The Law of Free Expression in the United States

By Christina E. Wells*

9 ČASOPIS PRO PRÁVNÍ VĚDU A PRAXI 353 (2001) (Journal for Legal Science & Practice, Masaryk University, Brno, Czech Republic)

Introduction

In the United States, as in many countries, freedom of speech is constitutionally protected. The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[1] Unfortunately, nothing in the text of the First Amendment elaborates on the meaning of this phrase. Thus, the First Amendment is essentially a vague statement of principle rather than a detailed list of rules. As a result, the Supreme Court is responsible for interpreting the meaning of the phrase "freedom of speech."

Initially, the Supreme Court could have interpreted the text of the First Amendment as establishing an absolute principle barring all regulation of speech. Certainly, the text of the First Amendment implies a complete prohibition of government regulation.[2] And, in fact, some justices argued in favor of this interpretation.[3] However, a majority of the Supreme Court has never adopted this position. Instead it has engaged in "a delicate and sometimes treacherous balancing act attempting to determine when free speech . . . rights trump state interests and when they do not."[4]

Over the last century, the Supreme Court has developed several principles that serve as cornerstones of the its current First Amendment jurisprudence. First, whether the Supreme Court considers speech to be "high-value" or "low-value" determines the level of protection speech receives under the First Amendment. Second, whether a regulation of speech is "content-based" or "content-neutral" also affects whether the Court finds the regulation to be constitutional. Finally, the government's ability to regulate speech occurring on government property – *e.g.*, public parks, streets, and libraries – may vary depending upon the type of property involved. These three foundational principles are discussed in greater detail below.

Low-Value Speech

According to the Supreme Court, "the First Amendment embraces at the least the liberty to discuss publicly . . . all matters of public concern."[5] In the Supreme Court's view, public discourse is at the core of what the First Amendment is designed to protect.[6] Another way of stating this proposition is to say that speech on matters of public concern is considered to be "high-value" speech. As discussed more thoroughly below, the Supreme Court interprets the First Amendment to provide substantial protection to high-value speech.

---

* Enoch H. Crowder Professor of Law, University of Missouri School of Law, Columbia, Missouri, USA. Professor Wells was a Visiting Professor of Law at Masaryk University from February 2001 through June 2001.

[1] U.S CONST., AMEND. 1.

[2] Although the text of the First Amendment only prohibits Congress from restricting free expression, the Supreme Court has interpreted the amendment to apply to states and municipalities as well. *See* Gitlow v. New York, 268 U.S. 652 (1925).

[3] Justice Hugo Black is the most famous proponent of the absolutist position. *See* Hugo Black, *The Bill of Rights*, 35 NYU L. REV. 865 (1960).

[4] Christina E. Wells, *Introduction: The Difficult First Amendment*, 66 MO. L. REV. 1, 1 (2001).

[5] Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 534 (1980).

[6] *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988); Bethel School District No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

If only some speech falls into the "high-value" category, it follows that the remaining speech falls into the "low-value" category. In fact, the Supreme Court has made clear that certain categories of speech are "no essential part of any exposition of ideas and [are] of such slight social value as a step to the truth that any benefit that may be derived from [such speech] is clearly outweighed by the social interest in order and morality."[7] In determining whether speech is low-value, the Court does not take an ad hoc approach. Instead the Court has created certain categories of speech that it considers to be low-value. To date, the Court's categories of low-value speech include speech that incites unlawful activity,[8] fighting words,[9] obscenity,[10] child pornography,[11] and, to some extent, commercial speech[12] and libel.[13] If speech is deemed to be low-value, the Court will generally uphold government regulations, even if such regulations would be prohibited if applied to high value speech.

The Court's determination that some speech is low-value, and consequently subject to greater regulation, has been controversial. Many scholars have criticized the Court's creation of low-value speech categories arguing that "the very concept of low-value speech is an embarrassment to [F]irst [A]mendment orthodoxy."[14] Others question whether the Court's definitions of low-value speech are sufficiently specific or whether they allow too much speech to be prohibited.[15] Despite scholars' arguments, the Supreme Court has continued to recognize the above-listed categories of speech as having less value than speech pertaining to public discourse. However, the Supreme Court has not created any additional categories of low value speech, perhaps recognizing that substantial use of such categories could destroy the First Amendment's main goal of encouraging and protecting expression.

