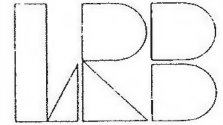


Wendell K. Kimura  
Acting Director

Research (808) 587-0666  
Revisor (808) 587-0670  
Fax (808) 587-0681



LEGISLATIVE REFERENCE BUREAU  
State of Hawaii  
State Capitol  
Honolulu, Hawaii 96813

No. 02-16

# LRB Notes

October 28, 2002

## FREEDOM OF SPEECH

By Mark Rosen

The First Amendment of the United States Constitution, and Article I, Section 4 of the Hawaii State Constitution, among other things, expressly prohibit the enactment of laws that would abridge the freedom of speech. The right to freedom of speech is one of the fundamental rights protected by the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution from impairment by state action. Any government action that chills constitutionally protected speech therefore violates the First Amendment.

This Note gives a brief description of some of the features of our right to freedom of speech. This memo is not meant to be a comprehensive treatment of this complicated constitutional subject.

### ***Q1: What are the freedoms guaranteed by the First Amendment?***

A1: The First Amendment is part of the Bill of Rights of the United States Constitution, that is, the rights of individuals that are legally protected against violation by the government. The First Amendment was designed as a constraint on the power and encroachment of the central government, and guarantees the freedoms of religion, speech, press, and assembly, as well as "the right of the people to petition the Government for a redress of grievances".

### ***Q2: What is the purpose of the constitutional right to free speech?***

A2: The First Amendment's guarantee of freedom of speech was designed to allow all people -- including those in extremist groups -- to freely express themselves, even if their speech creates unrest, dissatisfaction, or anger. The idea is that the government will be responsive to the will of the people only through free debate and the free exchange of ideas. The right to speak freely promotes a greater diversity of ideas and distinguishes the United States from more repressive countries.

**Q3: *Does freedom of speech mean that people can say anything they want, any time they want, and anywhere they want?***

A3: No. Speech that is protected under the First Amendment is not absolute at all times and under all circumstances. There are well-defined and narrowly limited classes of speech that may be restricted. For example, "fighting words" -- words that by themselves may cause an immediate breach of the peace or inflict injury or cause violence -- as well as libelous, obscene, and profane speech may be regulated by the State. State or county laws that burden speech incidentally or that control the time, place, and manner of expression of the speech are not invalid simply because there is some alternative that is less burdensome. Moreover, a law that is "content-neutral" -- in which speech is regulated without reference to the content of the speech -- does not pose the same threat as do content-based regulations.

In other words, if the State wants to regulate the content of speech, it must provide substantial justification for such regulation. If a state law does not regulate the content of speech, but merely other aspects of speech, then the justification for that law need not be as rigid.

**Q4: *Does speech refer only to verbal statements?***

A4: No. The right to freedom of speech includes nonverbal speech or expressive conduct. This conduct ranges from the display of a flag or a sign, dressing in a certain way, wearing a beard or a particular hair style, using funds to support a political candidate, and certain public parades and demonstrations. Thus, for example, while the expressive content of a parade may not be altered, reasonable restrictions may be placed on the time, place, and manner of the parade when these are necessary to further significant governmental interests, and if the interest is not related to the suppression of free speech.

**Q5: *Does the First Amendment protect against censorship?***

A5: Yes, although some restraint may be allowed under certain circumstances. The First Amendment's guarantee of freedom of speech was meant to put an end to restraints that at one time in English history were imposed on the public's right to speak and write. Generally, the First Amendment prohibits "prior restraint" -- the imposition of a restraint on a communication or publication before it is published. However, there is an exception for obscene publications, publications that invade the zone of personal privacy, and the fact that a publication creates a "clear and present danger".

**Q6: *What is the "clear and present danger" doctrine?***

A6: This doctrine allows for the government to impose restrictions on the freedom of speech and the press if necessary to prevent grave and immediate danger to interests that the government may lawfully protect. The issue is whether the nature of the words used, and the circumstances in which they are used, create a "clear and present danger" that they will bring about serious substantive evils that rise above public inconvenience or unrest. Perhaps the most famous expression of this concept is the idea that a person does not have a right to (falsely) "shout 'Fire' in a crowded theater".

