First Amendment Outline (Stone Fall 2010)

# Intro and Why Do We Care About Free Speech

1. Amendment I (1791)
   1. “*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances*.”
      1. What is “freedom of speech”? What is “abridge”? “Congress”?
      2. Though text appears to be absolute, doesn’t really decide anything.
   2. No RIGHT to give a speech
      1. Ask “is the law under which a person is prosecuted constitutional as applied to them?”
      2. Same speech might be protected or unprotected depending on what law.
2. Historical concept
   1. Probably intended to bar the use of prior restraints.
      1. Only about prior restraints? But if that was all, why adopt the 1A at all? Plausible understanding though.
   2. Probably did not intend FoS to include blasphemy and defamation.
   3. Seditious libel. Unclear what intended. Hotly debated at time. Many framers supported the Sedition Act of 1798 later.
   4. Overall, more about abstractions and open ended concepts than legalistic sense of what it would like in practice.
3. Where to put the risk of uncertainty
   1. In general, we are hesitant to repudiate laws unless we are certain they are unconst, as sections of Const are anti-democratic and anti-maj, don’t want to usurp authority of maj – under this view, if we don’t know for certain they wanted to go beyond prior restraints, we wouldn’t take it farther.
   2. Guarantees of individual liberty should be interpreted expansively, err on the side of broadness – anything the framers might have reasonably thought would be a violation can be a violation.
4. Theories of FoS
   1. **Political Concept** of FoS
      1. Speech as necessary for the effectiveness of a **self-governing** society, govt can’t control it.
         1. Problem – would leave lots of speech unprotected that wasn’t political
   2. **Speech as about Culture, Autonomy and Decisionmaking**
      1. Informs your world, influences your decisions in all areas
   3. **Individual self-fulfillment and realization**
      1. Right to speak a fundamental element of humanity and freedom
   4. **Contemporary Marketplace of ideas**
      1. Marketplace as a search for truth – best ideas will prevail
      2. Though, better to censor some out – too much speech makes a mess? In same way that laissez-faire doesn’t work in pure form
      3. But we don’t let the gov’t do the cleaning – we don’t trust them.
      4. Profound distrust of govt when it comes to regulating expression, especially when the expression is directly related to the govt’s ability to preserve its own power.
   5. Speech as a check on abuse of power
   6. Tolerant society – forces us to exercise self-restraint and be tolerant
5. Speech is Easily Discouraged
   1. We often know our individual speech won’t change much, so often not worth the risk of jail, especially if the lines of what is punishable aren’t clear.
      1. Jail is an extreme consequence.
6. Low value
   1. Assume speech is high value unless shown otherwise.

# Content Based Restrictions

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| --- | --- | --- |
| #1 | #2 | #3 |
| Express incitement | Specific Intent | Constructive Intent |

1. Two themes:
   1. (1) When is speech sufficiently dangerous to justify punishing it?
   2. (2) To what extent does the 1A or should 1A be understood as treating differently regulations of speech that do not further the purposes/goals/values of the 1A relative to other speech?
      1. Hand in Masses – not about danger, but EAUC doesn’t further purposes of 1A.
      2. Could argue that B only targets speech outside 1A protection.
         1. But would miss lots of dangers
2. Four categories
   1. Expression that induces unlawful conduct (low value)
   2. Threats (low value)
   3. Provokes Hostile Audience Response
   4. Disseminates Confidential Information
3. How applicable is C&P to all these categories?
4. Remember, part of purpose of C&P is to force gov’t to take other reasonable steps, rather than the suppression of speech.

## Expression That Induces Unlawful Conduct

1. Closest analog to seditious libel – really punishing people bc of bad things they’re saying about the govt, but reframe to say punishing bc inciting others.
2. ***Shaffer v. United States*** (9th Cir. 1919) –
   1. Shaffer convicted of violating Espionage Act. Had mailed a book saying the war was wrong. Court said that even though disapproval of the war and advocacy of peace were not crimes under the act, their natural and probable tendency was to produce the result condemned by the statute.
3. ***Masses Publishing Co. v. Patten*** (SDNY 1917) pg 21 [Learned Hand]
   1. **Espionage Act of 1917** – mostly concerned with espionage, but several provisions used against WWI dissenters. Prosecuted under bad tendency and constructive intent.
      1. (1) unlawful to cause or attempt to cause insubordination or disloyalty in the armed forces of the US
      2. (2) unlawful to obstruct recruiting/enlistment
      3. (3) gave postmaster general the power to exclude from the mails any written matter found to be in violation of the substantive provisions.
   2. Masses published revolutionary circular, pretty clearly anti-war. Postmaster saying violated Esp Act.
      1. **Bad tendency** - the natural and foreseeable consequences of the book would be to turn readers against the war.
         1. No need to prove intent – can be presumed.
         2. Analogy to speeding – can be ticketed even though no actual harm – bad tendency, causes harm.
         3. BT essentially makes seditious libel a crime.
   3. Learned Hand – interpreted Esp Act in such a way that pieces didn’t violate act. Didn’t say Act was unconst, but was clearly his view of 1A that it was.
      1. Concedes speech may have bad tendency, but says it is protected, not because it’s harmless, but because it’s **valuable**.
      2. Draws line at **Express Incitement** – must expressly advocate that readers do acts against the war.
         1. Draws line between 1 and 2, whereas criminal law would draw between 2 and 3.
            1. But unclear when you are in 2 or 3 (audience hears same thing, hard to determine speaker intent), that line would chill people in 3.
   4. Overturned on appeal. One of the great 1A opinions.
4. ***Schenck v. US*** (1919) pg 24 [Holmes]
   1. SC first addressing of 1A – Holmes seems oblivious to importance and delicacy of needing to think about regulating speech.
   2. ∆ criticized war to draftees, convicted, argued 1A rights, unanimously upheld.
   3. 1A is more than about just prior restraints. Kind of an offhand comment, but stuck.
   4. **Clear and Present Danger**
      1. Fire in a crowded theatre
         1. Rebut notion that 1A is absolute.
      2. Also uses as a paradigm for when speech can be punished
         1. False fire creates a clear and present danger, therefore speech can be punished when it creates a clear and present danger.
         2. But what if there really is a fire? Still C&P danger, but wouldn’t punish because valuable.
            1. Should be: punishable if creates C&P and is False.
         3. Focuses more on danger than value to public discourse
5. **Clear and Present Danger Test**
   1. **(1) Clear**
      1. significant probability that the danger will become a reality.
         1. Also balances degree of harm – less harm needs a higher probability
   2. **(2) Present** 
      1. Presumably something about proximity in time between the speech and the feared harm.
      2. Is this already in probability? Timing indicative of our ability to predict probability?
      3. Insist on **imminence**
         1. Gov’t likely to overestimate the harm farther down the road.
         2. And if far down road, gov’t can take other steps to prevent the harm.
            1. Achieve goals by means other than suppressing speech.
         3. Fire analogy – instant rxn, know caused by speaker. If more time, audience had more time to think about it and make own decisions about whether to act unlawfully.
   3. **(3) of a danger Cong as a right to prevent**.
      1. Gravity of the harm. How to think about?
         1. Irrelevant – C&P enough
         2. Min level – littering not grave enough
         3. Variable – balance between the three – looking for a total gov’t interest above a certain amount – if more grave, need less clarity and presence.
   4. Idea is to be sure the state’s interest is sufficiently great to justify suppressing speech.
      1. Hopefully create a safe harbor for people to criticize the draft
   5. Problem – C&P not self-defining.
      1. Seems to be a fairly speech protecting test, but reality hasn’t been consistent with that.
6. ***Frohwerk v. US*** (1919) pg 29 [Holmes]
   1. ∆ convicted under Esp Act of 1917
      1. Publication expressed admiration for those who resisted the draft, didn’t directly incite.
         1. Learned Hand prob would have overturned conviction.
   2. One week after Schenck, but no mention of C&P.
      1. 1A not meant to give immunity to all, a little breath can kindle the flames of harm.
      2. Inconsistent with what we would have thought C&P was.
7. ***Debs v. US*** (1919) pg 29 [Holmes]
   1. ∆ leader of Socialist Party, speech on socialism, criticized war and draft, praised those who had refused. 10 year sentence. Conviction affirmed.
   2. Jury instruction – guilty if speech had the natural tendency to obstruct service – no specific intent requirement.
   3. **[missed some stuff. Look into]**
8. ***Abrams v. United States*** (1919) pg 31
   1. **Sedition Act of 1918** – crime to criticize the war, military, draft, flag, president, uniform of soldiers, in any way. Truth was no defense.
      1. Enacted bc a couple of judges had construed Esp Act narrowly, wanted to be unambiguous. Also meant to protect speakers – so clearly criminal, wouldn’t need vigilante acts by public (murders had happened in past to critics)
   2. Russian imms, leaflets calling for general strike, worried that real reason of war was to crush the Russian Revolution. Convicted under Sedition and something else (Esp Act?), concurrent sentences.
      1. Only reviewed other conviction, avoided having to outright uphold seditious libel.
   3. **Holmes dissent**
      1. First of the series of Holmes/Brandeis dissents. Gives birth to American tradition of American judicial tolerance and protection to free speech.
      2. Doesn’t say persecution for expression of ideas is bad (actually, it’s logical), but just not here.
         1. Does say Schenck, Frohwerk and Debs were all right.
      3. **Present Danger of Immediate Evil** test for regulating speech
         1. (1) Creates a present danger of an immediate evil, OR
         2. (2) If a speaker specifically **intends** to create such an evil.
            1. Intent element meant to weaken C&P
      4. (Circle for C&P, circle for intent – most strict provision would be to only criminalize where they overlap, but not what he’s doing)
      5. Applies test to Abrams
         1. Not sufficiently clear or present to justify (he doesn’t take the possibility of harm of these leaflets seriously)
         2. But why not convict on specific intent, the 2nd prong of the test?
            1. Said intent was to aid Russia. Conflating intent and motive?
      6. Holmes applying a C&P test he’d articulated, but that hadn’t been followed, and then criticizing maj for not following…
   4. Last 2 paragraphs, talks about 1A – why govt tends to suppress unpopular speech, marketplace of ideas justification, condemns notion of seditious libel. First time discussed like this by a justice.
9. Schaefer, Pierce and Gilbert
   1. Three following cases, all 7-2 upholding convictions.
   2. McKenna in Gilbert talking about how every word ∆ had said was false – not talking about harm, talking about falsity – implicitly adopting seditious libel.
10. ***Gitlow v. New York*** (1925) pg 36 [Sanford]
    1. Published Left Wing Manifesto, convicted under NY law of criminal anarchy. Called for revolution when the time was right (unlike *Debs* – change through avenues of gov’t). Was not during a time of war – the was peacetime
       1. Statute- advocates, advises or teaches the duty, necessity or propriety of overthrowing organized gov’t.
          1. Cleary states what kind of speech is problematic, unlike *Schenck* and *Debs*.
    2. Refused to instruct jury that it could convict *only* if it advocated *immediate* acts of violence or a *likelihood* that unlawful acts would actually occur – applied statute as written.
    3. Convicted, affirmed 7-2. But first time maj makes effort to figure out what 1A means.
       1. Court suggests 1A applies to states through 14th DP
          1. This opens door to many more cases to come before the court.
       2. Speech was different than before, in that express incitement was for the future (whereas Abrams was immediate and Masses/Debs was not express)
          1. For Holmes, easy – no C&P.
             1. Continuing the C&P charade that they’re the ones following the law, rather than just say we think precedent is wrong and we won’t follow it.
    4. What kind of **SCRUTINY** should be applied when the statute speaks directly to speech rather than acts?
       1. If statute only about acts, no express judgment about speech for the court to refer to.
       2. If about speech, should they defer as long as not unreasonable? Doesn’t really answer, but has trouble distinguishing 1A and 14A – in EP, if rational basis, we defer (ophthalmologist case)
       3. Think about function of judicial review – when is it important for the court to second guess Cong? Ophthalmologist, not so much, but race, there is. Regulating speech, there is.
    5. What would Hand say? Said expressly advocating unlawful conduct was outside 1A, but does that include future? Later writings – prob wouldn’t protect.
11. Does C&P danger make sense?
    1. Make state wait for danger to be C&P before can act?
    2. Holmes in *Gitlow* - if people have bad ideas, the meaning of freedom of speech is that they should be given their chance, and if they’re adopted they’re adopted.
       1. But do we trust citizens enough? Nazi Germany.
       2. But do we trust the majority any more?
       3. **Holmes thinks the 1A makes this choice for us – of the two risks, better to risk the people making bad choices than the gov’t**.
       4. **Fundamental point of 1A is to prevent us from banning ideas because we don’t like them**.
          1. Allow people to hear ideas, make up their minds, and act on their ideas. But if the actions are illegal, can be punished for your actual actions
       5. Weird he brought this up in Gitlow, as this guy was actually advocating violence.
    3. **Note**: Holmes saying can’t be prosecuted just for your speech, but if your speech is prohibited to prevent bad acts, that’s ok 🡪 C&P danger situation.
       1. All about intent of the gov’t.
12. ***Whitney v. California*** (1927) pg 41 [Sanford]
    1. ∆ attended 2 conventions of Communist Labor Party, due to membership was convicted of violating the CA Criminal Syndicalism Act. She actually opposed their tactics at the convention, but remained after they adopted the platform.
       1. Act prohibited becoming a member of any org that advocates crime/sabotage/unlawful acts of force/violence.
    2. Unanimous affirmation of conviction (H/B on technicality)
    3. Sanford found to be easy case – like Gitlow, give deference to the legislature if not unreasonable.
    4. Here, not prosecuted for her own speech but for her knowing membership with the org involved in the speech.
       1. **What degree of involvement in that speech is necessary under the 1A for the gov’t to criminally punish individs that are involved in some way in the org**?
          1. Post WWII, court said **membership alone was not enough**, **need active membership and specific intent to further the unlawful goals**.
       2. Is joining a club speech, or an act?
       3. ***Humanitarian Law Project*** – terrorist orgs, but also humanitarian work. Punishable. (case last term).
    5. **Brandeis Concur**- Explains our reasons for our commitment to free speech, tries to connect them to C&P
       1. 5 reasons attributable to framers: (1) believed final end of state was to make man free to develop faculties (2) indispensable to discovery of political views (3) eschew silence coerced by law (4) fitting remedy for evil counsels is good ones (5) didn’t exalt order at expense of liberty.
       2. Looks at all forms of potentially dangerous speech, says only punishable one is advocacy consisting of incitement and danger that may be immediately acted upon.
       3. Strengthens theoretical underpinnings of C&P standard.
          1. Suggests even express advocacy can’t be punished unless C&P and serious.
13. *Pelly*
    1. WWII, convicted under false statements act (had formed the Silver Shirts – Nazi supportive org). Crime to make false statement to hinder the war.
       1. But had to prove falsity.
          1. Didn’t open door to as many prosecutions as WWI.
    2. Upheld conviction.
14. ***Dennis v. US (1951)*** og 47 [Vinson]
    1. McCarthy era, criminal prosecution of leaders of the COmm party, 9 month trial, confirms conviction 9-2 (Black/Douglas dissent).
       1. Years between Whitney and Dennis, court coming to accord with H/B opinions.
    2. Here, was actual advocacy of violence. Vinson implies that might be different of prosecuted merely for political discussion.
    3. **USES C&P DANGER review** – not mere reasonableness.
       1. But modifies it. Adopts Hand’s interpretation from below: “*In each case, courts must ask whether the gravity of the evil, discounted by its improbability justifies such an invasion of free speech as is necessary to avoid the danger.*”
          1. Watered down imminence.
          2. Redefined as a balancing test.
       2. Finds requisite danger, upholds. Makes no sense to wait til danger is at the front door.
          1. But to extent that anything is actually being advocated, it’s in the distant future. Danger is hardly imminent. Conviction should really be overturned.
       3. “Snatches defeat from the jaws of victory”
          1. Still more protective than reasonableness
    4. Frankfurter concur is the last gasp of the ad hoc, open ended reasonableness approach.
    5. Black/Douglas dissent – apply C&P as H/B wrote it, no showing of C&P here.
    6. NOTE:
       1. 7 of 8 justices reject *Gitlow*
       2. 7-8 agree that even some express advocacy is somewhat protected.
          1. 6 (not Black or Douglas) say that express advocacy of law violation is less protected than other expression though.
15. ***Yates*** (1957) pg 55 [Harlan]
    1. Similar to Dennis, but overturned conviction.
       1. Dennis, court focused on danger, here, focused on the content of the advocacy. Saw that while saying bad acts might be necessary, hadn’t told them to do anything specific.
    2. Interpret Smith Act narrowly so that it seems to only reach express advocacy of imminent unlawful conduct [EAUC], avoid const Q.
       1. Seems to be moving toward Hand in *Masses*.
    3. Harlan **Danger Zone** – area where if Cong legislated, would be on thin ice – regulated speech that doesn’t expressly advocate.
       1. Act penalizing anyone who criticized the Vietnam draft – would be unconst, bc punishes speech other than that which EAUC.
16. Two pre-Brandenburg cases
    1. *Kingsley pictures* 
       1. Statute making it a crime to exhibit sexually oriented material encouraging or approving of pre-marital sex. Movie. Overturned conviction – if advocacy falls short of incitement and won’t be immediately acted upon, not illegal – quotes brandeis in Whitney.
       2. If not EAUC, can’t limit speech.
    2. *Bond v. Floyd*.
       1. GA legislature refused to swear in Bond bc he’d expressed support for Vietnam draft resisters. Speech wasn’t a call to unlawful action, can’t be punished, so can’t exclude him.
17. ***Brandenburg v. Ohio*** (1969) pg 58 [Per Curiam]
    1. 50 years after Schenck, huge break from past decisions, though purporting to be simply stating current law. Statute almost same as in Whitney.
    2. **1A forbids gov't from forbidding even express advocacy of unlawful conduct unless speaker specifically intends to incite specific unlawful action and such action is likely to result imminently**.
       1. Essentially combines Hand’s protective elements in Masses with most speech protective elements of H/B C&P danger.
       2. Doesn’t address gravity of the danger – later, clarifies must be very serious.
       3. Also, doesn’t *explicitly* say “express” is needed, this was just the speech at issue. Interpreted as such.
       4. “Likely” and “Imminent” – to shed ambiguity of C&P, and all their baggage. Replaces C&P danger.
    3. **Today: can't punish unless express advocacy of Clear, serious, imminent danger that is very grave**.
       1. Gravity of state’s interest alone is not enough to justify.
    4. Court meant what it said – Brandenburg treated as stated law for last 40 years.
       1. Is this too narrow? Does it miss speech that may actually cause harm? If court enforced narrowly, allowed speech that caused harm, would court lose legitimacy in eyes of public?
       2. *Brandenburg* meant to build a fortress around 1A, shield us from the temptations to under-protect speech, be influenced by the public – we can look back on WWI/WWII cases now and see that wrong, but seemed right at the time. A type of pre-commitment device to prevent us from making the same mistakes as our predecessors.
       3. Rigid rules also important because the “worst case scenario” that *Dennis* was trying at almost never happens. Tailoring rule around that scenario is oppressive to everything else
          1. And when worst case happens, can be sure gov’t will ignore rule anyway.
    5. *Brandenburg* protects in criminal situations. Does it give you a right in others? (say kicked out of school for expressly advocating – does school need to abide by *Brandenburg*?)

