



## Free Speech/Freedom Of Expression

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### Background

FREEDOM OF SPEECH and freedom of expression are among the freedoms most cherished by Americans. Protected by the First Amendment to the U. S. Constitution and miscellaneous state constitutional provisions, these two freedoms were also among the freedoms deemed most important by the Founding Fathers. Democratic societies by definition are participatory and deliberative. They are designed to work best when their representative assemblies conduct informed deliberation after voters voice their opinions about particular issues or controversies. But neither elected representatives nor their constituents can fully discharge their democratic responsibilities if they are prevented from freely exchanging their thoughts, theories, suspicions, beliefs, and ideas, or are hindered from gaining access to relevant facts, data, or other kinds of useful information upon which to form their opinions.

The theory underlying the Free Speech Clause of the First Amendment is that truthful and accurate information can only be revealed through robust and uninhibited discourse and that the best way to combat false, deceptive, misleading, inaccurate, or hateful speech is with countervailing speech that ultimately carries the day with a majority of the populace and its elected representatives. Of course, the majority is not always persuaded by countervailing truthful and accurate speech, especially in capitalistic democracies where factions that spend the most money tend to have the loudest and most prevalent voices through radio and television advertisements. Supreme Court Justice Oliver Wendell Holmes articulated an extreme view of the risks underlying freedom of speech when he wrote "that a law should be called good if it reflects the will of the dominant forces of the community, even if it will take us to hell." (Levinson) Similarly, Holmes wrote that freedom of speech does not protect "free thought for those who agree with us, but freedom for the thought that we hate." *U.S. v. Schwimmer*, 279 U.S. 644, 49 S.Ct. 448, 73 L.Ed. 889 (1929).

The First Amendment to the U. S. Constitution provides that "Congress shall make no law... abridging the freedom of speech." But the Supreme Court has never literally interpreted this guarantee as an absolute prohibition against all restrictions on individual speech and expression. Instead, the Supreme Court has identified seven kinds of expression that the government may regulate to varying degrees without running afoul of the Free Speech Clause: (1) core political speech; (2) speech that incites illegal or subversive activity; (3) fighting words; (4) [OBSCENITY](#) and [PORNOGRAPHY](#); (5) symbolic speech; (6) commercial speech; and (7) student speech. The degree to which the government may regulate a particular kind of expression depends on the nature of the speech, the context in which the speech is made, and its likely impact upon any listeners. However, both state and federal courts will apply the same level of scrutiny to government regulation of free speech under the First Amendment, since the Free Speech Clause has been made applicable to the states via the Fourteenth Amendment's **EQUALPROTECTION** and **Due Process** Clauses. *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925).

## The Law Protecting Freedom of Expression

### ***Core Political Speech***

Core political speech consists of conduct and words that are intended to directly rally public support for a particular issue, position, or candidate. In one prominent case the U. S. Supreme Court suggested that core political speech involves any "interactive communication concerning political change." *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988). Discussion of public issues and debate on the qualifications of candidates, the Supreme Court concluded, are forms of political expression integral to the system of government established by the federal Constitution. *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (U.S. 1976). Thus, circulating handbills and petitions, posting signs and placards, and making speeches and orations are all forms of core political speech, so long as they in some way address social issues, a political positions, political parties, political candidates, government officials, or governmental activities.

The First Amendment elevates core political speech above all other forms of individual expression by prohibiting laws that regulate it unless the laws are narrowly tailored to serve a compelling state interest. Known as "strict scrutiny" analysis, the application of this analysis by a court usually sounds the death knell for the law that is being challenged. This application is especially true when the core political speech is expressed in traditional public forums, such as streets, sidewalks, parks, and other venues that have been traditionally devoted to public assembly and social debate. Strict scrutiny is also applied to laws that regulate core political speech in "designated public forums," which are areas created by the government specifically for the purpose of fostering political discussion. For example, state fair grounds may be considered designated public forums under appropriate circumstances. *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (U.S. 1981). However, in non-public forums courts apply a much lower level of scrutiny, allowing the government to limit core political speech if the limitation is reasonable and not aimed at silencing the speaker's viewpoint. Examples of nonpublic forums include household mail boxes, military bases, airport terminals, indoor shopping malls, and most private commercial and residential property.

### ***Speech that Incites Illegal or Subversive Activity***

Some speakers intend to arouse their listeners to take constructive steps to alter the political landscape. Every day in the United States people hand out leaflets imploring neighbors to write Congress, vote on a referendum, or contribute financially to political campaigns and civic organizations. For other speakers, existing political channels provide insufficient means to effectuate the type of change desired. These speakers may encourage others to take illegal and subversive measures to change the status quo. Such measures have included draft resistance during wartime, threatening public officials, and joining political organizations aimed at overthrowing the U. S. government.

