

Freedom of Speech



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The freedom of speech clause of the First Amendment guarantees the right to express information and ideas. It protects all forms of communication: speeches, books, art, newspapers, telecommunications, and other media. The First Amendment exists to protect ideas that may be unpopular or different from those of the majority. The U.S. Constitution protects not only the person *making* the communication but also the person *receiving* it. Therefore, the First Amendment includes the right to hear, to see, to read, and in general to be exposed to different messages and points of view. While courts are very protective of this right, freedom of speech, like other constitutional rights, is not absolute.

Our democracy requires vigilant protection of freedom of speech.



The Importance of Freedom of Speech

The First Amendment’s protection of speech and expression is central to U.S. democracy. The essential, core political purpose of the First Amendment is self-governance: enabling people to obtain information from a diversity of sources, make decisions, and communicate these decisions to the government. In this sense, the First Amendment’s protection of speech lies at the heart of an open, democratic society.

Beyond the political purpose of free speech, the First Amendment provides us with a “marketplace of ideas.” Rather than having the government establish the truth, freedom of speech enables the truth to emerge from diverse opinions. People determine the truth by seeing which ideas have the power to be accepted in the marketplace of ideas. This underscores the United States’s commitment to trusting the will of the people. The concept of a dynamic marketplace of ideas also encourages a variety of artistic and other creative expression that enriches our lives.

Related to self-government and the marketplace of ideas is the notion that a free, unfettered exchange of ideas and information gives society a “safety valve” that helps the people deal with change in a more orderly, stable way. Through discussion, society can adapt to changing circumstances without resorting to force. Those who disagree with a decision—and such disagreements are inevitable—may be more likely to go along with the majority if they have had a chance to voice their disagreement. Sometimes, this self-expression is like letting off steam, hence the safety valve concept.

The need for peace and public order must be balanced against the right to express individual opinion. *Why are conflicts involving freedom of expression so difficult to resolve?*



The language of the First Amendment seems absolute: “Congress shall make no law . . . abridging the freedom of speech.” Yet as the example of shouting “Fire!” in a public place showed, freedom of speech is not absolute and was not intended to be. Nonetheless, the expression of an opinion or a point of view is usually protected under the First Amendment, even if most people disagree with the speaker’s message. Remember, the First Amendment was designed to ensure a free marketplace of ideas—even unpopular ideas. Freedom of speech protects everyone, including people who criticize the government or express unconventional views. In some instances, the First Amendment provides people with a right *not* to speak and *not* to associate with others who propose a different message.

For example, in 1995 the Supreme Court considered a case that involved a St. Patrick’s Day parade. In this case, a veterans group had applied for and received a parade permit from the City of Boston. A group with a gay pride message—a message different from the parade organizers’—asked to be included in the parade. The parade organizers turned down this request. The second group sued, arguing that the refusal violated their First Amendment rights. The state’s highest court agreed with the second group. In a unanimous decision the Supreme Court reversed the state court’s ruling, saying that the veterans were a private group and that they had a right to keep a group with a different message out of the parade. Of course, the second group had a right to organize its own parade.



Irish American war veterans participated in a St. Patrick’s Day parade after another group with a different message was denied permission to participate. *Why did the Supreme Court reverse the state court’s ruling in this case?*

Problem 37.1

- a.** A Supreme Court justice once wrote that the most important value of free expression is “not free thought for those who agree with us, but freedom for the thought we hate.” What did the justice mean by this? Do you agree or disagree?
 - b.** Can you think of any public statements or expressions of public opinion that made you angry? How did you feel about protecting the speaker’s right to freedom of expression? What is the value of hearing opinions you dislike? What is the danger of suppressing unpopular thought?
 - c.** Assume that the United States is fighting a war and you disagree with the decision to be involved in this war. If you decide to join protests against the war, some people will call you unpatriotic. Is there some way that protest—even during a time of war—can be considered patriotic? Explain.
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Conflicts involving freedom of expression are among the most difficult ones that courts are asked to resolve. Free speech cases frequently involve a clash of fundamental values. For example, how should the law respond to a speaker who makes an unpopular statement to which the listeners react violently? Should police arrest the speaker or try to control the crowd? Courts must balance the need for peace and public order against the fundamental right to express one's point of view.

As already noted, freedom of speech may at times be limited by government action. Sometimes government can limit or punish speech because the content of the speech is not fully protected. This idea will be explored in the sections that follow on obscenity, defamation, commercial speech, fighting words, and incitement. Government can also regulate speech even when the content is protected. The section on time, place, and manner restrictions deals with regulation of protected speech.

