpretations of it have shifted and adapted to parallel society's technological advancements and Civil Rights changes. These interpretations extend to modern issues, including questions of wartime policing, Civil Rights debates, political protests, and public health concerns.

Soon after the Bill of Rights' ratification, the Alien and Sedition Acts of 1798 were the first test of free speech and free press. The Alien and Sedition Acts (1798) were "passed in preparation for an anticipated war with France" and "tightened restrictions on foreign-born Americans and limited speech critical of the government" which targeted potentially disloyal French sympathizers living in the United States.<sup>2</sup> Specifically, the Sedition Act "made it a crime to falsely criticize government officials," and the Alien Act allowed the U.S. government to deport "dangerous" immigrants, including those affected by the Sedition Act.<sup>3</sup> For the

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<sup>1</sup> Michael Les Benedict, *The Blessings of Liberty: A Concise History of the Constitution of the United States*, 3<sup>rd</sup> ed. (Lanham: Rowman & Littlefield, 2017; first published 1996), 98.

<sup>2</sup> "Alien and Sedition Acts (1798)," National Archives, [online](#).

<sup>3</sup> Les Benedict, *Blessings of Liberty*, 98.

first time, American laws were restricting free speech and free press. The acts were nothing if not controversial, and their ramifications became clear soon. Accused of committing illegal “seditious libel,” many Democratic-Republican newspaper editors and congressmen who questioned the constitutionality of the Sedition Act were prosecuted by the Federalist-controlled government.<sup>4</sup> The controversial Sedition trials, particularly the aforementioned prosecutions, contributed to the defeat of the Federalists in the election of 1800. The Democratic-Republican Party repealed the Alien and Sedition Acts or allowed them to expire, deciding unanimously in favor of political freedom and a democracy with opponents rather than suppressing the freedom of speech and the freedom of the press.<sup>5</sup>

*I. African Americans from Enslaved to Freedom (1865–1877):*

During the Reconstruction era (1865–1877), a period following the American Civil War when the previously seceded Southern states rejoined the United States, African Americans struggled to protect their constitutional rights. Prior to the abolition of slavery under the Thirteenth Amendment (1865), enslaved Blacks had lived highly restricted lives under a set of laws known as the Slave Codes. These Slave Codes prohibited enslaved Blacks from having any rights, including the liberties of the First Amendment, since they were considered property rather than humans. For example, enslaved people were not free to assemble in groups of more than five without a white person in attendance for surveillance, and they did not have the freedom of religion due to the prohibition of religious texts, including the Bible. Additionally, the Slave Codes restricted white abolitionists’ rights to free speech and free press by banning pro-abolition publications.

After the ratification of the Thirteenth Amendment (1865), the Slave Codes were abolished; however, they served as forerunners for the Black Codes—or Jim Crow laws—enacted across all Southern states in 1865 and 1866. The Black Codes continued to restrict formerly enslaved Blacks until Congress passed the Civil Rights Act of 1866, which granted all Blacks equal protection of their rights and liberties. A short time later, the Fourteenth Amendment (1868) solidified what the Civil Rights Act of 1866 had set forth by guaranteeing “all persons born or naturalized in the United States” due process and “equal protection of the laws.”<sup>6</sup> How precisely the Fourteenth Amendment would be applied and enforced would be determined years later in *U.S. v. Cruikshank* (1876), when U.S. Supreme Court Justice Waite overturned the convictions of several white men who had been charged with depriving Blacks of their constitutional right to assembly. The men on trial had killed one hundred (or more) Blacks in the 1873 Colfax Massacre for protesting the rigged victory of a white Democrat (John McEnery) against a

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<sup>4</sup> Les Benedict, *Blessings of Liberty*, 98.

<sup>5</sup> Les Benedict, *Blessings of Liberty*, 102.

<sup>6</sup> “Fourteenth Amendment to the U.S. Constitution: Civil Rights (1868),” National Archives, [online](#).

Republican (William Pitt Kellogg) who had already been pronounced the winner. Justice Waite argued that the Fourteenth Amendment did not protect individuals from other individuals, but only from the deprivation of rights by the government. The *Cruikshank* decision tied the First and Fourteenth Amendment rights to state and local governments and therefore did not guarantee complete protection of constitutional rights with regard to interaction between individuals.

