PROCEDURAL

- **Overbreadth**

DEFINING SPEECH

R.A.V. STRUCTURE

- ***R.A.V.* Concept**
  - **EXCEPTIONS**
    - **(1) Where the basis for content discrimination consists entirely of the very reason the entire class of speech is proscribeable.**
    - **(2) Secondary Effects** regulation
    - **(3) Conduct Laws.**
    - **(4) "No realistic possibility that the official suppression of ideas is afoot"**

CONDUCT/SECONDARY EFFECTS REG. (~ SAME TEST)

- **"Content Discrimination"**
- ***Clark v. CCNV* – [TPM FOR SPEECH ALONE + SECONDARY EFFECTS]**
- ***O'Brien* – [CONTENT + SPEECH]**

SPECIAL ISSUES

INTERFACE WITH INTELLECTUAL PROPERTY ("OWNERSHIP" OF SPEECH)

UNPROTECTED CATEGORIES

ADVOCACY OF ILLEGAL ACTION

- **MODERN *BRANDENBERG* STANDARD (1969+)**
  - ***Brandenberg* --** advocacy is "directed to inciting ***or*** producing **imminent lawless action** ***and*** is likely to produce such action"

DEFAMATION, TRUE LIGHT, AND IIED

- **DEFAMATION**
  - **(1) DEFAMATION?**
  - **(2) APPLICABLE TEST?**
    - **(A) PUBLIC FIGURES vs. MEDIA/NONMEDIA DEFENDANT** (Issue presumptively public)
    - **(B) PRIVATE FIGURE v. NONMEDIA (PUBLIC ISSUE)**
    - **(C) PRIVATE FIGURE v. NONMEDIA DEFENDANT (PRIVATE ISSUE) (*Greenmoss*)**
    - **(D) PRIVATE FIGURE v. MEDIA (PUBLIC ISSUE)**
    - **(E) PRIVATE FIGURE v. MEDIA (PRIVATE ISSUE)**
  - **(3) DAMAGES**
- **IIED**
- **FALSE LIGHT PRIVACY**

OBSCENITY

- **NEW *Miller* Test**
  - **(1) PRURIENT INTEREST**
  - **(2) PATENTLY OFFENSIVE**
  - **(3) SERIOUS LITERARY, ARTISTIC, POLITICAL, OR SCIENTIFIC VALUE**
- **INTERFACE WITH CONDUCT**

FIGHTING, OFFENSIVE WORDS, & INTIMIDATION ("TRUE THREATS")

- **(1) "Fighting Words"**
  - **GROUPS ("Hostile Audiences")**
- **(2) Offensive Words –** No punishment/limits.
- **(3) "True" Threats (Intimidation, &c.)**

CHILD PORNOGRAPHY

(ATTEMPTS AT) NEW CATEGORIES

- **(Determining)**
- **Pornography/Harm to Women (MacKinnon)**
- **Racist Speech**
- **Animal Cruelty**
- **Violent Videogames**

***LESS* PROTECTED CATEGORIES**

NEAR OBSCENE SPEECH

- **Secondary Effects dictate TPM test, but with reasonable alternatives, not "ample" as in *Clark***

COMMERCIAL SPEECH

- ***Central Hudson* Test**

PRIOR RESTRAINTS

GENERALLY

- ***LICENSING OR INJUNCTIONS.*** Nothing else.
  - **EXCEPTIONS**

LICENSING

- **Generally disallowed when licensing <u>speech per se</u> or <u>the press</u>**

INJUNCTIONS

- **Generally disfavored.** Act as an even more personalized/dangerous form of prior restraints.

<u>JUSTICE AND NEWSGATHERING</u>

PRE-TRIAL/TRIAL PUBLICITY

- **Presumption of Publicity**
  - **<u>Exception</u>: "w**here there is a *reasonable likelihood* that prejudicial news prior to trial will prevent a fair trial." *Sheppard*

ACCESS TO TRIALS (+ OTHER GOV'T THINGS?)

- **General presumption of openness for both civil and criminal trials.** *Richmond Newspapers v. Virginia*

<u>THE PUBLIC FORUM</u>

PUBLIC FORUM DOCTRINE

- **(A) Access to the Public Forum to Speak – ("<u>Liberty</u> Right").**
  - **(1) Public Property "traditionally available" for public expression**
  - **(2) Public Property Designated as a Public Forum**
    - **(A) Facilities, like school facilities.** Generally open to allow meetings, but scheduling conflicts etc.
    - **(B) Limited Purpose Forums (<u>FN 7</u> in *ISKCON*).** Meetings on <u>specific topics</u> or for <u>specific groups</u> or agencies.
  - **(3) Remaining Public Property**
  - **[4] "Special Cases" –** Oval office, etc. Probably dictate some sort of high government control.
- **(B) Equal Access ("<u>Equality</u> Right")**

<u>GOVERNMENT SUPPORT OF SPEECH</u>

SUBSIDIES OF SPEECH

- **Government may speak and *somewhat* discriminate on POV.**
- **Gov't speech generally <u>not subject to free speech clause</u>**, but subject to establishment clause and other provisos. *Pleasant Grove City.*
- **Gov't may <u>selectively fund</u> speech for some "managerial domains" (Robert Post).** *Rust v. Sullivan*
  - **(1) EXCEPTION: Gov't may not restrict speech pursuant to <u>block grants (i.e. invented public forii).</u>**

EDUCATION AND EDITING

- **SPLIT.** *Hazelwood* (RR/LPI) [newer] v. *Tinker* (SS/CSI? Super limited?) v. *Morse* (Adv. Illegal drug use – middle ground?)

GOVERNMENT AS EMPLOYER

- **Reactions to Speech (*Garcetti* Test)**
  - **(1) SPEAKING AS A CITIZEN ON A MATTER OF PUBLIC CONCERN**
  - **(2) SPEAKING AS AN EMPLOYEE ON ON-THE-JOB MATTER**

<u>BROADCASTING/FAIRNESS DOCTRINE</u>

<u>ASSOCIATION</u>

RIGHT <u>*NOT*</u> TO ASSOCIATE (AKA "RIGHT NOT TO SPEAK"

- **(1) <u>"Compelled Speech"</u> -**
  - **(A) <u>Public locations</u>**
  - **(B) <u>Regulatory disclosures</u>**
- **(2) <u>"Compelled Subsidy"</u> - Right to not subsidize speech.** *Abood v. Detroit Bd. Of Educ.* (union dues for political stuff)
- **(3) <u>Anonymous Speech</u> – Right to speak and not be associated –** Generally somewhat allowed. *Brown v. Socialist Workers*

<u>INTIMATE</u> AND <u>EXPRESSIVE</u> ASSOCIATION

- **(A) – IS THE ASSOCIATION BURDENED?**
- **(B) - Categories**
  - **(1) <u>Intimate</u> Association**
  - **(2) <u>Expressive</u> Association**

<u>MONEY AND THE POLITICAL PROCESS</u>

- **Contributions vs. Expenditures**

<u>FREEDOM OF RELIGION</u>

GENERALLY

- ***<u>Lemon</u>* Test**

FREE EXERCISE

- Where **law <u>neutral and generally applicable</u>, law > religion**. ***Employment Div. v. Smith***
  - **EXCEPTIONS**: **(1)** Ad hoc [targeted] rules**. (2)** Hybrid laws

ESTABLISHMENT CLAUSE

- **(1) "Endorsement Test"**
- **(2) "Coercion Text"** disputed – if gov't is coercing people to belief or the like (implied to exist in *Van Orden*).

AID TO RELIGION

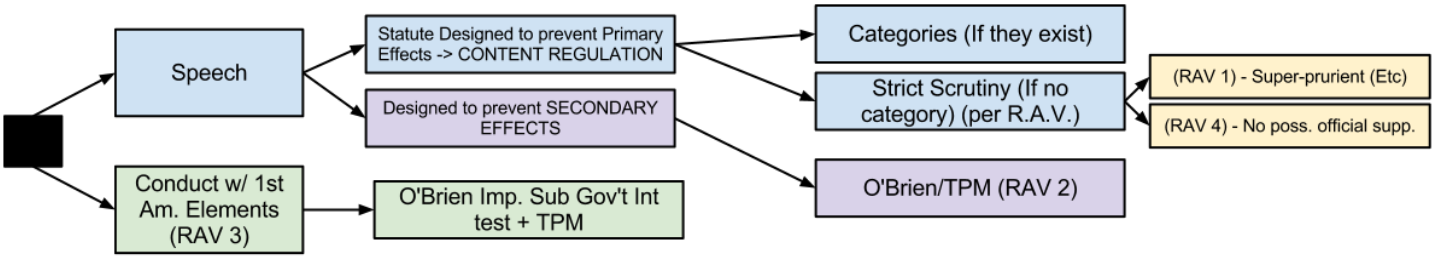
FIRST AMENDMENT

THEORIES

1. **Marketplace of Ideas** – Holmes in *Abrams* – Search for truth and competition of ideas. But even courts doubt (403, etc).
    a. **Truth-finding.** Idea that Marketplace leads to some sort of objective truth.
2. **Civic Republicanism** – Holmes in *Abrams* – Open participation in the political process, self-government.
3. **Catharsis** – Less desire to do illegal things when one can speak freely about them.
4. **Liberty –** More normative theory of the rightness of allowing people to do whatever -> self-fulfillment and autonomy. (Brandeis in *Whitney* talking about liberty as an end and a mean)
    a. **Combatting Injustice.** Allowing dissent, etc.

