Outline of First Amendment Doctrines

This outline is a brief sketch of the most prominent First Amendment principles and doctrines relating to the freedoms of speech, press, and association. As such, it necessarily omits many detailed distinctions and much nuance that would be found in lengthier works – for example, scholarly treatises such as Rodney A. Smolla, *First Amendment Law Handbook* (Deerfield, IL: Clark Boardman Callaghan, 2017-2018 ed.) and respectable nutshells such as Jerome A. Barron & C. Thomas Dienes, *First Amendment in a Nutshell* (St. Paul, MN: West Publishing Co., 5th ed. 2018). For purposes of this seminar, the outline serves to provide a general background for those who have not studied First Amendment rules and standards in previous courses. More concentrated analysis of specific topics will be fostered by future readings assigned over the course of this seminar.

1. Freedom of Speech: Basic Principles

- **Regulation of Private Speech:** The Free Speech Clause only restricts government regulation of private speech. It does not require the government to fund private speech. Nor does it restrict the government from funding its own speech to express its own views. Government funding of its own speech will be upheld if it is rationally related to a legitimate state interest.

- **Content-Based Regulations vs. Content-Neutral Regulations**: In general, government is permitted to regulate the conduct or behavior associated with speech (for example, its noise level or its time and place) much more readily than it is permitted to regulate the content or substantive ideas of the speech. Accordingly, a speech regulation should be analyzed at the outset as either focusing on the content of expression (a **content-based** regulation) or on the conduct associated with expression (a **content-neutral** regulation).

  The level of judicial scrutiny used to review a speech regulation turns on how it is characterized.

  Rule: Content-based restrictions on the **subject matter** or the **viewpoint** of speech must meet **strict scrutiny**. But **content-neutral** laws that burden expressive conduct generally need only meet **intermediate-level scrutiny**.

  See, e.g., *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015) (a viewpoint-biased ordinance, which depended entirely on the communicative content of the regulated items, was held to be content-based and struck under strict scrutiny).

Note that the rule requires strict scrutiny for laws that restrict speech either by its subject matter or its viewpoint. What is the distinction between these concepts? Keep this simple hypothetical in mind for clarification: A municipal government that forbids **any advertising for products or services** in the town square has regulated the **subject matter** of **commercial speech**. But a regulation of **any advertising for toys that reinforce sexist stereotypes,** like Barbi dolls, would be a **viewpoint-based regulation of commercial speech**.

Some laws may regulate using the **subject matter** of speech. These include regulations of **unprotected or less protected speech** (such as obscenity or defamation) or regulations of **government-funded speech**. In fact, it would be difficult to imagine how a law could effectively forbid unprotected speech such as obscenity or defamation without naming its subject matter and defining its contents.

The important question for such laws, nonetheless, is whether they are **viewpoint-neutral**. In other words, does a law that regulates an unprotected subject matter of speech nonetheless favor a particular viewpoint (for example, government funding for pro-Christian religious advocacy only) or is it truly viewpoint-neutral? A **viewpoint-biased** regulation even of unprotected, less protected, or government-funded speech will be **invalid *per se***, whereas a viewpoint-neutral regulation may still be valid if it passes the level of scrutiny appropriate to it. See, e.g., *R.A.V. v. City of Saint Paul*, 505 U.S. 377 (1992) (a viewpoint-biased regulation of even the unprotected speech category of fighting words is subject to strict scrutiny and is likely to be invalid).

- **Prior Restraints**: Another basic principle is that the First Amendment disfavors **prior restraints**. A prior restraint is a law that **prevents speech before it occurs**, rather than prescribing **subsequent punishment** for injuries that speech activities may inflict. To be valid, a prior restraint generally must meet **strict scrutiny** review.

  The classic example of a prior restraint is a court injunction ordered against a press publication of high public concern. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (197) (holding that the Executive failed to meet the heavy burden of justification required for a judicially imposed injunction against leading newspapers, such as the *New York Times* and the *Washington Post*, from publishing "the Pentagon Papers," which included classified material concerning the Vietnam War).

