

What the First Amendment protects — and what it doesn't

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The First Amendment is a mere 45 words. But it's still giving lawmakers and judges fits 227 years after its adoption.

The government can't establish religion, but federal, state and municipal officials can open meetings with a prayer.

The government can't block religious exercise, but it's trying to ban travelers from majority-Muslim countries in the name of national security.

It can't restrict free speech — not even hate speech or flag-burning or protests of military funerals. But don't try shouting "Fire!" in a theater or threatening folks on Facebook.

It can't muzzle the media, unless it concerns outright lies made with malicious intent.

And peaceful protests are protected, but that doesn't mean the Secret Service can't push you around a little in order to protect the president.

Sound confusing? Here's your guide to the First Amendment, circa 2018:

The First Amendment

noun

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Public protests

If white nationalists and neo-Nazis can march through the college town of Charlottesville, Va., and win backing from the American Civil Liberties Union, the rights of demonstrators are in safe hands.

What remains in doubt: whether such protests can be accompanied by displays of weapons, even in states that permit firearms to be carried in public. That raises the potential for violence, which public officials have the authority to prevent.

In a series of cases dating back to the 1960s, the Supreme Court has struck down restrictions on so-called "hate speech" unless it specifically incites violence or is intended to do so.

The First Amendment, the justices have said, protected neo-Nazis seeking to march through heavily Jewish Skokie, Ill., in 1977. It protected a U.S. flag burner from Texas in 1989, three cross burners from Virginia in 2003 and homophobic funeral protesters in 2011.

Even symbols of intimidation, such as torches carried by some marchers in Charlottesville, are protected unless they have specific targets. Justice Clarence Thomas dissented in the cross-burning case, reasoning that "those who hate cannot terrorize and intimidate," but he was on the losing end of an 8-1 vote.

Public speakers

If right-wing demonstrators are protected by the First Amendment, so too are right-wing speakers. The Supreme Court made that clear in 1969 when it protected a Ku Klux Klan member decrying Jews and blacks in Ohio because he did not pose an imminent threat.

Richard Spencer, a white nationalist who has traveled the country on a controversial "alt-right" speaking tour, is but the most recent example. He's been allowed to speak, along with counter-demonstrators aligned with a left-wing coalition known as Antifa.

Spencer is better off giving sparsely attended speeches and facing opponents in Florida, Michigan and Virginia than he would be overseas. He's been banned from visiting large portions of Europe and Great Britain by government officials who said his speeches foster hatred. Under the First Amendment, those bans would not stand.

"The American free speech tradition holds unequivocally that hate speech is protected, unless it is intended to and likely to incite imminent violence," says Jeffrey Rosen, president of the National Constitution Center in Philadelphia.

Adds Justice Stephen Breyer: "It's there for people whose speech you don't like."

Censorship

Speech isn't restricted to the spoken or written word. The First Amendment also protects movies and TV, art and music, yard signs and video games, clothing and accessories.

The Supreme Court has ruled in favor of video games depicting the slaughter of animals. It has upheld derogatory trademarks, such as those promoting The Slants, an Asian-American rock band. When a Pennsylvania school district tried to stop students from wearing breast cancer awareness bracelets reading "I (Heart) Boobies," the court refused even to hear the case.

But as usual, there are exceptions. When the speaker is the government, the court has allowed for censorship — such as when Texas refused to permit specialty license plates displaying the Confederate flag. The justices reasoned that the government, not the motorist, was doing the talking.

Compelled speech

The First Amendment gives you the right to speak out — as well as the right "to refrain from speaking at all," Chief Justice Warren Burger wrote in 1977. That signaled a win for a New Hampshire couple who covered up part of their home state's motto, "Live Free or Die," on license plates.

The doctrine is up for grabs in three major Supreme Court cases this term. It appears likely the justices will rule that an Illinois state employee cannot be compelled to contribute to his local union. They also seem inclined to say that California cannot force anti-abortion pregnancy centers to inform clients where they can get an abortion.

The third case is a closer call: Must a deeply religious Colorado baker use his creative skills to bake a cake for a same-sex couple's wedding? Here the court seems split.

"The case isn't about same-sex marriage, ultimately. It isn't about religion, ultimately," says Jeremy Tedesco, a lawyer with Alliance Defending Freedom, which represents Jack Phillips. "It's about this broader right to free speech, the right to be free of compelled speech."

Social media

Facebook, Twitter and other social media sites can police their own websites to control what's posted. But under the First Amendment, the government has no such right.

Thus did the Supreme Court rule that a North Carolina law criminalizing social media use by sex offenders violated the First Amendment.

The justices also gave a temporary reprieve to an angry, self-styled rapper who rattled his wife, co-workers and others on Facebook. Phrases such as "Hell hath no fury like a crazy man in a kindergarten class" are criminal only if intended as a threat, they ruled, and sent the case back to a lower court, which ruled against him on that basis.

Campaign spending

If you want to put free speech rights to work in politics, you're in luck. The Supreme Court equates campaign spending with speech.

Say you're a wealthy individual, or you run a corporation that wants to spend unlimited amounts in this year's elections. As long as you do not coordinate your spending with a candidate or political committee, you're home free.

And while there are anti-corruption limits on how much you can donate directly to a candidate, committee or political party, the court recently ditched restrictions on the total amount you can apportion among those recipients. That means you can give to as many campaigns as you like.

Religious exercise

Your First Amendment right to exercise your religion depends on what other rights it bumps up against. That's why it's a frequent conundrum in court.

When the arts and crafts chain Hobby Lobby wanted out from Obamacare's requirement that employers offer free coverage of contraceptives, the Supreme Court ruled narrowly in its favor. The corporation's First Amendment right "protects the religious liberty of the humans who own and control" it, Justice Samuel Alito said.

And when a Lutheran church in Missouri was denied state funds to resurface its playground, the high court said the separation of church and state does not apply to purely secular activities such as swings and slides.

But religious claims are not a slam dunk, as Phillips, the Colorado baker, may discover. At least four justices — possibly five — are likely to say his speech and religious beliefs must take a back seat to public accommodations laws requiring that merchants serve all customers.

Religious establishment

This is another area where more than two centuries haven't reduced passions on both sides, often leaving courts divided.

Public schools cannot lead children in prayer, a prohibition that has been extended in recent years to graduations and football games. But Congress, state legislatures and local governments can open their sessions with a prayer, provided the audience is not coerced to participate.

The line between what's OK and what's not is even thinner than that. On the same day in 2005, the Supreme Court ruled against displaying the Ten Commandments inside a county courthouse but said it could be memorialized outdoors on statehouse grounds.

Press freedom

President Trump took aim at the press soon after coming into office. "Our current libel laws are a sham and a disgrace and do not represent American values or American fairness," he said.

Since the 1960s, the Supreme Court has made clear that the First Amendment protects statements made about public officials unless they are false and intended to defame. Only "reckless disregard for the truth" is unprotected.

Furthermore, the media can publish information from classified documents even if the government says it would threaten national security, a conclusion reached in the Pentagon Papers case featured in the recent film, *The Post*.