First Amendment 101

Overview

If the government seeks to regulate speech, it must comport with the First Amendment of the Constitution, which states "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*"

Contrary to popular belief, the First Amendment does not bestow a general right to speak. The First Amendment is not implicated if one private party tries to silence another. The First Amendment is only implicated when the *government* (federal, state or local) tries to regulate speech. This not only includes when the government tries to limit speaking, but also hearing or reading someone else's speech.

If a law is challenged as a violation of the First Amendment, the judicial branch will assess the law's constitutionality. Courts will generally ask three questions when evaluating whether a law restricting speech is constitutional:

1. **Is the government regulating "speech"?** › See "Different Types of Speech"
2. **What kind of speech is the government regulating?** › See "Different Types of Speech"
3. **What is the basis for regulating the speech?** › See "Burdening Speech" &"Levels of Scrutiny"

Each question in this analysis has its own, underlying legal and constitutional analyses based on Supreme Court precedent, described below. We hope that this document will help you analyze the First Amendment implications of legislation.

Different Types of Speech

The concept of "speech" under the First Amendment includes several different types of expression—there is no exact definition. "Speech" that is valid under the First Amendment is generally considered either protected or unprotected. These labels help courts determine—although not conclusively—whether and to what extent the government may restrict the speech or access to the speech. We note that if the government its self is the speaker, the First Amendment's protections do not apply (so, the government can create restrictions on its own speech).

TABLE 1

Types of Protected and Unprotected Speech

Protected Speech	Unprotected Speech
Pure speech (spoken word)	Obscenity & child pornography
Written word	Defamation
Photographs & videos	Fighting words
Editorial functions	Incitement to imminent lawless action
Commercial speech	Harassment
Expressive conduct	True threats
The actions of creating or disseminating speech	
Speech plus conduct (peaceably assembling)	

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Supreme Court Rules & Tests for Unprotected Speech

The Supreme Court has created several tests as guides to what types of speech fall under the unprotected category of speech.

TABLE 2

Supreme Court Rules & Tests for Unprotected Speech

Unprotected Speech	Legal Test
Obscenity	• Miller v. California, **413 U.S. 15 (1973)** • "Guidelines" for jurors in obscenity cases: • Whether the average person applying contemporary community standards1 would find the work, taken as a whole, appeals to the prurient interest;[2] • Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and • Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
Defamation	• Defamation includes libel (written statements) and slander (spoken statements) • The elements needed for a defamation claim vary by state, but generally the elements are: • False statement • Publication or communication to a third party • Fault (negligence or actual malice– see below) • Harm to the reputation of the person defamed • If the person being defamed is a public official, then the defamatory statements must have been made with "actual malice." New York Times Co. v. Sullivan, **376 U.S. 254 (1964)**. Actual malice means: "with knowledge that it was false or with reckless disregard for the truth." • If the defamation doesn't concern a public official, then the person making defamatory statements must have acted negligently, i.e., failed to do something they should have done in order to check the veracity of the statement.
Fighting words	• Chaplinsky v. New Hampshire, **315 U.S. 568 (1942)** • Fighting words are those that will cause a person "of common intelligence" to fight. Fighting words must be directed at a specific person. • For example, using the "n" word to insult someone face-to-face could constitute "fighting words." E.g., Boyle v. Evanchick, No. 19-3270, 2020 WL 1330712 (E.D. Penn. 2020). • "Fighting words" is applied narrowly; today, invoking the "fighting words" exception to the First Amendment is rarely successful.
Incitement	• Brandenburg v. Ohio, **395 U.S. 444 (1969)** • A state may not forbid speech advocating the use of force or unlawful conduct unless • The advocacy is directed to inciting lawless action and • Is likely to incite such action
Harassment	• The Court has not created a single definition for "harassment" but it has provided definitions in specific contexts. • In education, conduct that is "so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect" may constitute harassment. Davis v. Monroe County Board of Education, **526 U.S. 629 (1999)**. • In the workplace, conduct that is severe and pervasive to the level of creating a "hostile work environment" may constitute harassment. Meritor Savings Bank, FSB v. Vinson, **477 U.S. 57 (1986)**.
True Threats	• Virginia v. Black, **538 U.S. 343 (2003)** • True threats encompass those statements where (1) the speaker means to communicate a serious expression of an intent (2) to commit an act of unlawful violence (3) to a particular individual or group of individuals.