## Threats

1. Warning vs. Threat
   1. Warning – provides you with info you can choose to act or not act on
   2. Threat creates the danger that previously didn’t exist. Not meant to provide you with info for your autonomous judgment, but to create a coercive situation.
      1. Nature of a threat, **doesn’t serve the purposes of the 1A**.
      2. The harm occurs when made, the harm being the fear and angst that is created.
         1. The fear and angst is imminent and immediate.
2. Low value
   1. Because of nature of threat, feel ok saying it is low value and can be regulated in ways that other speech cannot. (see section below)
3. Framework
   1. Doesn’t really make sense to apply EAUC/C&P framework – purpose isn’t to prevent the harm, but to protect the individual who is the target of the threat.
      1. Intent/capacity to harm of speaker doesn’t matter, as long as the victim believes it. (if victim knows it’s empty, then no harm)
   2. Hypo of telling judge if they don’t acquit, they won’t be reelected. Threat? What if out them as gay? One is blackmail, but why?
      1. Threatening non-reelection, or implying that will be the result? If a legislator, aren’t you just threatening them with democracy? Not a problem.
         1. The threat is not illegal.
      2. Have a right to talk about a judge being gay, but not to say IF X, then I’ll out you.
         1. Blackmail is an example where something you could legally do becomes, in the context of a threat, a crime.
      3. If say “dire consequences will happen”? Ambiguous – kill family, or not re-elect?
         1. If ambiguous, don’t punish – don’t want to punish those who didn’t intend to threaten.
         2. Same problem with Speakers A,B,C in incitement analysis – chilling on C if punish B, bc unclear which one you’ll be in.
         3. Ambiguity takes it out of low value speech.
4. ***Bridges v. California*** (1941) pg 64
   1. Sent telegram to Sec of Labor describing judge’s decision as outrageous, and suggest that if decision was enforced, his union would call strike.
      1. Found guilty of contempt of court.
   2. Black – conviction unconst
      1. The “substantive evil” was not enough, and would not be diverted by silencing. Can’t insulate judiciary from criticism. A strike was a foreseeable potential consequence of the decision.
   3. Frankfurter plus 3 dissenting
5. *Watts v. US* (1969) pg 66
   1. Statute was facially const, but reversed conviction because the “political hyperbole” wasn’t a threat.
6. ***Planned Parenthood v. American Coalition of Life Activists*** (9th 2002) pg 67
   1. Nuremburg files, Wanted posters of abortion doctors.
      1. Are they threats? Not a technical threat – the website people aren’t going to go out and kill the doctors.
      2. But standard is “**whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicated the statement as a serious expression of intent to harm or assault**.”
         1. Maj – intent here is unambiguous, it is a threat.
            1. They are avoiding the magic words like in express incitement, but intent is clear.
         2. Dissent – in order to punish, have to have either express incitement or technical threat. .
   2. Incitement?
      1. Express? Wanted poster so close, may cross the line.
      2. Likely and Imminent? No, flunks Brandenburg.
      3. (How much to we need to replicate every element of the incitement test when we deal with other types of low value speech?)
   3. Note: In the threat context, the court does NOT insist that the degree of gravity be as great.
      1. Harm here is the overbearing on the individual autonomy of the person, court willing to uphold prohibition.
   4. Is combination of express incitement and facilitating information sufficient?
      1. Probablity increases, but this is still just bad tendency.
   5. Privacy interest?
      1. Probably not enough. People don’t have a *right* to know abortion doctor’s addresses, but state doesn’t have a right to prevent them from knowing.
7. Cross burning hypo
   1. Mob marches in protest of integration saying if blacks move in, we will kill them
      1. Threat.
   2. Say there was a rally in protest?
      1. No threat. Unwelcome environment, but not threat.
   3. Burned cross at the rally?
      1. Maybe threat? Depends on meaning of burning of a cross – expression of racism, or threat?
         1. Wanted poster is less ambiguous – more clearly “kill the Drs”
      2. May be sufficiently unambiguous – protestors have credible argument to say not threatening anybody.
   4. Burn cross on someone’s lawn?
      1. Probably sufficiently unambiguous as a threat to satisfy Hand.
      2. (If we required perfect unambiguity, would be ridiculous, but where is the line?)

