FIRST AMENDMENT Law  
  
a Law school outline *by* corbin dodge  
  
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Fall 2014 | Professor Rocky Rhodes | South Texas College of Law

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ABOUT THIS OUTLINE

**A Note About this Outline**

* My outlines utilize the styles feature in Microsoft Word. An investment of your time in learning how to use the styles feature will allow you to use some of Microsoft Words most powerful features. But be warned, styles can be tricky. The styles that are used in this document are demonstrated below. The Table of Contents can be dynamically updated because it is based on these styles. To learn more about the benefits of using styles, as well as tips and tricks, visit\_\_\_\_\_. For more outlines, visit [www.corbin-dodge.com](http://www.corbin-dodge.com).
* **!!!** = Must-knows and exam tips. Use the keyboard shortcut Control + F (or Command + F on mac) to quickly scan through these points before the exam

**FAQs**

* **How do I apply a different font to any style?**   
  On the main menu, select Format/Style. Highlight the style that you would like to modify. Select modify. Choose your font. Make sure that the option to “Automatically update style” is not checked. Click Apply.
* **How do I update the Table of Contents?**
* Right-click and select “Update Field.” Choose the option to update all page numbers.

H1 (optimized for Helvetica, 16 pt)

Key notes & quotes are typefaced

In Hoefler Text, 18 pt

H2 (Bell MT, 11pt)

* **List paragraph (+Bold) (Helvetica, 9pt)**
  + List paragraph
    - List paragraph (+ indent)
      * List paragraph (+ indent)

H3

* **List paragraph (+Bold)**
  + List paragraph
    - List paragraph (+ indent)
      * List paragraph (+ indent)

Content-Based Regulations of Speech

 “Congress shall make no law… abridging the freedom of speech.”

I.        History

**First Amendment Protects 5 Liberties**

1. Religion (also “separation of church and state”)

Establishment of Religion

Free exercise of religion

2. Speech

3. Press

4.  Assembly (peaceably)

5.  Petition to redress grievances

**Interpretation**

1. Text

2. Structure

3. History

4. \*Precedent \*Bar exam focuses on this one

5. Ethos (ethical arguments) or “national values”

a)  Marketplace of Ideas (Justice Holmes) e.g., free flow of ideas **Rhodes had on past exams !!!**

*The truth will prevail*

*According to the people, not the gov’t*

b)  Promotes democratic self-government

c)  Individual autonomy e.g., self-expression

d) Anti-censorship Neutrality e.g., gov’t views all ideas equally

**MC Question on Exam: What are the values of the 1st Amendment? !!!**  
Beware, the answer is *not that it’s the first*

First Amendment Analysis

When you have a regulation of speech…

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

*Look to the:*

Text of the regulation

Justifications for the regulation

IF YES 🡪 Apply strict-scrutiny

Must be a compelling governmental interest

Must be narrowly tailored and the least restrictive means of achieving that interest

*Exceptions: Unprotected speech*

1. Obscenity
2. Incitement of Illegal Activity
3. Fighting Words
   1. Hostule Audiences
   2. True Threats
4. Speech that’s integral to Criminal Conuct
5. Fraud, Perjury

*I*F NO 🡪 Apply intermediate scrutiny (content-neutral)

* **Determining whether the speech is content-based**
  + Gov’t is regulating speech based on the content of the message. This particular type of speech is going to cause some harm
  + Must be narrowly tailored to achieve that interest
  + **On the Exam *for full pts*:** The speech in question is content-based and the statute which seeks to restrict that speech is content-based. The text of the statute applies to \_\_\_\_. The justification for the regulation is \_\_\_. It is not justified w/o reference to the content of the regulated speech. It focuses only on the content & the direct impact that speech has on others. **!!!**
* *US v.* ***Playboy*** Entertainment Group, p1
* **Determining whether the speech is content-neutral**
  + Free flow of traffic at airports, or state fairs, administrative needs of selective service, preventing fraud, curtailing littering, preserving peach and privacy in residential neighborhoods, fighting corruption, prostitution, organized crimes, etc.

Exceptions: The 5 Types of Speech that are Not Protected

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

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

NO

*Apply Intermediate-scrutiny*

*Apply strict-scrutiny*

The Main 5 Exceptions 🡪 Strict Scrutiny

1. Obscenity e.g., porn

2. Incitement of illegal activity

Must be **directed toward inciting or producing** [intent] **imminent lawless action** or [immediacy]  
**likely to produce such action** [probability]

3. “Fighting words” words that can cause an imminent breach of the peace e.g., an invitation to brawl

(1)  Hostile audiences

(2)  True threats

4. Speech that’s integral to criminal conduct Speech that is part & parcel of a crime e.g. child porn

5. Fraud, Perjury

Semi-Exceptions 🡪 Not Strict Scrutiny

Commercial speech has a lesser degree of protection

Defamation (libel/slander).

*US v. Stevens, 5 – Speech must fall w/in one of the historical exceptions to the 1st Amendment for the govt to regulate it*

*Brown vs. Entertainment Merchants Assoc., 9 –* Pre-enforcement challenge to CAs violent video game law

*Are they speech?* Yes

*Content-*based? Yes, applies to violent video games and the § applies to games w/ violence

*Exception?* No, depictions of violence isn’t on the list. *Stevens* said violence against animals is unprotected. It’s not obscenity b/c it’s not sex

*Other:*

II.     Incitement of Illegal Activity and Seditious Libel’s History

Content-based Guidelines—y🡪Strict Scrutiny

Exception #1: *Brandenburg* Test

Whether the particular speech is directed to, inciting or producing, imminent lawless action **&** likely to produce such action

***Schenck v. U.S. (1919)*** **– [Clear and Present Danger Test]**

* + Holmes & unanimous Ct affirmed ∆s convictions for mailing antiwar leaflets
  + The speech wasn’t protected b/c it created “a clear and present danger” of hindering the gov’ts war effort, which “Congress has a right to prevent. It’s a question of proximity & degree.”
  + Holmes also wrote: “when a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no ct could regard them as protected by any const’l right.”
  + Minimal scrutiny: Applied the clear-and-present-danger test w/ minimal scrutiny as to whether the antiwar pamphlets had any practical impact on readers.

***Debs v. U.S. (1919)*** – Holmes wrote to affirm the conviction of Eugene Debs, a prominent Socialist, for allegedly encouraging others to obstruct military recruiting.

***Frohwerk v. U.S.*** – Holmes wrote to affirm the conviction of a newspaper publisher for articles urging resistance to the draft. (If this were still the law decades later, the gov’t could have sent George McGovern to prison for opposing the Vietnam War.)

***Abrams v. U.S. (1919)*** – 8 months after Holmes articulated his **clear and present danger test** in ***Schenck***, the Court affirmed the conviction of 5 Russian nationalists for conspiring to violate the Espionage Act. They printed and distributed 5k leaflets that rebuked the U.S. while we were at war with Germany. The leaflets called for a general strike among munitions workers.

**Holmes dissent:** Disagreed that ***Schenck*** applied. Argued for the fundamental principle that the gov’t cannot suppress ideas b/c “the best test of truth is the power of the thought to get itself accepted in the competition of the market” (i.e., marketplace of ideas).

* + Argued that FREEDOM OF SPEECH cases analyzed under the 1st AMENDMENT must be subjected to a **heightened level of judicial scrutiny** before legislation abridging free expression could be upheld, a level of scrutiny that was eventually adopted by a majority of the Ct for the balance of the 20th century.
  + Holmes contended that the Abrams's majority opinion should have more closely examined the **intent** of the pamphleteers.
  + The danger must be **imminent**: unless the speech creates a “present danger of immediate evil,” Holmes argued that Congress cannot punish the speaker without violating the federal constitution.
  + In concluding that the "silly" leaflets distributed by Abrams and his co-defendants created no clear and present danger, Holmes said that “we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so **imminently** **threaten** **immediate** **interference** **with the lawful and pressing purposes of the law that an immediate check is required to save the country**.”

|  |  |
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| Discussion Problems, p.30 | |
| ***Brandenburg* Test**  Whether the particular speech is directed to, inciting or producing, imminent lawless action **&** likely to produce such action | |
| 1. During an anti-war demonstration… | Paid for by jointly Fed & State by general tax revenue  e.g., 50/50  States may exceed fed min. funding guidelines e.g., 60/40  States not req’d to have [it…]  If they do 🡪 Must follow fed regs |
| **2.** | He’s w/in his free speech rights b/c he’s just handing out pamphlets. There’s a question as to whether he is inciting the overthrow of the gov’t b/c the pamphlets are advocating the use of violence in the Middle East, yet they’re being handed out in the states, thus it’s unlikely to produce the action which it is intended to incite.   * It’s directed to members of the public in the US, which makes it unlikely to produce violence against the American gov’t in the Middle East. |
| **3.** | * It’s unlikely to meet the incitement element of the *Brandenburg* Test. * However, it is narrowly tailored enough to meet the *Dennis* standard of indoctrination...cohesiveness to action, etc. |
| **4. AA boycott against white merchants. White merchants say they’ll break their necks if the boycott occurs** | Even though |

|  |  |
| --- | --- |
| Exercise 1, Task 2, p.3 | |
| **Day 1** |  |
| **Day 2** |  |
| **Day 3** |  |

Exception #2: Fighting Words, Hostile Arguments, and Threats (p.60-86)

**Fighting Words**

* + **Definition:** Words that tend to incite an immediate breach of the peace
  + **Purpose:** Serious expression of Intent that you’re intending to incite violence against someone
  + Old cases focus on the words used
  + Modern cases focus on the context

*Cantwell v. CT*, p.31 A Jehovah’s Witness stopped a man on the street, received their permission to for him to play a record, and they got angry when it attacked Catholics. No breach of the peace b/c no assault or threat of BI, recording was targeted at all religions

*Chaplinsky v. NH*, p.32

*Feiner v. NY,* p.34 You can’t incite a riot, but the police must attempt to control the crowd first before arresting the speaker. . Today we apply the dissent. They must have a chance to speak before the speech can be suppressed. 1) Speech must incite a riot 2) Police must try to control the audience

Job of police is to protect the speakers rather than to suppress the speech

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| Discussion Problems, p59 | |
| **1.** |  |
| **2. Driver slowed down, gestured and yelled ‘Fuck you!’ to abortion protestors before speeding off** | Not fighting words b/c no imminence (he sped off) |
| **3. Al wrote a book slamming Vat. PD arrests Al right before Vat punches him, for inciting a breach of the peace.** | Not a fighting word, but if you get there in person and throw some insults then perhaps it *might* be |
| **4. School code of conduct that any student who addresses another w/ a racial epithet will be expelled.** | The racial epithet by itself is not a fighting word, but it may be depending on the context.  Also there’s a *VA vs. Black* concept. You’re distinguishing in a classification that’s an unprotected speech but there’s a problem. If it was a fighting word, there’s an issue b/c you can’t distinguish just based upon ideas or viewpoints. Also it might not apply equally to all racial epithets.  A similar problem will be on the exam **!!!** |

|  |  |
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| Exercise 3, Task 1, p.3 | |
| **Identify facts that wiil help you determine whether to prosecute Ms. Jones for a breach of the peace** | Ms. Jones is allowed to wear the shirt without inciting a breach of the peace. By wearing the shirt, alone, it’s not enough to arrest her for a breach of the peace. Likewise, even wearing the shirt while she screams ‘Fuck off!’ at the TSA officer is not justification to prosecute her for a breach of the peace.  There may be justification to prosecute for a breach of the peace if she is simultaneously getting in peoples faces. |
| **Day 2** |  |
| **Day 3** |  |

* + Fighting words, host

Obscenity

Statute prohibiting obscene materials / charged with distributing obscene materials /

