

Forms of Speech Not Protected by the First Amendment

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Abstract

The First Amendment provides broad protection for freedom of speech in the United States, including expression that is unpopular, offensive, or critical of government. The protection is not absolute. Courts have recognized limited categories of expression that may be regulated because the speech is closely connected to unlawful conduct or produces legally cognizable harm. This essay examines incitement, true threats, obscenity, child sexual-abuse material, defamation, fraud, perjury, speech integral to criminal conduct, and certain intellectual-property violations. It also explains forms of expression that are frequently misunderstood. Hate speech, flag burning, harsh political criticism, and most false statements do not automatically fall outside constitutional protection. Restrictions are additionally shaped by the distinction between content-based and content-neutral regulation, the public-forum doctrine, and the different authority of schools, government employers, prisons, and private platforms. The analysis shows that First Amendment exceptions are narrow legal tests rather than broad permission to suppress disturbing ideas (Congressional Research Service, 2023). This essay provides general educational information and not legal advice.

Keywords: First Amendment, unprotected speech, incitement, true threats, obscenity, defamation, freedom of speech

Introduction

The First Amendment states that Congress shall make no law abridging freedom of speech or of the press. Through the Fourteenth Amendment, the protection also applies to state and local governments. The constitutional principle is intentionally broad because democratic government depends on political debate, criticism, religious expression, artistic work, journalism, protest, and the exchange of ideas (Congressional Research Service, 2023).

The First Amendment generally restricts government action. A private employer, website, publisher, or social-media company is not automatically bound by the Free Speech Clause merely because it controls an important communication space. Other laws, contracts, labor protections, antidiscrimination rules, or state constitutions may limit private decisions, but those are separate questions (Congressional Research Service, 2023).

Courts are particularly suspicious of content-based restrictions, which regulate expression because of

its subject or viewpoint. Such laws usually receive strict constitutional scrutiny. However, several historically recognized categories receive reduced or no First Amendment protection. These categories are defined through precise tests. Speech does not lose protection merely because listeners consider it harmful, hateful, immoral, disrespectful, or false (Congressional Research Service, 2023).

Incitement to Imminent Lawless Action

The modern incitement standard comes from *Brandenburg v. Ohio*. Government may punish advocacy only when the expression is directed to inciting or producing imminent lawless action and is likely to produce such action. The test protects abstract support for illegal conduct, radical political ideas, and advocacy of future change unless intent, imminence, and likelihood are present (*Brandenburg v. Ohio*, 1969).

Imminence is essential. A statement supporting violence at an indefinite future time is different from directing an agitated crowd to attack a person immediately. Likelihood also matters. Dramatic rhetoric expressed in a context where unlawful action is improbable may remain protected. The government must distinguish advocacy from a genuine attempt to trigger immediate crime (*Brandenburg v. Ohio*, 1969).

The narrowness of the rule reflects a core concern. Broad incitement laws can be used against dissidents, minority movements, and political opponents. Courts therefore require more than the possibility that speech may influence unlawful behavior eventually (Congressional Research Service, 2023).

True Threats

A true threat is a serious expression communicating unlawful violence toward a person or group. The doctrine protects individuals from fear, disruption, and the possibility of violence while preserving political hyperbole, jokes, fiction, and statements that a reasonable listener would not understand as serious threats (*Counterman v. Colorado*, 2023).

Context is critical. Courts may consider the words used, prior communications, the relationship between the parties, the method of delivery, audience reaction, and surrounding events. A conditional statement can still be threatening, while disturbing language may remain protected when it is clearly satire or rhetorical exaggeration (*Counterman v. Colorado*, 2023).

In *Counterman v. Colorado*, the Supreme Court held that the First Amendment requires a subjective mental-state component in true-threat prosecutions. At minimum, the prosecution generally must establish recklessness, meaning conscious disregard of a substantial risk that the communication would be understood as threatening. The decision reduces the danger that a person will be criminally

punished solely because listeners reasonably misunderstood ambiguous expression (*Counterman v. Colorado*, 2023).

Obscenity

Legally obscene material is not protected by the First Amendment, but obscenity has a much narrower meaning than indecent, sexual, vulgar, or offensive content. Under *Miller v. California*, material may be considered obscene when three conditions are satisfied. Applying contemporary community standards, the average person must find that the work as a whole appeals to the prurient interest. The work must depict or describe specifically defined sexual conduct in a patently offensive manner. Finally, the work as a whole must lack serious literary, artistic, political, or scientific value (*Miller v. California*, 1973).

The final element uses a broader reasonable-person inquiry rather than allowing a local majority to eliminate serious value. A work must be considered as a whole; isolated passages cannot ordinarily be removed from context to establish obscenity (*Miller v. California*, 1973).

