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The First Amendment: Categories of Speech

The Free Speech Clause of the First Amendment prohibits the government from “abridging the freedom of speech” but does not define what that freedom entails. The Supreme Court has long interpreted the Clause to greatly circumscribe government regulation of “protected” speech (including some forms of expressive conduct) while giving the government greater leeway to regulate a handful of limited categories that the Court has deemed largely “unprotected.” This In Focus summarizes the main categories of protected and unprotected speech in First Amendment jurisprudence.

Introduction

The Supreme Court’s current approach to free speech is not entirely categorical. That is, just because a law implicates protected speech does not mean that the law automatically violates the Free Speech Clause. Likewise, the First Amendment may still provide grounds to challenge a law regulating unprotected speech. Nevertheless, the category of speech at issue can help determine what First Amendment standards, including what level of judicial scrutiny, a court might apply in a constitutional challenge to the law. A reviewing court would likely apply strict scrutiny to a law regulating protected speech on the basis of its content—that is, its topic or message. Strict scrutiny is a very difficult standard for the government to satisfy because it requires proof that the law is the least restrictive means of advancing a compelling governmental interest. If a law regulates only protected commercial speech, however, a court might apply intermediate scrutiny, which has no least-restrictive-means requirement. Intermediate scrutiny still requires the government to show, *inter alia*, that the law is narrowly tailored to a substantial government interest. By contrast, if a law regulates only unprotected speech, it might receive no First Amendment scrutiny or the lenient standard of rational basis review. Thus, for laws that regulate speech or bills that propose to do so, the category of speech involved may be an important factor in evaluating whether a particular measure is likely to survive a First Amendment challenge.

Protected Speech

The Supreme Court has recognized that the First Amendment’s protections extend to individual and collective speech “in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” Accordingly, speech is generally protected under the First Amendment unless it falls within one of the narrow categories of unprotected speech discussed in the next section. Whether the Court applies strict scrutiny or a lower form of scrutiny, however, depends on the character and context of the speech.

Political, Ideological, and Other Forms of Non-Commercial Speech

Apart from commercial speech, the Supreme Court has not developed a formal hierarchy of protected speech for purposes of applying legal scrutiny. For example, content-based speech restrictions generally receive strict scrutiny regardless of the topic at issue. At the same time, the Court has long maintained that “[n]ot all speech is of equal First Amendment importance.” Thus, the judicially ascribed “value” of the protected speech may matter in some circumstances.

The Court has long considered political and ideological speech to be at the core of the First Amendment, including speech concerning “politics, nationalism, religion, or other matters of opinion.” This speech can take forms beyond the written or spoken word, such as funding or symbolic acts. A regulation of political or ideological speech generally receives some form of heightened scrutiny, whether that be strict scrutiny for content-based laws, intermediate scrutiny for content-neutral laws, or the exacting scrutiny standard often applied to campaign finance disclosure requirements. The Court has also opined that the “Free Speech Clause exists principally to protect discourse on public matters.” Accordingly, the Court has distinguished between matters of public concern or interest and matters of purely private concern in contexts such as tort law or public employee speech. As summarized by the Court, “[s]peech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ ... or when it is a subject of legitimate news interest,” regardless of “the arguably ‘inappropriate or controversial character’” of the content.

Commercial Speech

Commercial speech—speech that merely proposes a commercial transaction or relates solely to the speaker’s and the audience’s economic interests—has historically received less First Amendment protection than other forms of protected speech. Under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, commercial speech restrictions typically receive intermediate scrutiny if they are directed at non-misleading speech concerning a lawful activity. Such laws are constitutional only if they directly advance a substantial government interest and are not broader than necessary to serve that interest. The Court in recent years has appeared receptive to applying a heightened level of scrutiny to laws that single out commercial speakers for less favorable treatment based on the content of their speech. In contrast, courts have sometimes applied “*Zauderer* review”—a standard more lenient than intermediate scrutiny but more stringent than rational basis review—to laws requiring disclosure of factual, uncontroversial information.

