

Freedom of Speech - General Principles

- Free **speech** is a fundamental right; thus, any regulation that limits free speech must pass strict scrutiny (the regulation must be necessary to achieve a compelling government interest).
- **Conduct** is also considered speech and also is protected if it is meant to convey a message.

Rules for regulating conduct:

- if the conduct is otherwise prohibited, the fact that it is meant as a political statement does not make it permissible!
- a state may prohibit public nudity even if that is meant to communicate an idea
- government may selectively prosecute people for draft dodging (those who bring to the attention of the government the fact that they have done so)

Freedom of Speech - General Principles

➤ Freedom of speech includes freedom to avoid speech

- people cannot be forced to salute the flag or rise during the national anthem
- children cannot be forced to recite the pledge of allegiance in school
- state may not require private parade organizers to include people with differing political views in their parade

➤ A regulation that is “**overbroad**” (i.e., it regulates more speech that is allowed) or is **too vague** to give reasonable notice of what it prohibits is void on its face and cannot be enforced at all!

➤ “Prior restraints” orders are very difficult to obtain against expression of (any) speech

Freedom of Speech - Content-Neutral Restrictions

A “content neutral restriction” is sometimes known as a “time, place and manner” restriction and is allowable to a greater extent than a content-based restriction.

To regulate speech in **public places** (streets, sidewalks, parks), the regulation must be:

- content-neutral,
- narrowly tailored,
- to achieve a significant government interest (a little less than strict scrutiny),
- must leave other channels open for the regulated speech.

Freedom of Speech – Content-Neutral Restrictions

For **non-public forums** (schools, military bases, government buildings), regulation must be:

- viewpoint neutral (not necessarily content neutral), and
- rationally related to a legitimate government purpose.

For **private forums** (private mailboxes, homes, shopping malls), the government can make any reasonable rule to protect individuals against invasion from other sources

Licensing requirements:

These are generally valid for conducting a parade, as long as the regulation:

- is content neutral,
- does not leave too much discretion in the hands of the licensing authority, and
- provides for adequate methods by which the speech can be expressed.

Unprotected Speech - Incitement

1) Speech that tends to provoke lawless action.

- Old Rule: Schenck v. U.S. the “clear and present danger” test
- Modern Rule: Brandenburg v. Ohio rule:
 - Speech can be prohibited and punished if:
 - intended to provoke imminent lawless conduct; and
 - likely to cause imminent lawless conduct

Unprotected Speech – Fighting Words

2) “Fighting words”

- Speech that is “*likely to incite physical violence as retaliation*” can be prohibited
 - As a practical matter, almost all such regulations fail because they are too vague or overbroad
- Statutes cannot prohibit “fighting words” only if they are based on particular content, such as racial or religious taunts

However, there may be increased penalties for hate crimes

Unprotected Speech - Obscenity

3) Obscenity: Elements

- a) appeals to prurient interest
- b) portrays the material in a way that is patently offensive in the community
- c) lacks any serious literary, artistic political or scientific value

- These qualifications do not apply to child pornography, which may be regulated, outlawed and punished even if it does not fit this definition of obscenity

Note: even when not “obscene” zoning regulation of adult entertainment facilities is permissible as long as it’s designed to promote legitimate social concerns

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QUIZ TIME!

Unprotected Speech - Defamation

4) Defamation

- False statements about people that are defamatory (cause their reputation in the community to suffer) are unprotected by the First Amendment

- The first Amendment grants some protection for media statements made about public figures or public officials:

The plaintiff must show “actual malice” to successfully sue for defamation. This means that the plaintiff must show, by clear and convincing evidence, that the defendant knew the statement was false or had reckless disregard for the truth when making the statement

- covered in more detail in Torts

Unprotected Speech – Commercial Speech

5) Commercial Speech

○ These are not protected:

- false or misleading advertising
- advertising for an illegal activity or transaction

○ Other “commercial speech” regulation is allowable only if:

- it serves a substantial government interest;
- it directly advances that interest; and
- is narrowly tailored to achieve that interest

○ Regulation of trade practicing and advertising, such as lawyer advertising is allowed to some extent (covered in Legal Ethics)

Unprotected Speech – Compelling Interest

6) Where the government has a **compelling interest in the regulation**; i.e.:

- **required for national security (e.g., preventing people from publishing troop locations in a war zone)**
- **preserving a fair trial (a “gag” order) by a judge or keeping media out of the courtroom**