Unit I: Suppression of Dangerous Ideas and Information

1. Introduction: Historical and Theoretical Background to the First Amendment; early free speech cases, pp. 3-23.
   - 8/22, Yellow legal pad
     - Black’s view, never accepted: absolutist
       - “No law” means “no law”
     - “Congress” = “gov’t,” and through incorporation, the states
     - Six theories of the First Amendment:
       - Search for Truth, from Holmes’s dissent:
         - Allow all perspectives so that society can figure out truth
         - Do this through the “marketplace of ideas.”
       - Objections:
         - Falsity may be easier to accept
         - Things that have little to do with “truth,” like art, beauty, political opinions w/o empirical basis, are left out
         - Truth is not absolute
         - When a marketplace does not work, you regulate it.
       - Self-governance: Meiklejohn; protect free speech so we can better govern ourselves
         - Speech as part of town meeting, getting out the information so we can make the best possible decision.
         - Another aspect of this: speech valuable b/c we define ourselves and our autonomy by speaking
       - Criticism:
         - As long as polity makes the right decisions, suppression is irrelevant
         - Both are too narrow (can’t justify why we protect art, etc.)
         - A lot can affect politics & create attitudes, but there’s much we don’t protect.
       - Self-fulfillment: cares about development of people
         - Criticism: there are a lot of things that are fulfilling and lead to growth that we don’t protect. This is just sophistry for the protection of “sexual expression.”
       - Checking value (Blasi)
       - Safety valve (Emerson): better to complain about losing & have outlet to change the majority’s mind w/o violence
       - Tolerant society (Bollinger): force us to respect & tolerate opposing viewpoints.
   - Pre-US speech restrictions:
     - Licensing: had died by late 17th century (England) / early 18th century (US)
     - (Constructive) treason: made it a crime to “compass or imagine the death of the king,” to levy war against him, or to give aid and comfort to his enemies
       - Constructive might only apply to imagining King’s death
     - Seditious libel: crime to bring the gov’t into disrepute
   - Blackstone: Free speech means freedom from prior restraint.
   - Zenger trial has come to stand for truth as a defense to libel
     - Did the Framers mean more?
   - Sedition Act:
Truth was a defense; some thought it was liberalization of law. In application, however, used to punish the Dem-Reps.

- Early First Amendment cases use a “bad tendency” test
  - Ask whether the speech has any “bad tendency” to produce a criminally-punishable result. If so, can punish the speech.
    - If govt can punish the result, it can punish speech with any tendency to cause the result.
    - *Shafer v. United States*, p. 20
  - No real question of intent to cause the result (whether the bad tendency was intended is irrelevant).
    - Or, intent inferred from the tendency (constructive intent)

- *Masses Publishing Co. v. Patten*, p. 21 (1917)—Incitement discussed for 1st time
  - Judge Hand wants to read the statute narrowly b/c of the First Amendment
  - Draws distinction between “discussion” and “trigger of action”
    - Today, “advocacy” vs. “express incitement.”
    - Reads the statute to punish the latter & not the former (view is rejected)
  - Is this overprotective of the clever inciter?


- 8/24, Yellow legal pad
  - *Schenck*, p. 24 (1919)
    - Holmes, writing for the court, proposes a “clear & present danger test”
    - He seemed to think this was more speech-protective, as he indicated in correspondence
    - But, looks like bad-tendency test. And, is applied (in this case) like the bad-tendency test.
      - These are people who urged draft-eligible people to know their rights & inductees to assert their rights. Urged peaceful resistance to draft, including petition for repeal of the act
    - Assumes that the first amendment means more than just freedom from prior restraints, and in later cases this is taken as a holding
  - *Frohwerk*, p. 28 / *Debs*, p. 29 (1919)
    - Holmes writes for the court, post-*Schenck*, but makes no reference to “clear & present danger”
    - Pretty much apply bad-tendency test
  - *Abrams*, p. 30 (1919)—same calendar year as *Schenck*, different term of court
    - Probably Holmes’s most famous dissent.
    - SC upholds conviction, citing *Schenck* and *Frohwerk*. Easy case under those.
    - Also easy case under *Masses*: these people are directly inciting reader to unlawful action.
    - Applies clear and present danger to protect speech: confusion over the test
      - Might mean “clear and present danger of an immediate evil”
      - Or, might mean intent to create such a danger; opinion is unclear
    - Also remarkable is application of law to the facts: Holmes belittles the leaflets & leafletters, implying that if they weren’t “silly,” they could be punished

- **8/29, Yellow legal pad**

4 kinds of speech, imagined
- 1) Speech critical of gov’t policy
- 2) Speech that persuades audience that “lawbreaking necessary, as a moral matter, to achieve goals.”
- 3) Speech advocating violence @ some point in the future
- 4) Violence now!

**Abrams = 4; Schenck = 1; Gitlow = 3**

- **Gitlow**, p. 35 (1925)
  - Law made it a felony to advocate, advise, or teach overthrow of gov’t by force or violence
  - First Amendment applied to states here.
  - Speech here is more dangerous (overthrow of gov’t vs. work stoppages / draft dodging in war) but is also not during a war, when gov’t presumably has more power to quash dissent
  - Majority opinion seems evocative of bad-tendency test
    - Must be w/in police power to punish. If so, law would only be unconstitutional if “arbitrary or capricious”
  - Also, legislature has determined a class of speech is dangerous and criminalized it. When the legislature has made such a specific determination, “clear and present danger” doesn’t apply
    - In contrast, in Espionage Act cases, Congress didn’t outlaw a type of speech, it outlawed resisting the draft. Defer to legislatures when they outlaw a category of speech.
  - Holmes: must be category 4 speech to be punished
    - Teeth in “immediacy”: speech can’t be punished if calling for lawbreaking @ some future point
      - Any idea might be an incitement; this one has no chance of starting a “present conflagration”
    - **Abrams**: teeth in “clear” (likelihood)
    - Holmes acknowledges that Abrams departed from his reading, but he feels too strongly about this to believe it’s settled law (!!)

- **Whitney**, p. 41 (1927)
  - Almost forgettable majority opinion.
  - Whitney’s speech is category #2, but she’s a member of an organization, & that’s enough (raises a lot of other questions not addressed here)
  - Brandeis has 5 points worth noting
    - Express advocacy cannot be punished unless it rises to level of incitement to imminent lawbreaking
    - Seriousness of harm: harm must be serious to be punishable (trespass example)
• Rationale for free expression: self-development, create the sort of people who are capable of governing themselves.
  • Necessary for effective self-governance; self governance, rather than search for truth, is ultimate end
    o Both are similar as consequentialist (protect speech b/c of something else); liberty as a means
  • Might be roots of safety valve here too.
    o Have to leave room for annoying speech so that the “great experiment” can continue (Pericles funeral oration)
• Counter speech: remedy for bad speech is more speech, not enforced silence
  • Analogue to “marketplace” as the means that promotes the end (in comparison to search for truth)
  • This might be a bad argument; counterspeech is not often good enough to prevent bad things
  • Virtually no deference to laws regulating speech.
    o More judicial dissent that’s unwarranted, in a way, but highly praised today.

- 8/31, seem to be missing; actually, I remember reading it and just took no notes
- Bifurcated review project:
  o Post-Lochner, there was a move toward a “preferred freedoms” view in which certain rights were given special solicitude
  o Carolene Products disclaimed authority to review certain classes of cases (economic rights) & heralded deference to Congress. But, indicated that some classes of cases might still be reviewed under strict scrutiny, among them First Amendment cases
  o Bifurcated review: review economic rights cases w/ great deference & personal rights cases w/ exacting scrutiny.