Content-Based and Content-Neutral Restrictions of High-Value Speech

Unlike the categories of low-value speech listed above, the Supreme Court has never explicitly defined categories of "high-value" speech. Rather, it has simply stated that speech which contributes to public discourse is high-value. In effect, the Court treats as high-value speech any speech that is not explicitly found to be low-value speech. High-value speech is subject to considerably more protection under the First Amendment than low-value speech. Even so, the government is not completely barred from regulating speech. Rather, its ability to regulate speech depends upon whether the regulation is considered to be "content-based" or "content-neutral."

---

[7] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1948).

[8] *See* Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (allowing punishment of speech advocating illegal action when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

[9] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1948) (holding that words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace" are unprotected).

[10] *See* Miller v. California, 413 U.S. 15, 24 (1973) (defining unprotected obscenity as speech which appeals to a prurient interest, depicts sexual conduct in a patently offensive manner, and lacks serious, redeeming social value).

[11] New York v. Ferber, 458 U.S. 747 (1982).

[12] Originally, commercial speech was not protected by the First Amendment. *See* Valentine v. Chrestenson, 316 U.S. 52, 54 (1942). Now, however, the Court accords some protection to commercial speech although it is still subject to more rigorous regulation than high-value expression. *See* Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

[13] The Court has also extended substantial First Amendment protection to libels (*i.e.*, false statements of fact) regarding public officials and public figures. *See* New York Times v. Sullivan, 376 U.S. 254 (1964). However, the Court has also stated that "there is no constitutional value in false statements of fact," especially when private figures are the subject of those statements. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

[14] *See* STEVEN SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 44 (1990); *see also* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 326 (1970).

[15] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW §11.3.1 at 800-01 (1997).

Content-based regulations of speech "limit communication because of the message it conveys."[16] Content-based laws have two primary forms. First, they can restrict a particular viewpoint, such as a law prohibiting speech opposing abortion. Second, such laws may restrict discussion of certain subject matters. A law that prohibits all discussion of abortion in public places is a subject-matter restriction. Under the Supreme Court's jurisprudence, "[c]ontent-based restrictions of speech are presumptively invalid."[17] Such restrictions are allowed only if they are necessary to meet a compelling state interest.[18] The Supreme Court almost never upholds content-based laws. While there may often be a compelling state interest behind the regulation, the Court usually rules that the regulation was not necessary and that a less burdensome law could have been used instead. Thus, once the Court determines that a statute is content-based, it will rarely uphold it.[19] The Supreme Court has upheld only one content-based restriction of high value speech.[20]

Content-neutral regulations, on the other hand, affect speech but do not regulate it because of the message it conveys. A law banning the use of amplified sound trucks in residential areas is a content-neutral regulation. Although it restricts some speech, it does so regardless of the viewpoint or subject-matter of such expression. The Supreme Court will uphold content-neutral regulations as long as they are "narrowly tailored to serve a significant government interest, and . . . leave open ample alternative channels for communication of information."[21] This test is far more lenient than the Court's very hostile approach to content-based regulations. In fact, the Court has frequently upheld content-neutral regulations of speech.[22] As long as the government has a significant reason for regulating the speech, such as protecting the privacy interest of people in their homes, and the regulation leaves the speaker able to communicate in another way, such as through handing out leaflets, the Court will find it constitutional. A content-neutral law is most often found to be unconstitutional when it infringes upon a particularly common and important mode of speaking, such as distributing leaflets or putting a sign up on one's own property.[23]

Why does the Supreme Court treat content-based and content-neutral regulations this way? Two reasons are most often suggested for the Court's behavior. First, content-based regulations distort public debate more than content-neutral regulations. By aiming at particular viewpoints or topics, content-based regulations "raise the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."[24] In contrast, content-neutral regulations less frequently distort public debate since, by definition, they do not aim at a particular message. Second, content-based regulations often reflect illegitimate government motives for regulating speech. Historically, the government has enacted content-based laws because it was hostile to the speaker's message or because it feared that speech would persuade citizens to act in an undesirable manner.[25] The Court has long held that such motives are insufficient

---

[16] Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 (1987).

[17] R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

[18] *See R.A.V.*, 505 U.S. at 382; *see also* Turner Broadcasting Systems, Inc. v. FCC, 512 U.S. 622, 641-42 (1994).

[19] *See* Christina E. Wells, *Bringing Structure to the Law of Injunctions Against Expression*, 51 CASE WEST. RESERVE L. REV. 1, 36 (2000); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992).

[20] *See* Burson v. Freeman, 504 U.S. 191 (1992).