Sometimes expressive conduct that communicates through actions rather than words is protected. You will learn about this in the section on symbolic speech. Finally, you will study laws passed to restrict speech that are unenforceable, either because they are unclear and vague or because they are overinclusive, that is, they prohibit expression that should be protected.

Obscenity

The portrayal of sex in art, literature, and films and on the Internet is a troublesome topic in American society. Although the First Amendment guarantees freedom of expression, the government has the power to prohibit the distribution of obscene materials. In general terms, **obscenity** is anything that treats sex or nudity in an offensive or lewd manner, violates recognized standards of decency, and lacks serious literary, artistic, political, or scientific value.

As you might expect, courts have had difficulty developing a precise legal definition of *obscenity*. For example, in speaking about pornography, Justice Potter Stewart once said that he could not define it, "but I know it when I see it." In 1957, the U.S. Supreme Court ruled that obscenity is not protected by the Constitution. Later, in the 1973 case of *Miller v. California*, the Court set out the following three-part test as a guideline for determining whether expression is obscene:

1. Would the average person applying contemporary community standards find that the material, taken as a whole, appeals to prurient interest (an immoderate, unwholesome, or unusual interest in sex)?
2. Does the work depict or describe, in a patently offensive way, sexual conduct specifically outlawed by applicable state law?
3. Does the work, taken as a whole, lack serious literary, artistic, political, or scientific value?

Applying these standards, an anatomy textbook with pictures of nudity is not obscene, because it has scientific value. But a magazine appealing to prurient interests and filled with photos of nude people committing sexual acts prohibited by state law might be obscene.

Recently, state and local governments have developed new strategies through lawmaking to deal with pornography. Some communities have tried to ban all pornographic works that degrade or depict sexual violence against women. Such works, they argue, are a form of sex discrimination that may lead to actual violence or abuse against women. Other communities regulate adult bookstores and movie theaters through their zoning laws. Such laws restrict these stores and theaters to special zones or ban them from certain neighborhoods. Finally, most communities have passed laws outlawing child pornography (depictions of children involved in sexual activity) and greatly restricting minors' access to sexually oriented material. The Supreme Court has held that laws against child pornography are constitutional, even when the laws ban material that would not be obscene if viewed by adults.

A more difficult problem arises in trying to protect children from pornography on Internet sites. The Supreme Court has found some of Congress's efforts to do this to be unconstitutional because those laws have not been sufficiently clear about exactly what expression is prohibited. Another problem with efforts to protect children from harmful material on the Internet is that such efforts may result in restricting adult access to material that is legal for adults to see. However, in 2008 the Supreme Court upheld a federal law that punished those who distribute child pornography on the Internet.



Some people argue that laws meant to protect children from adult content on the Internet also block lawful and meaningful speech for adults. *Why has the Supreme Court found some efforts to protect children from adult content on the Internet unconstitutional?*

Problem 37.2

- a. Should the government be allowed to censor books, movies, the Internet, or magazines? If so, under what circumstances, and why?
 - b. Who should decide if a book or movie is obscene? What definition should be used?
 - c. Do you think books and movies that depict nude women and emphasize sex encourage violence against women? Should they be banned? Explain your answer.
 - d. Is there a problem with indecent material on the Internet? If so, what should be done about it?
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Defamation

The First Amendment does not protect defamatory expression. **Defamation** is a false expression about a person that damages that person's reputation. When defamation is spoken, it is called **slander**. Defamation published in a more lasting form—for example, a writing, film, compact disc, or blog—is called **libel**. For example, assume a patient said that her doctor was careless and had caused the death of patients. If others heard this remark, the doctor could sue the patient for slander if the statement had been false. If the patient had written the same thing in a letter, the suit would be for libel. However, if a statement—written or spoken, no matter how damaging or embarrassing—is proven to be true, the plaintiff cannot win a defamation suit in court.

The value placed on freedom of speech in the United States makes it difficult for public officials or public figures to win defamation suits. There is a concern that holding speakers, which includes the press, responsible for comments about matters of public importance will “chill” or discourage expression.

Commercial Speech

Another form of speech that is not fully protected by the Constitution is **commercial speech**. Most advertising is considered commercial speech, as distinguished from individual speech. At one time commercial speech received no protection by the courts. It was assumed that government could regulate commercial speech in much the same way that it could regulate business itself. Today, commercial speech does not receive the same high level of protection accorded to political speech, but most commercial speech receives at least some First Amendment protection.

A case in point involves a state that passed a law making it unprofessional conduct for pharmacists to advertise prescription drug prices. The state's concern was that such advertising might lead to aggressive price competition and ultimately to unprofessional, shoddy services by pharmacists.