* **History/Founding Fathers**
  + There were laws against profanity. Mostly they were for disparaging others for their religious beliefs
  + There weren’t separate obscenity laws
* **Primary Question:** How is obscenity defined? What is it?
* **Primary Problem:** People have different views
* There hasn’t been an obscenity decision for almost 30 years
* Ct never said you have a right to purchase it
* **Obscenity will usually be MC on the exam!!! *Although sometimes he does a very short essay, but unlikely***
* **3 Main things re: Obscenity that will be on the Exam !!!**
  + Jury instructions
  + *Miller* 3 part test
  + Know what has to be given to the jury
* *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 applicable law

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

*\* Prurient interest:* A shameful or morbid interest vs. a normal interest

* ***Miller v. CA***
  + Man arrested for knowingly distributing obscene matter
  + *Issue:* What’s the test for obscenity? *See above*
  + *Dissent*
    - Obscenity laws weren’t around in the beginning. There’s no exception for obscene materials. The founding fathers could have put it in there if they really wanted to include it
    - Plus, it’s entirely vague and subjective
* ***Stanley v. GA, 65***
  + **Rule:** The mere private possession of obscene matter cannot be constitutionally made a crime. Thus you have the right to possess it in the privacy of your own home
  + **Reasoning:** You can’t control an individual’s own obscene thoughts
  + **Facts:** PD prosecutes man for possession of obscene materials after 3 reels of film were discovered while executing a warrant for unrelated suspected activities
* ***Paris Adult Theatre I v. Slaton, 67***
  + Adult theatre argues that this is much like *Stanley* b/c the theatre is providing the obscene material in a private environment, much like an individuals home Furthermore, they argue that only consenting adults may participate. *Ct rejects this* argument
  + *Key for the Ct:* The commercial exploitation of these materials impacts the public and the quality of life of the community environment, whereas *Stanley* occurred in the privacy of an individuals home
  + Justice Brennan’s Dissent
    - These tests just don’t work b/c we can’t decide on a clear standard
    - Let’s just let this go, unless It involves children or nonconsenting adults
* **Jenkins v. GA, 72**
  + **Facts:** Movie theater manager was arrested for distributing obscene material after showing the non-pornographic movie *Carnal Knowledge,* starring Jack Nicholson
  + Even though the standard is a contemporary community standard, there’s still room for judicial discretion. The Ct says it must be **patently offensive**. Nudity doesn’t meet that standard.

|  |  |
| --- | --- |
| Discussion Problems, p76 | |
| **1.** |  |
| **2** |  |
| **3. Statute prohibits hotel chain from showing pay-per-view adult movies.**  **Argument for a First Amendment Challenge? Against?** | Paying for it vs. no commercial choice to purchase  Typically the statutes defining these crimes track the *Miller* test  Here, it doesn’t meet the *Miller* elements. There’s a concern that you can have a lot of sexually explicit movies that are not patently offensive, etc |

Speech Integral to Criminal Conduct and Child Pornography

* **Requirements for the Exception to Apply**
  + 1) sexual conduct
  + 2) w/ an actual child  **!!!**
* **General**
  + State can define the age of the minor
  + The right to privacy in your own home doesn’t apply to child pornography
* **NY v. Ferber, 77**
  + Differentiates from obscenity
    - 1) Here, concern about the actual child
    - 2) Distribution creates a permanent record that affects the child as they grow older
    - 3)
  + There’s no *Stanley*-equivalent test for child pornography b/c criminal conduct is at the heart of it 🡪 the act itself
  + Ct sys you can get someone who’s older, but looks younger.
  + You can talk about engaging in sexual acts w/ the child, such as in a book
* ***Ashcroft v. Free Speech Coalition***
  + **Facts:** The *Child Pornography Prevention Act of 1996* extended a federal prohibition against child pornography to extend to computer-generated images (CGI) that appear to depict minors, w/o using real children
  + **Here:**
  + 1) § doesn’t meet the *Miller* test 🡪 therefore not obscene **&**
  + 2) § doesn’t meet *Ferber* b/c no sexual conduct with an actual child

|  |  |
| --- | --- |
| Discussion Problems, p85 | |
| **1.** |  |
| **2** |  |
| **3.** |  |

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

NO

*Apply Intermediate-scrutiny*

*Apply strict-scrutiny*

* 1) Compelling governmental interest **&**
* 2) Least restrictive means of achieving that interest

NO

YES

*Is there an exception?*

Incitement of Illegal Activity

Fighting Words & threats

Obscenity   
Speech integral to criminal conduct (incl. child pornography)

Fraud, perjury

gov’t may regulate the speech  
(rational basis review)

*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 applicable law

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

gov’t shall NOT regulate the speech

Commercial Speech

* **Commercial speech –** *solicitation* or *advertisement* of commercial transactions for a business purpose
* **Includes:** Commercials, ads on the radio, solicitors on the phone. It’s not commercial speech just because you’re selling something.
* **Doesn’t Include**: Paid political ads or protest ads are not commercial speech.
  + **Fraud and perjury** get no protection
  + **Commercial Speech** gets a lesser protection
  + **Commercial advertising related to an illegal activity** gets no protection
* *VA State Board of Pharmacy v. VA Citizens Consumer Counsel*
  + **Holding:** Commercial speech is protected, but it can still be regulated to a certain extent
  + **Facts:** Consumer group protested restriction on pharmacists advertising drug prices.
  + **Policy**
    - Suppressing prescription drug info hurts the poor, sick, and elderly
    - It’s a dissemination of info to the public, and it’s a matter of public interest that their decisions be intelligent + well informed.
  + **State Regulatory Concerns**
    - * + Concerned that pharmacists will not be professional – this is not a valid concern b/c the state board of pharmacists have many regulations controlling professional behavior of pharmacists, these restrictions only affect public perception of pharmacists
        + Will reduce pharmacist’s status to that of a mere retailer
  + ???
    - Not a time, place and manner
    - Not false and misleading
* ***Central Hudson Gas v. Public Service Commission***
  + **Facts:** Electric company trying to sell their electric products, Commission ordered all electric utilities to cease all advertising because there was an energy shortage and they needed to not encourage people to buy and use energy.
  + ***Central Hudson* Test** gov’t has BOP
    - * *Protected*?
        + Lawful activity
        + Not false or misleading

*Don’t apply the rest if it is not lawful or if it is false and misleading 🡪 Must know for a MC exam question* ***!!!***

* + - * *Substantial* gov’t interest
      * *Directly advanced* by regulation
      * *No more extensive than necessary* to serve that interest (no other means)

Hybrid Category – not the same protection as content-based discrimination, but there isn't total lack of protection – **Intermediate Scrutiny PLUS**

* + - * **State Interests:**
        + Energy conservation – state has a substantial interest in conservation
        + Rate structure – fair rates is a clear and substantial state interest
      * BUT state could have used a different restriction to further its policy of conservation, in the absence of a showing that more limited regulation is ineffective, advertising cannot be suppressed.
* ***44 Liquormart v. Rhode Island***
  + **Facts:** RI prohibited advertising of alcohol except for price tags or signs w/ the merchandise, could not be visible from the street, no outside advertisement
    - * **Court agrees this is unconstitutional, but cannot agree *why***
      * **Stevens:** Applied *Central Hudson*:
        + Must show the regulation directly advances the state interest
        + Uses a *reasonable fit* standard (instead of *no more extensive than necessary*

*Standard* like in *Central Hudson)*

* + **Thomas:** commercial speech is not of a lower value, it’s the same as other speech
  + **O’Connor:** follows Central Hudson, but she analyzes the same way as Stevens

|  |  |
| --- | --- |
| Discussion Problems, p105 | |
| ***1.*** *ACLU attorney going in for non-profit org is not considered commercial speech, no personal gain, it’s for the issue. Political advocacy, no profit motive. Mailing is not as in your face, most people would just toss the solicitation.* | Attorneys want to advertise to get clients, clients want to see attorneys advertise so they can determine who the best for them would be.  **Gov’t Interest?** Yes, there’s a substantial gov’t interest in preventing fraud or overreaching Attorneys shouldn’t necessarily be able to advertise b/c it fosters *over-reaching* (high-pressure sales pitches) (ambulance chasers and going to hospitals are especially restricted).  **Least restrictive means?** Yes. No better way to stop it other than preventing them from visiting clients in the hospital. |
| *University prohibits all commercial enterprises in its dorms b/c it wants to protect students from solicitor. Student challenges it b/c she wasn’t able to host a tupperware party* | *Was it* *commercial speech?* Yes *Interest?* . College students are there to learn, need to protect the students’ safety.  *Does it* advance that interest? Yes  *Is it more extensive than necessary?* Probably |
| **3.** | *Are Greensheets* *commercial speech?* Yes *Interest?* Reducing blight  *Does it* advance that interest? Not really b/c it only removes 200 out of 2000 news racks  *Is it more extensive than necessary?* Probably |
| *Restriction on self-service, placing cigarettes outside reach of children.* | *Was it commercial speech?* May just be conduct, not speech.  Interest? Keeping cigarettes outside of reach of minors is a substantial interest, this directly advances that interest, no more extensive than necessary.  Regulations directed at advertising, there may be strong interest in restricting ads, this is much more restrictive than necessary. Putting ads up 5 feet high doesn’t really seem to do much good at all. |
|  | (1) No solicitation for 24 hours and only to repeat customers. (2) No communication between 9pm and 9am. The second one is more reasonable, right to sleep and privacy, not reasonable to call late, this is a legitimate state interest and it’s no more extensive than necessary. First one not as reasonable, since anyone can find this information out there’s no substantial interest from stopping the bail bondsman from soliciting new customers. If gov’t was really concerned with tipping people off then they shouldn’t be making this information public. |
|  | Fraud and perjury are typically outside of 1st Amendment protection. Alvarez argued there must be a compelling government interest in stopping people from lying. Court worried that any lie could be criminalized, so they decided fraud, perjury and defamation has to involve some other injury than just speaking a lie. |

* Is the gov’t trying to regulate speech?
  + *Speech*
    - spoken, written, or printed word
    - Expressive conduct
      * Inherently expressive – intent to communicate message likely to be understood
      * Longstanding historical traditions
* Is it content-based or content-neutral?
  + 🡪 If content-based 🡪 Used SS
  + 🡪 If content-neutral 🡪 TPM of Expression
* **Expressive Conduct**
* ***O’Brien* Test when ‘speech’ and ‘nonspeech’ elements are combined in the same conduct** 
  + Const’l power of gov’t
  + Important or substantial gov’t interest
  + Unrelated to suppression of expression
  + Restriction no greater than is essential
  + Concern is not with what’s being said, but HOW it’s being said.
  + “Intent to communicate a message and it’s likely to be understood”
    - It doesn’t have anything to do w/ communicating a message on its face
    - Intent to convey a particularized message
    - Reasonably understood by those who saw it
* ***US v O’Brien*** 
  + **Facts:** Burning selective service certificates, wanted others to adopt his anti-war beliefs.
  + Statute doesn’t care why you destroy it, it only applies to anyone who knowingly destroys a draft card
    - **O’BRIEN TEST**- used
      * + w/in constitutional power of the gov’t
        + Furthers important gov’t purpose
        + Unrelated to suppression of expression (free speech)
        + Restriction no greater than essential to serve interest
  + There wasn’t a complete restriction on his wanting to get the message out, he could still engage other methods to spread the word, and the restriction just said he couldn’t burn his draft card.
* ***Texas v Johnson –*** flag burning outside Texas RNC
  + Conserving patriotism with the flag is not a compelling interest.
  + ***Content based so O’Brien does not apply:*** ‘national unity’ justification means you can use the flag in a way to bring country together, but not in protest.
    - Only interest is the communicative aspect of the flag.
    - Use Strict Scrutiny
    - Can’t ban an idea simply because society finds it offensive

