CHAPTER 14

FREEDOM OF EXPRESSION

I. GENERAL THEMES

A. Text of First Amendment: The First Amendment provides, in part, that "Congress shall make no law ... 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. **Related rights:** There are thus several distinct rights which may be grouped under the category "freedom of expression": freedom of ***speech***, of the ***press***, of ***assembly***, and of ***petition***. Additionally, there is a well-recognized "freedom of ***association***" which, although it is not specifically mentioned in the First Amendment, is derived from individuals' rights of speech and assembly.

B. Two broad classes: Whenever you consider governmental action that seems to infringe upon the freedom of expression, there's one key question that you must always ask before you ask anything else. That question is, "Is this governmental action '***content-based***' or '***content-neutral***'?" If the action is "content-based," the government's action will generally be subjected to strict scrutiny, and the action will rarely be sustained. On the other hand, if the action is "content-neutral", the government's action is subjected to a much less demanding standard, and is thus much more likely to be upheld.

1. **Classifying:** A governmental action that burdens a person's expression is "content-based" if the government is aiming at the ***"communicative impact"*** of the expression. By contrast, if the government is aiming at something other than the communicative impact of the expression, the government action is "content-neutral", even though it may have the *effect* of burdening the expression.

   Example 1 (content-based): Virginia forbids pharmacists to advertise the prices of prescription drugs, because it's afraid that the public will buy drugs at the lowest available price and will therefore receive low-quality goods and services. This government ban is "content-based", since the speech is being regulated because of the government's fears about how consumers will respond to its *communicative impact.* Therefore, the government's ban will be strictly scrutinized, and is in fact violative of the First Amendment. [*Virginia Pharmacy Bd. v. Virginia Consumer Council*]

   Example 2 (content-neutral): A city forbids the distribution of all leaflets, because it wishes to prevent littering. This ban is "content neutral" — the government is banning all leaflets, regardless of their content, and the harm sought to be avoided (littering) would exist to the same extent regardless of the message in the leaflets. Therefore, the government action is subject to less rigid review — more or less "intermediate level review" (though it was still struck down on these facts.) [***Schneider v. State***]

   a. **Tip:** Here's a tip to help you decide whether a given governmental action is content-based or not: would the harm the government is trying to prevent

exist to the same degree if the listeners/readers ***didn't understand English***? If the answer is "no," the action is probably content-based.

> **Example:** Suppose a consumer in the prescription-drug case above didn't speak English. He wouldn't suffer the harm the state was trying to prevent — being induced to buy bad drugs or bad service for a cheap price — even if he saw or read the advertising, so it's clearly the content of the communication that the state is objecting to. But in the case of the ban on littering, even a whole city of non-English-speakers would suffer the same harm — littered streets — so the ban is content-neutral.

b. Motive counts: When a court decides whether a regulation is content-based or content-neutral, ***motives*** count for everything — the question is what the state really ***intends*** to do. If the court believes that the state intends to inhibit certain speech because of its message, the court will treat the statute as content-based (and strictly scrutinize it) even though it is neutral on its face.

C. Analysis of content-based government action: Once we've determined that a particular government action impairing expression is "content-based", we then have to determine whether the expression falls within a category that is ***protected*** by the First Amendment.

1. Unprotected category: If the speech falls into certain pre-defined ***unprotected*** categories, then the government can basically ban that expression completely based on its content, without any interference at all from the First Amendment.

a. Listing: The main "unprotected" categories are: (1) ***obscenity***; (2) ***fraudulent misrepresentation***; (3) ***defamation***; (4) ***advocacy of imminent lawless behavior***; and (5) ***"fighting words"***.

b. Not totally unprotected: But even speech falling within an "unprotected category" receives one small First Amendment protection: government must regulate in a basically ***content-neutral*** way. (*Example:* The state may ban all "fighting words." But it may not choose to ban just those fighting words directed at the listener's race, religion, or other enumerated traits. [*R.A.V. v. City of St. Paul*])

2. Protected category: All expression not falling into one of these five pre-defined categories is "protected". If expression is protected, then any government ban or restriction on it based on its content will be ***presumed to be unconstitutional***. The Court will subject any content-based regulation of protected speech to ***strict scrutiny*** — the regulation will be sustained only if it (1) serves a ***compelling governmental objective***; and (2) is ***"necessary,"*** i.e., drawn as ***narrowly as possible*** to achieve that objective (since a broader-than-needed restriction wouldn't be a "necessary" means.)

> **Example:** A District of Columbia statute bans the display of any sign within 500 feet of a foreign embassy, if the sign would bring the foreign government into "public disrepute". *Held*, this regulation is content-based, since a sign is prohibited or not prohibited based on what the sign says. Therefore, the regulation must be strictly scrutinized, and cannot be upheld. Even if the govern-

ment's interest in protecting the dignity of foreign diplomats is compelling — which it may or may not be — the statute is not "necessary" to achieve that interest, since a narrower statute that only banned the intimidation, coercion or threatening of diplomats would do the trick. [*Boos v. Barry*].

a. **Religious speech gets equal protection:** The requirement of content-neutrality is now so strong that it seems to take precedence over the ***Establishment Clause*** (which protects separation of church and state). Thus if the government allows private speech in a particular forum, it may not treat ***religiously-oriented*** speech ***less favorably*** than non-religiously-oriented speech.

> **Example:** If a public university gives funding for student publications on various topics, the requirement of content-neutrality means that the university must give the same funding to a student publication whose mission is to proselytize for Christianity. [*Rosenberger v. Univ. of Virginia.*]

D. Analyzing content-neutral regulations: Now, let's go back to the beginning, and assume that the government restriction is ***content-neutral***.

1. **Three-part test:** Here, we have a ***three-part test*** that the government must satisfy before its regulation will be sustained if that regulation substantially impairs expression:

   a. **Significant governmental interest:** First, the regulation must serve a ***significant governmental interest.***

   b. **Narrowly tailored:** Second, the regulation must be ***narrowly tailored*** to serve that governmental interest. So if there's a somewhat ***less restrictive*** way to accomplish the same result, the government must use that less-intrusive way. (*Example:* Preventing littering is a significant governmental interest. But the government can't completely ban the distribution of handbills to avoid littering, because the littering problem could be solved by the less restrictive method of simply punishing those who drop a handbill on the street. [*Schneider v. State*])

   c. **Alternative channels:** Finally, the state must ***"leave open alternative channels"*** for communicating the information. (*Example:* Suppose a city wants to ban all billboards. If a political advertiser can show that there's no other low-cost way to get his message across to local motorists, this billboard ban might run afoul of the "alternative channels" requirement.)