PROCEDURAL

- **Carbon Copy Application.** State/Fed rulings equally applicable.
- **Vagueness & Overbreadth**
    - **OVERBREADTH –** Exception to *Broadrick* rule, where someone may challenge a statute *as applied constitutionally to them* (that is, their speech is *not* protected) where it could be applied unconstitutionally to others.
        - **"Substantially Overbroad" –** Disputed, but may be requirement per *Ferber*.
            - "[There] must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protection of parties not before the Court for it to be challenged on overbreadth grounds". *Taxpayers for Vincent*.
            - "The [overbreadth] doctrine is predicated on the sensitive nature of protected expression: persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression" *Ferber*.
        - **Emphasis on a chilling effect.** Some statutes may not chill, perhaps no issue?
        - **Does not apply to commercial speech.** *Bates v. State Bar of Arizona*
    - **Vagueness –** If persons of "common intelligence must necessarily guess as at [a statute's] meaning and differ as to its application" *Connally v. General Construction Co.*
        - **When applied to *nonprotected* speech** -> Can challenge *entire* statute *on its face*
        - **When applied to *protected* speech** ->Can challenge *as applied* only, as application can't stick.
        - **Issues:** (1) Lack/notice, (2) Selective application, (3) Institutional tension between federal and state where SCOTUS constantly questions after giving ambiguous standards. (Brennan in *Miller*).



DEFINING SPEECH

R.A.V. STRUCTURE

- ***R.A.V.* Concept**
    - **All regulations of any speech** require some degree of blanket protection – *no content regulation whatsoever*
        - **"Underbreadth" rule** – cannot be underbroad when purporting to regulate an unprotected/less protected category.
            - **Essentially SS/CSI for unprotected speech**. Contra Rat'l basis for commercial speech and other "less" protected categories.
            - Prima facie examples using specific actions, however, may be allowable.
            - ***More protection for unprotected categories than less protected.***
        - **EXCEPTIONS**
            - **(1) Where the basis for content discrimination consists entirely of the very reason the entire class of speech is proscribeable.** Ex: limiting prurient speech on grounds of obscenity. Threat of violence against Prez (but not to him based on specific justifications).
                - **Ironically includes cross burning.** *Virginia v. Black*.
            - **(2) Secondary Effects** regulation
                - **Primary Effect –** Effect on the audience – ex. making them more violent, etc ->**Content Regulation -> Category Tests**
                - **Secondary Effect –** Effect on those other than the audience – encouraging neighboring prostitution, etc. ->**TPM TEST**
                - **Mixture –** *Ferber*, etc. Probably implicates higher standard.
            - **(3) Conduct Laws.** Laws that regulate actions and not content.
                - **Probably not applicable.** This would destroy O'Brien and no other justices signed on.

- **(4) "No realistic possibility that the official suppression of ideas is afoot"**

- **Evidentiary standard –** Probably super-low for "low" speech.
- **Ex:** Cross burning statute overturned on the basis that it was "underbroad" re: fighting words. *RAV v. St Paul*. Introduction of membership in Aryan Brotherhood irrelevant. *Dawson v. Delaware*. Selection of white victim for race permissibly aggravated sentence. *Wisconsin v. Mitchell*. Under the first exception, cross burning statute allowed, but some dispute about the fact that cross was used as prima facie evidence. *Virginia v. Black*.

CONDUCT/SECONDARY EFFECTS REG. (~ SAME TEST)

- **"Content Discrimination"**
  - **Generally means direct attack on speech.** SCOTUS seems to imply some sort of exception for sexual things, such as nude dancing, which it considers not expressive. *Erie v. Pap's A.M.*
- ***Clark v. CCNV* – [TPM FOR SPEECH ALONE + SECONDARY EFFECTS]** "Expression, whether oral or written or symbolized by conduct, is subject to **reasonable time, place, or manner restrictions**. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and they leave open *ample [reasonable]* alternative channels for communication of the information" *Clark*
  - **OBSCENITY MOD?: *Renton* lowers "ample" to "reasonable" via analysis.** Few real estate offerings considered sufficient**.** *Renton.*
  - **"Pure" conduct regulation = no bar.** *Acara* (adult bookstore allegedly with adult activities)
  - **Considered functionally equivalent to *O'Brien*.**
- ***O'Brien* – [CONTENT + SPEECH]** "When **"Speech" and "non-speech" elements combined**, a sufficiently important governmental interest in regulating the nonspeech elements can justify incidental limitations on First Amendment freedoms" *O'Brien*
  - **Government regulation is sufficiently justified if:** "it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged first amendment freedom is no greater than is essential to the furtherance of that interest" *O'Brien*
  - **"Communication" –** whether"[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it" *Texas v. Johnson*
  - **"The Nonspeech Elements" –** Implies *any form of content regulation* results in nonapplicability to *O'Brien. Texas v. Johnson*.
  - **Main example:** draft card burning.
  - **Content neutrality** a major factor, for obvious reasons. *Clark v. Comm. For Creative Non-Violence*
    - **Dissent in *Clark*** argues this creates a two-tiered system where content neutral regs go free.
  - ***Not* "least restrictive means** just because First Am. implicated. *Acara.*
  - ***Not* motive of state.** Court will generally refuse to look at motive.
  - **Tribe Track 1:** Communication - where harm regards the way people will react to action – actual comm. -> CONDUCT + SPEECH UNIQUELY BAD (reaction to it, etc)
    - **Exception 1:** Speech with no redeeming value, i.e. dual theory
    - **Exception 2:** Compelling government interest(?)
  - **Tribe Track 2:** Where conduct has no communicative significance of whatsoever -> CONDUCT BAN ALONE
- **Ex:** Burning draft card restriction allowed even though burning was proffered speech. *O'Brien.*

SPECIAL ISSUES

- **Flag Burning**
  - *Texas v. Johnson* – Prohibition disallowed. No separate test for flag, similar indicia.
  - *US v. Eichman* – Flag protection act invalidated, no fear of destruction of symbol, countervailing communication power.
- **Sleeping**
  - *Clark v. Community for Creative Non-Violence* – Sleeping in the park not sufficiently expressive to justify overruling rules prohibiting sleeping on mall. Content neutral.
- ***Acara*** – Closure due to lewdness did not violate First Am because books were sold on premises.
  - *Virginia v. Hicks* – Bar of trespassing on pub property not overbroad, basis was not on the basis of preventing First Am.

INTERFACE WITH INTELLECTUAL PROPERTY ("OWNERSHIP" OF SPEECH)

- **Copyright ownership trumps right to disclose.** Copyright itself does not violate First Amendment, even extension thereof.
  - **Ideas vs. Expression –** Former not protected by Copyright, latter is.
  - **Goals of Copyright:** (1) Encourages publishing, (2) Punishes U.E.
  - **Fair use = content discrimination.**
- **Ex:** Quoting copyrighted manuscript of Ford's biography was violation, no free speech right to quote. *Harper & Row.* Extension of copyright law did not violate First Amendment. *Eldred v. Ashcroft.*

UNPROTECTED CATEGORIES

ADVOCACY OF ILLEGAL ACTION

- **Historical Trajectory**
  - **WWI - *Schenck/Debs* (1919) –** Whether the words & circumstances are of such a nature as to "create a **clear and present danger** that they will bring about the substantive evils that Cong. has a right to prevent" – "Proximity and degree" – (1) Intent (2) Tendency (3) Act.
    - **No right to shout "fire" in theater.**
    - **Wartime element.** Feeling that wartime may justify result.
    - **Learned Hand in *Masses* counsels against,** advocates "Explicit Avocation" standard (stricter) (Evil – Improb.) > Invasion, later adopted kinda-sorta in *Dennis*.
    - **Holmes in *Abrams* against:** Must be present danger of immediate evil or intent to bring about.
      - **"Marketplace of Ideas" concept.** Infers people will naturally seek truth. True? $$$
      - **Specific Intent argument.** Intent to cause harm, where majority is more general intent.
  - **State Sedition Laws (~1920s)**
    - ***Gitlow*:** Statutes are unconstitutional only where they are arbitrary or unreasonable attempts at exercising authority vested in the State. Spark kindling fire idea. **Idea that legislature decides what is C&P danger.**
      - **Deferential "Stark Raving Mad" test –** Ultimate almost unquestioning deference to legislature, even in peace
      - **Allows legislature to define *prima facie* speech-action C&P danger.**
    - ***Whitney*** – Membership as a form of advocacy can be prohibited. Low point.
  - **Communist Era (~1950s)**
    - ***Dennis* (1951)** *somewhat* adopts Learned Hand formula for laws :**(Evil – Improbability)> Invasion of Free Speech**. Probability of success alone irrelevant. *No deference to legislature.*
      - **Frankfurter's extra factors:** Relative seriousness of danger compared to value of occasion for speech or political activity, availability of more moderate controls, specific intent, etc. *Pro-deference.*
      - **Dissent – Black –** ABSOLUTE free speech, no limits.
      - **Dissent –Douglas –** "Extreme and Necessitous" C&P danger test.
      - ***Yates*(1957, post-McCarthy):**Distinguishes *Dennis*, saying that it only means that **indoctrination of a *group* for future action, overthrow, to violence "As a rule or principle of action" and employing "language of incitement" is not protected.**(GROUP EMPHASIS).
- **MODERN *BRANDENBERG* STANDARD (1969+)**
  - ***Brandenberg* --** States forbidden to pass law proscribing advocacy except where such advocacy is "directed to inciting ***or*** producing **imminent lawless action *and*** is likely to produce such action" *Brandenberg*
    - **Threats** not protected speech (see notes after *Brandenberg*)
    - **"Directed to incite" -> INTENT to incite** (probably)
      - **Probably requires direction to people and abnormal tone.** Se *Hess v. Indiana.*
    - **Three Interpretations**
      - **(1)** Language must (objectively?) manifest an attempt to incite ILA
      - **(2)** Inciting language only a factor, so *bland language* can still be punished if it incites action in fact
      - **(3) [Shiffrin]** (1) Speaker *sought* to incite audience (intent) and (2) imminent danger of ILA actually existed.
    - **New considerations:** Objective words alone, *not the probability of harm*. Some focus on the situation, not just the words.
    - **Group advocacy dimension:** I.L.A. for everything? Is *Yates'* "Now or in the future" incitement test preserved for *groups* where the groups advocate a doctrine that is violent, as in *Yates*?
      - ***Communist Party of Ind.*** Seems to indicate *Yates* standard for groups.
      - **OFTEN RELATED TO FREEDOM OF ASSOC.**
    - **Tribe:** Brandenberg = (C&P + Masses); **Shiffrin:** No objectivity(?)
    - **Application?:**Private solicitation? Public solicitation of serious crimes? Non-wartime scenarios?
    - **CRIMINAL LAW.**
- **Ex:** Leaflets against draft in WWI by socialist party member was a conspiracy to violate Espionage Act of 1917, which was valid. *Schenck.* Socialist party member violated SAME act in same year by making, among other things, an anti-war speech, even though he toed the line of the Espionage Act and addressed general not specific audience. *Debs v. US*. LH does not find violation of Espionage Act for mailings, considers magazine not connected to inciting to act. *Masses Publishing v. Patten.* Conviction on same act, Holmes dissents and calls for immediate impending danger. *Abrams v. US*. Upholding of state sedition law, finding Left Wing Manifesto may have kindled fire, emphasis on legislative deferment. *Gitlow v. NY.* Woman incidentally part of movement that got rowdy properly charged with "criminal syndicalism", emphasis on advocacy of criminal methods. Emphasis on conspiracy. Concurrence by Brandeis emphasizes imminence of danger, but agrees only insofar as conspiracy existed. *Whitney v. Cali.* Finding of C&P danger via law where people studied communism, despite mere discussion and not advocacy, as inference of conspiracy. Defined as conspiracy to attempt to violate law. Concurrences by Frankfurter, Jackson emphasize conspiracy, power of Congress. Dissent by Black emphasizes lack of imminent injury, intent. *Dennis v. US*. Distinguishes *Dennis* with a focus on group organization. *Yates.* Merely talking without incitement not violation. *Spock.* ACTIVE membership of then-proven dangerous advocacy group req'd to indict. *Scales/Noto.* Ohio advocacy act overturned, as it was not narrowly tailored towards imminent lawless action. Concurrences seem to imply C&P danger test is dead. *Brandenberg v. Ohio.* "We'll take the fucking street later" not calling for imminent lawless action, conviction overturned. *Hess v. Indiana.* Congress may ban ALL speech/assistance to terrorist groups – sedition depends on the time. *Holder v. Humanitarian Law Project.*