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| Discussion Problems, p118 | |
| *2. City bans all handbill distribution on public streets to reduce litter, noice & traffic congestion. Should the TPM test be applied to this ban?  If it did apply, would it be satisfied?* | (1) within gov’t power to regulate the burning of things downtown  (2) important interest in fire prevention  (3) unrelated to suppression of expression b/c restriction is ‘setting things on fire’  (4) restriction no greater than necessary, it’s reasonable to say nothing should be set on fire downtown for public safety.  Their only justification was in restricting his message against the draft when he burns a copy. There wouldn’t be a legitimate gov’t interest here.  As long as it bans everyone 🡪 it’s fine b/c it’s content neutral |
|  | No different from *Johnson*  Rhodes says there’s a historical tradition in protecting parades, monuments, instruments, art  Underpants restrictions – most people aren’t really intending it as speech or expression, and when you see them you don’t necessarily know what message they’re trying to convey, it’s not a message that’s likely to be understood. This isn’t expressive conduct.  Still not under this particular statute, the statute itself is still based on conduct not breach of peace. Under a general breach of peace statute you need to use O’Brien to analyze the conduct with expressive elements. |
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* **Time, Place, and Manner Restrictions**
  + **The Key:** It’s targeting speech but it’s not banning the speech. It’s regulating when it happens/how it happens
  + Gov’t is targeting speech but it deals w/ what time the speech is taking place or how loud the speech is, etc, in order to ensure some other government interest.
  + EX:
    - * **Time:** ban parades during rush hour, but unconstitutional to ban parades all of the time.
      * **Place:** ban smoking in front of buildings, but unconstitutional to ban smoking everywhere.
      * **Manner:** ban littering while passing out flyers, but unconstitutional to ban all handbills
  + ***Clark v Community for Creative Non-Violence*** 
    - **Facts:** General regulation on camping, camping is conduct, general conduct regulation. Claim that camping was expressive on advising the plight of the homeless.
    - **RULE:** expression, whether oral, written, symbolized by conduct, is subject to reasonable TPM restrictions
    - **Time Place and Manner (TPM) TEST:**
      * + Content Neutral
        + Narrowly tailored to serve a significant government interest
        + Not least restrictive – just interest could not be achieved as effectively without the regulation
        + Ample alternative communicative channels
        + “this is unrelated to the

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| Discussion Problems, p132 | |
| **1.** | * This is a place they’re trying to regulate 🡪 So start off w/ TPM test. * (1) It’s content-neutral b/c it’s not based on a specific expression * (2) Protecting decorum and protecting respectability of SC not really a very strong gov’t interest, (3) this would be the best place to have your views heard about landmark cases being decided by the SC. A regulation to keep down noise during oral argument and allow free-flow of traffic is a much stronger govt’l interest. * Sounds like a ban, should go right to strict scrutiny, no ample alternative communication channels. Not narrowly tailored, there are other methods that could serve your interest. * (1) Not content neutral so you must meet strict scrutiny * (2) There’s a compelling govt’l interest in protecting the president, however a guy holding a sign probably isn’t going to be a threat * Concerned with residential privacy, trying to get out of the neighborhood, cannot focus on one type of protesting, make sure statute applies to everyone, just not allow any residential picketing at all, but need to make ordinance apply to everything not just one specific subject.   There’s no good answer because the SC cannot figure out a good answer. |
| **2** *Izu homeowners prohibited from placing signs on their property, but churches & nonprofits can* | *This is a good one that picks up on whether it’s content-neutral*  *Is it content-neutral?*  The ban only restricts signs of homeowners but doesn’t distinguish by the subject-matter of the sign.  *Gov’t interest?* Yes, in increasing property values. But there’s not really a govt interest in decreasing visual clutter, other than it’s secondary effect of increasing property values.  *Ample Alternatives?* There’s other means of increasing property values such as limiting the number of signs, the size of the signs, etc.  This fails the time, place and manner test and it’s really a ban 🡪 So use SS |
| **3.** city bans handbill distributions on public streerts |  |

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| Skill and Values: Task 6, Exercise 1 | |
| **1.** | * First thing to do w/ gov’t owned property is to determine what type of forum it is. * *What type of forum?*    + Sidewalk is a public forum, unclear from facts if convention center is.     - Definition of narrowly tailored is wrong, it’s too strict, just needs to be a reasonable fit.     - Cited O’Brien test for their statement. Should have used TPM test     - Burden of proof is wrong, if it’s a traditional public forum, or a public forum of any kind, the gov’t must prove it meets the standard |
| **2** |  |
| **3.** |  |

* **Exam Tip**: some statutes can be examined under both O’Brien and TPM. Talk about both. ie: camping ban is conduct *and* TPM
* **Exam Tip**: The narrowly tailored req’t is violated if it’s substantially broader than necessary to achieve the objectives
* **Secondary Effects**
* **Exam Tip**: Don’t go overboard on secondary effects. He isn’t crazy about them and if it’s on the exam, he’ll only do it re: adult businesses. They have only been applied to adult entertainment establishments. Don’t put them in essay unless he says “Every time x happens, the impact is y” or “gov’t is targeting all the instances where y happens.”
* If text is content-based but justification is a secondary effect 🡪 Apply secondary effects test.
* If the ***text seems content-based but the justification for the restriction is the secondary effect*** of the act (instead of the primary effect on the listener) 🡪 The regulation will be ***deemed content-neutral*** 🡪 a form of intermediate scrutiny will apply.
  + **Intermediate Scrutiny will be either O’Brian (expressive conduct) or TPM Test.**
  + Not doing it because you disagree w/ message, but b/c there’s some other impact or effect of the speech that the gov’t is trying to regulate.
  + **In effect**: You agree that the message should exist; you just don’t want it next to you.
  + **Note**: Don’t have to prove the secondary effect is certain to happen in your city. That it happened in Seattle is enough.
  + ***City of Renton v Playtime Theatres*** 
    - **Facts:** Ordinance prohibited adult movie theaters w/in 1,000’ of a residential area, church, school, etc.
    - *Content?* The ordinance is neither obviously content-based or neutral, however it’s aimed at the particular *secondary effects* of such theaters on the surrounding community
    - City relied on studies done in Seattle, and was justified in comparing problems in that city that had to do w/ an issue that this city was having.
    - 1A only requires that they refrain from denying a reasonable opportunity to open and operate an adult theater w/in the city. The ordinance meets this req’t
    - It’s narrowly tailored to affect only the category of theaters shown to produce the unwanted secondary effects
  + ***City of Erie v Pap’s A.M.*** 
    - **Facts:** Ban on public nudity, strippers would be req’d to wear pasties and g-strings.
    - Gov’t restrictions on public nudity, like here, should be evaluated under *O’Brien*, this is a ban so TPM won’t apply.
    - Ordinance aimed at combating crime and other negative secondary effects caused by adult establishments like this one and aren’t aimed at suppressing the erotic message itself.
    - Ct won’t strike down an otherwise constitutional statute on the basis of an alleged motive

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| Discussion Problems, p144 | |
| **1.** | * No secondary effect argument, it’s clearly content-based and it’s based on the fact you’re going to offend them which is a primary effect, not a secondary effect. * There’s an argument that this may not even be a secondary effect, the reaction of violence is pretty much a primary effect of video games that have violence. And even if it’s a secondary effect you need to have some kind of proof that these video games CAUSE people to go out and be violent. * Not distinguishing what type of communication is restricted, this applies to any kind of healthcare facility so the text is not content based at all. Even though it’s motivated by abortion clinics, it’s not justified by abortion clinics, their interest is in preventing patients from having uncomfortable communications right in their faces. * Primary effect, the amount you pay is based on what you’re going to do, it’ll be based on how offended people are going to be, and the more offended they’ll be the more you have to pay for your demonstration. |
| **2** |  | |
| **3.** |  | |

Chapter 3: Public Speech Regulation   
in a Private Entity Capacity

*Gov’t in a proprietary fashion - Acting very similar to a private party but it is still the gov’t who is doing it. (4 Instances)*

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)
* *Perry Education Association v Perry Local Educators’ Assoc.*
  + **Facts*:*** Union wasn’t allowed to solicit through inter-school mailbox (but another was allowed)
  + **Holding**
    - Non-Public Forum
    - Internal mail system is not open to the general public, a non-rep union is the general public
* ***International Society for Krishna Consciousness v Lee***
  + **Facts:** Airports are not a traditional public forum. Not historically expressive, airports haven’t been around that long. Their purpose is not expressive, the purpose of an airport is to travel
    - Airports are a non-public forum b/c:
      * Reasonable: It is reasonable for gov’t to keep fraudulent solicitation and not delay travelers
      * Viewpoint-neutral: Not a restriction on specific literature, not saying what you cannot say, just said you can’t be there.
    - Take parks, sidewalks and streets as examples and make comparisons, airport is traditional public forum. Then decide if content-based or neutral, this is not a restriction on solicitation specifically, it’s a restriction on approaching people in-transit. Use TPM restriction or expressive conduct.
    - **Dissent:** They’re using intermediate scrutiny, which typically requires evidence. So here they say there’s no evidence
      * This is justified under TPM or O’Brien
      * He’s going to test to make sure we understand the diff b/w O’Brien and TPM
      * He’ll tie in whether it’s content-based
      * 4-5 issues that we’ll need to consider

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| Discussion Problems, p159 | |
| *1. Protestors in jail* | not traditional (not traditionally expressive, no primary expressive purpose)  not designated public forum (government not made this a designated forum)  It is a non-public forum (reasonable to not allow protestors inside jail because of security concerns, viewpoint neutral b/c not matter what they’re protesting) |
| **2** | State fair: could argue it’s traditional (traditionally expressive, purpose is primarily expressive) but if it’s traditional they can’t shut down any expression; could argue it’s a designated public forum (indiscriminate expressive use) and government can still shut it down with this type of forum. Restriction not based on what you’re saying, it’s a first come first serve sign up for a booth, could argue non-public forum as well. | |
| 3. | Designated forum – indiscriminate use by student organizations, this is content based b/c prohibiting religious speech which is bad. Only compelling government reason is trying to prevent violation of establishment cause, otherwise no valid justification | |
| 4 | Not a traditional public forum (not historical, primary purpose not expressive), this is more of a limited public forum (commercial advertisements) but it’d only be a limited public forum for commercial advertisers but since this is talking about a group of people who are not inside the commercial advertising limitation this is non-public forum. Reasonable because city not want to appear they are aligning themselves with a specific party, viewpoint neutral b/c they restrict all of that type of a advertisement | |
|  | Not public forum, if you’re a speaker you eventually leave, but if you post a flyer on a pole it’s there until it gets taken down or blows away, not open for indiscriminate use because there’s limited space on the pole, this is a non-public forum (reasonable to restrict clutter, viewpoint neutral b/c it restricts everything) | |
|  | Limited-designated public forum b/c open for the indiscriminate expressive use of commercial advertisers. Since they’re outside the group it was created for, it just must be reasonable & viepoint neutral.  Sidewalks are a traditional public forum, but that may also depend on the purpose of the sidewalk. | |

