I. General Overview

a. Question One: Start by asking whether the speech restriction is imposed by the government—if not, there is no constitutional restriction
   i. First Amendment applies to Congress—but this is now understood to mean that any government action or law, including tort law etc. falls under this purview.
   ii. The First Amendment only restrains government.
   iii. Fourteenth Amendment applies First Amendment to the states.
   iv. Private parties can punish speech by boycott, firing, etc. without violating the U.S. Constitution
   v. Government cannot restrict speech just because it is bad, harmful, or will produce a harmful effect.

b. Second step—Ask whether the government is restricting speech because of it communicative content—because of the message the speech communicates to its listeners, or because of the consequences that flow from the communication of this message.
   i. If yes, ask whether the speech falls within one of the exceptions to free speech protection, such as the exceptions for incitement, false statements of fact, threats, and the like.
      1. If yes, then the restriction is generally valid unless it impermissibly discriminates based on the content of the speech
         a. However, could be unconstitutionally content-discriminatory under R.A.V. (for instance, if the restriction bans libels on certain subjects but not on others)
      2. Ask also whether the restricted speech is commercial advertising, in which case the restriction is subject to some meaningful review, but a lower standard of review than for other speech.
      3. If no, the speech does not fall into one of the exceptions to free speech protection, and doesn’t constitute commercial advertising, ask whether the restriction nonetheless passes strict scrutiny, a very demanding test but still one that could theoretically be met if the court concludes that the restriction is necessary enough.

c. If the government is restricting speech—or expressive conduct—for reasons unrelated to its communicative impact (for instance, because the speech is too noisy, obstructs traffic, and the like), then apply the special (fairly relaxed) test applicable to such restrictions

d. Ask whether the government is acting in a special capacity, such as employer, as landlord, as public school educator, etc. rather than acting as sovereign (exercising its powers to control everyone’s conduct). If so, a lower level of scrutiny may be applicable, even if the speech would be protected against the government acting as sovereign.

e. Consider what other procedural doctrines—vagueness, overbreadth, or prior restraint—are applicable

f. If the government is compelling speech rather than restricting it, consider the special rules applicable to speech compulsions

g. If the government is burdening people’s ability to associate with each other for expressive purposes, consider the special rules applicable to such burdens.
h. From Bar-Bri book: miscellaneous notes:
   i. Content vs. Conduct: A regulation seeking to forbid communication of specific ideas (content regulation) is less likely to be upheld than a regulation of the conduct incidental to speech.
   ii. Content-based = strict scrutiny, except for unprotected categories of speech. Even then, the Court is less likely to uphold a prior restraint than a punishment for speech that has already occurred.
   iii. Three types of reasonableness inquiries with regard to statutes:
       1. Overbroad regulations are invalid
       2. Vague regulations are invalid
       3. Regulations cannot give officials unfettered discretion
          a. A regulation cannot give officials broad discretion over speech issues; there must be defined standards for applying the law. Otherwise, fear that they will use their power to prohibit speech they do not agree with. Licensing schemes must be related to an important government interest, contain procedural safeguards, and not grant officials unbridled discretion.
             i. Unbridled discretion = void on its face—you don’t even have to apply for such a permit.
   iv. In contrast to direct regulation of speech, government funding of speech may be based on content-based criteria as long as the criteria are viewpoint neutral.
   v. Only reasons the Court has allowed content-based restrictions on speech (remember that even if a regulations falls within one of the above categories, it will not necessarily be held valid, it might still be held to void for vagueness or overbreadth):
       1. Clear and present danger of imminent lawless action—incitement
       2. Fighting words as defined by a narrow, precise statute
       3. The speech is obscene.
       4. The speech constitutes defamation, which may be the subject of a civil penalty through a tort action brought by the injured party in conformite with certain rules.
       5. The speech violates regulation against false or deceptive advertising—commercial speech is protected by the First Amendment and it cannot be proscribed simply to help certain private interests.
       6. The government can demonstrate a compelling interest in limitation of the First Amendment activity.
   vi. Freedom of Association and Belief—Although the First Amendment does not mention a right of freedom of association, the right to join together with other persons for expressive or political activity is protected by the First Amendment. However, the right to associate for expressive purposes is not absolute. Infringements on the right may be justified by compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.
   vii. Social issue boycotts—A state may not impose civil or criminal liability on those persons who engage in a nonviolent boycott of commercial enterprises to influence governmental and private decisions on social issues. Imposition of
liability in such circumstances would violate the freedoms of speech and association. *Claiborne.* However, courts may regulate or punish labor organizations that engage in “secondary boycotts.”

II. Government Acting as Sovereign/Restrictions Based on Communicative Impact

a. Exceptions from Protection—**Incitement**—“Clear and Present Danger” of imminent lawless action. The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

i. Basic rule—*Brandenburg v. Ohio*—Advocacy of the use of force or law violation is unprotected when it is

1. Directed to inciting or producing (intent)
   a. Unclear how we interpret this—whether it is a “knew or should have known” standard or specific intent.

