

FLOW CHARTS

When you have a regulation of speech...
 ...is the regulation of speech **content-based?** [or content-neutral]

Look to the:

Text of the regulation

Justification for the regulation

YES

Apply strict-scrutiny

NO

Apply Intermediate-scrutiny

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

Unless there is an exception...

Miller Test for Determining Obscenity

- 1. 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
- 2. Incitement of Illegal Activity
 - a. Must be directed toward inciting or producing [intent]
 - b. imminent lawless action or [immediacy]
 - c. Likely to produce such action [probability]

- 3. Fighting Words
 - a. Hostile audiences
 - b. True threats

"Words that can cause an imminent breach of the peace"

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...

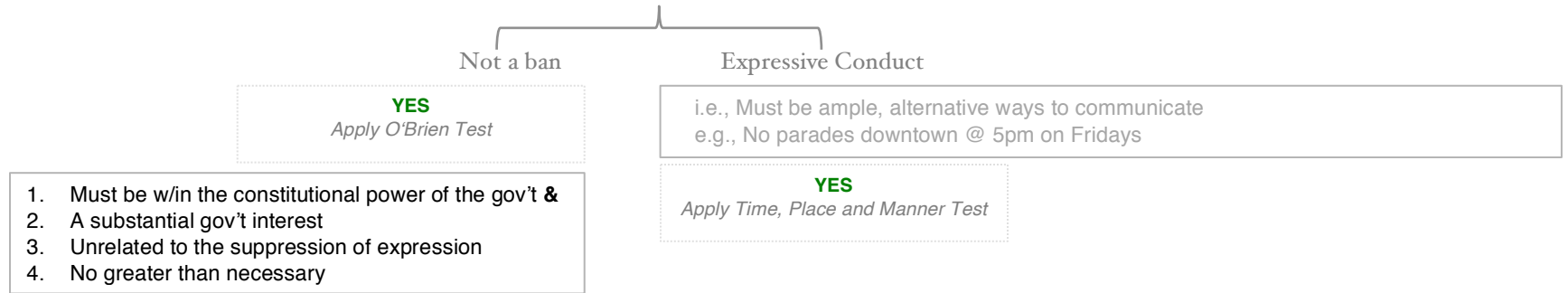
- 1. Commercial Speech
- 2. Defamation
 - a. Libel
 - b. Slander

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:



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 s
- b) Whether the work depicts or describes, in a patently offensive way, sexual conduct prohibited by applicable law
- c) Whether it lacks serious, artistic, scientific, or political value

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
speech does it impact?

e.g., how much & what types of

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 overbroad → 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

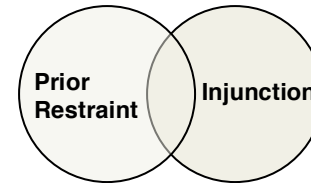
Must have precision

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

PRIOR RESTRAINTS & INJUNCTIONS

PRIOR RESTRAINT

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

- a. Burden no more speech than necessary
- b. Serve a significant or important (intermediate) govt'l interest
- c. 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

i. Was it an *expressive association*?

1. There must be some message they're trying to express

ii. Was there a *gov't intrusion*?

1. 3 different ways to have an intrusion:

a. Impose penalties e.g., crime for you to be a member of this organization

b. 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)

c. Interfere w/ internal workings of the organization

iii. Did the *intrusion substantially interfere w/ the message of expression of the association*?

1. If so → Apply Strict Scrutiny

If no → Restriction must only be reasonable

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vi. Did the *intrusion substantially interfere w/ the message of expression of the association*?

1. If so → Apply **Strict Scrutiny**

If no → **Restriction must only be reasonable**

- **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?**



Pickering Balancing Test

Speech Rights (of EE/public to receive communication) VS
Gov't Interest (managerial needs of EMR)

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**:

Hazelwood 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)