There is a twist to this rule, however. Although a court order suppressing speech before it occurs is a prior restraint that must meet strict scrutiny, a **procedurally proper court order** must nonetheless be **complied with until it is either vacated or overturned**. See, e.g., *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (contempt order for disobeying an *ex parte* judicial restraining order banning a civil rights march in violation of an ordinance was upheld).

The Supreme Court does permit some prior restraints. Nonetheless, any licensing authority for speech-related activities (e.g. a movie screening and censorship board or a bureaucracy issuing parade and demonstration permits) must operate under **narrowly drawn and clear content-neutral standards** that leave almost **no discretion** to the administrators. And there must be the opportunity for **prompt judicial review** of any censorship decision. These procedural requirements must be provided explicitly in the licensing or permit statute, or the law is likely to be unconstitutional on its face. See, e.g., *Thomas v. Chicago Park District*, 534 U.S. 316 (2002) (a city park ordinance requiring a permit before conducting large-scale events, which was designed to reconcile competing uses, was held to be a content-neutral time, place, and manner regulation).

- **Vague, Overbroad, or Discretionary Regulation of Speech**: A fourth basic principle for First Amendment analysis is that any regulation of speech-related activities will be unconstitutional if it is **too vague**, if it is **substantially overbroad**, or if it is **unduly discretionary**.

  Rules:

  (1) A regulation is **void for vagueness** if a reasonable person cannot tell from the terms of the law what is prohibited and what permitted.

  For example, a federal statute prohibiting transmission of "indecent" material on the Internet to persons under 18 years old was held **void for vagueness**. See *Reno v. ACLU*, 521 U.S. 844 (1997).

  (2) A regulation is **overbroad** if it affects **substantially** more speech than is necessary to serve the government's legitimate purposes.

  If a statute bans a broad range of speech at any particular location, it might be invalid for **substantial overbreadth**. See, e.g., *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (a regulation prohibiting persons from engaging "in First Amendment activities within the central terminal area at the Los Angeles International Airport" was

invalidated as substantially overbroad).

(3) A regulation is **unduly discretionary** if it gives officials inadequate standards for applying the law's requirements.

Given the prior restraint doctrine, a regulation that allowed a permit authority to charge fees for police protection at public parades and demonstrations, but that provided no clear standards for charging such fees would be invalid because it gives undue official discretion to charge higher fees for disfavored speech activities.

When vagueness, overbreadth, and undue discretion are concerned, there are several important observations to consider:

- **"Issue Trio:"** These are an "issue trio," since the same speech regulation often violates all three of these restrictions. Once having identified one of these issues, always consider the possibility of the other two being present as well.

- **Permit schemes**, such as the **prior restraint** regulations considered above, may violate one or more of the issue trio, unless they provide narrowly drawn and clear content-neutral standards that leave almost no discretion to the administrators.

- **All First Amendment Roads Lead to the "Issue Trio:"** Any regulation of speech-related activities – whether a content-based law or a content-neutral law regulating conduct – may ultimately be invalidated for unconstitutional vagueness, substantial overbreadth, or undue discretion. In this sense, the "issue trio" must be on a check list for any First Amendment analysis.

- **Scope of Speech**: The last basic principle for First Amendment analysis is that the freedoms of speech include more than the freedom to speak.

  (1) They also include the **freedom not to speak**. The government cannot require its citizens to salute the flag, or to mouth or display messages with which they disagree. See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977) (New Hampshire could not punish a motorist for blocking out the State's motto – "Live Free or Die" – on his automobile license plate).

  In contrast, government **can** support legitimate programs by imposing **general taxes or fees** on persons who might disagree with some of the speech activities that the government has funded. Thus, public school

student activities fees or attorney bar dues may be made mandatory, as long as they are distributed to student or attorney groups on a viewpoint-neutral basis. See, e.g., *Board of Regents of University of Wisconsin v. Southworth*, 529 U.S. 217 (2000) (upholding compulsory student fees without any showing that the mandatory fees were germane to the educational mission).