The Public Official's Lawsuit for Libel

On March 29, 1960, the *New York Times* printed an advertisement paid for by four African American clergymen. The ad was entitled “Heed Their Rising Voices.” It called attention to the civil rights struggle in the South and appealed for funds to be used for various causes, including a legal defense fund for Dr. Martin Luther King, Jr., who had been indicted for perjury in Montgomery, Alabama.

The ad focused on the violence with which the civil rights movement had been met in Montgomery. A portion of the advertisement contained factual errors. For example, the ad said that truckloads of armed police ringed the Alabama State College campus when, in fact, the police were deployed near the campus but did not surround it. The ad also said that Dr. King had been arrested seven times, but he had actually been arrested only four times.

L. B. Sullivan was an elected commissioner of the city of Montgomery, Alabama, and he was responsible for the police department there. While the advertisement did not mention him by name, he contended that references to police included him. Sullivan sued the clergymen and the newspaper for libel in the Alabama courts and was awarded damages of \$500,000.

On appeal, the U.S. Supreme Court reversed the decision. The Court viewed it as communicating information about a public issue of great concern. The Court said that debate on public issues must be “uninhibited, robust, and wide open” and that it may include “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” If critics had to guarantee the complete accuracy of every assertion, it would lead to self-censorship, not free debate.

In the case of *New York Times v. Sullivan*, the Court established a rule that a public official cannot recover damages for a defamatory



Dr. Martin Luther King, Jr., under arrest

falsehood relating to official conduct unless the official can prove the speaker either knew the statement was false or offered the statement with reckless disregard for its truth. In this case, the U.S. Supreme Court said that the clergymen and the newspaper did not know the information in the advertisement was false and they did not offer it with reckless disregard for its truth.

In a later case, the Court extended this rule to cover lawsuits brought by all public figures—not just public officials.

Problem 37.3

- Do you agree or disagree with the U.S. Supreme Court's decision in this case? Explain the reasons for your answer.
- Does the rule about public officials and public figures reduce the privacy rights of these people? Explain the reasons for your answer.
- What rights and interests were balanced by the Supreme Court in deciding this case?

While the information in these ads was purely commercial, the Supreme Court struck down the law based on the argument that society's interest in information about products was more important than the state's interest in regulating advertising of prescription drugs. In addition, when states tried to ban all advertising by lawyers as being inherently misleading, the Court said that such a concern could not support a total ban on advertising by lawyers.

In general, courts allow government to ban commercial speech that is false or misleading or that provides information about illegal products. If information is not false or misleading and the product or service being advertised is legal, then the government is limited in the ways it can regulate commercial speech. The courts tend to look carefully at such government regulation to see if there is a good reason for it and whether the regulation itself is consistent with that good reason.

In one case the government wanted to keep manufacturers of alcoholic beverages from competing with each other in "strength wars," so they banned statements about alcoholic content on beer cans. A beer company sued, arguing that this violated the company's freedom of speech. The Supreme Court agreed with the beer company. While the government had a good reason for its concern about "strength wars," it did not make sense to ban alcohol content from beer labels but not, for example, from wine labels.

Commercial speech includes advertising. *In what ways can states regulate commercial speech?*



The Offensive Speaker

In 1948, Father Terminiello, a Roman Catholic priest, arrived to make a speech at a Chicago auditorium. Outside the auditorium about 300 people were picketing his speech. Inside, Terminiello criticized Jews and African Americans, as well as the crowd outside. By the time his speech was finished, 1,500 people had gathered outside. A police line prevented the protesters from entering the building. However, the “howling mob” outside was throwing stones and bricks at the building, and the police were unable to maintain control. The crowd was also yelling at and harassing people who came to hear Terminiello speak.

Terminiello was arrested and charged with disorderly conduct under an ordinance forbidding any breach of the peace. He was convicted,

and his conviction was upheld in the Illinois courts. However, in a 5-to-4 decision, the U.S. Supreme Court reversed his conviction, ruling that the breach of the peace ordinance was vague and punished some speech that should have been protected.

