Flow Charts

Text of the regulation

Justification for the regulation

*Unless there is an exception…*

* 1) Must be a compelling governmental interest **&**
* 2) Must be narrowly tailored and the least restrictive means of achieving that interest

**NO**

*Apply Intermediate-scrutiny*

**YES** *Apply strict-scrutiny*

When you have a regulation of speech…

…is the regulation of speech **content-based?** [or **content-neutral**]

*Look to the:*

***Miller******Test for Determining Obscenity***

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

b) Whether the work depicts or describes, in a patently offensive way, sexual conduct prohibited by law

c) Whether it lacks serious, artistic, scientific, or political value

1. Obscenity
2. Incitement of Illegal Activity
   1. Must be directed toward inciting or producing [intent]
   2. imminent lawless action or [immediacy]
   3. Likely to produce such action [probability]
3. Fighting Words “Words that can cause an imminent breach of the peace”
   1. Hostile audiences
   2. True threats
4. Speech that’s integral to criminal conduct
5. Fraud, Perjury

***Central Hudson* Test** gov’t has BOP

*Protected*?

Lawful activity

Not false or misleading *Don’t apply the rest if it’s not lawful or if it’s false & misleading*

*Substantial* gov’t interest

*Directly advanced* by regulation

*No more extensive than necessary* to serve that interest (no other means)

*…or a semi-exception…*

1. Commercial Speech
2. Defamation
   1. Libel
   2. Slander

**YES** *Gets a lesser degree of protection*

When you have a regulation of speech…

…is the regulation of speech **content-neutral?**

*Look to the Time, Place and Manner Exceptions:*

Not a ban

Expressive Conduct

* i.e., Must be ample, alternative ways to communicate  
  e.g., No parades downtown @ 5pm on Fridays

**YES** *Apply Time, Place and Manner Test*

**YES** *Apply O‘Brien Test*

1. Must be w/in the constitutional power of the gov’t **&**
2. A substantial gov’t interest
3. Unrelated to the suppression of expression
4. No greater than necessary

***Miller******Test for Determining Obscenity***

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

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Governmental Property – the Public, Limited, or Non-Public Forum

* **Exam Tip**: Rhodes likes to test on public forums b/c he can bring in other issues. Begin the essay by talking about the forum.

3 Categories

Traditional Public Forum

* **Must be**
  + Traditionally expressive **&**
  + Purpose is primarily expressive
* **Applies:** Streets, sidewalks, parks
* **General**
  + This forum provides the most protection for the individual speaker.
  + Treated as if the gov’t is regulating - All of the “regulator” tests apply here.
* **On exam:** **It’s not a traditional public forum** **b/c**  
   it’s not a street sidewalk or park.   
  & it doesn't meet the traditional test b/c not historically used that way as a public forum.   
  (no ‘longstanding tradition of being used for public purposes, primarily for expression”)

Designated Public Forum

* **i. Unlimited Public Forum**
  + Unlimited use of the forum = Open to ALL as if it were a public park.
  + The “regulator” tests apply (same as for Traditional Public Forums)
* **ii. Limited Public Forum**
  + Open to certain groups or certain topics in an indiscriminate way
  + The constitutional right or access will only extend to other entities of similar character
  + If you’re allowed in the forum 🡪 The “regulator” tests apply (same as for Traditional Public Forums)
  + If you’re not allowed in the forum 🡪 “Non-Public Forum scrutiny”
* **On exam: It’s not a designated public forum b/c**
* not intended to be open for public use as to all or some groups/subjects.   
  (there’s no intent)

Non-Public Forum

* **Analysis** 
  + Restriction must be **reasonable** in light of purpose of forum **&**
  + Viewpoint-neutral (but may be content-based)
* **General:** Everything Else. Especially where the gov’t discriminates as to who gets access.
* **On exam**
  + **Not a traditional forum** b/c
  + **It is not a designated forum**
* **Exam Tip**: TPM factors helpful here: How closely tied to gov’t interest, alternatives available
  + - * ***Viewpoint neutral*** (but it may be subject-matter/content based)

Public Schools

* ***Tinker* Test for Speech While In Public Schools** 
  + Student speech can’t be prohibited/regulated unless engaging in the speech/conduct ***materially and substantially interfere*** with ***discipline*** in the school, or interferes with the ***rights of others***.
    - * Mere fear of disruption is insufficient

No viewpoint discrimination allowed

* ***Hazelwood* Exception (to Tinker Test) for Speech Connected to Public Schools: (school-created forum)**
  + Must be ***reasonably related to pedagogical concerns***  e.g., ensuring a learning environment
  + Lower standard than *Tinker*, school doesn’t have to endorse speech by students that can be attributed to the school.
  + Part of school curriculum
  + Speech involves sexually charged, vulgar language, inappropriate for school-aged children
  + Situation in which school officials reasonably believe that expression is advocating or promoting illegal use of drugs.