(2) Along with the freedom not to speak, the First Amendment guarantees the rights of **symbolic speech**. For example, protesting the Vietnam War by wearing black arm bands in public schools was a symbolic form of political speech that was held protected under the First Amendment because it did not substantially disrupt the work and discipline of the school. See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Rule: Government may regulate **symbolic speech** only if it has: (1) an **important purpose** (2) that is **unrelated** to **suppression** of the **message**, and (3) if the burden on communication is **no greater than necessary** to achieve that purpose.

For example, the First Amendment did not stand in the way of the federal government's prohibition of draft card destruction, even though Vietnam War protestors were burning draft cards as a symbolic form of political protest: (1) the federal government's actual purpose in requiring the possession of draft cards was found to be the important one of ensuring the smooth operation of the draft; (2) that purpose was speech-unrelated; and (3) any incidental burden on political speech activities was no greater than necessary to achieve the government's important purpose. See *United States v. O'Brien*, 391 U.S. 367 (1968).

(3) The scope of First Amendment speech also includes **anonymous speech**. Clearly, forcing the disclosure of a speaker's identity could have a serious **chilling effect** on expressive activities. The rights of anonymous speech are particularly strong in the political arena. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (a state government cannot force a public school teacher to reveal all political or social organizational memberships in order to prove government loyalty); *Talley v. California*, 362 U.S. 60 (1960) (invalidating on its face a city ordinance prohibiting anonymous handbilling, applied to distribution of unsigned handbills urging an economic boycott).

2. Freedom of Speech: Unprotected or Less Protected Speech

There are two tracks of First Amendment analysis that are set into motion upon answering the questions, "Is the government's regulation of speech-related activity content-based? Or is it content neutral?"

If you answer the question, "The regulation is content-based," the next consideration is whether the regulation involves a category of speech that is unprotected or less protected. This is important, as you already appreciate, because the government is able, under certain conditions, to regulate those forms of speech specifically by its subject matter. So, what are the historically recognized or primary categories of unprotected or less protected speech?

- **Incitement of Illegal Conduct**: The first category of unprotected speech is **incitement**. That is speech that creates a **clear and present danger** of illegal activity. The contours of the modern doctrine of incitement are found in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (focusing on the probability and imminence of danger arising from speech, the ruling revised the clear and present danger doctrine without mentioning the words "clear and present danger").

  Rule: For speech to be punished as "incitement," the illegal conduct must be **likely** and **imminent** and **intended** by the speaker.

  To be constitutional on its face, a regulation of incitement must contain, in its very terms, the elements of **specific intent** and of **probable** and **immediate injury**.

- **Fighting Words**: Closely related to incitement, the second category of unprotected speech is **fighting words**. Unlike incitement, which usually focuses on the actual danger involved in advocacy directed to the public generally, the fighting words doctrine addresses face-to-face encounters likely to provoke the average person to fisticuffs.

  Rule: Fighting words are **abusive** words, **directed personally** to the hearer, that are **likely** to produce **immediate and physically violent reactions** in the average person.

  The rule derives from *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), in which the unprotected speech category was defined as involving words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." The Supreme Court reasoned that such expressions does not contribute to the exposition of ideas or the search for truth, and

words brigaded with action are more akin to conduct that enjoys no First Amendment protection.

"Hate speech" laws have often been enacted on the rationale that they regulate "fighting words." But a "hate speech" law will not be valid if it is viewpoint-biased, selecting out only certain disfavored words, expressions, or ideas, such as hostile comments made against only particular protected classes. See, e.g., *R.A.V. v. City of Saint Paul*, 505 U.S. 377 (1992) (an ordinance that singled out fighting words based only on race, color, creed, religion, and gender was invalidated as discriminatory on the basis of speech content and underinclusive).

Caution: If confronted with a "fighting words" regulation, look carefully for the "issue trio" of vagueness, substantial overbreadth, and excessive discretion. Typically, fighting words regulations do not define the character of prohibited expressions precisely enough to survive a facial unconstitutionality challenge. For example, a fighting words regulation forbidding "abusive language" without more specificity would likely be void for vagueness, substantial overbreadth, and excessive discretion.

