

First Amendment – Freedom of Speech and the Press Common Interpretation

Geoffrey R. Stone & Eugene Volokh

“Congress shall make no law . . . abridging the freedom of speech, or of the press.” What does this mean today? Generally speaking, it means that the government may not jail, fine, or impose civil liability on people or organizations based on what they say or write, except in exceptional circumstances.

Although the First Amendment says “Congress,” the Supreme Court has held that speakers are protected against all government agencies and officials: federal, state, and local, and legislative, executive, or judicial. The First Amendment does not protect speakers, however, against private individuals or organizations, such as private employers, private colleges, or private landowners. The First Amendment restrains only the government.

The Supreme Court has interpreted “speech” and “press” broadly as covering not only talking, writing, and printing, but also broadcasting, using the Internet, and other forms of expression. The freedom of speech also applies to symbolic expression, such as displaying flags, burning flags, wearing armbands, burning crosses, and the like.

The Supreme Court has held that restrictions on speech because of its *content*—that is, when the government targets the speaker’s message—generally violate the First Amendment. Laws that prohibit people from criticizing a war, opposing abortion, or advocating high taxes are examples of unconstitutional content-based restrictions. Such laws are thought to be especially problematic because they distort public debate and contradict a basic principle of self-governance: that the government cannot be trusted to decide what

ideas or information “the people” should be allowed to hear.

There are generally three situations in which the government can constitutionally restrict speech under a less demanding standard.

1. In some circumstances, the Supreme Court has held that certain types of speech are of only “low” First Amendment value, such as:

a. Defamation: False statements that damage a person’s reputations can lead to civil liability (and even to criminal punishment), especially when the speaker deliberately lied or said things they knew were likely false. *New York Times v. Sullivan* (1964).

b. True threats: Threats to commit a crime (for example, “I’ll kill you if you don’t give me your money”) can be punished. *Watts v. United States* (1969).

c. “Fighting words”: Face-to-face personal insults that are likely to lead to an immediate fight are punishable. *Chaplinsky v. New Hampshire* (1942). But this does not include political statements that offend others and provoke them to violence. For example, civil rights or anti-abortion protesters cannot be silenced merely because passersby respond violently to their speech. *Cox v. Louisiana* (1965).

d. Obscenity: Hard-core, highly sexually explicit pornography is not protected by the First Amendment. *Miller v. California* (1973). In practice, however, the government rarely prosecutes online distributors of such material.

e. Child pornography: Photographs or videos involving actual children engaging in sexual conduct are punishable, because allowing such materials would create an incentive to sexually

abuse children in order to produce such material.
New York v. Ferber (1982).

f. Commercial advertising: Speech advertising a product or service is constitutionally protected, but not as much as other speech. For instance, the government may ban misleading commercial advertising, but it generally can't ban misleading political speech. *Virginia Pharmacy v. Virginia Citizens Council* (1976).

Outside these narrow categories of "low" value speech, most other content-based restrictions on speech are presumptively unconstitutional. Even entertainment, vulgarity, "hate speech" (bigoted speech about particular races, religions, sexual orientations, and the like), blasphemy (speech that offends people's religious sensibilities), and violent video games are protected by the First Amendment. The Supreme Court has generally been very reluctant to expand the list of "low" value categories of speech.

2. The government can restrict speech under a less demanding standard when the speaker is in a special relationship to the government. For example, the speech of government employees and of students in public schools can be restricted, even based on content, when their speech is incompatible with their status as public officials or students. A teacher in a public school, for example, can be punished for encouraging students to experiment with illegal drugs, and a government employee who has access to classified information generally can be prohibited from disclosing that information. *Pickering v. Board of Education* (1968).

3. The government can also restrict speech under a less demanding standard when it does so without regard to the content or message of the speech. Content-neutral restrictions, such as restrictions on noise, blocking traffic, and large

signs (which can distract drivers and clutter the landscape), are generally constitutional as long as they are “reasonable.” Because such laws apply neutrally to all speakers without regard to their message, they are less threatening to the core First Amendment concern that government should not be permitted to favor some ideas over others. Turner Broadcasting System, Inc. v. FCC (1994). But not all content-neutral restrictions are viewed as reasonable; for example, a law prohibiting all demonstrations in public parks or all leafleting on public streets would violate the First Amendment. Schneider v. State (1939).

Courts have not always been this protective of free expression. In the nineteenth century, for example, courts allowed punishment of blasphemy, and during and shortly after World War I the Supreme Court held that speech tending to promote crime—such as speech condemning the military draft or praising anarchism—could be punished. Schenck v. United States (1919). Moreover, it was not until 1925 that the Supreme Court held that the First Amendment limited state and local governments, as well as the federal government. Gitlow v. New York (1925).

But starting in the 1920s, the Supreme Court began to read the First Amendment more broadly, and this trend accelerated in the 1960s. Today, the legal protection offered by the First Amendment is stronger than ever before in our history.