## Expression That Provokes a Hostile Audience Reaction

1. ***Terminiello v. Chicago*** (1949) pg 70
   1. Speech in Chicago, jury instructed that they could convict if his speech stirred people to anger.
   2. Held that in light of this instruction, conviction couldn’t stand.
      1. Not enough to be offensive to listeners.
   3. C&P danger? Is C&P danger of stirring people to anger, which IS a harm
      1. But not sufficient. (remember, pre-*Dennis* adoption of C&P) Why?
      2. Argument 1 – not enough harm
      3. Arg 2 – no low value speech here. Nothing on its face suggests less than fuly protected.
   4. Is rule that speaker may never be punished bc of ideas the speaker communicates may upset people?
      1. Hypo of city bus, has spaces for advertising, refuses images of aborted fetuses bc have legit interest in safe, comfortable environment for riders.
         1. Would have to be neutral. System of rating? Panel? Still represents majority though – prob unconst.
         2. Alternative? No ads?
2. ***Cantwell v. Connecticut*** (1940) pg 71 [Roberts]
   1. JW peaceably walked down street playing phonograph attacking organized religion, many passerby were offended, testified tempted to resort to violence.
      1. Held: conviction of inciting a breach of the peace overturned.
   2. Unanimously invokes C&P danger.
      1. Say no C&P, but prob not best test.
         1. Not that likely, not that severe a danger. Though, if played long enough, someone would react.
      2. **For C&P to be an effective test, has to be more than “ultimately someone will react,” but that it is probable and knowable to the speaker**.
      3. What if had been a disturbance? Then was a known occasion of angry response.
         1. Even then, presumably no C&P bc wasn’t imminent – wasn’t any more likely that *that* time someone would react, so still not probable.
   3. Hypo- playing to thugs you know hate JWs and prone to violence – should ∆ be punished then?
      1. His speech isn’t low value.
3. ***Feiner v. New York*** (1951) pg 73
   1. ∆ speaking to crowd on soapbox, crowd getting restless, 2 cops fear a riot, ask ∆ to stop, he doesn’t.
   2. SC- created C&P danger, undertaken incitement to riot, upholds conviction.
      1. More classic C&P situation, not an “inevitably problem will arise” situation.
      2. Say riot had happened, arrest him for inciting.
         1. Doesn’t mean that there were words of express incitement though
         2. Court seeming to imply that it is **intent** to incite crowd.
   3. Assuming he did intend it
      1. One argument – too bad. Can never punish someone for content – audience should be held accountable.
      2. Back to Speakers 1,2,3 problem – specific intent all that distinguishes 2 and 3, 3 might be held accountable, chilling effect.
   4. **Heckler’s Veto** – if you uphold law punishing SI to incite, then you’re incentivizing a hostile audience to be more hostile and violent to silence the speaker.
      1. Not saying speaker should never be held accountable – people can knowingly create through their words situations that incite violent responses from others.
         1. Not holding them accountable literally for the violent responses, but for creating the situation – will still also punish the audience
      2. Also don’t want the jury to have the heckler’s veto (in finding specific intent)
   5. Cops – what is their role?
      1. Need to try to control the crowd.
         1. Dispersing crowd same effect as silencing the speaker.
      2. Can arrest people if a riot erupts. Can presumably take steps to prevent and warm people of the consequences.
      3. *Forsythe* – can’t impose the costs of reimbursing society for the protection of speech, so can’t force speaker to pay for police costs.
   6. Where does Feiner leave us?
      1. Suggests that if creates C&P danger of violent response, and intended to create it, he can be legally accountable for that conduct.
      2. In the 60 years since, court has never taken on the precise issue in a way that explicitly examines the continuing vitality of Feiner.
         1. Were civil rights cases, demonstrators arrested for breaching peace, threatened by white onlookers. Court reversed convictions in each case.
      3. In each case, clear that court becoming more aware of concerns of Heckler’s Veto, police and jury discretion and abuse of discretion.
      4. Court probably would not reach same result today. Would either tighten up C&P standard dramatically, or do more with idea of “undertaking incitement to riot” and hold that cops have a responsibility to take all reasonable steps to protect the speaker.
4. ***Chaplinsky v. NH*** (1942) pg 80 [Murphy]
   1. ∆ called cop “a god damned racketeer.” Court confirmed conviction.
   2. **Fighting Words** – narrowly define class of speech of such slight value in the search for truth that they aren’t entitled to full 1A protection.
      1. Similar justifications as to threats. Purpose of FW is not to persuade, but to hurt. Like a punch.
      2. Very narrow. 12 cases or so inviting this doctrine since, all rejected the application of the doctrine.
   3. Maintained in theory, but so narrow that any vitality would be in a situation of a face to face encounter when one calls the other a name and the likelihood of violence is almost certain.
   4. Still technically low value.
5. ***Skokie*** (1978) pg 86
   1. Nazi march of about 30, suburb half Jewish. City officials wanted an injunction. Nazi’s arguing march protected by 1A. Skokie offers 4 arguments to stop the march
   2. (1) Effect of the speech will inevitably be to inflict severe emotional harm on Skokie, particularly Jewish/Holocaust survivors.
      1. But if not intention to inflict harm (incidental byproduct), then can’t punish.
   3. (2) Intent wasn’t about free speech, but to inflict harm.
      1. How to measure intent? Could you argue civil rights marchers were trying to inflict emotional harm on whites?
      2. Doesn’t matter to court whether civil case or criminal/injunction.
      3. *Snyder v. Phelps* – the funeral protests, before SCOTUS now.
   4. Court rejected 1&2 saying emotional distress is not sufficient justification for restricting speech. Inquiries into intent don’t solve the basic problem.
   5. (3) Hostile audience – will be chaos, possibly physical harm to people.
      1. Classic heckler’s veto problem, should respond with more police, educate people, etc.
      2. Note – this is an **injunction**. If the marched, there was rioting, and they were prosecuted for breach of the peace, prob guilty under Feiner.
         1. BUT, they gave notice (get permit).
      3. Too tempting for judges to grant the injunctions, especially if an unpopular speaker. Have to let them speak, if real harm, punish after.
         1. Also much easier to prosecute violation of injunction – separate offense (Collateral Bar Rule). Like a prior restraint.
   6. (4) Fighting words
      1. Court rejects – display of swastika not face to face epithet. More like burning a flag.

## Expression That Discloses Confidential Information

1. ***NY Times v. US, US v. Washington Post*** (1971) pg 92 [per curiam]
   1. Ellsberg gave Pentagon Papers to the NY Times and the Post, US sought injunction. Case went up expedited, all about 2 weeks. 2nd and DC split.
   2. SC held injunction unconst.
      1. Harm needs to be convincingly established as clear, soon, and grave.
         1. Claims of nat’l security, foreign relations, death of American soldiers, prolonging the war, endanger safety of American POW’s etc, not good enough. Just claims, not detailed proof.
         2. Benefit of disclosure is also important – **balancing**.
   3. Dissent – maj moving too quickly, wants a trial, give gov’t more time to review the documents
   4. Like Wikileaks – not actually anything that bad, most info was old, just embarrassing.
      1. But greatest risk court has been willing to take to defend 1A.
2. Freedom of the press may be a right to publish information, but not a right to demand and receive information.

Overbreadth, Vagueness, and Prior Restraint

1. Under each of these doctrines, courts may invalidate restrictions on expression bc the means of suppression are impermissible
2. ***Gooding v. Wilson*** (1972) pg 109 [Brennan]
   1. Statute criminalizing use of opprobrious words and abusive language was struck down for overbreadth.
   2. “*Because First Amendment freedoms need breathing space to survive, gov’t may regulate in the area only with narrow specificity*”
      1. If broad, chills speech.
3. **Overbreadth**
   1. **Tests const on a law’s potential applications** – not just about whether facts before it are unconst or would be unconst if statute written narrowly.
   2. Exception both to the traditional “as applied” mode of judicial review
   3. Also exception to general rule that an individual has no standing to litigate the rights of third persons.
   4. *Broadrick v. OK* – court said that overbreadth should be invoked only when there is a significant likelihood of deterring important 1A speech.
4. Vagueness
   1. As a matter of DP, a law is void on its face if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.
   2. Unclear if also a waiver of traditional standing rules.
5. Prior Restraint
   1. A special presumption under 1A against the use of prior restraints.
   2. Much easier to suppress speech before the fact than after.
      1. Officials think a lot more about punishing after the fact.
      2. Also procedural protections (crim law) after the fact
      3. Censor’s job is to censor- professional interest in suppressing things
6. ***Lovell v. Griffin*** (1938) pg 120 [Hughes]
   * 1. City ordinance that can’t distribute literature without first getting written permission from the City manager. Otherwise, deemed a nuisance.
     2. Struck down as facially const – strikes at the very heart of the 1A.
7. ***City of Lakewod*** (1988) pg 121
   * 1. Cannot vest restraining control over the right to speak in an admin official where there are no appropriate standards to guide his action.
8. ***Freedman v. Maryland*** (1965) pg 123
   1. Movie censorship board.
   2. Court said that a process that requires prior submission to a censor must have procedural safeguards designed to obviate the dangers of a censorship system
   3. Const required ***Freedman* safeguards**
      1. (1) Burden of showing that the film is unprotected expression must rest on the censor
      2. (2) Censor cannot be final say. Must assure the speaker that the censor will, within a specified brief period, either issue a license or go to court to restrain the showing.
      3. (3) must also assure a prompt final judicial decision.
9. ***Near v. Minnesota*** (1931) pg 126 [Hughes]
   1. MN statute allowing for the abatement, as a public nuisance, of some publications. Defense if the truth was published with good motives and for justifiable ends.
      1. Clearly a prior restraint – struck down.
   2. Can regulate obscenity, but that’s not what this is.
   3. 1A doesn’t require good motives or truth or justifiable ends.
10. **Injunction**
    1. Dangerous prior restraint
    2. Collateral bar rule – even if your speech is const protected, if you violate the injunction, you’re still guilty
       1. But limited – if injunction was SO transparently invalid or a frivolous pretense to validity, no collateral bar rule.

# Low Value Speech

Presume all speech is high value, low value is the exception

Remember: **VALUE has ZERO relationship to HARM**

1. **Two-tiered approach**: **Low and high value speech**.
   1. Roots in ***Chaplinsky***dictum.
   2. **Rationale**: Without it, **unacceptable results** would follow – either
      1. (1) burden of justification on govt. when it regulates high value speech would be lowered, or
      2. (2) standards for high value speech would have to be applied to low value speech, thus preventing govt. from regulating speech that should be regulated.
2. **Categories of low or arguably low value expression**: express incitement, fighting words, threats, technical military information, false statements of fact, non-newsworthy invasions of privacy, commercial speech, obscenity, offensive language, offensive sexually oriented expression, group defamation, hate speech, porn.
   1. **Four relevant factors (Sunstein)**: (1) far afield from central concern of 1st A.; (2) distinction between cognitive and non-cognitive aspects of speech; (3) purpose of speaker and whether or not it is to communicate message; (4) judgment that in certain areas, govt. is unlikely to be acting for constitutionally impermissible reasons or producing constitutionally troublesome calls.
3. **Evaluations of low value speech doctrine**: (1) demonstrates sharply limited efficacy of judicial controls on censorship by majority; (2) serves salutary function as critical safety valve; (3) marked by vacillation and uncertainty and highly result-oriented approach.
4. Tradition an important factor also – we know we can manage them without too much harm to our system of free expression.
   1. Also avoid temptation to add new categories.

## False Statements of Fact

1. Why low value?
   1. Knowing, intentional lies in public discourse do not further the purposes of the 1A. Public lies are incompatible with the goals of a system of free expression.
   2. **No such thing as a false idea** (*Gertz*)
   3. **For it to be libel, has to be against somebody** (can’t punish someone for lying about their service in Vietnam, even though may meet *Sullivan* standards)
      1. Don’t want courts to be roving truth commissions.
2. ***NY Times v. Sullivan*** (1964) pg 136
   1. Before this, court had said FSOF were not protected at all.
   2. Lawsuit over publication, heart of civil rights movement. Southerners using private libel actions, finding inadvertent FSOF, AL/Miss juries happy to give large awards.
   3. **Requirements for FSOF claim**
      1. **Info is false**
      2. **Spoke with actual malice** 
         1. Knowledge that it was false or reckless disregard as to whether it was false or not
   4. False statements are inevitable in public discourse – can’t punish them all. Chilling.
   5. **Under-protective of free speech**
      1. Still risks chilling effect- still discretionary to judge/jury as to what “reckless disregard” is.
         1. Why not only Knowing?
            1. Analogy to *Brandenburg* req of specific intent.
      2. But, to absolutely protect would really invite lies. Would undermine quality of discourse and makes listeners more distrustful of speech.
         1. But falsehood should be corrected through public debate and the marketplace?
   6. **Over-protective of free speech**
      1. Why not negligence, like in driving?
         1. Public discourse more valuable in way driving isn’t, more easily chilled.
      2. Under-valuing reputations?
         1. Attack discourse very prevalent today, probably reckless or at least borderline - took away too much chilling?
      3. Chilling false statements isn’t bad
   7. Left victim w/o any remedy – can’t even get a declaration of falsehood.
3. ***Curtis Publishing v. Butts/AP v. Walker*** (1967) pg 146
   1. 1A not only about performance of official responsibilities by public officers
   2. **NY Times also applies to “public figures**”
      1. In a position to protect themselves.
   3. Found to be a public figure – university athletic director w/nat’l rep, retired military man who was a figure of nat’l prominence.
4. **Proving falsehood**:
   1. ∏ bears burden of proving that statement is false. (*Hepps*)
   2. **Altered quotation**: **∏** must prove that alteration **changed meaning**. (*Masson*)
   3. No recovery if word, etc. could reasonably be understood as **hyperbole** (*Bresler*) or **metaphor** (*Austin*).
5. **Proving reckless disregard**:
   1. Purposeful avoidance of truth may be sufficient. (*Connaughton*)
   2. Failure to investigate or otherwise seek corroboration is not reckless disregard for truth unless publisher acts with high degree of awareness of probable falsity. (*Thompson*)
   3. ∏ may inquire into state of mind of publishers and reporters in discovery. (*Herbert*)
6. ***Gertz v. Robert Welch*** (1974) pg 147 [Powell]
   1. Private individual suing for libel involving a matter of clear public interest.
      1. Lawyer, **not a public figure, Sullivan should not apply**
   2. Justified on two grounds
      1. When not a PF, has not put himself forward to assume the risk of being the subject of attention. When assume that risk as a PF, reasonable to put greater burden on you
      2. PF’s are likely to have more access to counter-speech.
         1. More dependent upon legal remedy.
   3. **Private individual may recover actual damages if they can prove negligence**.
      1. **Can get presumed and punitive damages if show reckless disregard**
      2. This is a **gradation** of Sullivan.
      3. Note – getting judgment that it was false is also really important.
   4. **Dissent** – should be about status of speech, not individual.
      1. Maj counter - Don’t want courts deciding what speech is a matter of public concern.
7. ***Dun v. Greenmoss Builders*** (1985) pg 151
   1. **Private figure** suing for libel in **non-public interest** expression (credit reporting agency
   2. Continues gradation of Sullivan – **allow π to recover both presumed and punitive damages upon a showing of negligence**.
      1. This is not a matter of public concern, so not as concerned about chilling speakers.
      2. Trying to accommodate competing interests
8. **Public Figur**e
   1. Court has construed narrowly – essentially a household name. Someone who as assumed the risks and has access to media outlets
   2. Not found to be PFs: (1) former wife of scion of one of America’s wealthiest families (*Firestone*); (2) individual convicted of contempt for refusing to appear before grand jury investigating Soviet espionage who later wrote book (*Wolston*); (3) scientific researcher given federal money to study aggressive monkey behavior (*Hutchinson*).
9. ***Hustler Magazine v. Falwell*** (SC) (1988) (p. 161):
   1. **Public figures** and public officials may not recover for tort of **IIED** by reason of publications such as sexually explicit cartoon about Falwell without showing in that publication contains **false statement of fact** which was made with **actual malice** – knowledge that statement was false or reckless disregard as to whether it was true.
   2. **Outrageousness standard rejected**: Inherent **subjectivity** in area of political and social discourse that would allow **jury** to impose liability on basis of **own taste or views** or dislike of particular expression.

