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First Amendment to the United States Constitution

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Jump to: navigation, search
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United States of America

This article is part of the series:

United States Constitution

Original text of the Constitution

Preamble

Articles of the Constitution

I · II · III · IV · V · VI · VII

Amendments to the Constitution

Bill of Rights

I · II · III · IV · V

VI · VII · VIII · IX · X

Subsequent Amendments

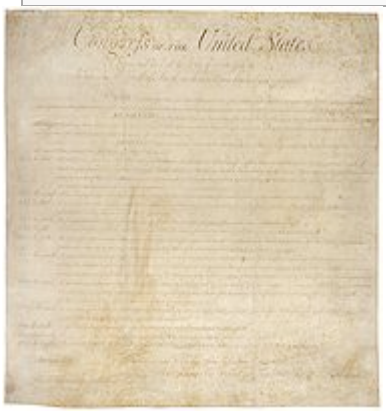
XI · XII · XIII · XIV · XV
XVI · XVII · XVIII · XIX · XX
XXI · XXII · XXIII · XXIV · XXV
XXVI · XXVII

Unratified Amendments

I(1) · XIII(1) · XIII(2) · XX(1) · XXVII(1) · XXVII(2)

Other countries · **Law Portal**

view · talk · edit



The Bill of Rights in the National Archives.

The **First Amendment** (**Amendment I**) to the United States Constitution is part of the Bill of Rights. The amendment prohibits the making of any law respecting an establishment of religion, impeding the free exercise of religion, abridging the freedom of speech, infringing on the freedom of the press, interfering with the right to peaceably assemble or prohibiting the petitioning for a governmental redress of grievances.

Originally, the First Amendment applied only to laws enacted by the Congress. However, starting with *Gitlow v. New York*, 268 U.S. 652 (1925), the Supreme Court has held that the Due Process Clause of the Fourteenth Amendment applies the First Amendment to each state, including any local government.

Contents

Text

> “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.”

Background

Main article: Anti-Federalism

Opposition to the ratification of the Constitution was partly based on the Constitution's lack of adequate guarantees for civil liberties. To provide such guarantees, the First Amendment (along with the rest of the Bill of Rights) was submitted to the states for ratification on September 25, 1789, and adopted on December 15, 1791.

Establishment of religion

Main article: Establishment Clause

The Establishment Clause prohibits the federal, state or municipal establishment of a religion or other preference for one religion over another, non-religion over religion, or religion over non-religion.

Originally, the First Amendment applied only to the federal government. A number of the states effectively had established churches when the First Amendment was ratified, with some remaining into the early nineteenth century.

Subsequently, *Everson v. Board of Education* (1947) incorporated the Establishment Clause (i.e., made it apply against the states). However, it was not until the middle to late twentieth century that the Supreme Court began to interpret the Establishment and Free Exercise Clauses in such a manner as to restrict the promotion of religion by the states. In the *Board of Education of Kiryas Joel Village School District v. Grumet,* 512 U.S. 687 (1994), Justice David Souter, writing for the majority, concluded that "government should not prefer one religion to another, or religion to irreligion."[1]

Wall of separation

Everson used the metaphor of a wall of separation between church and state, derived from the correspondence of President Thomas Jefferson. It had been long established in the decisions of the Supreme Court, beginning with *Reynolds v. United States* from 1879, when the Court reviewed the history of the early Republic in deciding the extent of the liberties of Mormons. Chief Justice Morrison Waite, who consulted the historian George Bancroft, also discussed at some length the *Memorial against Religious Assessments* by James Madison, who drafted the First Amendment; Madison used the metaphor of a "great barrier."[2]

Justice Hugo Black adopted Jefferson's words in the voice of the Court, and concluded that "government must be neutral among religions and nonreligion: it cannot promote, endorse, or fund religion or religious institutions."[3] The Court has affirmed it often, with majority, but not unanimous, support. Warren Nord, in *Does God Make a Difference?*, characterized the general tendency of the dissents as a weaker reading of the First Amendment; the dissents tend to be "less concerned about the dangers of establishment and less concerned to protect free exercise rights, particularly of religious minorities."[4]

Beginning with the *Everson* decision itself, which permitted New Jersey school boards to pay for transportation to parochial schools, the Court has used various tests to determine when the wall of separation has been breached. The *Everson* decision laid down the test that establishment existed when aid was given to religion, but that the transportation was justifiable because the benefit to the children was more important. In the school prayer cases of the early 1960s, (*Engel v. Vitale* and *School District of Abington Township v. Schempp*), aid seemed irrelevant; the Court ruled on the basis that a legitimate action both served a secular purpose and did not *primarily* assist religion. In *Walz v. Tax Commission*, the Court ruled that a legitimate action could not entangle government with religion; in Lemon v. Kurtzman, these points were combined, declaring that an action was not establishment if

1. The statute (or practice) has a secular purpose.
2. Its principal or primary effect neither advances nor inhibits religion.
3. It does not foster an excessive government entanglement with religion.

This Lemon test has been criticized by Justices and by legal scholars, but it remains the predominant means by which the Court enforces the Establishment Clause.[5] In *Agostini v. Felton*, the entanglement prong of the Lemon test was demoted to simply being a factor in determining the effect of the challenged statute or practice.[6] In *Zelman v. Simmons-Harris*, the opinion of the Court considered secular purpose and the absence of primary effect; a concurring opinion saw both cases as as having treated entanglement as part of the primary purpose test.[7]

Free exercise of religion

Main article: Free Exercise Clause of the First Amendment

In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Supreme Court required that states have a "compelling interest" in refusing to accommodate religiously motivated conduct. The case involved Adele Sherbert, who was denied unemployment benefits by South Carolina because she refused to work on Saturdays, something forbidden by her Seventh-day Adventist faith. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court ruled that a law that "unduly burdens the practice of religion" without a compelling interest, even though it might be "neutral on its face," would be unconstitutional.

The "compelling interest" doctrine became much narrower in *Employment Division v. Smith*, 494 U.S. 872 (1990), that as long as a law does not target a particular religious practice it does not violate the Free Exercise Clause. In *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), the Supreme Court ruled Hialeah had passed an ordinance banning ritual slaughter, a practice central to the Santería religion, while providing exceptions for some practices such as the kosher slaughter. Since the ordinance was not "generally applicable," the Court ruled that it was subject to the compelling interest test, which it failed to meet, and was therefore declared unconstitutional.

In 1993, the Congress passed the Religious Freedom Restoration Act (RFRA), which sought to restore the "compelling interest" standard. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court struck down the provisions of the Act that forced state and local governments to provide

protections exceeding those required by the First Amendment on the grounds that while the Congress could enforce the Supreme Court's interpretation of a constitutional right, the Congress could not impose its own interpretation on states and localities. According to the court's ruling in *Gonzales v. UDV*, 546 U.S. 418 (2006), RFRA remains applicable to federal statutes and those laws must still meet the "compelling interest" standard.

Freedom of speech

Main article: Freedom of speech in the United States

Speech critical of the government

The Supreme Court never ruled on the constitutionality of any federal law regarding the Free Speech Clause until the 20th century. The Supreme Court never ruled on the Alien and Sedition Acts of 1798, whose speech provisions expired in 1801.[8] The leading critics of the law, Thomas Jefferson and James Madison, argued for the Acts' unconstitutionality based on the First Amendment, among other Constitutional provisions (e.g. Tenth Amendment).[9] In retrospect, dicta from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) acknowledges that, "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history."[10]

The Espionage Act of 1917 imposed a maximum sentence of twenty years for anyone who caused or attempted to cause "insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States." Over two thousand were convicted under the Act. One filmmaker was sentenced to ten years imprisonment because his portrayal of British soldiers in a movie about the American Revolution impugned the good faith of an American ally, the United Kingdom.[11] The Sedition Act of 1918 went even further, criminalizing "disloyal," "scurrilous" or "abusive" language against the government.