**Q7: *Why can't the government simply pass laws to outlaw obscene pictures and broadcasts?***

A7: Generally, obscenity itself is not constitutionally protected speech or expression. The commercial exploitation of obscene material, such as the sale of obscene materials to anyone, even consenting adults, is not constitutionally protected and may be regulated by the State. However, the federal and state governments cannot simply adopt whatever procedures they want to deal with obscenity. Although the government may impose a system of prior restraint of obscene material, it must first comply with certain procedural safeguards to ensure that that system does not violate the First Amendment. Moreover, while the creation and distribution of obscene materials may be punished criminally, a state system of informal censorship of books, magazines, or movies may be considered an unlawful prior restraint on speech.

It should also be noted that terms such as "obscene" and "obscenity" are used very loosely to describe a very wide range of words, pictures, and conduct, and there are often vastly different views as to whether a particular item is "obscene" or "artistic". There is an entire body of law devoted specifically to issues concerning obscenity.

**Q8: *Does the freedom of speech also apply to commercial advertising?***

A8: Yes, but to a more limited extent than other types of non-commercial speech. "Commercial speech" -- speech that advertises a product or service for profit or for a business purpose -- was formerly not protected under the First Amendment, but now is protected to a more limited degree. As long as the speech is not misleading or fraudulent and concerns a lawful activity, the speech may be restricted only if the government's interest in doing so is substantial, the restrictions directly advance the government's interest, and the restrictions are no more extensive than necessary to serve that interest.

**Q9:** *Can you give an example of how far a law may go in this area without violating the right to freedom of speech? What is the distinction between an invalid law and a valid law?*

**A9:** Generally, in order for a law to qualify as a valid time, place, or manner restriction on free expression, the restriction must: (1) be "content-neutral"; (2) be "narrowly tailored to serve a significant government interest"; and (3) "leave open ample alternative channels of communication". However, applying these requirements in a real world context is not always easy; there is often a fine line between an invalid and a valid regulation affecting freedom of speech.

A case brought in the United States District Court in Hawaii and reversed on appeal is a good example of the difficulty in applying these rules to a particular factual situation. In that case, a Honolulu city ordinance was enacted to reduce the proliferation of newsracks in Waikiki by requiring all publishers to distribute their publications along sidewalks in that district to use one of two sets of newsracks: one set which was reserved solely for publications that charged readers, and the other set for free publications. The ordinance also required two sets of lotteries, one for coin-operated racks and one for noncoin-operated racks, every three years to determine which publishers could receive a permit for particular newsrack locations. A free newspaper that had been denied a permit to use the coin-operated racks sued in part on the grounds that the city's ordinance violated the newspaper's First Amendment right to freedom of speech.

Both the lower and appellate courts agreed that this type of regulation was "content-neutral", since any burden upon speech was without reference to the ideas that were expressed. The ordinance established a system that divided the publications into two classes based on whether or not the publisher charged its readers. This type of regulation also left open ample alternative channels of communication, since publications could use distribution mechanisms both inside and outside of the Waikiki district.

The determination of whether the law was valid or invalid came down to whether the regulation was "narrowly tailored to serve a significant government interest". This requirement can be met if the regulation promotes a substantial government interest that would be achieved less effectively without the regulation of speech, and the regulation is not substantially broader than necessary to achieve the government's interest.

In this case, the court found that the ordinance was enacted to protect the health, safety, and welfare of pedestrians; to preserve the aesthetics of the Waikiki Special District; and to facilitate the distribution of publications. Courts have found that the government has a substantial interest in protecting its citizens' health and welfare, and that aesthetics can be a substantial governmental interest. However, the federal

district court found that the ordinance, as applied, was a sweeping restriction that was not narrowly tailored to serve either aesthetics or safety, since preventing a free publication from using coin-operated racks, which offered a better, larger display than the non-coin operated racks, did not affect either aesthetics or safety.

The federal appellate court disagreed and upheld the ordinance, noting that the District Court "tried a little too hard to imagine an ordinance that would best balance the goals of the city with the desires of publishers." The Court of Appeals found the ordinance to be narrowly tailored to meet the government's interests, noting that it would not look into whether the method of addressing the problem was the best possible solution or the least restrictive means of doing so. However this case may be ultimately decided should it be further appealed, it serves as an example of how reasonable people and courts may differ about how to apply constitutional principles of freedom of speech to a specific set of facts.