Government Speech and Sponsorship of Speech

* **Gov’t speech** occurs when the gov’t advances its own message in the marketplace of ideas, through:
  + - Gov’t officials
    - Private speakers
  + If it’s gov’t speech 🡪 There’s no 1st Amendment free speech analysis. Political process will resolve it
* **Gov’t Funding of Private Speech**
  + Communicative avenue a “forum” or is it “government speech?”
  + Gov’t can selectively fund private speech, but can’t have an unconstitutional condition
  + **2 Factors**
    - Condition on recipient or how funds are used?
    - Relationship of condition to the govt’l program
  + What’s the amount of gov’t control over expression?
    - Extensive control 🡪 Gov’t speech
  + ***Rust v Sullivan*** 
    - **Facts:** Regulation prohibited federal funds for counseling on abortion and family planning
    - No benefits are denied to anyone. Dr’s aren’t being punished, & it’s simply insisting the public funds be spent on authorized purposes.
    - **Rule:** Gov’t can selectively fund a program to encourage certain activities it believes are in the public interest…  
      …w/o at the same time funding an alternative program which seeks to deal w/ the problem another way
  + Conditioning funds 🡪 OK
  + Conditioning the recipient of the funds 🡪 Not ok
  + The funds can be used for limited purposes but you can’t put a restriction on th grantee
  + So if you set up a campaign andraise $ for a specific purpose 🡪 then you can use it as you wish
  + ***Legal Services Corp v Velazquez*** 
    - **Facts:** Restriction on lawyers, funds given to provide financial support for legal assistance in noncriminal proceedings or matters to persons unable to afford legal assistance.
    - **Condition:** Can’t argue to a Ct that a state § conflicts w/ federal §, or that either § by its terms or application violates the Constitution.
    - **Holding:** Can’t confine litigants & their attys in this manner. There’s no alternative channel for expression of the advocacy they seek to restrict.
  + ***Pleasant Grove City v Summum*** 
    - **Facts:** Religious group tried to donate a monument to a city park and were denied, city passed a resolution putting their req’ts into writing
    - Gov’ts have long used monuments to speak to the public by their choice of which to use and have not used every monument in the past, expression would be attributed to the gov’t
    - Monuments are subjective, not everyone will look at it the same way, and the meaning conveyed by a monument is not a simple “Beef. It’s what’s for dinner,” it will be interpreted in different ways by different people.
    - **Rule:** Rorum analysis doesn’t apply to the installation of permanent monuments on public property
* **TEST to determine if it’s gov’t speech:**
  + **Intent**: Did the gov’t intend to create a forum or control the output?
  + **Objective indicia:** Is the gov’t controlling the channels of speech or creating a forum for divergent views?
    - Is there a clear message being adopted or does it seem viewpoint neutral?
    - Does it seem to be a gov’t-related message?
    - Did the message originate w/ the gov’t?
    - Did gov’t fund the speech?
    - Did gov’t have ultimate control over the message? More gov’t control 🡪 More likely it is gov’t speech
    - Is the gov’t merely participating w/ private parties **or**adopting the speech for itself?
    - Who would a reasonable person attribute the message to?
    - Did the gov’t or a private party identify itself as the speaker?
  + **Clear examples of Government Speech**
    - If gov’t leader is speaking clearly gov’t speech
    - If gov’t has certain ideas on its website that is gov’t speech
    - Excepting monuments in a park is gov’t speech
* Iu76

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| Discussion Problems, p159 | |
|  | The govt is providing a benefit, and can selectively apply to veterans, but the condition did not have anything to do with the benefit. Condition is not only for the time you were getting the tax exemption, it went on forever. Condition on recipient, so unconstitutional condition.  If you want to do substantial lobbying it’s ok, but you have to form a separate entity. This does not violate constitution for IRS to allow tax benefits, they have only given up substantial lobbying except by a separate entity. If this was a restriction on any connected entity doing lobbying it would be a problem. Entities can have a ‘political’ and a ‘civic’ branch, and get tax benefits on the ‘civic’ branch of the company.  First restriction is ok, funds cannot be used to legalize prostitution. Second restriction is more of an editorializing restriction, no other avenue, all entities would be required to adopt a policy, and once you take that position you can’t take it back. Organization must affirmatively declare they are against prostitution. |
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| Skills & Values, Task 10 | |
|  | To be a non-public forum, this would need to be a reasonable restriction and viewpoint neutral. The more you define the criteria to get the license plate, the less it looks like government speech, define what kind of plates will be issued. To get more government control, you could give the groups options to pick the designs, or say they have to submit several designs and the approver will choose which design is appropriate, or collaborate with the government entity somehow. Need more specificity about what type of things that are going to be offensive, it’s too vague to say they will reject if ‘objectionable to one or more members of the public.’ |

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| Discussion Problems, pg 172 | |
|  | To be a non-public forum, this would need to be a reasonable restriction and viewpoint neutral. The more you define the criteria to get the license plate, the less it looks like government speech, define what kind of plates will be issued. To get more government control, you could give the groups options to pick the designs, or say they have to submit several designs and the approver will choose which design is appropriate, or collaborate with the government entity somehow. Need more specificity about what type of things that are going to be offensive, it’s too vague to say they will reject if ‘objectionable to one or more members of the public.’ |

* **Public Employee Speech**
  + Those employed by the government have more speech protection than those in the private sector
  + Pickering Balancing Test
    - Expressive rights of employee/rights of public to receive communication; vs.
    - Managerial needs of employer
  + Connick Test
    - **Speech must be made outside employee’s public duties – not made according to official job duties of particular employee**
      * Discovery: Job description, routine practices, others at office w/ similar job or other organizations
      * Can be read narrowly (enumerated duties) or broadly (anything related to your work).
      * Truth is not a defense to the termination.
      * If your speech brings disrepute to your job, this might interfere w/ official duties
        + **Ex**: Police riding on racist parade float – if officer is racist he can’t do his job protecting minorities properly.
      * In ***Garcetti***, the speech was brought w/in the scope of the employee’s duties, but no relief granted b/c it was part of his duty
      * Three Approaches in Circuits:
        + Limited to speech government requires of employees (government speech)
        + Comparison to citizen speech/contextual analysis of job duties
        + Speech related to job
    - **Speech must be a matter of public concern**
      * Something that would affect the public at large
      * Cannot be so broad as “how government is run is always a matter of public concern.”
      * To determine whether the speech was a matter of public concern look at:
        + **Content**: What was the speech regarding?
        + **Context**: How did the speech arise and what were the surrounding circumstances?
        + **Forum**: Where was the speech made/delivered (tv, newspaper,etc)?
      * In ***Connick*** Only a small part of the questionnaire was related to public concern, not protected
    - **Assuming the first two are met then we do the Pickering Balance** 
      * Balance free speech rights at stake of the individual public employee and the public at large (who needs to be informed) w/ the gov’t need for efficiency and management of affairs (free speech somehow interferes w/ efficiency and management) w/ respect to being able to discharge governmental functions.
        + How did he report his suspicions? Private citizen or public official? To whom, when, how, has it happened before?
    - **Causation: Speech must have led directly to the termination.** 
      * If employee shows causation, government may try to rebut evidence by showing poor performance/bad acts.
    - First three issues are predominantly issues of law, fourth issue is a fact issue for the jury

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| Discussion Problems, pg | |
|  | * **Connick test:** * (1) speaking as a citizen b/c anyone can wear a police uniform, * (2) this is by no means a matter of public concern, his expression was about nothing that had to do with a matter of public concern, * (3) loses on balancing because the public at large needs to be able to trust law enforcement and the managerial concerns of the employer outweigh anything that he was doing in the video. * She’s only a data entry clerk, she was not making any kind of true threat, nothing she said had anything to do with her job duties. Everything that you say at work doesn’t become an official duty. * Fails the balancing test, managerial needs of the public employer trump the expressive rights of the EE * How many minorities are hired by a school are certainly a matter of public concern, she should be able to bring this information to the principal, this could be speech related to her job, parents could have complained to the principal in a similar manner. For correctional officer, complaining to superior is within your job, but complaining to a Senator is not within your job. Athletic director who investigated a hazing incident was fired, he won because this would be limited to speech the gov’t requires of employees. |

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| Skills and Values, Task 5 | |
|  | * Would need to get all his files, figure out what employee does on a day-to-day basis, is this something that’s in the handbook or does it specifically apply to what he does |

1. **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.

**General**

* + Balancing students’ rights **vs** school’s legit interest in maintaining discipline & ensuring an environment conducive to learning.
  + Public children do have expressive rights. Schools also have rights to maintain discipline and not get student speech attributed to them.
* *Tinker v Des Moines ISD*
  + **Facts:**during Vietnam war, a group of students planned to wear black armbands to school for a period of time during the Vietnam War. School wrote policy saying they’d expel any students who wore them.
  + A learning institution needs order and no distraction, but you can’t just restrict one way of demonstrating an opinion
  + **Test:** *see above*
  + Primary test tho restricted & cut back
* *Hazelwood School District v Klumeier* 
  + **Facts:** School officials removed 2 pages of a student publication for containing articles that they felt would harm students or were unfair to persons unable to give their opinion.
  + **Test:** *see above*

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| Discussion Problems, pg | |
|  | Schools are entitled to stop activity that advocates illegal drug use or alcohol use. Also allowed to stop anything that is vulgar or profane  Protection is not generally extended to clothing, not protected merely because they were worn in protest. This was only an expression of insubordination, no real message. |

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| Skills and Values Task 9 | |
|  | Analyze it under the Tinker. Is it a materially and substantial nterference with discipline in the school or interferes w/ the rights of others?  Then, look at it under the *Hazelwood* exception. Is it mat |

Chapter 4: Procedural Protections for Speech

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*

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

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| Exercise 7, Task 1 | |
| *1. Flicking off an officer. Is it overbroad?* | *Vagueness analysis:*  *Overbreadth analysis:* The scope of th |
| *2. Prohibition on obscene material. Vague?* | *Vagueness analysis:* Look to whether a reasonable person of common intelligence would be able to determine what’s prohibited & how important it is in the context of the 1A.  *Overbreadth analysis:*  You can’t assert an overbreadth argument here b/c obscenity is constitutionally protected |
| *3. Standing on hwy overpass w/ sign. Statute prohibits display of sign that impedes traffic* | *Vagueness Analysis: more likely than overbreadth to be allowed* |
| *4.* | *Prof just gave a brief explanation* |

***Vagueness***

***Overbreadth***

* *Coates v City of Cincinnati* 
  + **Facts:** Ordinance: Offense for 3+ people to assemble on sidewalks & conduct themselves in a manner that annoys others
  + **Vague:** A reasonable person may not know what ‘annoy’ means in this context
  + **Overbroad:** Restricts too much protected speech like freedom of assembly
* *Broadrick v OK*
  + **Facts:** § restricts the political activities of classified civil servants re: campaign contributions & campaign involvement
  + **Vague:** No. Men of common intelligence would know the meaning, plain language, easily understandable
  + **Overbroad:** Overbreadth of a § must not only be real, but substantial as well, judged in relation to its plainly legitimate sweep
* *City of Houston v Hill*
  + **Facts:** Ray Hill shouted at HPD officers to distract them from arresting Charles Hill. Ray charged w/ wilfully or intentionally interrupting an officer by verbal challenge during an investigation.
  + **Overbroad:** Ordinance criminalizes a **substantial** amount of const’ly protected speech & PD has total enforcement discretion

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| Discussion Problems, pg | |
| *1. Jews for Jesus* | *Vagueness analysis:*  *Overbreadth analysis:* |
| *2. Subversive Organization* | It could be if it interferes w/ your right to assemble, but it you’re a terrorist group then it might be alright. Look to the text of the statute to see if it is facially invalid and must also look to the state Ct interpretations of the statute. If state Cs have interpreted it narrowly then it might be alright |
| *3. Forbids all expressive activity on airport grounds* | *Vagueness analysis:* Reasonable person of common intelligence couldn’t read it & know what to do  *Overbreadth analysis:* No issue b/c … |
| *4.* | *Prof just gave a brief explanation* |

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
* EX: Speech would inevitably, directly, immediately cause an event
* that imperils human lives or troop movements 🡪 More than compelling interest