2. Imminent lawless action
   a. Which probably means action within hours or at most several days, but certainly excludes advocacy of illegal action “at some indefinite future time”—see *Hess v. Indiana*
   b. The government can react in other ways to non-imminent action

3. And is likely to incite or produce such action (likelihood)

ii. Why reversed? There is no imminent action. But they don’t really address Brandenburg’s case to the new test. They don’t really define the test either. It’s just black letter law. Why doesn’t the court have to apply the test? Because the statute is facially unconstitutional. If it were only unconstitutional as applied, then the test would be better explained. This statute doesn’t square with the court’s hypothetical statute that would be constitutional.

iii. Possible exception: *Dennis v. United States* and *Yates v. United States*—the Communist advocacy cases, are not consistent with the *Brandenburg* test. It’s not clear what rule they set forth, but they did allow restrictions on advocacy of concrete action rather than just of abstract doctrine even though the action wasn’t imminent. Most scholars think that these cases are no longer good law, and *Brandenburg* now governs, but these have never been formally overruled.

iv. Reasons for exception:

1. Perceived harm of risk that people will be persuaded to violate the law, and the consequent damage that this will cause.
2. If the likely harm is really imminent, then the cost of allowing speech is too great.

v. Why exception is so narrow:

1. Advocacy of illegal conduct may persuade the public that the law should be changed
2. A lot of important political advocacy involves urging illegal conduct

vi. Note: individualized solicitation to commit a crime is unprotected, even if the harm isn’t imminent or likely.

vii. General policy arguments from the exception:

1. Even really evil speech is protected
2. The government generally can’t restrict speech just because it has a tendency to change people’s views in such a way that they’ll commit crimes in the future.

3. When speech is about to lead to imminent harm, it might be restrictable.

b. Exceptions from Protection—False Statements of Fact
   i. Basic principles:
      1. There is no constitutional value in false statements of fact. *Gertz v. Robert Welch*
      2. “Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. Punishment of error runs the risk of [making speakers unduly cautious, and avoiding making even accurate allegations]. The First Amendment requires that we protect some falsehood in order to protect speech that matters. *Gertz*.
      3. [Under] the First Amendment there is no such thing as a false idea. *Gertz*.
      4. The key question in all these cases is just how much falsehood will be protected in order to protect “speech that matters”—and the flip side, how much of speech that matters can be put at risk in order to punish falsehood.
   ii. Basic doctrinal framework:
      1. Ask whether the statement is (1) about a public figure on a matter of public concern; (2) about a private figure but on a matter of public concern; or (3) on a matter of private concern.
      2. False statements on matters of public concern that defame public figures are unprotected if
         a. The speaker knows the statements to be false, or
         b. The speaker is reckless about their falsehood, but publishes them nonetheless.
            i. Actual malice test (really recklessness or worse test) (see below)
      3. False statements on matters of public concern that defame private figures are unprotected if they are made negligently. *Gertz*.
      4. False statements on matters of private concern may be unprotected even if they are nonnegligent. The rule is not clear. *Dun & Bradstreet*.
      5. False statements about the government generally aren’t punishable at all, but the exact boundaries of this rule—when it stops being a false statement about the government and becomes either a false statement about a government official or a false statement about other matters is unclear. *NYT v. Sullivan, Rosenblatt v. Baer*.
      6. False statements on matters of public concern that are not about particular people: no settled rule, but it appears that they are unprotected if they are made with “actual malice.”
   iii. Definitions
      1. Public figure
         a. Government officials of high enough rank (test is whether the position is important enough that the public has an independent
interest in the person who holds it above general interest in operation of government), and whether the position is one which would invite public scrutiny and discussion by the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.

b. People who have assumed an influential role in society. *Gertz.*
   i. Mere involvement in community and professional affairs is not enough

c. People who have achieved fame or notoriety

d. People who have voluntarily injected themselves or been drawn into a particular public controversy
   i. These people are limited-purpose public figures—public figures only as to that controversy
   ii. The controversy must have been of some public importance
      1. Not divorce case
      2. Not low-profile criminal prosecution

e. These people are not public figures: spouse of wealthy person (and divorce), person engaging in criminal conduct, scientist in federally funded program.

2. “Of public concern”:
   a. See *Dun & Bradstreet*—courts make a case-by-case determination looking at the content, form, and context of the publication.
   b. Anything which touches on an official’s fitness for public office—even if it might also be seen as private.
   c. Boundaries not well worked out
   d. Theoretical difficulty: The Free Speech Clause is often seen as prohibiting the government from deciding what the public should be concerned about. How can this be reconciled with courts determining what is a matter of “public concern”?

3. “Reckless disregard” of the facts:
   a. Publishing while entertaining “serious doubts” about the truth of the publication. *St. Amant v. Thompson.*
   b. “Although failure to investigate will not alone support a finding of actual malice, purposeful avoidance of the truth”—“a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of the charges” is enough. *Harte-Hanks Communications.*

4. Remedies and procedures:
   a. Punitive damages:
      i. In public concern cases—public figure or not—available only if actual malice is proved. *Gertz.*
      ii. In private concern cases, available generally. *Dun & Bradstreet.*
iii. Same rule for “presumed damages,” damages provided by traditional libel law as a sort of guess at compensatory damages. They are in principle compensatory, but don’t require any specific evidence of the degree of tangible economic harm flowing from the defamation.

b. Burden of Proof—at least in public concern cases, the P must prove falsehood. (Under common law, D had to prove truth. Philadelphia Newspapers v. Hepps.

c. Quantum of Proof—at least in public concern cases, knowledge of falsehood has to be proven by clear and convincing evidence.

d. Criminal libel penalties are permissible, subject to the limitations imposed on civil suits, but are rare.

5. Liability may be premised only on statements of fact, though statements that in context have a “provably false factual connotation”—implicit statements of fact—also count. Gertz, Milkovich. Likewise, if in context the “factual statement” is clearly a statement of opinion, it is not actionable.

6. Actual malice—knowledge that the statement was false, or reckless disregard as to its truth or falsity (entertained serious doubts as to its truthfulness.)

7. To be defamatory, the false statement must be viewed by a reasonable person as a statement of fact, rather than as a statement of opinion or parody. Furthermore, a public figure cannot circumvent the First Amendment restrictions by using a different tort theory to collect damages for a published statement about him that is not a false statement of fact.

   a. Note: The fact that the statement is labeled opinion will not provide First Amendment protection if the statement would reasonably be understood to be a statement of fact.