## Non-Newsworthy Disclosures of Private Information

1. **NOT Low Value really, but possibly? Court hasn’t said**.
   1. We just don’t want it in public
2. Not about falsity**. Argument that it, as a category, is low value**?
   1. Information could be important (politician having an affair). No C&P danger (embarrassment not enough). Can’t say low value bc of harm.
   2. How to define as a category?
      1. Non-newsworthy? To whom? To what degree?
      2. No legit public importance? Really open and subjective.
   3. Posner – usually if trying to hide info about themselves to deceive who they really are – kind of fraud? Counter- or bc people may treat you unreasonably bc of the knowledge. Like evidence- can keep it out if more likely to mislead.
3. Have a right to restrict the info gathering.
   1. Don’t tell people things you don’t want shared.
   2. Protect privacy in ways other than restricting speech.
4. ***Cox Broadcasting v. Cohn*** (1975) pg 155
   1. Murder/rape victim name published in paper, info was public in court records, sued for invasion of privacy.
   2. **Held: may not extend cause of action for invasion of privacy when information was publicly revealed**.
      1. **Balancing**: Right of privacy does not warrant sanction used here because of importance of press function w/r/t judicial proceedings, fact of prior public disclosure, and concerns about self-censorship.
   3. **States**: Must respond by means that **avoid public exposure** of private information
      1. Special interest b/c rape – don’t want to prevent rape victims from reporting things.
5. ***Bartnicki v. Vopper*** (SC) (2001):
   1. Held that federal and state **anti-wiretap statutes** **cannot constitutionally be applied to radio station** that broadcasts tape of unlawfully intercepted telephone call, where subject of call was matter of **public concern** and broadcaster **did not participate** directly in unlawful wiretap, **even though** broadcaster **knew** material was **obtained unlawfully**.
   2. **Balancing**: Privacy concerns give way to interest in publishing matters of public importance.

## Commercial Speech

1. **Summary: if illegal product or false, than can regulate. But if truthful, then court has come to a place where you can’t regulate**.
2. **Low Value**?
   1. Argue not contributing to marketplace of ideas (but, sometimes is. Good to know what products available?). Only profit seeking (but so is the NY Times). 1A is about self-governance and self-exploration, Comm speech not within it (but, we don’t take so narrow a view of 1A). No concerns of gov’t regulation, which often justify our high protection of speech. Corps shouldn’t have full const rights (over and under. Also NY times).
   2. Not even speech, but economic activity?
   3. **Dilution**
      1. If protect in same ways as political speech (say both are high value), we’d end up diluting the political bc comm. speech is so pervasive and we can’t have such a hands off approach to comm. speech.
         1. **Inevitable result over time – we’d reduce protection of political speech in order to reduce the protection of CA**.
   4. Original intent
      1. Framers never intended comm. speech to be protected.
3. Boundary problem between what is advertising and what is expression.
   1. Not a real problem – any more so than threat or incitement.
4. **Historical Development**: Court originally said not protected at all. Then low value. Current trend is toward more protection.
   1. ***Valentine v. Chrestensen*** (SC) (1942) (p. 169): Upheld prohibition on distribution of any handbill or other advertising on street on ground that **commercial speech is unprotected expression**.
   2. ***Breard v. Alexandria*** (SC) (1951) (p. 169): **Upheld prohibition** on **door-to-door solicitation** of magazine subscriptions, expressly reaffirming *Chrestensen*.
   3. ***NYT v. Sullivan*** (SC) (1964): **Rejected** argument that paid **political advertisement** was **unprotected** commercial expression.
   4. ***Bigelow v. VA*** (SC) (1975) (p. 169): **Reversed conviction** of individual who, prior to *Roe*, published **ad** announcing availability of **legal abortions** in NY – **factual material of clear public interest**.
      1. *Chrestensen* holding was **distinctly limited**.
5. ***Virginia Pharmacy*** (1976) pg 162 [Blackmun]
   1. **Comm speech clearly has value, gets some protection** – doesn’t say how much.
      1. Can regulate **comm. ads for illegal products** differently than we can for illegal speech (*Brandenburg* doesn’t apply)
         1. ***Posadas*** (pg 175): Scalia says we can ban gambling ads, bc state could ban gambling. But difference between *can* and *has*. Has 🡪 illegal product/activity.
            1. (Overturned by *44 Liquormart*, pg 175)
      2. **False and deceptive comm. ads** can be regulated more aggressively than other forms of expression (*Sullivan* and *Gertz* in applicable).
         1. Your product – more likely to know if false, less fear of chilling.
   2. Invalidated statute making pharmacistguilty of unprofessional conduct if he **publishes or** **advertises prices** for prescription drugs.
6. ***Central Hudson Gas*** (1980) pg 173 [Powell]
   1. Clarified Q left open in VA Pharmacy – how much can state regulate comm. speech that isn’t false or for illegal products? (implies they are not w/in 1A)
   2. **Can regulate comm. speech that isn’t false or for unlawful activity only if directly and narrowly serves a substantial gov’t interest**.
      1. But does narrowly tailored mean
         1. **Regulate precisely** (don’t swoop other speech) or
            1. What Powell meant – mid level test
         2. **Least restrictive** on other speech (exhaust not-speech “alternative means of achieving goals”)?
            1. How courts have interpreted subsequently – **practical matter, can never ban comm. advertising**.
   3. Invalidated prohibition on advertising by utilities designed to stimulate use of electricity.
7. Can you give less priority to comm. speech bc low value?
   1. Billboard rules – limit number. Give priority to political speech (higher value)?
      1. ***City of Cincinnati v. Discovery Network*** (SC) (1993) (p. 191): **Invalidated** City’s decision to **exclude** distributors of **commercial handbills** from using of **news racks on public property**, finding **lack of fit** – not more harmful to city aesthetics than non-commercial news racks that city permitted.
      2. ***Metromedia, Inc. v. San Diego*** (SC) (1981) (p. 192): **Invalidated** ordinance **prohibiting** virtually all **outdoor ad display signs**, designed to protect pedestrians and motorists and improve appearance of city, as applied to **non-commercial advertising**, but **sustained** as to **commercial messages**.
8. Children
   1. **Some products are illegal for children, can regulate advertising targeted to them**.
      1. But what if audience includes adults?
   2. What about products that are not illegal for children?
      1. Sugary cereal.