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Burdening Speech

When a court determines that the government *is* restricting speech, it also determines what type of burden that restriction constitutes. The Supreme Court has characterized burdens as being content-based, viewpoint-based, unduly vague or overbroad, or creating a prior restraint on speech. A finding that a law *does* create a burden on speech that is protected to some degree triggers an analysis of what level of scrutiny it is subject to (*see* "Levels of Scrutiny" below this section).

Content-based vs. Content-neutral:

A content-based law restricts speech based on the substance and content of what is being communicated. This includes laws that target speech based on subject matter, as well as laws that target speech based on its function or purpose. This distinction is important because it determines the level of scrutiny that will be applied.

- **Examples of content-based regulations:**
  - ➔ Regulation of signs that direct people to specific events or that convey political messages.[3]
  - ➔ A statute criminalizing "indecent" phone messages.[4]
  - ➔ A city regulation which does *not* allow peaceful picketing at private residences but *does* allow "peaceful picketing of a place of employment involved in a labor dispute" because it distinguishes between labor picketing and all other peaceful picketing.[5]
  - ➔ An Act prohibiting robocalls to cellphones, with an exception for robocalls made to collect federal debt.[6]
  - ➔ A selective tax targeting magazines about sports or religion.[7]
- **Examples of content-neutral regulations:**
  - ➔ A city regulation which mandates what times any picketing is allowed.
  - ➔ A municipal noise regulation which required musical performances in a public to use a sound system and technician provided by the city, in order to ensure performances did not disturb surrounding residences.[8]
  - ➔ An ordinance prohibiting posting signs on public property.[9]
- **How do courts treat content-based vs. content-neutral rules?**
  - ➔ **Courts consider content-based rules presumptively invalid.**[10] If a rule is presumptively invalid, it means it is automatically considered unconstitutional, unless the rule meets strict scrutiny.[11]
  - ➔ **Courts believe content-neutral rules pose less of a risk of excluding certain ideas or viewpoints from the public dialogue.**[12] As a result, they must generally meet only intermediate scrutiny.

It is not always straightforward for courts to determine whether a regulation is content-based. Problems do arise when applying the distinction between content-based and content-neutral laws:

- ➔ Sometimes, a permissible content-neutral purpose will justify a content-based restriction.[13]
- ➔ A restriction that is facially content neutral may have a purpose or justification that is content based.

Viewpoint-based vs. Viewpoint-neutral

When the government is regulating speech based on the ideology of the message, it is regulating based on viewpoint.[14] The Supreme Court considers viewpoint discrimination an "egregious form of content discrimination."[15]

- **Examples of viewpoint-based regulations:**
  - ➔ A law prohibiting the display of signs critical of foreign governments outside embassies.16
  - ➔ A municipal permit scheme governing public park demonstrations, which would allow the licensor the general discretion to decide whether to grant a permit based on the applicant's message.[17]
- **How courts treat viewpoint-based rules:**
  - ➔ **Similar to content-based rules, courts consider viewpoint-based rules presumptively invalid.**[18] If a rule is presumptively invalid, it means it is automatically considered unconstitutional, unless the rule satisfies strict scrutiny.[19]

Time, Place, and Manner Restrictions

As the name would indicate, time, place, and manner restrictions implicate when, where, or how something can be said. These restrictions are considered content-neutral, as their purpose is not to censor, but to regulate around nuisance, safety, aesthetics, or other common priorities of cities and counties.

