

Online Speech and the First Amendment: Ten Principles from the Supreme Court

1. The First Amendment's protections apply to online speech as much as to offline speech.

The First Amendment provides that “Congress shall make no law . . . prohibiting the freedom of speech.” This core principle applies whether the speech in question is shared in a public square or on the internet. As the Supreme Court recently stated, today, “the most important place[] . . . for the exchange of views[] . . . is cyberspace.” [Packingham v. North Carolina](#), 137 S. Ct. 1730, 1735 (2017). Indeed, the Supreme Court recognized more than two decades ago that the internet houses “vast democratic forums,” and there is therefore “no basis for qualifying the level of First Amendment scrutiny that should be applied” online. [Reno v. Am. Civil Liberties Union](#), 521 U.S. 844, 868, 870 (1997). As Congress continues its important oversight of online platforms, it must not legislate in ways that would threaten free expression online.

2. The First Amendment protects the right to receive and possess information, no matter where the information originates.

The Supreme Court articulated this principle in 1969 when it overturned a Georgia law that made it a crime to possess pornographic films. The Court reasoned: “[T]his right to receive information and ideas, regardless of their social worth, is fundamental to our free society.” [Stanley v. Georgia](#), 394 U.S. 557, 564 (1969).

The Court has also held that the receipt and possession of information are protected, regardless of the source of the information. Even at the height of the Cold War, the Court ruled that a federal law preventing the receipt of communist political propaganda in the mail from abroad constituted “an unconstitutional abridgment of the addressee’s First Amendment rights.” [Lamont v. Postmaster General](#), 381 U.S. 301, 306-07 (1965).

3. The First Amendment protects speech that society may consider offensive or reprehensible, including indecent and hateful speech.

In 1972, the Supreme Court explained that First Amendment protections are so broad because “the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.” [Healy v. James](#), 408 U.S. 169, 188 (1972). There, the Court overturned a state-supported college’s decision to refuse to recognize a local chapter of Students for a Democratic Society (SDS), a leftist student activist organization.

In 2017, the Court again made clear that First Amendment protections extend to speech that expresses hateful or derogatory viewpoints. After the U.S. Patent and Trademark Office refused to allow a band to trademark “The Slants” as its name, based on a federal law prohibiting “registration of trademarks that may ‘disparage...or bring... into contemp[t] or disrepute’ any persons,” the Court struck down the law as unconstitutional.

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The Court emphasized that “speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’” [Matal v. Tam](#), 137 S. Ct. 1744, 1764 (2017), citing [United States v. Schwimmer](#), 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

Speech that may be considered “indecent” is also protected. The government may not regulate such speech unless it is obscene, a narrow legal category that includes only speech that appeals to a prurient interest in sex or depicts certain sexual conduct in a “patently offensive” way, each as defined by local norms, and lacks “serious literary, artistic, political, or scientific value.” [Miller v. California](#), 413 U.S. 15, 24 (1973). In 1997, the Supreme Court ruled that a law prohibiting the transmission of pornography over the internet was unconstitutional, explaining that “[s]exual expression which is indecent but not obscene is protected by the First Amendment.” [Reno v. Am. Civil Liberties Union](#), 521 U.S. 844, 868, 870 (1997).

4. Political speech and advocacy are at the core of First Amendment protection.

The First Amendment protects the right of any person to engage in political speech and advocacy, regardless of whether it concerns a particular issue, public official, or candidate for office. In 1966, the Supreme Court struck down an Alabama law that made it a crime for a newspaper editor to publish an election-day editorial that sought to persuade people to vote in a particular way. The Court held that it would be “difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press,” reasoning that the First Amendment exists to “protect the free discussion of governmental affairs.” [Mills v. State of Ala.](#), 384 U.S. 214, 218 (1966).

5. The First Amendment protects anonymous speech.

Anonymous political speech has long been part of the American tradition and is constitutionally protected. In 1995, the Supreme Court struck down an Ohio prohibition on the distribution of anonymous campaign literature. The Court held that “an author's decision to remain anonymous...is an aspect of the freedom of speech protected by the First Amendment.” The Court went on to explain that legislators cannot ban anonymous political speech because anonymity “exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.” As such, it serves as “a shield from the tyranny of the majority.” [McIntyre v. Ohio Elections Comm’n](#), 514 U.S. 334, 342, 357 (1995).