DEFAMATION, TRUE LIGHT, AND IIED

- **Theory**
  - **Two Level Theory:** "Libel, Obscenity, and 'Fighting Words'" vs. Speech of Constitutional Value
  - **Mickeljohn Theory:** 1st Am. Only protects political speech, everything else can be freely limited
    - **"Cultivation of sensibilities" exception** all but renders a nullity. Contra civic republicanism.
  - **Libel, slander, etc** generally not protected from civil suits, etc.
    - **"Group" libel** may follow per *Beauharnais*, but debatable.
      - **Possibly overruled by *Colin v. Smith.*** See the cases on racism.
    - **Even Black** in *Beauharnais* seems to concede that libel can be punished
- **DEFAMATION**
  - **Old Standards**
    - **(Old) Seditious Libel –** Criticism of the gov't may be viewed as defamation and punished. Limited acceptance.
    - **(Old) Group Libel –** Criticism of group that is false. *Beauharnais*.
    - **Old:** "Galloping" presumptions of falsity, malice, damages, and belief. *Telling* alone it.
  - **(1) DEFAMATION?**
    - **Connects to Libel or Slander – both requiring falsity**
    - **FACT SUBREQUIREMENT**
      - **True Facts are protected.**
      - ***False* Facts are not protected.** Includes statements *with* private knowledge (that are false), etc.
        - **Opinion is protected.** Includes jokes, statements *without* knowledge on public materials,
    - **DEFAMATION PRIVILEGES**
      - **Exceptions to defamation suits:** Reporting on public records, reporting on court trials, etc.
      - **"Neutral Reportage" of responsible organizations**
  - **(2) APPLICABLE TEST?**
    - WARNING: MAY NOT APPLY PER *Citizens United* NONDISTINCTION WITH MEDIA/NONMEDIA.
    - **(A) PUBLIC FIGURES vs. MEDIA/NONMEDIA DEFENDANT (Issue presumptively public)**
      - **(1) NY Times for malice, (2) NY Times for damages.**
      - ***NY Times* Malice Standard**
        - Cannot recover "for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or [not]". *NY Times.*
        - **Requires actual malice and actual injury.**
          - **"Actual Malice"** – Knowledge of falsity or reckless disregard of the truth.
            - **"Reckless Disregard"** Standards
              - **(i) *St. Avant* –** Entertain serious doubts about the truth but publish anyway
              - **(ii) *Garrison v. Louisiana* –** High degree of awareness of probable falsity.
          - Impersonal attacks on gov't orgs != libel of those running it **–***NY Times v. Sullivan*
          - Protects against policies that would otherwise "inhibit the fearless, vigorous, and effective administration of policies of government" *Barr.*
      - **Damages**
        - **NY Times damages –** Requirement of proof BEFORE punitives
        - **EMOTIONAL DAMAGES AVAILABLE.**
      - **"Public Individual" –** General fame or notoriety in the community and a pervasive involvement in the affairs of society.
        - **Public officials in official conduct.** *NY Times.*
        - **Public *figures* included**. *Curtis Publishing.*
        - **"Limited" Public Figures- Private figures + public issue.** Must have "**thrust themselves to the forefront of particular public controversies** in order to influence the resolution of the issues involved." *Time Inc v. Firestone*
      - **"Public Concern[/Issue]" –** "When it can be fairly considered as relating to any matter of political, social, or other concern to the community or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public" *Connick v. Myers.*
        - Matters of public or general interest regardless of whether or not persons or famous or anonymous possibly count. *Rosenbloom*
        - **Justification:** (1) Opp/Respond, (2) Ass/Risk, (3) Rosemloon required difficult definition of matter of public concern
      - **Worries:** Self-censorship, fact that factual error and defamatory comments alone do not remove constitutional protections, questionable prosecutions, civic republicanism, public figures being open to criticism
      - **Punishment:** Damages and injunction, but *no declaratory relief*
    - **(B) PRIVATE FIGURE v. NONMEDIA (PUBLIC ISSUE)**
      - **(1) *Gertz Negligence* for liability, *NY Times* Malice for Punitive Damages** (Requiring actual malice, etc)
      - ***Gertz* Negligence Standard**
        - **Fault, not malice required.** *Gertz.* Wider power given relative weakness of private figure.

        - **Deference to state legislatures.** "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual"
    - **(C) PRIVATE FIGURE v. NONMEDIA DEFENDANT (PRIVATE ISSUE) (*Greenmoss*)**
        - **(1) *Negligence*** (or at least fault) **for liability, (2) *probably* Negligence for punitive damages.** No const. Standard.
        - "Permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern." *Dun & Bradstreet*
        - ***Dun & Bradstreet v. Greenmoss*** – *Gertz* does not apply to defamatory content of private concern, no constitutional standard.
        - ***ONLY EXCEPTION TO NY TIMES DAMAGES.*** Allows for presumption of punitives.
    - **(D) PRIVATE FIGURE v. MEDIA (PUBLIC ISSUE)**
        - **PROBABLY A DE FACTO PUB FIGURE -> NY Times rules apply in (A)**
    - **(E) PRIVATE FIGURE v. MEDIA (PRIVATE ISSUE)**
        - **(1) *Gertz* for liability (??) not damages?** Maybe no determination of private issue ad hoc, and thus auto-public?
- **(3) DAMAGES**
    - **Punitives *require NY Times* malice.** *Gertz* UNLESS private issue by private party.

- **IIED**
    - **General Protection**
        - **PUBLIC speech/broadcast on PUBLIC issues ->**Protected, no IIED claim. (*Snyder*)
            - **"Public" –** Perhaps different than defamation law (funeral in *Snyder*?)
        - **PUBLIC speech/broadcast on PRIVATE issues ->**Unclear (*Snyder*, but it involved public issues intermixed)
            - **Might die?**
    - **Test**
        - **IIED claims require false statement of fact made with actual malice.** *Husler v. Falwell.*
            - **Prevents "end-run" around defamation** for defendants.
        - **Controversial issues** can be public and thus subject to discussion. *Snyder v. Phelps.*
            - **Statement of ideas** may be the distinction here, but *Snyder* limited to facts.
- **FALSE LIGHT PRIVACY**
    - Also subject to actual malice standard. *Time v. Hill*
    - **Privacy of the home v. Freedom of the Press**
    - **Lawfully obtained truthful information cannot be published w/o tailoring to a state interest of the highest order.**
        - ***Daily Mail* test per *Florida Star*.** "If a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order"
        - **Factors:** (1) Lawful obtainment, (2) Degree of state interest correlated with liability, (3) Media/Nonmedia Distinction. (*Florida Star*).
            - **"Unusually low" interest + public figures may allow publication.** *Bartnicki v. Vopper*
                - **Illegally obtained info later obtained legally *may be useable*** depending on a reading of *Bartnicki*. May be limited to where info implicates criminal activity; otherwise, may implicate wholesale allowance where secondary obtaining is legal
- **Ex:** State may lawfully punish publication criticizing blacks, emphasizing that libelous speech towards individuals (or in this case, groups) is not protected. Dissent argues this reduces speech to rat'l basis, argues private feuds (libel) do not give grant to group libel. *Beauharnais v. Illinois.* Criticism of public figures extension. *Curtis Pub v. Butts & Assoc.* Criticism of random person who was merely part of community inappropriate, not protected. *Gertz v. Robert Welch.* Extramarital sexual activities of wealthy families was interesting but not a public controversy, and the filing of a divorce suit did not subject the family to public controversies. *Time v. Firestone.* Publication about Falwell's mother required actual malice with falsehood. *Hustler v. Falwell.* False light also subject to actual malice. *Time v. Hill.* Publication of ID of rape victim unpunished due to poorly drawn statute. *Florida Star v. B.J.F.* Protesting of public issues (namely, war, etc) okay even at funeral. *Snyder v. Phelps.* Recovery allowed on defamation or lies based on private concern, less worry about private matters with First Am. *Dun & Bradstreet.*