*5. Dennis, Brandenburg and modern subversive advocacy jurisprudence, pp. 48-65.
- 9/5, notes on laptop
  - Dennis, p. 48 (1951)
    o Communist teachers convicting of teaching the necessity of advocating the overthrow of the gov’t.
    o 4 categories of speech:
      ▪ Speech critical of gov’t
      ▪ Speech teaching that overthrow might be reasonable sometimes
      ▪ Overthrow of this gov’t necessary, but not now
      ▪ Vive le revolucion!
    o This is category 3
    o Plurality adopts clear & present danger; category 1 & 2 protected by 1st Amendment
      ▪ But, gov’t doesn’t have to wait until the eve of revolution: can regulate 3 & 4
      ▪ Continuing liberalization doesn’t acquit these guys, but standard may have acquitted previous Ds
- Difference btw plurality & Holmes / Brandeis:
  - Imminence isn’t in Hand’s formulation; H&B lack equation
  - Communism great danger of this time, feared like American Hitler
  - The test, though called “clear & present danger,” can be viewed as just a modified “bad tendency test”
    - Frankfurter: explicitly rejects “preferred freedoms theory” & FN 4 of Carolene Products; would broadly defer to legislature
    - Jackson: Preserve C&P danger as a “rule of reason,” but can crush nationwide, organized conspiracies to overthrow the gov’t; doesn’t make sense for that standard to apply here
    - Black: Only way to affirm convictions is to repudiate the “clear & present danger” test; junk the test as underprotective of free speech
    - Douglas: Wants to interpret “clear & present danger” test strictly
      - This is like burning books; the Nazis do that, not us (books are on the shelves; OK to read; why not to teach?)
      - Plus, in the US marketplace of ideas, communists’ wares remain unsold.
    - Where we are:
      - 7 of 8: reject Gitlow’s extreme deference; agree that Gitlow and Whitney are not good law; express advocacy of illegal action is protected to some extent
      - Majority adopts some version of “clear & present danger”
      - 6 of 8 (all but Black & Douglas) suggest express advocacy of incitement is entitled to less protection

  - Brandenburg, p. 59 (1969)
    - KKK leader convicted under Ohio Criminal Syndicalism
      - His conviction is reversed.
    - Holding: speech can be punished (as incitement) if it is:
      - Advocacy of (not abstract discussion of ideas)
        - Richards would add an additional, unspoken requirement of intent
      - Immediate lawbreaking that is (mere advocacy not enough)
      - Likely to occur (mere advocacy not enough)
    - Seriousness, which was present in Dennis, is not mentioned here as a requirement.
    - Court cites Dennis, w/ a straight face, that “mere advocacy” is not enough.
    - Douglas: “clear and present danger” test punishes loud but silly speech
      - Wants categorical rule that speech should be protected from prosecution, except for “speech acts” (shouting fire)
    - Black: also against “clear & present danger” but writes separately to point out that the Court doesn’t actually use the test, so it might be dead.

  - Layout:

<table>
<thead>
<tr>
<th>Immediate Danger</th>
<th>Express Advocacy</th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Future Danger</td>
<td>Discussion of ideas</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4</td>
</tr>
</tbody>
</table>

- Under bad tendency, all are punishable
- Holmes and Brandeis say 1 & 2
- *Dennis*: 1 & 3
- *Brandenburg*: 1, & maybe only a subset of those

*6. Threats and provocation, pp. 65-72 (Bridges); Supplement #3 (Cantwell v. Connecticut). Do not read the edited version of Cantwell in Stone, Seidman.

- Unclear how Incitement shakes out, after *Brandenburg*
  - Not a whole lot of incitement prosecutions
  - May or may not be a seriousness prong; court probably wouldn’t care about incitement to littering.
  - Media co.s have been sued for copycat crimes; cases turn on intent
- Threats: black-letter law is that true threats are outside protection of first amendment
  - Hyperbole is not, see *Watts*
  - A true threat is “a serious expression of intent to commit unlawful violence to an individual or group.”
- Speaker & audience, and speech makes audience do unlawful things:
  - Incitement, + 2 other analogous concepts to which court has applied “clear and present danger”:
  - Threats: speaker makes audience act against its will (*Bridges*)
  - Provocation: audience gets mad & can’t control violence (*Cantwell*)
- *Bridges v. CA*, p. 65 (1941):
  - Companion cases: 1) Union president threatened a strike if trial judge enforces order against him, 2) threatens that it would be a “serious mistake” if another judge grants probation to a couple of criminals
  - Black, @ this time likes “clear & present danger,” still in “preferred freedoms” era: substantive evil must be “extremely serious” and degree of imminence “extremely high
  - Supreme Court not about to presume weakness on part of judge (caving in to threats)
  - Frankfurter’s take: to be punishable, publication must refer to a matter under consideration and constitute threat to impartial disposition
- *Cantwell v. Conn.*, supplement (1940)
  - Jehovah’s witnesses playing anti-Catholic diatribes on a phonograph
  - Roberts’s “what this case is not”: noise control, fighting words
  - Kind of a “First Amendment” case; the free speech aspects aren’t easily separable from the religious aspects
  - Breach of peace laws unconstitutional as applied—or, Cantwell’s conduct did not amount to breach of peace
    - In absence of a statute designed to get at a particular type of speech (*Gitlow*), must be a clear & present danger; Cantwell’s was not that; he wasn’t trying to provoke anyone
  - And requiring a permit to solicit religious materials is unconstitutional as a prior restraint
    - Had to get license from state minister to solicit
  - No proof of “clear and present danger” or anything, so gov’t had to let him solicit even though it pissed some people off.
- Flag salute case, court decides it’s OK to force Jehovah’s Witnesses to submit to compulsory flag salute.
- Sort of overturned in *WV Board of Schools v. Barnette*

*9/7, notes on laptop*

*7. Fighting words, Chaplinski, and the Skokie controversy, pp. 83-89 (Chaplinski); 72-73 (Terminiello); 76-83 (Feiner); 89-92 (Skokie).*

**Fighting Words:**

- **9/12, notes on laptop**

  - *Chaplinski, p. 83*
    - Jehovah’s Witness called organized religion a “racket” and a cop a “fascist.”
    - Black letter law: fighting words are unprotected by First Amendment, categorically
    - Rationale for exclusion:
      - Words inflict injury
      - Tend to provoke an immediate breach of the peace
      - Words are “low value”: don’t bring anything to public sector or search for truth. Not reasoned dialogue. Just trying to hurt someone with words is not a significant injury
    - Significant jurisprudential step: carving out a whole category that receives no First Amendment Protection
    - Doctrine rests on assumptions of masculinity (it’s appropriate to fight, & can’t hold back); emotive power of insults
    - *Chaplinsky* is still good law & cited approvingly, but the SC has never since upheld a conviction for fighting words.
  
  - **Terminiello**
    - Speaker inside an auditorium calling people on the outside “bedbugs”
    - Douglas opinion: as long as speech does not create a “clear and present danger of unrest,” it’s protected
    - This case seems more appropriate with *Cantwell* than *Chaplinsky*
    - Can’t punish speech just b/c it creates unrest— that’s the point of speech
  
  - **Feiner**
    - I don’t think we talked about this case
    - Black man giving a public address; arrested for breach of peace after the police feared a riot
    - Conviction upheld: police can punish when there’s a clear & present danger of riot
      - But, can’t be used as instrument for suppression
    - J. Black dissented
      - No likelihood of riot; police had obligation to protect speaker’s right to talk; speaker had no right to shut up simply b/c police officer asked him to.
    - Subsequent cases limit *Feiner*: convictions of civil rights protesters vacated.

