

## Top 10 Points to Remember about Censorship and Speech Regulation under the First Amendment

### 1. The First Amendment limits control of speech by the government—not by others.

“*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.” After the Civil War the Fourteenth Amendment extended this check on federal power to the states, and since then it has become settled that local government agencies and even the courts, in issuing orders and judgments, are likewise bound not to abridge rights of religious belief (or disbelief), speech, press, assembly or petition. In the non-governmental sector, however, a corollary of private liberty is that private institutions—businesses, clubs, churches, families—generally *may* make and enforce restrictions on communication by their employees, patrons and members (but see *Top 10 Points to Remember about Access and Speech in the Private Sector*). For convenience, all government entities limited by the First Amendment will be referred to here as the State, and “speech” rights include those of assembly, petition and publication (press) as well.

### 2. The State may seldom censor content.

Prior restraint—where the State (or a court enforcing its will) prevents or suppresses speech or other First Amendment activity *based on what is about to be, or is being expressed*—is a governmental tool of control that is almost always found unconstitutional, no matter how plausible the official purpose. In 1976 the U.S. Supreme Court surveyed all of the handful of prior restraint cases that it had decided up to that time and stated:

The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty, or a judgment in a defamation case, is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative. A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication “chills” speech, prior restraint “freezes” it at least for the time.

The court's decision in *Nebraska Press Association v. Stuart*, 427 U.S. 539, invalidated a trial judge's order barring newspaper publication of information about a notorious murder case, as an unjustified prior restraint. Since then the court has yet to find an instance where prior restraint was justified. National security interests might, as the court speculated in an early case, justify censoring specifics about U.S. troop movements in wartime. But in a case from the Vietnam war era, they were not sufficient to show the need for barring publication of the Pentagon's history of how that conflict arose. *New York Times v. United States*, 403 U.S. 713 (1971).

As for punishing speakers *after* the fact, using criminal prosecutions or allowing for civil lawsuits can be a form of censorship, even if the message may not be one normally protected by the First Amendment. Accordingly, laws criminalizing communication must be neither vague nor overbroad. A law punishing the knowing transmission of "patently offensive" sexual content to a minor over the Internet was unconstitutionally vague because one could not tell who might be offended, or how or why. *Reno v. American Civil Liberties Union*, 521 US 844 (1997). If that same law had instead punished material transmitted to minors over the Internet depicting a bare female breast, it would have been far less vague, but would have been unconstitutionally overbroad by criminalizing any number of legitimate medical or scientific illustrations—or works of art. Even if a criminal law is free from both vagueness and overbreadth, it may not forbid advocacy of the use of force or violation of the law except where the advocacy is directed to inciting or producing *imminent* lawless action—and is likely to do just that. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Civil lawsuits reacting to speech also have their First Amendment limits. For example, while libel and slander are said to be unprotected by the First Amendment, in order to win such a defamation case, a government official must show that the defendant, at the time of making the false and injurious statement, knew it to be false or had serious doubts as to its truth. This principle keeps defamation lawsuits from being used to punish good-faith criticism of government and public officials. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

### **3. The State may never suppress—and may never compel—a particular viewpoint.**

It may, for example, prohibit or punish the burning of materials on a lawn for any reason, or the burning of materials in a manner calculated to cause terror. But it may not prohibit or punish burning of materials on lawns for the purpose of arousing terror *only* on the basis of racial, as opposed to religious, political, nationalistic, or ideological hatred. Racially bigoted terrorist threats are bad and destructive, but the government may prohibit or punish them only as part of a law criminalizing all terrorist threats against any person or group whatsoever. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), *Virginia v. Black*, 538 U.S. 343 (2003). In fact in

order to suppress content at all (see 2 above), the State must demonstrate that “there is no realistic possibility that official suppression of ideas is afoot.” (*R.A.V.*)

As a corollary, the State may never compel expressions of adherence to a particular viewpoint, whether religious or otherwise. At the height of World War II the Supreme Court observed, in a case deciding that schoolchildren could not be forced to recite the Pledge of Allegiance: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

#### **4. Sometimes, no matter what is to be said, the State may limit when, where or how.**

It may regulate the time, place and/or manner of expressive activity in a public forum (see 5 below), if three conditions are met.