OBSCENITY

- **Generally**
    - **Below the First Amendment,** typically. *Roth v. US.*
        - **Advocacy is superior to obscenity.** Advocacy of violence protected, obscenity not.
    - **Theory**
        - **Kant –** Humans superior based on reasoning and autonomy, no societal control where choice makeable
        - **John Stewart Mill –** That which debases should be prevented.
        - **George Will/Burke –** Kant, but with support of virtue.
- Old:*Roth* standard, where first amendment not protecting of speech where social order/morality > value of ideas/expression
    - **Theories of Sexuality:** (1) Procreation (2) Committed Rels (3) Recreational Sex
        - **None particularly correlated with obscenity.** Arbitrarily connected.
    - **Refined:** Obscene material as that which "by definition lacks any serious literary, artistic, political, or scientific value as communication". *Paris Adult Theater*
- **NEW *Miller* Test:** (A) conduct must be specifically defined, and (B) "At a minimum, [1] prurient, [2] patently offensive depictions or descriptions of sexual conduct must have [3] **serious** literary, artistic, political, or scientific value to merit First Amendment protection"

- **MAXIMUM PUNISHABILITY STANDARD.** Can protect *more*, but cannot protect *less* than *Miller*.
- **FACTORS**
  - **(1) PRURIENT INTEREST**
    - A "shameful or morbid" interest in sex. *Brockett v. Spokane Arcdes.*
    - "'Whether the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest" *Miller*.
    - **Relevant community can be anything.** Once national standard, now flexible.
      - **Federal statutes may use federal (nationwide) standard.**
      - **Jury trial** may allow for more presumptions than judge trial.
    - ***Mishkin* exception:** Porn judged by outsiders to fetish
    - ***Pinkus* exception:** If not marketed to kids, can't account for them : without evidence that 'children were the intended recipients' or if the defendant 'had reason to know children were likely to receive the materials', erroneous to instruct jury that kids were part of community.
      - **DISPUTED.** Not 100% accepted. - "Variable obscenity" idea.
  - **(2) PATENTLY OFFENSIVE**
    - "Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law" *Miller*
    - **Offensive ~~ "Hard core".** *Jenkins* seems to imply.
    - **No laundry list requirement.**
  - **(3) SERIOUS LITERARY, ARTISTIC, POLITICAL, OR SCIENTIFIC VALUE**
    - **Existence = COMPLETE BAR.**
    - **"Serious" –** Objective standard, *Pope v. Illinois*
    - **"Value" undefined.**
    - "Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value"
    - **NOT "social importance".** Repudiates "utterly without social value" standard of *Paris Adult Theater*, so some socially valuable works can still be obscene.
- **State statutes must be specifically defined.**
- **Kills** "utterly without social value" test of *Paris Adult Theater*.
- **Dissent by Brennan** outlines vagueness, no "sensitive tools" to define obscene and non-obscene

- **INTERFACE WITH CONDUCT**
  - Regulation of theaters, etc can be subject to **secondary effects analysis**. See above re: *City of Renton*, etc.
- **Ex:** State could rightfully limit obscenity in theater based on community standards. *Paris Adult Theater.* No prohibition of "Lady Chatterly's Lover" where the prohibition was based on the advocacy of infidelity. *Kingsley Int'l Pictures v. Regents.*

FIGHTING, OFFENSIVE WORDS, & INTIMIDATION ("TRUE THREATS")

- **(1) "Fighting Words" –** Words that "by their very utterance inflict injury or trend to incite an immediate breach of the peace. *Chaplinsky*
  - **Test:** "what men of common intelligence would understand would be words likely to cause an average addressee to fight" *Chaplinsky*
    - **Objective vs. Subjective – dispute re: hearer.** Not clear when it applies, but some mixing generally occurs.
    - Stereotypical blue collar hothead v. Cops.
  - **No intent requirement.** Can intend for good results but be punished due to bad results.
  - **State interest:** maintaining order and morality.
  - **GROUPS ("Hostile Audiences")**
    - "**When clear and present danger of riot, disorder, interference with traffic** upon the public street or **other immediate threat** to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious". *Feiner.*
      - **Can punish words that** "Create a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest". *Terminello.*
    - **No "heckler's veto".** "Innocent" words that cause violent reaction in crowd do not punish speaker without the speaker attempting to incite such a group.
      - Reactions alone insufficient, intent important.
    - **Dissent by Douglas in *Feiner*:** Police censorship w/o extremes proven.
  - **CONTRASTED TO INCITEMENT OF LAWLESS ACTION:** Fighting words involve drawing attacks upon oneself WITHOUT INTENT. I.L.A. tends to involve intent ("directed to incite").
- **(2) Offensive Words –** No punishment/limits.
  - **"[O]ne man's vulgarity is another's lyric** *"Cohen v. Cali* ("fuck the draft" jacket)
  - **Distinguished:** Not obscenity, not invasion of privacy in public place, etc.
  - ***Possibly* may be prohibited with proper time, place, and manner restrictions.** Infers that in some cases the use may be sufficient to incite violence. Still, this is very unlikely – either it would have to be content-neutral under *O'Brien* or outright fighting words.
  - **Emphasis:** Lack of desire to incite violence, even if some may find the words offensive.
- **(3) "True" Threats (Intimidation, &c.)**
  - "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals ... **Intimidation** in the constitutionally proscribable sense of the word is a type of true threat". *Watts v. US*, as discussed in *R.A.V.* with the cross burning law.
- **Ex:** Jehovah's Witness who denounced organized religion properly punished for "fighting words" where his words were incited to cause some fighting. *Chaplinsky v. New Hampshire.* Statute prohibiting speech that "invites dispute" struck down, considered overbroad and too much limited

free speech. *Terminello v. Chicago.* Man addressed street and was about to incite people to attack him, and police properly stopped his speech where there was a clear and present danger of attack. *Feiner v. NY.* "Fuck the Draft" jacket offensive speech, but not sufficient to be prohibited on the basis of possibly inciting riot. *Cohen v. California.* Struck down Georgia ordinance where it applies even to utterances where there was no threat of immediate violence response. *Gooding v. Wilson.* Ditto. *Lewis v. New Orleans.*

CHILD PORNOGRAPHY

- **Not protected.** High deference to prohibition -> ABSOLUTE RULE (completely **destroying *Miller* balancing** for CP). *Ferber*
- **Emphasis:** "Surpassing" State Interests in protecting children, etc.
- **Generally, states may prohibit CP.** Many justifications hinging around harms to minors. **Not digital CP.** *Ashcroft v. Free Speech Coalition.*
- **OVERBREADTH LIMITATION:** Must be *substantially* overbroad to challenge.

(ATTEMPTS AT) NEW CATEGORIES

- **(Determining)**
  - **"Historically unprotected"** speech may be required (Thomas, etc)
    - **IDEA:** If no historical precedent, VERY extreme version of SS/CSI. But very confusing.
    - **Not a mere cost-benefit analysis.** Something more than just balancing, as 1st Am. Tips scales.
  - ***Substantial* state interest in CP cases** may implicate some super-high standard.
- **Pornography/Harm to Women (MacKinnon)**
  - **Not a category.** Idea is out there, but not well accepted.
  - **Emphasis on resulting chance of abuse to women. For:** Encourages sexual violence, perpetuates discrimination, *lots* of content discrimination in 1st am cases, etc. **Against:** Black market, judges to normalize some pornography, etc.
  - **Distinguished from obscenity:** Porn = sex discrimination, obscenity requires no LAPS, patent offensiveness, prurient interest.
  - **Generally disfavored,** as MacKinnon's statute as per Indianapolis discriminated based on viewpoint. Easterbrook in *Hudnut* considers an enforcement of values, not 1st Am allowable. *Hudnut.*
    - **But *Hudnut* allows for appeal.** Seems to take allegations by legislators on face.
- **Racist Speech**
  - **Not a category.** The effect an idea may have on someone is no grounds for punishment. *Collin v. Smith*
    - "Public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers". *Collin* v. Smith.
    - See also death of group libel per *Beauharnais.*
  - ***R.A.V.* counsels against** in application, given allowance of cross burning. Scalia's opinion seems to infer that merely prohibiting racist speech would be underbroad under the *R.A.V.* requirements.
  - **Matsuda test:** Speech which (1) racial inferiority, (2) directed at a historically oppressed group which is persecuted, (3) hateful & derogatory
- **Animal Cruelty**
  - **Barely a category.** Likely more of a conduct limitation nowadays, given *Stevens* focus on hunting mags, etc.
    - **Some bans may be allowed.** If avoids the hunting mag category and only specifically targets crush videos. *US v. Stevens.*
  - **18 USC 48 –** [Criminalizes knowing creation, sale, or possession of depiction of animal cruelty, if done for commercial gain in interstate or foreign commerce]. **Retreated after substantially overbroad** in *US v. Stevens*
- **Violent Videogames**
  - **No restrictions pass under strict scrutiny.** Again, emphasis on lack of serious issue, historical prohibitions, etc.
  - **Indicate strict scrutiny for speech not explicitly in category.**
  - ***Cf* Renton –** High evidentiary standard (*Brown*) vs. Legislative deference (*Renton*)
- **Ex:** States may properly prohibit the dissemination of CP on the basis that it [1] prevents sexual exploitation, [2] imposing criminal penalties helps prevent, [3] prevents economic motive, [4] no value in children performing acts, [5] doctrine not incompatible. Statute not overbroad, well within limits. *NY v. Ferber.* Where children not involved, no income from harmful works may be shifted by statute to victims. *Simon & Schuster v. Members of NY State Crime Victims Bd.* Repeal of initially overbroad statute may have necessitated remand for new determination, but Scalia dissents, considers statute worrisome *ex post*, not *ex ante.* Moreover, determination of substantial overbreadth disputed. *Massachusetts v. Oakes.* No digitized CP bans. *Ashcroft v. Free Speech Coalition.* MacKinnon's so-called anti-pornography civil rights law struck down for discriminating based on viewpoint re: gender equality, etc. *Am. Booksellers Ass'n v. Hudnut.* Public expression of Nazi ideas protected against rules attempting to criminalize based on the effect the ideas have on hearers. *Collin v. Smith.* Prohibition of depictions of animal cruelty overbroad, would have hit things like hunting mags, needs to be much more scaled back. *US v. Stevens.* Cali's law prohibiting sale of violent videogames to minors not allowed, no tradition of limiting access to violence. *Brown v. EMA.*