  - **Skokie**: controversy, no real SC precedent of significance

*8. Disclosure of confidential, secret, or private information, pp. 92-111; 163-68.*

- **9/14, notes on laptop**
- **Landmark Communications v. VA**, p. 92 (1978)
  o Newspaper gets wind of investigation of a sitting judge for corruption; publishes
  o Court rejects “clear and present danger” approach for a balancing inquiry
  o Rather than punish, court suggests judicial system police itself & internal leaks better
  o Small town murder case; press about D’s confession
  o Here, you have 2 constitutional rights in opposition, rather than constitutional right vs. gov’t interest in efficiency or something
  o This is a classic prior restraint on speech, gag order
  o Judge should have used less restrictive means to get at interests—change of venue, instruction to jurors, etc.
    ■ “Less restrictive means” very important here, and jurisprudentially
  o Hard to see what to take away from the case b/c so many opinions
  o Presumption vs. prior restraint is very strong, especially when you have 2 leading newspapers & page 1 news
  o Newsworthiness + prior restraint + public importance prohibit gag order
  o Alternative to prior restraint: hire people who won’t leak; punish leaks
  o Wiretap case: anti-wiretap statutes can’t be applied to radio station in broadcasting calls when the radio station didn’t participate in the wiretap
  o So, if a newspaper participates in unlawful collection of info, it can be punished; 1st Amendment does not immunize
  o But, 1st Amendment prohibits restraints on publication, even when material is obtained illegally (by someone else)
  o Statute as applied to NY Times is unclear: Bartnicki applied to personal privacy, not 1st Amendment
  o MIGHT MAKE INTERESTING EXAM QUESTION
- **Cox Broadcasting Corp. v. Cohn**, p. 163 (1975)
  o Broadcast name of rape victim; Cox was sued for $$ damages
  o Pretty significant pedigree for privacy rights
  o Focus on narrow issues, not broader question of whether truthful publications may be subjected to civil / criminal liability (not for defamation! See below)
  o Press has responsibility to report on matters of public concern; privacy rights fade when information is of public record; info is not unprotected speech
  o Not going to make public records available to media but prevent publication
  o Need to do a better job of self-policing.
- **Florida Star v. B.J.F.**
  o Court invalidated a statute declaring it unlawful to publish the name of a sexual offense victim, as applied to a publisher who learned the name through a publicly released police report.
- **Progressive** secret of the H-bomb case, never made it up to the SC
  o J. Black dissented

**Unit II: Overbreadth, Vagueness, and Prior Restraint**

- 9/19, have on laptop

- Freedom of the press = freedom from prior restraints. Blackstone

- Lovell v. Griffin (1938)
  - Lovell, a Jehovah’s Witness, distributed leaflets w/o a license to do so
  - Standardless licensing; leaves too much discretion in the hands of the bureaucrat
    - Lacks procedural protections of criminal procedure; might have overcensorship (if your job is to censor, will make sure you do that)
    - Also makes self-censorship more likely (chilling effect)
    - Makes it harder to distinguish legitimate use of power from abuse
    - Applies as well to standardless licensing schemes w/ close enough nexus to expression to pose a real & substantial risk of censorship risks
      - For ex, standardless ordinance about license to place newsracks
    - Constitutionally-required safeguards for noncriminal submission to film censor:
      - Burden of proving film is unprotected is on censor
      - Stat may not require advance submission in a way that lends effect of finality to censor’s decision
      - Must be court review
      - Must be prompt

- Near v. Minnesota (1931)—gag order against paper treated like a prior restraint
  - Injunction against newspaper—“Jewish gangster”
  - Forcing paper to prove truth of its articles is prior restraint
  - Reasons for treating this like a prior restraint:
    - Unconstitutional injunctions must be followed—Richards doesn’t find this very convincing.
    - Gag orders prevent ideas from getting out, much like licensing. In a subsequent punishment regime, the ideas do get out
  - Principle is probably pretty absolute. Case suggest exceptions: might be able to gag publication of troop movements.
    - In theory, not a blanket prohibition on gag orders
    - If gag orders were allowed, must be extremely narrow & gov’t interest must be very, very important.
    - This is what the Pentagon Papers case was fought over.


- so I’m missing 9/21 and 9/26. But I seem to have #11...

- Overbreadth
  - Gooding v. Wilson: an arrestee had uttered fighting words toward a policeman; but the statute wasn’t confined to fighting words
    - Overbreadth allows person to attack statute w/o having to show that his own conduct was not regulable.
    - Justified b/c people may not exercise their right to speak for fear of criminal sanction.
    - Also, possible selective enforcement
  - Court has no authority to adopt narrowing construction
Overbreadth must be substantial: *Broadrick v. Oklahoma*: statute cannot be invalidated based on mere predictions, when state is acting w/in its power (otherwise)
  - Must be a realistic danger that statute will compromise 1st Amendment freedoms b/f it can be facially challenged on overbreadth grounds.
  - Vagueness: if persons “of common intelligence must necessarily guess at its meaning”
    - Overlap b/w this and overbreadth.
    - Applies to all criminal law out of fear of application on an ad hoc basis.
    - Applies w/ special force in 1st Amendment situation b/c
      - Specificity shows us that legislature focused on 1st Amendment interests and decided that other important state interests compelled regulations
      - Vague statutes inhibit 1st Amendment freedoms; citizens will steer wide (chilling effect)
      - Selective enforcement concerns.

Unit III: Content-based Regulation of “Low-value” Speech

   - 9/28, laptop
   - Defamation is unprotected speech:
     - Slander (spoken); libel (written); seditious libel (any statements tending to bring gov’t into disrepute—used to include true statements)
     - *Chaplinsky*: classed with Fighting Words
     - *NY Times* is first instance of limitation on state’s regulation of defamation
   
   *NY Times v. Sullivan*, p. 141 (1964)
   - Police chief suing to shut up NY Times in civil rights-era south
   - Black-letter law: In order for public official to recover for libel (defamation), must show that D published the false statement with actual malice w/ regard to falsehood (either actual knowledge of falsehood, or reckless disregard for truth)
     - Rationale: people might self-censor if they’re not sure of facts, if they have to prove truth (old standard)
       - Also, falsehoods worthy of protection, b/c they bring more truth or clearer perception of truth due to “collision with error.” This might be wrong...
   - Good exam quote: “debate on public issues should be uninhibited, robust, and wide-open.”
   - Justice Black wants absolute immunity for press when commenting on public officials
   - Definitional balancing vs. ad hoc balancing
     - This is definitional balancing: balances under the entire category of libel cases to draw the line on which low-value speech is protected
       - Cost vs. benefit of all libel cases
     - Would be ad hoc balancing if it balanced w/ regard to the facts of this case
   - Is the standard underprotective or overprotective?
     - Maybe underprotective: the cost & threat of a lawsuit itself might cause people to watch what they say. And gov’t has lawyers in its services. Too much to defend, even if you’ll win?
     - Maybe overprotective: chilling effect on true speech, but also on false speech. People might be more careful & deliberate in what they say.
       - Maybe interest in reputation is worth protecting
Might drive people who aren’t thick-skinned out of politics.


- 10/3, Red Spiral
    - Gertz represented a Chicago policeman in a murder case, and lost. The John Birch Society accused him of conspiracy to frame the cop, and of being a communist.
    - No such thing as “false idea” under 1st Amendment; false facts are punishable
    - Public figure holding: 2 types:
      - All purpose—people of general fame / notoriety—President, Oprah
      - Limited purpose public figure—People involved in a particular newsworthy event (the D): public figures for stories about the context in which they’re a public figure
      - Gertz is 2nd category: lawyer in a private case, hasn’t sought fame.