Problem 37.4

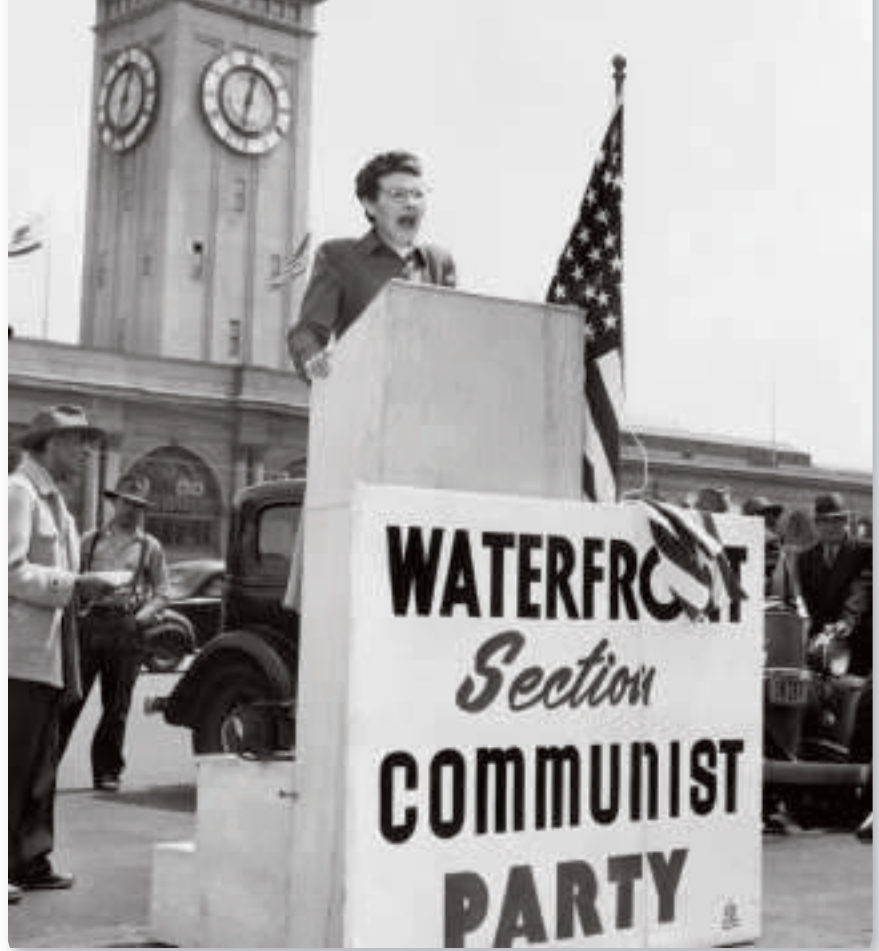
- a. What happened in the Terminiello case? Why was he arrested?
 - b. Should the police have controlled the crowd instead of arresting Terminiello? Did the police violate his First Amendment rights? Why or why not?
 - c. What did the U.S. Supreme Court decide in this case? Why?
 - d. Under what circumstances, if any, should people be prohibited from voicing unpopular views? Explain your answer.
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Fighting Words, Offensive Speakers, and Hostile Audiences

In addition to obscenity, defamation, and commercial speech, there are a few additional situations in which the U.S. Constitution does not protect the content of a person’s speech. When a person speaks publicly, two elements are interacting: the speaker and the audience. Protection of a person’s speech by the First Amendment depends on how these elements interact in different situations. There are times when certain words may be protected and other times when the same words may not be protected because the surrounding situation is different.

The First Amendment does not protect you if you use words that are so abusive or threatening that they amount to what the U.S. Supreme Court calls **fighting words**. These are words spoken face-to-face that are likely to cause an imminent breach of the peace between the speaker and the listener. Fighting words are like a verbal slap in the face. They do not convey ideas or contribute to the marketplace of ideas. Their value is outweighed by society’s interest in maintaining order. Still, courts very rarely use the “fighting words” doctrine today. Even offensive, provocative speech that makes its listeners very angry is generally protected and not considered to be fighting words.

In the early 1950s, some people were accused of trying to organize the Communist Party in order to overthrow the U.S. government. *What test did the Supreme Court use to decide the Dennis case?*



In addition to analyzing face-to-face speech, the police must also decide how to handle the responses of a large audience to speech. Police action may depend on whether the audience is friendly or hostile toward the speaker and whether there is evidence that a serious danger exists if the speech continues.

In *The Case of the Offensive Speaker* on page 451, the police had to deal with an audience that disagreed with the speaker's message. The police must also deal with problems caused when the audience agrees with the message. For example, the government must decide how to deal with speakers who advocate illegal activities. Prior to the 1950s, the courts used the **clear and present danger** test. This test examined the circumstances under which a speech was made and determined whether a clear and present danger of unlawful action existed. The courts generally held that the unlawful action did not have to occur immediately after the speech, for example, when a speaker encourages the audience to overthrow the U.S. government. When there was a clear and present danger of unlawful activity, the government could punish the speaker.

In the early 1950s, the Supreme Court reflected the nation's concern with the Cold War and national security. In *Dennis v. United States* (1951), the defendants were convicted for attempting to organize the U.S. Communist Party, whose goal was to overthrow the government.

In *Dennis*, the Court used a balancing test that downplayed the likelihood that the harm would occur. Instead, the Court balanced the right of the speaker against the harm the speaker proposed. When the speech advocated very dangerous acts, such as overthrowing the government, the Court required less proof of clear and present danger.

