Lecture Notes

# Chapter 6: Modern-Day Approaches to Free Expression

## Annotated Chapter Outline

1. An Overview of Modern-Day Free Speech Doctrine
   1. The contemporary Court considers disputes from many different angles.
      1. See Figure 6.1.
   2. Cases are triggered by allegations that the government has abridged someone’s right to free expression.
      1. Determining whether a case involved expression was easy enough.
      2. In the 1800s and early 1900s, most words were clearly spoken or written.
      3. Now, human communication takes other forms, including emails, video games, and computer code, as well expression that combines speech and conduct.
   3. Once people claim a depravation of their expression rights, the question becomes: Is the government doing the depriving?
   4. The Court has held that some categories of expression are not protected by the First Amendment.
      1. True threats.
      2. Certain speech that provokes listeners into lawlessness.
      3. Expression that listeners may be unable to avoid.
   5. If the expression does not fall into an unprotected category, the justices will take a closer look at both the speech and the regulation.
      1. Certain speakers and types of speech merit more protection under the First Amendment than others.
      2. The Court considers whether the regulation:
         1. Constitutes a prior restraint.
         2. Is overbroad or vague.
         3. Is content neutral or content based.
         4. If content based, whether it discriminates based on viewpoint.
      3. When government regulation is found to discriminate based on content, it is subject to strict scrutiny.
      4. When regulation is content-neutral, it is subject to intermediate scrutiny.
2. What Is Expression?
   1. Expressive Conduct
      1. Expressive conduct is conduct in which speech and nonspeech elements combine.
      2. ***Stromberg v. California (1931)***
         1. The Court acknowledged that at least some forms of expressive conduct merit protection.
         2. It reversed the conviction of a camp counselor who had raised a red flag in support of communism, an act that violated California law.
      3. ***Thornhill v. Alabama (1940)***
         1. The Court struck down state laws that prohibited labor union picketing.
      4. ***Spence v. Washington (1974)***
         1. A Washington state law prohibited flag desecration, defined as placing any “word, figure, mark, picture, design, drawing or advertisement” on an American flag.
         2. Spence, a college student, used tape to make a peace sign on a flag, hung it upside down from his apartment, and was charged with violating the law.
         3. The Court laid out what has become a two-part test:
            1. Whether there was an intent to convey a particularized message.
            2. Whether there was a reasonable likelihood that it would be understood as such by those who viewed it.
         4. Spence’s expression met the standard, and the Court ruled in his favor.
      5. *United States v. O’Brien (1968)*
         1. The defendants had expressed their opposition to the war in Southeast Asia by publicly and illegally burning their draft cards.
         2. The Court found that O’Brien’s conduct placed a burden on a legitimate and important government activity.
         3. Consequently, the government had the constitutional power to prosecute individuals who violated the Selective Service laws even if the acts in question communicated a message of political protest.
      6. *Tinker v. Des Moines (1969)*
         1. This case upheld the right of public school children to wear black armbands to express their opposition to the Vietnam War.
      7. *Texas v. Johnson (1989)*
         1. Even the justices who were most committed to free speech indicated their discomfort in extending First Amendment protection to those who burned the flag as a method of political expression.
         2. The Court found in favor of Johnson.
      8. *United States v. Eichman (1990)*
         1. Congress instead passed the Flag Protection Act of 1989, which penalized by a one-year jail sentence and a $1,000 fine anyone who “knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States.”
         2. Unlike the Texas law, this law banned flag desecration regardless of the motivation of the burner.
         3. The Court, using the same reasoning expressed in *Johnson* and by the same vote, struck down this law as a violation of the First Amendment.
   2. Association as Expression
      1. The Supreme Court has long regarded the right to join with like-minded individuals to advance mutual goals as essential to the exercise of political and social expression.
      2. ***NAACP v. Alabama (1958)***
         1. Justice John Marshall Harlan II explained, “Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.”
         2. Freedom of association was regarded as an inseparable aspect of the “liberty” assured by the Due Process Clause of the Fourteenth Amendment.
      3. ***Roberts v. United States Jaycees (1984)***
         1. The Jaycees is a private civic organization founded to help young men participate in the affairs of their community.
         2. The Minnesota Department of Human Rights claimed that the organization’s exclusion of women violated a state law prohibiting sex-based discrimination in public accommodations.