- **True Threats:** Similar to fighting words, "true threats" are not protected speech.

  Rule: A "true threat" is a statement that a **reasonable person** would interpret, under the circumstances, as the defendant's serious declaration of **intent** to **murder** or **inflict bodily harm**.

  In finding a "true threat," the following factors **do not matter** at all: (1) whether the threat was made **directly to the intended target**; (2) whether the threat was made **with knowledge that it would be communicated** to the target; or (3) whether the threat was made **in a private conversation or in public**.

  In *Virginia v. Black*, 538 U.S. 343 (2003) (Virginia statute treating any cross burning as prima facie evidence of intent to intimidate was invalidated), the Court observed that "a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'"

- **Obscenity and Sexually-Oriented Speech**: A fourth category of unprotected speech is **obscenity**. The **production, sale, or delivery** of sexually oriented material may be prohibited as obscenity if the material meets the **three-part test** in the rule.

  Rule: The material must describe or depict sexual conduct that, **taken as a whole** by the average person: (1) appeals to the **prurient interest** in sex, using **community** standards; (2) is **patently offensive**, using **community** standards; and (3) lacks **serious value** of a literary, artistic, political, or scientific nature, using a **national reasonable person** standard.

  - **Taken as a whole**: considering the entire work, not just a passage or depiction taken out of context

  - **Appealing to the prurient interest in sex**: appealing to an obsessive interest in sex, as those concepts would be understood by the average community member.

  - **Patently offensive**: more than a description or depiction of sex is required; the material must be objectively off-putting to the average community member.

  The current definition of obscenity derives from *Miller v. California*, 413 U.S. 15 (1973) (forging a definition of obscenity that stressed specificity in order to limit obscenity to hard-core pornography).

  Minors: When sexually oriented materials are produced for minors or sold to minors, the three-part obscenity test is **retooled to apply to minors**. Thus, material can be prohibited as obscenity for minors if it appeals to the prurient interest of minors, is patently offensive to minors, or lack serious value for minors. See, e.g., *Ginsberg v. New York*, 390 U.S. 629 (1968).

  Of course, adults cannot be prevented under such laws from viewing sexually oriented materials that would be obscene only for minors. For example, in *United States v. American Library Association, Inc.*, 539 U.S. 194 (2003) the Supreme Court recognized the power of Congress to require public libraries that receive federal money for Internet services to install filtering software that will block access by minors to visual depictions that may be obscene or indecent as to them. The Court upheld the law, in part, because the justices interpreted the statute to require a library, at the request of adults, to unblock those sites that would not obscene as to them.

Child pornography has assumed a unique status in the obscenity doctrine. The production, distribution, sale, **and possession** of materials depicting **actual minors engaging in sexual activities** can be **completely banned**, whether or not it would be found "obscene" under the three-part test. See e.g., *New York v. Ferber*, 458 U.S. 747 (1982) (fashioning a new category of unprotected speech, a unanimous Court reasoned that the states are entitled to greater leeway in regulating materials that encourage sexual exploitation and abuse of children).

The case is different for **"virtual" child pornography,** material that uses computer-generated images rather than photos of real children. The creation, distribution, sale, or possession of such imagery is constitutionally protected, unless the material fully meets the *Miller* obscenity standards. See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (invalidating the Child Protection Prevention Act, which extended the federal ban on child pornography to virtual child pornography).

In contrast, the Supreme Court has held that advertising the sale of real child pornography can be penalized even if the actual product sold is virtual child pornography. Such lurid and misleading advertising is unprotected under the doctrine of "pandering." See, e.g., *United States v. Williams*, 553 U.S. 285 (2008) (upholding a state law that prohibited "offers to provide and requests to obtain child pornography; the law would only be constitutionally invoked when "the speaker believes or intends the listener to believe that the subject of the proposed transaction depicts *real* children").

The industry of adult bookstores and movie theaters featuring pornography has been the source of much constitutional litigation. Such establishments that display non-obscene sexual materials can still be subject to **zoning ordinances**. The location of such bookstores and theaters may be regulated, provided that all such entertainment is not entirely zoned out of the community. See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding a land-use regulation that controlled the location of adult movie theaters).

