

Free Speech Cases: The Essentials

- Speech is closer to “absolute” than any other right, but in no way purely absolute or protected.
- The Free Speech Clause of the First Amendment applies to the states through the 14th Amendment.
- National Security issue confronted in many cases. Old rule: Does the speech present a **clear and present danger**? If so, it can be limited, *Schenk vs. U.S. (1919)*. S. Ct later revises this to the **imminent lawless action** standard, meaning actual rioting, violence must be imminent, direct result of the speech, *Brandenberg vs. Ohio (1969)*.
- Speech may be limited with reasonable **time, place and manner** restrictions.
- Level of court protection will depend upon where the speech is taking place: **traditional public forum, quasi-public forum or non-public forum**. Court will ask, is there a **captive audience**?
- Defamation, libel, slander not protected speech. Group defamation or hate speech is.
- Obscenity is not protected speech. How to define obscenity is the problem.

Case	Issue	Ruling
<i>Gitlow vs. NY (1925)</i>	Is 1 st amendment free speech protected from state or local action?	Yes. Selective incorporation. 1 st amendment free speech protection in US constitution applies to state and local government policies.
<i>U.S. vs. O'Brien (1968)</i>	burning a draft card protected speech?	No. Symbolic speech. Burning government property to protest the Vietnam War is not protected speech.
<i>Texas vs. Johnson (1989)</i>	Is burning the American flag at a political rally protected speech?	Yes. Symbolic speech. TX law prohibiting flag desecration overturned on symbolic speech grounds.
<i>Rosenberger vs. University of Virginia (1995)</i>	Must a public university provide religious group access to student activity fee funds?	Yes. Content-based restrictions on speech are prohibited, even if the policy maker is nervous about appearing to endorse religion.
<i>Capital Square Review Board vs. Pinette (1995)</i>	Must Cincinnati, OH provide public square space to KKK to display a cross?	Yes. Hate speech/group defamation. Content-based restrictions are prohibited, even for groups with hateful message. See also <i>Brandenberg vs. OH (1969)</i> – imminent lawless action test. Government cannot stop hate speech unless violence is about to happen as a result. Overturns <i>Schenk vs. US (1919)</i> clear and present danger test.
<i>McCullen v. Coakley (2014)</i>	Does MA state law requiring protesters to stand certain distance from women's clinic violate free speech right?	Yes and no. Reasonable time/place/manner restrictions. MA state law requiring abortion protesters to stay 35 ft from clinic door on public sidewalk violates free speech. Court upheld CO 8 ft zone in similar 2000 case.

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<i>NY Times vs. Sullivan (1964)</i>	Absent malice, is it okay to criticize a public figure?	Yes. Defamation/libel Public figures must prove that they were defamed on purposed with malicious intent in order to deny speaker's First Amendment right.
<i>NY Times vs. U.S. (1971)</i>	Would preventing the NY Times from publishing the Pentagon Papers on national security grounds violate press freedom?	Yes. Nixon administration sues to prevent publishing embarrassing information about Vietnam War. S. Ct. rules that such prior restraint would have a chilling effect on press freedom.
<i>Collins vs. Smith (1977)</i>	Must predominantly Jewish Skokie, IL give a parade permit to the KKK?	Yes. Content based restriction/hate speech/group defamation Skokie town council cannot deny parade permit to KKK and Nazi's. If groups follow parade rules, cannot be denied right to assemble, protest, speak.
<i>Forsythe vs. Georgia (1992)</i>	May Georgia county officials charge higher parade permit fee to "dangerous" groups?	No. Neo-Nazi group charged \$1000 for parade permit, everyone else \$300. Rules that might censor or place chilling effect on speech not allowed. "Democracy is expensive" says S. Ct.
<i>Tinker vs. Des Moines (1967)</i>	May Des Moines, IA high school students wear black arm bands in silent protest of Vietnam war?	Yes. Symbolic speech School administrator may not ban silent protest. "Teachers and students do not check their first amendment rights at the school house gate." But see also <i>Morse vs. Frederick (2007)</i> "bong hits for Jesus" case.
<i>Cohen vs. California (1971)</i>	Does California statute criminalizing "offensive conduct" apply to wording on jacket worn in the LA county court house?	No. Void for vagueness. Offensive conduct standard struck down as overbroad restriction on speech. Daniel Cohen wore jean jacket into court with words "F*** the draft" stenciled on it. Cohen was in court because he had ignored his induction notice.
<i>Miller vs. California (1973)</i>	Is California statute criminalizing distribution of obscene material an overbroad restriction on free speech?	Yes. Community standards/artistic expression/obscenity Miller establishes a multi-part test to determine if content is obscene and therefore not protected. Speech must offend community standard and have no artistic, literary, scientific, etc. merit to be considered obscene.
<i>Reno vs. ACLU (1996)</i> <i>ACLU vs. Ashcroft (2002)</i>	Is "patently offensive" language in federal internet communications laws overbroad restriction on free speech?	Yes. Congress tried twice and failed to control internet pornography and depictions of children. Both statutes were struck down as overbroad restrictions on free speech. The Miller community standard test does not work on the world wide web.