    - Damages holding:
      - To recover *actual damages*, has to be something more than SL
        - State interest extends only so far as compensation for actual injury
        - Doesn’t matter what standard; negligence is OK
        - But, can recover w/o proof of actual damages if you prove *NY Times* standard
      - To recover *punitive damages*, *NY Times* standard (malice) must be proved

    - Why the different standard?
      - Public figures assumed the risk
      - Public figures have greater access to communication; can rebut
      - Nature of subject a value for speech (speech about public figures presumably more valuable, or more likely to be about public issues)

    - Burger: shouldn’t constitutionalize law of libel
    - White: this is a huge subsidy for printers.

- Dunn & Bradstreet
  - A credit reporting agency sent a false credit report; and the SC upheld the damages
  - Court did not address the media / nonmedia defendant issue.
    - State court had held that *Gertz* didn’t apply to nonmedia defendant.
  - Speech was not a matter of public concern, but state interest in libel was the same, so it’s regulable
  - 2 concurrences want to overrule *Gertz* and are OK to limiting *Gertz* to issues of public importance.
  - Since it’s just a plurality, unsure of what the rule actually is
    - May not be any protection for truly private defamation.
    - *So, Gertz may apply to public concern / nonpublic figures? Ask Richards about this*
      - Marks doctrine: rule that governs is the narrowest rule that can be gleaned from justices supporting judgment
  - Dissent thinks that nonmedia rights are same as media rights. & *Gertz* isn’t limited to public interest.
I have in the notes that the “dissenters think prong 3 of *Gertz* is
categorical. Why?” But I don’t know what prong 3 is. *Gertz* doesn’t
seem laid out in prongs—ask Richards

  - Falwell suing for intentional infliction of emotional distress (IIED)
    - Doesn’t have to plead actual malice for IIED; clearly can’t win in libel (it’s a
      parody, no facts)
  - Rehnquist thinks that Hustler’s satire is a lot like a political cartoon
  - Speech inflicting IIED is not low-value speech, not outside 1st Amendment
  - A standard of “outrageousness,” separating this from political cartoons, is
    unworkable.
    - Bad motive / meanness is protected; allowed in cases of public figures.
  - Public figures can only recover for IIED if they show that publication contains false
    statement of fact made w/ actual malice.


- 10/5, Red Spiral
  - *VA State Bd. of Pharmacy v. VA Citizens’ Consumer Counsel* (1976)—restriction on pharmacist
    advertising
  - Protection of commercial speech:
    - Doesn’t lose protection if $$ paid for speech (*NY Times v. Sullivan*)
    - But speech on a commercial subject may be on a matter of public interest
    - Speech that proposes a commercial transaction is not w/o protection
    - Can’t draw a line btw publicly imp. commercial ads & the other
    - Free flow of commercial information is essential, in aggregate, to allocation
      of resources in free market society; also, indespensible to formulation of
      intelligent opinions as how system should be formed.
    - State’s claims of protectiveness merit attention (professionalism is important)
      but revolve around citizens being kept in ignorance. 1st Amendment doesn’t
      permit that
  - However, commercial speech can be regulated (what this case is not:
    - TPM restrictions can be imposed if they 1) are justified w/o reference to
      content, 2) serve significant gov’t interest, 3) leave open alternate channels
    - False & misleading ads may be forbidden
    - Also, could forbid ads for transactions that are themselves illegal
    - But state cannot suppress truthful information about lawful activity b/c of
      fear that the information will have.

  - Law made it unlawful for utilities to engage in promotional advertising (to stimulate
    energy use)
  - Court: 4 part analysis for commercial speech:
    - Whether expression is protected by 1st Amendment (must, at least, concern
      lawful activity & not be misleading)
    - Whether the asserted gov’t interest is substantial
    - If yes: does the regulation directly advance the gov’t interest
    - Could gov’t interest be secured by more limited restriction on commercial
      speech?
Here, regulations can’t survive: though state interest is substantial, esp. in light of conservation, there was 1) no exception for ads that would increase electricity use by decrease total use (increasing efficiency) and 2) could do this by more targeted of ads, such as requiring that the ad include information about efficiency.

Blackmun: this is insufficiently speech protective: the statute here strikes @ heart of 1st Amendment b/c it is an attempt to manipulate choice of citizens by depriving the information necessary to make that choice (rather than by persuasion).

Rehnquist doesn’t like protection for commercial speech here, either (didn’t in VA).


- Apparently missing 10/10
- Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico—PR prohibits ads for gambling
  o Rehnquist (hostile to commercial speech rights) wrote opinion
    ▪ Decreasing demands for gambling a “substantial gov’t interest”
    ▪ Challenged regulations “directly advance” this by lowering demand
    ▪ Measures are “no more expansive than necessary,” since PR is not required to permit the speech and then engage in its own counterspeech.
    ▪ Legislature has power to ban casino gambling outright; greater includes the lesser.
  o Brennan’s critique: this isn’t really Central Hudson, just deference to legislature dressed up in the test
- Liquormart, Inc. v. Rhode Island—attempt to ban price advertising for liquor
  o Stevens: convinced that Posadas was wrong: not up to legislature to choose suppression over less restrictive policy
    ▪ Requires evidence b/f concluding that this policy will further state interest
    ▪ Regulation not “no more extensive than necessary”: other ways to satisfy state goal such as regulation, raise taxes, educational campaigns.
  o O’Connor: notes that since Central Hudson, Court has been more searching of state interest & restrictiveness of statute.
  o Thomas: when gov’t’s interest is to keep legal users in the dark, shouldn’t even apply Central Hudson. Just hold gov’t conduct impermissible.
- Lorillard Tobacco Co. v. Reilly—Mass. regulation of outdoor tobacco advertising near schools
  o Unnecessary to consider validity of Central Hudson: regulations were unconstitutional even under that standard: broad sweep of geographical area; failed to show that regs are “not more extensive than necessary”
  o Thomas: No philosophical / historical basis for saying that commercial speech is lower value
  o Stevens: have to look @ whether there are alternate avenues of communication
- Thompson v. Western States Medical Center—allows compounded drugs to be exempted from FDA approval requirements, but only if they’re not advertised
  o Court invalidates this:
    ▪ Interest in free flow of commercial info “may be as keen as interest in the day’s most important political debate”
    ▪ Speech reg is not “no more extensive than necessary” Could prohibit commercial scale manufacturing or wholesale sale of compounded drugs
    ▪ Dissent’s described gov’t interest is not argued by gov’t; the idea that people need to be protected from truth is anathema
- Dissent: not that gov’t fears truthful info. They fear rational decisionmaking in a vacuum of testing
  - Also, 1st Amendment not automatically violated by commercial ad restrictions:
    - Don’t repress self-expression
    - Rarely interfere w/ democratic process
    - In fact, such restrictions often result from democratically-determined decision to protect consumer.