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
* **Injunction**
  + Ct order that parties will not say certain things, gag orders, time-place-manner conditions.
  + Injunction *might* be a prior restraint and vice versa– Will need “more than compelling interest”
  + Gag Orders for Attorneys: Usually upheld in federal ct.
    - **TX** does NOT allow them
  + Collateral bar rule applies to injunction
* *Walker v City of Birmingham* 
  + **Facts:** Injunction to prevent protestors from gathering. They still gathered. Later argued it was invalid & unconstitutional
  + **Collateral Bar Rule**
    - When there is a prior restraint in form of injunction 🡪 abide
    - i.e., You must obey an injunction, unless you get it modified or overturned
    - Remedy is to challenge the injunction in front of Ct that issued it & appeal if unsuccessful.
  + **Rationale:** The general language undoubtedly raised const’l issues, but petitioners didn’t try to get the injunction overruled
* *Shuttlesworth v. Birmingham*
  + **Facts:** Same basis as *Walker (above).*Ordinance criminalizes participation in a parade/procession/public demo w/o a permit. Protestors tried to get a permit but told they’d never get one (they were black, it was Birmingham). They marched anyway
  + **Rule:** A law subjecting the exercise of 1A freedoms to the prior restraint of a license, w/o narrow, objective & definite standards to guide the licensing authority is unconstitutional.
  + **Holding:** City clearly had extensive authority to issue or refuse to issue permits on the basis of criteria that are unrelated to legitimate municipal regulation.
* *NY Times v. US*
  + **Facts:** NYT wanted to publish Pentagon Papers, gov’t tried to restrain
  + **Holding**
    - Constitution tolerates absolutely no prior judicial restraints of the press just b/c there might be bad consequences.
    - Gov’t must make a good case for why the expression should be restrained 🡪 Here they didn’t
  + **Brennan:** would require true nat’l disaster / war/ imminent crisis heightened SS ; must be big harm
* *Madsen v. Women’s Health Center* 
  + ***Facts:*** Injunction prohibited antiabortion protesters from demonstrating in certain places & in a certain manner outside an abortion clinic. FL SupCt decision was affirmed in part and reversed in part
    - Petitioners argue an injunction is a content-based regulation on speech ***🡪*** Ct says content-neutral
    - Petitioners challenged the injunction b/c it applies to persons acting *“in concert”* w/ them
  + **Holding**
    - 36’ buffer zone 🡪 Const’l b/c narrowly tailored to serve the injunctions goals
    - Noise-Restriction 🡪 “*same as above 🡪* Unfeasible to ask patients to wear headphones// No Herculean efforts
    - 36’ buffer zone on private property around the Clinic 🡪 Unconstitutional. Burdens more speech than necessary
    - Images observable provision 🡪 broader than necessary to protect state interests 🡪 can close curtains
    - 300’ no-approach zone 🡪 broader than necessary to protect state interests
    - 300’ buffer zone around residences 🡪 broader than necessary to protect state interests 🡪 could have been narrower zone of restriction
  + **Souter**
    - Who was acting “in concert” w/ ∆s 🡪 should be taken up as individual cases
    - Even the petitioners acknowledged that FL law protects the flow of traffic, public safety, etc
  + **Stevens**
    - Agreed w/ Ct but disagreed w/ standard of review
    - Disagreed w/ second question
  + **Dissent**
    - Burdens more speech than necessary / doesn’t meet test of the SupCt
    - Should use SS for all speech-restricting injunctions
      * And this court didn't do that 🡪 so dissents from all parts
    - 300’ zone 🡪 ok

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| Discussion Problems, pg 221 | |
| *1. NYT* | In NYT all the info was older, but w/ current info that can relate to national emergencies & national security. If you could show a strong enough danger to national security (e.g., death, war) 🡪 better basis to restrain. Question is if it will be effective or not to try and restrain the journalist.  There was no guiding standard in *Birmingham*, the decision-maker applied their own specific discretion to the request.  A licensing scheme will be upheld if it is based on objective, neutral criteria n­—not based on content. |
| *4.* An injunction that was going to be a prior restraint. | There'­s a compelling interest in procuring a fair trial—it’s in the constitution. But! For a prior restraint to issue 🡪 there must be no other means to achieve the goal. Here, if there are other methods of restraint to protect the accused that are less restrictive they need to be used. |
| *3. Johnnie Cochran brought a defamation suit* | TXSupCt said that you could order the removal of that post, but you couldn’t order that no future post of a similar nature be made b/c that would be a prior restraint |

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| Discussion Problems, pg | |
| *1.* | **Case 1:**  Vagueness – Would a reasonable person know what was annoying? Here, cops are not regular people, so it’s not an ascertainable standard. State ct could give a limiting determination, they’d say it’s limited to people annoying through gang activities.  Overbroad – the scope is too broad, annoy is very broad, and this is a restraint on protected speech, which even annoying speech is pretty much protected. |
| *2.* | **Case 2:**  Vagueness – does a reasonable person know what obscene means? There’s no limitation on what may be found to be obscene.  Overbroad – not overbroad because obscenity is outside the protection of the first amendment. |
| *3.* | **Case 3:** FedCt can’t limit if state Ct already determined. Once State Ct defines it that’s enough. |
| *4.* | **Case 4:**  Vagueness – would a reasonable person know what would stop traffic?  Overbreadth – restraint on too many types of signs, doesn’t require any intent that the sign stop traffic. |

* **Exam Tip**: Part of the prior restraint/injunction might be unconstitutional but other parts might be valid.

Chapter 5: Other Expressive First Amendment Rights

* **OVERVIEW: Regulations of speech**
  + **Special**
    - Gov’t as proprieter
  + **Procedural** 
    - Vagueness
    - Overbreadth
    - Prior Restraints
  + **Other Expressive Rights**
    - Right against compelled speech
      * (1) Forced to recite/express something
      * (2) Compelled Financial Support for a Message you disagree w/
    - Right to Assemble
    - Right to Expressive Association
    - Right to Freedom of the Press
    - Right to Petition

Compelled Speech

* **General Rule:** Can’t be compelled to speak, nor can you be compelled to affirm a belief or fact that you disagree with
  + Gov’t ordered/coerced message
  + Attribution of message
* **2 Exceptions**
  + Commercial Speech/ Factual info in advertising: Gov’t can require those engaging in commercial speech to be truthful & not misleading
  + Gov’t Employees/Politicians: Gov’t can compel a gov’t employee to take an oath in order to take office
* *W. VA State Board of Education v Barnette* 
  + **Facts:** SC had already had a flag salute case pre-WWI. Argued their purpose was to foster national unity.
    - Compulsory unification of opinion achieves only the unanimity of the graveyard.
  + **Holding:** Gov’t can foster nat’l unity by persuasion & example—not by compulsion. Students can’t be expelled for refusing to salute the flag.

***&***

* *Hurley v Irish-American GLIB* 
  + **Facts:** Private group held a parade in Boston & controlled who would/wouldn’t be included & denied gay group 2 yrs in a row
    - * Denied the message, not the individuals who wanted to spread it.
      * The selection of groups to make up a parade is entitled to free speech protection.
      * The speaker has the right to tailor the speech to expressions of value, opinion, or endorsement and equally to statements of fact the speaker wishes to avoid.
  + **Rule**: Private individuals not req’d to further a message they don’t agree w/ & which might be attributable to them by a reasonable person.

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| Discussion Problems, pg | |
| *1. Federal law compels mushroom producers to pay funds, that would be used by a private org to fund ads that its mushrooms were better* | *Is it compelled speech?* They’re compelled by being forced to pay subsidies to pay for advertising message that they don’t agree with. An assessment that goes to a private entity & you disagree with the message 🡪 It violates your right against compelled speech  *How could they gov't get around this?* Make it a tax  *What if it was ‘Mushrooms, it’s what’s for dinner’?* 🡪 Then it’s gov’t speech, so they can’t challenge it. |
| *2. Man objects to NH motto ‘Live Free or Die’ which is placed on license plates. He claims his car is being made into a mobile billboard.* | *Is this gov’t speech?* It’s not you saying it, the gov’t are the ones who control the license plate. But the ct says this is compelled speech, and the opinion can be attributed to the driver. |
| *3. Pruneyard, a private shopping ctr., strictly prohibited any public-expressive activity. High schoolers* | Store could put up a disclaimer, or signs that they don’t encourage or allow speech, not compelled speech   * + 1.How specific is the message   + more specific = more likely it is to be compelled speech   + 2. Can you disassociate yourself from the message?   + 3. |

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**
       2. **If no 🡪Restriction must only be reasonable**
* *NAACP v AL., p. 228*
  + **Facts:** AL was trying to kick out the NAACP by saying they must register as an out-of-state corp. They cared about getting a list of member names to begin forcing members out of the state.
  + **Rule:** Compelled disclosure of affiliation w/ groups engaged in advocacy may constitute as effective restraint on freedom of association
* *Roberts v US Jaycees* 
  + **Facts:** Group has rule of male-only members promotes leadership among young men. One chapter allowed female members in violation of bylaws. Nat’l group sanctioned them. State group filed suit.
  + **Holding:**
    - Effect is no greater than is necessary to accomplish the state’s legitimate purpose.
    - There’s no basis for concluding that admission of women as full voting members would impede the orgs ability to engage in these protected activities or to disseminate its preferred views.
    - This was the least restrictive means, was narrowly tailored
* ***Boy Scouts of America v. Dale***
  + **Facts:** Boy Scouts kicked out Dale, an adult member for being gay.
  + **Analysis**
    - *Expressive Association?* Yes. Their mission is to “instill values in young people.”
    - *Gov't intrusion*? Yes, saying the org must take who they want.
    - *Significantly affected the BS message*?Yes.

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| Discussion Problems, pg | |
| *1.* | Not compelled speech – gov’t isn’t forcing law schools to adopt the ideology of the military recruiters. Schools could post a notice advising they don’t agree w/ military ideals. Not associational speech – the gov't isn’t forcing law schools to accept the military recruiters—they just had to be allowed a space in the schools to conduct recruitment activities. |
| *2.* | These are expressive associations. CLS can still exist and have their policy. They just can’t be part of the student orgs. The restriction must be reasonable & viewpoint-neutral. Intrusion wasn’t quite as significant + it was a limited public forum 🡪 Ct applied the reasonable and viewpoint-neutral test instead of strict scrutiny. |

Freedom of the Press

* + Press cannot be singled out to bear burdens that the general public does not have to bear.
  + Any time government tries to treat the press disfavorably we will apply strict scrutiny.
  + No distinction between press and everyone else w/ respect to free expression guarantees
    - * Has right to gather news but still have to reveal sources if called by a grand jury
      * Don’t have access to aspects of gov’t that other individuals wouldn’t have access to.
  + If ***gov’t*** is being ***abusive*** of the press and trying to use them ***to make their case*** then there may be a ***reporters’ privilege***.
* ***Branzburg v Hayes***
  + Carious reporters researched criminal activities. They were told to reveal their sources or go to jail. The 5th Amendment wasn’t available b/c they weren’t incriminating themselves. Reporters said they need a special privilege to ensure sources will keep talking to them.
    - * Reporters have the same duty as all other citizens
      * Gov't interest in enforcing the law exceeds interest in protecting sources
      * Better way to do this is to provide exceptions or exclusions for reporters
      * The existence of these shield laws is not a reason for denying it under the first amendment.
* ***Globe Newspaper v Superior Ct***
  + **Facts:** Ct excluded from trials involving minors who were sexually assaulted
  + General public has a right of access to criminal trials but the press has no special right of access.
    1. **Experience and Logic Test**
       1. History – is this traditionally something that has been open to the public? What has and has not been allowed?
       2. Function – does the right of access enhance the function of the institution?
    2. To close access 🡪 gov’t must meet strict scrutiny
       1. Protection of minor victims was a compelling state interest
       2. Not narrowly drawn, so not meet strict scrutiny.