2. **Mid-level review:** This three-part test basically boils down to ***mid-level*** review for content-neutral restrictions that significantly impair expression (as opposed to strict scrutiny for content-based restrictions).

E. Overbreadth: The doctrine of ***overbreadth*** is very important in determining whether a governmental regulation of speech violates the First Amendment. A statute is "overbroad" if it bans speech which could constitutionally be forbidden but *also* bans speech which is protected by the First Amendment.

1. **Standing:** To see why the overbreadth doctrine is important, let's first consider how a litigant attacks the constitutionality of a statute *outside* the First Amendment area. Here, the litigant can only get a statute declared unconstitutional if he

can show that it's unconstitutional in its ***application to him***. But the overbreadth doctrine lets a litigant prevail if he can show that the statute, applied according to its terms, would violate the First Amendment rights of ***persons not now before the court***. So overbreadth is really an exception to the usual rule of "standing" — under the usual standing rules, a person is not normally allowed to assert the constitutional rights of others, only his own.

2. **"Substantial" overbreadth:** In cases where the statute is aimed at ***conduct*** that has expressive content (rather than aimed against pure speech), the overbreadth doctrine will only be applied if the overbreadth would be ***"substantial"***. In other words, the potential unconstitutional applications of the statute must be reasonably numerous compared with the constitutional applications.

F. **Vagueness:** There is a second important First Amendment doctrine: ***vagueness***. A statute is unconstitutionally vague if the conduct forbidden by it is so ***unclearly defined*** that a reasonable person would have to ***guess at its meaning***.

1. **Distinguish from overbreadth:** Be careful to ***distinguish vagueness from overbreadth:*** they both leave the citizen uncertain about which applications of a statute may constitutionally be imposed. But in overbreadth, the uncertainty is hidden or "latent," and in vagueness the uncertainty is easily apparent.

> **Example:** Statute I prohibits anyone from "burning a U.S. flag as a symbol of opposition to organized government." Statute II prohibits anyone from "burning a U.S. flag for any purpose whatsoever." Statute I is probably unconstitutionally vague, because there's no way to tell what the statute means by "symbols of opposition to organized government." Statutue II is unconstitutionally overbroad — it's obviously not vague, since it's perfectly clear that it bans *all* flag burning. But since by its terms it appears to apply to constitutionally-protected conduct (e.g., burning that's intended as a political expression), and since there's no easy way to separate out the constitutional from unconstitutional applications, it's overbroad.

I. ADVOCACY OF ILLEGAL CONDUCT

A. **Advocacy of illegal conduct:** Remember that one of our "unprotected categories" is the ***advocacy of imminent illegal conduct***. The government can ban speech that advocates crime or the use of force if (but only if) it shows that two requirements are met:

1. **Intent:** The advocacy must be ***intended*** to incite or produce "imminent lawless action"; and

2. **Likelihood:** The advocacy must in fact be ***likely*** to incite or produce that imminent lawless action.

II. TIME, PLACE AND MANNER REGULATIONS

A. **Time, place and manner generally:** Let's now focus on regulations covering the ***"time, place and manner"*** of expression. This is probably the area of Freedom of Expression on which you are most likely to be tested, since these kinds of regulations are quite often found in real life. When we give you the rules for analyzing "time,

place and manner" restrictions below, assume that the speech that is being restricted is taking place in a ***public forum***. (If it's not, then the government has a somewhat easier time of getting its regulation sustained; we'll be talking about these non-public forum situations later.)

1. **Three-part test:** A "time, place and manner" regulation of public-forum speech has to pass a ***three-part test*** to avoid being a violation of the First Amendment:

   a. **Content-neutral:** First, it has to be ***content-neutral***. In other words, the government can't really be trying to regulate content under the guise of regulating "time, place and manner".

      Example: City enacts an ordinance allowing parades or demonstrations "to protest governmental policies" to be conducted only between 10 a.m. and 4 p.m. No such restrictions are placed on other kinds of parades or demonstrations. Even though this restriction is ostensibly merely a "time, place and manner" restriction, it violates the requirement of content-neutrality, because the restriction applies to some expressive conduct but not others, based on the content of the speech.

   b. **Narrowly tailored for significant governmental interest:** Second, it's got to be ***narrowly tailored*** to serve a ***significant governmental interest***. (We saw this above when we were talking more generally about the analysis of all content-neutral restrictions on speech.) This basically means that not only must the government be pursuing an important interest, but there must not be some significantly ***less intrusive*** way that government could achieve its objective.

      Example: Suppose the government wants to prevent littering on the streets. Even though prevention of littering is an important governmental objective, the government may not simply ban all distribution of handbills, because there is a significantly less restrictive means of achieving this objective — a direct ban on littering — so the ban on handbills is not "narrowly tailored" to achieving the anti-littering objective.)

   c. **Alternative channels:** Finally, the state must "leave open ***alternative channels***" for communicating the information.

      Example: City is a medium-sized city, with six public parks and many streets. City enacts an ordinance stating that any parade or demonstration, no matter what the content of the message, shall take place only in Central Park or on Main Street. City argues that its limited budget for police security, and the greater ease of handling crowds in these two places than in other places, justify the ordinance. Even though this time, place and manner restriction is apparently content-neutral and is arguably narrowly tailored for a significant governmental interest, it probably violates the "leave open alternative channels" requirement because it puts off limits for parades and demonstrations the vast majority of locations within City.