- Examples of permissible time, place, and manner regulations:
  - ➔ Regulating noise levels during public concerts
  - ➔ Capping the number of protesters allowed in a particular place
  - ➔ Barring protests at certain times of day
- Test: in *Ward v. Rock Against Racism*, the Supreme Court established a three-prong test which a time, place, and manner restriction must satisfy to survive a First Amendment challenge:
  - ➔ The regulation must be content-neutral; and
  - ➔ It must be narrowly tailored to serve a significant governmental interest; and
  - ➔ It must leave open ample alternative channels for communicating the speaker's message.[20]

Content and Viewpoint Comparisons

Determining whether or not a regulation is content- or viewpoint-based is nuanced. See the examples below for the distinctions between these labels. One

TABLE 3
Content and Viewpoint Comparison

Content/Viewpoint Neutral	Content-based	Viewpoint-based
A city restricts all protests after 11pm.	A city restricts all protests based on politics after 11pm.	A city restricts all protests based on republican politics after 11pm.
Government restricts robocalls to cellphones.	Government restricts robocalls to cell-phones except for those about collect-ing federal debt.	Government restricts robocalls to cellphones about joining a particular religious organization.
A city announces that no flyers may be posted on a public wall.	A city announces that abortion content cannot be posted on a public wall.	A city announces that pro-life content cannot be posted on a public wall.

way a court will analyze whether the government is regulating based on content or viewpoint is whether it appears that the government is regulating based on an agreement or disagreement with the message behind the speech.[21]

Unduly vague or overbroad: laws that restrict speech can also be challenged as unconstitutional on the grounds that they are unduly vague and overbroad. A finding that the law *is* unduly vague or overbroad typically invalidates the law entirely.

- **Vagueness:** a law is unconstitutionally vague if a reasonable person could not tell what speech would be prohibited vs. what would be permitted. *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). For example, a law banning people from standing on a sidewalk and acting "annoying to persons passing by" does not adequately describe what conduct is annoying enough to be banned. *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).
- **Overbroad**: a law is unconstitutionally overbroad if it regulates substantially more speech than the Constitution allows to be regulated, and a person to whom the law constitutionally can be applied can argue that it would be unconstitutional as applied to others. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981). For example, in *United States v. Stevens*, 559 U.S. 460 (2010), the Supreme Court struck down a law criminalizing creating, selling, or possessing "a depiction of animal cruelty," which was defined to include intentionally wounding or killing an animal, because the law's wording included protected speech (ex. Lawful hunting).
- **Overlap:** often, laws that are vulnerable to vagueness challenges can also be objected to on overbreadth grounds. *Coats v. City of Cincinnati*, 402 U.S. 611 (1971).
  - ➔ Sometimes, a law might be overbroad but not vague: *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). Sometimes, a law can be vague but not overbroad.

Prior Restraint

A "prior restraint" can be defined as a law, administrative system or judicial order "that prevents speech from occurring.[22] The Supreme Court considers prior restraints to be serious and intolerable, saying that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times v. United States*, 403 U.S. 713, 714 (1971). There have been few recognized exceptions by the Supreme Court, and the exceptions have been very narrow. The exceptions include imminent threats to national security and a defendant's right to a fair trial.[23]

Levels of Scrutiny

A law restricting speech will be subject to some form of heightened scrutiny, with the specific level of scrutiny depending on the type of speech being restricted and nature of the burden, as explained above. There are three levels of scrutiny, with strict scrutiny being the highest and most demanding standard.

In practice, a court will first determine that a government action is burdening a fundamental right or suspect class and is therefore subject to a form of heightened scrutiny. As a result, the court will automatically presume that the government action is unconstitutional. Because of this presumption, the government has the burden of proving that their actions are constitutional by proving that they meet the standard for the applicable level of scrutiny.

1. **Strict Scrutiny:** the highest level of review.

    a. **Test**: the government must show that its actions are "narrowly tailored" to further a "compelling government interest" and that they are the "least restrictive means" to further that interest.

        i. A "**compelling government interest**" means that the interest is not a matter of choice or discretion, but that it is *absolutely necessary*.

        ii. "**Narrowly tailored**" means that the government act or law is written very precisely so that it is not overinclusive or underinclusive so as to impact unintended rights.

        iii. The "**least restrictive means**" means that there are no alternatives that are more narrowly tailored.