In the 1969 case of *Brandenburg v. Ohio*, however, the Supreme Court began using the **incitement test** for cases in which the speaker urged the audience to take unlawful action. This test allowed the government to punish advocacy only when it was directed toward inciting, or producing immediate lawless action from, the audience and when the advocacy was likely to produce such behavior. Unlike the clear and present danger test, the incitement test required that the unlawful action be likely to occur within a short period of time. Therefore, the incitement test gives speakers greater protection.

For example, if a speech causes members of an audience to talk to one another in disagreement, the speaker might not be arrested. However, if the speech urges the audience to throw objects at others and the audience begins to do this, the speaker could be arrested. In practice, the police can face a difficult dilemma in deciding whether to arrest an unpopular speaker or to control a hostile audience.

Hate Speech

In recent years there has been an effort to punish those who express views, called **hate speech**, motivated by bigotry and racism. This effort has sometimes run afoul of the First Amendment.

Those who support punishment for hate speech argue that strong measures should be taken because of the emotional and psychological impact hate speech has on its victims and its victims' communities. Furthermore, supporters of punishment argue that hate speech amounts to fighting words and thus does not qualify for First Amendment protection. Others argue that so-called speech codes designed to promote tolerance for minorities, women, and gays, while well-intentioned, are vague and difficult to enforce fairly.

White supremacists express views motivated by bigotry and racism. *What are the arguments in support of punishing hate speech? Against it?*



They claim that such speech codes put the government into the censorship business—favoring certain content or viewpoints and disfavoring others—in violation of the First Amendment. Legal battles over speech codes, primarily on public college and university campuses, have usually resulted in courts striking them down as First Amendment violations. Supporters of the First Amendment argue that the preferred approach to hateful speech is more speech—speech that rebuts bigotry and racism.

The legal result has been different, however, for state laws that increase criminal punishments for bias-motivated violence and intimidation. In 1993 the U.S. Supreme Court unanimously upheld a Wisconsin law that provides enhanced sentencing when the defendant “intentionally selects the person against whom the crime (is committed) because of . . . race, religion, color, disability, sexual orientation, national origin or ancestry. . . .” Most states now have similar laws providing enhanced penalties for bias-motivated crimes.

Problem 37.5

A state university adopts the following policy: “A student or faculty member may be suspended or expelled for any behavior, verbal or physical, that stigmatizes an individual on the basis of race, ethnicity, religion, national origin, sex, sexual orientation, creed, ancestry, age, marital status, handicap, or veteran status.”

- a.** Decide whether the following actions violate the above policy. If they do, should the student or faculty member be punished?
 - After writing a limerick for an assignment, a student reads it aloud in an English class. It makes fun of the reported homosexual acts of a politician.
 - A white student writes an article on race relations for the school newspaper. It states that African Americans are more likely than whites to become criminals in the United States, and this is one reason whites do not mix more with African Americans.
 - The athletic director schedules the varsity club’s awards dinner on a major Muslim holiday. Several Muslim athletes are unable to attend.
 - An African American student hears that a group of Chinese students will not socialize with African Americans. She calls them “typical Chinese racists.”
 - Wearing white robes and hoods, a white supremacist student group stages a silent march on campus.
 - b.** What are the arguments for and against the above policy? Do you support or oppose it? Can it be improved? If so, how? Are there ways for students to take a stand against hate speech even if there is no code? Explain.
 - c.** Should television and radio stations be regulated by laws, or should they have their own rules similar to the above university policy? Should other private businesses have similar rules? Give your reasons.
 - d.** Think about how racial and ethnic slurs compare with fighting words. In what ways are they the same? How do they differ?
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Law Around the World

International Forum on Hate Speech

Individuals from many different countries have gathered to discuss whether all countries should enact criminal laws against hate speech. The following speakers give their views.

A German: “Because of the experience of our country under Hitler, we are worried about how speech can be used to condemn and abuse millions of people. If there had been laws forbidding anti-Semitic speech, perhaps the Holocaust could have been prevented. Today, we see strong antiforeigner feeling. We are thankful that we have laws prohibiting ‘incitement to hatred’ and believe they are needed in all countries.”

An American: “Our history includes a revolution that was at least partially a reaction to government censorship. We think it is dangerous to allow government to decide what speech will be allowed. It is true that racism is a serious problem in our country and that racist speech can have a very negative impact on the victims. However, it may be overly paternalistic for the government to try to protect people from such speech. Would it not be better to let the marketplace of ideas condemn the racists?”

An Israeli: “The continual conflict between Arabs and Jews in our region led the government to pass a criminal law governing incitement to racism. However, this law has done nothing but create the illusion of progress against racism. There have been few prosecutions, and the ones that have occurred have been against Arabs. Although the law has symbolic value, it may be better not to have prosecutions, because these just give racists on both sides a platform from which to speak.”