[21] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

[22] *See Clark*, 468 U.S. at 293 (upholding a National Park Service regulation banning protestors from staying overnight in a national park); Frisby v. Shultz, 487 U.S. 474 (1988) (upholding ordinance banning targeted picketing near residential homes); Ward v. Rock Against Racism, 491 U.S. 781 (1989); (upholding a municipal regulation requiring concert performers to use city amplification equipment); Kovacs v. Cooper, 336 U.S. 77, 81 (1949) (upholding law banning use of amplified sound trucks).

[23] *See* Schneider v. State, 308 U.S. 148 (1939) (striking down an ordinance prohibiting "a person rightfully on a public street from handing literature to one willing to receive it"); City of Ladue v. Gilleo, 512 U.S. 43 (1994) (striking down law banning homeowners from displaying signs on their own property).

[24] Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105, 116 (1991). *See also* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

[25] *See* Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 174-175 (1997).

reason to regulate speech[26] and their close association with content-based regulations has led the Court to be justifiably suspicious of such regulations. Because they are not aimed at a particular message, content-neutral restrictions simply are not as likely to have underlying improper motivations. Thus, the Court is willing to review content-neutral regulations under a more lenient standard.

Many scholars have criticized the Court's distinction between content-based and content-neutral laws. Some argue that the Court's strong antipathy toward content-based regulations is unwarranted. According to these scholars, the Court should allow content-based laws if those laws are designed to enhance public debate rather than restrict it.[27] In these scholars' view, a law requiring that broadcast stations carry material of a certain content might be constitutional as long as that law was designed to provide a viewpoint that was otherwise missing from the broadcast station's typical programming.

Other scholars argue that the content-based/content-neutral distinction lacks coherence and cannot be reliably used in many circumstances. A good example of this problem is seen in the Cable Television Consumer Protection and Competition Act of 1992 ("the Cable Act"). This federal law required cable television operators to devote certain channels to local broadcasters.[28] The law does not regulate content directly but instead only requires that certain classes of speakers be allowed access to the cable system. However, by requiring the inclusion of broadcasters with local programming, one could argue that the law requires broadcasters to publish speech with a certain content. At the same time, the Cable Act did not suppress a specific message but tried to enhance speech rights by preventing cable operators from squeezing out local broadcasters.[29] This suggests a far more neutral rationale than most content-based regulations. As a consequence, it is difficult to determine whether this law is content-based or content-neutral. Not surprisingly, the Supreme Court was also badly divided as to whether the Cable Act was content-based or content-neutral.[30] As a result, many scholars argue that the Court should use some other tool to determine the constitutionality of laws regulating speech.[31]

Speech on Public Property – The Public Forum Doctrine

Critical to effective expression is the ability of particular speakers to spread their message. From a purely physical perspective, however, this can be difficult for speakers. As Professor Erwin Chemerinsky has noted, "[m]ost people lack access to the mass media – television, radio, newspapers – to express their message. They need to have a place to distribute leaflets or a corner to place a soapbox. Moreover, some types of expression require a larger area than a private person is likely to own."[32] Thus, the question arises

---

[26] *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (noting that attempts "to suppress certain ideas that [the government] finds distasteful" were illegitimate).

[27] *See* Owen W. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987).

[28] Turner Broadcasting Systems, Inc. v. FCC, 512 U.S. 622, 630-32 (1994) (describing "must-carry" provisions of the Cable Act).

[29] *Turner*, 512 U.S. at 633-34 (citing to Congressional findings regarding the 1992 Act).

[30] Justices Kennedy, Souter, Stevens, Blackmun, and Chief Justice Rehnquist voted to uphold the regulations, arguing that they were essentially content-neutral. *Turner*, 512 U.S. at 641-61 (majority opinion). Justices O'Connor, Ginsberg, Scalia and Thomas believed that the regulations were illegitimately content-based. *Turner*, 512 U.S. at 674 (O'Connor J., concurring in part and dissenting in part).

[31] *See* Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture*, 74 N.C. L. REV. 141 (1995); C. Edwin Baker, *Turner Broadcasting: Content-Based Regulations of Persons and Presses*, 1994 SUP. CT. REV. 57.

[32] CHEMERINSKY, cited in note 15 above, § 11.4.1 at 917.

as to whether the government is required to make its own property available to speakers in order to facilitate free expression.

Initially, the Supreme Court found that individuals did not have a right to use government property to express themselves. In *Davis v. Commonwealth of Massachusetts*,[33] the Supreme Court upheld an ordinance prohibiting public speaking without a permit because a "legislature absolutely or conditionally [forbidding] public speaking in a highway or public park is no more an infringement of the rights of a member of the public than . . . the owner of a private house . . . forbid[ding] it in his house."[34] The modern Supreme Court, however, has recognized that individuals have a right to use certain types of government property for expressive purposes.[35]

Although the Supreme Court requires that government make available public property for expressive purposes, it recognizes that some property is better suited to expression than other property. As a consequence, the Court has developed a flexible approach to determining when people are allowed to use public property to speak. Specifically, the Court classifies government property into three types – public forums, designated public forums, and non-public forums. Depending upon the type of property at issue, the Court then applies different rules to determine if the government has infringed the speaker's First Amendment rights.

