言論自由(上)

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freedom of speech, or of the press…”

Q 僅限制國會(Congress)?

Ω 實際亦限制總統(行政)與法院(司法);並經由 14th Amend.（涵攝 1st Amend.）適用於各州

Q “No law”？

Ω 1st Amend. 從來不是絕對的保障

Q “of speech”？

Ω 1st Amend.保護範圍亦及於表意的「行為」-- 象徵性言論(symbolic speech)，例如焚燒國旗以示異議

一、言論自由的限制

(一) 事前審查(censorship, prior restraint)

＝預防制

1. 何謂「事前審查」(Alexander v. United States)
2. 事前審查之為害
3. 原則上違憲（不問審查之形式），例外始為合憲

3.1 例外情形（如戰時涉及國家機密之報導、猥褻出版品、煽惑以暴力推翻合法政府等）

Cf. Near v. Minnesota (1931)

3.2 政府應負責舉證其為合憲 *Cf.* New York Times Co. v. United States (1971, Pentagon Papers case): heavy burden of justification

3.3 須有程序保障

1) 陳述意見或言詞辯論之機會 (Carroll v. President and Comm. of Princess Anne County (1977))

2) 迅速獲得司法審查之機會

(National Socialist Party of America v. Village of Skokie (1977))

(二) 事後處罰(subsequent punishment)

＝追懲制（刑事、民事制裁）

二、雙軌理論(two-track theory)的司法審查

(一) 以言論內容為基礎的管制(content-based regulations)

Prof. Tribe 稱為 ***“Track one” analysis***: regulations aimed at “*communicative impact*”，例如：藥物廣告限制、攻擊性言論(offensive speech) →

適用「嚴格審查標準」(the strict scrutiny test)：政府應舉證系爭之言論自由限制係為追求（實現）「優位的政府利益所必要，且為量身剪裁之手段」(necessary and narrowly tailored means to achieve a compelling state interest) 或為「限制最少之手段」(the least restrictive means to further the claimed governmental interests)

(二) 與言論內容無關的管制(content-neutral regulations)

＝ 時間、地點、方式之管制(time, place and manner restrictions)

Prof. Tribe 稱為 ***“Track two” analysis***: regulations aimed at “*non-communicative impact*” but might having adverse effects on communicative opportunities。例如，禁止夜間在住宅區使用噪音型擴音器遊行等 →

適用「中度審查標準」(the intermediate scrutiny test)：政府應舉證系爭之言論自由限制與「追求（實現）

重要政府利益具有實質關連(substantially related to significant, substantial, or important governmental interests)，且「尚保留許多其他表意管道」(leave open ample alternative channels of communication)

或

「合理審查標準」(the rational relationship test or the rational basis test)：系爭之言論自由限制乃追求（實現）合法政府目的之合理手段」(rational means to legitimate governmental end)

三、雙層理論(two-layer theory)＝ 雙階理論(two-tier theory)

關於「以言論內容為基礎的管制」(content-based restrictions)，更按**系爭言論之價值**，給予不同程度之保障

(一) 高價值言論→ 完全保障(fully protected speech)

如：政治、學術、文學、藝術言論 *Cf.* 釋字 445

(二) 低價值言論→ 有限度保障（甚或不予保障）

1. 猥褻言論(obscenity)

1.1 定義：猥褻≠色情(pornography)

1.2 Miller v. California: the ***Miller*** test

a) Whether the ***average person***, applying ***contemporary community standards***, would find that the work taken as a whole appeals to the prurient interest.

b) Whether the work depicts, in a patently offensive way, sexual conduct.

c) Whether the work taken a whole lacks

serious literary, artistic, political or scientific value.

認定之分工：

Issues of fact for the jury to determine: appeal to prurient interest & patent offensiveness.

