



First Amendment and Sexual Expression

Sexual expression is protected by the First Amendment. Despite that, sexual content is often targeted for censorship and dismissed as trivial, obscene, or immoral.

Lawmakers continue to argue for bans or restrictions on sexual material, often based on grounds of morality. In other words, they think it should be legal to ban content if they believe it is immoral, offensive, or dangerous to children. However, the Supreme Court has made it clear that morality alone cannot justify these restrictions.^{1 2 3}

For much of U.S. history, moral arguments fueled censorship campaigns for everything from sexual novels to information about safe sex. Today, the same reasoning resurfaces in debates over drag performances, sex education, and content about LGBTQ+ experiences. However, these are not legally valid reasons for censorship. Legally, “obscenity” is the only category of sexual material that the government can restrict, and even then, the Supreme Court has a very narrow definition for what makes something obscene.

Maintaining this narrow definition of obscenity is important for protecting First Amendment rights for everyone; once sexuality is censored, it opens the door to reinterpreting the power of the First Amendment for other content, too. When the government decides what speech is allowable based on morality, the previously trusted limits of the First Amendment disappear. Today, it may be societally acceptable to ban pornography, drag performances, or certain books. But tomorrow, the people in power could choose to ban information about healthcare or specific spiritual practices. Once censorship is justified by subjective values rather than constitutional principles, no one’s rights are secure.

¹ *Lawrence v. Texas*

² *Reno v. ACLU*

³ *FCC v Pacifica Foundation*

Can sexual content be censored under the First Amendment?

For the most part, no. The Supreme Court has established that only obscene content is not protected by the First Amendment.⁴ All other sexual content is presumed to be protected by the First Amendment.^{5 6}

The definition of obscene is intentionally strict. **Most pornography does not qualify as obscene and remains protected speech.** To be considered legally obscene, material must meet three conditions:

- (1) the content appeals only to a deviant sexual interest
- (2) the content is clearly offensive, going beyond present-day community standards
- (3) Overall, it does not have literary, artistic, political, or scientific value.

This means that most sexual content, including sex education materials, art depicting nudity or sexual behavior, LGBTQ+ content, and erotic content for adults, is all protected by the First Amendment.

The Supreme Court has affirmed this protection in multiple decisions. In *Stanley v. Georgia*, the court ruled that having even obscene materials in one's home is a right protected by the Constitution.⁷ In *Ashcroft v. Free Speech Coalition*, the Supreme Court blocked a law that made it a crime to create computer-generated sexual images of adults who appear youthful, explaining that legal sexual expression cannot be banned just because some people find it offensive or uncomfortable.⁸ The Supreme Court has also invalidated a law that restricted access to violent and erotic video games, and refused to create new restrictions on protected expression.⁹ These rulings confirm that explicit adult content is protected, even when viewed as unpopular or immoral.

Gender expression is equally protected. In *Doe v. Yunits*, a Massachusetts court applied this reasoning to gender, ruling that a transgender student's choice of clothing was protected expression.¹⁰

⁴ *Miller v. California*

⁵ *Reno v. ACLU*

⁶ *FCC v. Pacifica Foundation*

⁷ *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

⁸ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 251–56 (2002).

⁹ *Brown v. Entertainment Merchants Assn.*

¹⁰ *Doe v. Yunits*

As these historical cases suggest, the court has protected sexual expression and sexual freedom. But, morality arguments continue. Those making these arguments often suggest that allowing legal sexual expression now could lead to more dangerous or obscene content becoming legal in the future. However, content that is clearly and universally harmful, such as child sexual abuse material (CSAM), is already a serious crime. Maintaining First Amendment protections for legal content does not lessen the strict laws against CSAM or other dangerous content, which is already clearly illegal. Illegal activity has, and will continue to be regulated and criminalized, even when legal sexual expression is allowed. In other words, authorities do not need to ban or censor legal sexual content to criminalize illegal behavior.

Does censoring sexual content really impact all of us?

Yes. Censoring sexual content limits access to important information about bodies, relationships, and safety, which affects people of all ages. It also gives the government more control over what we're allowed to see and learn, which obstructs the First Amendment and sets legal precedent to restrict non-sexual content in the future.

Sexual material considered immoral or inferior is often the first to be censored, but rarely the last. In recent years, censored material has included information about reproductive health and safe sex practices, content by sex workers and drag queens, and books about queer relationships or identities. This usually occurs because lawmakers and advocates use morality as a reason to justify censoring content they are not personally comfortable with, arguing such content is harmful to children and families. These efforts disproportionately target LGBTQ+ communities, women, and sex workers because they are more likely to operate outside of the normative ideas of "morality". However, these measures actually make it less safe for many students, families, and communities because they limit access to essential knowledge about sexuality, health, and identity. The harm is compounded for LGBTQ+ youth and other minorities, who often rely on schools and libraries for safe and accurate information.^{11 12}

The Supreme Court has recognized that the First Amendment protects the right to speak **and** the right to receive information.^{13 14} However, politicians have recently attempted to revive the 19th-century anti-obscenity Comstock Act, which was once used to ban

¹¹ Hawkins, 2022

¹² Oltmann, 2016

¹³ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*

¹⁴ *Bd. of Educ. v. Pico*

information about contraception and sexual health, and literature with sexual themes.¹⁵ Today, if reintroduced, it could also be used to remove access to reproductive care and gender-affirming health services.

Sexual expression has also recently been under attack. Recent drag bans, age verification statutes, pronoun restrictions, and dress-code laws have targeted the expressive aspects of identity, with lawmakers supporting these policies because of their belief that the content or behavior is immoral. However, morality is not a factor in the First Amendment, and wearing clothing aligned with one's gender identity is protected by the same right that allows people to wear Christian crucifixes as jewelry or armbands to protest war. Banning one type of expression legally opens the door to censoring other forms of expression.

References

Ashcroft v. Free Speech Coalition, 535 U.S. 234, 251–56 (2002).

Bd. of Educ. v. Pico, 457 U.S. 853, 872 (1982).

Brown v. Entertainment Merchants Assn., 564 U.S. 786 (2011).

Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *4 (Mass. Super. Ct. Oct. 11, 2000).

FCC v Pacifica Foundation, 438 U.S. 726 (1978)

Hawkins, Beth 2022

<https://www.laschoolreport.com/how-libraries-came-to-be-sanctuaries-for-lgbtq-kids/>

Lawrence v. Texas, 539 U.S. 558, 578 (2003).

Miller v. California, 413 U.S. 15, 24 (1973).

Oltmann, Shannon 2016

<https://www.yalsa.ala.org/jrly/2016/03/they-kind-of-rely-on-the-library-school-librarians-serving-lgbt-students/>

Reno v. ACLU, 521 U.S. 844 (1997)

Stanley v. Georgia, 394 U.S. 557, 564 (1969).

¹⁵ Werbel (2018)

Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 757 (1976).

Werbel, Amy *Lust on Trial: Censorship and the Rise of American Obscenity in the Age of Anthony Comstock* 22–29 (2018).