First Amendment – Freedom of Speech and the Press

Matters of Debate

“Fixing Free Speech”

Geoffrey R. Stone, Edward H. Levi Distinguished Service Professor of Law at the University of Chicago Law School

Three issues involving the freedom of speech are most pressing for the future.

Money, Politics, and the First Amendment

The first pressing issue concerns the regulation of money in the political process. Put simply, the question is this: To what extent, and in what circumstances, can the government constitutionally restrict political expenditures and contributions in order to “improve” the democratic process?

In its initial encounters with this question, the Supreme Court held that political expenditures and contributions are “speech” within the meaning of the First Amendment because they are intended to facilitate political expression by political candidates and others. The Court also recognized, however, that political expenditures and contributions could be regulated consistent with the First Amendment if the government could demonstrate a sufficiently important justification. In *Buckley v. Valeo* (1976), for example, the Court held that the government could constitutionally limit the amount that individuals could contribute to political candidates in order to reduce the risk of undue influence, and in *McConnell v. Federal Election Commission* (2003), the Court held that the government could constitutionally limit the amount that corporations could spend in the political process in order to influence electoral outcomes.

In more recent cases, though, in a series of five-to-four decisions, the Supreme Court has

overruled *McConnell* and held unconstitutional most governmental efforts to regulate political expenditures and contributions. *Citizens United v. Federal Election Commission* (2010); *McCutcheon v. Federal Election Commission* (2014). As a result of these more recent decisions, almost all government efforts to limit the impact of money in the political process have been held unconstitutional, with the consequence that corporations and wealthy individuals now have an enormous impact on American politics.

Those who object to these decisions maintain that regulations of political expenditures and contributions are content-neutral restrictions of speech that should be upheld as long as the government has a sufficiently important justification. They argue that the need to prevent what they see as the corruption and distortion of American politics caused by the excessive influence of a handful of very wealthy individuals and corporations is a sufficiently important government interest to justify limits on the amount that those individuals and corporations should be permitted to spend in the electoral process.

Because these recent cases have all been five-to-four decisions, it remains to be seen whether a differently constituted set of justices in the future will adhere to the current approach, or whether they will ultimately overrule or at least narrowly construe those decisions. In many ways, this is the most fundamental First Amendment question that will confront the Supreme Court and the nation in the years to come.

The Meaning of “Low” Value Speech

The second pressing free speech issue concerns the scope of “low” value speech. In recent years, the Supreme Court has taken a narrow view of the low value concept, suggesting that, in order for a

category of speech to fall within that concept, there has to have been a long history of government regulation of the category in question. This is true, for example, of such low value categories as defamation, obscenity, and threats. An important question for the future is whether the Court will adhere to this approach.

The primary justification for the Court's insistence on a history of regulation is that this limits the discretion of the justices to pick-and-choose which categories of expression should be deemed to have only low First Amendment value. A secondary justification for the Court's approach is that a history of regulation of a category of expression provides some basis in experience for evaluating the possible effects – and dangers – of declaring a new category of speech to have only low First Amendment value.

Why does this doctrine matter? To cite one illustration, under the Court's current approach, so-called "hate speech" – speech that expressly denigrates individuals on the basis of such characteristics as race, religion, gender, national origin, and sexual orientation – does not constitute low value speech because it has not historically been subject to regulation. As a result, except in truly extraordinary circumstances, such expression cannot be regulated consistent with the First Amendment. Almost every other nation allows such expression to be regulated and, indeed, prohibited, on the theory that it does not further the values of free expression and is incompatible with other fundamental values of society.

Similarly, under the Court's approach to low value speech it is unclear whether civil or criminal actions for "invasion of privacy" can be reconciled with the First Amendment. For example, can an individual be punished for distributing on the Internet "private" information about other

persons without their consent? Suppose, for example, an individual posts naked photos of a former lover on the Internet. Is that speech protected by the First Amendment, or can it be restricted as a form of “low” value speech? This remains an unresolved question.

Leaks of Classified Information

The Supreme Court has held that the government cannot constitutionally prohibit the publication of classified information unless it can demonstrate that the publication or distribution of that information will cause a clear and present danger of grave harm to the national security. *New York Times v. United States* (The “Pentagon Papers” case) (1971). At the same time, though, the Court has held that government employees who gain access to such classified information can be restricted in their unauthorized disclosure of that information. *Snepp v. United States* (1980). It remains an open question, however, whether a government employee who leaks information that discloses an unconstitutional, unlawful, or unwise classified program can be punished for doing so. This issue has been raised by a number of recent incidents, including the case of Edward Snowden. At some point in the future, the Court will have to decide whether and to what extent the actions of government leakers like Edward Snowden are protected by the First Amendment.

First Amendment – Freedom of Speech and the Press Matter of Debate

“Frontiers for Free Speech”

Eugene Volokh, Gary T. Schwartz Distinguished Professor of Law; Founder and Co-Author of "The Volokh Conspiracy" at Reason Magazine

I like Professor Stone’s list of important issues. I think speech about elections, including speech that costs money, must remain protected, whether it’s published by individuals, nonprofit corporations, labor unions, media corporations, or nonmedia business corporations. (Direct contributions to candidates, as opposed to independent speech about them, can be restricted, as the Court has held.) And I think restrictions on “hate speech” should remain unconstitutional. But I agree these are likely to be heavily debated issues in the coming years. I’d like to add three more issues as well.

