

State common law was also voided, with the Court in an opinion by Justice Black asserting that the First Amendment enlarged protections for speech, press, and religion beyond those enjoyed under English common law.³⁹⁶

Development over the years since has been uneven, but by 1964 the Court could say with unanimity: “we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”³⁹⁷ And, in 1969, the Court said that the cases “have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”³⁹⁸ This development and its myriad applications are elaborated in the following sections.

The First Amendment by its terms applies only to laws enacted by Congress, and not to the actions of private persons.³⁹⁹ This leads to a “state action” (or “governmental action”) limitation similar to that applicable to the Fourteenth Amendment.⁴⁰⁰ The limitation has seldom been litigated in the First Amendment context, but there is no obvious reason why analysis should differ markedly from Fourteenth Amendment state action analysis. Both contexts require “cautious analysis of the quality and degree of Government relationship to the particular acts in question.”⁴⁰¹ In holding that the National Railroad Passenger Corporation (Amtrak) is a governmental entity for purposes of the First Amendment, the Court declared that “[t]he Constitution constrains governmental action ‘by whatever instruments or in whatever modes that action may be taken’ . . . [a]nd under whatever congressional label.”⁴⁰² The relationship of the gov-

³⁹⁶ *Bridges v. California*, 314 U.S. 252, 263–68 (1941) (overturning contempt convictions of newspaper editor and others for publishing commentary on pending cases).

³⁹⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

³⁹⁸ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

³⁹⁹ Through interpretation of the Fourteenth Amendment, the prohibition extends to the states as well. See discussion on incorporation under Fourteenth Amendment, *infra*. Of course, the First Amendment also applies to the non-legislative branches of government—to every “government agency—local, state, or federal.” *Herbert v. Lando*, 441 U.S. 153, 168 n.16 (1979).

⁴⁰⁰ See discussion on state action under the Fourteenth Amendment, *infra*.

⁴⁰¹ *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 115 (1973) (opinion of Chief Justice Burger).

⁴⁰² *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) (quoting *Ex parte Virginia*, 100 U.S. 339, 346–47 (1880)). The Court refused to be bound by the statement in Amtrak’s authorizing statute that the corporation is “not . . . an agency or establishment of the United States Government.” This assertion can be