## II. National Unity or Liberties Amid Global Fear and Uncertainty (1914–1945)

With the U.S. involvement in World War I (1914–1918) and the new fear of communism, the expired Alien and Sedition Acts of 1798 returned in a new form as the Espionage Acts of 1917 and 1918, which were meant to restrict and control new radical ideas. The Espionage Acts, like the Sedition Act of 1798, restricted free speech by making criticism of the government illegal. In response to the Espionage Acts, many civil libertarians banded together to form the Civil Liberties Bureau (C.L.B.), which preceded the National Civil Liberties Bureau (N.C.L.B.) of 1917 and the American Civil Liberties Union (A.C.L.U.) of 1920 that exists to date. The C.L.B. was an American Civil Rights organization founded as a branch of the American Union Against Militarism (A.U.A.M.), specifically dedicated to opposing U.S. involvement in World War I. It defended approximately two thousand people arrested under the Espionage Acts of 1917 and 1918.<sup>7</sup>

For example, Jacob Abrams, of *Abrams v. U.S.* (1919), was a Russian immigrant arrested for posting flyers in ammunition factories encouraging workers to strike due to the U.S. involvement in the Russian Revolution. Supreme Court Justice Holmes determined that the pamphlets did not endanger the war effort against Germany and thus did not violate the Espionage Act. Other Justices claimed Adams's actions did not pass the bad tendency test, which originates from English common law and "measure[s] the legality of speech by its tendency to cause an illegal action."<sup>8</sup> Ultimately, Justice Holmes and Justice Brandeis opposed the bad tendency test in favor of protecting the First Amendment right of free speech.<sup>9</sup> The Espionage and Sedition Acts were finally repealed after the Red Scare of the 1920s, when mass hysteria surrounding communism led to the arrest of many radicals and labor union leaders who criticized the U.S. government.

During the Great Depression (1929–1939), many businesses feared communism-inspired revolts, while workers feared losing their First Amendment liberties and their financial stability due to economic uncertainty. The presidency of Franklin D. Roosevelt (1933–1945) saw the passage of the National Labor Relations Act, or Wagner Act, of 1935 as part of FDR's New Deal (1933–1939), a series of federal relief programs, reforms, and public projects meant to alleviate

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<sup>7</sup> Les Benedict, *Blessings of Liberty*, 266.

<sup>8</sup> David M. Rabban, "Bad Tendency Test," in *The Oxford Companion to the Supreme Court of the United States*, ed. Kermit L. Hall, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2005), published online.

<sup>9</sup> Les Benedict, *Blessings of Liberty*, 267.

the psychological and financial fears brought on by the economic depression after the stock market crash in 1929. The Wagner Act created the National Labor Relations Board (N.L.R.B.), a federal agency meant “to prevent unfair labor practices that obstructed union organization,” ultimately guaranteeing workers the freedom of speech and assembly with the federal government’s support.<sup>10</sup> The Wagner Act protected workers’ legal right to organize and join labor unions – the freedom of assembly. Before the Wagner Act, workers had struggled to obtain just treatment and conditions against anti-union management and the state and local governments that supported them.

During the Great Depression, local and state governments also threatened the liberties of Americans who were not specifically tied to the labor movement. In *Lovell v. Griffin* (1938) and *Schneider v. Irvington* (1939), the Supreme Court ruled against the violations of liberties, stating that any city law that prohibited the distribution of publications without permission was unconstitutional. The court determined that such laws violated Americans’ freedom of the press and religion. In *Cantwell v. Connecticut* (1940), Justice Roberts ruled against laws prohibiting the solicitation of money for charity or religious causes without permission, declaring them a violation of the freedom of religion. Conflicts between the freedom of religion and the freedom of speech appear in various other Supreme Court cases.

The underlying issue in *Minersville School District v. Gobitis* (1940) was that school administrators had potentially violated two Jehovah’s Witness students’ freedoms of speech and religion by expelling them for refusing to salute the American flag as required by the state legislature. The students argued that saluting the flag was against their religious beliefs since it was like “paying homage to a graven image.”<sup>11</sup> However, Justice Frankfurter led the court’s majority in favor of national unity and the right for public schools to persecute students who refused to salute the American flag or recite the Pledge of Allegiance. Three years later, the Supreme Court overturned this decision in *West Virginia State Board of Education v. Barnette* (1943), arguing that states did not have the power to restrict anyone’s constitutional right to free speech. National unity was no longer superior to the liberties guaranteed by the First Amendment, as seen during times of fear in World War I and World War II. However, during the Cold War era, this would once again change.