         3. The Jaycees argued that applying the Minnesota antidiscrimination law to its membership policies was a violation of the First Amendment’s right to freedom of association.
         4. The Court ruled against the Jaycees.
      4. *Board of Directors of Rotary International v. Rotary Club of Duarte (1987)*
         1. The Court approved the enforcement of California’s antidiscrimination laws against Rotary Club chapters that excluded women as regular members.
      5. *New York State Club Association v. City of New York (1988)*
         1. The Court upheld a New York ordinance that applied antidiscrimination regulations to organizations having more than four hundred members, providing regular meal service, and receiving payment from nonmembers for services or facilities for the furtherance of business interests.
      6. ***Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston (1995)***
         1. A private association organizing a Saint Patrick’s Day parade in Boston rejected the application of a gay rights group to march in the celebration.
         2. The gay rights group sued, claiming that its exclusion from the parade violated the Massachusetts antidiscrimination statute.
         3. The Court unanimously held that the First Amendment is violated by a state law requiring private sponsors of a parade to include among the marchers a group imparting a message that the organizers do not wish to convey.
      7. *Boy Scouts of America v. Dale (2000)*
         1. This case was a challenge to the dismissal of a scout leader on sexual orientation grounds.
         2. The justices’ divisions centered more on factual questions about nature of the organization’s beliefs and activities than on the constitutional principles governing free association.
   3. The Right Not to Speak (Compelled Speech)
      1. The government may attempt to regulate expression by requiring us to speak or write.
      2. *Minersville School District v. Gobitis (1940)*
         1. The Court upheld flag salute regulations against claims that the school system was violating the children’s right to free exercise of religion.
      3. *West Virginia State Board of Education v. Barnette (1943)*
         1. The Court again considered a challenge to the constitutionality of the compulsory flag salute laws brought by Jehovah’s Witnesses.
         2. Public opinion had calmed, the Court’s libertarian wing had strengthened, and the *Gobitis* decision had been criticized in legal circles.
         3. Lawyers for the Witnesses decided to base the attack primarily on the freedom of speech rather than on religious liberty.
         4. The Court ruled that the individual has at least a qualified right to be free of government coercion to express views he or she disavows.
      4. ***Wooley v. Maynard (1977)***
         1. New Hampshire’s license plates are embossed with the state slogan, “Live Free or Die,” a message that George Maynard, a Jehovah’s Witness, regarded as inconsistent with his personal beliefs.
         2. After he was fined for obscuring the motto with tape, he alleged that New Hampshire was forcing him to carry a message he saw as objectionable.
         3. The Court found in favor of Maynard.
      5. *303 Creative LLC v. Elenis (2003)*
         1. The Court’s six most conservative justices held that the state of Colorado violated the First Amendment by “forcing” a website designer to create sites with messages with which she disagreed.
         2. The more liberal justices dissented, arguing that the government did not compel speech but rather had enacted a neutral regulation of commercial conduct.
3. Does the Expression Fall into an Unprotected Category?
   1. “True Threats”
      1. According to the Court, true threats occur when the speaker “means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”
         1. The government must prove that the speaker intended to place the “victim in fear of bodily harm or death.”
      2. ***Virginia v. Black (2003)***
         1. A Virginia law treated all cross burnings as “true threats.”
         2. To determine the Virginia law’s constitutionality, the Court combined two cases.
         3. In the first, Barry Black led a Ku Klux Klan rally in Carroll County, Virginia.
            1. At the end of the rally, a thirty-foot cross was burned while the attendees played “Amazing Grace” over a loudspeaker.
            2. A sheriff, who had been watching the rally from the highway, drove to the gathering and arrested Black for violating the Virginia cross-burning law.
         4. In the second case, Richard Elliott and several others planted a cross and set it on fire in the yard of James Jubilee, a Black man.
            1. After seeing the cross, Jubilee was “very nervous” because he “didn’t know what would be the next phase. . . .”
            2. Elliot was charged with violating the Virginia law.
         5. According to the Court, whether burning a cross constitutes a true threat depends on the burners’ intent.
            1. On this logic, the Court ruled in Black’s favor.
            2. As for Elliot, his case was returned to the lower court to determine whether his cross-burning met the criteria of a true threat.
