

09-17 Class Session: First Amendment — Freedom of Speech vs. Expression, Tattooing Laws, and Nelson v. Streeter

Overview

- Setting: Classroom session led by Teacher ([Mr. Burkhard]) with students ([Speaker 1], [Speaker 2], and others including Anora, Aspen, Skylar, Lillian, Alex, Noah, Cole, Carlos, Adamari, Sebastian, Viviana, Chloe).
- Topic: First Amendment—Freedom of Speech and Freedom of Expression, with detailed case studies on restrictive tattooing laws (State of South Carolina v. Ronald P. White) and political satire/art (Nelson v. Streeter).
- Modes: Interactive lecture, guided question-and-answer sessions, in-depth case analysis, and administrative tasks including grade management.
- Core themes:
 - The nuanced difference between protected speech and nonverbal expression, and the conditions for the constitutional protection of expressive conduct.
 - The distinction between content-based and content-neutral government regulations, emphasizing the concept of the least restrictive means to achieve a legitimate state interest.
 - The strategic process by which individuals create “test cases” to challenge laws, often requiring arrest, conviction, or an adverse ruling to establish standing for appeal.
 - The balancing act between legitimate government interests (such as public health and property protection) and fundamental individual expressive rights.
 - Practical classroom logistics, including attendance protocols, device and phone policies, rules regarding tardiness and extra credit, and procedures for assignment submissions and grading.

Classroom Logistics and Policies

- Attendance and seating:
 - seating in a circular formation rather than a linear one.
- Devices and materials:

- Students were instructed to access the teacher's website and navigate to the very first link at the top, titled "First Amendment: Freedom of Expression."
- They were also asked to bring their Chromebooks and a chair to the designated "Big TIV" area.

Core Instruction: Freedom of Speech vs. Freedom of Expression

- Definitions:
 - Speech: Defined as the fundamental right to articulate thoughts and opinions verbally, or "the right to say things."
 - Expression: Explained as communicating beliefs or opinions through nonverbal means, with examples including clothing choices, hairstyles, message-bearing shirts (such as one saying "whiskey"), and tattoos. The teacher clarified that expression involves conveying one's opinion through something other than speaking.
- Protection of nonverbal expression:
 - Nonverbal expression is protected under the First Amendment if it contains "sufficient elements of communication."
 - However, not all expressive conduct is protected; the Supreme Court has been wary of granting generalized First Amendment protection to all nonverbal expression that conveys a message, as this could conceivably legitimize harmful, destructive, or otherwise illegal acts, even if motivated by an expressive purpose.
- Content-based vs. content-neutral regulation:
 - Content-based laws, which are directed at the specific message being conveyed, are typically found to be unconstitutional regulations of speech.
 - Conversely, content-neutral regulations, which are motivated by an important societal goal unrelated to the content of the expression (e.g., health, safety, property protection), can be permissible if they are narrowly tailored and justified by the government's interest.

Case Study Framework (Art as Speech)

- Recognized protected forms: The United States Supreme Court has held that nonverbal expression, including symbols, works of visual and written art, and even physical acts, may sometimes be considered speech and enjoy First Amendment protection, provided they have sufficient elements of communication.

- Key distinction:
 - Protected: Expressive art is protected in lawful contexts, such as creating art on a canvas, on one's own private property, or within an art class setting. For example, spray-painting graffiti in an art class is considered protected expression.
 - Unprotected: The same expressive act becomes unprotected when coupled with illegal conduct, such as spray-painting graffiti on public property like a bridge, which constitutes vandalism. The government's interest in protecting public property justifies regulating such acts, regardless of the artistic message.

Legal Process to Challenge Laws

- Strategy:
 - An individual can strategically engage in contested conduct to create a legal record, anticipating arrest or charges. This action is taken to establish standing, which is necessary to challenge the constitutionality of a law.
 - The typical path involves an arrest, followed by a trial ruling, and then an appeal asserting constitutional violations. This process can potentially lead to review by a state supreme court or even the U.S. Supreme Court.
- Rationale:
 - Courts generally require a concrete injury or a clear infringement of rights for a case to be heard and adjudicated, meaning a person must demonstrate that their rights have actually been taken away.
- Conclusion:
 - Creating a test case often necessitates that the individual be arrested or charged first, as this provides the tangible evidence that their rights were infringed, enabling them to pursue legal challenges.

Case Study 1: State of South Carolina v. Ronald P. White (1999) and Comparative State Context

- Facts:
 - In 1999, tattoo artist Ronald White of Florence, South Carolina, performed a tattoo on a man during a local television news broadcast. This act was a deliberate challenge to South Carolina's restrictive law, which prohibited tattooing by anyone other than a licensed physician for strictly cosmetic or reconstructive purposes.
 - Following the broadcast, Mr. White was promptly arrested, fined \$2,500, and placed on five years' probation for violating the state's

anti-tattoo law. He subsequently appealed his conviction to the South Carolina Supreme Court.