2. **Application to conduct:** These rules on when the state may regulate the "time, place and manner" of expression apply where what is being regulated is pure speech. But much more importantly, these rules apply where the state is regulating

"conduct" that has an expressive component. ***So the state can never defend on the grounds that "We're not regulating speech, we're just regulating conduct."***

Example: It's "conduct" to hand out handbills, or to form a crowd that marches down the street as part of a political demonstration. But since both of these activities have a major expressive component, the state cannot restrict the conduct unless its satisfies the three-part test described above, i.e., the restriction is content neutral, it's narrowly tailored to achieve a significant governmental interest, and it leaves open alternative channels.

3. **"Facial" vs. "as applied":** A "time, place and manner" regulation, like any other regulation impinging upon First Amendment rights, may be attacked as being either "facially" invalid or invalid "as applied." Thus even a time, place and manner restriction that has been very carefully worded to as to satisfy all three requirements listed above may become unconstitutional ***as applied to a particular plaintiff***.

Example: A City ordinance provides that any parade or demonstration participated in by more than five people shall be held only after the purchase of a permit, which shall be issued by the City Manager for free to any applicant upon two days notice. The City Manager normally issues such permits without inquiring into the nature of the demonstration planned by the applicant. P, who is known locally as an agitator who opposes the current city government, applies for a permit. The City Manager denies the permit, saying, "I don't like the rabble rousing you've been doing."

Even though the ordinance on its face is probably a valid time, place and manner restriction, the application of the ordinance to P's own permit request violates P's First Amendment rights, because that application is not being carried out in a content-neutral manner.

B. Licensing: Be especially skeptical of governmental attempts to require a ***license*** or ***permit*** before expressive conduct takes place.

1. **Content-neutral:** Obviously, any permit requirement must be applied in a ***content-neutral*** way. (*Example:* Local officials give permits for speeches made for purposes of raising money for non-controversial charities, but decline to give permits for demonstrations to protest the racism of local officials. The requirement of content neutrality in the licensing scheme is not being satisfied, and the scheme will be automatically struck down.)

2. **No excess discretion:** Also, the licensing scheme must set forth the grounds for denying a permit ***narrowly*** and ***specifically***, so that the discretion of local officials will be curtailed. (*Example*: A municipal ordinance cannot require a permit for every newspaper vending machine where the permit is to be granted on "terms and conditions deemed necessary by the mayor" — the grounds for denying a permit must be set forth much more specifically, to curb the official's discretion. [*Lakewood v. Plain Dealer Publ. Co.*])

3. **Narrow means-end tailoring:** Finally, the permit ***mechanism*** must be ***closely tailored*** to the ***objective*** that the government is trying to achieve.

Example: A village bans any "canvasser" from going onto residential property for the purpose of promoting any "cause" without first getting a Solicitation Permit from the mayor. The village defends the ordinance on the grounds that it helps prevent fraud, and protects residents' privacy. *Held*, this ordinance is invalid on its face, because it's not tailored to the village's stated interests. For instance, the ordinance applies even to religious and political proselytizing unaccompanied by fund-raising, which poses little risk of fraud. Conversely, the interest in protecting residents' privacy could be just as well achieved by letting residents post No Solicitation signs that it would be an offense to ignore. [*Watchtower Bible and Tract Soc. v. Stratton*]

4. **Reasonable means of maintaining order:** But if these three requirements — content-neutral application, limited administrative discretion and close means-end fit — are satisfied, the permit requirement will be ***upheld*** if it is a ***reasonable means of ensuring that public order is maintained.***

   Example: A requirement that a permit be obtained before a large group of people may march would probably be upheld as a reasonable way of maintaining order, if the requirement is applied in a content-neutral way and is drafted so as to apply without exception to *all* large marches.

5. **Right to ignore requirement:** Assuming that a permit requirement is unconstitutional, must the speaker apply, be rejected, and then sue? Or may he simply speak without the permit, and then raise the unconstitutionality as a defense to a criminal charge for violating the permit requirement? The answer depends on whether the permit is unconstitutional on its face or merely as applied.

   a. **Facially invalid:** If the permit requirement is unconstitutional ***on its face***, the speaker is ***not*** required to apply for a permit. He may decline to apply, speak, and then defend (and avoid conviction) on the grounds of the permit requirement's unconstitutionality.

   b. **As applied:** But where the permit requirement is not facially invalid, bu only unconstitutional ***as applied to the speaker***, the speaker generally doe ***not*** have the right to ignore the requirement — he must apply for the permi and then seek prompt judicial review, rather than speaking and raising th unconstitutionality-as-applied as a defense. (However, an exception to thi rule exists where the applicant shows that ***sufficiently prompt judicial revie*** of the denial was ***not available***.)

C. **Right to be left alone:** People have no strong ***right to be left alone***, and the gover ment therefore can't regulate broadly to protect that right. As a general rule, it's ***up the unwilling listener*** (or viewer) ***to avoid the undesired expression.***

   Example: A city can't make it a misdemeanor to walk up and down the str handing advertising brochures to people without the recipient's express co sent. (It's up to the recipient to decline the handbill).

   1. **Captive audience:** But if the audience is ***"captive"*** (unable to avert their eyes ears), this makes it ***more likely*** that a fair degree of content-neutral regulation

be allowed. (However, the fact that the audience is captive is just one factor in measuring the strength of the state interest in regulating.)

> **Example:** A state may make it a crime to approach close to a woman who is entering an abortion clinic, if the approacher's purpose is to orally "counsel or educate" the woman and the woman does not consent to the approach. [***Hill v. Colorado***].

D. Canvassing: A speaker's right to ***canvass***, that is, to go around ringing doorbells or giving out handbills, receives substantial protection.

1. **Homeowner can say "no":** The individual listener (e.g., the homeowner), is always free to say, "No, I don't want to speak to you about becoming (say), a Jehovah's Witness." The city can then make it a crime for the speaker to persist.

2. **City can't give blanket prohibition:** But the *government* cannot say "No" ***in advance*** on behalf of its homeowners or other listeners.