8. Trade libel is treated like normal libel—falsity about products the same as about people.

9. False light invasion of privacy—standards for this tort—which compensates people for the emotional injury of having false or misleading statements said about them that “would be highly offensive to a reasonable person,” rather than for damage to reputation—seem to be similar to those for libel. Time v. Hill. It is possible, however, that the “actual malice” standard might apply in this context to all statements on matters of public concern, both about public figures and about private figures; the Supreme Court has never decided this. See Cantrell v. Forest City Publ.

10. Falsehoods not related to particular people:

   a. NYT v. Sullivan and Rosenblatt v. Baer strongly suggest that the law can’t punish false statements about the government in general (the traditional definition of seditious libel), even if made with actual malice, so long as no defamation of a particular person is involved.
b. On the other hand, the Court has hinted that other falsehoods made with “actual malice” may generally be punished, even if they don’t relate to specific people. Punishments for fraud, lying to government agents, etc. are justified on these grounds.

c. The Court has never made clear where the line between impermissible seditious libel laws and permissible false statement laws is drawn.

a. Policy explanations for the existence of the exception:
   a. The perceived harms that justify the suppression of false statements of fact: harm to subjects of falsehood:
      i. In the libel context, falsehoods can cause specific, grave harm to particular people.
      ii. Harm to listeners and to society: falsehoods hinder the search for the truth.
      iii. Harm to quality of public participation in public affairs: pervasive scurrilous attacks can drive the victims away from participation in civic affairs, and deter others from involving themselves in public life in the first place.
   b. False statements of fact also seem less valuable, because they are less likely to contribute to the search for truth and to effective self-government.

b. Policy explanations for the limits on the exception:
   a. The risk of liability might excessively “chill” even true statements.

c. Policy arguments:
   a. Some speech—such as false statements of fact—is widely agreed to be of low constitutional value, and therefore sometimes punishable.
   b. Procedural requirements can be very important ?????

d. Bar-bri notes:
   a. Defamation actions brought by private individuals are subject to constitutional limitations only when the defamatory statement involves a matter of public concern. And even in those cases, the limitations are not as great as those established for public officials and public figures. When the defamatory statement involves a matter of public concern, *Gertz* imposes two restrictions on private plaintiffs: it prohibits liability without fault, and it restricts the recovery of presumed or punitive damages.
      i. If P establishes negligence but not malice, which is a higher degree of fault, he also has to provide competent evidence of “actual” damages.
      ii. Presumed or punitive damages allowed only if malice established. There is no constitutional protection for statements made with malice.
   iv. Private individual suing on a matter not of public concern—no constitutional restrictions on these actions. Presumed and punitive damages can be recovered even if malice is not established.
   v. Recovery for depiction in a false light—pre-*Gertz*—to recover damages for depiction in a false light (as opposed to a defamatory injury to reputation) arising out of comments directed at activities of public interest, an individual
must establish falsity and actual malice whether or not he qualifies as a public figure under *Time*. However, it is assumed that the Court would now modify this to mirror the *Gertz* negligence rule for private plaintiffs.

1. Officially could have two separate types of reasoning, because different causes of action, but since the facts are the same, a court today would probably fall in line with *Gertz*.

vi. Commercial Privacy—Disclosing a Private Performance Can Violate “Right to Publicity”—In *Zachini*, the Court held that state law could award damages to an entertainer who attempted to restrict the showing of his act to those who paid admission, when a television station broadcast his entire act.

vii.

c. Exceptions from Protection—**Obscenity**

i. Basic rule: The *Miller v. California* test: Speech is unprotected if

1. The average person, applying contemporary standards, would find that the work, taken as a whole, appeals to the prurient interest, *and*
2. The work depicts or describes, in a patently offensive way (under contemporary community standards), sexual conduct specifically defined by the applicable state law, *and*
3. The work, taken as a whole, lacks serious literary, artistic, political, or scientific value (using a national reasonable person standard rather than the contemporary community standard).

ii. Subsidiary rules:

1. While distribution of obscene material, and even the transportation of it for one’s own private use, may be outlawed, private possession at home may not be.
2. The phrase “appeals to the prurient interest” is limited to appeals to a “shameful or morbid interest in sex,” appeals to “normal” interests in sex (mere “lust”) are not included.
3. “Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group (e.g. sadists), rather than the public at large, the prurient-appeal requirement is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.” *Mishkin*.
4. The serious value prong looks to whether “a reasonable person would find [serious] value in the material,” not to whether “an ordinary member of any given community” would find such value. *Pope*
5. A defendant can be punished only if he knows (or, possibly, has reason to know) the contents of the material. *Reasonable* ignorance is certainly a defense. It’s not clear whether negligent ignorance is a defense.
6. A defendant need not, however, know that the material is actually obscene—mistake of law is no defense. *Hamling*.
7. The government may also bar people from selling to minors material that fits a special “obscene as to minors” test—essentially the standard obscenity test but with “to minors” added at the end of each prong. *Ginsberg*, a pre-*Miller* case, upheld a law that implemented the then-current obscenity test with “to minors” added at the end of each prong.
Most courts and commentators assume that *Ginsberg* plus *Miller* justify laws that implement the *Miller*-based test given above.

8. **However, the government may not prohibit the sale or distribution of material to adults merely because it is inappropriate for children.**
   a. For example, a statute that barred transmitting indecent messages to minors over the Internet was struck down because there isn’t sufficient technology to block only certain users, thus the regulation would bar all such transmissions and violate the First Amendment rights of adults to receive such materials.

