

Free Speech and Content Control in Cyberspace

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

First Amendment Guarantees

Freedom of Religion

- right to exercise religion freely

First Amendment Freedom of Expression

- freedom of speech
- right to a free press
- right to assemble peaceably
- freedom to petition the government for redress of grievances

Key Points:

1. You have a right to be free from punishment by the government in retaliation for most speech
2. Government generally cannot exercise the power of prior restraint on your speech or publication. (high hurdle to suppress)
3. The internet protects against prior restraint just as the U.S. Constitution does

Value of Freedom of Expression

(1) Promotes individual autonomy

- want people to express themselves freely in all their uniqueness and candor in furtherance of self-development

- affirms the dignity and worth of each and every member of society

realizing full human potential is an end in itself

(2) Vital to market place of ideas

- expression is vital to attainment of knowledge and search for truth

- let people decide for themselves what is true through full discourse and exposure

- enlightened judgement possible only if one considers all facts and ideas from whatever source

(3) Vital to democracy

- speech enriches public debate

- mass ignorance is a breeding ground for oppression and tyranny

- the discourse that should be most valued is that focused on policy and politics

- freedom of expression provides a checking function by people against government excess and corruption

Unprotected Speech

Fighting Words

- words which by their very utterance inflict injury or tend to incite an immediate breach of peace

Defamation

- statement made with knowledge it was untrue or with reckless disregard for the truth

- In writing (libel) vs orally (slander)

- defamatory falsehoods about public officials may be punished only if official can prove published with "actual malice"

True threats

- punishable if a reasonable person saying those same words, in the context in which the accused said them, would foresee the impact of the words to generate fear.

Obscenity

Legally Obscene v Pornographic

Legally Obscene - banned for everyone, deemed harmful to society (e.g. sexually explicit images involving children or killing – contraband with severe penalties)

Current test:

1. appeal to the average person's prurient (shameful, morbid) interest in sex,
2. depicts sexual conduct in a "patently offensive way" as defined by community standards,
3. taken as a whole, lacks serious literary, artistic, political, or scientific value

- **highly subjective assessments**

Pornographic

Examples:
(a) sexually explicit speech in which we allow adults to engage, (b) allowed hate speech

- banned only for children (Ginsberg Speech)

Commercial Speech

- speech on behalf of a business to make a profit

- corporate free speech is **more limited** in some instances
 - ... no strict scrutiny of gov't regulation
 - ... analysis driven by consumer protection
 - ... less protection if speech is misleading (penalties)
 - ... must be substantial government interest (mandating drug and cigarette warnings allowed)
- corporate free speech is far **more powerful** in other instances
 - ... generally overrides privacy rights of humans

Content-Based Regulations by Gov't

- regulation takes into account the message being conveyed (e.g. banning or penalizing unpopular positions)

- such regulations must pass "strict scrutiny" analysis

Burden on Government to prove:
(1) regulation is the narrowest means necessary to
(2) achieve a compelling government interest

- *seldom upheld by U.S. Supreme Court*

Viewpoint Discrimination

- a regulation favoring some viewpoints or ideas over others

(i.e. racist viewpoints may not be banned – tolerating hateful speech is “the best protection we have against any Nazi type regime in this country”)

- viewpoint discrimination is virtually always unconstitutional

Content-Neutral Regulations by Gov’t

- regulation does not take into account the message being conveyed
- regulation has less scrutiny

Regulation is constitutional if:

- (1) content neutral
- (2) serves an important government interest, and
- (3) leaves open ample, alternative channels of communication

(e.g. time, place, and manner regulations often upheld)

Many Forms of Speech

Words and images

- writings, oral presentations, art, song lyrics, plays, movies, parodies, satire

Symbolic speech

– sit-ins, flag waving, flag burning, arm bands, marches, carrying signs

Regardless of form, may be protected

Controversial Protected Speech

Hate Speech

- Free speech is right to express one's opinion or views on a matter
- Government prohibited from punishing or suppressing citizen's opinions and viewpoints
- Extends to all opinions; even the most abhorrent and distasteful

If government allowed to regulate unpopular speech, creates a *slippery slope*.

Laws that ban opinions (even hateful ones) might then be used to quash any idea or opinion.

Speech **may be regulated preemptively** if a demonstrable imminent danger.

Even then, speech typically delayed and controlled by time, place, and manner rather than banned.

Right to Anonymity

(1) **vital to political and social discourse**

- allows expression of controversial or unpopular views without fear of retribution
- whistleblowers in government and industry good for truth seeking

(2) **publishing anonymously guaranteed** unless government interest overrides concerns for individual liberty

- government overrides were previously very rare
- with Internet, recent defamation and consumer fraud cases have succeeded in showing a substantial government interest allowing overriding of anonymity

Student Speech

- public school students have less free speech protection than adults
- speech rights may be regulated if they disrupt functioning of school or violate school policy

Upheld restrictions:

- time, place, and manner restrictions, dress codes, grooming codes, profanity codes
- any restrictions imposed on adults (e.g. fighting words, actual threats, etc)

Upheld rights:

- school may not compel expression (e.g. pledges)
- unobtrusive symbolic speech not incorporated in codes (e.g. arm bands)

Further Unprotected Speech

Right to free speech is not absolute

- Incitement
- Crimes Involving Talking and Agreeing
- Blackmail and Extortion
- Legally Obscene
- Perjury and False Statements Under Oath
- Breach of Copyright Laws
- Speech at Work

Online Speech

Internet is a Public Forum - governments typically may not keep a person from accessing the internet

Private Platforms – may ban anybody’s speech on their platform based on their Terms of Service

Public Officials – politician or local government office probably cannot block constituent comments they don’t like on a platform like Facebook (i.e. in courts)

Free Speech Zones – whether online or physical space, generally opposed by free speech advocates (i.e. you should not be restricted to just certain areas)