> **Example:** A city passes an ordinance providing that "All doorbell ringing for the purpose of handing out handbills is hereby forbidden." *Held*, such an ordinance violates the First Amendment, even if (as the city claims) it is a content-neutral ordinance designed to protect unwilling listeners, such as those who work nights and sleep days. The most the city can do is to provide that once the individual homeowner makes it clear he doesn't want to be spoken to, the speaker must honor that request. [*Martin v. Struthers*]

3. **Time, place & manner:** But the authorities may impose "time, place & manner" limits on canvassing, if these limits: (1) are content-neutral; (2) serve a significant governmental interest; and (3) leave open adequate other channels for communication. (*Example:* A town might prohibit canvassing after 6:00 PM, if its policy is truly content-neutral (e.g., it wasn't enacted for the purpose of silencing Jehovah's Witnesses), is enacted to protect homeowners' night-time tranquility, and allows solicitation to take place at other times.)

E. Fighting words: One of our other "unprotected categories" consists of ***"fighting words."*** "Fighting words" are words which are likely to make the person to whom they are addressed commit an ***act of violence***, probably against the speaker. Expression that falls within the "fighting words" category can be flatly banned or punished by the state. [*Chaplinsky v. New Hampshire*]

> **Example:** D picks out one member of his audience and calls him a liar, racist and crook. D can be arrested for this speech, because these are words which might well provoke a reasonable person to whom they are addressed into physically attacking D.)

1. **Limits:** But the "fighting words" doctrine is tightly limited:

   a. **Anger not enough:** It's not enough that the speaker has made the crowd angry; they must be so angry that they are ***likely to fight***.

   b. **Crowd control:** The police must ***control*** the angry crowd instead of arresting the speaker if they've got the physical ability to do so. (In other words, the police can't grant the hostile crowd a "heckler's veto.")

c. **Dislike of speaker's identity:** The doctrine doesn't apply where it's the mere ***identity*** or ***lawful acts*** of the speaker, rather than his threatening words, that moves the crowd to anger. (*Example*: If D is a black civil rights worker speaking in a small southern town with a history of racial violence, the fact that members of the audience are ready to attack D because they hate all black civil rights activists will not suffice to make D's speech "fighting words" — here the anger is not really coming from the speaker's particular threatening words, but from his identity and his lawful advocacy of change.)

F. Offensive language: Language that is ***"offensive"*** is nonetheless protected by the First Amendment.

1. **Profanity:** This means that even language that is ***profane*** may not be banned from public places. (*Example*: D wears a jacket saying "Fuck the Draft" in the L.A. County Courthouse. D cannot be convicted for breaching the peace. The state may not ban language merely because it is "offensive," even if profane. [*Cohen v. Calif.*])

   a. **Sexually-oriented non-obscene language:** This protection of "offensive" material also means that messages or images that are ***sexually-oriented*** but not obscene are, similarly, protected.

      Example: Congress bans the use of the Internet to display any "indecent" language or images which may be accessed by minors. *Held*, this statute is unconstitutional, because it restricts the First Amendment rights of adults to receive indecent-but-not-obscene material. [*Reno v. ACLU*]

2. **Racial or religious hatred:** Similarly, this means that messages preaching ***racial or religious hatred*** are protected (at least if they don't incite imminent violence or come within the "fighting words" doctrine). (*Example*: A member of the American Nazi Party tells a predominantly-Jewish audience, "Jews are the scum of the earth and should be eliminated." D cannot be punished for, or even restricted from, saying these words.)

3. **Limits:** But offensive language *can* be prohibited or punished if: (1) the audience is a ***"captive"*** one (e.g., the speech occurs on a city bus or subway); or (2) the language is ***"obscene,"*** under the formal legal definition of this term (lewd and without socially redeeming value).

G. Regulation of "hate speech": Government efforts to regulate ***"hate speech"*** — for instance, speech attacking racial minorities, women, homosexuals, or other traditionally disfavored groups — may run afoul of the First Amendment for being content-based.

1. **Three rules:** Here are the general rules about how a state may go about banning hate speech:

   ❑ **General ban:** A ban on speech or conduct intended or likely to incite anger or violence based solely on ***particular listed topics or motives*** — such as race, color, religion or gender hatred — is ***impermissibly content-based.*** That's true even if all the speech/conduct banned falls within an ***"unprotected"*** category such as, here, ***"fighting words."*** [*R.A.V. v. St. Paul*]

Example: City bans only those "fighting words" that evoke hatred or conflict based on race, ethnicity or gender (not fighting words based on, say, the listeners' political affiliation). This enactment is content-based, in that it selects speech for proscription based on its content. Therefore, the statute will be strictly scrutinized, and struck down for not being sufficiently narrowly-tailored to achieve the compelling state interest in avoiding dangerous physical conflict. (However, a state could ban *all* fighting words — it just can't select fighting words based only on certain types of hatred.) [*R.A.V.*]

- **Worst examples:** However, a state ***may*** impose a content-based ban on ***particular instances*** of unprotected speech if the ban forbids ***only the very worst examples*** illustrating ***the very reason the particular class of speech is unprotected.***

  Example: The state may choose to criminalize just the very most dangerous "fighting words," just the very most obscene obscene images, etc. [*R.A.V.*]

- **Penalty-enhancement statutes:** Also, a state may identify particular generally-applicable criminal proscriptions, and may then choose to punish ***more severely*** those criminal acts that happen to be motivated by hate than those not motivated by hate. This is called the ***"penalty enhancement"*** approach. [*Wisconsin v. Mitchell*]

  Example: For instance, from within the overall class of acts that constitute arson (all of which are defined as crimes), the state may punish arson more seriously if it's motivated by bias against particular groups.

- **All intimidating acts:** Finally, a state may select a particular type of expressive act (e.g., cross-burning), and punish ***all instances*** where that act is done with a purpose of ***intimidating or threatening*** someone, even though the state doesn't punish other types of intimidating or threatening acts. [*Virginia v. Black*]

  Example: A state may choose to ban all cross-burnings that are done with intent to intimidate another. That's true even if the state chooses not to criminalize other types of expressive activity that are done with intent to intimidate another (e.g., burning that other in effigy).