Matter of law to be determined by the court: Whether lacks serious literary, artistic, political or scientific value is to be found by ***a reasonable person***, rather than an ordinary member of any given community

1.3 例外

- To possess obscene material “in the privacy of his own home.”
- Child Pornography: Ashcroft v. Free Speech Coalition

1.4 *Cf.* 釋字 407

2. 商業言論(commercial speech)

2.1 定義：以促銷（促成交易）為目的之言論

2.2 **Four-prong *Central Hudson* test**

1) Whether the commercial speech at issue is protected by the First Amendment, i.e., if the regulated speech is ***misleading*** or concerns an ***illegal activity*** ?

2) Whether the asserted government interest in restricting is ***substantial*** ?

If both inquires yield positive answers, then

3) Does the regulation ***directly advance*** the government interest asserted ?

4) Is the restriction "***not more extensive than is necessary*** to serve that interest" ?

The fourth prong is satisfied if there is ***a reasonable fit*** between the legislature's ends and the means chosen to accomplish those ends.

2.3 *Cf.* 釋字 414, 釋字 577

3. 誹謗性言論(defamation = libel & slander)

故意為有關他人之不實傳述，致他人名譽受損；

3.1 對「公眾人物」(public figure)或「官員」(public officials)

New York Times v. Sullivan (1964)

原告須證明被告（媒體）「確有惡意」(actual malice)（亦即「明知」或「因重大過失而不知」其所言不實而言之），始能獲判賠償

Hustler Magazine v. Falwell (1988)

(Libel of a public official is only unprotected if the falsehood was intentional or at least reckless).

3.2 對「私人」(private figure)

原告須證明被告（媒體）有「過失」，始得

判賠；但涉及公共事務之誹謗則更須證明被告「確有惡意」，始得請求「精神上損害賠償」(presumed damages)或「懲罰性損害賠償」(punitive damages)

4. 挑釁言論(fighting words)

4.1 Chaplinsky v. New Hampshire (1942)

1) The ***insulting or fighting words***--

"Those which by their very utterance inflict injury or tend to incite an imminent breach of the peace", and are "no essential part of any exposition of ideas, and of such slight social value as a step to truth"

2) Chaplinsky, a Jehovah's Witness said to a listener, "You are a God damned racketeer" and "a damned Fascist and the government of Rochester are Fascists or agents of Fascists."

→ It's likely to cause a violent response against the speaker, or it's an insult likely to inflict immediate emotional harm.

4.2 冒犯性言論(offensive speech)尚不構成「挑釁言論」

Cohen v. California (1971): The offensiveness of a symbol ("Fuck the Draft" jacket) is not a basis for banning it and that people in public places have little

or no claim to be considered captive audience.

J. Harlan: “No individual actually or likely to be present could reasonably regard the words on the appellant’s jacket as a direct personal insult.”

4.3 仇恨性言論(hate speech)

僅於不涉及「以內容為基礎之分類」(content-based distinctions)時，始能構成「挑釁言論」

R.A.V. v. City of St. Paul (1992)

1) City ordinance banned placing on public or private property a symbol, including a burning cross or Nazi swastika, if one knows or has reasonable grounds to know ***arouses anger, alarm or resentment*** in others on the basis of race, color, creed, religion or gender”

2) J. Scalia (majority opinion):

A content-based distinction within a category of unprotected speech will have to meet strict scrutiny, subject to two exceptions.

a. If it directly advances the reason why the category of speech is unprotected;

b. If it is directed at remedying

secondary effects of speech and is justified without referring to content.

The Ordinance was unconstitutional as it prohibited hate speech based on race, religion or gender, but not based upon political affiliation or sexual orientation.

5. 煽惑違法之言論

5.1 Schenk v. U.S. (1919): Clear and Present Danger Doctrine

1) J. Holmes：任何人不得主張言論自由，而在擁擠的戲院謊稱失火

2) 惟合法的言者之自由可能因違法的聽者而受到限制

5.2 Brandenburg v. Ohio (1969): advocacy/indictment distinction

倡議使用暴力或犯罪之言論，僅於

1) the advocacy is ***directed to*** inciting or producing imminent lawless action; and

2) the advocacy is ***likely to*** incite or produce such action 時，方得禁止。

6. 象徵性言論(symbolic speech)