LESS PROTECTED CATEGORIES

NEAR OBSCENE SPEECH

- **Secondary Effects dictate TPM test, but with reasonable alternatives, not "ample" as in *Clark***
  - **O'Brien incidental effects fine for secondary effects**
  - **Zoning laws** to combat secondary effects generally allowed.
  - "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Renton*
  - **Secondary Effects** may justify some zoning or outright prohibition, on fiction of problems with something other than content.
  - **"Public indecency" may also apply** in situations where conduct in public – nudity in public, etc.
    - **Public nudity not considered expressive.**
  - **"Intermediate scrutiny" in effect?**
  - **Cf *Brandenberg***, where direct effects are protected but here they are not – so secondary effects can be punished but not primary ones?
- **Ex:** Zoning ordinance moving adult theaters (upon showing of secondary harm) to different district upheld. *Renton v. Playtime Theaters.* Emotive aspect of speech on signs that criticized foreign visitors could not be banned, not proper regulation, distinguishing Renton. *Boos v. Barry.* Zoning plus limitation on number of adult businesses in building upheld. Scalia would have allowed outright ban. *LA v. Alameda Books.* Ban on appearing nude in public (requiring pasties) upheld for moral goals and "secondary effects" of prostitution, etc. *Barnes v. Glen Theatre.* Banning of nudity upheld, nudity not considered expressive. *Erie v. Pap's Am.*

COMMERCIAL SPEECH

- **Companies have *some* free speech rights,** likely limited to *solicitation*, probably not much further.
- **"Commercial Speech" –** Probably that explicitly advertising or the like. Possible category of hybrid speech.
- ***Central Hudson* Test:** (1) If expression protected by First Amendment. (2) For commercial speech to come within that provision, it must concern lawful activity and not be misleading. (3) Next, we ask whether the asserted government interest is substantial. (4) If (2) and (3) are true, we must determine whether the regulation directly advances the governmental interest asserted and whether it is not more extensive than is necessary to serve that interest.
  - ***Strict.*** Once applied variably, but now very strictly applied against govt. See: *Lorillard Tobacco* (striking tobacco advertising regs do not meet central Hudson due to lack of parity with advertising reg and worry about underage smoking).
  - ***Virginia Pharmacy > Central Hudson.*** Shiffrin argues that VP may presume more protection of commercial speech than *Central Hudson* allows in fact -> SHIFT TOWARDS GREATER STATE DEFERENCE.
  - **Revival of *Lochner*?** Likened to political speech.
- **Image and Informational advertising protected** though logic only really extends to latter.
- **Truthful speech generally protected.**
  - **FN24 allows action against false/misleading speech, illegal transactions, "Special" issues of broadcast media,** etc. Protects FTC injunctions, etc.
    - **Lawyer solicitation prohibited,** on the basis of it being conduct. But see *Primus*, allowing it. Basis of making money?
    - **Justification:** Commercial speech "hardier", so more regulations can be placed on it.
  - **Some degree of flexibility.** Commercial speech may involve political speech, may be be defamatory, etc.
  - **Considered lesser form,** *but* Stevens in *Cincinnati v. Discovery* seems to indicate this may not be the case.
- **Ex:** Commercial speech at least generally protected under the First Amendment, no suppression of truthful speech with commercial element. *Virginia State Bd of Pharmacy v. Virginia Citizens Consumer Council.* In-person solicitation by lawyers can be prohibited, the conduct is being proscribed not the speech itself – emphasis on undue influence, overreaching, misrep, invasion of privacy. *Ohralik v. Ohio State Bar Ass'n.* Offer to provide free legal assistance to illegally sterilized women not punishable. *In re Primus.* Refusal to allow commercial publications in news racks in city comprised discrimination and vio of First Amendment. *Cincinnati v. Discovery Network.* Anti-soliciting law shut down, could have been achieved through alt means. *Martin v. Struthers.*While generally decent, tobacco restrictions were not sufficiently drawn because they would have effectively banned tobacco ads all over Boston, would have conflated different types of tobacco, etc. *Lorillard Tobacco v. Reilly.* Invalidation of rule prohibiting the advertisement of compounded drugs, no proof that less reasonable alt not met. *Thompson v. Western States Med Centers.*

PRIOR RESTRAINTS

GENERALLY

- ***LICENSING OR INJUNCTIONS.*** Nothing else.
  - "Strikes at the very foundation of the freedom of the press by subjecting it to license and censorship" *Lovell v. Griffin.*
  - "offensive ... to the very nation of a free society .. that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so". *Watchtower Bible.*
  - **"Subsequent sanctions"** (i.e. statutes, etc) not included, unless they effectuate a licensing system.
- **Presumption against prior restraints.** *Near* (injunction to prevent press publication of info).
  - **EXCEPTIONS**
    - **(1)** National Security [ex: publishing troop transport info] . *Near v. Minnesota*, but heavy burden in *Pentagon Papers* (disallowing secrecy for Pentagon Papers to be published in NYT).
      - **Test?:** "publication inevitably, directly, and immediately cause the [harm]". Brennan concurring in *Pentagon Papers.*
    - **(2)** Obscenity [to enforce the "primary requirements of decency"] . *Near v. Minnesota*
    - **(3)** Incitement to Violence/Overthrow of Gov't [for the "security of community life"]. *Near v. Minnesota*
    - **(4)** Injunctions against False, Deceptive, or Misleading Commercial Advertisements. – **FN 24 of *Virginia Pharmacy***
      - *Pittsburgh Press* – "continuing course of conduct", BUT this made it not *prior*, but *subsequent.*

- **History:** Based on the idea that the King should not have to approve speech *before* it is said.
  - **Does not consider nature of speech**. Prior restraint invalidation results in case dismissal.
- **Collateral Bar Rule**
  - **Cannot violate court order, even if later found unconstitutional.** *Walker v. Birmingham*
  - **Exceptions:** (1) No jurisdiction, (2) Flagrantly unconstitutional injunction, (3) California rule – if illegal even in the future, no punishment, (4) N/A in some states.
- ***Freedman* Procedural Safeguard:** Procedure for injunction or license must "assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license," that he censor must promptly institute the proceedings, that the burden of proof to show the speech in question is unprotected must rest on the censor, and that the proceedings must be adversarial.
- **Ex**: Requirement that handbook/ad distributors get written permission from city manager invalid. *Lovell v. Griffin.* Where lesser forms of protection existed, licensing requirement overturned. *Watchtower Bible & Tract Soc. V. Stratton*. Injunction preventing future publication (and past publication?) of newspaper on the basis of scandalous info improper. *Near v. Minnesota.* Despite unconstitutionality, petitioners cannot ignore injunction. *Walker v. Birmingham.*

LICENSING

- **Generally disallowed when licensing speech per se or the press**
  - **Limited.** Lawyers, etc can still be regulated BUT "Where the professional nexus [between professional and client] does not exist and a speaker does not purport to be exercising judgment on behalf of any particular individual [...] government regulation [regulates speaking or publishing in violation of the First Amendment]" White concurring in *Lowe v. SEC.*
    - **Speaking as professional (regulateable) vs. speaking as an individual (prob. Not)**
  - *Mandatory* licenses may change calculus, but disputed. *Watchtower Bible & Tract.*
  - **Still subject to TPM regulations no matter if there is a license or not.**
  - **Even if allowed,** state must provide licensor "Will, within a specified brief period, either issue a license or go to court" *Riley*
  - **Pamphlets, etc protected.** *Lovell.*
- **For Publication:** "The publication must be 'bona fide' and it must be 'of regular and general circulation'. *Lowe v. SEC*
- **Ex:** No right to license those simply publishing *impersonal* financial advice in newsletter. *Lowe v. SEC.* No licensing of fundraising. *Riley v. Nat'l Federation of the Blind.*

INJUNCTIONS

- **Generally disfavored.** Act as an even more personalized/dangerous form of prior restraints.

JUSTICE AND NEWSGATHERING

PRE-TRIAL/TRIAL PUBLICITY

- **Presumption of Publicity**
  - **Gen:** General presumption that press is allowed. No 1st Amendment right of TV access, but it may be allowed at the discretion of the judge. Presence of TV not a violation of a fair trial. *Sheppard v. Maxwell* (but see exception)
    - **Press itself usually polices priorities.** Use of AP, etc.
  - **Exception: "w**here there is a *reasonable likelihood* that prejudicial news prior to trial will prevent a fair trial." *Sheppard*
    - **Factors:** (a) Nature and extent of pretrial news coverage, (b) whether other measures would be likely to mitigate effects of unrestrained pretrial publicity, (c) how effectively a restraining order would operate to prevent the threatened danger. *Nebraska Press* – ***Essentially fatal in fact*** (concord White's concurrence in *Nebraska Press*, saying he had "grave doubts" the orders would "ever be justifiable").
    - **Limited to reasonableness.** Judge may move trial or otherwise make small changes, but cannot over-react.
  - **Can always close a trial** for important reasons, just can't manipulate press coverage.
  - **Different standards for non-press.** Defense, Prosecutor, etc governed by entirely different speech rules.
- **Ex:** Reasonable likelihood that reporters will prevent a fair trial means judge may prevent publicity of trial. *Sheppard v. Maxwell.* Order restricting press merely on defendant's (uncontested) request not enough, overturned. *Nebraska Press Ass'n v. Stuart.*

ACCESS TO TRIALS (+ OTHER GOV'T THINGS?)