In the midst of World War I, Charles Schenck, then the general secretary of the Socialist party, was found guilty of violating the Espionage Act after a search of the Socialist headquarters revealed a book of Executive Committee minutes. The book contained a resolution, dated August 13, 1917, to print 15,000 leaflets to be mailed to men who had passed exemption boards.[12] The contents of these leaflets intimated a fervent opposition to the draft, comparing conscripts to convicts and urging potential draftees to "not submit to intimidation."[13] Schenck's appeal of his conviction reached the Supreme Court as *Schenck v. United States*, 249 U.S. 47 (1919). According to Schenck, the Espionage Act violated the Free Speech Clause of the First Amendment. The Supreme Court unanimously rejected Schenck's appeal and affirmed his conviction. Justice Oliver Wendell Holmes, Jr., writing for the Court, explained that "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[14]

The "clear and present danger" test of *Schenck* was elaborated in *Debs v. United States*, 249 U.S. 211 (1919). On June 16, 1918, Eugene V. Debs, a political activist, delivered a speech in Canton, Ohio, the main theme of which "was socialism, its growth, and a prophecy of its ultimate

success."[15] Debs spoke with pride of the devotion with which his "most loyal comrades were paying the penalty to the working class — these being Wagenknecht, Baker and Ruthenberg, who had been convicted of aiding and abetting another in failing to register for the draft."[16] Moreover, hours earlier, Debs had spoken with approval of an *Anti-War Proclamation and Program* adopted at St. Louis in April, 1917 which advocated a "continuous, active, and public opposition to the war, through demonstrations, mass petitions, and all other means within [their] power."[17] Following his speech, Debs was charged and convicted under the Espionage Act. In upholding his conviction, the Court reasoned that although he had not spoken any words that posed a "clear and present danger," taken in context, the speech had a "natural tendency and a probable effect to obstruct the recruiting services[.]"[17]

Benjamin Gitlow was convicted of criminal anarchy after he was found advocating the "necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means" in the *Left Wing Manifesto*, as well as publishing and circulating a radical newspaper called *The Revolutionary Age* advocating similar ideas.[18] In arguing before the Supreme Court, Gitlow contended that "the statute as construed and applied by the trial court penalize[d] the mere utterance, as such, of 'doctrine' having no quality of incitement, without regard to the circumstances of its utterance or to the likelihood of the unlawful sequences[.]"[19] While acknowledging "liberty of expression 'is not absolute,'" he maintained "it may be restrained 'only in instances where its exercise bears a causal relation with some substantive evil, consummated, attempted or likely[.]'"[19] As the statute took no account of the circumstances under which the offending literature was written, it violated the First Amendment. The Court rejected Gitlow's reasoning. Writing for the majority, Justice Edward Sanford declared that "utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion....Such utterances, by their very nature, involve danger to the public peace and to the security of the state."[20] *Gitlow v. New York*, 268 U.S. 652 (1925) greatly expanded *Schenck* and *Debs* but established the general opinion of the Court that the First Amendment is incorporated by the Fourteenth Amendment to apply to the states.[21]

In 1940, Congress enacted the Smith Act, making it illegal to advocate "the propriety of overthrowing or destroying any government in the United States by force and violence."[22] The law provided law enforcement a tool to combat Communist leaders. After Eugene Dennis was convicted for attempting to organize a Communist Party in the United States pursuant to the Smith Act § 2, he petitioned for *certiorari*, which the Supreme Court granted.[23] In *Dennis v. United States* 341 U.S. 494 (1951), the Court upheld the law 6-2 (Justice Tom C. Clark did not participate because he had ordered the prosecutions when he was Attorney General). Chief Justice Fred M. Vinson explicitly relied on Oliver Wendell Holmes, Jr.'s "clear and present danger" test as adapted by Learned Hand: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as necessary to avoid the danger."[24] Clearly, Vinson suggested, clear and present danger did not intimate "that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited."[25]

Dennis has never been explicitly overruled by the Court, but its relevance within First Amendment jurisprudence has been considerably diminished by subsequent rulings. Six years

after *Dennis*, the Court changed its interpretation of the Smith Act. In *Yates v. United States*, 354 U.S. 298 (1957). the Court ruled that the Act was aimed at "the advocacy of action, not ideas."[26] Advocacy of abstract doctrine remains protected while speech explicitly inciting the forcible overthrow of the government is punishable under the Smith Act.

During the Vietnam Era, the Courts position on public criticism of the government changed drastically. Though the Court upheld a law prohibiting the forgery, mutilation, or destruction of draft cards in *United States v. O'Brien*, 391 U.S. 367 (1968), fearing that burning draft cards would interfere with the "smooth and efficient functioning" of the draft system,[27][28] the next year, the court handed down its decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), expressly overruling *Whitney v. California*, 274 U.S. 357 (1927) (a case in which a woman was imprisoned for aiding the Communist Party).[29] Now the Supreme Court referred to the right to speak openly of violent action and revolution in broad terms:

[Our] decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not allow a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or cause such action.[30]

Brandenburg discarded the "clear and present danger" test introduced in *Schenck* and further eroded *Dennis*.[31] In *Cohen v. California*, 403 U.S. 15 (1971), wearing a jacket reading "Fuck the Draft" in the corridors of the Los Angeles County courthouse was ruled not to be punishable.

Political speech

Anonymous speech

In *Talley v. California*, 362 U.S. 60 (1960), the Court struck down a Los Angeles city ordinance that made it a crime to distribute anonymous pamphlets. In *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), the Court struck down an Ohio statute that made it a crime to distribute anonymous campaign literature. However, in *Meese v. Keene,*, 481 U.S. 465 (1987), the Court upheld the Foreign Agents Registration Act of 1938, under which several Canadian films were defined as "political propaganda," requiring their sponsors to be identified.

Campaign finance

Main article: Campaign finance reform

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court affirmed the constitutionality of some parts, while declaring other parts unconstitutional, of the Federal Election Campaign Act of 1971 and related laws. These laws restricted the monetary contributions that may be made to political campaigns and expenditure by candidates. The Court concluded that limits on campaign contributions "serve[d] the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion."[32] However, the Court overturned the spending limits, which it found imposed "substantial restraints on the quantity of political speech."[33]

Further rules on campaign finance were scrutinized by the Court when it determined *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003). The case centered on the Bipartisan Campaign Reform Act of 2002, a federal law that imposed new restrictions on campaign financing. The Supreme Court upheld provisions which barred the raising of soft money by national parties and the use of soft money by private organizations to fund certain advertisements related to elections. However, the Court struck down the "choice of expenditure" rule, which required that parties could either make coordinated expenditures for all its candidates, or permit candidates to spend independently, but not both, which they agreed "placed an unconstitutional burden on the parties' right to make unlimited independent expenditures."[34] The Supreme Court also ruled that the provision preventing minors from making political contributions was unconstitutional, relying on *Tinker v. Des Moines Independent Community School District*.

In *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), the Supreme Court sustained an "as applied" challenge to provisions of the 2002 law dealing with advertising shortly before a primary, caucus, or an election.

In *Davis v. Federal Election Commission*, 554 U.S. 724 (2008), the Supreme Court declared the "Millionaire's Amendment" provisions of the BCRA to be unconstitutional. The Court held that easing BCRA restrictions for an opponent of a self-financing candidate spending at least $350,000 of his own money violated the freedom of speech of the self-financing candidate.

In *Citizens United v. Federal Election Commission*, 558 U.S. ___ (2010), the Court ruled that the BCRA's federal restrictions on electoral advocacy by corporations or unions were unconstitutional for violating the Free Speech Clause of the First Amendment. The Court overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which had upheld a state law that prohibited corporations from using treasury funds to support or oppose candidates in elections did not violate the First or Fourteenth Amendments. The Court also overruled the portion of *McConnell* that upheld such restrictions under the BCRA.[35]

Flag desecration

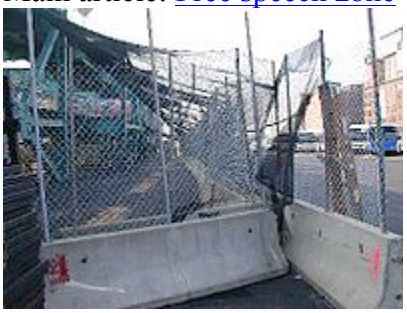
The divisive issue of flag desecration as a form of protest first came before the Supreme Court in *Street v. New York*, 394 U.S. 576 (1969). In response to hearing an erroneous report of the murder of James Meredith, Sidney Street burned a 48-star U.S. flag. When questioned by the police he responded: "Yes; that is my flag; I burned it. If they let that happen to Meredith, we don't need an American flag."[36] Street was arrested and charged with a New York state law making it a crime "publicly [to] mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act [any flag of the United States]."[37] Street appealed his conviction to the Supreme Court, arguing the law was "overbroad, both on its face and as applied," that the language was "vague and imprecise" and did not "clearly define the conduct which it forbids", and that it unconstitutionally punished the destruction of an American flag, an act which Street contended "constitute[d] expression protected by the Fourteenth Amendment."[38] In a 5–4 decision, the Court, relying on *Stromberg v. California*, 283 U.S. 359 (1931), found that because the provision of the New York law criminalizing "words" against the flag was unconstitutional, and the trial did not sufficiently demonstrate that he was convicted solely under the provisions not yet deemed unconstitutional, the conviction was unconstitutional. The Court, however,

"resist[ed] the pulls to decide the constitutional issues involved in this case on a broader basis" and left the constitutionality of flag-burning unaddressed.[39]

The ambiguity with regard to flag-burning statutes was eliminated in *Texas v. Johnson*, 491 U.S. 397 (1989). In that case, Gregory Lee Johnson participated in a demonstration during the 1984 Republican National Convention in Dallas, Texas. At one point during the demonstration, Johnson poured kerosene over an American flag and set it aflame, shouting anti-American phrases. Johnson was promptly arrested and charged with violating a Texas law prohibiting the vandalizing of venerated objects. He was convicted, sentenced to one year in prison, and fined $2,000. In 1989, his appeal reached the Supreme Court. Johnson argued that the Texas statute imposed an unconstitutional content-based restriction on symbolic speech. The Supreme Court agreed and, in a 5–4 vote, reversed Johnson's conviction. Justice William J. Brennan, Jr. asserted that "if there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable."[40] Many members of Congress criticized the decision of the Court and the House of Representatives unanimously passed a resolution denouncing the Court.[41] Congress passed a federal law barring flag burning, but the Supreme Court struck it down as well in *United States v. Eichman*, 496 U.S. 310 (1990). Many attempts have been made to amend the Constitution to allow Congress to prohibit the desecration of the flag. Since 1995, the Flag Desecration Amendment has consistently mustered sufficient votes to pass in the House of Representatives, but not in the Senate. In 2000, the Senate voted 63–37 in favor of the amendment, which fell four votes short of the requisite two-thirds majority. In 2006, another attempt fell one vote short.