9. The question of whether material is obscene is a question of fact for the jury.

10. State may regulate the display of certain material, to prevent it from being so obtrusive that an unwilling viewer cannot avoid exposure to it.

11. Private possession of obscenity at home cannot be made a crime because of the constitutional right of personal private. (EXCEPT child porn)

iii. Policy explanations for the exception:
   1. Perceived harm is that obscenity has a tendency to exert a corrupt and debasing impact leading to antisocial behavior. *Paris Adult Theatre*. The concern isn’t that any one obscene work will cause harm, rather, it’s that aggregation will change consumer’s attitudes—and then his behavior—for the worse. (Cf. arguments made about violence on t.v.)
   2. Why obscenity different from other speech that can lead to antisocial behavior—because it lacks value, and is therefore different from control of reason and intellect. *Slaton*.
   3. In recent years, obscenity has been implemented narrowly.

iv. Policy arguments one can draw from the existence of the exception:
   1. It sometimes is permissible to restrict speech because of its long-term tendency to influence listeners to do bad things.
   2. The law may permissibly sort material that has “serious value” form material that doesn’t, and punish the latter but not the former.

v. Arguments for why this exception is unsound:
   1. It shouldn’t be up to the government to decide what’s seriously valuable and what’s not.
   2. The test is too vague to provide adequate guidance to people, and might therefore lead them to overconstrain themselves.
   3. Sexually explicit material necessarily communicates certain viewpoints—that sex is good, and thus does have political value.

vi. Difficulties with statutory attempts to define obscenity broadly: sweeping language is a problem, but construction can save the statute if the state courts limit the proscription to specific types of sexual conduct.

d. Exceptions from Protection—**Child Pornography** (subset of obscenity?)
   i. Basic rule: Speech is unprotected if it visually depicts children below the age of majority performing sexual acts or lewdly exhibiting their genitals. *Ferber*.
      1. It doesn’t matter whether the speech meets any of the *Miller* prongs
      2. Something can be pornography about children, or pornography that people think is harmful when shown to children, or pornography that
urges people to go out and harm children, and still NOT be child pornography.

ii. Subsidiary rules:

1. Private possession of child pornography may be outlawed. Osborne.
2. A defendant may only be punished if he knows (or possibly, has reason to know) that the material he distributed or possessed involved an underage performer. A reasonable mistake of fact is a defense. Ferber.

It’s not clear whether negligent mistake of fact is a defense, i.e. whether the mens rea required for liability is merely negligence as to age or recklessness as to age.

a. Under Ferber and its rationale, which is to prevent the harm to children that flows from their being used in the making of child pornography, the speech must in fact be a live performance or a visual representation of a live performance. If the description is merely verbal or if the person looks like a child but is actually an adult, it’s not child porn.

b. Dictum in Osborne suggests that the child porn exception can be justified that child porn is used to seduce other children into sexual activity. This rationale could have been used to uphold broader restrictions, but the Ashcroft case stuck with Ferber.

iii. Policy explanations for the exception:

1. The perceived harm is the injury to children in the production of the pornography, both the injury of having to engage in the acts being displayed, and (in most cases) the injury of having a permanent record of those acts.

2. Ferber also stresses the “exceedingly modest, if not de minimis” value of this material, at least as a general rule.

iv. Policy arguments based on existence of the exception:

1. When the harm of the speech is great enough and its value is small enough, the Court should be willing to carve out a new exception.

2. Speech restrictions justified not by the ability of the speech to persuade or offend, but by something else—for instance, the noncommunicative harm involved in the very creation of the speech—are more permissible.

v. Exceptions from Protection—Offensive Speech/Risk of Violent Reaction—“Fighting Words”.

i. Basic rule #1: Speech is unprotected if it’s “fighting words” if

1. It tends to incite an immediate breach of the peace by provoking a fight (Chaplinsky), so long as the speech is individually addressed to the person who’s insulted. Gooding, Chaplinsky.

2. Possible limitation: Chaplinsky suggests that this exception might be limited only to “utterances [that] are no essential part of any exposition of ideas, and are of…slight social values as a step to the truth”—perhaps only epithets or vulgarities. On the other hand, Texas v. Johnson does not rely on such a limitation, thus leaving open the possibility that political statements such as flag burning might under the right
circumstances constitute fighting words, too. Or could flag burning be seen as the equivalent of a verbal epithet?

3. States are free to ban the use of “fighting words,” i.e. those personally abusive epithets that, when addressed to the ordinary citizen, are inherently likely to incite immediate physical retaliation. *Chaplinsky.*

4. *Chaplinsky* has been narrowly read. *Cohen* held that “Fuck the Draft” not punishable because not directed at the person of the hearer.

5. Statutes regulating fighting words tend to be overbroad or vague.

6. Statutes attempting to regulate fighting words will not be upheld if designed to punish only certain viewpoints. *R.A.V.*

ii. Policy explanations for the exception:

1. Perceived harm—risk of immediate violence. This doctrine (as opposed to the ones in #2 and #3) is not primarily concerned with avoiding hurt feelings—it is focused on preventing fights.

2. Because the same ideas can be conveyed in a less provoking manner, the fighting words exception doesn’t really constrain speech.

iii. Counter-arguments

1. Why let the risk of immediate fights justify speech suppression when the threat of later, but more severe violence is protected?

2. A person’s rights should not be restricted because of the risk of misbehavior by others.

3. Fighting words doctrine can suppress political speech (e.g. *Chaplinsky*—“fascist”, etc.)

4. Compare this with *Cohen v. California*, which suggests that harsh words often express thoughts in ways that kinder, gentler words just can’t match.

iv. Basic rule #2: Speech might be unprotected—though it’s not clear that this rule is still the law—if

1. It inflicts injury by its very utterance. *Chaplinsky.*

2. Limitations: *Cohen, Hustler,* and *Texas v. Johnson* show that some very offensive speech is protected. However, they don’t articulate any clear rules that identify the boundaries of what is and what isn’t protected.