            3. The Supreme Court of Virginia upheld Elliot’s conviction.
   2. Speech That Provokes Listeners into Lawlessness
      1. Hostile Audience
         1. *Terminiello v. Chicago (1949)*
            1. A suspended Catholic priest, Father Arthur Terminiello, addressed a substantial crowd inside a Chicago auditorium.
            2. Terminiello launched into a tirade directed against Communism and Jews.
            3. Outside the auditorium, an even larger and angry crowd had gathered in opposition to Terminiello.
            4. The crowd grew unruly, throwing bricks and bottles at the building and breaking several of the auditorium’s windows.
            5. Terminiello was convicted of “breach of the peace,” defined by a city ordinance as action that “stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance.”
            6. The Court reversed Terminiello’s conviction.
         2. *Feiner v. New York (1951)*
            1. Irving Feiner, a college student, stood on a box and made an impromptu speech on a street corner in Syracuse.
            2. He criticized several public officials and encouraged Black people to demand equal rights.
            3. Two police officers on the scene determined that, to ensure public safety, Feiner should suspend his speech.
            4. When he refused, he was arrested.
            5. The Court upheld the conviction for breach of the peace.
      2. Fighting Words
         1. *Chaplinsky v. New Hampshire (1942)*
            1. To the court, speech that is so inflammatory that it provokes a violent response from the listener is not really speech at all.
            2. The majority opinion affirmed Chaplinsky’s conviction, holding the government may prohibit fighting words.
            3. Fighting words were defined as words “which by their very utterance inflict injury or tend to incite an immediate breach of peace.”
         2. *Cohen v. California (1971)*
            1. The Court refined its approach to fighting words.
            2. In addition to meeting *Chaplinsky*’s definition, the government must show that the speech was a “direct personal insult” intended to “violently arouse” the listener.
         3. *Gooding v. Wilson (1972)*
            1. The justices considered a Georgia law prohibiting “opprobrious words or abusive language, tending to cause a breach of the peace.”
            2. To show how broadly the law swept, the Court pointed out that the Georgia Supreme Court allowed the remark, “You swore a lie,” to be considered fighting words.
         4. ***R.A.V. v. City of St. Paul (1992)***
            1. The Court considered a fighting words ordinance that prohibited placing “on public or private property objects, characterizations, or graffiti . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”
            2. Because the law, without sufficient justification, created “content-based distinctions among expressions of hate” the Court invalidated it.
   3. Unprotected Categories and Hate Speech
      1. Legal observers have increasingly turned their sights on expression that vilifies others, more commonly referred to as “hate speech.”
      2. Educational institutions try to provide an open and welcoming environment, and some have speech codes that aim to maintain that environment.
      3. It is conceivable, though, that the Court would invalidate at least some of the codes maintained by public universities.
      4. The university could attempt to argue that its code met the standard of strict scrutiny.
4. Who Is Speaking?
   1. Student Speech
      1. *Tinker v. Des Moines Independent Community School District (1969)*
         1. Teachers and students, Justice Fortas declared, do not shed their constitutional rights at the schoolhouse gate.
         2. If the speech does not disrupt the educational process, government has no authority to proscribe it.
      2. *Bethel School District No. 403 v. Fraser (1986)*
         1. The justices upheld the action of Washington state education officials who disciplined high school senior Matthew Fraser for delivering a student assembly speech that violated a policy against “the use of obscene, profane language or gestures.”
      3. *Morse v. Frederick (2007)*
         1. The justices express a wide array of views.
         2. Justice Stevens’s dissenting opinion strongly supports the *Tinker* precedent; he would protect almost all student expression.
         3. Justice Thomas believes that students have no constitutionally protected expression rights and thinks *Tinker* should be overruled.
         4. Most of the justices take positions between those two extremes.
      4. ***Mahanoy Area School District v. B.L. (2021)***
         1. A student used vulgar language in a social media post, made off-campus and on a weekend, to complain about not being chosen as a varsity cheerleader.
         2. After the school suspended her from the junior varsity squad, she filed suit with her case eventually reaching the Supreme Court.
         3. On the one hand, the justices held that much off-campus speech is likely beyond the school’s reach.
         4. On the other hand, the justices agreed that some off-campus behavior and speech may be subject to school regulation.
         5. Since there was no evidence that the student’s post had any real disruptive effects within the school, the justices held that her suspension violated her speech rights.
   2. Government Speech
      1. ***Pleasant Grove City v. Summum (2009)***
         1. A religious sect claimed that a municipality violated the First Amendment by refusing it permission to erect in the city park a monument it donated.