Free speech zones

Main article: Free speech zone



The "free speech zone" at the 2004 Democratic National Convention.

Free speech zones are areas set aside in public places for political activists to exercise their right of freedom of speech as an exercise of what is commonly called "TPM" or "time, place, manner" regulation of speech. Free speech zones are set up by the Secret Service who scout locations near which the president is to pass or speak. Officials may target those displaying signs and escort them to the free speech zones before and during the event. Protesters who refuse to go to free speech zones could be arrested and charged with trespassing, disorderly conduct, and resisting arrest. In 2003, a seldom-used federal law was brought up that says that "willfully and knowingly to enter or remain in any posted, cordoned off, or otherwise restricted area of a building or

grounds where the President or other person protected by the Secret Service is or will be temporarily visiting" is a crime.[42][43]

Commercial speech

Commercial speech is speech done on behalf of a company or individual for the purpose of making a profit. Unlike political speech, the Supreme Court does not afford commercial speech full protection under the First Amendment. To effectively distinguish commercial speech from other types of speech for purposes of litigation, the Supreme Court uses a list of four indicia:[44]

1. The contents do "no more than propose a commercial transaction."
2. The contents may be characterized as advertisements.
3. The contents reference a specific product.
4. The disseminator is economically motivated to distribute the speech.

Alone, each indicium does not compel the conclusion that an instance of speech is commercial; however, "[t]he combination of *all* these characteristics...provides strong support for...the conclusion that the [speech is] properly characterized as commercial speech."[45]

The Court in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), upheld a New York City ordinance forbidding the "distribution in the streets of commercial and business advertising matter."[46] Writing for a unanimous court, Justice Roberts explained:

This court has unequivocally held that streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in their public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.[47]

In *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), the Court overruled *Valentine* and ruled that commercial speech was entitled to First Amendment protection:

What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients... [W]e conclude that the answer to this one is in the negative.[48]

In *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), the Court ruled that commercial speech was not protected by the First Amendment as much as other types of speech:

We have not discarded the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite a dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech.[49]

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), the Court clarified what analysis was required before the government could justify regulating commercial speech:

1. Is the expression protected by the First Amendment? Lawful? Misleading? Fraud?
2. Is the asserted government interest substantial?
3. Does the regulation directly advance the governmental interest asserted?
4. Is the regulation more extensive than is necessary to serve that interest?

Six years later, the Supreme Court, applying the *Central Hudson* standards in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986), affirmed the Supreme Court of Puerto Rico's conclusion that Puerto Rico's *Games of Chance Act of 1948*, including the regulations thereunder, was not facially unconstitutional. The lax interpretation of *Central Hudson* adopted by *Posadas* was soon restricted under *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), when the Court invalidated a Rhode Island law prohibiting the publication of liquor prices.

School speech

In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Supreme Court extended free speech rights to students in school. The case involved several students who were punished for wearing black armbands to protest the Vietnam War. The Supreme Court ruled that the school could not restrict symbolic speech that did not cause undue interruptions of school activities. Justice Abe Fortas wrote,

[S]chools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students...are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.

However, since 1969 the Supreme Court has placed a number of limitations on *Tinker* interpretations. In *Bethel School District v. Fraser*, 478 U.S. 675 (1986), the Court ruled that a student could be punished for his sexual-innuendo-laced speech before a school assembly and, in *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), the Court found that school newspapers enjoyed fewer First Amendment protections and are subject to school censorship. More recently, in *Morse v. Frederick*, 551 U.S. 393 (2007) the Court ruled that schools could, consistent with the First Amendment, restrict student speech at school-sponsored events, even events away from school grounds, if students promote "illegal drug use."

Obscenity

See also: Right to pornography

The federal government and the states have long been permitted to limit obscenity or pornography. While The Supreme Court has generally refused to give obscenity any protection under the First Amendment, pornography is subject to little regulation. However, the exact definition of obscenity and pornography has changed over time.

When it decided *Rosen v. United States* in 1896, the Supreme Court adopted the same obscenity standard as had been articulated in a famous British case, *Regina v. Hicklin*, [1868] L. R. 3 Q. B. 360. The *Hicklin* standard defined material as obscene if it tended "to deprave or corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[50] The Court ruled in *Roth v. United States*, 354 U.S. 476 (1957) that the *Hicklin* test was inappropriate. Instead, the *Roth* test for obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interest." [51]

Justice Potter Stewart, in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), famously stated that, although he could not precisely define pornography, "I know it when I see it".[52]

The *Roth* test was expanded when the Court decided *Miller v. California*, 413 U.S. 15 (1973). Under the *Miller* test, a work is obscene if:

(a)...'the average person, applying contemporary community standards' would find the work, as a whole, appeals to the prurient interest,...(b)...the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c)...the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[53]

Note that "community" standards—not national standards—are applied whether the material appeals to the prurient interest; thus, material may be deemed obscene in one locality but not in another. National standards, however, are applied whether the material is of value. Child pornography is not subject to the *Miller* test, as the Supreme Court decided in *New York v. Ferber*, 458 U.S. 747 (1982). The Court thought that the government's interest in protecting children from abuse was paramount.[54]

Personal possession of obscene material in the home may not be prohibited by law. In writing for the Court in the case of *Stanley v. Georgia*, 394 U.S. 557 (1969), Justice Thurgood Marshall wrote, "If the First Amendment means anything, it means that a State has no business telling a man, sitting in his own house, what books he may read or what films he may watch."[55] However, it is not unconstitutional for the government to prevent the mailing or sale of obscene items, though they may be viewed only in private. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), further upheld these rights by invalidating the Child Pornography Prevention Act of 1996, holding that, because the act "[p]rohibit[ed] child pornography that does not depict an actual child..." it was overly broad and unconstitutional under the First Amendment.[56] Justice Anthony M. Kennedy wrote: "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[57]

In *United States v. Williams*, 553 U.S. 285 (2008), by a vote of 7–2, the Supreme Court upheld the PROTECT Act of 2003. The Court ruled that prohibiting offers to provide and requests to obtain child pornography did not violate the First Amendment, even if a person charged under the Act did not possess child pornography.[58]

Libel, slander, and private action

Libel and slander

Main article: United States defamation law

American tort liability for defamatory speech or publications—slander and libel—traces its origins to English common law. For the first two hundred years of American jurisprudence, the basic substance of defamation law continued to resemble that existing in England at the time of the Revolution. An 1898 American legal textbook on defamation provides definitions of libel and slander nearly identical to those given by Blackstone and Coke. An action of slander required:[59]

1. Actionable words, such as those imputing the injured party: is guilty of some offense, suffers from a contagious disease or psychological disorder, is unfit for public office because of moral failings or an inability to discharge his or her duties, or lacks integrity in profession, trade or business;
2. That the charge must be false;
3. That the charge must be articulated to a third person, verbally or in writing;
4. That the words are not subject to legal protection, such as those uttered in Congress; and
5. That the charge must be motivated by malice.

An action of libel required the same five general points as slander, except that it specifically involved the publication of defamatory statements.[60] For certain criminal charges of libel, such as seditious libel, the truth or falsity of the statements was immaterial, as such laws were intended to maintain public support of the government and the truth of the statements merely eroded public support more thoroughly.[61] Instead, libel placed specific emphasis on the result of the publication. Libelous publications tended to "degrade and injure another person" or "bring him into contempt, hatred or ridicule."[60]

Concerns that defamation under common law might be incompatible with the new republican form of government caused early American courts to struggle between William Blackstone's argument that the punishment of "dangerous or offensive writings...[was] necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty" and the argument that the need for a free press guaranteed by the Constitution outweighed the fear of what might be written.[61] Consequently, very few changes were made in the first two centuries after the ratification of the First Amendment.