The Supreme Court has held that the government may not prohibit speech that advocates illegal or subversive activity unless that "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). Applying the Brandenburg test, the Supreme Court has ruled that the government may not punish an antiwar protester who yells "we'll take the f—ing street later" because such speech "amounted to nothing more than advocacy of illegal action at some indefinite future time." *Hess v. Indiana*, 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973). Nor can the government punish someone who, in opposition to the draft during the Vietnam War, proclaimed "if they ever make me carry a rifle, the first man I want in my sights is [the President of the United States] L.B.J." *Watts v. U. S.*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). Such politically charged rhetoric, the Supreme Court held, was mere hyperbole and not a threat intended to be acted on at a definite point in time.

### ***Fighting Words***

"Fighting words" are another form of speech receiving less First Amendment protection than core political speech. Fighting words are those words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace" or have a "direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." *Chaplinski v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). Where subversive advocacy exhorts large numbers of people to engage in lawless activity, fighting words are aimed at provoking a specific individual. For example, calling someone a derogatory epithet like "fascist," "nigger," "kike" or "faggot," may result in street brawl, but cannot be accurately described as subversive speech.

Fighting words should also be distinguished from speech that is merely offensive. Unkind and insensitive language is heard everyday at work, on television, and sometimes even at home. But the Supreme Court has ruled that the First Amendment protects speech that merely hurts the feelings of another person. The Court has also underscored the responsibility of listeners to ignore offensive speech. Television channels can be changed, radios can be turned off, and movies can be left unattended. Other situations may require viewers of offensive expressions simply to avert their eyes. In one noteworthy case, the Court ruled that a young man had the right to wear a jacket in a state courthouse with the aphorism "F— the Draft" emblazoned across the back because persons in attendance could look away if offended. *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). "One man's vulgarity," the Court said, "is another's lyric," and the words chosen in this case conveyed a stronger message than would a subdued variation such as "Resist the Draft."

### ***Obscenity and Pornography***

Artful depictions of human sexuality highlight the tensions between lust and love, desire and commitment, fantasy and reality. Vulgar depictions can degrade sexuality and dehumanize the participants, replacing stories about love with stories about deviance, abuse, molestation, and pedophilia. State and federal laws attempt to enforce societal norms by encouraging acceptable depictions of human sexuality and discouraging unacceptable depictions. Libidinous books such as *Lady Chatterly's Lover* and pornographic movies such as *Deep Throat* have rankled communities struggling to determine whether such materials should be censored as immoral or protected as works of art.

The Supreme Court has always had difficulty distinguishing obscene material, which is not protected by the First Amendment, from material that is merely salacious or titillating, which is protected. Justice Potter Stewart once admitted that he could not define obscenity, but he quipped, "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (1964). Nonetheless, the Supreme Court has articulated a three-part test to determine when sexually oriented material is obscene. Material will not be declared obscene unless (1) the average person, applying contemporary community standards, would find that the material's predominant theme appeals to a "prurient" interest; (2) the material depicts or describes sexual activity in a "patently offensive" manner; and (3) the material lacks, when taken as a whole, serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

Although the Supreme Court has failed to clearly define words like "prurient," "patently offensive" and "serious artistic value," literary works that deal with sexually related material are strongly protected by the First Amendment, as are magazines like *Playboy* and *Penthouse*. More difficult questions are presented in the area of adult cinema. Courts generally distinguish hard-core pornography that graphically depicts copulation and oral sex from soft-core pornography that displays nudity and human sexuality short of these "ultimate sex acts." In close cases falling somewhere in the gray areas of pornography, outcomes may turn on the "community standards" applied by the jury in a particular locale. Thus, pornography that could be prohibited as obscene in a small rural community might receive First Amendment protection in Times Square.

### ***Symbolic Expression***

Not all forms of self-expression involve words. The nod of a head, the wave of a hand, and the wink of an eye each communicate something without resort to language. Other forms of non-verbal expression communicate powerful symbolic messages. The television image of the defenseless Chinese student who faced down a line of tanks during the 1989 democracy protests near Tiananmen Square in China is one example of symbolic expression that will be forever seared into the memories of viewers. The picture of the three New York City firefighters raising the American flag amid the rubble and ruins at the World Trade Center following the terrorist attacks of September 11, 2001, is another powerful example of symbolic expression.

However, the First Amendment does not protect all symbolic expression. If an individual intends to communicate a specific message by symbolic expression under circumstances in which the audience is likely to understand its meaning, the government may not regulate that expression unless the regulation serves a significant societal interest unrelated to suppressing the speaker's message. *Spence v. Washington*, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974). Applying this standard, the U. S. Supreme Court reversed the [CONVICTION](#) of a person who burned the American flag in protest over the policies of President Ronald Reagan (*Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989)), invalidated the suspension of a high school student who wore a black arm-band in protest of the Vietnam War (*Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969)), but upheld federal legislation that prohibited burning draft cards (*U. S. v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)). Of the governmental interests asserted in these three cases, maintaining the integrity of the selective service system was the only interest of sufficiently weighty importance to overcome the First Amendment right to engage in evocative symbolic expression.