A South African: “With its history of ethnic and racial division, my country seems a likely candidate for a law against hate speech. In fact, for many years there has been such a



South Africa's Nelson Mandela

law, which prohibited ‘bringing any section of inhabitants of the country into ridicule or contempt.’ This law was used principally by the white government to prosecute blacks. But many in my country think that the violence can be stopped only if people aren’t allowed to promote racial hatred. My view is that while we work to undo racial injustice, it makes sense to ban racist speech.”

Problem 37.6

- Which of the speakers favor laws against hate speech? Why?
- Which of the speakers oppose such laws? Why?
- How do you think the history of each speaker’s country affects the viewpoints expressed?
- What are the pros and cons of encouraging countries to enact their own criminal laws against hate speech? What is your position? Give your reasons.

Time, Place, and Manner Restrictions

Laws may regulate expression in one of two ways. Some laws regulate expression based on its content. These laws deal with *what* a speaker is allowed to say or not to say. Other laws regulate the time, place, and manner of expression. These laws set forth *when*, *where*, and *how* speech is allowed.

As a general rule, government cannot regulate the content of expression, except in special situations, as noted in the preceding sections. However, government may make reasonable regulations governing the time, place, and manner of speech. For example, towns and cities may require citizens to obtain permits to hold a march, to use sound trucks, or to stage protests in parks, on streets, or on other public property. Towns and cities may also regulate the time during which loudspeakers may be used, the places where political posters may be displayed, and the manner in which political demonstrations may be conducted. Such laws control when, where, and how expression is allowed.

The Case of . . .

The Nazis in Skokie

The American Nazi Party planned a demonstration in the town of Skokie, Illinois. A large number of Skokie's residents were Jewish, and many were survivors of Nazi concentration camps during World War II. Many had lost relatives in the gas chambers. Because of this, many residents strongly opposed the Nazi demonstration in their town.

To prevent violence and property damage, the town passed a law that it hoped would keep the Nazis from demonstrating there. The law required anyone seeking a demonstration permit to obtain \$300,000 in liability insurance. However, this requirement could be waived by the town. The law also banned distribution of material promoting racial or religious hatred and prohibited public demonstrations by people in military-style uniforms. The Nazis challenged the law as a violation of their First Amendment rights.

Problem 37.7

- a. Why did Skokie's Jewish population feel so strongly about this demonstration?
- b. Some people claimed that the purpose of the demonstration was to incite Skokie's Jews and to inflict emotional harm rather than to communicate ideas. Do you agree or disagree? Should the motive of the speaker influence whether a speech is protected by the Constitution?
- c. Does the government have an obligation to protect the rights of Nazis and other unpopular groups, even if their philosophy would not permit free speech for others? Should Ku Klux Klan or Communist Party rallies have the same protection?
- d. Was the law in this case neutral in its viewpoint? Explain.
- e. How should this case be decided? In what ways, if any, should the town be able to regulate speech and assembly?

Courts analyze such regulations by first determining whether the site affected is a **public forum**, such as a street or park that is traditionally open to expression—or designated for this purpose—or whether the site is a non-public forum, such as a bus terminal or a school. If the site is a public forum, then the regulation will be overturned unless it serves an important government interest. For example, the government may prohibit loudspeakers from blaring in quiet hospital zones or keep marchers off busy main streets when commuters are driving to or from work. In these cases, the government is regulating speech but the regulation serves an important interest. However, regulations for non-public forums can be more restrictive and need only be reasonable. For instance, a school district could choose to limit the use of school buildings—a nonpublic forum—to educational purposes.

Regulations for public and nonpublic forums must also be viewpoint-neutral; that is, they cannot promote or censor a particular point of view. The courts will also be more likely to uphold time, place, and manner restrictions if they leave open alternative ways for communicating the information in question.



Public forums, such as streets or parks, are places in which First Amendment rights of expression are traditionally exercised. *How do the courts analyze time, place, and manner restrictions?*

Problem 37.8

Which of the following laws regulate the content of expression, and which regulate the time, place, and manner of expression? Which, if any, violate the First Amendment?