- The regulation must be content-neutral—it must apply equally to all communications of the same form irrespective of the message, for example to loudspeakers on city streets or music amplifiers in a park.
- The regulation must be “narrowly tailored to serve a significant governmental interest,” such as to avoid disturbing public tranquility in multiple-use areas.
- The regulation must leave open ample alternative channels of communication—other reasonably equivalent ways to get the message across—such as unamplified speech on city streets (or the use of print or broadcast media), or lower amplification of a bandshell concert. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

In terms of public protest restrictions, for example, even a content-blind requirement that demonstrators be confined to a “speech zone” farther away from their preferred location than would be necessary to protect safety or other significant public interests may fail both the first and second factors. It is not narrowly tailored (minimally intrusive), and if the protesters’ whole point is to be witnessed expressing their views *about a particular event or place*, preventing their being shown on or near the scene may actually undercut the message’s force and thus not be a reasonable alternative. *Galvin v. Hay*, 374 F.3d 739 (2004).

#### **5. Just how free speech is often depends on its setting—its “forum.”**

Under the First Amendment, speech is most free in a “traditional public forum”: a street, plaza or park, where communication on all sorts of topics has always been expected and is therefore most consistently protected. There, any regulation of the time, place and/or manner of speech must follow the criteria in 4 above: content-neutral, narrowly tailored to advance a significant public interest, and leaving open alternative channels or modes of communication. The same

criteria apply to a “limited” public forum—one specifically created by the State for certain types of communication or subject matter. By definition, limited public forums are typically not, strictly speaking, *content*-neutral, since they were established for certain speakers, types of message or both. For example, the public’s opportunity to address a city council or school board at a meeting, provided in the Brown Act, may be limited to comments dealing with city or school business, respectively. Comments may also be restricted to particular points during the meeting, and subject to reasonable time limits. But the parameters adopted by the council or board must be *viewpoint*-neutral; they may not provide more or less opportunity to be heard depending on whether or not officials welcome the speaker’s message. *Rubin v. City of Santa Monica*, 823 F.Supp. 709 (1993). The third setting is the “nonpublic” forum; a place or channel of communication owned by the government but not opened up to public speech. Any limitations here, including an outright speech ban, must merely be reasonable in light of the purpose of the forum, so long as they are viewpoint-neutral. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983). But once communication favoring one perspective has been allowed, the forum is said to be “opened” to speech from competing viewpoints. For example, a military facility is normally a nonpublic forum. *Greer v. Spock*, 424 U.S. 828 (1976). But if a base or naval vessel holds an open house with speakers and displays showing the effectiveness of military power, those who want to come aboard to question or criticize the official message must be allowed to do so, subject to reasonable time, place and manner regulations. *United States v. Albertini*, 710 F.2d 1410 (1983).

Under California’s broader constitutional protection for speech, the “public forum” doctrine is not limited to traditional public forums such as streets, sidewalks, and parks or to sites dedicated to communicative activity such as municipal theaters. Rather, the test under California law is whether the communicative activity is *basically incompatible with the normal activity* of a particular place at a particular time. *Kuba v. I-A Agricultural Association*, No. 02-16989 (9th Cir. 10/19/2004; emphasis added) By this standard, first formulated by the California Court of Appeal in *Prisoners Union v. California Department of Corrections*, 135 Cal. App. 3d 930 (1982), the U.S. Ninth Circuit Court of Appeals has found a public forum to exist:

- in the parking lots and pedestrian walkways outside San Francisco’s Cow Palace, for the purpose of picketing, leafleting, signature collecting and other demonstration activity by animal rights activists protesting practices at a rodeo (*Kuba*); and
- in comparable areas outside the Anaheim Stadium and the Anaheim Convention Center, for the purpose of soliciting donations by members of the International Society for Krishna Consciousness (*Carreras v. City of Anaheim*, 768 F.2d 1039 (1985)).