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| Discussion Problems, pg | |
|  | Yes, they’re being treated like every other group being taxed, there is no singling them out for tax treatment  Cannot single out one section of publications to tax while exempting other groups. A tax is always going to be considered a penalty, and only applying the penalty to one group and not another is unfairly singling them out.  Look at precedent, history of a restriction like this. There is a bar on commercial media entering prisons, however there’s nothing to stop them from contacting the family of prisoners.  They were looking for material evidence, no right to the press.  In civil lawsuits that don’t involve the press, you need to make a showing that there is relevance in what info the press had discovered. |

Petition for Redress of Grievances

* + Provides you the ability to go to the gov’t and say that you want something changed in way the gov't operates.
  + Right to petition incorporates right of access to courts.
  + Right of petition and speech are intertwined to some extent and thus far the Supreme Court treats redress of grievances the same as speech.
  + EX: Public EE retaliation claim predicated on petitioning for redress of grievances must address a matter of public concern, just like a public EE speech retaliation claim.
  + BUT, since underlying purposes of provisions differ, 2 rights might nevertheless be subject to diff analysis (hasn’t come up)
    - * Purpose of Petition: Authorize citizens to direct ideas and concerns to the gov't
      * Purpose of Speech: Bolster public exchange of ideas.

Chapter 6: Applying Free Speech to   
Politics and Broadcasters

The Political Process and Free Expression

* **Contributions**
  + The amount that people contribute to a political candidate or a political party 🡪 Regulations ok
* **Expenditures**
  + Independent expenditures by individuals (groups/individuals/associations/corps), or a political party or candidate expenditures
  + Regulation of expenditures can’t be done, they can’t stop the amount of money that is spent
* **Individuals can spend as much $ as they want for advertising, etc.**
  + ***Buckley v Valeo***
    - § restricted individual political contributions, contributions/expenditures above a threshold. Public funding of Presidential campaign, Federal Election Commission established.
      * Suppression of expression of the political process, the idea of reducing contributions was an idea about reducing speech. Expression in the political arena is to donate money.
      * The message in a contribution is that you are in general supporting a candidate
      * **Contributions Test:** Closely drawn to important govt’l interest of reducing corruption or the appearance to corruption
      * **Expenditures**
        + Considered political speech when done by an individual.
        + There’s no compelling govt’l interest in stopping individuals from expending $ as long as they do it individually.
        + No interest in corruption or the appearance of corruption to justify expenditure limits.
* ***Citizens United v Federal Election Commission*** 
  + **Facts:** Corps prohibited from doing certain election activities 30 days before a primary or 60 days before a general election. They weren’t doing anything for a candidate, they were going against Hillary Clinton, trying to claim it was political advertising.
  + b/c they were a corporation 🡪 Corps and labor unions had restriction on their expenditures.
  + Laws that burden political speech are subject to strict scrutiny which requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest
  + Anti-Distortion Rationale: funding is coming from random people not from the actual corporation
    - * itself, worried it might distort the marketplace of ideas.

Broadcasters

* The ct has upheld restrictions against TV and radio broadcaster (such as fines for indecent speech, mandates re: program “balance” and req’ts of equal time for political candidates).
  + Upheld b/c broadcast frequencies are inherently scarce & viewers and listeners have paramount right
* BUT Ct hasn’t allowed similar regulations to be applied to either cable television or the print media.
  + Reasoning that these media do not suffer from the same limitations that characterize radio and TV broadcasters.
* The need to protect children has also been a compelling interest in *FCC v. Pacifica* (Chap. 1)
  + Can sanction for patently offensive language regarding sexual or excretory activities and organs during times of day when reasonable risk that children might be listening. But a fleeting expletive wouldn’t be sanctionable (except use of the F-word)
    - This was declared void for vagueness by the Second Circuit and is now being heard by the SupCt.

Chapter 7: The Religion Clauses

*Congress shall make no law respecting an establishment of religion.*

The Establishment Clause

* Prevents governmental assistance to religion
  1. **TESTS**
     + - **Lemon:** (hardest for government to meet)

Secular Legal Purpose;

Principal effect neither substantially advances nor inhibits religion; and

No excessive entanglement between government and religion (government stays out)

* + - * **Endorsement** (modification of Lemon, used a lot in “display” cases)

Analyses whether through the eyes of a reasonable observer the government is favoring or promoting a particular sect of religion or religion over non-religion.

Many ways is modification of Lemon looking at predominantly” purpose and effect” - Whether reasonable person would think that the purpose or effect of this particular gov’t conduct towards religion is favoring or promoting (endorsing) a religion indicating that those of a particular religious belief are gov’t insiders/part of the “favored” community while others individuals are ‘outside” of the preferred legal/political process

* + **Coercion**
    - * Precludes gov’t from coercing religious beliefs or practices
      * In strong form would rarely be violated & would very infrequently have any add’l assistance over “Free Exercise” clause which also prohibits gov’t from requiring someone to engage in particular religious practice.
      * Although justice Kennedy in some school prayer cases has interpreted it to be a more flexible approach that reaches direct coercion (penalty of law, fine, taxation), but also includes indirect/subtle coercion especially in school context.

History/Traditions

* + If US has a longstanding tradition of engaging in a particular religious practice 🡪 hard to say it violates the First Amendment.
  + “In God We Trust” – been on coins since Civil War – hard to say establishment clause violation
  + Sometimes hard to take a modern tradition and trace it back.
    - * Didn’t celebrate Xmas
      * 10 Commandments not placed in Courthouses
* **Exam Tips**
  + Know which is hardest/easiest
  + Know that if you pass endorsement 🡪 you pass historical and coercion.
  + What he does is put us on one side and we argue that Lemon would be the test and π wins or on the other side
  + we argue coercion is the test so gov’t wins

Official Acknowledgements of Religion

* ***Lynch*** – used the Lemon test, upheld multifarious holiday display with a Santa and reindeer along with a nativity scene
* ***Allegheny v ACLU*** (Holiday Display) –
  + ***Facts:*** 2 displays at issue: a) nativity scene on top of stairs inside courthouse, b) Christmas tree and menorah under arches.
  + *Nativity:* Ct says it endorses religion, it’s inside the courthouse in a place of prominence, reasonable person couldn’t think it’s not something the government is supporting a specific religion. *Must determine whether the challenged action is seen as an endorsement of the denomination.* Nothing in the display detracts from the religious message. No coercion, you’re not being made to believe. Not historical, the Christmas holiday is a relatively recent occurrence.
  + *Tree/menorah/sign:* a reasonable observer looks at the display and sees “Happy Holidays”, creates an overall winter theme instead of focusing on one religious message, it’s secular.
* ***McCreary County v ACLU*** 
  + (permanent display)
  + Ct applied Lemon to find three displays of the 10 commandments unconstitutional. None of the attempts had a secular purpose. Religion was always being highlighted in one way or another. The display sent the message that anyone not believing was an outsider.
* ***Van Orden v Perry*** 
  + (permanent display) –
  + Ct applied History/Tradition Test to uphold the placement of a monument partially depicting the 10 commandments around the TX state capitol. Purpose was to educate people about what made TX what it is today and not to promote religion

Govt Prayer and Religious Exercise

* ***Engel v Vital –*** Didn’t say that students couldn’t pray, just that there can’t be organized prayer in schools.
* ***Marsh v Chambers*** (History/Tradition test) – Paid chaplain gave opening prayer of each legislative day.
  + Presents no more potential for establishment than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations.
  + The practice of opening legislative sessions with prayer has become part of the fabric of society.
  + ***Lee v Weisman*** (Coercion test) – Invocation and benediction prayer as part of the formal graduation ceremonies for middle schools and high schools
    - * Prayer exercises in public schools carry a particular risk of indirect coercion
    - Adolescents are often susceptible to peer pressure to conform, & that influence is strongest in matters of social convention
      * The school district supervision and control of high school graduation ceremony places public and peer pressure on attending students to stand as a group or at least maintain respectful silence.

Governmental Financial Aid to Religion

* Ct doesn’t say which of the 4 tests applies, however they do ***focus on purpose and effect.*** If the purpose and effect are too tied up in religion 🡪 that’s the problem.
* **3 Factors controlling purpose and effect**
  + **Whether aid is available to all** (does everybody get the benefit? Or is it just helping religious groups?)
  + **Aid provided to the individual or to the school/religious entity?** – does the aid go to the individual to use how they want (religious or not) or does it go to the school to provide it to you? The more individual, the less likely it is a violation of the Establishment Clause.
  + **Is the aid used for religious education or indoctrination?** – The more it goes to educate people or indoctrinate people with respect to religious matters, the more it’s a problem.
* ***Zobrest v Catalina Foothills District –*** Deaf child wanted a sign language interpreter to assist with classes.
  + Purpose and Effect Factors:
    - * (1) Aid available to all,
      * (2) Aid goes to the individual for their benefit, &
      * (3) Aid is not directly used for religious education.

Crt focused on 3rd factor and said that an interpreter is not a teacher and neutrally relays the message. School only gets a small, indirect benefit

* ***Zelman v Simmons-Harris***
  + **Facts:** School voucher program allowed parents to send children to a private school of choice. Most vouchers went to Catholic schools b/c these were the only schools that signed up (aren’t as ritzy and would accept vouchers).
  + **Purpose and Effect Factors:**
    - * (1) Program is available to all schools (religious or non-religious) & all low-income families regardless of religion;
      * (2) Program of true private choice – $ is given to families in need and in turn they may decide to put it towards religious education – isn’t endorsement bc it is attributable to the individual;
      * (3) Parents can select secular education options for their children. Just bc most of the schools are religious that does not condemn the program

The Free Exercise Clause

* Gov’t can’t put any kind of substantial burden on your religious beliefs.
  + If regulation is targeting religious belief 🡪 Always unconstitutional
* ***What is Religion*?** Broadly defined in conscientious objector §s - anything that’s in the life of the individual that would be similar or that would take the place of a belief in god. Something that’s close to your own version of what is the divine.
* More difficult question is 🡪 When can religious conduct or practice be regulated?
  + **TEST:** Whether there’s a SUBSTANTIAL burden on Free Exercise through this regulation of religious conduct or practice
    - * **“Play in the Joints.”** There are some religious accommodations that are prohibited. There are other aspects of religious accommodations where accommodation is req’d. And there is an area in the middle where it is up to the gov’t to decide whether or not it wants to grant a particular accommodation. It can if wants to w/o violating the establishment clause.
    1. **If YES 🡪**Neutral & General Applicability?
       1. Neutral: Cannot have as its object to target or disfavor religion
       2. General Applicability: Look at the justifications for the particular § and make sure that the law is being generally applied in all circs where those justifications exist. What are the justifications? Make sure the law is being applied in those situations. Everyone engaging in similar activities is implicated the same way under the law.
    2. **If regulation is BOTH Neutral and of General Applicability 🡪 Rational basis (presumed valid)**
    3. **If regulation is NOT Neutral or of General Applicability 🡪 Strict Scrutiny**
  + **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!