H. Injunctions against expressive conduct: Where the restriction on expression is in the form of an ***injunction*** issued by a judge, there is a special standard of review. When a court issues an injunction that serves as a kind of "time, place and manner" restriction, the injunction will be subjected to slightly ***more stringent*** review than would a generally-applicable statute or regulation with the same substance: the injunction must "***burden no more speech than necessary*** to serve a significant governmental interest." [*Madsen v. Women's Health Center, Inc.*]

I. The public forum: Let's turn now to the concept of the ***"public forum."***

1. **Rules:** Here are the rules concerning when the fact that speech occurs in a public forum makes a difference, and how:

a. **Content-based:** If a regulation is ***content-based***, it makes no difference whether the expression is or is not in a public forum: strict scrutiny will be given to the regulation, and it will almost never be upheld.

b. **Neutral "time, place & manner":** It's where a regulation is ***content-neutral*** that the existence of a public forum makes a difference; especially regulations on "time, place & manner" are less likely to be upheld where the expression takes place in a public forum.

i. **Non-public forum:** When expression takes place in a ***non-public forum***, the regulation merely has to be ***rationally related*** to some ***legitimate governmental objective***, as long as equally effective alternative channels for the expression are available.

ii. **Public forum:** When the expression takes place in a ***public forum***, by contrast, the regulation has to be ***narrowly drawn*** to achieve a ***significant governmental interest*** (roughly *intermediate-level* review). It is necessary, but not sufficient, that the government also leaves alternative channels available.

Example 1 (public forum speech): A city says, "No political campaign messages may be presented in handbills distributed on city streets." Since this rule impairs communications in a public forum (city streets), the city will have to show that its ordinance is necessary to achieve a significant governmental interest, which it probably can't do (anti-littering won't be enough, for instance). The city can't say, "Well, TV or radio ads will let the same message be given" — the existence of alternative channels for the communication is necessary, but is not enough, when the expression takes place in a public forum.

Example 2 (non-public forum speech): A city says, "No political campaign messages may be displayed on privately-owned billboards, even with the consent of the owner." Here, no public forum is involved. Therefore, as long as adequate alternative channels are available (which they probably are, e.g., radio & TV ads), the city only has to show that its regulation is rationally related to some legitimate governmental objective. The city can probably meet this burden (e.g., by pointing to the objective of beautifying the city.)

2. **What are public forums:** What places, then, are public forums?

a. **"True" or "traditional" public forums:** First, there are ***"true"*** or ***"traditional"*** public forums. These are areas that are public forums by custom and tradition, not by virtue of any particular government policy. The classic examples are: (1) ***streets;*** (2) ***sidewalks***; and (3) ***parks***.

b. **"Designated" public forums:** There's a second type of public forum: places that the government has ***decided to open up*** to a broad range of expressive conduct.

Some possible Examples:

- ❑ places where ***government meetings*** take place that the government has decided to open to the public at large (e.g., a school board meeting held in a school auditorium);
- ❑ places that government has decided may be ***used by a broad range of people*** or groups (e.g., ***school classrooms after hours***, under a policy that lets pretty much any group use them, or a municipal theater that any group may rent).

These are called ***"designated"*** public forums.

i. **Same rules:** The ***same rules*** apply to designated public forums as apply to true public forums, except that government can ***change its mind*** and remove the designation (in which case the place becomes a non-public forum that can be subjected to much broader viewpoint-neutral regulation, as described below).

c. **Non-public-forums:** Still other public places are not at all associated with expression traditionally, so they can be treated as ***non-public forums. Here, the government regulation just has to be rationally related*** to some ***legitimate governmental objective***, as long as the interference with speech is not "substantial." And if alternative channels are available, then this fact alone usually *makes* the interference "insubstantial." So we basically use "mere rationality" review for content-neutral "time, place & manner" regulations of non-public-forum expression that leave open alternative channels of communication.

i. **All expression banned:** Often, even a regulation that completely ***bans*** expression in a particular non-public forum will be found to satisfy this "mere rationality" test. Or, the government can choose to forbid discussion of certain subjects (but not certain viewpoints).

Example: A publicly-owned airport terminal is not a public forum. Therefore, the government may ban face-to-face solicitation of funds in the terminal, because such a ban is rationally related to the legitimate governmental objectives of reducing congestion and combatting fraud. (However, a total ban even on literature distribution will not be upheld, because this ban does not even satisfy the "mere rationality" standard.) [*Int'l Soc. for Krishna Consciousness v. Lee*])

ii. **Illustrations of non-public-forums:** Here are some illustrations of facilities that, even though they are owned by the government, are not public forums: ***airport terminals***, ***jails***, ***military bases***, the insides of ***courthouses***, and ***governmental office buildings***.

iii. **Limited public forums:** Some places are referred to by the Court as ***"limited public forums."*** These are government property that the government has decided to ***open only to a particular set of topics or purposes***. A limited public forum is treated ***just like a non-public forum***: the government merely has to be rational, and viewpoint-neutral, in its regulation.

(But the requirement of viewpoint-neutrality has real impact, especially in cases where government tries to keep out religious material.)

Example: A school district allows an elementary school to be used after hours by any community group that wishes to put on a program about current affairs. However, the district says that "programs of primarily religious content" are excluded. The Good Christians Club wants to hold a discussion of how practicing Christians should view recent events in the Middle East, to be followed by a prayer for peace in that region. The district's program is a "limited public forum," and is to be treated like a non-public forum. Since the proposed program concerns the appropriate topic (current affairs), the school district cannot exclude it on the grounds of its religious orientation, because that would be illegal viewpoint-discrimination. [Cf. *Good News Club*]

J. Access to private property: In general, a speaker does not have any First Amendment right of ***access*** to another person's ***private property*** to deliver his message. Most significantly, a person does not have a First Amendment right to speak in ***shopping centers***. [*Hudgens v. NLRB*] (*Example:* State trespass laws may be used to prevent a person from conducting an anti-war demonstration or a religious proselytizing campaign at her local privately-owned shopping center.)

IV. REGULATION OF SYMBOLIC EXPRESSION

A. Symbolic expression: Let's consider ***"symbolic expression,"*** i.e., expression that consists solely of ***non-verbal*** actions.

1. **Standard:** We use essentially the same rules to analyze restrictions on symbolic expression as we do for restrictions that apply to verbal speech, or to verbal speech coupled with conduct. Thus: (1) any attempt by government to restrict symbolic expression because of the ***content*** of the message will be strictly scrutinized and almost certainly struck down; (2) any restriction on the ***time, place or manner*** of symbolic expression will have to be narrowly tailored to a significant governmental objective and will have to leave open alternative channels.