2. **Intermediate Scrutiny**.

    a. **Test**: the government's action must further an "important" or "substantial" interest and must do so by means that are "substantially" related to that interest.

        i. An "**important**" or "**substantial**" interest is one that is less than compelling and more than legitimate. Courts will address this on a case-by-case basis.

3. **Rational Basis Review**: the least stringent review that U.S. courts use to determine the constitutionality of government action. It is a very lenient standard compared to the others.

    a. **Test**: the government must have a "legitimate" interest where there is a rational connection between the action's means and goals.

        i. "**Legitimate**," in this context, means that the government's interest is valid, justifiable, and not illegal or arbitrary.

        ii. A "**rational connection**" means that the government action has some logical connection to the behavior they are trying to regulate.

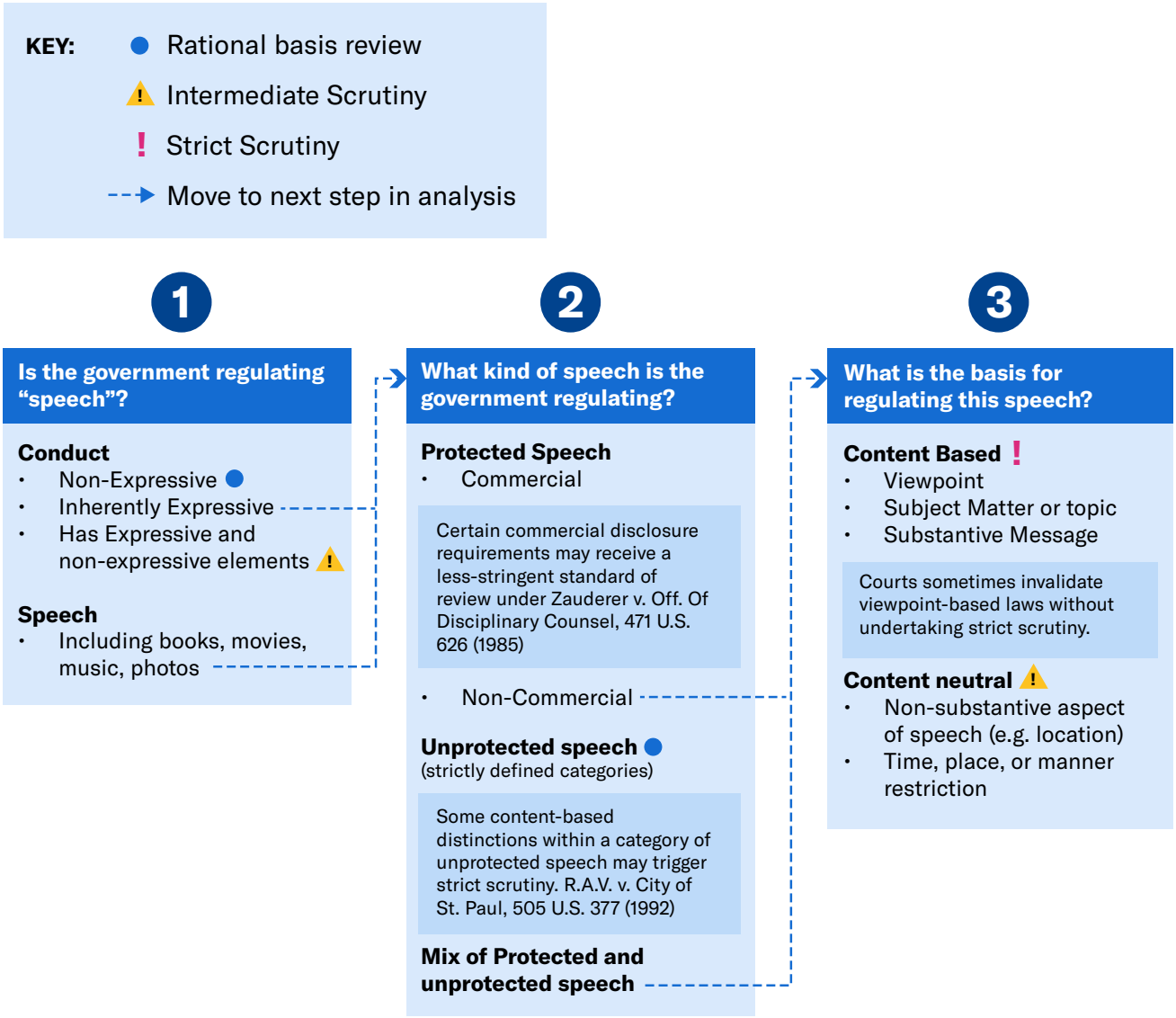
TABLE 4

Levels of Scrutiny Applied to First Amendment Laws

Level of Review	When It Applies	Government Interest	Level of Tailoring Required
Strict Scrutiny	Content-based laws, viewpoint-based laws, laws targeting protected speech	Compelling	Narrowly tailored with least restrictive means
Intermediate Scrutiny	Content-neutral laws, viewpoint-neutral laws, laws that only incidentally burden protected speech, commercial speech	Important or Substantial	Substantially related
Rational Basis	Laws that restrict only unprotected speech	Legitimate	Rationally related

FIGURE 1

Analytical Steps in a Typical As-Applied Free Speech Challenge [24]



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Endnotes

1 "Contemporary community standards" refers to how the "average" community member would view the work, rather than a specific person (e.g. the views of the intended audience or a more sensitive person are irrelevant). For laws regulating speech on the Internet, some courts have concluded that "community standards" must refer to national community standards, i.e., what the country thinks, as opposed to what a specific town or city might think. *E.g.*, *United States v. Kilbride*, 584 F.3d 1240 (9th Cir. 2009).

2 The Supreme Court has acknowledged that it may be impossible to formulate a single definition for "prurient interest." *Smith v. United States*, 431 U.S. 291, 302 (1977). One description of material that appeals to the prurient interest is "material having a tendency to excite lustful thoughts." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