The Supreme Court's ruling in *New York Times Co. v. Sullivan*.376 U.S. 254 (1964) fundamentally changed American defamation law. The case redefined the type of "malice" needed to sustain a libel case. Common law malice consisted "ill-will" or "wickedness". Now, a public officials seeking to sustain a civil action against a tortfeasor needed to prove by "clear and convincing evidence" actual malice. The case involved an advertisement published in *The New York Times* indicating that officials in Montgomery, Alabama had acted violently in suppressing the protests of African-Americans during the civil rights movement. The Montgomery Police Commissioner, L. B. Sullivan, sued the *Times* for libel claiming the advertisement damaged his

reputation. The Supreme Court unanimously overruled the $500,000 judgment against the *Times*. Justice Brennan suggested that public officials may sue for libel only if the publisher published the statements in question with "actual malice" — "knowledge that it was false or with reckless disregard of whether it was false or not."[62]

While actual malice standard applies to public officials and public figures,[63] in *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1988), the Court found that, with regard to private individuals, the First Amendment does "not necessarily force any change in at least some features of the common-law landscape."[64] In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 472 U.S. 749 (1985), the Court held that "[i]n light of the reduced constitutional value of speech involving no matters of public concern...the state interest adequately supports awards of presumed and punitive damages — even absent a showing of 'actual malice.'"[65] Despite varying from state to state, private individuals generally need prove only the negligence of the defendant.

In *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*, 398 U.S. 6 (1970), the Supreme Court ruled that a Greenbelt News Review article, which quoted a visitor to a city council meeting who characterized *Bresler's* aggressive stance in negotiating with the city as "blackmail", was not libelous since nobody could believe anyone was claiming that *Bresler* had committed the crime of blackmail and that the statement was essentially hyperbole (i.e., clearly an opinion).

The Supreme Court ruled in *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974), opinions could not be considered defamatory. It is, therefore, permissible to suggest, for instance, that someone is a bad lawyer, but not permissible to declare falsely that the lawyer is ignorant of the law: the former constitutes a statement of values, but the latter is a statement alleging a fact.

More recently, in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Supreme Court backed off from the protection from "opinion" announced in *Gertz*. The court in *Milkovich* specifically held that there is no wholesale exception to defamation law for statements labeled "opinion," but instead that a statement must be provably false (falsifiable) before it can be the subject of a libel suit.

Hustler Magazine v. Falwell, 485 U.S. 46 (1988), extended the "actual malice" standard to intentional infliction of emotional distress in a ruling which protected a parody.

Private action

Ordinarily, the First Amendment applied only to direct government censorship. The protection from libel suits recognizes that the power of the state is needed to enforce a libel judgment between private persons. The Supreme Court's scrutiny of defamation suits is thus sometimes considered part of a broader trend in U.S. jurisprudence away from the strict state action requirement, and into the application of First Amendment principles when private actors invoke state power.

Likewise, the Noerr-Pennington doctrine is a rule of law that often prohibits the application of antitrust law to statements made by competitors before public bodies: a monopolist may freely

go before the city council and encourage the denial of its competitor's building permit without being subject to Sherman Act liability. Increasingly, this doctrine has been applied to litigation outside the antitrust context, including state tort suits for intentional interference with business relations and SLAPP Suits.

State constitutions provide free speech protections similar to those of the U.S. Constitution. In a few states, such as California, a state constitution has been interpreted as providing more comprehensive protections than the First Amendment. The Supreme Court has permitted states to extend such enhanced protections, most notably in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). In that case, the Court unanimously ruled that while the First Amendment may allow private property owners to prohibit trespass by political speakers and petition-gatherers, California was permitted to restrict property owners whose property is equivalent to a traditional public forum (often shopping malls and grocery stores) from enforcing their private property rights to exclude such individuals. Writing for the majority, Justice Rehnquist rejected the appellants argument for the common law's protection of property against trespass, writing that such an interpretation would "represent a return to the era of *Lochner v. New York*, 198 U.S. 45 (1905), when common-law rights were also found immune from revision... [it] would freeze the common law as it has been constructed by courts, perhaps at its 19th-century state of development."[66] The Court did, however, maintain that shopping centers could impose "reasonable restrictions on expressive activity."[67] Subsequently, New Jersey, Colorado, Massachusetts and Puerto Rico courts have adopted the doctrine;[68][69] California's courts have repeatedly reaffirmed it.[70]

The U.S. Supreme Court has never interpreted the First Amendment as having the same power to alter private property rights, or provide any other protection against purely private action. When considering private authority figures (such as parents or an employer), the First Amendment provides no protection. A private authority figure may reserve the right to censor their subordinate's speech, or discriminate on the basis of speech, without any legal consequences. "All may dismiss their employees at will,...for good cause, for no cause, or even for a cause morally wrong, without thereby being guilty of a legal wrong."[71] With specific regard to employee free speech, a few court cases illuminate the limits of the First Amendment *vis-a-vis* private employment.

In *Korb v. Raytheon*, 574 N.E.2d 370, 410 Mass. 581 (1991), Raytheon terminated Lawrence Korb after receiving complaints of his public involvement in an anti-nuclear proliferation nonprofit known as the Committee for National Security (CNS) and his advocacy of reduced defense spending. On February 26, 1986 *The Washington Post* ran an article describing Korb's speech at a press conference held the day prior as "critical of increased defense spending." Following the publication of the article, several military officials "expressed their disapproval" of Korb's comments.[72] Despite writing a letter of retraction which ran in *The Washington Post*, Raytheon terminated Korb's position after it continued to receive "Navy, Air Force, and Armed Services Committee objections."[73] In adjudicating Korb's claim of wrongful discharge, the Supreme Judicial Court of Massachusetts found "no public policy prohibiting an employer from discharging an ineffective at-will employee." His claim under the State Civil Rights Act was dismissed as well. In affirming the lower courts decision to dismiss, Justice Abrams wrote: "Although Korb has a secured right to speak out on matters of public concern, and he has a right

to express views with which Raytheon disagrees, he has no right to do so at Raytheon's expense."[74]

In the similar case, *Drake v. Cheyenne Newspapers, Inc.*, 891 P.2d 80 (1995), Kerry Drake and Kelly Flores, editorial employees at Cheyenne Newspapers, Inc. were fired for refusing to wear a button urging a "no" vote on the unionization of the editorial division.[75] Drake and Flores filed an action claiming the management engaged in a "retaliatory discharge in violation of public policy, breach of covenant of good faith and fair dealing and breach of the employment contract."[75] Drake and Flores argued that the "right to speech found in the Wyoming Constitution at Art. 1, § 20 represents an important public policy" which the Newspaper violated "when it terminated [their] employment because they exercised free speech[.]"[76] In examining the court precedent, the Wyoming Supreme Court concluded that "[t]erminating an at-will employee for exercising his right to free speech by refusing to follow a legal directive of an employer on the employer's premises during working hours does not violate public policy."[76] As for Drake and Flores' claim for breach of a covenant of good faith and fair dealing, the court found no "explicit promise by the Newspaper that they would terminate only for cause."[77]

The precedent of *Korb* and *Drake* do not, however, demonstrate an absence of free speech protections at private employers, but merely the limits of such protections. In both *Korb* and *Drake*, *public policy* was mentioned as a possible cause of action. Since *Petermann v. International Brotherhood of Teamsters*, 344 P.2d 25 (Cal.App. 1959), courts have recognized public policy exceptions to at-will terminations. In that case, the California Court of Appeals held "it would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge an employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute." [78]

Some jurisdictions, courts have moved to expand some speech protections to political activity under the public policy doctrine. In *Novosel v. Nationwide*, 721 F. Supp. 894 (3d Cir. 1983), the court found some public policy protection of private-sector employee free speech, writing: "[T]he protection of an employee's freedom of political expression would appear to involve no less compelling a societal interest than the fulfillment of jury service or the filing of a workers' compensation claim."[79] The court found "Pennsylvania law permits a cause of action for wrongful discharge where the employment termination abridges a significant and recognized public policy."[80] Subsequently, however, the Pennsylvania courts rejected the Third Circuit's reasoning, "believing that you can't claim wrongful discharge under a provision of the Constitution unless you can show state action," which is impossible where the employer is a private enterprise.[81]

Involuntary administration of medicine

First Amendment implications of involuntary administration of psychotropic medication arose late in the twentieth century. In *Rogers v. Okin*, 478 F. Supp. 1342 (D.Mass. 1979) Judge Joseph L. Tauro for the United States District Court for the District of Massachusetts found:

The right to produce a thought — or refuse to do so — is as important as the right protected in *Roe v. Wade* to give birth or abort [...] The First Amendment protects the communication of ideas. That protected right of communication presupposes a capacity to produce ideas. As a practical matter, therefore, the power to produce ideas is fundamental to our cherished right to communicate and is entitled to comparable constitutional protection.[82]

He went on to contend that "whatever powers the Constitution has granted our government, involuntary mind control is not one of them."[82] Two years later in *Rennie v. Klein*, 653 F.2d 836 (3d. Cir. 1981), the United States Court of Appeals for the Third Circuit avoided the plaintiffs' First Amendment and Eighth Amendment arguments, finding it "preferable to look to the right of personal security recognized in *Ingraham v. Wright*", a Fourteenth Amendment case, in analyzing the constitutional implications of the involuntary administration of psychotropic medication.[83]

Memoirs of convicted criminals

In some states, there are Son of Sam laws prohibiting convicted criminals from publishing memoirs for profit. These laws were a response to offers to David Berkowitz to write memoirs about the murders he committed. The Supreme Court struck down a law of this type in New York as a violation of the First Amendment in the case *Simon & Schuster v. Crime Victims Board*, 502 U.S. 105 (1991). That statute did not prohibit publication of a memoir by a convicted criminal. Instead, it provided that all profits from the book were to be put in escrow for a time. The interest from the escrow account was used to fund the New York State Crime Victims Board — an organization that pays the medical and related bills of victims of crime. Similar laws in other states remain unchallenged.