## **6. A speech permit or license must be available on objective, content-neutral grounds.**

To keep good order and administer public resources effectively, the State may require a permit or license to conduct certain speech activities in traditional public forums, for example parades, rallies or other demonstrations. The permit regulations, like others affecting public forum speech, must meet the time/place manner standards under 4 above. But also, the official(s) issuing the permit must not be left with uncontrolled discretion to grant or deny it. To avoid becoming a matter of whim, permit regulations are required, and they must provide “narrowly drawn, reasonable and definite standards for the officials to follow.” *Niemotko v. Maryland*, 340 U.S. 268 (1951). The standards must be blind to the purpose or theme of the event, focusing instead, for example, on the number of people, the time and/or the size of the area involved. Likewise, the fee schedule, if any, must be based on the issuing agency’s anticipated administrative and/or public resource costs. It may not be sensitive to the event’s purpose or theme; it cannot be allowed to increase, for example, based on an official’s estimate of how controversial the event may be in terms of need for added police security to protect the marchers from a hostile mob (as opposed to added police patrols to deal with increased traffic congestion). *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). Also subject to constitutional attack are liability insurance requirements that are burdensome despite any history of need with respect to the applicant, that give city officials wide discretion to set the amount of coverage, and/or that let the private insurance market set the premium, in effect, based on its own estimate of how controversial the applicant’s message or theme may be. *Long Beach Lesbian and Gay Pride Inc. v. City of Long Beach*, 14 Cal. App. 4th 312 (1993). Finally, a total ban on wooden or other rigid handles or supports attached to signs carried in a parade or assembly has been held unconstitutional as lacking narrow tailoring to promote a significant public interest, and as leaving open no reasonable alternatives (*Edwards v. City of Coeur d’Alene*, 262 F. 3d 856 (2001)), but an ordinance limiting the thickness of wooden sign handles to two inches by a quarter inch (with no length limit) was upheld as a reasonable measure of violence prevention (*Vlasak v. Superior Court*, 329 F.3d 683 (2003)), and a limit on the size of sidewalk picketers’ signs to three by three feet was upheld as reasonable as a measure of traffic safety. *Foti v. City of Menlo Park*, 146 F.3d 629 (1998).

## **7. Doorstep speech may not be regulated if nothing is sought but the resident’s attention.**

Going door to door simply to hand out literature or urge support for a cause must be left free from State attention because citizens doing no more than speaking to one another have the right to do so anonymously; because many would decline to apply for a permit on religious or philosophical grounds, and thus forego

fundamental freedoms; because prior State permission would throttle spontaneity of discussion; because a resident can always ignore a knock or express lack of interest; and because criminals would hardly be thwarted by such regulation. *Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150 (2002). In contrast, while commercial vendors may be required to register for a doorstep sales permit, assuming their goods or services are lawful and not misleadingly described they cannot be required to call only on homes offering a “solicitors welcome” sign. *Project 80’s Inc. v. City of Pocatello*, 876 F. 2d 711 (1988). Nonprofit groups soliciting charitable contributions may be required to register with a city and provide proof of reputation, good character and financial responsibility. *Gospel Army v. City of Los Angeles*, 27 Cal. 2d 232 (1945). But given those permissible safeguards, an additional requirement of providing a fingerprint tends to chill speech without providing corresponding protection against fraud, and is unconstitutional. *Greenpeace, USA v. City of Glendale*, 3 Cal. App. 4th 340 (1992).

## **8. Most public employees may not be silenced by their superiors on matters of public interest.**

They ordinarily have the right to express their personal opinions (presented as such) on matters of legitimate public concern without fear of discipline or dismissal, even in criticism of their own employing agency and even if the opinions are based on mistaken facts—especially if the facts are matters of public record and open to anyone’s checking. *Pickering v. Board of Education*, 391 U.S. 563 (1968). “Whether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.” *Connick v. Myers*, 461 U.S. 138 (1983) Personal grievances and disputes with supervisors that do not call into question the performance of the agency’s mission, raise issues of actual wrongdoing or breach of the public trust are not matters of public concern in this context, and even the voicing of genuine matters of public concern may, under the First Amendment, lead to discipline or removal if the result is to poison close working relationships between superiors and subordinates essential to the effective operation of the agency, especially if the time, place and manner of the speech contributes to disruption or disharmony within the agency (*Connick*). But an employer’s snap decision that a subordinate’s offhand comment to a fellow worker outside the public earshot renders her unfit for employment, given the agency’s overall mission, is not sufficient for dismissal, since

... some attention must be paid to the responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee’s role entails. Where... an employee serves no confidential, policymaking, or public contact role, the danger to the agency’s successful

functioning from that employee's private speech is minimal.