6. The First Amendment protects false speech and speech criticizing public figures.

First Amendment protections extend to speech that is false and they substantially protect false statements that may damage the reputations of public figures. In 1964, the Supreme Court overturned a state court's judgment in favor of a public official who claimed that certain speakers defamed him, ruling that public officials must prove that the speakers either purposefully lied or spoke with reckless disregard for whether their statements were true. The Court explained that we have "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," and that means "it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." [*New York Times Co. v. Sullivan*](#), 376 U.S. 254, 283 (1964).

Speech that is not defamatory is protected even if the speaker knows it is false, as long as it does not cause specific harm. In 2012, the Court struck down the Stolen Valor Act, a federal law that made it a crime to falsely claim receipt of military decorations or medals. The Court explained that "[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society." [*United States v. Alvarez*](#), 567 U.S. 709, 727-29 (2012).

7. The First Amendment protects against government attempts to target speech based on its content.

The constitution sharply limits the government's ability to enact laws that target speech based on the topics it covers or the views it expresses. The Supreme Court reinforced this long-standing principle in 1991 when it struck down New York's "Son of Sam" law, which required all proceeds from a book written by an accused or convicted criminal to go to a special Crime Victims Board. The Court explained that "the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace," holding that "[t]he First Amendment presumptively places this sort of discrimination beyond the power of the government." [*Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*](#), 502 U.S. 105, 116 (1991).

8. The First Amendment protects against government efforts to impose prior restraints on publications.

The Supreme Court has roundly rejected attempts by the government to censor speech prior to publication. In 1963, the Supreme Court ruled that a state commission to review literature for "obscene, indecent or impure language" and investigate and recommend prosecution of the distribution of those materials constituted an unconstitutional prior restraint. The Court held that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," such that the government cannot enjoin "particular publications" that it finds "objectionable" without a prior "judicial determination[] that such publications may lawfully be banned." [*Bantam Books, Inc. v. Sullivan*](#), 372 U.S. 58, 70 (1963). To pass constitutional muster, prior restraints must also, at a minimum, be necessary to further a governmental interest of the highest magnitude. [*Nebraska Press Ass'n v. Stuart*](#), 427 U.S. 539, 562-66 (1976), and must include clear, narrow standards about what the government can restrain. [*Shuttlesworth v. City of Birmingham*](#), 394 U.S. 147, 150-51 (1969).

9. The First Amendment protects individuals from being compelled by the government to communicate messages with which they disagree.

In addition to guaranteeing individuals' rights to say what they want, the First Amendment protects them from being compelled by the government to say something against their will. In 1943, the Supreme Court struck down a state regulation requiring students to salute the flag or be expelled from school. The Court explained that "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, 642 (1943).

10. The First Amendment protects speakers' rights by limiting liability for intermediaries.

The First Amendment limits the liability that may be imposed on third parties who enable speakers to reach an audience, in order to protect the rights of speakers who depend on them. In *Smith v. California*, for example, the Court said that booksellers could not be strictly liable for obscene content in books they sell, because cautious booksellers would over-enforce, removing both legal and illegal books from the shelves. The resulting "censorship affecting the whole public" would be "hardly less virulent for being privately administered." 361 U.S. 147, 154 (1959). In *New York Times Co. v. Sullivan*, the Court observed that failing to protect the *New York Times* from liability for third party advertisements "would discourage newspapers from carrying 'editorial advertisements' ... and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities[.]" *Sullivan*, 376 U.S. at 266. The same principles apply to laws holding today's internet intermediaries liable for users' speech. Restrictive rules, which effectively outsource censorship of lawful speech to powerful private companies, may violate the First Amendment.

PARTICIPATING ORGANIZATIONS & CONTACT INFORMATION:

American Civil Liberties Union

Kate Ruane
kruane@aclu.org

Electronic Frontier Foundation

David Greene
davidg@eff.org

Corynne McSherry
corynne@eff.org

Brennan Center for Justice

Faiza Patel
patelf@brennan.law.nyu.edu

New America's Open Technology Institute

Sharon Bradford Franklin
franklin@opentechinstitute.org

Spandana Singh
singh@opentechinstitute.org

Center for Democracy and Technology

Emma Llansó
ellanso@cdt.org