   Example: The Ds (high school students) wear armbands to school, in the face of a school policy forbidding students from wearing such armbands. Because school officials were motivated by a desire to suppress particular messages — anti-war messages — the ban must be strictly scrutinized, and is struck down. [*Tinker v. Des Moines Schl. Dist.*]

2. **Flag desecration:** The most interesting example of government regulation of symbolic expression is ***flag desecration*** statutes. The main thing to remember is that if a statute bans flag desecration or mutilation, and either on the statute's face or as it is applied, the statute is directed only at particular ***messages***, it will be invalid. (*Examples:* Both the Texas and federal flag burning statutes have been struck down by the Supreme Court. In the case of the federal statute, the Court concluded that Congress was trying to preserve the flag as a "symbol of national unity." The statute was therefore content-based, so the Court struck it down. [*U.S. v. Eichman*])

V. DEFAMATION AND INVASION OF PRIVACY

A. Defamation: The First Amendment places limits on the extent to which a plaintiff may recover tort damages for ***defamation.***

1. ***New York Times v. Sullivan test:*** Most importantly, under the rule of ***New York Times v. Sullivan***, 376 U.S. 254 (1964), where P is a ***public official***, he may only win a defamation suit against D for a statement relating to P's official conduct if P can prove that D's statement was made either "with ***knowledge*** that it was false" or with ***"reckless disregard"*** of whether it was true or false. These two mental states are usually collectively referred to as the ***"actual malice"*** requirement.

   Example: The *New York Times* runs an ad saying that P — the Montgomery, Alabama police commissioner — has terrorized Dr. Martin Luther King by repeatedly arresting him. Even if these statements are false, P cannot recover for libel unless he can show that the *Times* knew its statements were false or acted with reckless disregard of whether the statements were true or false. [*N.Y. Times v. Sullivan, supra*].

2. **Public figures:** This rule of *Times v. Sullivan* — that P can only recover for defamation if he shows intentional falsity or recklessness about truth — applies not only to public "officials" but also to public ***"figures"***. Thus a well known college football coach, and a prominent retired Army general, were public figures who had to show that the defendant acted with actual malice. [*Assoc. Press v. Walker*]

   a. **Partial public figure:** Someone who voluntarily ***injects himself*** into a public controversy will be a public figure for ***just that controversy*** — thus an anti-abortion activist might be a public figure for any news story concerning abortion, but not for stories about, say, his private life unrelated to abortion.

   b. **Involuntary public figure:** Also, some people may be ***"involuntary"*** public figures. (*Example:* A ***criminal defendant*** is an involuntary public figure, so he cannot sue or recover for a news report about his crime or trial unless he shows actual malice).

3. **Private figure:** If the plaintiff is a ***"private"*** (rather than "public") figure, he does ***not*** have to meet the *New York Times v. Sullivan* "actual malice" rule. [*Gertz v. Robert Welch, Inc.*]. On the other hand, the First Amendment requires that he show at least ***negligence*** by the defendant — the states may not impose strict liability for defamation, even for a private-figure plaintiff. *Id.*

   a. **No punitive damages:** Also, a private-figure plaintiff who shows only negligence cannot recover ***punitive*** damages — he must show actual malice to get punitive damages. *Id.*

B. Intentional infliction of emotional distress: The *Times v. Sullivan* rule applies to actions for intentional infliction of ***emotional distress*** as well as ones for defamation. Thus a public-figure plaintiff cannot recover for any intentional infliction of emotional distress unless he shows that the defendant acted with actual malice. (***Example***: *Hustler* Magazine satirizes religious leader Jerry Falwell as a drunken hypocrite who has sex with his mother. *Held*, Falwell cannot recover for intentional infliction of emo-

tional distress unless he shows that *Hustler* made a false statement with knowledge of falsity or with reckless disregard of falsity. [*Hustler Magazine v. Falwell*])

C. Falsity: The First Amendment also probably requires that the plaintiff (whether or not she is a public figure) must show that the statement was ***false***.

VI. OBSCENITY

A. Obscenity: Another of our "unprotected categories" is ***obscenity***. Expression that is obscene is simply ***unprotected*** by the First Amendment, so the states can ban it, punish it, or do whatever else they want without worrying about the First Amendment.

B. Three-part test: For a work to be "obscene," all three parts of the following test must be met:

1. **Prurient interest:** First, the average person, applying today's community standards, must find that the work as a whole appeals to the ***"prurient"*** interest;
2. **Sexual conduct:** Second, the work must depict or describe in a "patently offensive way" particular types of ***sexual conduct*** defined by state law; and
3. **Lacks value:** Finally, the work taken as a whole, must lack "serious literary, artistic, political or scientific value."

[*Miller v. Calif.*]

C. Significance: So something will not be "obscene" unless it depicts or describes ***"hard core sex"***. (For instance, mere ***nudity***, by itself, is not obscene.)

D. Materials addressed to minors: It will be much easier for the state to keep erotic materials out of the hands of ***minors***. Probably even minors have some First Amendment interest in receiving sexually explicit materials, but this is typically ***outweighed*** by the state's compelling interest in protecting minors against such material. So the distribution of non-obscene but sexually explicit materials may basically be forbidden to minors (provided that the regulations do not substantially impair the access of adults to these materials).

1. **Adult's rights impaired:** But if a measure aimed at minors *does* substantially impair the access of adults to material that's "indecent" but not obscene, the measure will be struck down. (*Example:* If Congress bans all "indecent" material on the Internet (as it has done), out of a fear that the material will be seen by minors, there's a good chance the measure will be found to violate the First Amendment rights of adults.)

E. "Pandering": The issue of whether the material appeals primarily to prurient interests may be influenced by the manner in which the material is ***advertised*** — if the publisher or distributor plays up the prurient nature of the materials in the advertising, this will make it more likely that the materials will be found to appeal mostly to prurient interests and thus to be obscene. The advertisement itself, and expert testimony about the likely effect of the advertising, may be admitted into evidence to aid the determination on obscenity. (The marketing of materials by emphasizing their sexually provocative nature is often called ***"pandering."***)

F. Private possession by adults: The mere ***private possession*** of obscene material by an adult may ***not*** be made criminal. [*Stanley v. Georgia*].