## Obscenity

1. Two major questions
   1. (1) What is obscenity
      1. Has evolved over time
   2. (2) Under what circumstances and under what theory may the sale/exhibition be prohibited?
      1. If were to say not low value, then presumably you couldn’t regulate any of the ‘harms.’
2. **Definition of obscenity**: Graphically explicit, sexual material that is patently offensive to whatever community, appeals to prurient interest, and is without serious value.
   1. Prurient interest – invokes a physical rather than intellectual response
   2. What is offensive has narrowed so much that what is covered is a speck.
3. **Summary**
   1. Can regulate O, but narrowly defined.
   2. O for kids – problem defining. If can individuate child from adult, then ok, if not, more difficult – more inclined to say don’t deprive adults.
   3. Child porn – can regulate because of harm to child
   4. Profanity protected
   5. Pacifica/Erznoznik/Cohen – not O, but sexual. Court back and forth.
   6. Sexual imagery in public unclear – possible O for kids
   7. Internet – if not O, can’t be prohibited
   8. Zoning – Court tries to enable communities to place far away
4. **Arguments that obscenity is low value speech**
   1. **History** – obscenity long deemed low value speech.
      1. ***Hicklin*** (1815): Test of obscenity is whether tendency of matter is to deprave and corrupt those whose minds are opened to such immoral influences.
      2. *U.S. v. One Book Called “Ulysses”* (S.D.N.Y. 1933): **Rejected *Hicklin* test** and adopted standard focusing on effect on average person of dominant theme of work as whole.
   2. **Mere entertainment**; no serious political value.
   3. **Patently offensive** to average person;
   4. **Lacks serious literary, artistic, scientific value.**
      1. But “low value” means no redeeming value. Not what we’re saying here.
   5. Affects people indirectly – not persuasion, but insidious impact on morals through experience – not bc thought about and considered.
   6. Obscenity isn’t content, it’s meanings – could convey the same message in a non-obscene method (like using a loudspeaker rather than a leaflet)
5. Say low value – how to regulate?
   1. Do they have some value? Chilling problem? How much harm?
   2. **Harm**
      1. Erodes moral standards of society
         1. Assumes a “correct” moral stance.
      2. Consequences – will lead to sexual action, some non voluntary
      3. Just bad tendency!
      4. Exposure to unconsenting adults and children
         1. Where Brennan, Stewart, and Marshall get off ship.
      5. **Court has not engaged in this – only category where they haven’t taken a closer look to determine the proper balance of harm and chilling vs. value**.
6. **Roth v. US** (1957) pg 188 [Brennan]
   1. First confronting obscenity.
   2. Held that speech could be deemed obscene and therefore prohibited, **if the average person applying contemporary community standards could deem the dominate theme as a whole appealed to the prurient interest**.
7. ***Memoirs v. Massachusetts*** (1966) pg 196 [Brennan]
   1. Material deemed obscene only if
      1. (1) Govt’ could prove the dominant theme as a whole appealed to prurient interest.
      2. (2) the material is patently offensive to contemporary community standards, and
      3. (3) has no redeeming social value.
   2. But only 3 justices endorsed this test
      1. Black and Douglas maintained no such thing was obscenity.
8. After Memoirs and until Miller, SC decided all obscenity cases (no real principle to go by – only SC could determine) with 1 line per curiam cases, saying only whether obscene or not.
9. ***Miller v. California*** (1973) pg 198 [Burger]
   1. 4 justices willing to say obscenity was low value but could only be regulated with respect to unconsenting adults and children, but couldn’t get Powell.
   2. Held obscenity unprotected by 1A. Three important changes
      1. **(1) Any statute regulating obscenity had to specify in the statute what acts, if depicted, could be deemed a violation**.
         1. Also a floor – “serious sexual conduct” (could say nudity or kissing)
      2. **(2)** although retaining prurient interest and patently offensive, **replaced “utterly w/o redeeming” with “no serious scientific or literary” value**
         1. Broadened definition of O
         2. Undermines argument that O unprotected b/c valueless if you then say “no serious value”
      3. **(3) community standards means local standards**, not national.
         1. Chilling problem b/c of differing standards and nat’l distribution? Ashcroft v. ACLU – internet version – bring us case where standards are so diff it’s a problem.
10. ***Stanley v. Georgia*** (1969) pg 197 [Marshall]
    1. Held **illegal to punish an individual for possession of obscenity in their home**. Can possess it, but nowhere else.
       1. Does not extend to child porn (harm is the same) – *Osborne* pg 218.
    2. Case only makes sense as an incremental step to dissenting opinion in *Miller*, but then court changed, dissent lost in *Miller*.
11. ***Paris Adult Theatre I v. Slaton*** (SC) (1973) pg 201
    1. **Rejected** contention that obscene, pornographic films acquire **constitutional immunity** from regulation simply because exhibited for **consenting adults only**.
12. **Obscene for minors**:
    1. ***Butler v. MI*** (SC) (1957) (p. 204): Unanimously invalidated law prohibiting sale of lewd material that might have deleterious influence upon youth, declaring that **state may not reduce adult population to reading only what is fit for children**.
    2. ***Ginsberg v. NY*** (SC) (1968) (p. 204): Upheld doctrine of **variable obscenity** – material may be obscene for minors even though it is not obscene for adults.
       1. **Rationale**: (1) state has more power over children than adults; (2) supports parents’ right to direct child-rearing; (3) state has independent interest in well-being of its youth.
       2. **Postscript**: To extent it is **possible to separate** children and adults, Court has permitted states to enact **different rules** governing **adults and children**.
13. **Violence**
    1. Can we define a category of speech using almost same language as obscenity?
       1. “Appeals to a morbid interest in violence, patently offensive, no serious redeeming value.”
       2. **Every lower court has rejected this – can’t regulate**.
          1. Statutes applied to children – trying to apply Ginsberg doctrine to violence for children. Not arguing applicable to adults.
    2. 2 reasons for rejecting
       1. No tradition of regulating. Don’t want to open door to creating new low value categories.
       2. Violence, no concept of low value. So to say it is for children is to try to create a smaller category without even having a larger category. Obscenity is low value for all, makes sense to heighten for kids.
14. ***New York v. Ferber*** (1982) pg 212.
    1. Unanimously **upheld statute prohibiting** knowingly producing, promoting, directing, exhibiting, or selling any material depicting **sexual performance by child under 16**.
       1. Invokes several doctrines, none well – effect on viewers is bad tendency and low value is tough bc nothing saying the speech isn’t valuable.
       2. Not about the crime involved, but this is about the making and distributing of the movie.
    2. **Ultimately justified as an effective and necessary means of preventing the underlying criminality**.
       1. But can you restrict speech because it is the product of an illegal act?
          1. Where would the line be? Pentagon papers, murderers writing books about their crimes
    3. Also, **the continuing availability in the marketplace of these films is an ongoing harm to the children**, so state has a sufficient interest in restricting the continued exhibition.
       1. Is this a sufficient stand alone justification?
       2. What if the kids had made the movie themselves? State still justified?
       3. This is more of a right to privacy question – state interest justified?
15. ***Ashcroft v. Free Speech*** (2002) pg 215 [Kennedy]
    1. Holding that the **state may prohibit** the distribution of depictions of children engaged in sexual conduct **only if they are real children** engaged in the conduct
    2. **Rejects** two themes Ferber may have relied upon
       1. That the speech was low value (bc would be irrelevant if children were real or not)
       2. Bad tendency/effect on the audience.
16. Child porn is not about value, but about harm.
17. **US v. Williams** (2008) supp pg 10 [Scalia]
    1. PROTECT Act – **criminalized anything that purported to involve real children**.
       1. Argue that it criminalizes sale of material that is in fact const protected
    2. **Upheld**: Can be a crime to propose an unlawful transaction, regardless of whether the transaction would have been made unlawfully.
       1. We’re prohibiting the offer to sell illegal material.
       2. If you say you’re selling heroine, but only sell sugar, still a crime.
    3. Real question is the chilling effect
       1. Burden of proof?
          1. Can you require people to affirmatively say that their porn is virtual child porn?
          2. Or does gov’t have to prove it was offered as illegal material?
       2. Unclear.
18. ***US v. Stevens*** (2010) supp pg 13 [Roberts]
    1. Crush videos - Fed statute makes it a crime to sell/exhibit any images that depict animal cruelty in a jurisdiction where that particular cruelty would be illegal, if lacks science/artistic value.
       1. Trying to go off child porn/obscenity doctrine, but didn’t really capture enough of either.
    2. **Unconst**.
       1. Impossible to make an argument that this is low value as a category – really just creepy and offensive.
    3. Suppose re-write statute to say it’s unlawful to sell/distribute images of animal cruelty that are the product of ACTUAL cruelty to ACTUAL animals where the act was unlawful
       1. Child porn analog? The underlying act?
          1. But lost ongoing harm argument.
          2. Slippery slope for videos of crimes.
       2. Harm caused by child sexual abuse is much worse, very rare exception we make there.
          1. Also, we allow cruelty to animals all the time – almost never to kids.

## The Lewd, The Profane, The Indecent

Sexual expression that is not obscene, not child porn.

1. ***Cohen v. California*** (1971) pg 219 [Harlan]
   1. Court reversed conviction of disturbing the peace for wearing a shirt that said “fuck the draft”
   2. Harlan – this case is NOT: incitement, obscenity, fighting words, Feiner violence
   3. **Gov’t can’t forbid the public use of certain words**, either to protect the sensibility of others or to elevate the level of public discourse.
      1. **Use of profanity is not without 1A value**
      2. Identifying a class of prohibitable words is almost impossible under statute’s formulation – how to know when offensive?
         1. Could this be corrected with a *Miller* (1973) like enumeration?
      3. State’s interests aren’t sufficiently important to justify the restriction.
         1. Defending sensibilities is not enough. *Terminello*.
   4. **Is a word content, or means of communication**? (and therefore can be regulated)
      1. Distinguish *Terminiello* by arguing this is a means, T not relevant.
      2. Could you say the same thing about sexually explicit images? Not about a message, just a communication.
   5. **Standard for protecting hearers**: Must show that **substantial privacy interests** are being invaded in essentially **intolerable manner**.
2. How to reconcile Cohen and obscenity doctrine?
   1. 50 yrs ago, Cohen inconceivable – would regulate. Now, some justices see the relative innocuousness of the words, which they don’t see in obscenity.
   2. History is a huge one – history of regulating obscenity.
3. ***FCC v. Pacifica*** (1978) pg 227
   1. **Bans on airwaves any patently indecent language** dealing with sexual or excretory functions at any time of day that children might be listening. (Carlin’s filthy words)
   2. Plurality **upholds** law.
      1. **No real articulated rationale**: Doesn’t restrict ideas, just words – a useful means of communication. While not obscenity, think of profanity as low value by analogy. Broadcasting in the home, protecting children.
      2. Narrow decision: FCC relied on nuisance rational, under which **context is all-important**.
   3. Powell concurrence – not low value, but can regulate because invasion of home and interest of children.
      1. Also not as bad because just channeling speech rather than banning.
   4. Dissent – this is just Cohen! Follow it.
4. ***Erzoznik v. Jacksonville*** (1975) pg 226
   1. **Strikes** ordinance to **ban** exhibit motion pictures with certain body parts (**nudity) if visible from the street**.
   2. Argument that it would distract motorists rejected as underbroad.
   3. Also argued protecting children – but these images are not obscene for children – **all nudity can’t be obscene for kids**.
      1. BUT, may be a category of obscene for children that could be regulated.
   4. Builds upon Cohen.
5. ***U.S. v. Playboy Entertainment Group*** (SC) (2000) (p. 237):
   1. In 5-4 decision, **invalidated** section 505 of Telecommunications Act of 1996, which **required** cable channels primarily dedicated to sexually oriented program to be either fully **scrambled or** limited to transmission between **10 P.M. and 6 A.M.**
      1. **Content-based burdens** must satisfy **same** rigorous **scrutiny as** **content-based bans**.
      2. **Not least restrictive**: Cable systems can **block** unwanted channels on **house-by-house** basis.
   2. **Breyer (dissenting)**: Because law works without **parental supervision**, opt-out is not similarly effective.
6. ***Reno v. ACLU*** (1997) pg 230 [Stevens]
   1. **Invalidated Communications Decency Act, which restricted indecent communications to minors on the internet**. Similar language to Pacifica.
   2. Court: too vague, limits too much speech for adults, clearly reaches speech that has serious value (though, court could have said all that in Pacifica)
   3. Distinguishes from Pacifica in that Pacifica was just channeling, this would be more of a ban.
      1. Radio and TV traditionally regulated – limited airwaves. Not case with Internet.
      2. Also more control on the internet of what content you see.
7. ***Ashcroft v. ACLU*** (2004) pg 232 [Kennedy]
   1. Cong enacts COPA to solve problems identified in Reno.
      1. Regulates only material defined as obscene for children, applies only to commercial sites. Only requires age verification to access – credit card would be sufficient.
   2. Still **unconst**
      1. **Less restrictive alternatives**
         1. Blocking and filtering software – works if parents want to protect. Independent gov’t interest to protect?
         2. If gov’t interest, filter not enough.
            1. White filter – access to pre-cleared sites only
            2. Black filter – blocks objectionable sites.
   3. **Chilling effect** of credit card requirement – identify yourself, some adults don’t have credit cards.
   4. Jx issue – US doesn’t have jx over many cites?
8. **Zoning**
   1. ***Young v. American Mini-Theatres*** (1976) pg 238 [Stevens]
      1. **Upheld requirement that adult movie theaters disperse** so as to prevent creation of red-light district.
      2. **Court says not a content regulation** (though what makes a movie “adult” is precisely content) **bc the state interest isn’t the communicative interest of the speech** (it’s quality of urban life)
         1. What about *Erznoznik* and *Ashcroft* – treated as content.
         2. Like a pool hall – don’t want them in one place. Not saying the speech will cause bad things, just a correlation between the theatres and crime.
      3. Incoherent really.
         1. Stone – dissent correct – no more const basis for allowing the selective regulation of these theatres than in *Erzoznik*.
   2. ***City of Renton v. Playtime Theaters*** (SC) (1986) (p. 251):
      1. **Upheld** **prohibitio**n on **adult movie theaters** locating within **1000 feet** of any residential zone, family dwelling, church, part, or school.
      2. Huge burden – left only 5% of city open. How is this not a ba?
   3. Stone – **a law should not be thought of as not content based if content based on its face because the HARM the gov’t is looking at is not caused by communicative impact.**
      1. If it treats A different than B based on content, shouldn’t matter what the gov’t is focused on.