Streets, parks, and sidewalks are classic examples of public forums. According to the Court, use of such places for expressive purposes "has, from ancient times, been a part of the privileges, immunities, rights, and liberties of the citizens."[36] Thus, the government's ability to regulate speech is strictly circumscribed. According to the Court, "in . . . quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling interest and is narrowly drawn to achieve that end."[37] In essence, the Court will uphold a regulation of speech in a public forum only if it is content-neutral. Even then, the Court will only uphold such regulations if they meet the test for content-neutral standards set forth above.

Designated public forums are similar to public forums but they are subject to greater government control. A designated public forum is public property, other than streets parks, and sidewalks, which the state has voluntarily opened to the public for expressive activity.[38] The most common example of a designated public forum is the public university. Many universities allow groups to use their facilities for meeting and other expressive purposes. Universities are not required to allow such access, but because they do, university property is treated as a designated public forum. In contrast to a public forum, the government is not required "to indefinitely retain the open character" of a designated public forum but "as long as it does so it is bound by the same standards as apply in a traditional public forum."[39] Thus, as long as a university allows groups access to its property for expressive purposes, it can regulate expression only by using content-neutral rules. It cannot discriminate based upon the content of the speech.[40]

A non-public forum is government property that "is not by tradition or designation a forum for public communication."[41] The government has substantial control over non-public forums. According to the Court, "the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public

---

[33] 167 U.S. 43 (1897).
[34] The Supreme Court explicitly approved of the language in the Supreme Court of Massachusetts's opinion. *See* Commonwealth v. Davis, 162 Mass. 510, 39 N.E. 113 (1895).
[35] Hague v. CIO, 307 U.S. 496 (1939).
[36] *Hague*, 307 U.S. at 515 (Roberts, J., concurring).
[37] Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 44 (1983).
[38] *Perry*, 460 U.S. at 45.
[39] *Perry*, 460 U.S. at 45.
[40] *See* Widmar v. Vincent, 454 U.S. 263 (1981); Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993).
[41] *Perry*, 460 U.S. at 46.

officials oppose speakers' views."[42] Examples of non-public forums include military bases,[43] telephone poles,[44] airports,[45] and prisons.[46] In each case, the government is allowed to exclude speakers if they show a reasonable purpose for the exclusion.[47] Obviously, the government has more control over speech in the non-public forum than in any other type of forum.

As one can see from the above discussion, whether a speaker can be excluded from government property differs dramatically depending on the type of forum to which they seek access. The designation of property as a public forum, designated public forum, or non-public forum is thus the single most important factor in the Court's public forum decisions. Not surprisingly, speakers try to argue that the property to which they seek access is either a public forum or a designated public forum. However, the Court has been reluctant to find that either of these forums exists. The Court has never found that anything other than streets, parks and sidewalks amount to a traditional public forum. In addition, the Court has never adequately set forth the criteria for distinguishing between a designated public forum and a non-public forum. It often appears that the Court makes these decisions on a case-by-case basis using a strong presumption that most government properties are non-public forums.[48] As a result, the Court's doctrine, which was very protective of speech in its early stages, has become far more tolerant of the government attempts to regulate speech on public property.

Conclusion

The above discussion is a summary of the most important free speech principles currently used by the United States Supreme Court. There are, of course, many other doctrines relevant to First Amendment analysis. However, these three foundational principles provide substantial insight into the values underlying the Supreme Court's First Amendment jurisprudence and reflect the Supreme Court's most common concerns when trying to balance First Amendment rights against other state interests.

---

[42] *Perry*, 460 U.S. at 46.
[43] Greer v. Spock, 424 U.S. 828 (1976).
[44] Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).
[45] International Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992).
[46] Adderly v. Florida, 385 U.S. 39 (1966).
[47] *See Adderly*, 385 U.S. at 47-48 (Court found that government could exclude civil rights protestors from jail property in order to preserve jail security); *Greer*, 424 U.S. at 831 (upholding military installation's exclusion of political speeches in order to insulate the military from political activities).
[48] *See* CHEMERINSKY, cited in note 15 above, § 11.4.2.5 at 933-34.