Many sexually explicit works remain constitutionally protected. Government may use zoning, age restrictions, and other regulations in some circumstances, but it cannot label all adult sexual expression obscene (Congressional Research Service, 2023).

Child Sexual Abuse Material

Visual depictions involving the sexual abuse of actual children are outside First Amendment protection. In *New York v. Ferber*, the Supreme Court recognized the government's compelling interest in protecting children from exploitation and in destroying the market for recordings of abuse (*New York v. Ferber*, 1982).

This category differs from adult obscenity because the underlying production itself harms a child. The material does not need to satisfy the complete *Miller* test. However, the distinction between images involving real children and wholly virtual or simulated material can be legally important. Laws must be carefully drafted so that they do not criminalize protected artistic, medical, educational, or fictional expression (*New York v. Ferber*, 1982; Congressional Research Service, 2023).

Defamation

Defamation involves a false statement of fact that harms a person's reputation. Written defamation is traditionally called libel, while spoken defamation is called slander. The law balances reputation against the need for robust debate (Congressional Research Service, 2023).

Public officials and public figures face a demanding constitutional standard. Under *New York Times Co. v. Sullivan*, a public official generally must prove actual malice, meaning that the speaker knew the statement was false or acted with reckless disregard for its truth. The term does not mean personal hatred (*New York Times Co. v. Sullivan*, 1964).

Private individuals may receive greater protection under state law, although constitutional limits still apply when the statement concerns a matter of public interest. Pure opinion is generally protected when it cannot reasonably be interpreted as asserting provable facts. Merely adding “in my opinion” does not protect a disguised factual accusation (Congressional Research Service, 2023).

Truth is a defense, and honest mistakes receive substantial protection in public debate. These principles prevent defamation law from becoming a method of silencing criticism (*New York Times Co. v. Sullivan*, 1964).

Fraud and False Commercial Speech

Fraudulent representations made to obtain money, property, services, or another benefit can be punished. Fraud law typically requires a material misrepresentation, knowledge or legally sufficient fault, intent that another person rely on it, actual reliance in some contexts, and resulting harm (Congressional Research Service, 2023).

False or misleading commercial advertising also receives limited protection. Government may regulate deceptive claims concerning products, prices, qualifications, investments, or health effects. Truthful commercial speech is protected, but generally receives less constitutional protection than political expression (Congressional Research Service, 2023).

Most lies are not categorically unprotected. In *United States v. Alvarez*, the Supreme Court rejected a broad law criminalizing false claims about receiving military honors. The decision illustrates that falsity alone is not enough. The legal context and harm matter (*United States v. Alvarez*, 2012).

Perjury and False Statements in Official Proceedings

Perjury consists of knowingly making a material false statement under oath in a legally authorized proceeding. It can be punished because the judicial system depends on truthful testimony. Similar principles apply to certain false statements made to government investigators, false records, obstruction, and evidence tampering (Congressional Research Service, 2023).

The First Amendment does not create a right to corrupt an official process through deliberate deception. Nevertheless, statutes must define the prohibited conduct clearly, and prosecutors must prove the required elements, including materiality and mental state (Congressional Research Service,

2023).

Speech Integral to Criminal Conduct

Words can form part of a crime. Soliciting a murder, arranging an illegal transaction, issuing instructions as part of a conspiracy, extorting money, or coordinating criminal activity may be punished even though communication is involved. The doctrine does not mean that discussing crime, reporting on criminal methods, or portraying illegal activity is automatically unprotected (Congressional Research Service, 2023).

The phrase “speech integral to criminal conduct” must not become a circular justification for criminalizing ideas. Government cannot first label expression illegal and then argue that it is unprotected because it violates the new law. The speech must be closely connected to independently unlawful conduct (Congressional Research Service, 2023).

Intellectual Property and Confidential Information

Copyright, trademark, trade-secret, and related laws can restrict the unauthorized use of protected expression or information. Copyright protects original expression while doctrines such as fair use preserve criticism, research, teaching, news reporting, and transformative use in appropriate circumstances (Congressional Research Service, 2023).

Intellectual-property restrictions must coexist with the First Amendment. They generally regulate the use of protected material rather than viewpoint, and they contain limitations designed to protect public discourse. Trade-secret law can restrict misappropriation of confidential commercial information, but public-interest, whistleblowing, and news-reporting questions may require a more complex analysis. Related digital issues are examined in [cyber law case studies on privacy and intellectual property](#) (Congressional Research Service, 2023).

Fighting Words

In *Chaplinsky v. New Hampshire*, the Supreme Court described fighting words as personally abusive epithets likely to provoke an immediate violent reaction when addressed face to face. The doctrine has become exceptionally narrow. Later decisions have invalidated laws that were vague, overbroad, or based on viewpoint (*Chaplinsky v. New Hampshire*, 1942; Congressional Research Service, 2023).