But **nude dancing** in adult entertainment parlors and in bars **can be prohibited entirely**, as long as the regulations are **viewpoint-neutral** and ban all forms of public nudity. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (Writing for the Court, Chief Justice Rehnquist declared "that nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.").

- **Defamation**: A fifth category of unprotected speech that may be prohibited is **defamation**. Many issues regarding libel and slander – such as scienter, the fact vs. opinion distinction, the "of and concerning" requirement, and others – are necessary elements of the tort of defamation, rather than the central concern of constitutional law. First Amendment jurisprudence focuses primarily on the appropriate standards of judicial review in defamation actions – standards that turn on levels of fault, the public or private character of the defendant, and statements of public or private concern.

  Rule: A **governmental official** or a **public figure** suing for a **libelous** or **slanderous** statement can recover damages by demonstrating **clear and convincing evidence** that a **false** statement involving a matter of **public concern** was made with **actual malice**. A **private figure** can recover **compensatory** damages for **actual injury** by demonstrating that a **false** statement involving a matter of **public concern** was made **negligently**, but recovery of **presumed or punitive** damages for such a statement requires a showing of **actual malice.** When a false statement involves only a matter of **private concern,** actual malice need not be demonstrated in order to recover any form of damages.

  - **Public figure**: an **all-purpose public figure** is an individual who has achieved **pervasive celebrity or notoriety**, whereas a **limited public figure** is one who has **voluntarily injected** himself or herself into a **particular public controversy**, and thereby becomes a public figure for a limited range of issues. See, e.g., *Gertz v. Robert Welch, Inc.*, 481 U.S. 323 (1974) (the availability of the *New York Times* privilege turns on the status of the plaintiff as a public official, an all-purpose public figure, a limited public figure, or a private figure).

  - **Actual malice**: **knowledge** that the defamatory statement was false or **reckless disregard** of whether it was false or not.

  New York Times v. Sullivan, 376 U.S. 254 (1964) set forth the actual malice standard for a public official suing over criticism of his or her official conduct. The privilege was extended to "anything which might touch an official's fitness for office" in *Garrison v. Louisiana*, 376 U.S. 947 (1964). *Gertz v. Robert Welch, Inc.*, 481 U.S. 323 (1974) established a lesser degree of constitutional protection in defamation actions brought by private figures; but where the false statement involves speech of public concern, even a private figure plaintiff must prove actual injury and fault under a negligence standard. And recovery of compensatory, presumed, and punitive damages for false statements involving matters of private concern that are negligently

made was established in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

- **Fraud**: A sixth category of unprotected speech that may be prohibited is **fraud**. Fraud statutes, for example, typically penalize an **intentional misrepresentation** upon which a victim **relied** and which caused **actual injury**, and such content-based statutes would be constitutional. Thus, where false claims are made to defraud and wrongfully gain money, offers of employment, or other valuable matters, it is well established that the government may restrict the speech without affronting the First Amendment.

  For First Amendment purposes, however, it is important to understand that, outside of unprotected speech categories such as defamation and fraud, false statements of fact constitute fully protected speech that can be regulated on the basis of their content only if the regulations meet strict scrutiny review. The government's interest in promoting truthful discourse alone is not sufficient to ban speech, since otherwise the government would enjoy an unprecedented and broad power of censorship. See, e.g., *United States v. Alvarez*, 567 U.S. 709 (2012) (in the "Stolen Valor" case, the Court declared that there was no general rule that false statements do not receive First Amendment protection).

- **Commercial Speech**: The seventh primary category of unprotected or less protected expression involves **commercial speech**. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) narrowly defined commercial speech as expression which "proposes a commercial transaction." The definition of commercial speech was broadened in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) to include "expression related solely to the economic interests of the speaker and its audience."

  Rules:

  1. Commercial advertising that solicits for an **illegal activity** or that is **false** or **misleading** is unprotected speech that can be prohibited. See, e.g., *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973).