Freedom of the press

Main article: Freedom of the press in the United States

In *Lovell v. City of Griffin*, 303 U.S. 444 (1938), Chief Justice Hughes defined the press as, "every sort of publication which affords a vehicle of information and opinion."[84] Freedom of the press, like freedom of speech, is subject to restrictions on bases such as defamation law.

In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Court ruled that the First Amendment did not give a journalist the right to refuse a subpoena from a grand jury. The issue decided in the case was whether a journalist could refuse to "appear and testify before state and Federal grand juries" basing the refusal on the belief that such appearance and testimony "abridges the freedom of speech and press guaranteed by the First Amendment."[85] The 5–4 decision was that such a protection was not provided by the First Amendment.

Taxation of the press

State governments retain the right to tax newspapers, just as they may tax other commercial products. Generally, however, taxes that focus exclusively on newspapers have been found unconstitutional. In *Grosjean v. American Press Co.* 297 U.S. 233 (1936), the Court invalidated

a state tax on newspaper advertising revenues. Similarly, some taxes that give preferential treatment to the press have been struck down. In *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), for instance, the Court invalidated an Arkansas law exempting "religious, professional, trade and sports journals" from taxation since the law amounted to the regulation of newspaper content.

In *Leathers v. Medlock*, 499 U.S. 439 (1991), the Supreme Court found that states may treat different types of the media differently, such as by taxing cable television, but not newspapers. The Court found that "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas."[86]

Content regulation

The courts have rarely treated content-based regulation of journalism with any sympathy. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court unanimously struck down a state law requiring newspapers criticizing political candidates to publish their responses. The state claimed that the law had been passed to ensure journalistic responsibility. The Supreme Court found that freedom, but not responsibility, is mandated by the First Amendment and so it ruled that the government may not force newspapers to publish that which they do not desire to publish.

Content-based regulation of television and radio, however, have been sustained by the Supreme Court in various cases. Since there is a limited number of frequencies for non-cable television and radio stations, the government licenses them to various companies. However, the Supreme Court has ruled that the problem of scarcity does not allow the raising of a First Amendment issue. The government may restrain broadcasters, but only on a content-neutral basis.

In *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978), the Supreme Court upheld the Federal Communications Commission's authority to restrict the use of "indecent" material in broadcasting.

Petition and assembly

Main articles: Right to petition in the United States and Freedom of assembly

The right to petition was an echo of the English Bill of Rights 1689 which, following the Seven Bishops case, stated *it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal*.

The right to petition the government extends to petitions of all three branches of government: the Congress, the executive and the judiciary.[87] According to the Supreme Court, "redress of grievances" is to be construed broadly: it includes not solely appeals by the public to the government for the redressing of a grievance in the traditional sense, but also, petitions on behalf of private interests seeking personal gain.[88] Nonetheless, in the past, Congress has directly limited the right to petition. During the 1790s, Congress passed the *Alien and Sedition Acts*,

punishing opponents of the Federalist Party; the Supreme Court never ruled on the matter. In 1835 the House of Representatives adopted the *Gag Rule*, barring abolitionist petitions calling for the end of slavery. The Supreme Court did not hear a case related to the rule, which was abolished in 1844. During World War I, individuals petitioning for the repeal of sedition and espionage laws were punished; again, the Supreme Court did not rule on the matter.

The right of assembly was originally distinguished from the right to petition. In *United States v. Cruikshank*, 92 U.S. 542 (1875), the Supreme Court held that "the right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or duties of the National Government, is an attribute of national citizenship, and, as such, under protection of, and guaranteed by, the United States."[89] Justice Waite's opinion for the Court carefully distinguished the right to peaceably assemble as a secondary right, while the right to petition was labeled to be a primary right. Later cases, however, paid less attention to these distinctions.[*citation needed*]

Freedom of association

Further information: Freedom of association

Although it is not explicitly protected in the First Amendment, the Supreme Court ruled, in *NAACP v. Alabama*, 357 U.S. 449 (1958), freedom of association to be a fundamental right protected by it. In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Supreme Court held that associations may not exclude people for reasons unrelated to the group's expression. However, in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston,* 515 U.S. 557 (1995), the Court ruled that a group may exclude people from membership if their presence would affect the group's ability to advocate a particular point of view. Likewise, in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Supreme Court ruled that a New Jersey law, which forced the Boy Scouts of America to admit an openly gay member, to be an unconstitutional abridgment of the Boy Scouts' right to free association.

International significance

Some of the provisions of the United States Bill of Rights have their roots in the English Bill of Rights and other aspects of English law. The English Bill of Rights, however, does not include many of the protections found in the First Amendment. For example, while the First Amendment guarantees freedom of speech to the general populace, the English Bill of Rights protected only "Freedome of Speech and Debates or Proceedings in Parlyament."[90] The Declaration of the Rights of Man and of the Citizen, a French revolutionary document passed just weeks before Congress proposed the Bill of Rights, contains certain guarantees that are similar to those in the First Amendment. For instance, it suggests that "every citizen may, accordingly, speak, write, and print with freedom."[91]

Article III, Sections 4 and 5 of the Constitution of the Philippines, written in 1987, contain identical wording to the First Amendment regarding speech and religion, respectively.[92] These phrases can also be found in the 1973[93] and 1935[94] Philippine constitutions. All three

constitutions contain, in the section on *Principles*, the sentence, "The separation of Church and State shall be inviolable", echoing Jefferson's famous phrase.

While the First Amendment does not explicitly set restrictions on freedom of speech, other declarations of rights sometimes do so. The European Convention on Human Rights, for example, permits restrictions "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."[95] Similarly the Constitution of India allows "reasonable" restrictions upon free speech to serve "public order, security of State, decency or morality."[96]

The First Amendment was one of the first guarantees of religious freedom: neither the English Bill of Rights, nor the French Declaration of the Rights of Man and of the Citizen, contains a similar guarantee.

See also

- Establishment Clause of the First Amendment
- Free Exercise Clause of the First Amendment
- Freedom of association
- Freedom of thought
- *Lemon v. Kurtzman* – Established the *Lemon Test* for evaluating government violations of the *Establishment Clause*.
- List of amendments to the United States Constitution
- List of United States Supreme Court cases involving the First Amendment
- Marketplace of ideas
- Military expression
- Virginia Statute for Religious Freedom
- Censorship in the United States

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Freedom of speech in the United States

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Freedom of speech in the United States is protected by the First Amendment to the United States Constitution and by many state constitutions and state and federal laws, with the exception of obscenity, defamation, incitement to riot, and fighting words,[1] as well as harassment, privileged communications, trade secrets, classified material, copyright, patents, military conduct, commercial speech such as advertising, and time, place and manner restrictions.

Criticism of the government and advocacy of unpopular ideas that people may find distasteful or against public policy, such as racism, sexism, and other hate speech are almost always permitted. There are exceptions to these general protections, including the Miller test for obscenity, child pornography laws, speech that incites imminent lawless action, and regulation of commercial speech such as advertising. Within these limited areas, other limitations on free speech balance rights to free speech and other rights, such as rights for authors and inventors over their works and discoveries (copyright and patent), protection from imminent or potential violence against particular persons (restrictions on fighting words), or the use of untruths to harm others (slander). Distinctions are often made between speech and other acts which may have symbolic significance.

Flag desecration has continually, albeit controversially, been protected by the First Amendment, despite state laws to the contrary. A Constitutional Amendment has been introduced to contravene the First Amendment's protection on flag burning, but it has failed to acquire the requisite enactment by all the states.

Despite the exceptions, the legal protections of the First Amendment are some of the broadest of any industrialized nation, and remain a critical, and occasionally controversial, component of American jurisprudence.

Contents

[edit] Historical background

[edit] England

During colonial times, English speech regulations were rather restrictive. The English criminal common law of seditious libel made criticizing the government a crime. Chief Justice Holt, writing in 1704, explained the apparent need for the prohibition or no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it. The objective truth of a statement in violation of the libel law was not a defense.

Until 1694, England had an elaborate system of licensing. No publication was allowed without the accompaniment of a government-granted license.