## Hate Speech and Pornography

1. Hate speech as defined by Matsuda:
   1. (1) message of racial inferiority
   2. (2) directed toward an historically oppressed group, and
   3. (3) the message is persecutorial, hateful, and degrading.
2. Arguments that Hate Speech is low value?
   1. Useless in marketplace of ideas.
   2. Extension of fighting words – but to groups
      1. Dampened by *RAV*.
   3. Not about persuasion, but insidiously undermining social attitudes and beliefs
   4. Incompatible with human dignity and equality
   5. Obscenity-esque argument – appeals to prurient interest, a physiological response.
3. ***Beauharnais v. Illinois*** (1952) pg 244 [Frankfurter]
   1. B convicted under libel law making unlawful to distribute publication exposing citizens to race contempt or derision.
   2. Court **upheld** conviction 5-4
      1. Because libel is unprotected speech, no need for C&P danger instruction (relying on Chaplinsky dictum) (was also no instruction to allow truth as a defense)
      2. Group libel theory
   3. Key is whether this is low value speech.
      1. Missing key elements of what we see in fighting words, or libel. Saying will lead to racial hatred is just bad tendency.
   4. **No longer good law**
      1. Sullivan, Hustler – **libel is of low 1A value only insofar as it consists of FSOF**.
         1. Q still open – **can a FSOF about a group be punished if there was reckless disregard of truth by the speaker**?
            1. Harm more diffuse than in individ libel, not as much need for a remedy?
            2. With group, more complicated to know if factually false. More opps for counter speech. Leave to market.
4. ***RAV v. City of St. Paul*** (1992) pg 253 [Scalia]
   1. Ordinance prohibiting display of certain symbols that are known to arouse anger on basis of race, etc. ∆ convicted for burning cross on black family’s lawn.
      1. MN SC interprets it as limited to fighting words
   2. Held unconst, even as narrowed.
   3. **Maj**: **Unconst even if limited to fighting words**
      1. Even though city can prohibit all fighting words, it **can’t selectively prohibit some fighting words** (e.g. race, gender, religion) but not others. – that would be content based, viewpoint discrim
         1. **1A not just about how much speech, but the lines the gov’t draws**.
         2. (Scalia clearly right on this basic principle)
      2. **Caveat # 1**: Constitutionalto regulate only certain subcategories as long as **basis** for content discrimination **consists entirely of reason entire class of speech at issue is proscribable**. (neutral) (**ex**: prohibition on threats against President, most prurient obscenity)
         1. If designed to get a worse form of the speech in the category.
            1. Why isn’t this that? Saying FW about race are the worst
      3. **Caveat # 2**: Particular content-based subcategory of proscribable class of speech can be swept up incidentally in statute **directed at conduct** **rather than speech**. (Title VII)
   4. **Concur**: **this is beyond the boundaries of fighting words doctrine – overbroad** – could fall under even if merely angering or hurting feelings.
      1. 4 concurring disagree w/Scalia- once say something is FW, no longer protected, ends 1A analysis -1A can’t be violated when gov’t restricts some FW but not others.
   5. **Sunstein**: *R.A.V.* involves **subject matter restriction**, not viewpoint discrimination.
      1. **Viewpoint discrimination** occurs only if govt. takes one side in debate, **not** where in some **hypotheticals** one side has greater means of expression than another.
   6. **Was the ordinance regulating content, or viewpoint?** Does it matter?
      1. Neither great, but we dislike VP discrim more.
5. ***Virginia v. Black*** (2003) pg 263 [O’Connor]
   1. While state, consistent with 1st A., **may ban cross burning carried out with intent to intimidate**, provision in VA statute **treating cross burning as prima facie evidence of intent to intimidate renders statute unconstitutional**
      1. This would also apply to Klan burning in a meeting in a field – chilling effect.
      2. **Prima facie evidence provision: Strips away very reason why state may ban cross burning with intent to discriminate and creates unacceptable risk of suppression of ideas**.
      3. RAV problem – only limited to a cross. Why not a noose or swastika? Is this really the worst form of a threat?
   2. Hypo: if put threat on a billboard on your lawn to black family across street saying leave or die, would be express threat, const. If law said 5 yrs for threats, 10 yrs for murder threats, const under RAV exception.
      1. Is a cross on a lawn that? We do understand it to be a threat like that and can be punished. But to impute intent is too much.
6. ***Wisconsin v. Mitchell*** (1993) pg 259 [Rehnquist]
   1. Hate-crime penalty enhancement statute upheld.
   2. **Said this wasn’t about speech, was about conduct**. **Directed at conduct inspired by bias** – looking at motive w/o regard to whether communication is intended.
      1. But you’ve moved totally outside of the reasons for punishing the conduct and are increasing the penalty because of viewpoint/communicative impact.
      2. Why can we punish motive?
         1. Crimes out of race bias instills fear in other members of the community, state has a legit interest in avoiding that.
            1. **But how does it instill fear if it isn’t communicated**?!
            2. Fear is a result of the knowledge of the motive, not the motive itself, so there is a speech aspect.
   3. **Say different from RAV because it doesn’t involve speech**.
   4. Had to uphold this in Mitchell, otherwise would have to overturn Title VII, which punishes based on motive (and if you say motive is equivalent to speech, all under the bus).
7. **Pornography**
   1. Argument that porn is just hate speech against women, and that is why it is prohibitable.
      1. But, at its basic core, it’s just intended to prohibit a particular viewpoint. Doesn’t satisfy 1A criteria.
      2. And not low value.
   2. **Rejected as a viable const doctrine**.
      1. Subset of obscenity? Say we only punish obscenity insofar is it also violates the MacKinnon/Dworkin concept (demeaning and oppressive to women) – would be against RAV. If porn and obscenity circles overlap, you can’t just punish the overlapping – have to punish the whole thing.
      2. Worst form argument? But obscenity is meant to also address other concerns.
   3. ***Am. Booksellers v. Hudnut*** (7th Cir. 1985) (p. 277): Held **unconstitutional anti-pornography ordinance**, finding that it’s definition of pornography was **not limited** **to low value speech**.
      1. **Problems with definition**: (1) **no reference** to **literary, etc. value**; (2) creates **approved point of view** – speech that subordinates women is forbidden, but speech that portrays women in positions of equality is lawful.
      2. **Racial bigotry, anti-Semitism,** and **violence on TV** also influence culture and shape socialization, yet all is **protected speech**, however insidious.

# Content Neutral Restrictions

## General Principles

1. **Three paradigm situations**: 1) No person may criticize U.S. policy in Iraq. 2) No person may criticize U.S. policy in Iraq within 220 feet of recruitment center. 3) No person may erect sign more than 20 ft. x 40 ft.
   1. **Situation 1** is clear example of **per se unconstitutional** **viewpoint discrimination**.
      1. **Skews public** **debate** by completely removing issue of great public importance.
      2. Based at least in part on **paternalistic justifications**.
      3. **Prevents** attainment of **self-fulfillment**.
   2. **Situation 2** is, at least in theory, **more problematic**.
      1. **Presumptively unconstitutional** as viewpoint discrimination without regard to whether viewpoint is completely outlawed or simply discriminated against.
         1. **Distortion** of public debate, **administrative problems**, etc.
         2. Difficult to measure the **cumulative effect** on speech.
         3. **EP not** focused on **degree** of denial, **but** on **fact of denial**.
      2. **Must weigh speech interests against govt.’s justification**.
   3. **Situation 3 is** **content neutral**.
      1. **Two questions**: 1) Does it impact marketplace of ideas? 2) Is it justified?
      2. Less concern about gov’t motivation.
      3. **Balancing**: **Weigh speech interests/burden on speech against govt. justification**. (factors below)
2. **Concerns with CN regs**
   1. Might have a **disparate impact** on certain types of speakers or POVs
   2. Might **intend to have a disparate impact**, be censorial
   3. If 1A assumes the existence of a robust system of free expression, then we don’t want content neutral regs to **overly dampen the opportunities for free expression**.
3. **Ten factors for evaluating constitutionality of content-neutral rules**: (1) total impact on speech; (2) availability of alternative means of speech; (3) strength of state interest (compelling, legitimate, substantial, reasonable); (4) whether state has alternative means of achieving its interest; (5) tradition; (6) disproportionate impact (differential effect); (7) direct regulation of speech v. incidental impact; (8) whether govt. property is involved; (9) whether private property is involved and whether it belongs to speaker or someone else; (10) govt. motivation.
   1. **Problem**: Enormous **uncertainty** with this ad hoc balancing. Little precedent, very fact based. Could lead to chilling and a messy doctrine.
   2. **Partial solution**: Establish **categories** of content-neutral regulations, allow to apply relatively predictable tests.