### ***Commercial Speech***

Commercial speech, such as advertising, receives more First Amendment protection than subversive advocacy, fighting words, and obscenity, but less protection than core political speech. Advertising is afforded more protection than these other categories of expression because of consumers' interest in the free flow of market information. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). In a free enterprise system consumers depend on information regarding the quality, quantity, and price of various goods and services. Society is not similarly served by the free exchange of obscenity.

At the same time, commercial speech deserves less protection than core political speech because society has a greater interest in receiving accurate commercial information and may be less savvy in flushing out false and deceptive ads. The average citizen is more conditioned, the Supreme Court has suggested, to discount the words of a politician than the words of a fortune 500 company. The average citizen may also be more vulnerable to misleading commercial advertising. Even during an election year, most people view more commercial advertisements than political and rely on those advertisements when purchasing the clothes they wear, the food they eat, and the automobiles they drive. Thus, the First Amendment permits governmental regulation of commercial speech so long as the government's interest in doing so is substantial (e.g., the prohibition of false, deceptive, and misleading advertisements), the regulations directly advance the government's asserted interest, and the regulations are no more extensive than necessary to serve that interest.

### ***Freedom of Expression in Public Schools***

In 1969 the Supreme Court articulated one of its most cited First Amendment pronouncements when it said that "[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Despite the frequency in which other courts have quoted this passage in addressing the free speech rights of

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public school students, as a principle of First Amendment law the passage represents somewhat of an overstatement. The First Amendment does not afford public school students the same liberty to express themselves as they would otherwise enjoy if they were adults speaking their minds off school grounds. In fact, the Supreme Court has since qualified this principle by stating that a public school student's right to free speech is "not automatically co-extensive with the rights of adults in other settings." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988). In *Hazelwood* the Court held that educators may control the style and content of school-sponsored publications, theatrical productions, and other expressive conduct, so long as the educator's actions are reasonably related to legitimate pedagogical concerns. In short, student speech that is not consistent with a school's educational mission can be censored.

Applying the standard set forth in *Hazelwood*, the U.S. Court of Appeals for the Sixth Circuit upheld the disqualification of a candidate for student council president after he made discourteous remarks about an assistant principal during a campaign speech at a school-sponsored assembly. *Poling v. Murphy*, 872 F.2d 757 (6th Cir. 1989). "Civility is a legitimate pedagogical concern," the court declared. Even state universities may adopt and enforce reasonable, nondiscriminatory regulations as to the time, place, and manner of student expressions. *Bayless v. Martine* 430 F.2d 873 (5th Cir. 1970). However, a state university's refusal to recognize a gay student services organization violated the First Amendment because it denied the students' right to freely associate with political organizations of their choosing. *Gay Student Services v. Texas A & M University*, 737 F.2d 1317 (5th Cir. 1984).

### State Law Protecting Free Expression

The federal Constitution establishes the minimum amount of freedom that must be afforded to individuals under the First Amendment. State constitutions may offer their residents more freedom of speech than is offered under the federal Constitution, but not less. Below is a sampling of state court cases decided at least in part based on their own state's constitutional provisions governing freedom of expression.

**ARKANSAS:** A state [STATUTE](#) penalizing night-riding did not abridge the freedom of speech guaranteed by the state or federal constitutions. U.S.C.A. Const. Amends. 1, 14; Const.Ark. art. 2, § 6. *Johnson v. State*, 197 Ark. 1016, 126 S.W.2d 289 (Ark. 1939).

**ALABAMA:** A city's [ORDINANCE](#) forbidding a business from permitting consumption of alcoholic beverages and nude dancing at the same time regulated conduct and not individual expression; thus, the ordinance did not violate the state's constitutional right to freedom of speech. Const. Art. 1, § 4; *Anniston, Ala., Ordinance No. 94-0-03. Ranch House, Inc. v. City of Anniston*, 678 So.2d 745 (Ala. 1996).

**ARIZONA:** The state's [STATUTORY](#) ban on targeted residential picketing was a valid accommodation for the right to freedom of speech explicitly protected by the state constitution. A.R.S. Const. Art 2, §§ 6, 8; A.R.S. § 13-2909.U.S.C.A. Const.Amend. 1; A.R.S. Const. Art. 2. *State v. Baldwin*, 184 Ariz. 267, 908 P.2d 483 (Ariz. App. Div. 1 1995).