[edit] Colonies

The colonies originally had different views on the protection of free speech. During English colonialism in America, there were fewer prosecutions for seditious libel than England, but other controls over dissident speech existed.

The most stringent controls on speech in the colonial period were controls that outlawed or otherwise censored speech that was considered blasphemous in a religious sense. A 1646 Massachusetts law, for example, punished persons who denied the immortality of the soul. In 1612, a Virginia governor declared the death penalty for a person that denied the Trinity under Virginia's *Laws Divine, Moral and Martial*, which also outlawed blasphemy, speaking badly of ministers and royalty, and "disgraceful words."[2]

More recent scholarship, focusing on seditious speech in the 17th-century colonies (when there was no press), has shown that from 1607 to 1700 the colonists' freedom of speech expanded dramatically, laying a foundation for the political dissent that flowered among the Revolutionary generation. See Larry D. Eldridge, *A Distant Heritage: The Growth of Free Speech in Early America* (NYU Press, 1994).

The trial of John Peter Zenger in 1735 was a seditious libel prosecution for Zenger's publication of criticisms of the Governor of New York, William Crosby. Andrew Hamilton represented Zenger and argued that truth should be a defense to the crime of seditious libel, but the court rejected this argument. Hamilton persuaded the jury, however, to disregard the law and to acquit Zenger. The case is considered a victory for freedom of speech as well as a prime example of jury nullification. The case marked the beginning of a trend of greater acceptance and tolerance of free speech.

[edit] The First Amendment

In the 1780s after the American Revolutionary War, debate over the adoption of a new Constitution resulted in a division between Federalists, such as Alexander Hamilton who favored a strong federal government, and Anti-Federalists, such as Thomas Jefferson and Patrick Henry who favored a weaker federal government.

During and after the Constitution ratification process, Anti-Federalists and state legislatures expressed concern that the new Constitution placed too much emphasis on the power of the federal government. The drafting and eventual adoption of the Bill of Rights, including the First Amendment, was, in large part, a result of these concerns, as the Bill of Rights limited the power of the federal government.

The First Amendment was adopted on December 15, 1791. The Amendment states:

> *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.*

The Supreme Court applied the incorporation principle to the right of free speech with the case of Gitlow v. New York in 1925. This decision applied First Amendment speech rights to state laws as well as federal ones.

[edit] The Alien and Sedition Acts

See also: Espionage Act of 1917 and Sedition Act of 1918

In 1798, Congress, which contained several of the drafters and ratifiers of the Bill of Rights at the time, adopted the Alien and Sedition Acts of 1798. The law prohibited the publication of "false, scandalous, and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame . . . or to bring them . . . into contempt or disrepute; or to excite against them . . . hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States."

The law did allow truth as a defense and required proof of malicious intent. The 1798 Act, however, made ascertainment of the intent of the framers regarding the First Amendment somewhat difficult, as some of the members of Congress that supported the adoption of the First Amendment also voted to adopt the 1798 Act. The Federalists under President John Adams aggressively used the law against their rivals, the Democratic-Republicans. The Alien and Sedition Acts were a major political issue in the 1800 election, and after he was elected President, Thomas Jefferson pardoned those who had been convicted under the Act. The Act expired and the Supreme Court never ruled on its constitutionality.

In *New York Times v. Sullivan*, the Court declared "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." 376 U.S. 254, 276 (1964).

[edit] First Amendment interpretation

Freedom of speech in the U.S. follows a graduated system, with different types of regulations subject to different levels of scrutiny in court challenges based on the First Amendment, often depending on the type of speech.

[edit] Types of Speech

[edit] Core Political Speech

This is the most highly guarded form of speech because of its purely expressive nature and importance to a functional republic. Restrictions placed upon core political speech must weather strict scrutiny analysis or they will be struck down. The primary exception to this rule would be within the context of the electoral process, whereby the Supreme Court has ruled that suffrage or standing for political office as a candidate are not political speech and

thus can be subjected to significant regulations; such restrictions have been upheld in the *Buckley* case.

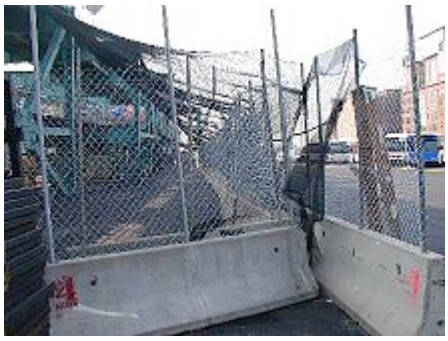
[edit] Commercial Speech

Main article: Commercial speech

Not wholly outside the protection of the First Amendment is speech motivated by profit. Such speech still has expressive value although it is being uttered in a marketplace ordinarily regulated by the state. Restrictions of commercial speech are subject to a four-element intermediate scrutiny. (*Central Hudson Gas & Electric Corp. v. Public Service Commission*)

[edit] Types of restraints on speech

[edit] Time, place, or manner restrictions



The free speech zone at the 2004 Democratic National Convention

Freedom of speech is also sometimes limited to free speech zones, which can take the form of a wire fence enclosure, barricades, or an alternative venue designed to segregate speakers according to the content of their message. There is much controversy surrounding the creation of these areas — the mere existence of such zones is offensive to some people, who maintain that the First Amendment to the United States Constitution makes the entire country an unrestricted free speech zone.[3] Civil libertarians claim that Free Speech Zones are used as a form of censorship and public relations management to conceal the existence of popular opposition from the mass public and elected officials.[3] The Department of Homeland Security under the Bush Administration "ha[d] even gone so far as to tell local police departments to regard critics of the War on Terrorism as potential terrorists themselves."[4][5]

Time, place, or manner restrictions must withstand intermediate scrutiny. Note that any regulations that would force speakers to change how or what they say do not fall into this category (so the government cannot restrict one medium even if it leaves open another). Time, place, or manner restrictions must:

1. Be content neutral

2. Be narrowly tailored
3. Serve a significant governmental interest
4. Leave open ample alternative channels for communication

[edit] Content-based restrictions

Restrictions that require examining the content of speech to be applied must pass strict scrutiny.[citation needed]

[edit] Viewpoint-based restrictions

Restrictions that apply to certain viewpoints but not others face the highest level of scrutiny, and are usually overturned, unless they fall into one of the court's special exceptions. An example of this is found in the United States Supreme Court's decision in Legal Services Corp. v. Velazquez in 2001. In this case, the Court held that government subsidies cannot be used to discriminate against a specific instance of viewpoint advocacy.

[edit] Special exceptions

[edit] Obscenity

Obscenity, defined by the Miller test by applying contemporary community standards, is one exception. It is speech to which all the following apply: appeals to the prurient interest, depicts or describes sexual conduct in a patently offensive way, and lacks serious literary, artistic, political, or scientific value. (This is usually applied to more hard-core forms of pornography.)

[edit] 'Fighting words'

Fighting words are words or phrases that are likely to induce the listener to get in a fight. This previously applied to words like "nigger" but with people getting less sensitive to words, this exception is little-used. Restrictions on hate speech have been generally overturned by the courts; such speech cannot be targeted for its content but may be targeted in other ways, if it involves speech beyond the First Amendment's protection like incitement to immediate violence or defamation.

[edit] Imminent Threats

Speech that presents imminent lawless action was originally banned under the clear and present danger test established by Schenck v. United States, but this test has since been replaced by the imminent lawless action test established in Brandenburg v. Ohio. The canonical example, enunciated by Justice Oliver Wendell Holmes, is falsely yelling "Fire!" in a crowded movie theater (This example was authored in Schenck v. United States, but still passes the "imminent lawless action" test). The trend since Holmes's time has been to restrict the clear and present danger exception to apply to speech which is completely apolitical in content.

[edit] Lesser protection of commercial speech

Restrictions on commercial speech, defined as speech mainly in furtherance of selling a product, is subject to a lower level of scrutiny than other speech, although recently the court has taken steps to bring it closer to parity with other speech. This is why the government can ban advertisements for cigarettes and false information on corporate prospectuses (which try to sell stock in a company).

[edit] National security

Publishing, gathering or collecting national security information is not protected speech in the United States.[6] Information related to "the national defense" is protected even though no harm to the national security is intended or is likely to be caused through its disclosure.[7] Non-military information with the potential to cause serious damage to the national security is only protected from willful disclosure with the requisite intent or knowledge regarding the potential harm.[7] The unauthorized creation, publication, sale or transfer of photographs or sketches of vital defense installations or equipment as designated by the President is prohibited.[8] The knowing and willful disclosure of certain classified information is prohibited.[9] The unauthorized communication by anyone of "Restricted Data", or an attempt or conspiracy to communicate such data, is prohibited.[10] It is prohibited for a person who learns of the identity of a covert agent through a "pattern of activities intended to identify and expose covert agents" to disclose the identity to any individual not authorized access to classified information, with reason to believe that such activities would impair U.S. foreign intelligence efforts.[11]

In addition to the criminal penalties, the use of employment contracts, loss of government employment, monetary penalties, non-disclosure agreements, forfeiture of property, injunctions, revocation of passports, and prior restraint are used to deter such speech.[12]

[edit] Speech of falsehoods

Limits placed on libel and slander have been upheld by the Supreme Court. The Court narrowed the definition of libel with the case of Hustler Magazine v. Falwell made famous in the movie The People vs. Larry Flynt.