> **Example:** While police are lawfully arresting D at his house on a robbery charge, they spot obscene magazines on his shelf. D may not be criminally charged with possession of pornography, because one has both a First Amendment right and a privacy right to see or read what one wants in the privacy of one's own home.

1. **Child pornography:** However, the states ***may*** criminalize even private possession of ***child pornography***. [*Osborne v. Ohio*]
2. **No right to supply to consenting adults:** Also, the state may punish a person who ***supplies*** pornography even to consenting adults. In other words, there is a right to *have* pornography for one's own home use, but not a right to supply it to others for their home use.

VII. COMMERCIAL SPEECH

A. Commercial speech generally: Speech that is ***"commercial"*** — that is, speech advertising a product or proposing some commercial transaction — gets First Amendment protection. But this protection is in some ways ***more limited*** than the protection given to non-commercial (e.g., political) speech.

1. **Truthful speech:** ***Truthful*** commercial speech gets a pretty fair degree of First Amendment protection. The government may restrict truthful commercial speech only if the regulation (1) ***directly advances*** (2) a ***substantial governmental interest*** (3) in a way that is ***"no more extensive than necessary"*** to achieve the government's objective. So basically, we apply ***mid-level review*** to government restrictions based on the content of commercial speech (whereas we apply strict scrutiny to content-based restrictions on non-commercial speech).

   > **Example:** Virginia forbids a pharmacist from advertising his prices for prescription drugs. Virginia must show that it is pursuing a "substantial" governmental interest, and that materially-less-restrictive alternatives are not available. Here, the state's desire to prevent price-cutting that will lead to shoddy service is not strong enough to qualify as "substantial," so the measure must be struck down on First Amendment grounds. [*Virginia Pharmacy Board v. Virginia Consumer Council*]

2. **False, deceptive or illegal:** On the other hand, ***false*** *or* ***deceptive*** commercial speech may be ***forbidden*** by the government. Similarly, speech which proposes an ***illegal transaction*** may be forbidden (e.g., advertisements for cocaine).

   a. **Harmful:** But if the product or service is ***harmful*** but ***lawful***, the state ***may not limit*** advertising about it any more than the state may limit advertising about a non-harmful product — the right to ban product X does not necessarily include the "lesser" right to regulate speech about product X. (*Example:* Congress is free to ban casino gambling entirely. But if Congress allows such gambling, it may not limit advertising of casino gambling unless the limitation passes the mid-level review standard, summarized above, that applies to

regulation of truthful commercial speech. [*Greater New Orleans Broadcasting v. U.S.*])

3. **No overbreadth:** The ***overbreadth*** doctrine does ***not apply*** in commercial speech cases, because advertisers are thought not likely to be "chilled" by overly broad governmental regulation of speech. Therefore, a commercial enterprise that is protesting a regulation of speech must show that the regulation infringes the enterprise's own speech, not merely that the regulation would curtail speech not now before the court.

B. Advertising of lawful but harmful products: Sellers of products that are ***lawful*** but ***harmful*** receive the ***same protection as any other commercial speaker***. That is, the fact that government could completely ***ban*** the product does ***not*** mean that government can automatically curtail truthful advertising about the product. Therefore, regulation of advertising about the product must be substantially related to an important governmental objective, and the court will require a fairly tight fit between means and end.

> **Example:** A state bans all outdoor tobacco advertising, on the theory that this will help minors be less attracted to tobacco products. (Tobacco cannot legally be sold to minors in the state). *Held*, the regulation is invalid — it unduly interferes with the rights of tobacco vendors, and their adult customers, to exchange truth information about tobacco. [*Lorillard Tobacco v. Reilly*]

C. Lawyers: The qualified First Amendment protection given to commercial speech means that ***lawyers*** have a limited right to advertise. Thus a state may not ban all advertising by lawyers or even ban advertising directed to a particular problem. See, e.g., *Bates v. State Bar of Ariz.* (Thus a lawyer can advertise, "If you've been injured by a Dalkon shield, I may be able to help you.")

1. **In-person solicitation:** On the other hand, the states may ban certain types of ***in-person solicitation*** by lawyers seeking clients (e.g., solicitation of accident victims in person by tort lawyers who want to obtain a contingent-fee agreement. [*Ohralik v. Ohio St. Bar Ass'n.*])
2. **Direct mail:** Similarly, the states may ban lawyers from ***direct-mail*** solicitation of accident victims, at least for a 30-day period following the accident. [*Florida Bar v. Went For It*]

VIII. SOME SPECIAL CONTEXTS

A. Special contexts:

1. **Public school students:** Students in ***public schools*** have a limited right of free speech. The student's right to speak freely has to be ***balanced*** against the administration's right to carry out its educational mission and to maintain discipline.
   a. **Allowable regulation:** Thus a school may ban profanity. It may also ban the school newspaper from running stories that would disturb the school's ***educational mission*** (e.g., stories about sex and birth control that the principal reasonably believes are inappropriate for younger students at the school). [*Hazelwood Sch. Dist. v. Kuhlmeier*]

b. **Non-allowable regulation:** But school officials may not suppress students' speech merely because they disagree with that speech on ideological or political grounds. (*Example:* School officials may not ban the wearing of anti-war armbands).

B. Group activity: The rights of a ***group*** to engage in ***joint expressive activity*** get special First Amendment protection, generally called the ***"freedom of association"***. (*Example*: Groups have the right to get together to bring law suits, or to conduct non-violent economic boycotts. Therefore, they cannot be prevented from doing these things by state rules against fomenting litigation or conducting boycotts. [*NAACP v. Button*])

C. Campaign spending: The state or federal governments can regulate ***campaign spending*** to some extent, but other campaign regulations would violate the First Amendment.

