3.3: First Amendment: Freedom of Speech
Explain the extent to which the Supreme Court's interpretation of the First and Second Amendments reflects a commitment to individual liberty.

The First Amendment contains our most cherished rights. Often our courts give them a preferred position. Governments did not give these rights to us. Rather we empower governments to protect these natural rights. The fundamental rights contained in the First Amendment are: freedom of speech; freedom of press; freedom of religion, freedom of assembly; and freedom of petition. Majority rule cannot interfere with these rights, nor can government abridge these rights. The federal judiciary often is called upon to serve as the guardian of these rights. **Provisions of the U.S. Constitution's Bill of Rights are continually being interpreted to balance the power of government and the civil liberties of individuals.**

The freedom of speech gets preferential treatment by the courts. It is our most sacred right. Yet even freedom of speech has its limits. You are not free to publish obscene materials. You are not free to lie or slander others nor can you write falsely which is called libel. There are numerous court precedents that define when and where our free speech can and cannot be limited. *Schenck* v. *U.S.* (1919) was an early example of a limit on our free speech. Justice Oliver Wendell Holmes famously stated in his opinion, "…Free speech would not protect a man in falsely shouting fire in a theater." The ruling precedent of this case established the clear and present danger standard. Dangerous speech can be limited.

Today the standard for limiting speech is even higher. Today the court no longer assesses if speech is dangerous, nor do they hold suspect speech that is merely advocacy of illegal activity. If speech today is to be limited, such speech must be proven to provoke "imminent lawlessness." The court established this test in the case Brandenburg v. Ohio (1969). In a per curiam decision the court stated:

> I see no place in the regime of the First Amendment for any "clear and present danger" test, whether strict and tight, as some would make it, or free-wheeling, as the Court in Dennis rephrased it.
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> When one reads the opinions closely and sees when and how the "clear and present danger" test has been applied, great misgivings are aroused. First, the threats were often loud, but always puny, and made serious only by judges so wedded to the status quo that critical analysis made them nervous. Second, the test was so twisted and perverted in Dennis as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.
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> Action is often a method of expression, and within the protection of the First Amendment….
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> Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained…Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.

> Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments…

The Court has, however, established "time, place and manner" (TPM) restrictions. Under these conditions speech and expression can be limited as to when, where and how:

- *Be content neutral*
- *Be narrowly tailored*
- *Serve a significant governmental interest*
- *Leave open ample alternative channels for communication*

Freedom of speech is not absolute. At times the demands of living in a civil society require us to surrender our freedom to act as we might naturally desire. So too unwarned interrogations can now be upheld under Court sanctioned "public safety" exceptions.

What about kids in school? Do students lose their rights when they walk through the schoolhouse gate? This was the question in the case Tinker v. Des Moines (1969). We know the First Amendment's free speech clause has been given a "preferred position." But does it apply equally to kids sitting in classrooms? The Des Moines public school system in 1965 said: "No." "Schools are no place for demonstrations," the school system's spokesperson said in response to five students who had been suspended for showing up to class wearing black arm bands in protest of the Vietnam War. The Supreme Court would be called upon again to interpret the reach of the First Amendment. Provisions of the Bill of Rights are continually being interpreted to balance the power of government and the civil liberties of individuals. Public school students, as decided in this case, could wear black armbands in school to protest the Vietnam War. Though the court recognized the school's right to maintain order within the classroom, "school officials do not possess absolute authority over their students." Furthermore, the court argued, "Fear that something might happen, is not a basis for quelling all student speech." Finding the proper balance between order and liberty is never easy. Be encouraged, however, that as you learn about your civil liberties they do not exist in theory alone. You gain possession of your liberties today, right now, regardless of your age. For this we can thank the courage of John and Mary Beth Tinker who decided to speak out against war while sitting in just another high school math class.

"School speech," however, is easier to limit as was seen in the Morse v. Frederick (2007). In this case a student's speech advocated drug use. The court upheld a limit on this kind of speech. **Provisions of the U.S. Constitution's Bill of Rights are continually being interpreted to balance the power of government and the civil liberties of individuals.**