*Rankin v. McPherson*, 483 U.S. 378 (1987)

The public employer's factfinding to determine what was said and the circumstances need not be as procedurally formal as the rules of evidence; the question is one of reasonable belief at the time. On the other hand, the employee is entitled to try to show that a finding of disruptiveness was a pretext for the discipline or dismissal, which was actually motivated more by her other criticisms of the agency, which were protected as matters of public concern and were not disruptive. *Waters v. Churchill*, 511 U.S. 661, 673 (1994). In cases of mixed motivation, the employee has the initial burden to show that his or her speech conduct was constitutionally protected and was a "substantial" or "motivating" factor in the employer's disciplinary or termination decision. If the employee makes those showings, then the burden shifts to the employer to show "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the [employee's] protected conduct." *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

## **9. Students' speech is more protected by California law than by the First Amendment.**

The First Amendment allows public school authorities to dictate the content of official school publications and activities—written and published or performed by students—provided the officials have a reasonable educational motive for doing so. For example, they may censor student newspapers to protect the sensibilities of younger students, or to avoid the impression that the school gives its official blessing to what may be offensive or otherwise controversial material. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). Moreover, the First Amendment provides no relief for students of private schools. On the other hand, provisions of the California Education Code, operating independently of, but with as much force as, the First Amendment, offer substantial protection for the freedom of student speech. Prior restraint (see 2 above) may not be used to censor student expression in official school publications or other unofficial media such as bulletin boards or flyers, buttons or badges, other than to prevent libel or slander, obscenity, or to suppress material "which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school." In student-written news publications, the content must be chosen by student editors, with advisors responsible only to teach and uphold professional standards of journalism. Finally, "School officials shall have the burden of showing justification without undue delay prior to any limitation of student expression under this section." (Education Code §48907)

Moreover, if a public or private high school student is disciplined or expelled for speech that would be constitutionally protected outside the school setting, he or she may sue for removal of the discipline or reinstatement in school, and if successful, may get a court order forcing the school authority to pay his or her attorney's fees. A sectarian school is not subject to this remedy if its application would violate the religious tenets of the denomination that operates the school. (Education Code §48950)

#### **10. The First Amendment conveys no right that is in principle uniquely that of the press.**

That is to say, those rights of journalists or news organizations held by the U.S. Supreme Court to be guaranteed by the First Amendment are, so far, simply parallels of those guaranteed to everyone as a matter of free speech. These include freedom from prior restraint (*Near v. Minnesota* (283 U.S. 697 (1931) ; *New York Times v. United States*, 403 U.S. 713 (1971); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976)); from compelled speech (*Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974)); and from arbitrary or content-sensitive regulation (*Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993)). The right to attend and observe all phases of criminal court proceedings, developed in a series of cases culminating in *Press-Enterprise v. Superior Court*, 478 U.S. 1 (1986), while waged exclusively by press organizations, is a right consistently expressed as one of the public as well as the press. In fact, cases decided under the First Amendment have consistently ruled *against* press arguments for special treatment, holding for example that journalists have no more right than other citizens:

- to gain information from interviews with persons subject to a valid "gag" or protective order from the court (*Sheppard v. Maxwell*, 384 U.S. 333 (1966)); or
- to visit prisons, jails, or inmates if the institution can show a valid penological objective for imposing the restriction (*Saxbe v. Washington Post*, 417 U.S. 843 (1974) and *Houchins v. KQED*, 438 U.S. 1 (1978)); or
- to refuse to reveal to a grand jury information gained as a percipient witness to a crime (*Branzburg v. Hayes*, 408 U.S. 665 (1972)); or
- to be exempt from otherwise properly warranted searches by law enforcement agencies (*Zurcher v. Stanford Daily*, 436 U.S. 547 (1978)); or
- to accompany law enforcement officers on searches of private premises subject to the Fourth Amendment (*Wilson v. Layne*, 526 U.S. 603 (1999)).