3 *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

4 *Sable Communications of California v. Federal Communications Commission*, 492 U.S. 115 (1989). In *Sable*, the Supreme Court held that denial of adult access to indecent messages exceeded what was necessary to protect minors from obscene messages.

5 *Carey v. Brown*, 447 U.S. 455 (1980).

6 *Barr v. American Ass'n of Political Consultants*, 591 U.S. 610 (2020). In *Barr*, the Supreme Court found that Congress's amendment to the Telephone Consumer Protection Act of 1991 (TCPA) to allow for debt collection calls "was about as content-based as it gets," explaining that the law essentially said, "[A] robocall that says, 'Please pay your government debt is legal.' A robocall that says 'Please donate to our political campaign' is illegal."

7 *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

8 *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). In *Ward*, the Supreme Court said that this regulation was a "time, place, manner" regulation and thus only incidentally impacted the speech. (Music is a protected First Amendment activity).

9 *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

10 *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

11 *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994).

12 *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994).

13 In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), a zoning ordinance prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park, or school. The Supreme Court held that the ordinance was valid because there were "serious problems created by adult theaters" that the ordinance solved.

14 *Matal v. Tam,* 582 U.S. 218 (2017).

15 *Rosenberger v. Rector and Visitors of Univ. of VA*, 515 U.S. 819, 829 (1995).

16 *Boos v. Barry*, 485 U.S. 312 (1988). In *Boos*, the Supreme Court held that such a regulation was content-based because it restricted political speech in a public forum.

17 *Rubin v. City of Santa Monica*, 308 F.3d 1008 (9th Cir. 2002).

18 *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

19 *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994).

20 *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

21 *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

22 Erwin Chemerinsky, Constitutional Law (2024).

23 Smolla & Nimmer on Freedom of Speech (2025).

24 https://www.congress.gov/crs-product/R47986

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