Free Speech and Religion Clause

* ***Rosenberger Case –*** Part of student fees went to printing costs of certain publications. School said that it would not support publications promoting a relationship with a deity.
  + **Issue*:*** Whether funding scheme was a forum or gov’t speech.
    - * **Held*:*** Forum/not gov’t speech b/c university tried to distance itself from being responsible for message of students.
  + **Issue**: Whether withholding funding from publications supporting a deity is constitutional?
    - * **Held**: Since limited designated forum was created and were excluding those who were trying to employ a religious viewpoint you apply non-public forum test (reasonable and viewpoint neutral).
      * **Held**: Unconstitutional b/c there was viewpoint discrimination (taking out religious viewpoint).
  + **Issue**: Can you use establishment clause to get around being viewpoint neutral? University tried to defend on basis that they had to not allow funding to go to religious publications in order to comply with establishment clause.
    - * **Held**: Majority concluded no establishment clause violation – there was a neutral access to funds for both religious and non-religious purposes. It is up to the student group to use the funds as they want (similar to vouchers).
      * **Dissent**: thought establishment clause had been violated and was a lot of similarities to a gov’t tax (taking fees from everyone and then distributing them towards religion).
* **Government Speech and Sponsorship of Speech**
* Gov’t speech occurs when the gov’t advances its own message in the marketplace of ideas, through gov’t officials or private speakers
* If it’s gov’t speech 🡪 no 1st Amendment free speech analysis
  + The political process will take care of it
  + Can only claim establishment clause violation
* **Gov’t funding of private speech – communicative avenue a “forum” or is it “gov’t speech?”**
  + Gov’t can selectively fund private speech, but can’t have an unconstitutional condition
  + **2 factors**
    - Condition on recipient or how funds are used?
    - Relationship of condition to the govt’l program
  + What’s the amount of gov’t control over expression?
    - Extensive control makes it gov’t speech
  + ***Rust v Sullivan –*** regulation prohibiting federal funds for counseling on abortion and family planning
    - There’s no denial of the benefit to anyone, doctors aren’t being punished, & it’s simply insisting the public funds be spent on authorized purposes
    - **Rule:** Gov’t can selectively fund a program to encourage certain activities it believes to be in the public interest, w/o at the same time funding an alternative program which seeks to deal with the problem another way.
  + ***Legal Services Corp v Velazquez –*** restriction on lawyers, funds given to provide financial support for legal assistance in noncriminal proceedings or matters to persons unable to afford legal assistance.
    - **Condition:** Can’t argue to a ct that a state § conflicts w/ federal §, or that either § by its terms or application violates the Constitution.
    - **Hold:** Not permissible to confine litigants and their attys in this manner b/c no alternative channel for expression of the advocacy they seek to restrict.
  + ***Pleasant Grove City v Summum***
    - **Facts:** Religious group tried to donate a monument to a city park and were denied, city passed a resolution putting their req’ts into writing
    - Gov’ts have long used monuments to speak to the public by their choice of which to use and have not used every monument in the past, expression would be attributed to the government
    - Monuments are subjective, not everyone will look at it the same way, and the meaning conveyed by a monument is not a simple “Beef. It’s what’s for dinner,” it will be interpreted in different ways by different people.
    - **Rule:** Forum analysis simply doesn’t apply to the installation of permanent monuments on public property
  + **TEST: Look at to determine if gov’t speech:**
    - **Intent**: Did the gov’t intend to create a forum or control the output?
    - **Objective indicia:** Is the gov’t controlling the channels of speech or creating a forum for divergent views?
      * Is there a clear message being adopted or does it seem viewpoint neutral?
      * Does it seem to be a gov’t related message?
      * Did the message originate w/ the gov't?
      * Did the gov't fund the speech?
      * Did the gov't have ultimate control over the message
      * Is the gov't merely participating with private parties OR adopting the speech for itself
      * Who would a reasonable person attribute the message to?
      * Did the gov't or a private party identify itself as the speaker?
  + **Clear examples of Gov't Speech**
    - Gov’t leader is speaking
    - Gov’t has certain ideas on its website
    - Excepting monuments in a park
* **Discussion Problems – pg 170**
  + - The gov't is providing a benefit, and can selectively apply to veterans, but the condition did not have anything to do with the benefit. Condition is not only for the time you were getting the tax exemption, it went on forever. Condition on recipient, so unconstitutional condition.
    - If you want to do substantial lobbying it’s ok, but you have to form a separate entity. This doesn’t violate constitution for IRS to allow tax benefits, they have only given up substantial lobbying except by a separate entity. If this was a restriction on any connected entity doing lobbying it would be a problem. Entities can have a ‘political’ and a ‘civic’ branch, and get tax benefits on the ‘civic’ branch of the company.
    - First restriction is ok, funds cannot be used to legalize prostitution. 2nd restriction is more of an editorializing restriction, no other avenue, all entities would be required to adopt a policy, and once you take that position you can’t take it back. Organization must affirmatively declare they are against prostitution.
  + Skills & Values: Task 10
    - To be a non-public forum, this would need to be a reasonable restriction and viewpoint neutral. The more you define the criteria to get the license plate, the less it looks like government speech, define what kind of plates will be issued. To get more government control, you could give the groups options to pick the designs, or say they have to submit several designs and the approver will choose which design is appropriate, or collaborate with the government entity somehow. Need more specificity about what type of things that are going to be offensive, it’s too vague to say they will reject if ‘objectionable to one or more members of the public.’

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*

*Is there an exception?*

Incitement of Illegal Activity

Fighting Words & threats

Obscenity   
Speech integral to criminal conduct (incl. child pornography)

Fraud, perjury

gov’t may regulate the speech  
(rational basis review)

*Apply Intermediate-scrutiny*

NO

YES

* Speech must be a matter of public concern
  + *To determine whether the speech was a matter of public concern look to:*
    - **Content**: What was the speech regarding?
    - **Form**: Where was the speech made/delivered? e.g., TV, newspaper,etc
    - **Context**: How did the speech arise & what were the surrounding circs?
* **General**
  + Gov't EE’s have more speech protection than EE’s in the private sector
* ***Pickering* Balancing Test** *Pickering v. Bd of Education*
  + Expressive rights of EE/rights of public to receive communication; vs.
  + Managerial needs of employer
* ***Connick* Test** *Connick v. Myers, 174*
  + Speech must be made outside EE’s public duties (not made according to official job duties of particular EE)
    - Discovery: Job description, routine practices, others at office w/ similar job or other orgs
    - Can be read narrowly (enumerated duties) **or** broadly (anything related to your work).
    - Truth 🡪 Not a defense to the termination
    - If your speech brings disrepute to your job 🡪 Might interfere w/ official duties
      * e.g., Police riding on racist parade float – if officer is racist he can’t do his job protecting minorities properly.
* ***Garcetti, 179***
  + **Rule:** When EE’s make statements pursuant to their official dutities 🡪 the EEs aren’t speaking as citizens for First Amendment purposes, and the Constitution doesn’t insulate their communications from EMR discipline
  + **Held:** Speech was w/in the scope of the EE’s duties. Therefore, he had no relief
    - **3 Approaches in Circuits**
      * Limited to speech gov't requires of EE’s (gov't speech)
      * Comparison to citizen speech/contextual analysis of job duties
      * Speech related to job
      * Speech that would affect the public at large
      * Cannot be so broad as “how gov't is run is always a matter of public concern.”
    - **Assuming the first two are met then we do the *Pickering* Balance** 
      * Balance free speech rights at stake of the individual public employee and the public at large (who needs to be informed) w/ the gov’t need for efficiency and management of affairs (free speech somehow interferes w/ efficiency and mgmt) w/ respect to being able to discharge govt’l functions.
        + How did he report his suspicions? Private citizen or public official? To whom, when, how, has it happened before?
    - **Causation: Speech must have led directly to the termination**
      * If EE shows causation 🡪 gov't may try to rebut evidence by showing poor performance/bad acts.
      * 1st 3 issues are predominantly issues of law, fourth issue is a fact issue for the jury
* *Connick*
  + - **Facts:** Only a small part of the questionnaire was related to public concern, not protected

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| Discussion Problems, pg 185 | |
| *Police Officer sells porn of himself in uniform on eBay* | * + - *Connick* test: (1) speaking as a citizen b/c anyone can wear a police uniform, (2) this is by no means a matter of public concern, his expression was about nothing that had to do with a matter of public concern, (3) loses on balancing because the public at large needs to be able to trust law enforcement and the managerial concerns of the employer outweigh anything that he was doing in the video. |
| *Data entry clerk says she hopes the president gets shot on a private conversation w/ her boss* | * + - She’s just a data entry clerk and it’s not a real threat. It had no relation to her job duties. Everything you say at work doesn’t become an official duty. |
|  | * + - Fails the balancing test, managerial needs of the public EMR trump the expressive rights of the EE |
|  | * + - How many minorities are hired by a school are certainly a matter of public concern, she should be able to bring this information to the principal, this could be speech related to her job, parents could have complained to the principal in a similar manner. For correctional officer, complaining to superior is within your job, but complaining to a Senator is not within your job. Athletic director who investigated a hazing incident was fired, he won because this would be limited to speech the gov't requires of EEs |

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| Skills & Values, Task 8 pg 55 | |
| *What add’l info should you prepare?* | Job description Would need to get all his files  Find out what EE does on a day-to-day basis  Get the EE handbook  Is this something that’s in the handbook or does it specifically apply to what he does |

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)
    - Part of school curriculum
    - Speech involves some type of sexually charged, vulgar language, inappropriate for school aged children *Bethel v Frasier*
    - Promoting illegal drug use at school
* **General**
  + Balancing student rights **vs** school’s legitimate interest in maintaining discipline & ensuring an environment conducive to learning
  + Public children have expressive rights
  + Schools have rights to maintain discipline and not get student speech attributed to them
* ***Tinker v Des Moines ISD***
  + **Facts:** Students wore black armbands to school for a period of time during the Vietnam War. In response, the school wrote a new policy whereby any student who wore the armband would be expelled
  + **Rule:**Students can express themselves so long as it doesn’t materially or substantially disrupt the school and doesn’t interfere w/ the rights of others
  + **Reasoning:** A learning institution needs order + no distraction, but you can’t just restrict one way of demonstrating an opinion
* ***Hazelwood School District v Klumeier***
  + **Facts:** School official removed 2 pages from the student newspaper for articles he felt would harm students or were unfair to persons unable to give their opinion

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| Discussion Problems, pg 196 | |
|  | Schools are entitled to stop activity that advocates illegal drug use or alcohol use. Also allowed to stop anything that is vulgar or profane |
|  | Protection is not generally extended to clothing, not protected merely because they were worn in protest. This was only an expression of insubordination, no real message. |

II. Content-Neutral Regulations of Speech (approximately 2 weeks)

A. Expressive Conduct–pages 107-119

B. Time, Place, and Manner Restrictions–pages 120-133; S&V Ex. 6, Task 1

C. Secondary Effects–pages 134-144

III. Governmental Speech Regulation in a Private Entity Capacity (approx. 2 weeks)

* + Govt is acting in a proprietary capacity
    - Gov’t is a landowner-property owner
    - Gov’t speech
    - Govt is an employer
    - Public education
    - Restrictive environment e.g., Govt educating
  + We can use gov’t property or expressive purposes
  + But sometimes the gov’t has more power to regulate its own property e.g., can’t protest ISIS in a Courtroom
  + See notes pp144-150

1. Governmental Property–Public, Limited, and Non-Public Forums–pages 145-159

B. Government Speech and Sponsorship of Speech–pages 160-173; S&V Ex. 10, Task 1

C. Public Employee Speech–pages 174-186; S&V Ex. 8, Task 2

D. Public Schools–pages 187-196; S&V Ex. 9, Task 1

IV. Procedural Protections for Speech (approx 1 week)

PAGE 197-221 NEXT CLASS 10/15

A. Vagueness and Overbreadth–pages 197-204; S&V Ex. 7, Task 1

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| Discussion Problems, pg | |
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B. Prior Restraints and Injunctions–pages 205-221

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V. Other Expressive First Amendment Rights (approx 1 week)

A. Compelled Speech–pages 222-227

B. Assembly and Associational Rights–pages 228-239; S&V Ex. 11

C. Freedom of the Press–pages 240-250 [S&V Ch. 13 Intro recommended]

D. Petition for Redress of Grievances–page 251

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VI. Applying Free Speech to Politics and Broadcasters (approx 1 week)

A. The Political Process & Expression–pages 252-274 [S&V Ch. 12 Intro recommended]

1. Broadcasters–page 275-276

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VII. The Religion Clauses (2 Wks)

* EC=Establishment Clause

*Congress shall make no law   
respecting an establishment of religion.*

A. The Establishment Clause (p. 277-324; S&V Ch. 14 Intro)

Lemon Test

* Secular Legal Purpose hardest for gov’t to meet
* Principal effect neither substantially advances nor inhibits religion **&**
* No excessive entanglement between government and religion (gov’t stays out)

Endorsement Test

* + - Modification of Lemon, used a lot in “display” cases
      * **Analyses whether through the eyes of a *reasonable observer* the *gov’t is favoring* or promoting a *particular sect of religion or religion over non-religion.***
      * Kinda a modification of Lemon looking at predominantly” purpose and effect” –
        + `Whether reasonable person would think that the purpose or effect of this particular gov’t conduct towards religion is favoring or promoting (endorsing) a religion indicating that those of a particular religious belief are gov’t insiders/part of the “favored” community while others individuals are ‘outside” of the preferred legal/political process

Coercion Test

* + Precludes gov’t from coercing religious beliefs or practices
  + In strong form would rarely be violated and would very infrequently have any additional assistance over “Free Exercise” clause which also prohibits gov’t from requiring someone to engage in particular religious practice.
  + Although justice Kennedy in some school prayer cases has interpreted it to be a more flexible approach that reaches direct coercion (penalty of law, fine, taxation), but also includes indirect/subtle coercion especially in school context.