- 10/12, in black spiral book

- Definitional question (what is obscenity) / suppression question (why is suppression ok?)
- Original standard
  - Regina v. Hicklin (1868): whether the tendency of the matter is to “deprave and corrupt” those whose minds are open to immoral influences
  - Early 1900s SDNY case rejected this test and focused on the dominant theme of the work as a whole.
- Roth v. US, p. 198 (1957)
  - Obscenity can be regulated; receives no 1st Amendment protection
  - Test here is:
    - Would the average person
    - Applying contemporary community standards (objective w/ regard to space, time)
    - Find the dominant theme of the material as a whole (one randy passage won’t do)
    - Appeals to the prurient interest (so, sort of intent test for the reader?)
      - Speech primarily intended to arouse sexual desire.
  - Douglas in dissent:
    - No originalist support for suppression of sexual expression
    - Gov’t shouldn’t be deciding value of expression.
- Confusion in the interim
  - Court unable to agree on standard: Stewart’s “I know it when I see it.”
    - Dominant theme of material as whole must be obscene
    - Material must be “patently offensive to contemporary social standards
    - Material must be “utterly w/o redeeming social value.”
  - Stanley v. GA (1969): private possession of obscene material can’t constitutionally be made a crime.
  - But, US v. Reidel. Stanley is limited to the home. Doesn’t give constitutional protection of sale of porn to consenting customer. Stanley didn’t overrule Roth, nor will the court.
- Miller v. California, p. 206 (1973)
  - Miller convicted of sending obscene ads through the mail.
  - Court’s attempt to get final answer to definitional question, has three guidelines
- Whether the average person, applying contemporary community standards, would regard the work as a whole as designed to appeal to the prurient interest. (prurient)—local standard
- Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law (offensive)
  - Richards: “must gross you out and turn you on
  - Specifically defined to provide the pornographer w/ notice, avoid vagueness
- Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value
  - Refuses to adopt the “utterly without redeeming social value” construction from Memoirs
  - This is a national, objective standard, but realistically if you lose before a jury on 1 and 2 you won’t win on this. For protection through appellate review?
- Courts have generally accepted local community standards for internet, rather than national standards, or community standards of reasonable internet user
  - Paris Adult Theaters I v. Slaton, p. 209 (1973)
    - Wanted to play videos of simulated fellatio in a movie theater to consenting adults.
    - Reject that Stanley governs. This is not private, and consenting adults is not enough.
    - Legitimate interests in regulating obscenity: quality of life, tone of commerce, safety
      - Quotes a Bickel article that essentially says “obscenity in public affects us all, and it’s sophistry to say that offended people should simply avert their eyes.
      - No conclusive proof of connection btw obscenity and antisocial behavior, but look at history & past 2 decades.
    - State has power to make moral judgment that obscenity injures the community.
  - Why is obscenity suppressed?
    - Because we always have—not a good answer: sedition, blasphemy, etc. fall in too
    - Lacks social value: not part of search for truth, doesn’t further self-gov’t
    - Theory that it can be suppressed b/c of appeal to prurient interest does’nt make room for art & literature, which is protected
    - “Obscenity is not speech, it’s stimulation”
      - But, so are tearjerkers (Beaches) and those are protected
      - Plus, those things operate through the intellect; so does obscenity
    - Gradual debasement of person, operating on a sub-rational level
    - May be valueless expression, but is still expression
  - Miller, Paris are good law, but we’re “awash in obscenity.”—social acceptability, prosecutorial discretion, new media (VHS & DVD, internet)

- 10/17, also in black spiral
    - D sold tapes of young boys masturbating; jury held this wasn’t obscene, but it violated a NY statute.
    - Child porn is not protected, but is a separate category from obscenity (?):
- State’s interest in protecting children is compelling
- Distribution of kiddie porn is a permanent record of exploitation, &
distribution network must be cut off to control the exploitation
- Advertising & selling kiddie porn creates a market for its production, which
is illegal.
- Value of permitting this “speech” is modest, if not de minimis. Find it
doubtful that this will ever be valuable part of expression of any ideas.
- Classifying kiddie porn as outside 1st Amendment is not incompatible w/
earlier decisions; can carve out content-based classification b/c evil to be
restricted overwhelmingly outweighs expressive interests (if any)
  - Test is separate from obscenity, modifies *Miller*:
    - No requirement that material appeals to the prurient interest of an average
    person
    - Not required that sexual conduct is portrayed in a patently offensive manner
    - Material at issue need not be considered as a whole
  - So, the new test:
    - 1st prong: does it become: material must appeal to someone’s prurient
    interest? To this D’s prurient interest? Or is there no requirement of
    prurient interest? **This is a question for Richards**
    - Whether the work depicts or describes sexual conduct specifically defined by
    applicable state law—no requirement of patent offensiveness.
    - Either 1) material in this part lacks serious literary, artistic, political, or
    scientific value, or 2) there’s no inquiry into this. **Another question for
    Richards**
- *Bartnicki v. Vopper* again: argument by analogy that it doesn’t make sense to prohibit X from
showing the movie if it was illegal for Y to make it. B/c in *Bartnicki* the radio station
couldn’t be punished for airing the wiretapped call
- *Osborne v. Ohio* (1990): *Stanley v. GA* does not extend to possession of kiddie porn: state is not
trying to regulate D’s mind, but destroy market for exploitative use of children
  - Creation, not consumption harm.
  - But, what about prostitution? State can criminalize that, and adult porn DVDs are
essentially videotaped records of that. Many of *Ferber’s* arguments would apply w/
equal force to adult porn. Ideological bases are inconsistent.
  - Kennedy: Court invalidated Child Pornography Prevention Act (virtual porn)
    - No harm of child abuse (using of-age performers or virtual representations)
    - Value of speech potentially great—Romeo & Juliet, Traffic
      - Inconsistent w/ *Ferber*; Kennedy accepts this as an area where speech
      might have value.
    - Also, tendency to encourage bad acts (pedophilia) is no excuse for banning
    speech
  - Concurring opinions: if it becomes difficult to tell the difference (real children
become indistinguishable from virtual children), should let the government step in
and regulate. And, the statute should be limited by such a construction.
- Doctrinally inconsistent w/ the adult obscenity decisions, but there’s a lot of political will
behind this
Profane speech = speech that is offensive to listeners and readers. Is there speech that can be regulated b/c offensive or annoying to recipients?

*Cohen v. California*, p. 225 (1971)—“Fuck the Draft”

- Harlan’s discussion of what this case is not:
  - Fighting words—important fighting words holding. They must be provocative to violence and directed at a person. Harlan severs them from indecency.
  - Not a hostile audience
  - Not libel—no false statements.
  - Not captive audience—you can avert your eyes (distinct from the privacy issue—Cohen is not coming into your home).
  - Not obscenity. But if the case were analyzed under obscenity, *Miller’s* 3rd prong (serious political value) might protect speech. Direct criticism of gov’t policy
  - Gov’t interest: keeping discourse @ a high & civil level. Legitimate, though not compelling. 2 responses to this:
    - Court rejects that this is low value speech. It’s political speech cannot be censored; form of speech doesn’t matter. “One man’s vulgarity is another man’s lyric.”
      - Plus, words are emotive and may be best way of expressing honestly-held feelings towards the draft.
      - Fear of gov’t regulation: “fuck the draft” more likely to be punished than “fuck communism.”
    - Constitution leaves balance up to individual, not gov’t. Remedy is counterspeech, not jail or fines.
      - Note that in obscenity law, offensiveness is considered as part of the harm.

  - Court upheld ban on controversial ads inside city buses
  - Idea here is that bus-riders are captive audience & state could protect them by banning all speech
  - So, can ban the smaller class of controversial ads (for abortion services, vs. regular commercial ads. For cookies.)