- **AKA "Right to Listen"**
- **General presumption of openness for both civil and criminal trials.** *Richmond Newspapers v. Virginia*
  - **Reasoning:** Openness promotes trust, etc.
  - **Subject to countervailing interests:** Security (national, etc), some confidentiality, etc. Brennan concurring in *Richmond Newspapers*
    - **Test:** Party seeking to close proceedings "must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect the interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure". *Waller v. Georgia.*
- **May extend in the *future* to some generalized right to listen.** *Cf* Yale Kamisar's comments, pp 347.
- **Ex:** Uncontested closing of trial not allowed, general presumption of openness. *Richmond Newspapers v. Virginia.*

THE PUBLIC FORUM

PUBLIC FORUM DOCTRINE

- **(A) Access to the Public Forum to Speak – ("Liberty Right").**
  - Often blurs with TPM test.
  - Presumption that publicly accessible areas can be freely used to speak on **any topic.**
  - **(1) Public Property "traditionally available" for public expression**
    - **Strict scrutiny** – only TPM restrictions meeting *compelling state interest. ISKCON v. Lee*, citing *Perry*
      - **Need not be least restrictive means.** *Ward v. Rock against Racism* (blasting music at concert)
      - **But not fatal in fact.** *Burson* election territory solicitation (special justifications?)
      - **Fees** may or may not be allowed. *Cox* (yes) v. *Forsyth County* (no).
      - ***Content neutral* TPM restrictions allowed**. *Schneider v. Irvington, Cox v. New Hampshire.* Generally somewhat strict, especially in regards to likelihood actual content is being regulated. *Mosley*
    - **"Counter Dictum" of *Hague v. CIO***: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO.*
    - **Ex:** Streets, sidewalks, parks, polling locations, etc. Ex: *Sneider v. Irvington* (struck down prohibition on leafleting in street), MAYBE marching *Cox v. NH* (but convicted?)
  - **(2) Public Property Designated as a Public Forum**
    - **Also strict scrutiny just like a trad'l pub forum**. *ISKCON v. Lee.*
    - **(A) Facilities, like school facilities.** Generally open to allow meetings, but scheduling conflicts etc.
    - **(B) Limited Purpose Forums (FN 7 in *ISKCON*).** Meetings on specific topics or for specific groups or agencies.
      - **Allow *some* form of content discrimination.** "Middle forum", so perhaps some scrutiny?
      - Agendas usually used properly to control scenario.
    - May be created for special purposes or topics. *Perry.* Examples include school board meetings, train car advertising.
    - Existence may justify higher restrictions in (3) areas, such as in *ISKCON v. Lee* and the segregated areas.
  - **(3) Remaining Public Property**
    - **Limited review.** "The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view" *ISKCON v. Lee.*
    - ***Maybe* specially opened commercial forii.** *Lehman v. Shaker Heights*' car ads.
    - **Ex:** Airport terminals, etc.
    - O'Connor uses Kennedy's *Graynard* compatibility test here for reasonableness. Proper connection?
  - **[4] "Special Cases" –** Oval office, etc. Probably dictate some sort of high government control.
  - **Alternative View:** Kennedy in *ISKCON* promotes a view of "compatibility with the normal activity of a particular place at a particular time" (*Grayanrd*).
- **(B) Equal Access ("Equality Right")**
  - **Subject matter restrictions blanket impermissible.** Must allow equal access to channels of comm. *Chicago Police Dep't v. Mosley.*
    - **(1) EXCEPTION:** If somehow unprotected speech, etc – fighting words, etc.
    - **From both 1st Am and EPC.** *Mosley.*
  - ***ISKCON* FN 7 forii** may allow some subject matter limitations.
  - Certain channels may in themselves imply subject matter restrictions, if they are limited.
- **Ex:** Restrictions on leafleting in street not allowed. *Schneider v. Irvington.* Permit requirements for Jehovah's Witnesses allowed, reasonable TPM restriction. *Cox v. NH.* State fair rule prohibiting solicitation of funds without booth allowed, given TPM test. *Heffron v. ISKCON.* Picketing restriction re: labor topics disallowed, must be content neutral. *Chicago Police Department.* Airport terminals not public forii such that speech is subject to CSI/TPM regs, limits on ISKCON solicitation reasonable.. *ISKCON v. Lee.* Public train car advertising could properly be limited to nonpolitical subjects. *Lehman v. Shaker Heights.* Though polling locations fall into (1) territory, SS/CSI met by desire to prevent intimidation and fraud by prohibiting campaign solicitation within 100ft. *Burson v. Freeman.*

GOVERNMENT SUPPORT OF SPEECH

SUBSIDIES OF SPEECH

- **Government may speak and *somewhat* discriminate on POV.**
  - Viewpoint neutrality per se not a good thing. "If government entities must maintain viewpoint neutrality in their selection of donated monuments, they must either 'brace themselves for an influx of clutter' or face the pressure to remove longstanding and cherished monuments." *Pleasant Grove City v. Summum.*
  - Not required to give forum to every speaker where it speaks, BUT subject to Establishment Clause, etc.
    - **Subsidies** in question.
  - **VIRTUALLY NO LIMITS EXPLAINED.**
    - ***But*** some sort of rule of reason. Ex: *City of Boston* municipality promoting voting initiative.
- **Gov't speech generally not subject to free speech clause**, but subject to establishment clause and other provisos. *Pleasant Grove City.*
  - **May be difficult to distinguish from the proviso of a private forum.** May rely on purpose.
- **Gov't may selectively fund speech for some "managerial domains" (Robert Post).** *Rust v. Sullivan*
  - "The government can, without violating the Constitution, **selectively fund a program to encourage certain activities it believes to be in the public interest,** without at the same time funding an alternate program which seeks to deal with the problem in another way" *Rust v. Sullivan.*
  - "A legislature's decision not to subsidize the exercise of a fundamental right does not infringe upon that right" *Regan*

- **(1) EXCEPTION: Gov't may not restrict speech pursuant to block grants (i.e. invented public forii).** *Rosenberger v. University of Virginia.*
  - Hinges on the idea that the government creates a public forum via things like block grants.
  - **"[Just] X"** may be okay, whereas **"Everything but X"** may not be okay.
  - **Dissent** argues this may be limited only to where restrictions specific to people, not a topic.
  - **Restrictions on types of art** disputed, but discussed in *Endowment for the Arts v. Finley*.
- **Unconstitutional conditions:** Conditions of the *recipient* of a subsidy rather than on the particular program or purpose.
- **Theory of "managerial domains" –** Idea that government should be able to seek specific ends that implicate speech or opinions without being forced to advocate all.
  - Professionals v. Nonprofessionals?

- **Ex:** Government speech to erect religious monument and to refuse other religious monuments, allowed. *Pleasant Grove City v. Summum*. Gov't may limit Title X project recipients in their ability to recommend abortion. *Rust v. Sullivan*. Gov't may not restrict nature of speech that occurs pursuant to block grants for university newspapers. *Rosenberger v. UoV*.

EDUCATION AND EDITING

- **SPLIT.** *Hazelwood* (RR/LPI) [newer] v. *Tinker* (SS/CSI? Super limited?) v. *Morse* (Adv. Illegal drug use – middle ground?)
- **Attendance**
  - Gov't **may compel attendance, but not to public schools**. *Pierce v. Society of Sisters.*
- **Regulation of Speech in Schools**
  - **May regulate speech in school-sponsored contexts** where the regulation is reasonably related to legitimate pedagogical concerns. *Hazelwood* (student magazine)
  - Gov't **may not *entirely* limit the nature of speech in schools**. *Tinker v. Des Moines.* (distinguish on equality grounds?)
    - *Maybe* exception for conduct-esque behavior like school uniforms?
    - ***Tinker* Exception:** where forbidden right would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" or impinge on the rights of other students *Tinker*, citing *Burnside*
      - **Strongest in kindergarten/preschool**, semi-weak in high school, **weakest in college** (MORE academic freedom, LESS focus on RR/LPC).
        - **Academic Freedom** becomes countervailing interest *within curricular limits*.
      - Regulations allowed on "speech or action that intrudes upon the work of the school or the rights of other students". *Tinker*

- **Ex:** Government may not force students to attend public schools. *Pierce.* Students could not be prohibited from wearing black armbands to protest Vietnam war. *Tinker v. Des Moines.* Legislature could not restrict the teaching of certain languages. *Meyer v. Nebraska.* Student may punish student for displaying banner reading "Bong Hits for Jesus", perception of promoting illegal drug use. *Morse v. Frederick.* School may limit nature of publication for legitimate pedagogical concerns, including desire not to expose personal lives of kids, etc. *Hazelwood School Dist. V. Kuhlmeier.*

GOVERNMENT AS EMPLOYER

- **Reactions to Speech (*Garcetti* Test)**
  - **(1) SPEAKING AS A CITIZEN ON A MATTER OF PUBLIC CONCERN**
    - "So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively" *Garcetti v. Ceballos.*
    - **Full First Amendment Protections.** *Garcetti v. Ceballos.* (killing old "public"/"private" matter distinction)
      - **Alt:** Souter would allow even on on-the-job matter if matter of "unusual importance"
    - **Special rules for lawyers/"speaking" classes?**
  - **(2) SPEAKING AS AN EMPLOYEE ON ON-THE-JOB MATTER**
    - **Limited protection.** "A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations" *Garcetti v. Ceballos*.
      - "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*.
    - **Hinges on job description.**
    - **Dissent** argues this discourages proper reactions to bad government actions, etc.
    - **May *not* be punished for speech *outside work*.** Such as political party involvement. *Elrod v. Burns.*
- **Ex:** Supervising DA not protected for comments in affidavit, acting as employee. *Garcetti v. Ceballos.*

