

Limits on Freedom of Speech Cases

Hill v. Colorado, 530 U.S. 703 (2000)

Question: Does Colorado's statutory requirement that speakers obtain consent from people within 100 feet of a health care facility's entrance before speaking, displaying signs, or distributing leaflets to such people violate the First Amendment rights of the speaker?

Case Facts

A Colorado statute makes it unlawful for any person within 100 feet of a health care facility's entrance to "knowingly approach" within 8 feet of another person, without that person's consent, in order to pass "a leaflet or handbill, display a sign, or engage in oral protest, education, or counseling with [that] person...." Leila Hill and others, sidewalk counselors who offer abortion alternatives to women entering abortion clinics, sought to enjoin the statute's enforcement in state court, claiming violations of their First Amendment free speech rights and right to a free press. The trial court held that the statute imposed content-neutral time, place, and manner restrictions narrowly tailored to serve a significant government interest and left open ample alternative channels of communication.

Court Decision 6-3

The First Amendment right to free speech was not violated by a Colorado law limiting protest, education, distribution of literature or counseling within eight feet of a person entering a health-care facility.

The Court concluded that the statute "is not a regulation of speech. Rather, it is a regulation of the places where some speech may occur." "Although the statute prohibits speakers from approaching unwilling listeners, it does not require a standing speaker to move away from anyone passing by. Nor does it place any restriction on the content of any message that anyone may wish to communicate to anyone else, either inside or outside the regulated areas. It does, however, make it more difficult to give unwanted advice, particularly in the form of a handbill or leaflet, to persons entering or leaving medical facilities.

Dissent

- This law is not content neutral as it is obviously only being applied to abortion clinics and anti-abortion messages.
- Protecting citizens from unwanted speech is not a compelling state interest.
- The amount of places actually being covered by this statute is very large if one considers the extensive amount of healthcare facilities there are. So, speech is being restricted very significantly.
- This law removes one of the few outlets in which peaceful and civil pro-life citizens could get their point across to women considering abortion; now only inappropriate bullying groups will be heard.
- This opinion of the court is in conflict with other First Amendment restriction cases. The only reason the Court is changing now is because the messages are not content neutral – it is about abortion.
- This legislation is definitely content based and is in direct violation of the First Amendment.

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

Question: Is the sale and distribution of obscene materials by mail protected under the First Amendment's freedom of speech guarantee?

Case Facts

The appellant, Marvin Miller, operator of one of the West Coast's largest mail-order businesses dealing in sexually explicit material, had conducted a mass mailing campaign to advertise the sale of illustrated books, labeled "adult" material (a common euphemism for pornography). He was found guilty in the Superior Court of Orange County, California (the state trial court) of having violated California Penal Code 311.2 (a), a misdemeanor, by knowingly distributing obscene material. The conviction was affirmed by the California Court of Appeals. The Appellant's conviction was specifically based on his conduct in causing five unsolicited advertising brochures to be sent through the mail in an envelope addressed to a restaurant in Newport Beach, California. The envelope was opened by the manager of the restaurant and his mother. They had not requested the brochures and complained to the police.

Court Decision 5-4

The Court held that obscene materials did not enjoy First Amendment protection. The Court modified the test for obscenity established in *Roth v. United States* and *Memoirs v. Massachusetts*, holding that "[t]he basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Effects of the decision

Miller provided states greater freedom in prosecuting alleged purveyors of "obscene" material because, for the first time since *Roth*, a majority of the Court agreed on a definition of "obscenity." The "community standards" portion of the decision is of particular relevance with the rise of the Internet, as materials believed by some to be "obscene" can be accessed from anywhere in the nation, including places where there is a greater concern about "obscenity" than other areas of the nation.

***Cohen v. California*, 403 U.S. 15 (1971)**

Question: Did California's statute, prohibiting the display of offensive messages such as "Fuck the Draft," violate freedom of expression as protected by the First Amendment?

Case Facts

On April 26, 1968, Paul Robert Cohen, 19, was arrested for wearing a jacket bearing the words "Fuck the Draft" inside the Los Angeles Courthouse. Inside the court room he had the jacket folded over his arm, only after exiting the room he put the jacket on and was then arrested. He was convicted of violating section 415 of the California Penal Code, which prohibited "maliciously and willfully disturbing the peace or quiet of any neighborhood or person by offensive conduct" and sentenced to 30 days in jail. The conviction was upheld by the California Court of Appeal, which held that "offensive conduct" means "behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace."