3. Limitation: One can argue based on *Chaplinsky* that this doctrine is limited only to “low-value speech”—mere personal insults. The discussion of *Johnson* suggests that the “inflict injury” rule might likewise apply even to ideological speech such as the burning of a flag.

4. Many commentators believe that this doctrine is no longer good law, but the Court has neither overruled nor reaffirmed it.

v. Basic rule #3: Speech might possibly be unprotected if it intentionally, knowingly, or recklessly inflicts severe emotional distress through outrageous means (ones that “offend[] generally accepted standards of decency or morality”) on a private figure (or on a public figure, outside the context of public debate). *Hustler.*

1. The Court has never held that such speech was indeed unprotected—it only reserved in *Hustler* the question whether it’s unprotected. It’s
particularly unclear whether such a rule would apply when the plaintiff is a private figure but the speech is on a matter of public concern.

vi. A few other possible exceptions for future reference:
1. *FCC v. Pacifica Found.* holds that offensive speech may sometimes be restrained on radio and television.
2. The court has at times mentioned that offensive speech may in some situations be restrained in order to protect a “captive audience,” but it has generally shied away from squarely holding this.

vii. Policy explanations for possible exceptions:
1. Perceived harm in these contexts:
   a. The risk of offense/humiliation/emotional distress (esp. serious if cumulated among many offensive incidents perpetrated by many people).
   b. The deterioration of public spaces caused by people avoiding certain places in order to avoid being offended.
   c. A coarsening of the level of public discourse, which may make it harder for society to come to a consensus on important issues.
2. The restriction would restrict only the mode of expression, not the ideas being expressed.

viii. Policy counterarguments:
1. Any “principle [outlawing certain offensive expressions] seems inherently boundless. How is one to distinguish [them] from any other offensive word[s]? . . . [B]ecause governmental officials cannot make principled distinctions in the is area[,] the Constitution leaves matters of taste and style to the individual.” *Cohen*.
2. Expression “conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force . . . [F]orbid[ding] particular words . . . also run[s] a substantial risk of suppressing ideas in the process.” *Cohen*.

f. Exceptions from Protection—**Threats**

i. Basic principle: Threats of violence (and probably of other illegal conduct) are generally unprotected

ii. Important caveats:
1. Threats may not be punished if a reasonable person would understand them as obvious hyperbole. *Watts*.
2. Threats of social ostracism and of politically motivated boycotts (and resulting economic loss) are constitutionally protected. *NAACP v. Claiborne Hardware*.
3. Speech doesn’t lose its protection just because it’s trying to pressure someone into doing something. It only loses protection if it imposes this pressure through a threat of violence, or at least of independently illegal activity (such as perhaps trespassing or vandalism).
4. Speech, at least political speech, cannot be punished just because it creates a menacing environment. The Court has never precisely
delineated the boundaries of this principle, but *Claiborne Hardware* provides an important benchmark.

5. When speech by employers or unions is challenged as a threat under labor law, courts pay more attention to the possible implications of the speech, considering the economic dependence of the employees on their employers and on unions, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested party. *NLRB v. Gissel Packing Co.*

6. Common error to watch out for: The question is whether the statements are punishable threats or protected speech...not whether they are punishable threats or political speech—it can be political without being protected, it can be neither a threat nor political.

iii. Policy justification for the exception:
1. Threats cause unjustified emotional distress to the threatened person.
2. Threats improperly coerce the threatened person into doing things, and if he refuses to go along, he will often be coerced into taking expensive protective measures (such as security).
3. People who threaten to do something are likely (though not certain) to in fact do it, or at least to do some other bad thing. Punishing them for the threat may thus incapacitate them and prevent them from implementing the threat.

iv. Policy arguments one can draw from the existence of the exception:
1. Some kinds of speech seem so closely related to illegal conduct that they are often perceived as being closer to the conduct than to other forms of speech.
2. Even speech that causes tangible economic loss to particular people through intimidation (and not merely persuasion) may nonetheless be constitutionally protected.

3. Exceptions from Protection—*Speech Owned by Others*

i. Basic problem: Various intellectual property rights are speech restrictions. So far, the Court has held that:
1. Copyright law is a constitutionally permissible speech restriction.
2. A specific kind of right of publicity law, which gives a performer a right to stop broadcasts of his entire act, is a constitutionally permissible speech restriction. *Zachini.* Note that the case said nothing about the more common right of publicity statutes that give people the exclusive right to commercial exploitation of their names, likenesses, and voices.
3. The Court has also upheld some rather broad trademark-like rules, but only as to commercial advertising, which is less protected than other speech.
4. The court has never articulated a rule for which IP rights are constitutional and which aren’t. For now, the arguments have to be made by comparing and contrasting with *Harper & Row* and *Zachini.*

ii. Policy explanations
1. Justification of IP laws:
a. Use of others’ IP unfairly profits from the hard work of others, unjustly enriching the copier
b. Use of others’ IP unfairly competes with the property owners, unjustly impoverishing them
c. Use of others’ IP diminishes the incentive to produce more such works, impoverishing all of us. Restrictions on infringing speech can thus actually enrich the speech marketplace: As H & R puts it, “copyright itself [is] the engine of free expression.”
d. Use of others’ IP is immoral regardless of the economics, because authors have a basic moral right to control their creations or their names and likenesses.