**CALIFORNIA:** The free speech clause in the state constitution contains a state action limitation and, thus, that clause only protects against government regulation of free speech and not private regulation thereof. West's Ann.Cal. Const. Art. 1, § 2(a). *Golden Gateway Center v. Golden Gateway Tenants Assn.*, 26 Cal.4th 1013, 29 P.3d 797, 111 Cal.Rptr.2d 336 (Cal. 2001).

**ILLINOIS:** The defendants' arrest for protesting on the premises of an [ABORTION](#) clinic did not violate the defendants' state constitutional right of free speech, since the clinic's policy required removal of all demonstrators from the clinic's premises regardless of their beliefs, and there was no indication that the

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clinic's policy of excluding demonstrators was ever applied in discriminatory manner. S.H.A. Const. Art. 1, § 4. *People v. Yutt*, 231 Ill.App.3d 718, 597 N.E.2d 208, 173 Ill.Dec. 500 (Ill.App. 3 Dist. 1992).

MAINE: The state's statute allowing the State Employees Association to pay 80% of the [COLLECTIVE BARGAINING](#) unit dues for association members, while contributing nothing toward the dues of nonmembers, violated neither the state nor federal guarantees to freedom of speech. Laws 1st Reg.Sess.1979, L.D. 1573; M.R.S.A.Const. art. 6, § 3; U.S.C.A. Const. Amend. 1. *Opinion of the Justices*, 401 A.2d 135 (Me. 1979).

MASSACHUSETTS: A conviction for threatening to commit a crime does not violate a defendant's free speech rights under the federal or state constitutions if the [EVIDENCE](#) is sufficient to satisfy each element of the crime, since those elements are defined in a way that prevents a conviction based on protected speech. U.S.C.A. Const.Amend. 1; M.G.L.A. Const. Pt. 1, Art. 16; M.G.L.A. c. 275, § 2. *Commonwealth v. Sholley*, 432 Mass. 721, 739 N.E.2d 236 (Mass. 2000).

MICHIGAN: A state administrative rule prohibiting simulated sexual conduct in licensed liquor establishments did not violate the state's constitutional provision guaranteeing free speech. M.C.L.A. Const. Art. 1, § 5; Art. 4, § 40; Mich. Admin. Code r. 436.1411(1). *Kotmar, Ltd. v. Liquor Control Com'n*, 207 Mich.App. 687, 525 N.W.2d 921 (Mich.App., 1994).

MINNESOTA: Differences in terminology between the free speech protection in the federal Constitution and the free speech protection under the state constitution did not support a conclusion that the state constitutional protection should be more broadly applied than the federal. U.S.C.A. Const.Amend. 1; M.S.A. Const. Art. 1, § 3. *State v. Wicklund*, 589 N.W.2d 793 (Minn. 1999).

NEW YORK: The state statute banning the televising of any court proceeding in which the [TESTIMONY](#) of witnesses by [SUBPOENA](#) is or may be taken denies free speech guaranteed by the state and federal constitutions. U.S.C.A. Const.Amend. 1; McKinney's Const. Art. 1, § 8; McKinney's **CIVIL RIGHTS** Law § 52. *Coleman v. O'Shea*, 184 Misc.2d 238, 707 N.Y.S.2d 308, 2000 N.Y. Slip Op. 20199 (N.Y.Sup. 2000).

OHIO: The state constitution's separate and independent guarantee of free speech applies to defamatory statements only if those statements are matters of opinion, and citizens who abuse their constitutional right to freely express their sentiments by uttering defamatory statements of fact will remain liable for the abuse of that right. Const. Art. 1, § 11. *Wampler v. Higgins*, 93 Ohio St.3d 111, 752 N.E.2d 962 (Ohio 2001).

TEXAS: The state constitution offers greater free speech protection than the federal Constitution for political speech, but this greater protection does not extend to exotic dancing businesses. Society has a lesser interest in protecting material on the borderline between pornography and artistic expression than it does in protecting the free dissemination of ideas of social and political significance. U.S.C.A. Const.Amend. 1; *Vernon's Ann.Texas Const. Art. 1, § 8. Kaczmarek v. State*, 986 S.W.2d 287 (Tex.App.- Waco 1999).

WASHINGTON: Nude dancing receives constitutional protection under the free speech guarantees of the First Amendment and the state constitution, although nudity itself is conduct subject to the police powers of the state. U.S.C.A. Const.Amend. 1; West's RCWA Const. Art. 1, § 5. *DCR, Inc. v. Pierce County*, 92 Wash.App. 660, 964 P.2d 380 (Wash.App. Div. 2 1998).

## Additional Resources

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*Fan Letters: The Correspondence of Holmes and Frankfurter*. Levinson, Sanford, 75 Tex. L. Rev. 1471, 1997

<http://caselaw.lp.findlaw.com/data/constitution/amendment01>. U. S. Constitution: First Amendment.

*West's Encyclopedia of American Law*. West Group, 1998.

## Organizations

### *American Bar Association*

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