- a.** A city ordinance prohibits posting signs on public property such as utility poles, traffic signs, and streetlights.
 - b.** A regulation prohibits people from sleeping in federal parks, even though the sleeping is part of a demonstration against homelessness.
 - c.** A federal regulation prohibits public radio stations from airing editorials.
 - d.** An ordinance prohibits commercial billboards within the town limits.
 - e.** A District of Columbia ordinance prohibits the display within 500 feet of a foreign embassy of any sign that tends to bring a foreign government into “public disrepute.”
 - f.** A town ordinance prohibits picketing outside abortion clinics.
 - g.** A city ordinance prohibits political or religious organizations from passing out leaflets or asking for donations inside the airport terminal.
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The Flag Burning

While the Republican National Convention was taking place in Dallas in 1984, Gregory Lee Johnson participated in a political demonstration. Demonstrators marched through Dallas streets, stopping at several locations to stage “die-ins” intended to dramatize their opposition to nuclear weapons. One demonstrator took an American flag from a flagpole and gave it to Johnson.

The demonstration ended in front of the Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, protesters chanted, “America, the red, white, and blue, we spit on you.” There were no injuries or threats of injury during the demonstration.

Of the hundred or so demonstrators, only Johnson was arrested. He was charged under a Texas criminal statute that prohibited desecration of a venerated object (including monuments, places of worship or burial, or a state or national flag) “in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.”

At Johnson’s trial, several witnesses testified that they had been seriously offended by the flag burning. He was convicted, sentenced to one year in jail, and fined \$2,000. The case was appealed to the U.S. Supreme Court.

Problem 37.9

Assume that you are a justice on the U.S. Supreme Court. Study the two opinions that follow, decide which you would vote for, and in a letter to the editor of a national newspaper, give the reasons for your decision.

Opinion A

Johnson argues that his burning of the flag should be protected as symbolic speech under



The American flag

the First Amendment. The First Amendment literally protects speech itself. However, this Court has long recognized that First Amendment protection does not end with the spoken or written word. While we have rejected the idea that virtually all conduct can be labeled speech and so is protected by the First Amendment, we have recognized conduct as symbolic speech when the actor intended to convey a particular message and there was a great likelihood that those viewing the conduct would understand the message.

In this case, Johnson’s conduct is similar to conduct protected as symbolic speech in our earlier cases. However, the First Amendment does not provide an absolute protection for speech. This Court will analyze the Texas law, along with the facts of the case, to determine whether the state’s interest is sufficient to justify punishing Johnson’s action.

In earlier cases, we upheld the conviction of a protester who burned his draft card. We reached that decision because the government

had an important interest in requiring that everyone age 18 and older carry a draft card. In that case we did not punish the protester's speech but rather his illegal act (burning his draft card). However, we have held that freedom of speech was violated when individuals were arrested for displaying a flag decorated with a peace symbol constructed of masking tape and for wearing pants with a small flag sewn into the seat.

In the *Johnson* case, the state argues that it has two important interests: preventing a breach of the peace and preserving the flag as a symbol of nationhood and national unity. The first interest is not involved in this case because there was no breach of the peace or even a threat of such a breach.

The state's other argument—the preservation of the flag as a symbol of nationhood and national unity—misses the major point of this Court's earlier First Amendment decisions: the government may not prohibit expression simply because society finds the ideas presented to be offensive or disagreeable. Johnson was prosecuted for burning the flag to express an idea—his dissatisfaction with the country's policies. His conviction must be reversed because his act deserves First Amendment protection as symbolic speech. The government has not provided sufficient justification for punishing his speech.


Opinion B

For more than 200 years, the American flag has occupied a unique position as the symbol of the nation. Regardless of their own political beliefs, millions of Americans have an almost mystical reverence for the flag. Both Congress and the states have enacted many laws prohibiting the misuse and mutilation of the American flag. With the exception of Alaska and Wyoming, all the states have specific laws prohibiting the burning of the flag. We do not

believe that the federal law and the laws in the 48 states that prohibit burning of the flag are in conflict with the First Amendment. Although earlier cases have protected speech and even some symbolic speech related to the flag, none of our decisions has ever protected the burning of a flag.

The First Amendment is designed to protect the expression of ideas. Indeed, Johnson could have denounced the flag in public or even burned it in private without violating the Texas law. In fact, other methods of protest were used and permitted at the demonstration. The Texas statute did not punish him for the ideas that he conveyed but rather for the conduct he used to convey his message. Requiring that Johnson use some method other than flag burning to convey his message places a very small burden on free expression.

We have never held that speech rights are absolute. If Johnson had chosen to spray-paint graffiti on the Washington Monument, there is no question that the government would have the power to punish him for doing so. The flag symbolizes more than national unity. It symbolizes to war veterans, for example, what they fought for and what many died for. It also symbolizes our shared values such as freedom, equal opportunity, and religious tolerance. If the great ideas behind our country are worth fighting for—and history demonstrates that they are—then the flag that uniquely symbolizes the power of those ideas is worth protecting from burning. The conviction should be affirmed.



**Landmark
Supreme Court Cases**

Visit the Landmark Supreme Court Cases Web site at landmarkcases.org for information and activities about *Texas v. Johnson*.