2. What makes IP law more tolerable than other speech restrictions aimed at avoiding even great harms? People can still copy the same underlying ideas or facts, and even copy some of the words under the rubric of “fair use”, so people still have ample channels for expressing themselves about the topic.

iii. Policy arguments one can draw from this:
   1. Sometimes speech can be restricted even based on rather speculative and indirect risk of harm—and not tremendously great harm at that—where private rights of third parties are involved.
   2. Sometimes, contrary to Cohen, courts can distinguish between laws that suppress ideas and laws that only suppress particular expressions of those ideas.

h. Diminished Protection—Commercial Advertising
   i. Basic rule: Commercial speech (advertising) is less protected than other kinds of speech.
      1. False or misleading commercial advertising can be punished because it is not protected by the First Amendment.
      2. Government can require disclosures aimed at keeping consumers from being misled.
      3. If the speech regulated concerns a lawful activity and is not misleading or fraudulent, the regulation will only be valid if the restriction is justified by a substantial government interest and the regulation directly advances this interest and it is not more extensive than is necessary to serve that interest (narrowly tailored).

   ii. Strict Scrutiny
      i. Basic Rule: If a certain kind of speech does not fall into an exception or diminished protection category, there is a very strong presumption that the government may not suppress it. This is “fully protected speech”. However, the term is misleading, because Court has left open the possibility that any speech can be suppressed if the restriction passes strict scrutiny: if it’s “narrowly tailored” to a “compelling state interest.” However, strict in theory, fatal in fact—in practice it’s a very hard test to pass.
      ii. The test: The law must serve a compelling state interest. This is a normative judgment about the ends rather than the means of the legislation—is the government concern at stake important enough to justify restricting speech?
1. The government can have no compelling interest in privileging particular subclasses of core protected speech—discussion about economic, social, and political matters—over other subclasses. All such speech “rests on the highest rung of First Amendment values”, and mere interest in furthering a subset, without more, cannot justify a content-based exemption. *Carey*.

2. Avoidance of offense and restriction of bad ideas are not compelling interests by themselves. “The government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*.
   a. Note that “simply” leaves this uncertain.

3. A law’s underinclusiveness—its failure to reach all speech that implicates the interest—may be evidence that an interest is not compelling. Such underinclusiveness suggests that the government itself doesn’t see the interest as compelling enough to justify a broader restriction. *Florida Star*. It may also suggest that the government’s true interest isn’t really the one that it’s asserting. *Carey*.

4. An asserted interest might itself be impermissibly underinclusive, even if the law is quite narrowly fitted to the interest: The government (at least under some circumstances) may not claim a compelling interest in fighting one particular ill, and then refuse to deal with other ills that seem almost indistinguishable.

5. Outside these general areas, the Court has recognized a number of specific interests as compelling:
   a. Protecting voters from confusion, undue influence, and intimidation. *Burson*.
   b. Preventing vote-buying. *Buckley*.
   c. “Eliminating from the political process the corrosive effect of political ‘war chests’ amassed with the aid of the legal advantages given to corporations.” *Austin*.
   d. Protecting the “unique role [of] the press,” which may justify otherwise impermissible speaker discrimination. *Austin*.

6. The Court has also said in dictum that the following interests are compelling, though how serious they are about them is unclear:
   b. Ensuring the “criminals do not profit from their crimes.” *Simon & Schuster*.
   c. Protecting the right of “members of groups that have historically been subjected to discrimination…to live in peace where they wish.” *R.A.V*.

7. The Court has held that these interests are NOT compelling:
   a. Equalizing the relative ability of individuals and groups to influence the outcome of elections. *Buckley*.
   b. Reducing the allegedly skyrocketing costs of political campaigns. *Buckley*.
   c. Preserving party unity during a primary. *Eu*. 
d. Protecting speakers who “are incapable of deciding for themselves the most effective way to exercise their First Amendment rights.” Riley.

e. If the substantive due process and equal protection cases are any guide, the interest in administrative efficiency isn’t compelling, either.

8. How do we know whether an interest is compelling or not? The Court has never explained. Lawyers have to resort to making common sense arguments, comparing and contrasting with past decisions, and arguing by counterexample. (Counterexample = if this interest were compelling, then look at the restrictions that would be allowed—but these restrictions are clearly unconstitutional, so the interest cannot be compelling.)

iii. Most cases striking down speech restrictions rely primarily on the narrow tailoring prong. This is an empirical inquiry into the means—do they satisfy all four of the following elements?

1. Advancement of the Interest. For a law to be narrowly tailored, the government must prove to the Court’s satisfaction that the law actually advances the interest to some degree. The government need not, however, prove this scientifically—a sufficiently persuasive common-sense foundation is enough.

2. No Overinclusiveness: A law is not narrowly tailored if it restricts a significant amount of speech that doesn’t implicate the government interest. If the government can serve the interest while burdening less speech, it should. There are two definitions of overinclusiveness—one that focuses on whether, in retrospect, the law has frustrated the interest. The other is whether the speech can be identified up front as jeopardizing the interest.

3. Least Restrictive Alternative: A law is not narrowly tailored if there are less speech-restrictive means available that would serve the interest essentially as well as the speech restriction would. For example: restricting unprotected conduct rather than speech, or merely limiting the speech in some ways rather than barring it altogether. The government need not, however, choose an alternative that falls short of serving the compelling interests. If you want to defeat a law, you need to show that the less restrictive alternative would be pretty close to being just as effective.

   a. NOTE: 1 through 3 are closely related, and could be subsumed in “least restrictive alternative.” When the court says, “necessary to serve a compelling state interest, it seems to be referring to these three components.

4. No Underinclusiveness: A law is not narrowly tailored if it fails to restrict a significant amount of speech that harms the government interest to about the same degree as does the restricted speech. Underinclusiveness suggests that the interest isn’t very important, or that the stated interest isn’t the real interest. It may also show the presence of content discrimination beyond that justified by the compelling interest.
Because content discrimination presumptively violates the First Amendment and justified only by a compelling interest, the presence of this extra, unjustified distinction makes the law unconstitutional.