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Court Decision 5-4

The State may not, consistently with the First and Fourteenth Amendments, make the simple public display of this single four-letter expletive a criminal offense. Justice Harlan famously wrote "one man's vulgarity is another's lyric."

Three major points:

- States (California) cannot censor their citizens in order to make a "civil" society.
- Knowing where to draw the line between harmless heightened emotion and vulgarity can be difficult
- People bring passion to politics and vulgarity is simply a side effect of a free exchange of ideas—no matter how radical they may be.

Dissent

Cohen's wearing of the jacket in the courthouse was not speech but *conduct* (an "absurd and immature antic") and therefore not protected by the First Amendment.

<i>Chaplinsky v. State of New Hampshire</i>, 315 U.S. 568 (1942)

Question: Does the application of the statute violate Chaplinsky's freedom of speech protected by the First Amendment?

Case Facts

Walter Chaplinsky distributed Jehovah's Witnesses material in Rochester, NH, and irritated several persons by calling all organized religion a "racket." A disturbance ensued, and a city traffic officer asked Chaplinsky to accompany him to the police station. Along the way, they encountered City Marshall Bowering, and Chaplinsky accused Bowering of being a "God damned racketeer" and a "damned Fascist." Chaplinsky was arrested for violating the NH laws which prohibit the speaking of "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place." Chaplinsky was convicted in a trial court and the NH Superior Court affirmed the conviction.

Court Decision Affirmed 9-0

Some forms of expression--among them obscenity and fighting words--do not convey ideas and thus are not subject to First Amendment protection. In this case, Chaplinsky uttered fighting words, i.e., words that "inflict injury or tend to incite an immediate breach of the peace."

1. **Worthwhile Speech**
Expression that has social value as a step to truth (news reports, editorial/opinion columns, speeches on social issues, political debates, etc.)
2. **Worthless Speech**
Expression that has little, if any, social value as a step to truth
 1. The lewd, obscene, and profane
 2. Slander and libel
 3. Insulting or "fighting" words
 - a. offensive language, even if it does not provoke a fight
 - b. fight-provoking language that tends to incite violence

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The test is what persons of common intelligence would understand would be words and expressions which by general consent are 'fighting words' when said without a disarming smile. Such words, as ordinary persons know are likely to cause a fight.

***Thornhill v. Alabama*, 310 U.S. 88 (1940)**

Question: Did the Alabama law violate Thornhill's right to free expression under the First Amendment?

Case Facts

Byron Thornhill joined a picket line that was peaceably protesting against his former employer. Alabama state law made it an offense to picket. Thornhill was arrested and fined \$100.

Thornhill, a union president, was the only picketer to be arrested and tried under the law. After his conviction in the Inferior Court of Tuscaloosa County, he appealed to the Circuit Court of Tuscaloosa County. He was fined "\$100 and costs," but was sentenced to prison for 59 days after not paying. After he failed his appeal, the circuit court increased the prison time to 73 days.

Court Decision 8-1

The majority opinion reversed the lower courts' rulings by citing the freedoms of speech and the press granted in the first amendment, and secured by the fourteenth. The court also found the Alabama statute to be invalid on its face. The Court held that labor relations were "not matters of mere local or private concern," and that free discussion concerning labor conditions and industrial disputes was "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." The Court found that no clear and present danger of destruction of life or property or of breach of the peace was inherent to labor picketing, and thus deserved First Amendment protection.

Associate Justice Frank Murphy wrote for the Supreme Court that the free speech clause protects speech about the facts and circumstances of a labor dispute. The statute in the case prohibited all labor picketing, but *Thornhill* added peaceful labor picketing to the area protected by free speech.

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

Question: Did Ohio's criminal syndicalism law, prohibiting public speech that advocates various illegal activities, violate Brandenburg's right to free speech as protected by the First and Fourteenth Amendments?

Case Facts

Clarence Brandenburg, a Ku Klux Klan leader in rural Ohio, contacted a reporter at a Cincinnati television station and invited him to come and cover a KKK rally in Hamilton County in the summer of 1964. Portions of the rally were filmed, showing several men in robes and hoods, some carrying firearms, first burning a cross and then making speeches. One of the speeches made reference to the possibility of "revengeance" [sic] against "niggers," "Jews" and those who supported them. One of the speeches also claimed that "our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race," and announced plans for a march on Washington to take place on the Fourth of July. Brandenburg was charged with advocating violence under Ohio's criminal syndicalism for his participation in the rally and for the speech he made. Brandenburg was fined \$1,000 and sentenced to one to ten years in prison.

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On appeal, the Ohio First District Court of Appeal affirmed Brandenburg's conviction, rejecting his claim that the statute violated his First Amendment and Fourteenth Amendment right to freedom of speech.