[edit] Government Speech Doctrine

The Government speech Doctrine establishes that the government may censor speech when the speech is its own, leading to a number of contentious decisions on its breadth.

[edit] Speech in the role of the employee

Statements made by public employees pursuant to their official duties are not protected by the First Amendment from employer discipline as per the case of Garcetti v. Ceballos. This applies also to private contractors that have the government as a client. The First Amendment only protects employees from government employers albeit only when speaking

publicly outside their official duties in the public interest Pickering v. Board of Ed. of Township High School Dist. Speech is not protected from private sector disciplinary action.[13]

[edit] Prior restraint

If the government tries to restrain speech before it is spoken, as opposed to punishing it afterwards, it must: clearly define what's illegal, cover the minimum speech necessary, make a quick decision, be backed up by a court, bear the burden of suing and proving the speech is illegal, and show that allowing the speech would "surely result in direct, immediate and irreparable damage to our Nation and its people" (*New York Times Co. v. United States*). U.S. courts have not permitted most prior restraints since the case of Near v. Minnesota in 1931.

[edit] Schools

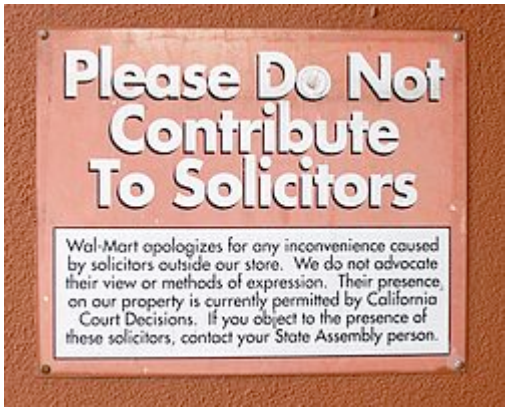
Main article: School speech (First Amendment)

In *Tinker v. Des Moines Independent Community School District* (1969), the Supreme Court extended broad First Amendment protection to children attending public schools, prohibiting censorship unless there is "substantial interference with school discipline or the rights of others". Several subsequent rulings have affirmed or narrowed this protection. *Bethel School District v. Fraser* (1986) supported disciplinary action against a student whose campaign speech was filled with sexual innuendo, and determined to be "indecent" but not "obscene". *Hazelwood v. Kuhlmeier* (1988) allowed censorship in school newspapers which had not been established as forums for free student expression. *Guiles v. Marineau* (2006) affirmed the right of a student to wear a T-shirt mocking President George W. Bush, including allegations of alcohol and drug use. *Morse v. Frederick* (2007) supported the suspension of a student holding a banner reading "BONG HiTS 4 JESUS" at a school-supervised event which was not on school grounds. In *Lowry v. Watson Chapel School District*, an appeals court struck down a school dress code and literature distribution policy for being vague and unnecessarily prohibitive of criticism against the school district.[14]

Such protections also apply to public colleges and universities. For example, student newspapers which have been established as forums for free expression have been granted broad protection by appeals courts.[15][16]

In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), the Supreme Court of the United States held (in a unanimous decision) that the Free Speech Clause of the First Amendment was offended by a school district that refused to allow a church access to school premises to show films dealing with family and child-rearing issues faced by parents.

[edit] State action and lack thereof



A sign prompted by the *Pruneyard* case.

A major issue in freedom of speech jurisprudence has been whether the First Amendment merely runs against state actors or whether it can run against private actors as well. Specifically, the issue is whether private landowners should be permitted to utilize the machinery of government to exclude others from engaging in free speech on their property (which means balancing the speakers' First Amendment rights against the Takings Clause). The right of freedom of speech within private shopping centers owned by others has been vigorously litigated under both the federal and state Constitutions, notably in the case *Pruneyard Shopping Center v. Robins*.

[edit] Censorship

Main article: Censorship in the United States

While personal freedom of speech is usually respected, freedom of press and mass publishing meet with some restrictions. Some of the recent issues include:

- United States military censoring blogs written by military personnel.
- The Federal Communications Commission censoring television and radio, citing obscenity, e.g., Howard Stern and Opie and Anthony (Though the FCC only has the power to regulate over the air broadcasts and not cable or satellite television or satellite radio).

See also *Roth v. United States*

- Scientology suppressing criticism, citing freedom of religion, e.g., Keith Henson.
- Censoring of WikiLeaks at the Library of Congress

As of 2002, the United States was ranked 17th of 167 countries in annual Worldwide Press Freedom Index by Reporters Without Borders. "The poor ranking of the United States (17th) is mainly because of the number of journalists arrested or imprisoned there. Arrests are often because they refuse to reveal their sources in court. Also, since the 11 September attacks, several journalists have been arrested for crossing security lines at some official buildings."

In the 2006 index the United States fell further to 53rd of 168 countries. "Relations between the media and the Bush administration sharply deteriorated after the president used the pretext of 'national security' to regard as suspicious any journalist who questioned his 'war on terrorism.' The zeal of federal courts which, unlike those in 33 US states, refuse to recognise the media's right not to reveal its sources, even threatens journalists whose investigations have no connection at all with terrorism. The US improved to rank 48th in 2007, however, and 20th in 2010. "Barack Obama's election as president and the fact that he has a less hawkish approach than his predecessor have had a lot to do with this."[17]

[edit] Freedom of expression

While freedom of expression by non-speech means is commonly thought to be protected under the First Amendment, the Supreme Court has only recently taken this view. As late as 1968 (*United States v. O'Brien*) the Supreme Court stated that regulating non-speech can justify limitations on speech. The Court carried this distinction between speech and expression through the early part of the 1980s (*Clark v. C.C.N.V.*, 1984). It was not until the flag-burning cases of 1989 (*Texas v. Johnson*) and 1990 (*United States v. Eichman*), that the Supreme Court accepted that non-speech means applied to freedom of expression and freedom of speech.

[edit] Freedom of speech on the Internet

In a 9-0 decision, the Supreme Court extended the full protection of the First Amendment to the Internet in *Reno v. ACLU*, a decision which struck down portions of the 1996 Communications Decency Act, a law intended to outlaw so-called "indecent" online communication (that is, non-obscene material protected by the First Amendment). The court's decision extended the same Constitutional protections given to books, magazines, films, and spoken expression to materials published on the Internet. Congress tried a second time to regulate the content of the Internet with the Child Online Protection Act (COPA). The Court again ruled that any limitations on the internet were unconstitutional in American Civil Liberties Union v. Ashcroft (2002).

In *United States v. American Library Association* (2003) the Supreme Court ruled that Congress has the authority to require public schools and libraries receiving e-rate discounts to install filters as a condition of receiving federal funding. The justices said that any First Amendment concerns were addressed by the provisions in the Children's Internet Protection Act that permit adults to ask librarians to disable the filters or unblock individual sites.

[edit] See also

- *Areopagitica*
- Free speech fights
- Imminent lawless action
- Public Broadcasting Act of 1967
- *Free Speech, "The People's Darling Privilege"*
- *New York Times Co. v. United States*
- Censorship in the United States
- Freedom of speech
- School speech
- Fleeting expletive
- Shouting fire in a

- Clear and present danger
- Floyd Abrams
- Free speech zone
- Freedom of the press in the United States
- crowded theater
- Threatening the President of the United States
- Vikram Buddhi

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The following information comes from this web-site:

http://en.wikipedia.org/wiki/United_States_defamation_law

United States defamation law

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The origins of **United States defamation law** pre-date the American Revolution; one famous 1734 case involving John Peter Zenger established some precedent that the truth should be an absolute defense against libel charges. (Previous English defamation law had not provided this guarantee.) Though the First Amendment of the U.S. Constitution was designed to protect freedom of the press, for most of the history of the United States, the Supreme Court neglected to use it to rule on libel cases. This left libel laws, based upon the traditional common law of defamation inherited from the English legal system, mixed across the states. The 1964 case *New York Times Co. v. Sullivan*, however, dramatically changed the nature of libel law in the United States by establishing that public officials could win a suit for libel only if they could demonstrate publishers' "knowledge that the information was false" or that it was published "with reckless disregard of whether it was false or not." Later Supreme Court cases barred strict liability for libel and forbid libel claims for statements that are so ridiculous as to be patently false. Recent cases have addressed defamation law and the Internet.