5. Permissible Tailoring—Though the Court has never held this, it might strike down some speech restrictions even if they are necessary to serve a compelling government interest and aren’t underinclusive. However, this is just conjecture.

j. Content Discrimination Within the Exceptions to Protection—Even a restriction on unprotected speech—one of the exceptions—might be unconstitutional if it is improperly discriminatory
   i. Basic rule: A restriction on “unprotected” speech must still face strict scrutiny if it includes a content discrimination beyond the one that makes the speech unprotected.
   ii. Exceptions:
      1. An extra content discrimination within an unprotected category need not be justified under strict scrutiny “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.” R.A.V.
         a. What doesn’t qualify?—the R.A.V. statute—because the reason why fighting words are excluded from protection is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) mode of expression.
      2. An extra content discrimination within an unprotected category need not be justified under strict scrutiny when “the subclass happens to be associated with particular ‘secondary effects’ of the speech, so that the reason is ‘justified without reference to the content of the …speech’.”
      3. A generally applicable law that applies to speech as well as conduct need not be subject to strict scrutiny when “a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech.
      4. More generally, an extra content discrimination within an unprotected category need not be justified under strict scrutiny when “the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot.”

III. Content-Neutral Speech Restrictions
   a. Basic rule: Ward—restrictions on the time, place, or manner of speech are permissible if they
      i. Are justified without reference to the content of the regulated speech (i.e. are content-neutral)
      ii. Intermediate scrutiny applies:
         1. Serve a substantial government interest—an important interest unrelated to the suppression of speech. Examples of such interests: traffic safety, orderly crowd movement, personal privacy, noise control, litter control, aesthetics, etc.
2. Are **narrowly tailored** to serve this interest (considerably weaker form of narrow tailoring than under strict scrutiny)—they do not burden substantially more speech than necessary to further those interests
   a. Cannot be overinclusive
   b. Cannot impose a burden out of proportion to the degree to which the speech implicates the interest
   c. The law need not be by the least restrictive means
   d. Underinclusiveness is probably not a problem

Note: a regulation that is not narrowly tailored might also fail on overbreadth grounds.

iii. Leave open **ample alternative channels** for communicating the information
   1. Can be inadequate if too expensive, or if unlikely to reach pretty much the same audience, if the alternative channel would implicitly carry a different message. There are no clear definitions of what is ample enough.
   b. This does NOT mean that all time, place, and manner restrictions are okay. It applies only to content-neutral restrictions. Content-based restrictions must pass strict scrutiny unless they apply to speech that’s excepted from protection, even if they only regulate time, place, and manner of people saying certain things.
   c. Bar-Bri note: Regulations involving public forums must be narrowly tailored to achieve an important government interest. Regulations involving non-public forums must have a reasonable relationship to a legitimate regulatory purpose.
   d. Core underlying theory:
      i. Some speech activities have side effects—noise, traffic congestion—that are unrelated to the communicative function of the speech. The government must be able to deal with these side effects.
      ii. So long as ample alternative channels are present, the restriction doesn’t really ban speech, only reroutes it into other, pretty much as effective, forms of communication.
      iii. Recall the “undue burden” inquiry set forth in *Planned Parenthood v. Casey*. If the law imposes a substantial burden on the right to abortion, then it’s invalid. If the law imposes an insubstantial burden, then it only needs to pass the rational basis test.
      iv. Likewise, the test for the right to marry in *Zablocki*: if the law imposes a substantial burden on the right to marry, then it must pass a form of heightened scrutiny, if the burden is insubstantial, then it only needs to pass the rational basis test.
      v. The time/place/manner test uses a similar framework, though the components are slightly different: If the law imposes a substantial burden on speech by not leaving open ample alternative channels, then the time/place/manner analysis doesn’t apply, and the law must pass strict scrutiny. If the law imposes an insubstantial burden—when it leaves ample alternatives—then the law must pass a sort of intermediate scrutiny (must serve a substantial interest and must not restrict more speech than necessary.)
   e. Example: *Frisby*—statute upheld that prevented focused residential picketing (picketing in front of a single house) because it was content neutral (regulated location...
and manner rather than message), was narrowly tailored (since it applied only to focused picketing) to the important interest of protecting a homeowner’s privacy, and alternative means were available because protesters could march through the neighborhood in protest.

define_picking:

f. Most locations other than streets, sidewalks, and parks are not public forums. When a nonpublic forum is involved, government regulations on time, place, and manner will be upheld if they are viewpoint neutral and reasonably related to a legitimate government purpose.

i. Viewpoint neutral means that the state can discriminate against certain issues or discussions. However, if it allows discussion on a topic, it must allow all viewpoints to be expressed. Example: Exclusion of candidates not from a major party and lacking popular support is permissible because these criteria are viewpoint neutral and reasonable in light of the logistics for an educationally valuable debate.

IV. Restrictions on Expressive Conduct

declare_restricted:

a. Basic rule: If there’s a general rule restricting conduct—destroying draft cards, burning flags, sleeping in a park—which applies whether or not the conduct is meant to express some message, does the First Amendment guarantee an exemption from such a law to people who are engaging in the conduct for expressive purposes?

The rule is:

i. Threshold inquiry: An exemption is possible only if the conduct is expressive—

1. It intends to convey a particularized message
2. And the likelihood is great that the message would be understood by those who viewed it (Johnson) OR
3. It is within a traditionally protected genre, such as painting, music, poetry, or a parade.