## Public Forum

1. Sunstein – PF doctrine promotes **3 goals**
   1. (1) speakers access to a wide array of people
   2. (2) speaker access to specific people and institutions – legislators by standing outside city hall
   3. (3) hearer access to wide array
2. **Three kinds** (discussed in Perry)
   1. **(1) Quintessential PFs – parks, streets, etc**.
      1. Content based rules allowed only if necessary to serve a compelling interest. No VP rules.
      2. *Mosley*
   2. **(2) Voluntarily created public forums**
      1. Places or activities that aren’t in themselves PFs, but can be created so by gov’t.
         1. **Test** seems to be, if you take the paradigm of a quintessential PF, when has the govt voluntarily created a PF?
            1. If open to most speech except a bit, then prob PF. If a non PF open only to a small bit of speech, not based on VP, then not a PF.
      2. State must abide by exact same rules that govern quintessential public forums, for as long as they leave the public forum open.
         1. But could close the whole forum, unlike (1)
      3. *Widmar*.
   3. **(3) Non-public forum situations**
      1. Reasonable regulation of content is permissiable as long as it isn’t VP based.
      2. *Lehman*, *Perry*
3. ***Commonwealth v. Davis*** (Mass 1895) pg 299 (aff’d sub nom SCOTUS)
   1. Const for legislature to forbid public speaking in a public place without a permit.
   2. Analogy to private home – **gov’t owns the park, resorting to common law concepts of private property, owner has absolute discretion to exclude**.
   3. Later rejected by *Jamison v. Texas*, citing Roberts plurality in *Hague*.
4. ***Hague v. CIO*** (1939) pg 300 [Roberts]
   1. Ordinance forbidding all public meetings in streets/public places w/o permit
      1. City arguing clearly const under Davis.
   2. Plurality: “*Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public…”*
      1. Doesn’t reject private property rationale, more like a **1A easement** created by tradition.
      2. **Creates two categories of PP – those w/history and those without**.
   3. **State needs a substantial justification to restrict traditional uses**.
5. ***Schneider v. State*** (1939) pg 301
   1. Interest in keeping streets clean is legitimate, but isn’t enough to prohibit the distribution of leaflets on public property, rather, state should prohibit littering.
6. **Regulating the Public Forum**
   1. ***US v. Grace*** (1983) pg 302
      1. Court struck down a ban prohibiting signs promoting a party, organization, or movement on the sidewalks outside the SC.
      2. Government may enforce **reasonable time, place, and manner restrictions** in public forums only if the restrictions are:
         1. **Content neutral**
         2. **Narrowly tailored to serve a significant government interest**
         3. **And leave open ample alternative channels of communication**.
      3. Can **only absolutely ban** a particular type of expression if the ban is narrowly drawn to accomplish a compelling governmental interest.
   2. ***Grayned v. Rockford*** (1972) pg 303
      1. Upheld ban on noise on public property that disturbs school.
         1. Do it more quietly or a little farther away.
   3. ***Frisby v. Shultz*** (1988) pg 303
      1. Upheld ban regarding residential picketing in front of a particular residence. Privacy of the home of the highest order.
      2. **Rationale**: privacy of home; captive audience; narrowly tailored
   4. ***Clark v. CCNV*** (1983) pg. 304
      1. Upheld restriction regarding sleeping in a park at night
   5. ***Ward v. Rock against Racism*** (1989) pg 304
      1. Upheld requirement that you use city soundsystems and technicians for concerts in central park – purpose of limiting noise.
   6. ***Madsen v. Women’s Health Center*** (1994) pg 304
      1. Protestors at abortion clinic, repeatedly violated injunction
      2. Upheld: 36’ buffer zone and noise limitations
      3. Struck down: Image ban, Approaching people ban, 300’ zone for picketing a residence – beyond Frisby. Too limiting.
   7. ***Schenck v. Pro-Choice Network of Western NY*** (1997) pg 305
      1. Upheld: Fixed buffer zones – fifteen feet of clinic doorways, parking lots, and driveways
      2. Struck: Floating buffer zones – 15’ from persons or vehicles seeking access to the clinic
         1. Limits too much speech – can’t engage in a conversation or hand leaflets.
   8. ***Hill v. Colorado*** (2000) pg 305
      1. Upheld ban – can’t knowingly approach within 8’ of a person within 100’ of a health care facility, without their consent, in order to pass a leaflet, display a sign, or engage in oral protest, education, or counseling.
         1. What would be consent here?
      2. Court said reasonable time, place and manner.
         1. Protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it.
7. **Speech zones**
   1. Gov’t tries to locate speakers in places that aren’t that effective in communicating message – putting protestors 20 blocks away from Prez.
   2. To what extent may the gov’t **move** a demonstration?
      1. Stone- court erred too much on protection, speakers too far away.
8. **Public Property Not Traditionally Used for Speech**
   1. Three approaches to this problem
      1. **(1)** Black in *Adderly*: gov’t has absolute control just like a private owner, with the exception of streets, parks and sidewalks, and gov’t may absolutely prohibit.
      2. **(2)** Rehnquist in *Greenberg* and *Lee*, and Stevens in *Vincent*: **a ban on public property is ok so long as it’s content neutral and reasonable.**
         1. Reasonable interpreted over time as **rational**. Not balancing, not bite, just rational. Essentially same as (1) in practice.
         2. **Accepted over the years**.
         3. Not worth opening up to ad hoc to catch the few situations this might preclude. Robustness vs. clarity.
      3. **(3)** Brennan and Marshal, first in *Grayned*: whether the manner of expression is incompatible with normal activity in a particular place at a particular time.
         1. No special weight to tradition, balancing justification with limitation on ability of individuals to communicate.
         2. Willing to pay costs of ad hoc to err on the side of speech.
   2. Better to have a more flexible understanding of public forum? As society changes, are their forums that are functionally like S/P/S and should therefore be regarded as public forums?
      1. Wouldn’t require the ad hoc balancing of (3), but not as rigid as (2).
   3. ***Adderley v. FL*** (1966) p. 309
      1. Affirmed convictionsfor **trespass** for refusing to leave **county jail** property while protesting arrests of civil rights demonstrators.
      2. State, **no less than private owner**, has power to **preserve** property under its control for **use** to which it is **lawfully and non-discriminatorily dedicated**.
      3. **Douglas (dissenting)**: **Govt. is different** than private owner because right **to assemble to petition** for redress of grievances runs to govt.; such tactics should **not** be **condemned** as long as assembly and petition are **peaceable.**
         1. **Limit**: Some cases in which such assemblies are **inconsistent** with **other necessary purposes** of public property; others in which right to assemble must be **adjusted** to accommodate interests in **other normal uses** of property.
   4. ***Heffron*** (1981) pg 313
      1. Upholds **state fair** prohibition on leafleting.
         1. Not unreasonable. Legit reasons (litter, obstruct traffic). Doesn’t have to be least restrictive method.
      2. Court not going to be open to arguments to extend concept of S/P/S to other places, even if sympathetic situation.
   5. ***Greer v. Spock*** (1976) pg 312
      1. **Military base** with public access, but limitations on political speech.
      2. Court accepts justification that military doesn’t want certain political messages attributed to it.
         1. Military base not a public forum.
            1. B/M dissent: fitting forum, protesting Vietnam. Can disassociate yourself easily.
   6. ***Greenburgh v. USPS*** (1981) pg 314
      1. Upheld rule prohibiting placing material in **mailboxes** (owned by USPS), not a public forum.
         1. Not that restricting – just mail it.
      2. B/M: convenient form of communication, no showing of problem of overcrowding, alternatives aren’t great (expensive, blow off door).
   7. ***Vincent*** (1984) pg 314
      1. No right to put signs on **public utility poles**.
         1. Rational justifications (aesthetics, litter).
      2. B/M approach – would say yes – convenient, not imcompatible with normal activity.
   8. ***Lee*** (1992) pg 315
      1. Upheld ban on leaflets in **airports** on a 5-4 plurality.
         1. Justifications of obstructing movement of travelers (could say same for sidewalks). Not going to say a public forum.
      2. OC – only vote ever cast apply (2) approach to say the regulation was unreasonable. But doesn’t think it’s a PF.
      3. Kennedy – PF since place of discourse and shouldn’t be limited by history, but ban ok.
9. **Methods/Devices of Regulating**
   1. **Licenses**
      1. ***Cox v. NH*** (1941) pg 307
         1. Ok to require a **parade permit**, stressed that licensing isn’t totally arbitrary and they can’t discriminate.
      2. ***Watchtower*** (2002) pg 308
         1. **Struck req of licenses to go door to door**, but might be ok for commercial or solicitation of funds.
         2. Rationale: (1) interests of speakers who want to remain anonymous; (2) administrative burden on spontaneous speech
   2. **Fees**
      1. ***Cox*** (above) – upheld fees for parade to defray admin costs.
         1. Goldberger – speech is also for the public, society should pay, proper cost distribution.
      2. ***Murdock v. PA*** (1943) p. 308
         1. Held that state may not impose flat license tax on pursuit of 1st A. activities where tax is not nominal fee imposed as regulatory measure to defray expenses of policing activities in question
      3. ***Forsyth*** (1992)
         1. Invalidated ordinance that authorized permit fees for parades, demonstrations, etc., up to $1,000, based in part on anticipated expense necessary to maintain public order
10. **Right to a Private Forum**
    1. ***Food Employees Local 590 v. Logan Valley Plaza*** (1968) p. 320
       1. Held that owner cannot constitutionally prohibit peaceful labor picketing of business in **shopping** **center**.
       2. **Rule**: **State may not delegate** power, through use of **trespass laws**, wholly to **exclude** members of public wishing to exercise 1st A. rights in **manner** and for **purpose generally consonant** with use to which property is put.
    2. ***Hudgins v. NLRB*** (SC) (1976) (p. 316): **Overruled *Logan Valley***.
    3. ***Pruneyard Shopping Center v. Robins*** (1980) pg. 320
       1. **Rejected claim** of **shopping center** owner who wanted to prevent students from circulating petitions on Zionism, that he had **1st or 5th A. right not to be forced** **to use his** **property as forum for speech of others**.
       2. **Rationale**: Views expressed will **not likely** be **identified with owner**, and in any event he can disavow connection by posting **disclaimer** signs.
11. **Unequal Access**
    1. Assuming the gov’t can prohibit all speech activity of a certain sort, to what extent can it allow some, but not all, of the activity without violating 1A?
       1. You have no right hear except insofar as the state has allowed others to speak.
       2. Essentially same problem as *RAV*.
    2. **Three concerns**:
       1. (1) inequality between speakers or messages;
       2. (2) motivation;
       3. (3) allowing some speech impeaches credibility of argument that speech is inconsistent with use of property.
    3. Remember – can level up or level down. Invalidating doesn’t necessarily give us more speech.
    4. ***Police Dept of Chicago v. Mosley*** (1972) pg 321 [Marshall]
       1. Struck down ordinance prohibiting picketing in front of a school except for labor
          1. Not a right to picket, but couldn’t only allow labor and not him.
       2. Allowing labor pickets undermines the defense you’ve put forward for allowing a content neutral rule.
       3. Basic principle – content based rules are unconst, even though a neutral rule would have been const.
          1. Even though restricting MORE speech would be const, less is unconst.
       4. Not about EP analysis – EP adds nothing.
    5. ***Widmar v. Vincent*** (1981) pg 325
       1. Extend Mosley – can’t allow after hours use of classrooms for student groups but not religious groups. Can exclude all or none. Essentially created a public forum.
    6. ***Lehman v. City of Shaker Heights*** (1974) pg 326 [Blackmun]
       1. Transit system sells **ad space on buses**, but does not allow political ads.
       2. Court **upholds**.
          1. Plurality differentiates from Mosley saying that there is NO public forum to be found here.
             1. Tough to reconcile. Had city created a public forum, or merely a commercial venture, like newspaper ads?
       3. Argument that city didn’t want people to think they endorsed the ads (like Greer). Also a captive audience.
    7. **Perry Educators** (1983) pg 332 [White]
       1. **Upheld** decision to grant access to **interschool mailing system** to one union (collective bargaining agent for all teachers) and certain outside organizations (YMCA; Cub Scouts), but to no other unions.
       2. Discussed 3 types of forums (above).
12. **Religious Expression and the Meaning of “VP Neutrality**”
    1. ***Lamb’s Chapel*** pg 338
       1. Allowed after school use of property for civics uses, but not for religious uses.
          1. Lower court said not PF, ok content
          2. **SC – this is VP restriction, and invalid**.
             1. Could have also said PF and invalid content restriction.
       2. VP bc say there were two programs, one discouraging teen sex for health reasons, the other for sin. The former would allowed, but not the latter.
          1. So not clearly VP, but can have effect of VP discrim.
    2. ***Rosenberger*** (1995) pg 339 [Kennedy]
       1. UVA subsidizes printing for some student groups, but not groups promulgating views on faith.
       2. Court- also VP discrim.
    3. ***Reagan v. Taxation w/o Representation***
       1. Exemption from general rule that non-profits can’t **lobby** that is granted to **veteran’s organizations**.
       2. Court unanimously says this is non-content, non-VP, but **rather based on the nature of the speakers**.
          1. How is this different from Lamb’s Chapel, saying it has the effect of VP discrim?
    4. ***Ark Ed Television v. Forbes*** (1998) pg 335
       1. Exclude some candidates from debate, Forbes only one arguing for repeal of progressive tax – excluding him excludes that side of debate
       2. Court – doesn’t think VP discrimination at all.
    5. How do we determine what is VP and what isn’t?
       1. Don’t want to turn all disparate impact into VP based
13. **Association**
    1. ***CLS v. Martinez*** (2010) supp 25 [Ginsburg]
       1. Gives money to student groups, groups have to allow all members. Are they creating a forum? Money to subsidize speech, or pay for pizza? Not directed at speech in same way as Widmar and Rosenberger.
       2. If PF, then no content regulation except for good reason. Is this a content regulation? About who you let in – facially neutral. May have a disparate effect.
       3. Court: conditioning the $500 on all student access is a reasonable regulation.
          1. Would be different if it was a state ban on orgs of 20 people or more if they didn’t allow all people.
             1. **Association for the rights of speech is a right**.
          2. Is the disadvantage to CLS sufficiently great to treat it as if they had said CLS was prohibited as an org?
             1. How dissent sees it.
    2. ***Boy Scouts v. Dale*** (2000) pg 434 [Rehnquist]
       1. NJ non-discrim law. Boy scouts excluded openly gay scoutmaster – said incompatible with their expressive mission, which included (arguably) an opposition to homosexuality.
       2. Court said **unconst as applied** to Boy Scouts
          1. 5 in maj, more conservative, one of the tiny number of cases where they invalidated a law because of an **incidental effect** of a law.
       3. Association need not associate for purpose of disseminating message to have 1st A. protections, and 1st A. does not require that every member agree on every issue.
14. **Government Speech**
    1. **It has to be the gov’t specific message that is being conveyed to come within the gov’t speech doctrine**.
       1. Gov’t cannot discriminate among private speakers when its basic goal isn’t to convey a particular specific message, but rather to support the opps for free speech.
          1. *Rosenberger* – not gov’t speaking, students were.
    2. ***Rust v. Sullivan*** (1991) pg 347 [Rehnquist]
       1. Federal regulation prohibiting recipients of fed public health funds engaged in family planning clinics from counseling abortion as an appropriate means of family planning.
       2. Challenged as unconst VP discrim – not disputed that it’s VP discrim
       3. Upheld. This is gov’t speech.
          1. Can’t apply same VP discrim rules to gov’t speech, or else would never speak. Basic principle correct, but limiting principle?
       4. Unconstitutional condition? Receipt of healthcare to sacrifice right?
          1. Are doctors engaged in speech when counseling, or really just being a doctor?
       5. Gov’t can speak, can speak through agents, give a particular point of view.
          1. But this speech isn’t really about abortion – paying for all kinds of things, whole set of messages.
          2. Unclear to patients that it’s gov’t speech.
          3. Real problem is that it is abortion – a const right. Less problematic if smoking.
    3. Problems if gov’t disguises its identity as the speaker
    4. Objection if gov’t uses speech in a really partisan way.
    5. What if gov’t overwhelmed the market – huge amounts of money on anti-abortion campaign?
    6. General rule:
       1. Courts are more willing to sanction govt. restrictions on how govt. funds may be used than complete restrictions on funding recipients (own funds).
    7. ***Legal Services Corp. v. Velazquez*** (2001) pg 353 [Kennedy]
       1. Gov’t funds LSC to provide indigent civil defense. Made rule that they can represent their rights, but **can’t challenge legality of welfare laws**.
       2. Court **strikes** down
          1. This isn’t about a message, is about excluding one type of activity. More like *Rosenberger*. Lawyers speak for their clients, not for the gov’t. Gov’t can’t be on both sides of the issue.
          2. Harder to see the specific message here.
       3. Dissent – this is *Rust*.
       4. Really, court was trying to cabin *Rust*.
    8. ***Pleasant Grove c. City of Summum*** (2009)
       1. **Monuments donated by private donors, some excluded**. Argued VP discrim.
          1. If gov’t was building the monuments, clearly gov’t speech and ok.
       2. Court **upheld** gov’t regulations. **This is about deciding what speech it wants to convey**. Don’t have to open it up to everyone.
       3. Back to *Rosenberger* and *Lamb’s Chapel* – there, they weren’t picking the specific views they wanted to represent.
    9. ***NEA v. Finley*** (1998) pg. 356
       1. Held that section 954(d)(1), which directs NEA to take into consideration general standards of decency and respect for diverse beliefs and values of American public, is **not unconstitutional** on its face.
          1. It only provides considerations; it does not preclude any grant awards.
       2. **General rule**: Govt. may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or criminal penalty at stake.
       3. **Limit**: Explicitly viewpoint-based regulation is unconstitutional, even in grant program.
       4. Scalia (concurring): Viewpoint discrimination, but it doesn’t matter; no constitutional difference between govt. furthering point of view by achieving it directly, advocating it officially, or giving money to others to achieve it.
       5. Souter (dissenting): Govt. may engage in viewpoint discrimination when it acts in role of speaker or buyer, but not patron; in patron situation, excellence is acceptable standard (scarce resources), but not one based on viewpoint.