Professional-Client Speech

Many professionals serve their clients by speaking. Psychotherapists try to help their patients by talking with them. Doctors make diagnoses, offer predictions, and recommend treatments. Lawyers give legal advice; financial planners, financial advice. Some of these professionals also do things (such as prescribe drugs, perform surgeries, or file court documents that have legal effect). But much of what they do is speak.

Yet the law heavily regulates such speakers. It bars people from giving any legal, medical, psychiatric, or similar advice unless they first get licenses (which can take years and hundreds of thousands of dollars’ worth of education to get)—though the government couldn’t require a license for people to become journalists or authors. The law lets clients sue professionals for malpractice, arguing that the professionals’ opinions or

predictions proved to be “unreasonable” and harmful, though similar lawsuits against newspapers or broadcasters would be unconstitutional.

And the law sometimes forbids or compels particular speech by these professionals. Some states ban psychiatrists from offering counseling aimed at changing young patients’ sexual orientation. Florida has restricted doctors’ questioning their patients about whether the patients own guns. Many states, hoping to persuade women not to get abortions, require doctors to say certain things or show certain things to women who are seeking abortions. The federal government has tried to punish doctors who recommend that their patients use medical marijuana (which is illegal under federal law, but which can be gotten in many states with the doctor’s recommendation).

When are these laws constitutional? Moreover, if there is a First Amendment exception that allows such regulations of professional-client speech, which professions does it cover? What about, for instance, tour guides, fortunetellers, veterinarians, or diet advisors? Courts are only beginning to confront the First Amendment implications of these sorts of restrictions, and the degree to which the government’s interest in protecting clients—and in preventing behavior that the government sees as harmful—can justify restricting professional-client speech.

Crime-Facilitating Speech

Some speech contains information that helps people commit crimes, or get away with committing crimes. Sometimes this is general information, for instance about how bombs are made, how locks can be picked, how deadly viruses can be created, how technological protections for copyrighted works can be easily

evaded, or how a contract killer can get away with his crime.

Sometimes this is specific information, such as the names of crime witnesses that criminals might want to silence, the location of police officers whom criminals might want to avoid, or the names of undercover officers or CIA agents. Indeed, sometimes this can be as familiar as people flashing lights to alert drivers that a police officer is watching; people are occasionally prosecuted for this, because they are helping others get away with speeding.

Sometimes this speech is said specifically with the purpose of promoting crime—but sometimes it is said for other purposes: consider chemistry books that talk about explosives; newspaper articles that mention people’s names so the readers don’t feel anything is being concealed; or novels that accurately describe crimes just for entertainment. And sometimes it is said for political purposes, for instance when someone describes how easy it is to evade copyright law or proposed laws prohibiting 3-D printing of guns, in trying to explain why those laws need to be rejected.

Surprisingly, the Supreme Court has never explained when such speech can be restricted. The narrow incitement exception, which deals with speech that aims to persuade people to commit imminent crimes, is not a good fit for speech that, deliberately or not, informs people about how to commit crimes at some point in the future. This too is a field that the Supreme Court will likely have to address in coming decades.

“Hostile Environment Harassment” Rules

Finally, some government agencies, courts, and universities have reasoned that the government may restrict speech that sufficiently offends employees, students, or business patrons based

on race, religion, sex, sexual orientation, and the like. Here's how the theory goes: Laws ban discrimination based on such identity traits in employment, education, and public accommodations. And when speech is "severe or pervasive" enough to create a "hostile or offensive environment" based on those traits, such speech becomes a form of discrimination. Therefore, the argument goes, a wide range of speech—such as display of Confederate flags, unwanted religious proselytizing, speech sharply criticizing veterans, speech suggesting that Muslims are disloyal, display of sexually suggestive materials, sexually-themed humor, sex-based job titles (such as "foreman" or "draftsman"), and more—can lead to lawsuits.

Private employers are paying attention, and restricting such speech by their employees. Universities are enacting speech codes restricting such speech. Even speech in restaurants and other public places, whether put up by the business owner or said by patrons, can lead to liability for the owner. And this isn't limited to offensive speech said to a particular person who doesn't want to hear it. Even speech posted on the wall or overheard in the lunchroom can lead to liability, and would thus be suppressed by "hostile environment" law.

To be sure, private employers and business owners aren't bound by the First Amendment, and are thus generally free to restrict such speech on their property. And even government employers and enterprises generally have broad latitude to control what is said on their property (setting aside public universities, which generally have much less such latitude). But here the government is pressuring all employers, universities, and businesses to impose speech codes, by threatening liability on those who don't impose such codes. And that government pressure is subject to First Amendment scrutiny.

INTERACTIVE

CONSTITUTION

Some courts have rejected some applications of this “hostile environment” theory on First Amendment grounds; others have upheld other applications. This too is something the Supreme Court will have to consider.