1. **Contributions:** Contributions made by individuals or groups to candidates or to political action committees may be limited. (*Example*: Congress may constitutionally prevent anyone from contributing more than $1,000 to a candidate for federal office. [*Buckley v. Valeo*])

2. **Expenditures:** But a person's ***independent*** campaign-related ***expenditures*** (whether he's a candidate or not) may ***not*** be limited. (*Example*: A candidate may not be prevented from spending as much of his own money on getting elected as he wishes. Similarly, private citizen X may spend as much money to try to get Y elected as he wishes, as long as X spends the money in a truly independent manner rather than contributing it to Y or coordinating with Y on how it should be spent. *Buckley v. Valeo, supra.*)

3. **Ballot measure:** A person has a First Amendment right to spend as much as he wants and however he wants in connection with a ***ballot measure***. (*Example*: The insurance industry can spend as many millions as it wants, and organize those expenditures however it wants, in order to defeat a proposal that would roll back car insurance rates.)

D. Government as speaker or as funder of speech: So far, we've looked only at the role of government as the regulator of speech by non-government actors. But sometimes, ***government itself wishes to speak***. And sometimes, government wishes to give ***financial support*** to certain speech by others. In these two contexts — government as speaker, and government as funder of speech — government seems to have at least ***somewhat greater ability to prefer one viewpoint over another*** than it does when it merely regulates.

1. **Government as speaker:** When government wishes to ***be a speaker itself***, it is pretty clear that government may ***say essentially what it wants***, and is not subject to any real rule of viewpoint neutrality.

   Example: Government can pay for ads attacking smoking as a health hazard, without having to pay for opponents' ads saying that the dangers of smoking are overrated.

rights when, on the basis of my political beliefs, he declines to hire me as, say, a speech writer, a high advisor, or some other post with a ***heavy political content***.

On the other hand, if I'm a Democrat, and there's a Republican governor in power, he can't block me from getting a government job as a clerk or secretary or police officer — the old fashioned "patronage" system whereby all public jobs could be restricted to supporters of the party in power has been outlawed as a violation of freedom of association, and only jobs with a heavy political content, like speech writer, say, or Chief of Staff, can be based on party membership.

i. **Independent contractors:** The same rule — that party affiliation may be used if and only if the performance is reasonably related to one's politics — applies to people and companies doing work for government on an ***independent-contractor*** basis. (*Example:* P has a contract to haul trash for City. Even if the contract is at-will, City can't decline to renew it on the grounds that P belongs to the wrong political party or has supported the Mayor's opponent.)

c. **Speech critical of superiors or otherwise inappropriate:** An employee gets only limited protection for speech or associational activities that are ***critical of superiors***, or otherwise ***inappropriate for the workplace***. Where the speech involves a matter of ***"public concern,"*** the court will ***balance*** the speech rights of the employee and the government's interest as employer in promoting efficiency on the job. Where the speech does not involve a matter of public concern, the court gives great deference to the employer's judgment. [*Connick v. Myers*]

Example: P, a government clerical worker, hears that John Hinckley has tried to shoot Pres. Reagan, and says, "If they go for him again, I hope they get him." P is fired for the remark. *Held*, for P. This remark was intended as political commentary and was thus on a matter of "public concern," so P could not be fired unless the remark heavily affected P's job performance, which it did not. [*Rankin v. McPherson*]

X. SPECIAL PROBLEMS OF THE MEDIA

A. The media (and its special problems): Here is a brief review of some special problems related to the ***media***:

1. **Prior restraint:** In general, the government will not be able to obtain a ***prior restraint*** against broadcasters or publishers. In other words, only in exceptionally rare circumstances may the government obtain an ***injunction*** against the printing or airing of a story, and the government will almost never be allowed to require that a publisher or broadcaster obtain a ***permit*** before it runs a story.

Example: The *New York Times* may not constitutionally be enjoined from publishing part of the Pentagon Papers, even though these government-pre-

pared materials might contain information that is useful to our enemies or that would embarrass the U.S. [*N.Y. Times v. U.S.*]

a. **Gag order:** This means that a judge may generally not impose a ***gag order*** on the media ordering it not to disclose a certain fact about a pending trial.

i. **Participants:** But the judge may usually order the ***participants*** not to speak to the press. For instance, a state may prevent a lawyer from making any statement which would have a "substantial likelihood of materially prejudicing" a trial or other court proceeding. [*Gentile v. State Bar of Nevada*]

2. **Subpoenas by government:** The press does not get any special protection from government demands that the press ***furnish information*** which other citizens would have to furnish. In particular, if a reporter has information that is of interest to a ***grand jury***, the reporter may be required by subpoena to disclose that information to the grand jury even though this would cause him to violate a promise of confidentiality to a source. [*Branzburg v. Hayes*] (But the state is always free to enact a "shield law" making such subpoenas illegal under some or all circumstances.)

3. **Right of access:** The press does not get any general ***right of access*** to information held by the government.

a. **Right to attend trials:** However, the media does have a constitutionally protected right to ***attend criminal trials***. This right is not absolute — the government can close the media (and the public) out of a trial if it shows that there is an "overriding" government interest being served by a closed trial, and that that interest cannot be served by less restrictive means. [*Richmond Newspapers v. Virginia*]

i. **Showing rarely made:** But this showing will rarely be made, so that as a practical matter the press is usually entitled to attend a criminal trial. (*Example:* A state statute automatically bars the press from hearing any trial testimony by a minor who was allegedly the victim of a sex crime. *Held*, the statute unduly interferes with the public's right of access to criminal trials. [*Globe Newspapers v. Sup. Ct.*])

ii. **Other proceedings:** Probably the media also has a qualified constitutional right to attend other proceedings, like ***civil trials*** and ***pre-trial proceedings***. [*Gannett Co. v. DePasquale*].

4. **Disclosure of confidential or illegally-obtained information:** Government may generally ***not*** prohibit the media from disclosing information that goverment believes ought to be ***secret***. If a media member ***lawfully*** obtains information about a matter of public significance, government may punish disclosure of the information only if government has "a ***need*** of the ***highest order***," which it will rarely be found to have. [*Smith v. Daily Mail*]

Example: A broadcaster may not be held civilly liable for ***publishing the name of a rape victim***, if the broadcaster learns the name from reading a publicly-filed indictment. [*Cox Broadcasting v. Cohn*]