

- ❖ **Freedom of Speech:** 1<sup>st</sup> Amendment: “Congress shall make no law abridging the freedom of speech. Applies to states through 14<sup>th</sup> Amendment. 1) Determine if regulation is content based or content neutral, 2) apply applicable tests (infra), 3) address Prior Restraint, Overbreadth and Vagueness \*\*Don’t forget POV!!!
- **Content Based Regulation:** Must meet strict scrutiny or concern unprotected, or lesser protected, speech
  - **Clear & Present Danger:** Government may regulate speech that is directed to inciting or producing imminent lawless action and is likely to incite or produce such action
  - **Defamation** (*see infra*, under Torts)
  - **Obscenity (Miller test):** Test: 1) Appeals to prurient interest in sex (local standard); 2) depicts or describes in a patently offensive way sexual conduct (local); and 3) lacks serious literary, artistic, political, or scientific value (national)
    - Right to possess in home; zoning OK; child access more restricted; child pornography always illegal
  - **Fighting Words:** Likely to provoke ordinary person to violence. But regulation is always vague and overbroad.
  - **Commercial Speech (Central Hudson Test):** 1) speech concerns a lawful, non-fraudulent activity; 2) there is a substantial government interest; 3) the government action directly advances the interest; and 4) the regulation is narrowly drawn and the means employed is reasonably fit to ends sought.
- **Content Neutral Regulation:** Time, place, manner restrictions are allowed so long as the restrictions are 1) content neutral, 2) narrowly drawn, and 3) leave open ample alternative channels of communication.
  - **Public Forum:** Sidewalks, parks. Time, place, manner must comply with above.
  - **Semi-Public Forum:** Public property that is generally open to the public, but is not a traditional forum for public discussion and is use for important government business, can be regulated substantially more to prevent disrupting government business. Once government opens place to speech, treated as public forum.
  - **Non-Public Forum:** Government can regulate if regulation is reasonable and viewpoint neutral. Ex: military bases, sidewalks on post office property, airports, areas outside prisons and jails.
  - **Private Forum:** States determine whether shopping centers are public or private forums.
  - **Licensing for Time, Place, Manner:** Ordinance must be narrowly drawn and restrict the discretion of licensing official(s) to public safety considerations (no “unfettered discretion”)
- **Prior Restraint:** Presumed invalid; Court order must meet SS; Licensing permissible only where no “unfettered discretion” is given to individual or board that issues license, prompt determination and judicial review, clear criteria.
  - **Collateral Bar Rule:** If prior restraint proper, one may not violate it and then defend against punishment by claiming it is unconstitutional. Instead, the party being restrained must respect the restraining order and go through the proper channels of an appeal and may bring their constitutional claim then as a basis for invalidating the restraining order.
- **Overbreadth:** law is overly broad if it restricts constitutionally protected speech
- **Vagueness:** A law is “void for vagueness if people of common intelligence have to guess as to the meaning of the law or differ as to its application
- ❖ **Freedom of Association:** 1<sup>st</sup> Amendment: protects the right to join with others in exercising rights. Incorporated by 14<sup>th</sup> Amendment. Strict Scrutiny applies.
  - **Membership in a Subversive Organization and right to public employment:** Can be deprived if 1) person is an active member, 2) person knows of illegal ends of the organization, 3) person has specific intent to further those illegal goals.
- ❖ **Religion:** 1<sup>st</sup> Amendment: Congress shall make no law respecting establishment of religion or prohibiting the free exercise thereof; Strict Scrutiny applies.
  - **Free Exercise:** Test: weight of government interest, the degree of interference with religion, & least drastic means
  - **Establishment Clause:** Lemon Test: 1) Law must have a secular purpose, 2) the law’s primary effect must be secular, and, 3) there must be no excessive government entanglement with religion.