Q 「言論」包含「表意的行為」(expressive conduct)，例如焚燒國旗（政治性）或跳脫衣舞（道德性）？

6.1 United States v. O’Brien (1968)

1) If the government has an important

interest unrelated to suppression of the message, and

2) If the impact of restriction on communication is no more than necessary to achieve the government's purpose
禁止故意毀損徵兵登記卡之聯邦法律為「合憲」
→ 近似「中標」(intermediate scrutiny)

6.2 Texas v. Johnson (1989) 焚燒國旗事件

1) 禁止 any person to "deface, damage or otherwise physically mistreat" a flag "in a way that the actor knows will seriously offended one or more persons likely to observe or discover his action"之州法律，違憲。

2) J. Brennan：本案與 *O'Brien* 案不同，系爭州法之目的乃在禁止使用國旗表達異議

6.3 West Virginia State Board of Education v. Barnett (1943)

1) 規定學童須向國旗敬禮之州法，違憲。

2) J. Jackson："Symbolism is a primitive but effectiveway of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a short cut from mind to

mind."

6.4 Barnes v. Glen Theater, Inc.(1990)

1) 依據禁止公然裸體之（印第安那）州法，禁止女性全裸舞蹈，合憲

2) 複數意見(C. J. Rehnquist)：「非屬猥褻之娛樂性質之脫衣舞應屬**意見**，可享受有限度之言論自由」；採「嚴格標準」審查，合憲

3) 協同意見(J. Scalia)：系爭州法乃針對「行為」(而非「言論」)之管制；採「合理標準」審查，合憲

4) 協同意見(J. Souter)：系爭州法乃為促進「防止嫖妓、性侵害及有關犯罪」之政府利益，合憲

5) 不同意見(J. White)：禁止裸舞乃為壓抑言論。且屬「以內容為標的」而限制言論之選擇性執法。採「嚴格標準」審查，認不具優越之政府利益，違憲。

四、新聞自由(Freedom of the Press)

(一) 公平接近使用廣電媒體權

1. Red Lion Broadcasting Co. v. Federal Communications Commission (1969)

1.1 法律規定廣電媒體應平衡報導公共議題。凡個人之誠信或人格遭受攻擊時，受攻擊者應被告知，並應有答辯之機會(opportunity to reply).

1.2 係爭規定合憲，因為廣電頻率具有稀少性 (scarcity rationale)

J. White: "in view of the ***scarcity of broadcast frequencies***, the Government's role in allocating those frequencies and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations…constitutional."

2. Miami Herald Pub. Co. v. Tornillo (1974)

2.1 佛羅里達州法規定，公職候選人之人格或政績遭受報紙攻擊者，該報紙應於同樣顯著位置免費刊登其人之回應。

2.2 係爭規定違憲，蓋「平面媒體」與「廣電媒體」性質不同。

C. J. Burger: "Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty…is exacted in terms of the cost in printing and …in taking up space that could be devoted to other material the newspaper may have preferred to print…Faced with [such a penalty], editors might well conclude that the safe course is to avoid controversy."

3. *Cf.* 釋字 364

(二) 有線電視媒體之管制

Turner Broadcasting System, Inc. v. FCC 114 S.Ct. 2445 (1994)

1. 聯邦有線電視法(The Federal Cable Act)規定有線電視公司均應播出地方無線廣播系統所製作的節目。
2. 有線電視與無線電視不同，應適用中度審查基準。

J. Kennedy: "The rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation does not apply in the context of cable regulation. The justifications for our distinct approach to broadcast regulation rests on the ***unique physical limitations of the broadcast medium***…The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium."

【進階閱讀】

李念祖，〈從釋字五０九號解釋論「陳述不實」是否為「誹謗罪」之構成要件-- 兼論社會變遷中言論自由憲法解釋對刑法及其解釋之影響〉，輯於湯德宗主編，《憲法解釋之理論與實務》第四輯，頁 233-290（台北：中央研究院法律學研究所，2005 年 5 月）。

Michael J. Perry, *Freedom of Expression: An Essay on Theory And Doctrine*, 78 Northwestern University Law Review 1137 (1983).