BROADCASTING

FAIRNESS DOCTRINE

- **Fairness Doctrine** generally legal *for limited forii, including airwaves*
- **Publications *immune***, including "right to reply" rules. *Miami Herald v. Torniello* ("right of reply" statute). Compare *Gertz.*
  - **Likely limited.** Absolute immunity from such regulations seems implausible.
  - **Two reasons:** (1) Autonomy of news/"freedom of the press" and (2) Chilling effects worry. See *Miami Herald*,
- **Licensure at least partially allows regulation of TV/radio.** Idea that limited airwaves dictate licensing which dictates ability to demand sharing of airwaves. *Red Lion Broadcasting v. FCC*
  - **SCARCITY** = LIMITATIONS due to LICENCING.
    - **"Proxies of the entire community"** per *Red Lion*. (Airwaves are free – pretty much given by Gov't)
    - **Auction obligation?** Possibly would remove "licensure" justification, allow anything.
    - Gives FCC a ton of power.
  - **No active requirement that FCC/gov't provide fairness.** FCC may, for example, *not* require broadcasters to accept paid editorial announcements. *CBS v. Democratic Nat'l Comm.* Journalistic integrity thus some amount of a factor.
    - Focuses on rights of broadcasters – some degree of newspaper-like protection.
    - **Fairness doctrine repealed** in 1985 by FCC, enforced in *Syracuse Peace Council*.
  - USUALLY PUBLIC FORII.
  - **State Owned Public Television –** FIRST AMENDMENT RIGHTS GRANTED TO GOVERNMENT AS SPEAKER.
    - **Still allowed to exclude some opinions.** Broadcaster decisions to exclude opinions considered within the ken of editorial discretion. *Arkansas Educational Televsion Comm. v. Forbes* (dispute re: minority candidate exclusion from debate)
  - Open Issues
    - Government notice requirements? May infringe on editorial rights.
    - Right of retraction for libel? Probably allowable per court powers, but questions.
- **Ex:** "Right of reply" statute struck down as penalty for content due to chilling effects, etc. *Miami Herald Pub. Co. V. Tornillo.* Fairness doctrine upheld where frequencies limited and licensing involved. *Red Lion Broadcasting v. FCC.* Journalistic independence and license control allows FCC to *not* require some amount of fairness on airwaves. *CBS v. Democratic Nat'l Comm.* State owned public TV may exclude some from a public debate. *Arkansas Educational Television Comm'n v. Forbes.* FCC properly may limit broadcasting material that is indecent (in this case, George Carlin's 7 words). *FCC v. Pacifica.*

ASSOCIATION

GENERAL

- ***NAACP v. Alabama ex rel Patterson*** – "elevate[s] freedom of association to an independent right, possessing an equal status with the other rights" of the First Amendment.
- **Individuals have rights to join with others for *expressive* purposes.**

RIGHT *NOT* TO ASSOCIATE (AKA "RIGHT NOT TO SPEAK"

- **Generally:** "No official ... can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein". *WV State Bd. Of Educ. V. Barnette.*
  - **Some balancing.** Not exactly lived up to, esp. where government reg can be classified as gov't speech.
  - **Prevents** "mind control", sincerity issues, being a "forced courier," protects dignity. -> **DIGNITY ISSUE** (but cf *Red Lion*)
    - **Dignity = $?** Why does speech
  - **General *private* right of autonomy to choose content of one's own message.**
  - **Limited in sphere of public control –** public centers, lawyers, etc sometimes required.
- **(1) "Compelled Speech" - Right to "refrain from speaking"** – i.e. not express any sort of opinion at all. *WV St. Bd. Of Educ. v. Barnette* (forced salute), *Wooley v. Maynard* (license plates).
  - Requirement to opt-out in itself may constitute an impermissible requirement of speech.
  - **(A) Public locations may not have this right** where there is no possibility people would perceive message as supported by location. *Pruneyard Shopping Center.*
    - **Perceptions of support** may dictate allowing avoidance of speech. *See e.g. Pacific Gas.*
    - But **semi-public events and locations,** including parades, may not be forced. *Hurley v. Irish-Am. GLB Group of Boston*
  - **(B) Regulatory disclosures** also an exception, in limited circumstances. *Zaudered v. Office of Disciplinary Counsel* (legal ads)
- **(2) "Compelled Subsidy" - Right to not subsidize speech.** *Abood v. Detroit Bd. Of Educ.* (union dues for political stuff)
  - **Does not apply to Government speech.** Taxes cannot be thus withheld. *Johanns v. Livestock Mktng Assoc.* (beef marketing campaign)
  - **Targeted taxes.** Seemingly allowed in *Johanns*, but questionable.
- **(3) Anonymous Speech – Right to speak and not be associated –** Generally somewhat allowed. *Brown v. Socialist Workers*
  - **Compelled election disclosures - Disclosure of contributors** may be limited where "evidence offered [by a minor party] need show only a reasonable probability that the compelled disclosure [of] names will subject them to threats, harassment, or reprisals from either Government officials or private parties" *Brown v. Socialist Workers.*
  - **Requirement to specifically request communist mail** disallowed, would expose support. *Lamont v. Postmaster General.*
- **Ex:** Students could refuse to salute flag. *West Virginia State Bd of Ed. V. Barnette.* "Live free or die" on license plate was inappropriate, violated right to "refrain from speaking". *Wooley v. Maynard.* Public shopping mall could not keep people from leafleting, was not being compelled to speak. *Pruneyard Shopping Center v. Robbins*. Disallowed requirement that utility company include anti-utility company pamphlets in billing envelope. *Pacific Gas & Electric v. Public Utilities Comm'n.* Requirement that law schools allow JAG recruiting for federal funding not speech inhibitive, mere condition of conduct. Arguably a spending clause issue or equality issue. *Rumsfeld v. Forum for Academic and Institutional Rights.* State could not force parade to accept GLBT members, right to dictate message. *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston.* NAACP could properly boycott businesses despite tortious interference laws given speech-related nature of boycott. *NAACP v. Claiborne Hardware.* Attorney advertising disclosure requirement upheld as merely setting standard for commercial advertising. *Zauderer v. Office of Disciplinary Counsel.* Rebates must be provided to those compelled to pay union dues where certain funds used for electioneering. *Abood v. Detroid Bd. Of Educ.* Gov't promotion of beef not compelled speech where funds came from taxes, okay given lack of attribution. *Johanns v. Livestock Mktng Assoc.* Ohio could not prohibit distro of anonymous literature. *McIntyre v. Ohio Elections Comm'n.* Special instances may allow no disclosure of campaign contributors. *Brown v. Socialist Workers.* Could not require specific request to receive communist literature. *Lamont v. Postmaster General.*

INTIMATE AND EXPRESSIVE ASSOCIATION

- **(A) – IS THE ASSOCIATION BURDENED?**
- **(B) - Categories**
  - **Test factors:** "**s**ize, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent" *Roberts.*
  - **(1) Intimate Association**
    - **"Small Groups" – No real test or limitation**. Only use of words – *Lawrence v. Texas.*
    - Right to "maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts.*
    - **Incidental abridgement ... no more than necessary to accomplish a State's legitimate purpose** seemingly the test in *Roberts.*
  - **(2) Expressive Association**
    - "Right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, [and] religion". *Roberts.*
      - **"Speaking" groups protected**, like in *BSA v. Dale*
        - **Possibly religious and religious-esque groups?** Theory of *Christian Legal Soc. v. Martiniez.*
          - May also relate to use of pub forum.
        - **Conduct still not limited.** Ex: Funding limits re: JAG. *Rumsfeld.*
      - **Not Protected:** General groups like the Jaycees in *Roberts v. US Jaycees*
      - **ALT VIEW:** O'Connor divides based on commercial nature of the group – Jaycees v. CLS.
    - **Strict scrutiny.** "Regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms". *Roberts.*

        - **Infringements include:** Penalties or withholding business from members of a disfavored groups, disclosure of membership, interference with internal policies, etc.
            - **Infringements may be allowed if contingent and with lax punishment.** "official" recognition can be conditioned on agreement to set policies that do not concord with official policies. *Christian Legal Soc. v. Martinez*
        - **O'Brien Inapplicable.** Association alone supersedes TPM test.
    - **(3) "In Between"**
- **Ex:** Jaycees could not prevent women, not expressive org. *Roberts v. US Jaycees.* The BSA is expressive in not wanting gay scoutmasters, thus allowing them to avoid state req. *BSA v. Dale.* Hastings Law could condition official recognition of the Christian Legal Society on the agreement to certain policies, particularly where recognition meant relatively little. *Christian Legal Society v. Martinez.*

MONEY AND THE POLITICAL PROCESS

GENERALLY

- **Contributions vs. Expenditures**
  - **Test:** "significant interference" with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms. -> **SS/CSI(?)**
    - **Not O'Brien.** "Speech" being political in this context avoids O'Brien, subjects to SS/CSI.
    - **Usual worries:** (1) creating and (2) giving appearance of corruption, (3) wealthy domination, (4) obsession with $.
  - **(1) Contributions** may be regulated, effectuate little in terms of speech other than symbolic speech.
    - **May involve calculation of amount.** Super-small amounts may be worse than proffered worry of corruption. *Randall v. Sorrell.*
  - **(2) *Independent* Expenditures** may not be regulated generally, given their connection to speech and the vagueness of regulation.
    - ***Expenditures with campaign*** are contributions.
  - **(3) Disclosure Reqs**
    - **Allowed.** Considered not a burden(?)
  - **(4) Overall Spending Limits on Campaigns**
    - ***Not allowed.*** *Buckley.*
    - ***ALLOWED IF GOVT FUNDING ACCEPTED***. Part of Prez. Funding schema.
  - **CORPORATIONS may spend money**, given that states cannot penalize organizations of people (even in the commercial context) for their form. *Citizens United.*
    - **Old**
      - *Buckley* restricts contributions, but allows various amounts of **"hard money"** to political parties **and "soft money"** for special exceptions like "get out the vote" campaigns
      - Development of PAC system – where PACs can be funded by "voluntary" contributions by shareholders or directors *without involvement of the corporate treasury*
      - **Major exceptions for media corporations and "advocacy" corps**, where the latter could not accept any sort of corporate donations (*Massachusetts Citizens for Life)*
      - **McCain-Feingold attempts to close loopholes,** prohibiting, inter alia, mentioning a candidate's name ~30 days before an election, providing "soft money", etc.
    - ***Wisconsin Right to Life v. FEC*** - Effectively overrules McCain-Feingold, allowing corporations to spend as much as they like.
      - **Standard:** Gov't may only limit ads that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"
      - Opens door for "contact your Congressman"-esque ads, etc. By corps with virtually no limit.
    - ***Citizens United***
      - **Overrules *McConnell*,** which allowed Bipartisan Campaign Reform Act to close up "soft money" req. But *Wisconsin Right to Life* already effectually did that.
      - **Does not give a free speech right to corporations.** May hinge on limit rights in cases like *Virginia Pharmacy*
      - **Odd argumentation.** Relies on presumption that documentaries are ads subject to FEC regs, assumption that Citizens United is a for-profit non-media corporation, and that the case should not be waived away by some sort of "significant" contribution requirement of *Massachusetts Citizens for Life*
      - Issues: Requires myth that voters aren't easily misled re: democracy? What about mutual fund investors who do not want corp to speak?
- **Ex:** Congress may limit *contributions* to a candidate, but may not limit *expenditures in support of* a candidate, on the basis that the former involves the regulation of campaigns and the latter is more connected to speech. *Buckley v. Valeo.* Ohio contribution and expenditure rule inappropriate, too closely drawn on both counts in light of Buckley. *Randall v. Sorrell.* No justification for requirement that corporations cannot spend funds but PACs can, corps can speak. *Citizens United.*