  - Invalidated ordinance prohibiting nudity in drive-in movie theaters
  - Tried to suppress b/c nuisance: but these drivers aren’t captive audience. Have to look away.
    - “Avert the eyes” here really distorts it (Rehnquist in dissent).
  - Police power to protect children—not all nudity is obscene, and this isn’t directed at sexually explicit nudity (overinclusive)
  - Will distract passing motorists—but so might violence or Aladdin. (underinclusive)
  - Ordinance tries to regulate offensiveness, but only regulates offensive nudity. So it’s overinclusive. But a statute targeting just offensiveness would probably fail too.
    - Could be vague; might drop discourse improperly to the level fit for children; definitional problem (what is “offensive”?)
- 10/26, on laptop

- *FCC v. Pacifica*, p. 233 (1978)—George Carlin’s “seven dirty words”
  - Plurality opinion (Stevens)’s repudiation of *Cohen* (NOT part of majority opinion):
    - Court says that the vulgar language is “no essential part of any exposition of ideas...” from *Chaplinsky*
    - Where *Cohen* says that “we won’t judge the language used,” *Pacifica* plurality says “we will judge, though some like Carlin.” Essentially, turned to “one man’s lyric is another’s vulgarity.
    - Powell’s opinion (w/ Blackmun) explicitly disclaims this attempt to judge which speech protected by 1st Amendment is most “valuable.” That’s a judgment for listeners
  - Holding is essentially confined to facts:
    - Broadcast of vulgar words, over a medium accessible to children, during a time that children might hear, over a broadcast medium (radio) that can come into your home, over a public commons (air; ability to listen), when it’s not a total ban but a limitation on broadcast hours, and there’s no actual punishment (just warning / censure)
    - This is ad hoc balancing
  - Some (poor / inconsistent) rationale behind the case:
    - Accessible to children? Why? Because they can listen? Are drugs uniquely accessible to children b/c of small hands?
    - Case about privacy of home, but in your home you can shut the radio off. No one’s coming in and turning your radio on for you.
      - Also, that rationale doesn’t apply in the car, where you don’t have that expectation of privacy. (Drive-in movies)
    - Streets & courthouses also public commons; that’s not enough for regulation
  - *Sable Communications v. FCC*, p. 239 (1989)
    - Held unconstitutional a federal statute that banned “dial-a-porn”
    - Adults have to dial in, specifically dial that number; makes it different from radio (opt in vs. opt out)
    - Some children might get in, but prohibition limits adult conversations to the level suitable for children.
      - Have to protect ability of adults to engage in adult discourse; as long as you keep casual children (children not trying to get in) safe, that will probably be enough
  - Amendments to Cable Act of 1984,
  - Upheld section 10(a), which allowed cable operators to not carry programs they believed to be indecent; prohibits less, not more, speech than *Pacifica* (and thus OK)
  - Struck down 10(b), which required cable operators to segregate indecent programming on one channel & only provide it upon subscriber’s request
- Struck down as not narrowly tailored, overbroad, has chilling effect. People might not want to opt in. More narrowly tailored to let people opt out.

    - Strikes down part of the Communications Decency Act of 1996 which made it illegal to broadcast stuff over the internet knowing it’d be available to minors.
    - Factual distinctions from *Pacifica*: wasn’t a total ban, there was no punishment there, and affirmative steps are required to access internet.
    - Also: don’t want to drop adult discourse to level of children; not least restrictive means
    - Internet treated like newspaper, not radio—taken seriously, not “new” area where regulation is OK
    - **Possible exam question—Zoning the Internet?**

    - Scarcity of broadcast spectrum means that there’s greater opportunity for gov’t regulation; major rational for different treatment of broadcast media vs. print / electronic media.

  - *US v. Playboy Enterprises*
    - Struck down legislation requiring cable providers to either 1) fully block porn channel, or 2) limit the bleed—adults might want to watch porn b/f 10 PM
      - Example of discourse not dropping to the level of children.


  - **10/31, on laptop**

  - Content-based restrictions vs. content-neutral
    - Content based = regulate speech based on its content (obscenity, defamation, incitement, etc.)
    - Content neutral = On its face, regulating something other than speech (trespass)

  - *Young v. American Mini-Theaters*
    - Zoning regulation: adult theaters can’t be located w/in 1000 feet of other “regulated use” businesses
    - This is content-based, but facially enacted for a content-neutral reason
    - IMPORTANT: AMT didn’t raise the argument that this regulation imposes a limit on the # of adult businesses.
    - Stevens’s reasoning:
      - Speech is regulated in a viewpoint-neutral way, here
      - Society’s interest in this is far less than in other types of speech; state can classify this based on content
        - Not accepted by full court
        - Rejects the *Cohen* view that court shouldn’t be determining relative values of speech
      - City has interest in preserving the quality of urban life
    - Powell: doesn’t join underlined bit
      - This isn’t trying to gag speech; city can regulate these businesses based on their effect on the community
      - Lays out 4-part test to judge constitutionality of content-neutral regulations that incidentally impact 1st Amendment rights:
• W/in constitutional power of the Gov’t
• If it furthers important or substantial gov’t interest,
• Gov’t interest is unrelated to suppression of free expression
• If incidental restriction on 1st Amendment freedoms is no greater than is essential to furtherance of that interest

- City of Renton v. Playtime Theaters
  o Rehnquist realizes that the “lower First Amendment value” argument won’t fly” (see above)
  o City can enact this type of ordinance w/o empirical evidence about 2ndary effects; can learn from the effect of such businesses on other cities (Detroit)
  o Also rejects underinclusion argument: city can regulate 1 industry that produces these 2ndary effects w/o regulating others
  o Rejects argument that city didn’t leave open other avenues of communication b/c only 5% of land available for these businesses: 1st Amendment doesn’t compel that speech must be had @ bargain prices (interesting characterization)
  o Compare to Lorillard (ban on tobacco billboards)
    ▪ Have powerful 2ndary effects there (kids want tobacco), but not crime, prostitution, depressed property val, etc.
    ▪ In Lorillard, law was struck down: prevents adults from getting the info they need.
  o Compare to Brandenburg: super-high value speech vs. lower-value speech: only works if we don’t consider the valuation too much.

- City of LA v. Alameda Books
  o No first amendment objection to prohibiting multiple adult businesses in the same building, so long as it’s aimed at 2ndary effects. Even though this will limit speech (overhead goes up)
  o Content-based zoning doesn’t automatically make it unconstitutional.
  o Statute can’t be based on an impermissible purpose (or effect) of targeting speech itself (per Kennedy’s concurrence)
  o Would 2ndary effects doctrine justify prohibiting Grateful Dead concert, or political rally, b/c of litter? Seems ridiculous example, but maybe ridiculous b/c sexually explicit speech is less valuable? But that’s inconsistent w/ the rest of indecency law.

- Nude dancing: is w/in outermost bounds of the First Amendment, but it is protected, expressive speech.

20. Hate Speech I: Beauharnais and R.A.V., pp. 255-74

- 11/2, on laptop

- Beauharnais v. Illinois (1952)
  o Speech criticizing black ppl, as group, for violence & drugs; application of Illinois’s criminal group libel law was upheld by Frankfurter.
  o Applies rational basis review, and racism is a HUGE problem @ that time, so OK
  o What warrants the hands-off approach?
    ▪ History: reference to racial & religious minorities (Frankfurter’s experience w/ anti-semitism; 2nd world war)
    ▪ Deference to legislatures in post-Lochner period; FF took a little farther
- Criminal libel laws upheld as constitutional: pre-
  Sullivan, no case considered constitutionality of libel
  - Group libel is far less easily quantifiable as true vs. false
  - Beauharnais didn’t get to prove his speech was true, but his offer of proof didn’t include that his speech was made w/ good motives, so that’s OK too
  - Assessment under current doctrine: would be categorically unconstitutional:
    - It’s his opinion, political speech, & hard to evaluate speech abt a group for “truth” or “falsity”
  - Might this be unprotected speech?
    - Not incitement: no imminence; lawbreaking might not be serious
    - Fighting words? No—they make no contribution to public discourse. This (arguably) does. Plus, no immediate risk of violence; not directed @ a person.
    - If hate speech were regulable...
      - Why it might be: little contribution to public discourse; words wound (like fighting words); handicaps exchange of ideas; gov’t interest in racial equality from 14th amendment & enforcement clause
      - Why it might not be: basis for marketplace of ideas (we’ve been wrong before abt fundamentals); speech on matter of public concern; 1st Amendment is a right of dissent from majoritarian norms; arguments were made during McCarthy era, but speech wasn’t really a problem like it was made out to be.