Court Decision 8-0

The U.S. Supreme Court reversed Brandenburg's conviction, holding that government cannot constitutionally punish abstract advocacy of force or law violation. The unanimous majority opinion was *per curiam* (issued from the Court as an institution rather than as authored and signed by an individual justice). The Court held that the Ohio law violated Brandenburg's right to free speech. The Court used a two-pronged test to evaluate speech acts: (1) speech can be prohibited if it is "directed at inciting or producing imminent lawless action" and (2) it is "likely to incite or produce such action." The criminal syndicalism act made illegal the advocacy and teaching of doctrines while ignoring whether or not that advocacy and teaching would actually incite imminent lawless action. The failure to make this distinction rendered the law overly broad and in violation of the Constitution. The Court articulated a new test — the "imminent lawless action" test — for judging so-called seditious speech under the First Amendment:

Brandenburg did not explicitly overrule the bad tendency test, but it appears that after "Brandenburg" the test is de facto overruled. "Brandenburg" also made the time element of the clear and present danger test more defined and more rigorous.

Subsequent developments

The *Brandenburg* test was the Court's last major statement on what government may do about inflammatory speech that seeks to incite others to lawless action. It resolved the debate between those who urged greater government control of speech for reasons of security and those who favored allowing as much speech as possible. As of 2009, the *Brandenburg* test is still the standard used for evaluating attempts to punish inflammatory speech.

Terminiello v. Chicago, 337 U.S. 1 (1949)

Question: Did the Chicago ordinance violate Terminiello's right of free expression guaranteed by the First Amendment?

Case Facts

Arthur Terminiello (a Catholic priest under suspension) was giving a speech to the Christian Veterans of America in which he criticized various racial groups and made a number of inflammatory comments. There were approximately 800 people present in the auditorium where he was giving the speech, and a crowd of approximately 1,000 people outside, protesting the speech. The Chicago Police Department was present, but was unable to completely maintain order. Terminiello was later assessed a fine of one hundred dollars for violation of Chicago's breach of peace ordinance, which he appealed. Both the Illinois Appellate Court and Illinois Supreme Court affirmed the conviction, and the U.S. Supreme Court granted certiorari.

Court Decision 5-4

The Court held that the "breach of the peace" ordinance of the City of Chicago unconstitutionally infringed upon the freedom of speech. Noting that "[t]he vitality of civil and political institutions in our society depends on free discussion," the Court held that speech could be restricted only in the event that it was "likely to produce a clear and present danger of a

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serious substantive evil that rises far above public inconvenience, annoyance, or unrest." Justice Douglas wrote that "a function of free speech under our system is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." Although Douglas acknowledged that freedom of speech was not limitless, and did not apply to "fighting words" (citing *Chaplinsky v. New Hampshire*), he held that such limitations were inapplicable here.

Dissent

The Illinois courts had construed the ordinance only as punishing fighting words. The majority was ignoring the very real concern of maintaining public order, and that the majority's generalized suspicion of any restriction of free speech was blinding them to the fact that a riot was occurring at Terminiello's place of speaking. Although the First Amendment protects the expression of ideas, it does not protect them absolutely, in all circumstances, regardless of the danger it may create to the public at large.

Justice Jackson's dissent in this case is most famous for its final paragraph: "This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."

<i>Frisby v. Schultz</i>, 487 U.S. 474 (1988)
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Question: Does a city ordinance prohibiting picketing in front of residential homes violate the First Amendment?

Case Facts

Sandra Schultz and Robert Braun both strongly opposed abortion and gathered like-minded citizens together to picket in front of the home of a local doctor who performed abortions. In response, the city of Brookfield, Wisconsin passed a law against all picketing in front of residential homes except for labor disputes. Following the advice of the town attorney, the city amended the law to ban labor picketing as well. The stated purpose of the law was "the protection and preservation of the home." When enacted, Schultz and Braun stopped picketing and filed suit in federal district court, claiming that the law violated the First Amendment. The court declared it would issue a permanent injunction against the law unless it was narrowed in scope. The United States Court of Appeals of the Seventh Circuit affirmed that the law violated the First Amendment.

Court Decision 6-3

The Court held that since the street constituted a traditional public forum, the ban must satisfy strict standards in order to remain. Since the ban is "content neutral," "leaves open ample alternative channels of communication," and serves a "significant government interest," the Court ruled that it passed the strict standards and could remain. The city government had a legitimate purpose in protecting the homes of its residents, and did so without favoring one idea over another or eliminating the ability to communicate an idea.