### III. Modern Political Challenges and the Continued Strife for Freedoms (1947–present)

The Cold War era (1947–1991) brought new restrictions of free speech and assembly. Similar to the Espionage Acts of World War I, new legislation was enacted during this time of geopolitical tensions between world superpowers, namely, the United States, the Soviet Union (U.S.S.R.), and their respective allies.

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<sup>10</sup> Les Benedict, *Blessings of Liberty*, 289.

<sup>11</sup> Alex Aichinger, “*Minersville School District v. Gobitis* (1940),” *The First Amendment Encyclopedia*, Middle Tennessee State University, [online](#).

During the Korean War (1950–1953), Congress passed the Taft-Hartley Act (1947) to avoid strikes interrupting steel production. The act gave the president the power to “order strikers back to work in cases threatening the national welfare.”<sup>12</sup> It also required workers to take an oath stating no affiliation with communism as part of their employment contract. Overall, the act violated workers’ freedom of assembly by prohibiting boycotts and strikes and their freedom of speech by prohibiting unions from contributing to political campaigns. The U.S. government justified the act under its federal power to regulate commerce and protect national security as a higher priority than protecting constitutional liberties, as seen in cases like *Dennis v. U.S.* (1951).<sup>13</sup>

In *Dennis v. U.S.* (1951), Justice Black and Justice Douglas used the clear and present danger test to determine whether Dennis’s communist doctrine teachings would inevitably lead to the overthrow of the U.S. government.<sup>14</sup> After taking a cost-benefit approach, according to which the cost of no free speech would be weighed against the benefit of public safety, the Supreme Court ruled in favor of regulating free speech in all cases involving communism. In 1950, fearful of the danger posed by communism, Congress passed the Subversive Activities Control Act, or McCarran Act, prioritizing national security and public safety over constitutional liberties. The act required communists and other subversive group members to register with the attorney general. Yet in *U.S. v. Robel* (1967), when Robel was charged under the McCarran Act for being a registered communist who was working illegally in a defense facility, the Supreme Court ruled the act unconstitutional and a violation of the right to free assembly. In *Brandenburg v. Ohio* (1969), the Supreme Court ruled all laws curtailing the freedom of speech unconstitutional, no matter how radical the ideas, unless they posed a threat according to the clear and present danger test. These cases upheld free speech for all during times of uncertainty and fear of impending international conflicts.

In addition to communist-related cases, other cases like, *U.S. v. O’Brien* (1968), *Tinker v. Des Moines* (1969), and *Johnson v. Texas* (1989), introduced the debate pertaining to radical actions as an expression of free speech or as a threat to government interests. In *O’Brien* (1968), David Paul O’Brien had illegally burned his draft card as a form of protest based on his anti-war beliefs. The Supreme Court ruled against the burning of the draft card, arguing that such an action disrupted the efficiency of the “government’s legitimate interest in administering the draft” and maintaining an efficient military draft system.<sup>15</sup> In *Tinker* (1969), school administrators suspended two students for wearing black bands in protest of the Vietnam War (1954–1975). Justice Fortas argued that schools did not have the right to prohibit student’s free speech or any other constitutional right unless it

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<sup>12</sup> Les Benedict, *Blessings of Liberty*, 353.

<sup>13</sup> Les Benedict, *Blessings of Liberty*, 353.

<sup>14</sup> Les Benedict, *Blessings of Liberty*, 316.

<sup>15</sup> Les Benedict, *Blessings of Liberty*, 386.

interfered “materially and substantially” with the operation of the school. In *Johnson* (1989), Gregory Johnson was charged under Texas law for burning an American flag at the 1984 Republican Convention. The Supreme Court ruled in favor of Johnson, arguing his action was a representation of free speech in the form of anger and protest rather than opposition to the U.S. government and the values represented by the flag. Justice Brennan stated that, although many did not approve of the action, the First Amendment guarantees free speech to everyone.

