

Combating Hate within the Framework of the First Amendment

Cleveland State University

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Congress shall make no
law...abridging the
freedom of speech....

U.S. CONST. amend. I (1791)

Though the First Amendment refers only to the federal government (“Congress shall make no law...”), it applies as well to state and local governments via the Fourteenth Amendment.

Gitlow v. New York

268 U.S. 652, 666 (1925)

State Action

Lebron v. National Railroad Passenger Corp., 513 U.S. 374, 378 (1995)

Under the First Amendment, the government is denied the power to pick and choose which viewpoints may be expressed. Why?

Governmental Efforts to Outlaw Certain Viewpoints

Sedition Act of 1798

Anti-Slavery Speech in the
Pre-Civil-War South

Punishing Women Who Sought the Vote

Punishing Opposition to World War I

Legal Protection for
Hateful Viewpoints

versus

Moral Condemnation of
Hateful Viewpoints

Low-Level Speech Categories

Completely Unprotected

Advocacy of Imminent Lawless Action

Obscenity

Child Pornography

Fighting Words

True Threats

Less Than Fully Protected

Defamatory Statements

Commercial Speech

**Lewd/Profane/
Indecent**

To prove a **TRUE THREAT**, the prosecution should have to prove:

1

that the speaker made a statement intending to frighten or intimidate the victim with the threat of harm;

2

that the speaker knowingly suggested that the threat would be carried out by the speaker or his coconspirators; and

3

that a reasonable person who heard the statement would conclude that it was meant to threaten the victim with harm.

Speech is UNPROTECTED under Brandenburg if three elements are satisfied:

1

express advocacy of law violation;

2

the advocacy must call for immediate law violation; and

3

the immediate law violation must be likely to occur.

Hate Speech Precedents

R.A.V. v. City of St. Paul,

505 U.S. 377 (1992)

(hate speech)

Doe v. University of Michigan,

721 F. Supp. 852 (E.D. Mich. 1989)

(campus speech codes)

American Booksellers Association

Inc. v. Hudnut,

771 F.2d 323 (7th Cir. 1985)

(rejecting an attempt to ban pornography
as a species of hate literature),

aff'd mem., 475 U.S. 1001 (1986).

What happened?

Courts *refused* to expand the fighting words doctrine and *refused* to create new categories of unprotected speech to which hate speech and pornography might have been relegated.

Given those refusals, the courts either used *overbreadth* analysis (Doe, Hudnut) to strike down such speech codes, or, as in R.A.V., held that viewpoint discrimination is impermissible even within the parameters of an *unprotected* category like fighting words.

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When the government regulates speech, it does so in one of two ways — restricting:

expressive **content** ; or

the **time, place, or manner** of its expression.

STRICT SCRUTINY

for content-based restrictions; or

INTERMEDIATE SCRUTINY

for content-neutral time,
place, and manner restrictions.

STRICT SCRUTINY

The regulation must be necessary, and narrowly drawn, to serve a compelling government interest.

INTERMEDIATE SCRUTINY

1. The regulation must be content neutral.
2. It must be narrowly tailored to serve a significant government interest.
3. It must leave open ample alternative channels for communicating the information.

What To Look for in Applying Intermediate Scrutiny

Prong #1: Content Neutrality

If not facially content-based, does the regulation serve a content-neutral aim or purpose? (How does the gov't justify the law?)

Prong #2: Narrow Tailoring

Look for substantial restrictions on valued speech methods like marching, demonstrating, leafleting, picketing.

Prong #3: Alternative Channels

Does the regulation largely impair the speaker's capacity to reach her intended audience? (Key: Speaker's desired location)

**THE PUBLIC
FORUM
DOCTRINE**

Access to public property
for speech-related activity
is governed by the public
forum doctrine.

Four Types of Government Property

TRADITIONAL Public Forum

DESIGNATED Public Forum

LIMITED Public Forum

NON-PUBLIC Forum

Public Forum Characteristics

TRADITIONAL: Public streets, sidewalks, parks, and squares.

DESIGNATED: Not created by governmental inaction; must be affirmatively dedicated as an open forum for all speakers and all topics.

LIMITED: Like a Designated Forum, but limited to a specific category of speakers or topics; e.g., a student conference center.

NON-PUBLIC: Military bases, federal workplaces — and any government property that is not a Traditional, Designated, or Limited Public Forum.

In forum analysis, the government's power to impose speech restrictions depends on how the affected property is categorized; the level of judicial scrutiny hinges on whether the property is deemed a traditional, designated, limited, or nonpublic forum.

Krishna Consciousness, 505 U.S. at 678-79.

Traditional public forums
may be regulated only via
content-neutral time, place,
and manner restrictions...

To survive judicial review,
such restrictions must satisfy
intermediate scrutiny...

INTERMEDIATE SCRUTINY

1. The regulation must be content neutral.
2. It must be narrowly tailored to serve a significant government interest.
3. It must leave open ample alternative channels for communicating the information.

Governmental restrictions on the
content

of speech in a traditional public forum
are presumptively unconstitutional;
they will be analyzed under strict
scrutiny...

STRICT SCRUTINY

The regulation must be necessary, and narrowly drawn, to serve a compelling government interest.

These same standards govern the second category — restrictions on speech in designated public forums.

Special Rules Governing

LIMITED

Public Forums

The rules are different for the third category — restrictions on speech in LIMITED public forums. The three-prong intermediate scrutiny test does NOT apply here; instead, a reasonableness test prevails, and only viewpoint discrimination is forbidden.

Christian Legal Society v. Martinez, 130 S. Ct. 2971, 2984 n.11 (2010).

Special Rules Governing

LIMITED

Public Forums

Though the government may limit access to certain speakers (e.g., student groups) or certain subjects (e.g., school board business), and though it need not keep such a forum open indefinitely, its restrictions must be applied evenhandedly to all similarly situated parties.

Special Rules Governing
NON-PUBLIC
Forums

The same relaxed standard governs speech restrictions in non-public forums. The challenged regulation need only be reasonable, so long as it is not an effort “to suppress expression merely because public officials oppose the speaker’s view.”

Perry Education Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 (1983).

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