- The trial court did not consider expert medical testimony regarding the health risks of tattooing, instead relying on Mr. White's own concession that completely unregulated tattooing could potentially pose a public health risk.
- Comparative statewide context:
 - At the time, Oklahoma was noted as the only other state with a similar physician-only law, which restricted tattooing solely to licensed physicians for medical purposes (e.g., reconstructive procedures for burn victims or post-mastectomy nipple tattooing). In contrast, other states allowed tattooing but implemented health and safety regulations, including training, certification, and inspections for tattoo artists and shops.
- Government interests vs. expressive rights:
 - The *stated rationale* for such laws was public health, aiming to protect citizens from infection and disease associated with tattooing.
 - However, the *suspected hidden rationale* was a value-based disapproval of tattoos by lawmakers, who considered them "nasty and gross."
 - Tattoos were framed as a form of expressive conduct protected by the First Amendment, allowing individuals to express who they are by putting ink on their bodies.
- Least restrictive means:
 - The teacher argued that blanket bans or physician-only rules were overbroad and not the least restrictive means to achieve public health goals.
 - Viable alternatives included licensing tattoo artists, requiring specific training and coursework, implementing certification exams, establishing sanitation standards, and conducting regular inspections of tattoo shops. These measures could ensure public safety without prohibiting expressive tattooing.
 - The responsibility for aftercare was noted to lie with the tattoo recipient, distinguishing it from the professional compliance required of artists.
- Practical analogies:
 - The discussion drew parallels to graffiti: protected as art on a canvas or private property, but unprotected when it constitutes vandalism on public property.
 - Other expressive items mentioned included political shirts, shirts proclaiming "I have rights," and American flag tattoos.

- Reconstructive tattoos, such as post-mastectomy nipple tattooing, were acknowledged as legitimate medical exceptions within the restrictive laws.
- Expected outcome:
 - The discussion suggested that public health goals could be effectively met through targeted and less restrictive regulations, implying that categorical prohibitions like the one in South Carolina would likely fail constitutional scrutiny under the least restrictive means test.

Case Study 2: Nelson v. Streeter (1998) — Satire and Political Commentary

- Facts:
 - In May 1998, David Nelson, a student at the School of the Art Institute of Chicago, submitted his painting "Mirth and Girth" to the school's annual competition. The painting controversially depicted the recently deceased Chicago Mayor Harold Washington wearing women's lingerie.
 - Upon learning of the painting, three city aldermen went to the institute, removed the painting from display, and attempted to take it from the campus. During this process, the painting sustained a one-foot gash in the canvas. A fourth alderman then contacted the Chicago police superintendent, who ordered the painting to be taken into custody by police, accompanied by the three aldermen.
 - David Nelson subsequently filed a lawsuit against the aldermen, alleging that their actions violated his First Amendment rights.
- First Amendment principles:
 - The Supreme Court has consistently held that political cartoons and satire, even when offensive, caustic, or calculated to injure feelings, are robustly protected under the First Amendment due to their prominent role in public and political debate.
- Government actors under color of law:
 - Public officials acting under their official authority ("under color of law") who violate an individual's constitutional rights can be sued for monetary damages (e.g., under 42 U.S.C. § 1983). This means that a public official who suppresses protected speech faces a risk of financial liability, a consequence far more severe than mere vandalism or theft claims applicable to private citizens.
- Qualified immunity:
 - Officials are granted qualified immunity and are liable only if the unlawfulness of their conduct was "clearly established" at the time of the action. This means that even if a court later finds an action

unconstitutional, the official might be shielded from liability if prior cases did not clearly establish that such an action would be deemed unconstitutional.

- Conclusions:
 - Nelson's painting was recognized as protected expression, as an artist has the right to create and display satirical works, even if they are offensive to some.
 - The removal of the painting by government officials due to their offense constituted a violation of Nelson's First Amendment freedom of expression.
 - Any damages liability for the aldermen would depend on whether the specific right to display such a painting without government interference was clearly established in law at the time of their actions.

Pedagogical Questions and Student Input

- What is freedom of expression?
 - Students offered examples such as clothing choices, hairstyles, and message-bearing shirts.
- Do tattoo bans violate freedom of expression?
 - Student consensus generally leaned towards "yes," arguing that such bans limit expressive autonomy and could inadvertently encourage unsafe, "stick and poke" DIY tattooing practices, thereby undermining public health goals.
- Least restrictive means:
 - The class discussed that physician-only rules for tattooing are not the least restrictive means, as public safety can be adequately ensured through comprehensive licensing, training, and inspection regimes for tattoo artists and shops.
- Strategic civil disobedience:
 - It was highlighted that Ronald White's televised tattooing was a deliberate act of civil disobedience, specifically designed to force judicial review and create a legal test case.