Note: O’Brien and Clark both suggest that some conduct that is far outside traditionally protected genres may be ineligible for exemption even if it’s intended to convey a particularized message and it’s likely that the message would be understood. But the court has never done more than suggest that this might be the case, so we don’t know if the O’Brien test applies to any conduct that fits the criteria given above, or only to a more limited set of conduct.

Thus, for instance, there’s been little doubt that waving a flag, burning a flag, wearing a black armband, or wearing a uniform is expressive conduct; all are traditional and fairly common means of self-expression. The Court split on a sit-in, however.

ii. Test: If that preliminary requirement is satisfied, then the law may be applied to the expressive conduct only if the law

1. Is justified without reference to the communicative impact of the expressive conduct (i.e., is content-neutral)

a. The inquiry is: does the conduct endanger the government interest because of the message that the conduct communicates, like Johnson?
b. The Court will not inquire into whether the legislators’ “real motive” was the suppression of expressive conduct.

2. And serves a significant governmental interest unrelated to suppression of speech (an important government interest)

3. And does not burden a substantial amount of expressive conduct that doesn’t implicate the interest or impose a burden on expressive conduct that is disproportional to the degree to which the conduct implicates the interest—the burden is not greater than necessary.

4. Underinclusiveness is probably not a problem.

Note: This is the same test as for content-neutral speech restrictions, except that it doesn’t seem to have an “ample alternative channels” prong. Such a prong, however, may be implicit but almost always met, because there’s almost always a good, albeit imperfect, alternative to expressive conduct—speech that communicates pretty much the same message.

iii. A state may prohibit certain conduct and incidentally burden speech if it has a substantial interest in regulating the secondary effects of the conduct. E.g., regulating nude dancing in the interest of combating crime, etc.

V. Government Acting in Special Capacities (not covered). Examples of these: employer, educator, postmaster, landlord, subsidizer/speaker, regulator of the airwaves.

VI. Procedural Rules

a. Vagueness and Overbreadth

i. Basic rule—Vagueness: A speech restriction

1. A speech restriction may be unconstitutionally vague if it fails to provide an ascertainable standard of conduct. *Baggett*.

   a. Why: to allow persons to choose to act lawfully, to prevent arbitrary and discriminatory enforcement, and because they chill more speech than necessary.

   b. Failure to give reasonable notice violates the Due Process Clause

2. On the other hand, the Court has upheld many restrictions that are indeed pretty vague; consider the definitions of obscenity, copyright infringement, fighting words, and indecency. If you can persuade a judge that the law you’re defending in no more vague than those, then the law will probably be upheld.

3. The rules are much more relaxed when the government is acting as subsidizer, at least considerably relaxed when it’s acting as employer, and possibly in other areas.

4. Important point: Recall that in U.S. jurisprudence, the meaning of a statute is determined by how courts construe it, not just by what it says. The same applies in vagueness challenges. If courts have construed the terms of a vague law in a way that makes them less vague (called a “clarifying construction”), then a court considering a vagueness challenge would have to look to the terms of the statute as construed by those other courts, not just as written. What’s more, the court that’s faced with a vagueness challenge might itself create a clarifying
construction, and uphold the statute on the basis of that construction, at
least so long as the construction is not “unexpected” or “unforeseeable.”

5. Vagueness issues most often arise in relation to content regulations, but
the same principles would apply to time, place, and manner restrictions.

6. Bar-bri note: Greater imprecision is allowed when the government acts
as a patron in funding speech activity than when enacting criminal
statutes or regulatory schemes, because speakers are less likely to steer
clear of forbidden areas when only a subsidy is at stake.

ii. Basic rule—Overbreadth:

1. Outside the free speech context, someone who’s challenging a law on
constitutional grounds can generally argue only that his own conduct is
(which the law bars) is constitutionally protected. If his own conduct is
constitutionally unprotected, he can’t challenge the law on the grounds
that the law bans someone else’s constitutionally protected conduct.

2. In free speech cases, though, I can challenge an entire law on the
grounds that it’s substantially overbroad: If a law unconstitutionally
restricts a substantial amount of other people’s speech, the law (and my
conviction under it) will be invalidated even if my speech was
constitutionally unprotected.

3. Important limitations:
   a. The overbreadth must be substantial.
   b. As with vagueness cases, the question is what’s covered by the
      law as construed by the courts; in fact, the court might in this
      very case construe the law narrowly (saying, for instance that
      “offensive speech” only means fighting words), and the law may
      therefore prove not to be overbroad.
   c. The overbreadth must relate to noncommercial speech,
      commercial speech is viewed as so hardy that we needn’t fear its
      being chilled. The question isn’t whether the challenger’s speech
      is commercial; the question is whether the other speech is
      commercial.
   d. While vagueness and overbreadth are two separate problems,
      sometimes a law’s overbreadth can actually lead it to be vague:
      Because the law is so overbroad, no one would really think of
      enforcing it according to its literal terms, and will therefore in
      practice impose limits that will ultimately prove vague.
      i. A law that confers on police a virtually unrestrained
         power to arrest and charge a person is unconstitutional
         because the opportunity for abuse, especially where a
         statute has received a virtually open-ended interpretation,
         is self-evident.
   e. Likewise, a law’s vagueness can expand the law’s perceived
      breadth, since the vague law will in practice “lead citizens to
      steer far wider of the unlawful zone…than if the boundaries of
      the forbidden areas were clearly marked.”
f. Bar-Bri note: If a regulation bans a broad range of speech at a particular location or under a particular circumstance, it will likely be held invalid for overbreadth.

b. Prior Restraints—not studied

c. Independent Appellate Review—not studied

VII. Speech Compulsions—not studied

VIII. Right of Expressive Association—not studied

IX. Religion Clauses—not studied