History/Tradition Test

* + - * **If U.S. has a *long standing tradition of engaging in a particular religious practice* it is hard to say that it violates the First Amendment.**
      * “In God We Trust” – been on coins since Civil War – hard to say establishment clause violation
      * Sometimes hard to take a modern tradition and trace it back.
        + Didn’t celebrate Christmas
        + 10 Commandments not placed in Courthouses
* **Exam Tip !!!** 
  + Know which is hardest/easiest
  + Know if you pass endorsement 🡪you pass historical and coercion
  + He’ll put us on one side and we argue that Lemon would be the test and π wins or   
    on the other side we argue coercion is the test so gov’t wins.
* **General**
  + Can’t be a recitation of prayer in public schools violates EC *Engel v. Vitale (1962)*
    - Prayer should be individual
* ***Marsh v. Chambers; p. 304***
  + **Issue:** Whether NB legislatures practice of opening each legislative session w/ a prayer by a chaplain paid by the state violates the EC
  + **Rule:** No, based on historical leanings of draftsmen who saw no EC violation
  + **Procedural:**
    - **DC:** *Prayer* 🡪Doesn’t violate EC | *Payment* 🡪 Violates EC
    - **NB CtApp:** *Prayer* 🡪 Violates EC | *Payment* 🡪 Violates EC
      * Modified DC’s injunction to prohibit state from engaging in any aspect of the practice
    - **USSupCt:** History and tradition est. constitutionality of this prayer
  + Prevents gov’tl assistance to religion
* **Official Acknowledgements of Religion**

Purpose and Effect Test

* (1) Aid available to all
* (2) Aid goes to the individual for their benefit **&**
* (3) Aid is not directly used for religious education
  + - ***Lynch -*** Applies Lemon test. Upheld multifarious holiday display of Santa and reindeer + a nativity scene
    - ***Allegheny v. ACLU***
      * *1. Nativity Scene at top of courthouse stairs*
        + It endorses religion. It’s prominently displayed inside a courthouse. A reasonable person couldn’t think it’s not something the gov’t is supporting a specific religion.
        + *Must determine whether the challenged action is seen as an endorsement of the denomination.*

Nothing in the display detracts from the religious message. No coercion, you’re not being made to believe. Not historical, Christmas holiday is a relatively recent occurrence.

* + - * *2. Christmas tree & menorah under arches*
        + A reasonable observer would see “Happy Holidays,” It just creates a winter theme & doesn’t focus on one religious message, it’s secular
    - ***McCreary County v ACLU*** (permanent display) – Applies Lemon Test to find 3 displays of the 10 commandments unconstitutional. None had a secular purpose. Religion was always highlighted somehow. The display sent a message that that anyone not believing was an outsider.
    - ***Van Orden v Perry***
      * Permanent display
      * Applies History/Tradition Test
      * Upheld a monument that partially depicted the 10 commandments @ the TX state capitol.
      * Purpose was to educate people about what made TX what it is today, not to promote religion
  + **Government Prayer and Religious Exercise**
    - ***Engel v Vital –*** There can’t be organized prayer in schools. Doesn’t ban student prayer.
    - ***Marsh v Chambers*** (History/Tradition test)
      * + Paid chaplain gave opening prayer of each legislative day.
        + Presents no more potential for establishment than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations.
        + The practice of opening legislative sessions with prayer has become part of the fabric of society.
    - ***Lee v Weisman*** (Coercion test)
      * + **Facts:**Invocation and benediction prayer at middle/high school graduation ceremonies
        + Prayer exercises in public schools carry a particular risk of indirect coercion
        + Adolescents are susceptible to peer pressure that they conform. Influence is strongest in social situations
        + The school district supervision and control of high school graduation ceremony places public and peer pressure on attending students to stand as a group or at least maintain respectful silence
  + **Governmental Financial Aid to Religion**
    - *Ct doesn’t say which of the 4 tests applies, however they* ***focus on purpose and effect.*** *If the purpose and effect are too tied up in religion, that’s the problem.*
    - **3 Factors controlling purpose and effect**
      * **Whether aid is available to all**?
        + Does everybody get the benefit? Or is it just helping religious groups?
      * **Aid provided to the individual or to the school/religious entity?**
        + Does the aid go to the individual to use how they want (religious or not) or does it go to the school to provide it to you? The more individual, the less likely it is a violation of the Establishment Clause.
      * **Is the aid used for religious education or indoctrination?**
        + The more it goes to educate people or indoctrinate people w/ respect to religious matters 🡪 more likely a problem
    - ***Zobrest v Catalina Foothills District***
      * **Facts:**Deaf child wanted a sign language interpreter to assist w/ classes
      * **Issue:** May a school district decline to provide an interpreter to a deaf child based on the Establishment Clause of the First Amendment?
      * **Purpose and Effect Factors** 
        + (1) Aid available to all e.g., provided only to schools w/ a secular purpose
        + (2) Aid goes to the individual for their benefit **&** e.g., direct payment of funds to school 🡪 strike down
        + (3) Aid isn’t directly used for religious education

Ct focused on 3rd factor & said an interpreter isn’t a teacher and neutrally relays the message. School only gets a small, indirect benefit.

* + - * + $ for school buses 🡪 Ok $ for school buses used for field trips 🡪 Not ok
        + $for math books 🡪 Ok $ for bibles 🡪 Not ok
        + $ provided to individuals who can decide what they do w/ it 🡪 Ok b/c true private choice
    - ***Zelman v Simmons-Harris***
      * **Facts:** School voucher program allowed parents to send children to a private school of choice. Most vouchers went to Catholic schools b/c these were the only schools that signed up (catholic schools were cheaper b/c subsidized + those schools accepted the vouchers).
      * **Purpose and Effect Factors**
        + (1) Program is available to

… all schools (religious or non-religious) **&**

**…** all low-income families regardless of religion

* + - * + (2) Program of true private choice

$ is given to families in need In turn, they may decide to put it towards religious education

Not endorsement b/c it’s attributable to the individual

* + - * + (3) Parents can select secular education options for their children. Just b/c most of the schools are religious doesn’t condemn the program

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| Discussion Problems, pg | |
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| * 1) Must be a compelling governmental interest **&** * 2) Must be the least restrictive means of achieving that interest   When can religious conduct be regulated?  *Look to the:*  Is there a substantial burden on free exercise?  Justification for the regulation  YES  NO  *Apply Intermediate-scrutiny*  *Apply strict-scrutiny* |  |
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B. Free Exercise of Religion (p.325-348; S&V Ch. 15 intr)

Neutral

*Can’t target or favor religion as its objective*

When can religious conduct be regulated?

Is there a substantial burden on free exercise?

YES

NO

General applicability

*Can’t target or favor religion as its objective*

* **TEST: When can religious conduct or practice be regulated? !!!**
  + Whether there is a SUBSTANTIAL burden on Free Exercise through this regulation of religious conduct or practice
    - * **“Play in the Joints.”** Some religious accommodations are prohibited. There are other aspects of religious accommodations where accommodation is req’d. And there is an area in the middle where it is up to the gov’t to decide whether or not it wants to grant a particular accommodation. It can if wants to w/o violating the establishment clause.
    - **If YES 🡪 Neutral & General Applicability?**
      * Neutral: Its object can’t be to target or suppress religion
      * General Applicability: The law must be applied in all circs where the govt’l interests/justifications exist (name them). Make sure the law is being applied in oth religious and non-religious conduct. Everyone engaging in similar activities is should be implicated the same way.
    - **If BOTH Neutral and of General Applicability 🡪Apply rational basis (presumed VALID)**
    - **If NOT Neutral or of General Applicability 🡪Apply strict scrutiny**

Exceptions: Apply Strict Scrutiny

* **Unemployment Compensation**
  + Must be an individualized determination made (regardless of whether it’s neutral and of general applicability) on a *case-by-case basis of whether a particular religious practice can be accommodated*.
  + ***Sherbert***
    - * **Facts:** Seventh Day Adventist doesn’t want to work on Sat.
      * **Held:** Ct says there’s a substantial burden b/c she must 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 🡪 this doesn’t apply***
        + ***Employment Division, OR v. Smith***

**Facts:** Native American fired for smoking peyote, part of his religious practice.

**Held:** 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 booze /o violating free exercise of religion

**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!
* **General**
  + Gov’t can’t substantially burden your religious beliefs mere burden not sufficient
  + Regulation targets religious belief 🡪 Always unconstitutional
* **What is Religion?**
  + Anything that’s in the life of the individual that would be similar or that would take the place of a belief in god
  + Something that’s close to your own version of the divine
  + Very broadly defined in conscientious objector statutes

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| Discussion Problems, pg | |
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C. Free Speech & the Religion Clauses (p.349-354)

* ***Rosenberger***
  + **Facts:** Student fees helped pay printing costs of certain publications. School wouldn‘t support publications promoting a relationship w/ a deity.
  + **Issue*:*** Whether funding scheme was a forum or gov’t speech.
    - **Held*:*** Forum/not gov’t speech b/c university tried to distance itself from being responsible for message of students.
  + **Issue**: Whether w/holding funding from publications supporting a deity is constitutional?
    - **Held**: Since limited designated forum was created and were excluding those who were trying to employ a religious viewpoint you apply non-public forum test (reasonable and viewpoint neutral).
    - **Held**: Unconstitutional b/c there was viewpoint discrimination (taking out religious viewpoint)
  + **Issue**: Can establishment clause be used to get around being viewpoint neutral? University tried to defend on basis that they had to not allow funding to go to religious publications in order to comply w/ establishment clause.
    - **Held**: No establishment clause violation. There was neutral access to funds for both religious and non-religious purposes. It’s up to the student group to use the funds as they want (similar to vouchers).
  + **Dissent**: Thought establishment clause had been violated and was a lot of similarities to a gov’t tax (taking fees from everyone and then distributing them towards religion).

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| Discussion Problems, pg | |
| In the recent *Hobby Lobby* decision re: forcing employers health insurance plans to offer 20 different types of contraceptives, does it seem like a free exercise clause violation? *\*Note the real issue in this case was could the protections that apply to an individual be applied to a corp. Maj said yes. Dissent said no.* | *Does it substantially burden Hobby Lobbies free exercise of religion?* No, doesn’t really seem like it. |
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| Skills & Values, pg | |
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EXAM Tips

* **Classroom:** 517 **Contact Info:**
* **Exam Format:** MC (40 pts) + Essay (60 pts)
* **Exam Timeframe:** 2 ½ hours
* **Do:**
  + He gives us enough time to finish the exam (30% more time when compared against his ConLaw exam)
  + Write only as much as is necessary to complete the exam. Avoid
* **Don’t:**
* **Activities:**
  + Discussion problems & hypotheticals from class will appear in MC questions on the exam