Classroom Guidance and Expectations

- Objectives:
 - Students were expected to apply First Amendment principles to the case studies, identifying the rights involved, the government interests at stake, potential less restrictive means, and the likely constitutional outcomes.

- Responses were to specifically cite and discuss First Amendment protections.
- Work mode:
 - While discussion and collaboration were encouraged, students were explicitly instructed that their answers must be individually written. The teacher stated that identical submissions would result in half credit for each student involved.
- Visual aids:
 - The instructor provided a visual image for the Nelson v. Streeter case, along with other visuals as needed, to aid student understanding.

Assignments, Deadlines, and Grading Notes

- Freedom of Speech case studies:
 - These included cases about the Skokie Nazis march, a KKK leader's advocacy, a high-school poem, and a fourth unspecified case. They were theoretically due last Friday, and the teacher intended to grade them today, having announced on Monday that they should be ready.
- Student Freedom of Speech Analysis:
 - This was described as a "bell-ringer" activity, focusing on book banning, the specific books involved, and the reasons for their potential banning. It was given out on Monday, expected to take 10–15 minutes, and was posted on the class webpage for today.
- Freedom of Expression case studies:
 - This was a new set of case studies, with the expectation that they could extend into early next week if necessary.
- In-class policy:
 - The current class period was designated as a workday, during which music was permitted until lunch. The teacher stated that music would continue to be allowed after lunch only if students demonstrated productive work before lunch.
- Time cues:
 - At one point, students were informed that 13 minutes remained until lunch and were encouraged to use the time wisely to finish either the Freedom of Speech case studies or the analysis.

Individual Student Administrative/Grade Details

Behavioral and Classroom Management Notes

Music was allowed during the workday, contingent on students remaining productive. If students were observed "goofing off" before lunch, music would not be permitted after lunch.

- The teacher openly invited students to raise any grade concerns directly, stating they were "in a good frame of mind to be yelled at today."
- Ms. Renee was identified as a support person who could proctor quiz retakes with notes.
- The teacher showed concern for student well-being by checking in on Lily's mood, noting she seemed "a little down today."

Key Conclusions

- Freedom of expression encompasses nonverbal forms, including tattoos, with constitutional protection dependent on communicative intent and the lawfulness of the context.
- Content-neutral, narrowly tailored regulations can legitimately limit the mode of expression for important government interests (e.g., health, safety, property protection), whereas content-based restrictions are generally presumed unconstitutional.
- Blanket or near-total prohibitions, such as physician-only tattoo rules, are likely unconstitutional when less restrictive health regulations can effectively achieve public safety without unduly suppressing expression.
- Creating a legal test case typically necessitates that an individual incur a tangible injury, such as an arrest or charge, to establish the necessary standing for appellate review.
- The classroom environment emphasized the importance of clear procedures for assignment submission, attendance, managing tardiness, and adherence to device and phone policies.

To-Dos and Follow-Ups

- Students:
 - Open the teacher's website and navigate to the "First Amendment: Freedom of Expression" link.
 - Complete and submit the Freedom of Speech case studies (covering topics like the Skokie Nazis march, KKK advocacy, a high-school poem, and a fourth case).
 - Complete the Student Freedom of Speech Analysis, which is a book-banning bell-ringer activity.
 - Continue working on the Freedom of Expression case studies, aiming for completion by early next week.

- Verify that all assignments show as submitted; re-submit if necessary and email the instructor upon completion to ensure timely grade updates.
- Teacher:
 - Grade all pending work, including any items that can be graded quickly.
 - Meet with students individually to address and resolve grading and extra credit concerns.
 - Record tardies and apply extra credit deductions strictly according to established policy.
 - Deliver the confiscated phone to Mr. Naughton after classes are concluded.
 - Post the prior class summary to the website.

Next Arrangements and Action Items

- ☐ Open the teacher's website → First Amendment: Freedom of Expression.
- ☐ Finish and submit Freedom of Speech case studies for grading.
- ☐ Complete the book-banning bell-ringer (Student Freedom of Speech Analysis).
- ☐ Continue Freedom of Expression case studies (target early next week).
- ☐ Check that assignments show as submitted; re-submit if needed and email the instructor.
- ☐ Teacher: Grade pending items; meet students about grades/extra credit.
- ☐ Teacher: Record tardies and apply extra credit deductions.