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United States v. Grace, 461 U. S. 171 (1983)

Question: Does prohibiting, among other things, the "display [of] any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement" in the United States Supreme Court building and on its grounds, violate the First Amendment?

Case Facts

In 1978, Thaddeus Zywicki, stood on the sidewalk in front of the Supreme Court building and distributed leaflets to passersby concerning the removal of unfit judges from the bench. A Supreme Court police officer approached Zywicki and told him that Title 40 of the United States Code prohibited the distribution of leaflets on the Supreme Court grounds, which includes the sidewalk. Zywicki left. Zywicki again visited the sidewalk in front of the Court in 1980 to distribute pamphlets containing information about forthcoming meetings and events concerning 'the oppressed peoples of Central America and was again informed that the distribution of leaflets on the Court grounds was prohibited by law. Zywicki was told he would be arrested if the leafletting continued. Zywicki left. Zywicki reappeared in February 1980 on the sidewalk in front of the Court and distributed handbills concerning oppression in Guatemala and once again was told that he would be subject to arrest if he persisted in his leafletting. Zywicki complained that he was being denied a right that others were granted, referring to the newspaper vending machines located on the sidewalk, but nonetheless, he left the grounds.

In 1980, Mary Grace stood on the sidewalk in front of the Court and began to display a four foot by two and a half foot sign on which was inscribed the verbatim text of the First Amendment. A Court police officer approached Grace and informed her that she would have to go across the street if she wished to display the sign. Grace was informed that Title 40 of the United States Code prohibited her conduct and that if she did not cease she would be arrested. Grace left the grounds.

Zywicki and Grace filed suit in the United States District Court for the District of Columbia. They sought an injunction against continued enforcement of 40 U.S.C. 13k and a declaratory judgment that the statute was unconstitutional on its face.

Court Decision 7-2

The Court held that Section 13k, as applied to the public sidewalks surrounding the Court building, is unconstitutional under the First Amendment. As a general matter, peaceful picketing and leafletting are expressive activities involving "speech" protected by the First Amendment. "Public places," such as streets, sidewalks, and parks, historically associated with the free exercise of expressive activities, are considered to be "public forums." In such places, the Government may enforce reasonable time, place, and manner regulations, but additional restrictions, such as an absolute prohibition of a particular type of expression, will be upheld only if narrowly drawn to accomplish a compelling governmental interest. The Court grounds are not transformed into "public forum" property merely because the public is permitted to freely enter and leave the grounds at practically all times and is admitted to the building during specified hours. But where the sidewalks forming the perimeter of the grounds are indistinguishable from any other sidewalks in Washington, D.C., they should not be treated any differently and thus are public forums for First Amendment purposes.

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Frye v. Kansas City Missouri Police Dept., 375 F. 3d 785 - COA, 8th Circuit 2004

Question: Do police limits on public display of anti-abortion signs violate the First Amendment?

Case Facts

A group of pro-life picketers were peacefully assembled on a pedestrian right of way beside a public sidewalk in a non-residential area of Kansas City, Missouri. After a small number of motorists complained to police officers about the content of some of the signs being held by petitioners — namely, the signs depicting aborted fetuses — the officers stated that unless those holding these particular signs either put them down or moved elsewhere they would be arrested. Petitioners refused to lay aside those signs to which the motorists objected, and respondents arrested them for violating the city's loitering ordinance. Officer Tarwater told the demonstrators that the "poster-size photos were offending people passing through the intersection [and thus] creating a hazard to public safety." He asked the demonstrators to move further away from the road with the large photographs of the mutilated fetuses. They refused, and Tarwater gave them the option of staying at the same location as long as they did not display the large photographs that were creating a traffic hazard. They again refused. Tarwater told them if they refused to either relocate or stop displaying the large photographs of mutilated fetuses at the side of the road, they would be arrested. They again refused and were arrested for violating the city's loitering ordinance, which makes it "unlawful for any person to ... stand ... either alone or in concert with others in a public place in such a manner so as to [o]bstruct any public street, public highway ... by hindering or impeding the free and uninterrupted passage of vehicles, traffic, or pedestrians."

Court Decision 2-1

The Court held that the district court did not err in holding that the police officers reasonably interpreted the ordinance as prohibiting conduct which distracted drivers and thereby obstructed a public street by "hindering the free and uninterrupted flow of traffic." An officer on duty in the field is entitled to make a reasonable interpretation of the law he is obligated to enforce." In this case, the police officers acted reasonably and "surely thought they had probable cause to arrest [appellants]." Accordingly, we affirm the judgment of the district court.