

What Is Symbolic Speech? When Is It Protected?

The First Amendment says: 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 to peaceably assemble and to petition the government for a redress of grievances.

Is all speech free?

The freedom of speech clause of the First Amendment guarantees the right to express information and ideas. On its most basic level, it means you can express an opinion without fear of censorship by the government, even if that opinion is an unpopular one. It protects all forms of communication: speeches, books, art, newspapers, telecommunications, and other media.

The First Amendment does not mean you can say anything you want, wherever you want, or whenever you want. For instance, fighting words – words that cause distress or incite violence – are not protected. In addition, obscene expressions are not protected by the First Amendment. If you tell a lie about someone who then sues you because you damaged their reputation, you will not be able to claim that the First Amendment protects you.

What is symbolic speech?

Sometimes speech is spoken or written. Sometimes speech is symbolic or an action. Symbolic speech is conduct that expresses an idea. Although speech is commonly thought of as verbal expression, we are all aware of nonverbal communication. Sit-ins, flag waving, demonstrations, and wearing . . . protest buttons are examples of symbolic speech. While most forms of conduct could be said to express ideas in some way, only some conduct is protected as symbolic speech. In analyzing such cases, the courts ask whether the speaker intended to convey a particular message and whether it is likely that the message was understood by those who viewed it. To convince a court that symbolic conduct should be punished and not protected as speech, the government must show it has an important reason. However, the reason cannot be that the government disapproves of the message conveyed by the symbolic conduct.

So, just as there are limitations on the extent to which "free speech" applies to the spoken word, there are restrictions on the actions that people seek to have protected as symbolic speech. Examine the actions on the next page. Based on the information you have just read, determine if each action listed is a form of constitutionally protected "symbolic speech." In the last column, provide a brief rationale for your response.

ACTIVITIES

Action	Is the action a form of constitutionally protected "symbolic speech?"		Rationale
	Yes	No	
In order to protest against a former employer, an individual joins a picket line. State law says picketing is illegal. The individual is arrested and fined \$100.			
An individual burns a draft card to express opposition to the war. Federal law says that burning draft cards is a crime.			
A person taped a peace symbol to an American flag and then hung the flag upside down in the window of his apartment. An upside down flag is typically a symbol of distress or danger. This person believed the nation was in trouble. He was arrested and convicted of violating a state law against improper use of the flag.			
In response to increasing racial tensions on campus, school officials banned images of the Confederate flag from their high school. A group of students filed suit saying they should be allowed to wear t-shirts to school depicting the Confederate flag to show their pride in their Southern heritage.			
An organization applies for a permit to hold a demonstration on the National Mall. Members plan to erect "tent cities" in order to demonstrate the plight of the homeless. The permit was denied on the grounds that camping is forbidden on the Mall.			
New Hampshire's state motto, "Live Free or Die" appears on license plates. An individual covers "or die" on the grounds that it goes against his religious and political beliefs. He is convicted for violating a state law, fined, and sentenced to jail time.			

Questions to consider

1. Are there any general standards that seem to apply to symbolic speech?
2. Based on what you have learned about symbolic speech, how do you think the Court will rule in *Texas v. Johnson*

This material is used with permission and was originally published in Street Law: A Course in Practical Law, Eighth Edition. Glencoe/McGraw-Hill. (2010)