Unprotected Speech

While content-based laws are typically subject to strict scrutiny, the Supreme Court has recognized limited categories of speech that the government may regulate *because of* their content, as long as it does so evenhandedly. The Court generally identifies these categories as obscenity, defamation, fraud, incitement, fighting words, true threats, speech integral to criminal conduct, and child pornography. The contours of these categories have changed over time, with many having been significantly narrowed by the Court. In addition, the Court has been disinclined to expand upon this list, declining to recognize, for example, violent entertainment or depictions of animal cruelty as new categories of unprotected speech.

Obscenity

For material to be obscene, and thus unprotected under the First Amendment, it must meet the standard set out in *Miller v. California*: the material, considered as a whole, “appeal[s] to the prurient interest in sex” (as judged by contemporary community standards), depicts or describes specifically defined sexual conduct in “a patently offensive way,” and “lacks serious literary, artistic, political, or scientific value.” Not all sexually explicit material rises to the level of legally obscene.

Defamation

Defamation involves certain false statements of fact about a person conveyed verbally (slander) or in writing (libel). As a tort claim, the elements of defamation depend on the relevant state’s law and the Supreme Court’s free speech precedents. Although defamatory statements are considered unprotected speech, the Court has recognized First Amendment limits on liability in defamation cases. For example, in cases where the statement concerns a public official or figure, the party alleging defamation must demonstrate that the speaker acted with “actual malice,” that is, knowledge that the statement was false or reckless disregard as to its truth or falsity.

Fraud

Recognizing that “some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation,” the Supreme Court has rejected a categorical First Amendment exception for false statements. Still, the Court has stated that false statements can form the basis for other “legally cognizable harm[s]” such as defamation or fraud. A “properly tailored fraud action” might require proof of “a false representation of a material fact,” knowledge “that the representation was false,” “intent to mislead the listener,” and reliance by or injury to the listener. The government may also prohibit false or inherently deceptive commercial speech, often without triggering the intermediate scrutiny standard applicable to most commercial speech restrictions.

Incitement

In *Brandenburg v. Ohio*, the Supreme Court held that the First Amendment protects advocating the use of force or lawbreaking “except where such advocacy is directed to

inciting or producing imminent lawless action and is likely to incite or produce such action.” In other words, the government may punish “statements ‘directed [at] producing imminent lawless action,’ and likely to do so,” but generally may not prohibit or punish “mere *advocacy* of the use of force or violence.”

Fighting Words

In 1942, the Supreme Court held in *Chaplinsky v. New Hampshire* that the First Amendment does not protect “fighting words”—those “likely to provoke the average person to retaliation, and thereby cause a breach of the peace.” The Court has since stated, however, that “speech cannot be restricted simply because it is upsetting or arouses contempt.” Although the Court continues to cite “fighting words” as an example of speech that the government may proscribe, it has not upheld a government action on the basis of that doctrine since *Chaplinsky*.

True Threats

The First Amendment does not bar the government from prohibiting “true” threats. True threats—as distinguished from “political hyperbole”—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.” To comply with the First Amendment, the government must prove that the defendant either *knew* or *recklessly* ignored—that is, “consciously disregarded a substantial risk”—that the defendant’s “communications would be viewed as threatening violence.”

Speech Integral to Criminal Conduct

In general, the First Amendment affords no protection to speech “used as an integral part of conduct in violation of a valid criminal statute.” The Court has cited this rule as one reason the government may prohibit traditional inchoate offenses such as conspiracy or solicitation to commit a crime, or offers or requests to obtain illegal material. This category does not give the government carte blanche to criminalize speech because of its content.

Child Sexual Abuse Material

The Supreme Court in *New York v. Ferber* recognized “child pornography”—now commonly referred to as “child sexual abuse material” or “CSAM”—as a category of unprotected speech separate from obscenity. The Court reasoned that the advertising and sale of such materials are integral to the underlying criminal conduct of their production. As defined in *Ferber*, this category of proscribable speech involves materials that “visually depict sexual conduct by children below a specified age.” Without a depiction of an actual minor, such material might be considered protected speech (unless legally obscene). The Court has not squarely decided the First Amendment status of altered images that depict identifiable minors.

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