General insults, profanity toward police, offensive political slogans, and harsh criticism are often protected. Modern courts rarely rely on the fighting-words doctrine because government must not give people a “heckler’s veto” by suppressing speech whenever listeners might react violently (Congressional Research Service, 2023).

Hate Speech Is Usually Protected

The United States does not recognize a broad First Amendment exception for hate speech. Expression attacking people based on race, religion, ethnicity, sex, sexual orientation, gender identity, disability, or another status may be deeply harmful while remaining constitutionally protected (Congressional Research Service, 2023).

Hateful expression can lose protection when it satisfies another doctrine, such as true threats, incitement, targeted harassment prohibited under a valid law, or speech integral to criminal conduct. Bias motivation may also increase punishment for an independently criminal act. Government generally cannot punish an idea solely because it expresses hatred (Congressional Research Service, 2023).

Flag Burning and Offensive Political Expression

In *Texas v. Johnson*, the Supreme Court held that burning the United States flag as political protest is protected expressive conduct. Government may regulate fire safety or property damage through content-neutral rules, but it cannot prohibit flag desecration because observers find the message offensive (*Texas v. Johnson*, 1989).

The decision reflects a central First Amendment principle. Government does not possess authority to protect national symbols from political criticism by suppressing expression. The same protection extends to many forms of provocative protest, parody, satire, and symbolic conduct (*Texas v. Johnson*, 1989; Congressional Research Service, 2023).

Time Place and Manner Restrictions

Protected speech may be subject to reasonable content-neutral rules concerning time, place, and manner. A city may regulate noise at night, require permits for large demonstrations, protect access to buildings, and apply traffic or safety rules. Such restrictions should serve a significant government interest, remain narrowly tailored, and leave adequate alternative channels for communication (Congressional Research Service, 2023).

A restriction that appears neutral may still be unconstitutional if officials apply it selectively against disfavored viewpoints. Permit systems require clear standards so that decision-makers cannot approve friendly speech and reject criticism (Congressional Research Service, 2023).

Different Institutional Settings

[First Amendment rights](#) vary with context. Public schools may regulate student expression under doctrines designed for the educational setting, but students do not lose all constitutional rights. Government employers may restrict employee speech when workplace interests outweigh the employee's protected interest, particularly when the employee speaks as part of official duties (Congressional Research Service, 2023).

Prisons can impose restrictions reasonably related to legitimate penological objectives. Military settings also involve specialized rules. Public universities generally provide strong protection for academic and political expression, subject to lawful rules concerning threats, discrimination, and disruption (Congressional Research Service, 2023).

Private platforms can enforce community standards without becoming government actors in ordinary circumstances. A platform's decision to remove content may raise important policy questions, but it is not automatically a First Amendment violation (Congressional Research Service, 2023).

How Courts Analyze Speech Restrictions

A careful analysis asks several questions. Who is restricting the speech: government or a private actor? Is the law based on content or viewpoint? Does a recognized exception apply? Is the rule vague or overbroad? What level of scrutiny applies? Is the setting a traditional public forum, designated forum, nonpublic forum, school, workplace, or prison? Are procedural safeguards available? (Congressional Research Service, 2023).

Labels should not replace analysis. Calling speech dangerous, hateful, misinformation, or harassment does not establish that it is constitutionally unprotected. The facts, legal elements, institutional context, and remedy all matter (Congressional Research Service, 2023).

Conclusion

The First Amendment protects a wide range of expression precisely because free societies must tolerate ideas that cause disagreement and offense. Unprotected categories exist, but they are narrow. Incitement requires intent, imminence, and likelihood. True threats require serious threatening communication and a constitutionally sufficient mental state. Obscenity, child sexual-abuse material, defamation, fraud, perjury, and speech integral to criminal conduct each have distinct legal requirements (*Brandenburg v. Ohio*, 1969; *Counterman v. Colorado*, 2023; *Miller v. California*, 1973; Congressional Research Service, 2023).

Hate speech, flag burning, political extremism, profanity, and false statements do not automatically

fall outside the First Amendment. Courts must protect both public safety and the principle that government cannot suppress ideas merely because they are unpopular. Any real dispute should be evaluated under the law of the relevant jurisdiction and the specific facts (*Texas v. Johnson*, 1989; *United States v. Alvarez*, 2012; Congressional Research Service, 2023).

References

Brandenburg v. Ohio, 395 U.S. 444 (1969).

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

Counterman v. Colorado, 600 U.S. 66 (2023).

Miller v. California, 413 U.S. 15 (1973).

New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

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

Texas v. Johnson, 491 U.S. 397 (1989).

United States v. Alvarez, 567 U.S. 709 (2012).

Congressional Research Service. (2023). *The First Amendment Categories of Speech*.