

Summary

In the 1960s, the Supreme Court began broadening the way in which constitutional rights are interpreted. In the area of free expression, the First Amendment now guarantees virtually any form of communication, although several exceptions exist. First, *libel*—false statements that harm a person's reputation—remains unprotected, but it has been made more difficult to prove in certain situations. Public figures must prove actual malice, an extremely high burden in which a defamed person must establish that a statement was uttered either in the knowledge that it was false or with reckless disregard. In 1991, the Court went so far as to exclude fabricated quotations from the definition of libel so long as the misquote did not "materially change" the meaning of what was actually said. *Obscenity* is the second form of speech not protected under the First Amendment. The problem is that it is not entirely clear what constitutes pornography for constitutional purposes. The absence of a precise definition of obscenity has led to anomalies, such as the rap group 2-Live Crew being acquitted of pornography in Broward County, Florida, despite the conviction of a record store owner for selling albums in the same county that contained the same songs. The Court's current *Miller* test of obscenity hardly articulates a satisfactory standard for banning a particular kind of speech.

The third variety of speech rendered at least partially unprotected under the First Amendment is called *symbolic speech*. Expression of this kind typically involves some type of behavior designed to communicate an idea. Speech expressed through

conduct is frequently referred to as "speech plus," the plus being the conduct. Activities considered symbolic speech include demonstrating and marching, pouring blood on army recruiting records, and wearing a black armband as a protest. Such speech is not wholly without constitutional safeguard, but it is entitled to a lesser degree of protection. In the words of Justice Goldberg, "We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct . . . as these amendments afford to those who communicate ideas by pure speech" (*Cox v. Louisiana* (1), 1965). Thomas Tedford summarizes the Supreme Court's position in determining whether behavior is considered "symbolic speech" in the following way: (a) the speaker must have an intent to convey a message; (b) the audience must be likely to understand the message; and (c) the speech must make a contribution to the body of knowledge. The Court has allowed the government more latitude in regulating the conduct associated with symbolic speech than the expressive component itself. Thus the government can punish the burning of a draft card as a form of protest, since its goal in making the regulation is not to suppress the idea being communicated but to defend the national security. On the other hand, the government cannot forbid the burning of the American flag as a form of protest since the behavior does not threaten a breach of peace, making the suppression of an idea as the only purpose behind the law.

The fourth type of expression lacking complete constitutional protection is commercial speech. At first, the Supreme Court placed commercial speech entirely outside the First Amendment (*Valentine v. Chrestensen*, 1942) but eventually provided it limited coverage. Advertising, according to Justice Harry Blackmun in *Bigelow v. Virginia* (1975), is "not stripped of all First Amendment protection" so long as it is truthful and of value to the public. It is only when advertising is either deceptive or involves an illegal or harmful product that commercial speech is subject to suppression.

The religion clauses of the First Amendment are caught in a similar web of confusion. The free exercise clause was initially treated, in the words of Leo Pfeffer, as a "stepchild" of the free speech clause. Until the 1960s, cases raising free exercise claims were typically decided on the basis of principles of free speech. In *Sherbert v. Verner* (1963), the Court gave the free exercise clause an independent identity and required the government to provide a "compelling interest" to justify any burden on the practice of religion. The confusion enters through the manner in which this tough standard was implemented, with the Court almost always deciding against the free

In 1988, a fatal blow to *Sherbert* was rendered in *Employment Division v. Smith*, in which the compelling interest test was held inappropriate to criminal conduct. People can no longer rely on the free exercise clause to exempt their behavior from a law of "general applicability" that is not designed as an attack on a particular religion. In response to *Smith*, the Congress passed the Religious Freedom Restoration Act (RFRA, 1993), which was explicitly intended to displace *Smith* and reinstate *Sherbert's* compelling interest test. In *City of Boerne v. Flores, Archbishop of San Antonio* (1997), however, the Court ruled that the RFRA exceeded Congress's authority. The opinion, delivered by Justice Kennedy, noted that Congress could properly "enforce" the constitutional right to free exercise of religion, but that such enforcement could only be "preventive or remedial." The RFRA, however, involved the Congress in defining the right. As such, it contradicted the separation of powers. Second, the RFRA was described as wildly "out of proportion to a supposed remedial or preventive object": "All told, RFRA is a considerable congressional intrusion in the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens and is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion." Thus the RFRA also

contravened federalism. The *Smith* standard has therefore been reinstated, though legal scholars speculate about what additional actions might be taken by Congress.

Many of the same problems haunt the establishment clause, which, in the words of Thomas Jefferson, is intended to erect a "wall of separation" between church and state. It is generally agreed that the clause forbids the creation of an official religion and restricts the government from becoming involved in church matters, even on a nonpreferential basis. Beyond that, the meaning of the establishment clause remains elusive. The Court in *Lemon v. Kurtzman* (1971) articulated a three-part test to determine violations of the establishment clause: (1) the statute must have a legislative purpose that is secular, (2) a government policy must have a "primary effect" that neither advances nor inhibits religion, and (3) a government policy must not result in an excessive entanglement between church and state. These tests have produced a great deal of uncertainty, to the point where some courts have openly refused to abide by the *Lemon* standards, while others have distorted their meaning to reach a desired conclusion. Thus the ambiguity of both religion clauses awaits further judicial clarification.

Discussion Questions

1. Another area of speech not given automatic constitutional protection is "fighting words": words that would provoke a reasonable person to fight. Should fighting words be protected as a form of speech? What if the words are true? Should the First Amendment permit the punishment of truth?
2. What is the Supreme Court's current definition of obscenity? Is this definition clear? Could it guide a publisher who wished to publish a certain book but who wondered whether it was obscene? If pornography cannot be clearly defined, what does this suggest about who will be prosecuted for selling it, and why?
3. The free exercise clause protects religious behavior. But what is a valid religion? What about members of a Satanic group? How can courts distinguish fraudulent religious claims from legitimate ones?

First Amendment Reading

Name _____

Hr _____

Explain the court's view on the following:

Libel-

Obscenity-

Symbolic Speech

Commercial Speech-

Religion-

Wall of Separation-