- RAV v. City of St. Paul, Minn.
  - Court strikes down crossburning statute (bias-motivated crimes), Scalia op.
  - Cross-burning is punishable as conduct (arson, trespass) and speech (fighting words, true threat)
  - Within a category of speech that’s proscribable by content, can’t further discriminate based on viewpoint (ban only fighting words expressing a particular viewpoint, for ex—can’t do it)
  - Can ban a subcategory of proscribable speech if those lines are reasonably related to the reason that the speech is regulable in the first place
    - Grossly offensive obscenity; kiddie porn that punishes more for a younger age
    - But then, isn’t cross-burning just a really bad type of fighting words, and thus bannable for the reason the category is bannable? No, says Scalia, b/c this is viewpoint discrimination.
  - Stevens’s response: people are free to speak, but must do so with words
  - White’s response: forget this. The statute is overbroad—bans a lot more than fighting words. Scalia’s analysis is confusing and overcomplex
  - Maybe this ordinance does level the playing field, since there’s no similarly-hateful symbol for advocates of tolerance to use.

  - In retaliation for a white beating of a black kid, Mitchell (a black kid) severely beat a random white kid, and had his sentence increased under a hate-crime statute.
  - Assault is not expressive conduct.
  - But, this statute enhances sentence b/c of motive
We’ve rejected employers’s claims that Title VII violates 1st amendment rights
- Distinguishing from R-A-V: the statute in this case aims at conduct unprotected by 1st Amendment.
- Plus, state has adequate reason for enhancement that’s not disagreement w/offenders’s beliefs: bias-motivated crimes are more likely to provoke retaliation, incite community unrest, inflict distinct emotional harms.

Great Final Exam Question: Zoning of the Internet. Could secondary effects apply to internet zoning?

   - Missed this class (11/7 – Legal Profession paper)
   - *VA v. Black*—Cross-burning statute allowed for cross burning to be used as prima facie evidence of intent to intimidate.
     - Majority recognized that cross burning could be a true threat but could be political speech
     - Statute improperly allowed people to be convicted even when the person was making political speech, b/c it allowed the jury to use the mere fact of cross burning, w/o more, as evidence of intent.
       - Scalia: it just lets it get to the jury! Jury can acquit if no evidence of intent
       - That’s not good enough. Plus, with the jury being instructed that this is prima facie evidence of intent, deliberations might be skewed.
   - Porn as hate speech.
     - Anti-porn ordinances arguably (by feminists) justified on the basis that:
       - Marketplace of ideas breaks b/c social power is distributed to dominant groups, so “free speech” perpetuates that.
       - Operates at sub-rational level; conditions men to associate harmful attitudes towards women w/ sexual excitement.
       - While justified by pornographers on self-expression grounds, it prevents women from fully developing their own dignity & choice.
         - *American Booksellers Association v. Hudnut* (7th Cir. 1985)
           - Anti-porn statute like the model statute was strick down
           - Racial bigotry, anti-Semitism, etc. also affects socialization. But though insidious, it’s protected.
   - Indy’s statute is not coextensive w/ obscenity; statute is viewpoint discrimination

**Unit IV: Content-Neutral Restrictions**

22. Introduction to content neutrality, pp. 281-95.
   - 11/9, on laptop
   - Sunstein’s response to pornography as hate-speech: not viewpoint based: regulation is based on a harm (to the women who work in pornography—much like kiddie porn)
   - Arguments about porn as hate speech:
     - Marketplace of ideas doesn’t work here
     - Pornographers act insidiously; porn operates at sub-rational, -cognitive level
Million $$ industries behind them
Acting against the backdrop of cultural subornation of women
- Can gov’t regulate in favor of powerless viewpoints when there’s a market failure?
  - Might not trust gov’t to balance playing field (pure motive) vs. actually trying to suppress (impure motive)
  - Might not trust gov’t to get it right (error)
  - If gov’t can regulate against disfavored viewpts when market fails, that applies to more than porn; have to rethink other areas
- Grand theory of why certain types of speech are less protected? Sunnstein has one:
  - Away from core control of political affairs
  - Second, distinction between cognitive & non-cognitive aspects of speech
  - Treated more favorably when you make a political message
  - Various classes of low-value speech reflect judgment that gov’t is unlikely to be producing constitutionally troublesome harms (may be circular)
- Why isn’t “violent speech” low-value, but sex speech is?

Content-neutrality:
- Viewpoint-based, content-based, content-neutral
  - Viewpoint based: can’t place ad critical of Iraq war: presumptively invalid
  - Content-based: prohibits billboard ads discussing Iraq war: suppresses discussion, but gov’t not threatening outcomes (but, still will be a differential impact on who can speak): strict scrutiny
  - Content-neutral: prohibits billboards: analyzed under intermediate scrutiny. Risk of viewpoint discrimination even less here.
- Schneider v. State: strikes down anti-littering ordinance as applied to leafletters.
  - Unclear whether problem is substantiality of the interest (anti-litter), tailoring (apply this to the people who litter), or both.
- Martin: strikes down ordinance prohibiting door-to-door soliciting
  - This is important means of communication, and may restrict ability of poorer people (who can’t afford media) to speak
  - Also, gov’t can’t make the choice for people—but it can enforce “no solicitation” signs & do not call registry
  - Along w/ Stanley v. GA, shows importance of privacy in the home.
- Kovacks v. Cooper: uphold prohibition on sound-trucks.
  - Sound trucks are so intrusive, and you can’t really refuse to listen, that they’re regulable. They’re distracting (majority) & people may be forced to listen (FF—aural aggression)
  - Black’s dissent suggests that more tailored rule for sound trucks would solve the problem—shows the importance of tailoring
- Metromedia v. San Diego—ban on billboards (content-neutral); SC splinters
  - Brennan: Statute is unconstititional, though C-N, b/c city hasn’t met burden of showing aesthetic interest in banning billboards (what? How do you show that?)
  - Stevens: dissent that becomes law: gov’t can outlaw entire media if:
    - Substantial gov’t interest
    - Gov’t leaves open ample alternative channels of communication.
    - Content neutrality
- City of Ladue v. Gilleo—SC strikes down statute prohibiting display of sign on property
Stevens opinion: could be read as either: “I meant what I said about alternative channels” or “city is regulating historical, well-pedigreed means of comm.”