         2. Already erected in the park were fifteen other monuments donated by private organizations exhibiting content ranging from the Ten Commandments to a September 11 memorial.
         3. According to the organization’s argument, the city’s rejection constituted a form of viewpoint discrimination and denied the group access to a public forum open to other organizations.
         4. The justices concluded that the city’s decision to place or not to place a monument on the public land it administered was best classified as government speech.
         5. The city was free to determine what expressive messages it wanted to display in its park.
      2. In two cases, the justices struggling to draw a clear distinction between private speech and government speech.
         1. *Walker v. Texas Division, Sons of Confederate Veterans (2015)*
         2. *Matal v. Tam (2017)*
      3. ***Iancu v. Brunetti (2019)***
         1. The founder of a clothing brand called FUCT—the letters were to be read sequentially, not as a single word—was denied a trademark because of a provision of the law that forbade trademarks deemed “immoral” or “scandalous.”
         2. The Court invalidated this part of the law, finding that it discriminated on the basis of viewpoint.
   3. Commercial Speech
      1. *Valentine v. Chrestensen (1942)*
         1. The Court upheld a law banning the distribution of handbills that advertised commercial goods and services.
      2. ***Bigelow v. Virginia (1975)***
         1. Jeffrey C. Bigelow, managing editor a Charlottesville newspaper, approved an advertisement promoting a service that made arrangements for women in Virginia (where abortions were illegal) to obtain abortions in New York (where abortions were permitted).
         2. The state of Virginia charged Bigelow with violating an 1878 state law.
         3. The U.S. Supreme Court reversed Bigelow’s conviction, explaining “The fact that the particular advertisement . . . had commercial aspects . . . did not negate all First Amendment guarantees.”
      3. ***Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council (1976)***
         1. This case centered on a constitutional challenge to a Virginia regulation making it unlawful for a pharmacy to advertise the prices of its prescription medications.
         2. The state justified its regulation as protecting the public from deceptive advertising and maintaining the professionalism of the state’s pharmacists.
         3. Not only did the Court strike down the Virginia regulation as inconsistent with the First Amendment; it also overruled *Valentine v. Chrestensen*.
      4. *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York (1980)*
         1. This was a dispute over an energy conservation law prohibiting utility companies from advertising to promote the sale of their products.
         2. If the commercial expression concerns a lawful activity and is not misleading, it merits First Amendment protection.
         3. The state may regulate that expression if the regulation serves a substantial government interest, directly advances that interest, and is no more extensive than necessary to achieve it.
5. Is the Regulation Content Neutral or Content Based?
   1. Content-Neutral Regulations
      1. The most common forms are restrictions on the time (when the speech occurs), place (where the speech occurs), and manner (how the speech occurs).
      2. The Court has identified four categories of government-controlled places.
         1. Traditional public forums are government property where the public freely congregates and traditionally exchanges views.
         2. Designated public forums are government property that has not traditionally been regarded as a public forum but which is intentionally opened up for that purpose.
         3. Limited public forums are places that the government has established for a specific purpose.
         4. Nonpublic forums are government facilities that traditionally have not been locations for public discourse and private property where the owner has not given consent.
      3. Assuming regulation on the place of the speech is content neutral, the Court subjects the first two categories to intermediate scrutiny.
      4. *Heffron v. International Society for Krishna Consciousness (1981)*
         1. The justices considered a Minnesota rule that all groups desiring “to sell, exhibit or distribute materials” during its annual state fair, a public forum, do so only from rental booths on the fairgrounds.
         2. The Court found this role to be content-neutral.
         3. The Court held that the state’s interest in the “orderly movement and control” of the crowd was sufficient to justify the rule.
   2. Content-Based Regulations
      1. *Boos v. Barry (1988)*
         1. The Court considered a provision of the District of Columbia code aimed at protecting the representatives of foreign governments by making it unlawful to display within 500 feet of a foreign embassy a sign that tends to bring that foreign government into “public odium” or “public disrepute.”
         2. The Court held that the law was not narrowly tailored to serve the interest of protecting diplomats.
      2. *McCullen v. Coakley (2014)*
         1. Chief Justice Roberts saw the buffer zone as content neutral: the law regulates not what people say but where they say it.
         2. By contrast, Justice Scalia concluded that the law was content based, aimed specifically at the discussion of abortion.