FREEDOM OF RELIGION

GENERALLY

- **History**
  - Jefferson's "wall of separation" between church and state
  - Evidence that one purpose of Establishment Clause was to protect state-established churches from newly ordained national gov't. Thomas seems to support.
    - Possibly destroyed by 14th Amendment.
- **"Religion"**
  - **Free Exercise –** More about beliefs.
  - **Establishment Clause –** More about organized religions – beliefs (ex: evolution) per se not banned.
    - **Justifications:** Equality, Inherent value of pluralism, state corruption of religion, legal harm. STATE CAPTURING RELIGION AND RELIGION CAPTURING STATE.
    - **General prohibitions include:** state-created churches, laws aiding one religion or any religion, forcing or influencing participation in a church or faith, taxing for religious activities, open or secret state participation in affairs of religious organization, and vice versa. *Everson.*
- ***Lemon* Test –** Statute must have a [1] secular legislative purpose, [2] "principal or primary effect must be one that neither advances nor inhibits religion;" [3] the statute must not foster "an excessive government entanglement with religion"
  - **"Entanglement" –** Both **(i)** Political (i.e. causing debates about religion, etc) or **(ii)** Administrative (taxing churches, etc)
  - **Dying.** More focus on new trajectory per Kennedy's dissent in *McCreary Co.*
- ***Incidental* benefits may generally be allowed.** Bus usage, etc in *Everson.*
- **Thomas argues that the establishment clause does not apply to states.** 14th Am. Applies to only provide "liberty", liberty does not restrict ability of states, etc. Would limit to coercion only.
- **Ex:** No prov. of the Constitution is more closely tied to FA than the Establishment Clause, given context of Rev. War, BUT public busses may be provided generally for the public where catholic schools incidentally benefit.. *Everson v. Board of Educ.* Because tax exemption for religious property was broad, did not advance or inhibit religion, and merely classified as quasi-public and did not entangle religion with government, tax exemption allowed. *Walz v. Tax Com'n.*

FREE EXERCISE

- **"Burden[s] on the free exercise of appellant's religion" must be justified by a "compelling state interest."** *Sherbert v. Verner*
- Where **law neutral and generally applicable, law > religion**. ***Employment Div. v. Smith***
  - "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate". *ED v. Smith.*
  - **ABSOLUTE RULE, NOT A TEST.** Scalia absolutism replacing the balancing of *Sherbert.*
    - **Allowed, but not required to protect some religious behavior.** Peyote exemptions, etc.
  - **EXCEPTIONS**:
    - **(1) Ad hoc [targeted] rules.** Intentional discrimination prohibited. "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, see *Smith*; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest"
    - **(2) Hybrid laws** [Religion + other protected right]. Generally means courts can invent rights.
  - ***OLD Sherbert* Test –** Governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest.
    - ***Probably* dead post-*ED.*** Seems to imply presumptive invalidity of a law, which cannot be the standard. *But* **concurrence by O'Connor seems to maintain**, so *Sherbert* may be good law.
      - **MAY BE STILL ALIVE IN GROUP vs. INDIVIDUAL DETERMINATION SCHEMA.** Individualized determination of unemployment in *Sherbert* vs. vaguer, more broad attack on religion in *ED v. Smith.*
    - Like an *O'Brien* TPM test for religion? Possibly why Scalia sought to kill it.
  - **Intentional discrimination prohibited.** "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, see *Smith*; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest"
  - ***NEW TRAJECTORY*:** Following more along the lines of Kennedy's dissent in *McCreary Co.*, more mixing, less of a wall.
  - *ED v. Smith* called the "Dredd Scott" of Free Exercise
- **Nature of religion may be somewhat relevant.** *Yoder* seems to give great deference to "good" Amish.
  - **"Good" Religion > "Bad" Religion = Atheism.** Seems to imply religion can be more legitimate than lack thereof in *Yoder*, but this is questionable.
  - ***Gilette* –** Cannot distinguish opposition to all wars v. Some? Sincerity issue?
- **Ex:** Denial of employment benefits disallowed where they were premised on discharge due to religious beliefs. *Sherbert v. Verner.* CSI shown where government wanted to establish a single day of rest (Sunday). *Braunfield.* State could not prove CSI for mandatory highschool attendance re: Amish. *Wisconsin v. Yoder.* Peyote use was proper ground for dismissal from federal job, no right to circumvent law with religion. *Employment Division v. Smith.* Restriction on animal sacrifices did not meet SS/CSI implicated from discriminatory purpose. *Church of the Lukumi Bablu Aye v. Hialeah.* Statute allowing avoidance of draft to allow atheists (religion being similar to moral views?) *Sieger.* Sunday not an establishment clause issue, however, it once was. *McGowan v. MD.*

ESTABLISHMENT CLAUSE

- **(1) "Endorsement Test" – Endorsement depends on "what [the reasonable observer] may fairly understand to be the purpose of the display".** (Prong 2 of O'Connor in *Allegheny Co. v. ACLU*)

- **"Reasonable Observer" –** is armed with <u>all of the facts.</u> *Capitol Square.*
  - Arguably, should be of minority religion.
- **<u>Split on public forii.</u>** What if state creates public forum that creates perception? Scalia seems to indicate a requirement of some sort of specific favoritism, O'Connor seems to focus on result even without intent, Stevens hinges on reasonable person.
- **<u>O'Connor Prong (1)</u> Any endorsement of religion is "invalid"** because it "sends a message to nonadherents that they are outsiders, not full members of the political community ,and an accompanying message to adherents that they are insiders, favored members of the political community".
- **"Secular purpose" of religious displays** seemingly a factor, but logic somewhat attenuated.
  - **Test: "Although a legislature's stated reasons will generally get deference, the secular purpose required has to be <u>genuine</u>, <u>not a sham</u>, and <u>not merely secondary to a religious objective</u>."** *McCreary Co. v. ACLU*
  - Does *not* extend to things like teaching religion, but teaching *about* religion OK. *McCollum v. Illinois.*
  - Development of secular purpose (ex: historical value) may be justification.
- **Considered somewhat broken by dissent**, difficult to determine *who* and borderline cases.
  - **Peer pressure** may result, as generally discussed in *Lee v. Weisman.*
  - **Endorsement of <u>specific translation</u>** may be sufficient. Ex: multiple translations of 10 commandments.

- **"Coercion Text"** disputed – if gov't is coercing people to belief or the like (implied to exist in *Van Orden*).
  - **High deference to history.** "Under god" in pledge in *Elk Grove*, etc.
  - **<u>Public forii</u>** *don't get protection.* Idea that a public place doesn't coerce anything, so no establishment issue. MAJOR reason against this test.
  - **Scalia in *Lee* standard:** "Force of law and threat of penalty" for coercion that violates Establishment Clause
  - **Purpose of government allowing speech** may be relevant
  - **"Private" speech?** May depend on context, but government intentionally giving forum for certain speech certainly questionable
- **Ex:** Display that seems to indicate "season's greetings" with mixed message of religion allowed, but not a menorah alone. *Allegheny County v. ACLU.* Ten Commandments on display in Kentucky county courthouses violated Establishment Clause, secular purpose proffered was insufficient. *McCreary Co v. ACLU.* Display of Ten Commandments among a lot of other statues etc allowed, inferring museum-like scenario. *Van Orden v. Perry.* Peer pressure of invitation of members of clergy to speak at graduation very important. *Lee v. Weisman.* Dicta seems to indicate "under god" not violative of Establishment Clause. *Elk Grove Unified School Dist. v Newdow.* Because of seeming ill purpose, ability of students to elect someone to deliver invocation held invalid on face. *Sante Fe Ind. School Dist. v. Doe.* Latin cross in capital square endorsing KKK did not violate Establishment Clause, not endorsement alongside a bunch of other various symbols provided by other groups. *Capitol Square Review & Advisory Bd. V. Pinette.* Cross on federal land to honor soldiers, after moved to private land and transferred at cost to government, no result, but inference that it was *possibly* allowed. *Salazar v. Buono.*

AID TO RELIGION

- **<u>Providing direct aid</u> vs <u>private choice</u>**
  - ***Muller, Witters,* and *Zobrest* [Test]** – "Where a government aid program is <u>neutral with respect to religion</u>, and provides <u>assistance directly to a broad class of citizens</u> who, in turn, direct government aid to religious schools wholly as a <u>result of their own genuine and independent private choice</u>, the program is not readily subject to challenge under the Establishment Clause" *Zelman.*
    - "The **incidental advancement of a religious mission**, or the perceived endorsement of a religious message, is **reasonably attributable to the individual recipient**, not the government". *Zelman.*
      - Something like the "ordinary observer" test of official endorsements.
    - But *Allen* seemed to indicate severability for things like parochial schools – does the test implicitly require severability?
- **Ex:** Voucher-esque support program for schools that mainly went to religious parochial schools allowed. *Zelman v. Simmons-Harris.*