Symbolic Conduct

1. Big question: **When does individual have right to violate law not directed at speech in order to speak more effectively**? (ex: urinating on public building to express contempt for govt.)
2. Types of conduct SC has **recognized as speech**: **parades** (*Hurley*); **cross-burning** (*R.A.V*.): **black armbands** (*Tinker*); **sit-in** (*Brown*); **red flag** (*Stromberg*).
3. ***United States v. O’Brien*** (1968) pg 368 [Warren]
   1. **Burned a draft card** in plain view. Speech under 1A? Yes. But court had trouble dealing with symbolic speech – can’t say punching the director of the selective service in the head is speech and protected by 1A.
      1. You say it is speech, but the regulation on speech is only incidental to the regulation.
         1. Depends on the nature of the govt’s regulation.
   2. **Upheld conviction**. Haven’t got to differentiating yet.
      1. Applied test (below), found interest. Didn’t really apply test as we think of it. See “substantial” as not without merit, not as weighty.
   3. If O’Brien is right, what about *Cohen*? Don’t need to burn the draft card, there are other means of speech, but you also don’t have to use fuck.
      1. Speech is being targeted *as speech*  in *Cohen*.
4. **Two different problems posed by symbolic expression**
   1. (1) When the law is directed at the communicative effect of the expression/speech
      1. “can’t burn to show opposition to the war”
      2. **If gov’t is directing its attention at the content/expressive element of the speech, then it’s no different than a regulation on speech**.
   2. (2) Law prohibits something which only has an incidental effect on speech (assault, burning a draft card). **Don’t tend to invalidate laws that only have an incidental effect**.
5. **O’Brien test – when statute has an incidental effect on speech a violation of 1A?** (pg 370)
   1. (1) End, purpose of the law must be in legit authority of gov’t.
   2. (2) Further substantial gov’t interest
   3. (3) Interest must be unrelated to the suppression of free expression
   4. (4) Restrict no further than necessary to further the state interest.
   5. (Really about 2 and 4)
6. ***Barnes v. Glen Theatre*** (1991) pg 384 [Rehnquist Plurality]
   1. **Upheld** const of law prohibiting **nude dancing** in nude dancing establishments
   2. Rehnquist concedes there’s a speech element, but says **only incidental** – really about public nudity. Unrelated to purpose of the speech and serves a substantial interest.
   3. **White** – these are consenting adults, lose gov’t interest behind public nudity laws. **Here, really about regulating the expression/speech, so you’re out of O’Brien**.
   4. **Scalia** – this is designed to prevent immoral behavior, not speech.
      1. But is morality a justification where there is a heightened level of scrutiny? (But he doesn’t see it as speech, so no heightened scrutiny)
7. **Flag Burning**
   1. Law prohibiting any open fire in a public place, used to prosecute flag buring – OB, incidental effect, state prob has a substantial interest.
   2. Law says can’t destroy integrity of flag with intent to desecrate.
      1. This is unconst content/VP regulation, about the speech.
   3. Law saying you can’t alter the flag – flag “misuse” statute.
      1. Not targeting just speech. Not content based.
      2. But disparate impact.
      3. And probably bad motive.
         1. But how to get at? Court does all time in VP discrim. Draws inference from circumstances
         2. But motive really tough. How to ascertain from a multi-member body, cong would just re-enact and clean up leg history, insulting to accuse Cong to have an unconst motivation (as opposed to an unconst law).
      4. Gov’t privileging its symbol above all others – protecting ITS speech
   4. ***Texas v. Johnson*** (1989)
      1. **Overturned conviction under TX flag desecration** statute for burning American flag as part of political demonstration.
         1. Doesn’t go into motive, but implies that the purpose is to prohibit expressive uses of the flag.
      2. Conduct sufficiently imbued w/ elements of communication to implicate 1A.
      3. Govt. may not prohibit particular conduct because it has expressive elements, and Johnson’s was prosecuted because his expression would cause “serious offense.”

Political Speech

1. ***Buckley v. Valeo*** (1976) pg 393
   1. First question – **is money speech**? Is for this kind of purpose. How to analyze? Not low value, this is more than a TPM restriction, not really content (though political content)
   2. Federal Election Campaign Act
      1. Restrictions on ind expenditures, contributions, and amount candidates could spend on their own.
   3. **Upheld contribution limit** – fear of corruption, reduces appearance of corrupt relationship.
   4. **Invalidated Expenditure restriction** – greater burden on speech, need greater justification.
      1. Gov’t argues just a channeling rule – but, money is so important in modern campaigning, knocking on doors is trivial in comparison.
      2. Corruption interest not as strong.
      3. Equalization argument not legit – antithetical to core of 1A.
         1. Debate- need for constraint bc time bound – more demand to speak than time. Not same in political discourse.
2. McCain-Feingold in 2002
   1. Address the effective contributions problem – contributions couched as expenditures.
   2. ***McConnell*** (2003) supp 35
      1. **Upheld party contribution limits**
      2. Not a huge party/candidate distinction.
   3. ***Davis v. FEC*** (2008) supp 39
      1. **Struck down Millionaire’s Amendment** – if one candidate spent more than $350k of own money, other opponent could get larger donations.
      2. 5-4, said effectively was a penalty on the exercise of a 1A right.
3. ***Belotti*** (1978)
   1. In 5-4 decision, **struck down statute that prohibited corporations to make contributions or expenditure**s in referenda to influence or affect vote on anything but issue materially affecting any property, business, or assets of corporation.
   2. **Corporations have 1st A. rights**.
   3. People are entrusted with responsibility for judging and evaluating arguments.
   4. State made no showing that relative voice of corporations has been overwhelming or even significant in influencing referenda in MA, or that there has been any threat to confidence of citizenry in govt.
4. ***Austin*** (1990)
   1. **Upheld limitation on how much corporations could spend from their treasuries on behalf of political candidates**, but allowed such expenditures from segregated funds used solely for political purposes (PACs)
      1. Distinguished from *Belotti* – no corruption fears with referenda.
   2. Corps’ **unique legal and economic characteristics** enable them to use resources amassed in economic marketplace to obtain unfair advantage in political marketplace – unfair because resources in corporate treasury are not indication of popular support for corporation’s political ideals
5. ***Wisconsin Right to Life*** (2007) supp 43
   1. Said § 203 ban on electioneering communications by corps was unconst as applied to WRTL – mentioned some senators names, but was about abortion.
   2. Sub silentio overruled *McConnell*
6. ***Citizens United v. FEC*** (2010) supp 45 [Kennedy]
   1. Same statute as McConnell and WRTL – **corporate expenditures**.
   2. Court struck as **unconst**.
   3. Dissent
      1. Corps don’t have 1A rights. State interest found in McConnell still sufficiently important.
   4. Stare decisis
      1. Maj saying Austin wrong, we’re going back to Belotti
      2. Dissent – just change of Alito since McConnell, disregarding all value of stare
   5. Originalism
      1. Stevens dissent – Framers never envisioned 1A to protect corps
      2. Maj – speech is speech.
   6. Is 1A about ideas, regardless of their source, or is it about more skeptical, more paternalistic, more nervous vision about the capacity of people to weigh the sources of info, to be skeptical when they should be, and to make wise judgments?

Freedom of the Press

1. Four questions
   1. (1) In what circumstances, if any, is the press, bc of its const protected status, **exempt from laws of other general application**?
      1. None.
   2. (2) Guarantee a right to **gather news**?
      1. *Richmond Newspapers, Branzburg, Globe*
   3. (3) In what circumstances may the gov’t **treat the press differently** than other institutions?
      1. *Minneapolis Star*
   4. (4) In what circumstances may gov’t **regulate the press to improve the “marketplace of ideas**”?
      1. *Pruneyard, Miami Herald v. Tornillo*
   5. If yes to any, how would you **define “press”**?
      1. Court has tried to avoid creating a const definition.
2. ***Richmond Newspapers v. V***A (1980)
   1. Right to attend criminal trials implicit in 1A
      1. Framed not as a right of the press, but of the people.
   2. Long history of criminal trials being open, the Const (9A or 1A), can’t close w/o compelling justification.
3. ***Branzburg v. Hayes*** (1972) pg 495
   1. Issue of **privilege – reporter** promises confidentiality to source, prosecutor threatens contempt, reporter says 1A right not to reveal – if you force me to reveal, will dampen my ability to get this info in the future.
   2. **Court** – **1A does not grant such immunity**.
      1. But we give lots of privileges like this already (atty/client, marital, dr/patient).
      2. Rule of general application. Exceptions elsewhere does not suggest discrim against the press.
   3. 49 states and DC have adopted statutes protecting journalists. Fed hasn’t. So, prosecution in federal court, press has no privilege.
      1. Still difficulty of how to define press.
   4. **Stewart dissent: Right to gather news is corollary of right to publish**.
      1. **Test**: When reporter is asked to reveal confidences before grand juries, govt. must
         1. (1) show probable cause to believe he has information clearly relevant to specific probable violation of law;
         2. (2) demonstrate that information can not be obtained by alternative means; and
         3. (3) demonstrate compelling and overriding interest in information.
4. ***Globe Newspaper Co. v. Superior Court*** (1982) pg. 511 [Brennan]
   1. In 6-3 decision, held **unconstitutional** MA law requiring trial judges in sex offenses cases involving **victims under 18 to exclude press and public from courtroom during victim’s testimony**.
   2. Standard: Whether 1st A. right of access to criminal trials can be restricted in context of any particular trial depends not on historical openness of that type of criminal trial, but on state interests supporting restriction.
   3. **Where state attempts to deny access in order to inhibit disclosure of sensitive information, there must be compelling govt. interest and narrow tailoring**.
   4. Application: Interest in safeguarding well-being of minor is compelling, but it does not justify mandatory closure rule; **must perform case-specific inquiry**.
5. ***Minneapolis Star & Tribune Co. v. MN Comm. of Revenue*** (1983) pg. 515
   1. Held **unconstitutional MN taxing** scheme that exempted periodical publications from sales tax, imposed use cost on newspaper and ink products used by them, but exempted first $100,000 worth, with result that only 11 publishers paid at all and one paid 2/3 of revenue raised with tax.
   2. Selection of press for special treatment threatens press not only with current differential treatment, but with possibility of subsequent differentially more burdensome treatment, and courts are poorly equipped to evaluate relative burdens of methods of taxation.
      1. Exception: If state employed same method of taxation but applied lower rate to press, no doubt not singled out, and court would be able to evaluate.
   3. Also unconstitutional because it targets small group of newspapers.
6. ***PruneYard Shopping Center v. Robins*** (1980) pg 440
   1. CA law **requiring shopping centers to allow leafletters** on – not enough oppos for people to engage in conventional means of communication.
      1. PY arguing for a right NOT to speak, as a private property owner to not be forced by state to allow his property to be used as a forum for the speech of others.
   2. **Upheld** law.
   3. Analysis: Regulation designed to improve marketplace upheld over objection of individual whose property was being commandeered **to allow others to speak more effectively**
7. ***Miami Herald v. Tornillo*** (1974) pg 520 [Burger]
   1. Held FL “**right of reply” statute unconst**.
      1. Statute- if a paper attacks a candidate in an election, they must give the candidate free and equivalent space to defend the attack.
      2. State argued that few papers, so had power and influence to shape the debate, could determine outcome of elections, especially local.
   2. Court - **you can’t attempt to improve the marketplace of ideas by forcing the media to carry messages with which they don’t agree**
   3. *PY* – just physical space. Paper, space is much more valuable and limited. Also penalizing the paper for criticizing candidates – like a **tax on speech**.
      1. Tax will result in **chilling**.
      2. And undermines the value/effectiveness of the paper’s speech.
      3. Intrudes on editorial discretion.
   4. Diff between *PY* and *Tornillo* – **newspaper is actually engaged in speech**.
      1. *Hurley* between the two – parade more like newspaper, engaging in their own message.
8. **Broadcasting**
   1. Unique history. Really powerful new means of communication, limited airwaves, didn’t want private entities to control it all. SO much capacity to shape public opinion in just a few hands.
      1. Still valid to regulate?
   2. **Public Trusteeship**/BBC model – runs all programming on all frequencies. Treats like a public facility (like an auditorium), can manage the same way. Not a public forum, not traditionally one. Gov’t property – we build infrastructure, we manage. Programming is just gov’t speech.
   3. **Licensing** – intermediate ground.
      1. Not for sale, not about highest bidder. Get for limited period of time, subject to renewal based on having served the public interest.
      2. FCC
      3. A **prior restraint**?
         1. Kind of, but allowed sometimes (parades). Different because about access to gov’t own property
   4. Hypo: Rule that have to provide free airtime to candidates for Dem party. Clearly VP discrim. Defeat two ways:
      1. Not gov’t speech – licenses gives private individuals freedom for programming, no longer gov’t speech. Like Rosenberg. Can’t do that.
      2. Establishment/free speech argument
         1. Gov’t partisan speech with public resources may just be unconst.
   5. **Right of reply**
      1. Different – scarcity in broadcasting/licensing scheme. Newspaper, anyone can create one. More understandable here.
      2. Scarcity rationale reversed today? Cable, tons of channels, but few newspapers. And then the internet.
   6. **Fairness Doctrine** 
      1. Said 2 critical things to broadcasters (repealed by Reagan)
      2. (1) You must cover matters of public concern
      3. (2) more specific right of reply regulations
         1. Have to give equal time (in debates for example)
      4. Upheld in ***Red Lion v. FCC*** (1969) pg 521
   7. Still valid to regulate?
      1. Scarcity rationale gone today
      2. But free.
      3. Safe harbor for viewers?
   8. **Cable and internet held as NOT broadcasting**.