Symbolic Speech

Expression may be symbolic as well as verbal. **Symbolic speech** is conduct that expresses an idea. Although speech is commonly thought of as verbal expression, we are all aware of nonverbal communication. Sit-ins, flag-waving, demonstrations, and wearing armbands or protest buttons are examples of symbolic speech. While most forms of conduct could be said to express ideas in some way, only some conduct is protected as symbolic speech. In analyzing such cases, the courts ask whether the speaker intended to convey a particular message and whether it is likely that the message was understood by those who viewed it.

To convince a court that symbolic conduct should be punished and not protected as speech, the government must show that it has an important reason. However, the reason cannot be merely that the government disapproves of the message conveyed by the symbolic conduct.

Vagueness and Overinclusive Laws

Courts have ruled that laws governing free speech must be clear and specific. This is so that a reasonable person can understand what expression is allowed and what is prohibited. Laws also need to be clear so they can be enforced in a uniform and nondiscriminatory way. Laws governing free speech that are not clear and specific can be struck down by courts on grounds of **vagueness**.

In addition, laws that regulate free speech must be narrowly drafted to prohibit only as much as is necessary to achieve the government's goals. Laws that prohibit both protected and unprotected expression are termed **overinclusive**. In specific cases, courts may strike down statutes that are vague or overinclusive, even if the expression in question could have been prohibited or punished under a clearer, more narrowly drafted law.

People have used sit-ins, a form of symbolic speech, to protest. *How do the courts determine whether conduct is protected as symbolic speech?*



The Cross-Burning Law

In the late 1980s, many states and localities passed laws against hate crimes. These laws defined the types of acts that constituted hate crimes and provided criminal penalties for them. St. Paul, Minnesota, was one of many cities to pass such a law. This city's ordinance read as follows:

Whoever places on public or private property a symbol . . . or graffiti, including but not limited to a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender, commits disorderly conduct and shall be guilty of a misdemeanor.

Russell and Laura Jones and their five children were an African American family who had just moved into a mostly white St. Paul neighborhood. Late one night they were awakened by noise outside their bedroom window. When they parted the curtains, they saw a cross burning on their front lawn. St. Paul police arrested an 18-year-old white male. He was prosecuted and convicted under the local ordinance described above.

Problem 37.10

- a. What happened in this case? Why was the 18-year-old prosecuted?
 - b. Could the state have prosecuted the defendant using some other law or ordinance? If so, which ones? Why do you think it used the hate crimes ordinance?
 - c. Can you identify words or phrases in the ordinance above that are not clear and specific? What are they? Exactly what expression is prohibited?
 - d. On appeal, what legal arguments can the defendant raise? What legal arguments can the state make?
- e. When interviewed by a national newspaper, the lawyer for the defendant stated that, "Everybody's gotten real thin-skinned lately, and I'm defending the right to express yourself in that kind of climate. . . . With an ordinance like this, you open up a doctrine that swallows the First Amendment." What did the defendant's lawyer mean by these comments? Do you agree or disagree with these comments? Give the reasons for your answers.
 - f. How should this case be decided? Give the reasons for your answer.
 - g. Assume that a group of students hang a rope ending in a noose from a tree limb near the black cultural studies center at a local university. Assume the St. Paul ordinance is in effect here. Can this act be prosecuted as a crime? What should university administrators do if this happens?



Surveying the damage

Advising Your City Council

Citizens have come to their representative on the city council and asked for her help in solving the following problem. They are concerned about people on their downtown streets who are approaching local citizens and tourists and asking for money. These people hold out a cup and say “Help the homeless” to passersby. Some people report that they have had their path blocked and have felt harassed.

The city council member is sympathetic to the concerns voiced by her constituents, but she also realizes that this issue might involve the First Amendment and the right to freedom of speech.

Problem 37.11

Assume that you work for this council member. Draft a paper advising her about possible approaches the city council might take. Consider these points:

- a. Should a new criminal law be drafted to address this problem? Can an existing criminal law be used to address this problem? Remember that a criminal law that violates the First Amendment would be unconstitutional.
- b. Is the phrase “Help the homeless” protected speech under the First Amendment? If so, would the phrase be considered political speech? Commercial speech? Some other type of speech? If the words “Help the homeless” would not be protected, why not? Explain your answers.
- c. Even if the words “Help the homeless” are protected, is there some way to regulate this activity according to time, place, and manner that will improve the situation in the community?



A homeless man

- d. Draft a proposed law to regulate asking for money on downtown streets. Analyze the law to be sure that it is not vague or overinclusive and that it is not designed to prohibit one particular point of view.
- e. Would citizens support passing such a law? Would police support enforcement? Might the law be challenged in court? Explain your answers.