Best analogy to sound truck case would be if someone came into your house and wallpapered it with signs

* Bartnicki v. Vopper
  - Privacy interest is not enough to save the anti-wiretapping statute, as applied to a radio station playing a wiretapped call

* Current law on content-neutral speech: 4 part test implicit in *Ladue*
  - Regulation must be justified w/o reference to content of speech (jurisdictional?)
  - Must be narrowly tailored to
  - A significant gov’t interest (more or less than substantial? Don’t know)
  - Must leave open alternative channels of communication.
    - Besides this prong, like *Central Hudson*

- Why do C-N regulations survive where C-B do not?
  - C-B are more likely to distort marketplace; more likely to be enacted for impermissible purpose of suppressing ideas; more likely to restrict speech b/c of communicative impact (how speakers will react)
  - When the listener’s reaction triggers operation of law, court will probably treat as content based

- Law may be C-N on face, but invalid b/c enacted w/ impermissible motive

23. The public forum and speech on public property, pp. 295-301; 306-08; 317-21; 325-28; 352-59.
   - 11/16 (no class on 11/14)

- Public fora:
  - Gov’t used to have the same rights as private property owner—*Commonwealth v. Davis* (then-Judge Holmes)
  - *Hague v. CIO / Schneider v. State*—gov’t must hold such places like streets & parks open to the public as public fora, except for a weighty reason.
    - *Schneider*: rejected that anti-littering interest enough to prohibit leafletting & for only using city sound systems in park (solidarity protest) were upheld
  - No constitutional mandate to create a public forum; can just shut it down
  - Gov’t can regulate speech in public forum based on unprotected speech (obscenity); regulations against violence, littering, etc.; can impose reasonable TPM restrictions; must not burden “substantially more speech than is necessary.”

- Nonpublic forum: gov’t can constitutionally close the area to speech activities
  - *Adderly v. Florida*: trespass conviction for protesting outside jails upheld.
  - Nothing in jurisprudence to help us draw lines on what is a public forum; may depend on whether certain places have “traditionally” been areas for political protest
  - *Lehman v. City of Shaker Heights*: gov’t doesn’t have to accept every ad for its buses: can ban political advertisements

- Limited public forum: gov’t could close it to speech but voluntarily opens it
  - As long as it’s open, the rules of the public forum apply
  - *Rosenberger*: student activity fee @ university. Don’t have to fund student activities, but if you do, can’t allow Muslin & Jewish groups, but not Christian groups, to take the fee for a religious newspaper
Legal Services Corp v. Velasquez
- Court invalidates restriction on use of Legal Services $$ for challenges to welfare. LS fun was limited public forum; had to be made available for any kinds of arguments.
  - But, Rust v. Sullivan: court upholds restriction that recipients of federal family-planning funds can’t use them for abortion counseling. It’s the state speaking, and the state can favor childbirth over abortion
NEA v. Finley: regulation allowed the NEA to consider decency in grant funding
  - Finley argues content- or viewpoint-discrimination
  - Court says this is gov’t’s speech; gov’t can decide what kind of statues (for ex.) to put up in the public forum
  - Scalia: of course this is viewpoint discrimination! But the First Amendment does not require subsidies.
  - Theory question: does 1st Amendment protect only against being silenced? Or does it ensure equal access to channels of communication.

- 11/21, on laptop

- Regulation of conduct as speech:
  - Conduct can be regulated even when as expressive as speech
  - 4 part test (pre-dated the content neutral test & is very similar—4 part intermediate scrutiny):
    1. Is the conduct within the gov’t’s power to regulate?
    2. Does the regulation of conduct further an important / substantial government interest?
    3. Is the government interest unrelated to the suppression of free expression?
    4. Is the incidental restriction “not greater than it needs to be”?
  - Might be another situation where traditional government activity will be OK
    1. Seems a specious analysis under the 4-part test; the Court doesn’t value this speech much. 2nd and 3rd prong, at least, should not be satisfied. 4th—Court doesn’t see any other way to preserve the expression.
    2. This is pretty clearly political expression.
  - Flag Burning—Court dodges issue until Texas v. Johnson
    1. Can’t just ban expressive conduct b/c it’s offensive. Outright criminal punishment for offensive speech.
    2. Rehnquist: burning a flag is no essential part of an expression of any idea
    3. Flag Protection Act passed after Johnson—removes requirements of proving offense, message, and motive to try to preserve constitutionality.
      1. Court invalidated in US v. Eichman: the FPA was really about suppressing expression out of concern for communicative impact. So, subject to the “most exacting scrutiny.”
  - Nude dancing
    1. Law is unclear—2 plurality opinions:
- **Barnes v. Glen Theater**: Nude Dancing w/in outer perimeters of 1st Amendment; state’s anti-nudity ordinance is w/in constitutional power & interest is unrelated to suppression of free expression.
  - Scalia: general law regulating conduct shouldn’t be subject to 1st Amendment scrutiny
  - Souter: would uphold regulation b/c of 2ndary effects
- **City of Erie v. Pap’s A.M.**: g-string & pasty ordinance
  - Plurality: effect on expression is de minimis; Erie has interest in combating negative secondary effects of adult establishments.
  - Scalia: state can enact this as morals legislation
  - Stevens: never before have we used the 2ndary effects doctrine to justify a total ban on protected expression.

25. Litigation, association, and the right not to speak, 412-30.

- **Litigation as speech**
  - **NAACP v. Button**: Court strikes down ordinance that prohibits a lawyer from litigating a case when the lawyer’s salary is not being paid by a party to the case
    - Facially neutral reason based on professionalism; conflict bw representing client & representing the one paying you
    - But, worried about the statute being used as a tool of political oppression vs. the NAACP. Takes the selective prosecution argument much more seriously here than in public nudity cases (selective prosecution of adult establishments)—possibly the value of speech here is greater?
  - **In re Primus**: ACLU can “ambulance chase,” free of state regulations (solicit clients & then accept employment) b/c litigation is a form of political expression
  - **Ohralik v. Ohio State Bar Assoc.**: but, a real PI lawyer can’t ambulance chase. Ouch.
- **Association / Right to Exclude**
  - **Roberts v. Jaycees**—Court upholds anti-discrimination law against Jaycees, forcing the Jaycees to admit women members despite that the group was about helping men
  - **Boy Scouts v. Dale**—Court invalidates anti-discrimination ordinance as applied to Boy Scouts, allowing the Boy Scouts to exclude gay scoutmaster
  - Distinctions between cases:
    - More of an impact on expression: Boy Scouts explicitly said “part of our message is that gay behavior is not OK” while the Jaycees didn’t have an anti-woman message (just wanted to focus on helping men)
      - Organization’s perceived need to exclude
    - Sex discrimination vs. sexual orientation discrimination:
      - Eradicating discrimination against women more compelling? (sexual orientation not a suspect class)
      - Court comfortable w/ outlawing discrimination based on sex, but not sexual orientation?
  - Epstein’s argument: private organizations should have absolute right to exclude absent a monopoly power (political party)
  - How do these arguments apply to employers? Is employment different from association? Everyone needs a job, & working at a job is not really expressive
- **Right not to speak**
- **PruneYard Shopping Center v. Robbins**—speech @ a mall
  - *Marsh*—exception to state action doctrine. When private actor assumes the function of gov’t, 1st Amendment applies (not really applicable here).
  - Court upholds CA constitution (superprotective; gave protesters a right to speak) over 1st Amendment claim: no compelled speech
    - People wouldn’t confuse protester speech w/ mall speech
    - State not dictating message; content chosen by protesters
    - Another remedy for the mall: engage in counterspeech

- **WV v. Barnette**—compelled flag salute case

- **Wooley v. Maynard**—can demand different license plates if you disagree w/ state motto
  - In either of these cases, state dictates content of message: forces speech, forces association w/ message, or forces profession of sth

- **FAIR v. Rumsfeld**—Solomon amendment
  - Forcible sending of e-mails (either inviting the employer or notice e-mails to students) is not compelled speech in same way as *Barnette* or *Maynard*
  - Speech was not expressive speech, either to recruiters or students
  - Solomon Amendment did not violate “expressive association” rights: military recruiters are not brought into the community
    - But, court held that expressive association rights protect more than just membership decisions. Also include tax penalties, fines, etc.