Vagueness and Overbreadth

Vagueness

* **Test**
* A *reasonable* *person of common intelligence* would be able to determine what’s prohibited and what’s allowed (w/ respect to the law) & how important that is in the context of the first amendment.
* Fair Notice: Shouldn’t criminalize speech unless individuals ***know*** that engaging in it breaks the law **&**
* Selective Enforcement: Officers & prosecutors more likely to punish speech they disagree w/ if have too much discretion
* Requires a connection b/w what you’ve done & what your planning to do
* 3P standing not allowed

Overbreadth

* **Test**
* What’s the *scope* of the statute?
  + Look to text
  + Look to interpretations e.g., how much & what types of speech does it impact?
* *How much of that scope* is protected expression? e.g., Is it a category of unprotected speech?
* Regulates substantially more speech than permissible / § cannot outlaw a substantial amount of protected speech
  + If only a bit 🡪 it’s w/in the scope of the § & regulation will be upheld
* Facially invalid, not just as-applied
* 3P standing allowed
* Can have a limited construction e.g. if Cts have interpreted it narrowly, even tho § appears overbraod 🡪 OK
* **Rationale**
  + 1A needs breathing space
  + A substantially overbroad § chills speech b/c people fear their speech may violate the law

***---------------------------------------------------***

***Vagueness v. Overbreadth***

*3P standing not allowed 3P standing is allowed*

*Must have precision*

***---------------------------------------------------***

***If state court makes a determination as to a statute 🡪 that binds the lower courts***

Prior Restraints & Injunctions

**Prior Restraint**

**Injunction**

Prior Restraint

* A judicial or administrative order
* Requires permission to speak
* That considers content
* Based on discretion
  + e.g., one is barred from speaking or must apply in advance to speak and decision is based on content and circs
* **TEST: Hallmarks of Prior Restraint**
  + **Prior** approval or prohibition
  + **Based on content** of speech
  + **Decision maker is utilizing discretion** in deciding whether or not to allow individual to speak.
  + Gov’t must show a **MORE THAN COMPELLING interest**:
    - * EX: people will die

Injunction

Time Place Manner Injunction

* Can be *content-neutral* if it’s
* based on the group’s *conduct*
* rather than the *content* of the expression

*Madsen* Test for Time Place Manner Injunction

* 1. Burden no more speech than necessary
  2. Serve a significant or important (intermediate) govt’l interest
  3. Does not have to be perfectly tailored, but needs to be pretty close

Assembly and Associational Rights

* Right to assemble is almost absolute. You can assemble for any *peaceful* purpose.
  + The only limit would be if it’s unlawful e.g.,blocking traffic
* Combo of Assembly and other 1A rights created right of Expressive Association
  + A group trying to expressive themselves by gathering together
* **TEST**
* An expressive association &
* Gov’l intrusion on that association
* that substantially interferes w/ the message of the expression of the association
* 🡪Apply strict scrutiny
  + 1. **Was it an *expressive association*?**
       1. **There must be some message they’re trying to express**
    2. **Was there a *govt’l intrusion*?** 
       1. **3 different ways to have an intrusion:**
          1. Impose penalties e.g., crime for you to be a member of this organization
          2. Require disclosure of membership (want to allow people to have anonymity so that people can associate w/ even unpopular ideas and try to enter the marketplace)
          3. Interfere w/ internal workings of the organization
    3. **Did the *intrusion substantially interfere w/ the message* of expression of the association?**
       1. **If so 🡪 Apply Strict Scrutiny**

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* + **Exceptions**: Must apply Strict Scrutiny
    - * + ***Unemployment compensation*** where there is an individualized determination made (regardless of whether it is neutral and of general applicability) on a ***case by case basis of whether a particular religious practice can be accommodated***.

***Sherbert case*** – Seventh Day Adventist doesn’t want to work on Sat. Ct says there is a substantial burden bc she has to choose b/w her religion and employment/ benefits. Ct applies SS. No compelling interest. Not the least restrictive means.

***If it is a criminal law then this doesn’t apply***

***Employment Division, Oregon v. Smith –*** Native American fired for smoking peyote. Ct says so long as the law is otherwise valid (not targeted at religion), he doesn’t have a claim b/c this is a criminal law. If general applicability (purposes apply to religions and non-religious conduct), otherwise valid and neutral then it’s valid.

So TX can outlaw all alcohol across the board 🡪 Not a free exercise violation!

* + **Exam Tip** – There will be a question like this in MC.
    - * + ***Hybrid Claims*** – Can join a free Exercise claim with another constitutional claim (such as compelled speech claim or associational rights claim) and if the other claim gets strict scrutiny then both claims get strict scrutiny.
  + **Exam Tip** – Know this! He will test on it!
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Public Employee Speech

When you have public EE speech…

…is the speech a **matter of public concern?**

*Look to the:*

Content

Form

Context

Speech Rights (of EE/public to receive communication) VS

Gov’tInterest(managerial needs of EMR)

*Pickering Balancing Test*

Public Schools

* ***Tinker* Test**
  + Student speech can’t be prohibited/regulated unless engaging in the speech/conduct materially and substantially interfere w/ discipline in the school or interfere w/ the rights of others
  + Mere fear of disruption is insufficient
  + No viewpoint discrimination allowed
  + (Primary test though restricted and cut back)
    - **Exception to *Tinker* Test:   
      Hazlewood Test for Speech Connected to Public Schools:** (school-created forum)
      * + Must be reasonably related to pedagogical concerns/ensuring a learning environment
        + School doesn’t have to endorse speech by students that can be attributed to the school (Lower standard than Tinker)