

endorsement of religion? The Court recently has attempted to establish guidelines to determine what kinds of displays are permissible on government property. For example, it has revised the second part of the *Lemon* test to hold that public display of a nativity scene on government property is unconstitutional if its effect is to endorse religion. Using such a test, they found a nativity scene located in a government building with the words "Glory to God in the Highest" to be a Christian religious display that violated the establishment clause,⁴² but not a government-sponsored nativity scene in a private park with a Santa Claus and a banner displaying the number of shopping days until Christmas.⁴³ Similarly, in a 2005 decision, the Court ruled a monument of the Ten Commandments on the grounds of the Texas Capitol permissible because it was part of a historical exhibit including forty other monuments such as tributes to the Alamo, Confederate veterans, and Korean War veterans.⁴⁴ The same year, however, it found the posting of the Ten Commandments inside two Kentucky courthouses an unconstitutional endorsement of religion.⁴⁵ In 2010, the Court ruled in *Salazar v. Buono* that Congress did not promote religion when it attempted to avoid an establishment clause issue by trading an acre of federal land containing a white, wooden cross approximately five feet tall with the Veterans of Foreign Wars for five privately owned acres elsewhere in the same Mojave Desert preserve.

FREEDOM OF SPEECH

Freedom of speech is essential to a democratic political system. Without the ability to speak about politics, citizens cannot make intelligent judgments about candidates, political parties, and public policies. Freedom of expression is also essential for the intellectual enlightenment of a society and the human race. John Stuart Mill wrote that freedom of speech was the only way to discover the truth. Mill saw a free society as one that traded in a "marketplace of ideas" that would either confirm previous beliefs or provide new perceptions of the truth.⁴⁶

Speech takes several different forms, which are subject to different levels of protection. Sometimes speech consists not of spoken words, but rather an act such as burning a flag or wearing a sign. As with freedom of religion, freedom of speech is not absolute in the United States. The Supreme Court has established boundaries for permissible speech by refusing to protect utterances that are obscene, defamatory, or that constitute what it calls "hate speech."

Political Speech

Political leaders often believe that freedom of speech is less important than considerations such as national security, public order, the right to a fair trial, and public decency. This sometimes produces legislation limiting freedom of speech to serve goals perceived as vital to the nation's interest. Popular opposition to U.S. participation in World War I led Congress to pass the 1917 Espionage Act, which made it a federal crime to obstruct military recruiting, to circulate false statements intending to interfere with the military, or to attempt to cause disloyalty in the military. The government later prosecuted Charles Schenck, the general secretary of the Socialist Party of Philadelphia, under the act for printing and mailing fifteen thousand pamphlets urging draftees to resist conscription. The Supreme Court upheld his conviction but, in doing so, left a broad scope for permissible speech.

In articulating the **clear and present danger test** to determine free speech cases, Justice Oliver Wendell Holmes ruled that Schenck's writings would be constitutionally protected in ordinary times but "the character of every act depends upon the circumstances in which it is done." He compared writing such a pamphlet during wartime to falsely shouting fire in a crowded theater, stating that the context of a speech determines its permissibility. Only words that produce both a clear (obvious) and a present (immediate) danger are prohibited.⁴⁷ Justice Louis Brandeis supported Holmes, reasoning that prohibition is an appropriate remedy only for speech that threatens immediate harm. Given time to discover the facts through discussion and education, more speech serves the public interest better than enforced silence.⁴⁸

clear and present danger test Free speech test that only prohibits speech that produces a clear and immediate danger.