Defamation law in the United States is much less plaintiff-friendly than its counterparts in European and the Commonwealth countries, due to the enforcement of the First Amendment. In the United States, a comprehensive discussion of what is and is not libel or slander is difficult, because the definition differs between different states, and under federal law. Some states codify what constitutes slander and libel together into the same set of laws. Criminal libel is rarely prosecuted but exists on the books in many states, and is constitutionally permitted in circumstances essentially identical to those where civil libels liability is constitutional. Defenses to libel that can result in dismissal before trial include the statement being one of opinion rather than fact or being "fair comment and criticism," though neither of these are imperatives on the US constitution. Truth is always an absolute defense against a defamation suit in the United States.[1]

Most states recognize that some categories of false statements are considered to be defamatory *per se*, such that people making a defamation claim for these statements do not need to prove that the statement was defamatory. (See section **Defamation *per se*.**)

Contents

[edit] Development

Laws regulating slander and libel in the United States began to develop even before the American Revolution. In one of the most famous cases, New York publisher John Peter Zenger was imprisoned for 8 months in 1734 for printing attacks on the governor of the colony. Zenger won his case and was acquitted by jury in 1735 under the counsel of Andrew Hamilton. The case established some precedent that the truth should be an absolute defense against libel charges. Previous English defamation law had not provided this guarantee. Gouverneur Morris, a major contributor in the framing of the U.S. Constitution said, "*The trial of Zenger in 1735 was the germ of American freedom, the morning star of that liberty which subsequently revolutionized America*." [2]

Zenger's case also established that libel cases, though they were civil rather than criminal cases, could be heard by a jury, which would have the authority to rule on the allegations and to set the amount of monetary damages awarded.[3]

The First Amendment of the U.S. Constitution was designed specifically to protect freedom of the press. However, for most of the history of the United States, the Supreme Court neglected to use it to rule on libel cases. This left libel laws, based upon the traditional common law of defamation inherited from the English legal system, mixed across the states.

In 1964, however, the court issued an opinion in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) dramatically changing the nature of libel law in the United States. In that case, the court determined that public officials could win a suit for libel only if they could demonstrate "actual malice" on the part of reporters or publishers. In that case, "actual malice" was defined as "knowledge that the information was false" or that it was published "with reckless disregard of whether it was false or not." This decision was later extended to cover "public figures", although the standard is still considerably lower in the case of private individuals.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Court suggested that a plaintiff could not win a defamation suit when the statements in question were expressions of opinion rather than fact. In the words of the court, "under the First Amendment, there is no such thing as a false idea". However, the Court subsequently rejected the notion of a First Amendment opinion privilege, in *Milkovich v. Lorain Journal Co.*, 474 U.S. 953 (1985). In *Gertz*, the Supreme Court also established a *mens rea* or culpability requirement for defamation; states cannot impose strict liability because that would run afoul of the First Amendment. This holding differs significantly from most other common law jurisdictions, which still have strict liability for defamation.

In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Supreme Court ruled that a parody advertisement claiming Jerry Falwell had engaged in an incestuous act with his mother in an

outhouse, while false, could not allow Falwell to win damages for emotional distress because the statement was so obviously ridiculous that it was clearly not true; an allegation believed by nobody, it was ruled, brought no liability upon the author. The court thus overturned a lower court's upholding of an award where the jury had decided against the claim of libel but had awarded damages for emotional distress.

After *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 N.Y. Misc. Lexis 229 (N.Y. Sup. Ct. May 24, 1995), applied the standard publisher/distributor test to find an online bulletin board liable for post by a third party, Congress specifically enacted 47 U.S.C. § 230 (1996) to reverse the Prodigy findings and to provide for private blocking and screening of offensive material. § 230(c) states "that no provider or user of an interactive computer shall be treated as a publisher or speaker of any information provided by another information content provider," thereby providing forums immunity for statements provided by third parties. Thereafter, cases such as *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997), and *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998), have demonstrated that although courts are expressly uneasy with applying § 230, they are bound to find providers like AOL immune from defamatory postings. This immunity applies even if the providers are notified of defamatory material and neglect to remove it, because provider liability upon notice would likely cause a flood of complaints to providers, would be a large burden on providers, and would have a chilling effect on freedom of speech on the Internet.

In *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006), the California Supreme Court ruled that 47 U.S.C. § 230(c)(1) does not permit web sites to be sued for libel that was written by other parties.

To solve the problem of libel tourism, the SPEECH Act of 2010 makes foreign libel judgments unenforceable in U.S. courts, unless those judgments are compliant with the U.S. First Amendment. The act was passed by the 111th United States Congress and signed into law by President Barack Obama.[4]

[edit] Defamation law in modern practice

Defamation law in the United States is much less plaintiff-friendly than its counterparts in European and the Commonwealth countries, due to the enforcement of the First Amendment. One very important distinction today is that European and Commonwealth jurisdictions adhere to a theory that every publication of a defamation gives rise to a separate claim, so that a defamation on the Internet could be sued on in any country in which it was read, while American law only allows one claim for the primary publication.

In the United States, a comprehensive discussion of what is and is not libel or slander is difficult, because the definition differs between different states. Some states codify what constitutes slander and libel together into the same set of laws. Some states have criminal libel laws on the books, though these are old laws which are very infrequently prosecuted. Washington State has held its criminal libel statute unconstitutional applying the state and federal constitutions to the question.[5]

Most defendants in defamation lawsuits are newspapers or publishers, which are involved in about twice as many lawsuits as are television stations. Most plaintiffs are corporations, businesspeople, entertainers and other public figures, and people involved in criminal cases, usually defendants or convicts but sometimes victims as well. In no state can a defamation claim be successfully maintained if the allegedly defamed person is deceased.

Section 230 of the Communications Decency Act of 1996 generally immunizes from liability parties that create forums on the Internet in which defamation occurs from liability for statements published by third parties. This has the effect of precluding all liability for statements made by persons on the Internet whose identity cannot be determined.

In the various states, whether by case law or legislation, there are generally several "privileges" that can get a defamation case dismissed without proceeding to trial. These include the litigation privilege, which makes statements made in the context of litigation non-actionable, and the allegedly defamatory statement being "fair comment and criticism", as it is important to society that everyone be able to comment on matters of public interest. The United States Supreme Court, however, has declined to hold that the "fair comment" privilege is a Constitutional imperative.[*citation needed*]

One defense is reporting or passing through information as a general information or warning of dangerous or emergent conditions, and intent to defame must be proven. Also, the truth of the allegedly defamatory statement will always negate the claim (whether because the plaintiff fails to meet his/her burden of proving falsity or because the defendant proves the statement to be true).[6]

[edit] Defamation *per se*

All states except Arizona, Arkansas, Missouri, and Tennessee recognize that some categories of false statements are so innately harmful that they are considered to be defamatory *per se*. In the common law tradition, damages for such false statements are presumed and do not have to be proven. "Statements are defamatory per se where they falsely impute to the plaintiff one or more of the following things":[7]

- Allegations or imputations "injurious to another in their trade, business, or profession"
- Allegations or imputations "of loathsome disease" (historically leprosy and sexually transmitted disease, now also including mental illness)
- Allegations or imputations of "unchastity" (usually only in unmarried people and sometimes only in women)
- Allegations or imputations of criminal activity (sometimes only crimes of moral turpitude) [8][9]

[edit] Criminal defamation

On the federal level, there are no criminal defamation or insult laws in the United States. However, on the state level, seventeen states and two territories as of 2005 had criminal defamation laws on the books: Colorado (Colorado Revised Statutes, § 18-13-105), Florida

(Florida Statutes, § 836.01-836.11), Idaho (Idaho Code, § 18-4801-18-4809), Kansas (Kansas Statute Annotated, §21-4004), Louisiana (Louisiana R.S., 14:47), Michigan (Michigan Compiled Laws, § 750.370), Minnesota (Minnesota Statutes. § 609.765), Montana (Montana Code Annotated, § 13-35-234), New Hampshire (New Hampshire Revised Statute Annotated, § 644:11), New Mexico (New Mexico Statute Annotated, §30-11-1), North Carolina (North Carolina General Statutes, § 14-47), North Dakota (North Dakota Century Code, § 12.1-15-01), Oklahoma (Oklahoma Statutes, tit. 21 §§ 771-781), Utah (Utah Code Annotated, § 76-9-404), Virginia (Virginia Code Annotated, § 18.2-417), Washington (Washington Revised Code, 9.58.010 [Repealed in 2009[10]]), Wisconsin (Wisconsin Statutes, § 942.01), Puerto Rico (Puerto Rico Laws, tit. 33, §§ 4101-4104) and Virgin Islands (Virgin Islands Code, Title 14, § 1172).[11]

Between 1992 and August 2004, 41 criminal defamation cases were brought to court in the United States, among which six defendants were convicted. From 1965 to 2004, 16 cases ended in final conviction, among which nine resulted in jail sentences (average sentence, 173 days). Other criminal cases resulted in fines (average fine, 1700 USD), probation (average of 547 days), community service (on average 120 hours), or writing a letter of apology.[12]

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