Although most Supreme Court cases discussed by Michael Les Benedict involve issues over free speech, many other cases involve debates over the freedom of religion, such as *School District of Abington Township v. Schempp* (1963) and *Lemon v. Kurtzman* (1971). In *School District of Abington Township* (1963), the Supreme Court ruled against the encouragement of religious prayer or instruction in public schools due to the violation of the students’ right to freedom of religion. Additionally, they ruled that imposing religious beliefs on students further violated the separation of church and state.<sup>16</sup> In a similar case, *Lemon* (1971), the Supreme Court overturned a Pennsylvania state law that provided aid to religious schools as blurring the separation of church and state. To resolve future state-religion cases, the courts created the *Lemon* test, which helps determine whether there is “excessive entanglement” between government and religion that would violate the constitutional right to freedom of religion.<sup>17</sup> In one *Lemon* test case, *Lynch v. Donnelly* (1984), the Supreme Court determined that a religious display on government property did not violate the freedom of religion. They reasoned that it had the “secular purpose of celebrating a state-sanctioned holiday.”<sup>18</sup> Another *Lemon* test case, *Zelman v. Simmons-Harris* (2002), brought into question government aid of religious schools through a school voucher plan. However, the Supreme Court reasoned that the program did not violate the *Lemon* test since it gave aid to the parents rather than directly to the religious schools.

In the early 2000s, there were multiple Supreme Court cases, similar to those during World War I, World War II, and the Cold War, resulting from global fear and uncertainty. Most of these cases occurred in the aftermath of the September 11 terrorist attacks (2001) and the subsequent passage of the U.S.A. PATRIOT Act (2001). This act provided law enforcement with the tools to expand federal surveillance powers, including eavesdropping on telephone and electronic communications with anyone. Although the purpose was to obtain information on serious crimes, the government’s invasion of the public’s privacy fueled a lot of debate surrounding violations of various First Amendment liberties, including free speech and free press. Specifically, the act allowed the government to impose searches based on speech, assembly, and the press, all of which should be protected under the First Amendment. Additionally, it permitted gag orders

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<sup>16</sup> Les Benedict, *Blessings of Liberty*, 320.

<sup>17</sup> Les Benedict, *Blessings of Liberty*, 386.

<sup>18</sup> Les Benedict, *Blessings of Liberty*, 392.

without judicial review. Just as violations of free press, assembly, and speech continue to be debated in the U.S. Supreme Court, freedom of religion has been the topic of many recent debates and cases.

Freedom of religion has been highly contested when it comes to public health issues, including access to birth control. In *Burwell v. Hobby Lobby Stores* (2014), Hobby Lobby owners refused to provide contraception coverage as part of their health insurance under the protection of the Religious Freedom Restoration Act (R.F.R.A.) of 1993. The act gave “private individuals [the freedom] from [not] having to conform to federal laws inconsistent with their religious beliefs.”<sup>19</sup> The Supreme Court argued that, according to the R.F.R.A., corporations were legally individuals, and therefore had the constitutional right to freedom of religion. The courts ruled that the contraceptive mandate under the Affordable Care Act violated the R.F.R.A., and thus Hobby Lobby was not required to provide their employees with coverage of certain contraceptives. As can be seen with the overturning of *Roe v. Wade* (1973) in *Dobbs v. Jackson Women’s Health Organization* (2022), women’s health and the freedom of religion continue to be highly debated topics.

### *Conclusion*

Although the First Amendment is the best-known portion of the Bill of Rights, its constitutional guarantees of the freedom of religion, speech, the press, assembly, and the right to petition have been—and continue to be—at the center of many U.S. Supreme Court cases. These cases have changed what is and what is not protected under certain liberties. However, as we have seen with the most recent controversial case, *Dobbs v. Jackson Women’s Health Organization* (2022), the court’s decisions are never truly finite and irreversible. Because of this, Americans’ rights and liberties are constantly shifting based on new interpretations. The First Amendment may be one of the easiest amendments to understand linguistically, however, the pertaining interpretations have morphed repeatedly over time. As we approach new challenges and modern debates, the First Amendment will continue to see interpretations that differ from the many that have preceded it.

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<sup>19</sup> Les Benedict, *Blessings of Liberty*, 488.