  2. Truthful advertising with an inherent **risk** of **deceiving** or **misleading** the public can be forbidden.

Under this principle, states have been allowed to regulate commercial advertising by professionals. See, e.g., *Friedman v. Rogers*, 440 U.S. 1 (1979) (upholding a state statute forbidding the practice of optometry under a trade name that presented opportunities for deception).

3. Otherwise, government regulation of truthful commercial advertising for **lawful** products or services will be upheld only if it meets **intermediate-level scrutiny**. See, e.g., *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) (a four-part inquiry basically asking whether the regulation of truthful commercial expression is narrowly tailored to serve a substantial governmental interest); *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (calling for "special care" in the application of the *Central Hudson Gas* test).

Because the Supreme Court has yet to mandate strict scrutiny review for regulation of First Amendment protected commercial advertising, commercial speech is regarded as a **less protected category of speech**.

- Strict Scrutiny for Protected Speech Categories:

Outside of these seven primary unprotected or less protected speech categories, expression that receives full First Amendment protection generally cannot be regulated on the basis of its content. A content-based regulation of protected speech must meet **strict scrutiny** review, and will likely be held to violate the First Amendment.

3. Freedom of Speech: Time/Place/Manner Regulations of Speech Activities

Recall that there are two tracks of First Amendment analysis that are set into motion upon answering the questions, "Is the government's regulation of speech-related activity content-based? Or is it content neutral?" Let us assume that this time you answer the question, "The regulation is content-neutral."

Your answer means that you have identified a government regulation of speech **conduct** rather than speech **content**. And the second basic principle for First Amendment analysis presented at the beginning of this outline established that a government is permitted much greater latitude in regulating conduct associated with speech than in regulating the content of the speech. The government is permitted to do so by appropriate **time, place, and manner** restrictions on speech and on association.

Following the second track of First Amendment analysis, the next consideration for a **content-neutral** regulation is whether or not it is an appropriate time, place or manner regulation in a **public forum**. This is an important question, because the government's power to regulate speech conduct differs depending on the public or private character of the place in which speech activities occur.

What, then, are the distinctions between public and private forums, and what difference do these distinctions make for a government's powers?

Rules:

The first rule applies to governmental regulation of speech and assembly in places called **traditional public forums** – those public places historically associated with exercises of First Amendment rights, such as public **streets, sidewalks,** and **parks**. But even non-traditional venues can be considered **designated public forums** if the government dedicated the public spaces to general speech and assembly activities, such as **public auditoriums** or **public theaters**. See, e.g., *Hague v. CIO*, 307 U.S. 496 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972) ("Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.").

1. Government regulation of the **time, place,** or **manner** of speech and assembly in **traditional** public forums (such as public streets and parks), or in **designated** public forums (such as public auditoriums and theaters) is only permitted if the regulation is **content neutral** both as to subject matter and viewpoint, is **narrowly tailored** to serve an **important** governmental interest, and leaves open **alternative avenues** of communication. See *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983).

   The U.S. Supreme Court applied these standards to a local law that banned targeted picketing of any kind on a sidewalk in front of a single residence. The Court held that the ordinance passed the standards for valid time, place, and manner regulations as applied to pro-life picketers who targeted an abortion doctor's home. Even though the sidewalk was a public forum, the ordinance was subject matter and viewpoint neutral, narrowly served the important government interest of protecting privacy in the home, and left alternative means of communication since the protesters were permitted to march through the doctor's neighborhood. See *Frisby v. Schultz*, 487 U.S. 474 (1988).

Subsequently, however, the Court held that, although a public park is considered a traditional public forum with respect to speeches and similar expressive acts, the public forum analysis does not apply to the government's display of permanent monuments. Public parks can only accommodate a limited number of permanent monuments, and application of the public forum doctrine might force a cluttering of the park. Moreover, the placement of a permanent monument in a public park is considered to be the government's own speech, and therefore not subject to scrutiny under the First Amendment free speech clause. See *Pleasant Grove City, Utah v. Summum*, 555 US. 460 (2009).

Rule 2 applies to public property that is called a "**limited public forum**" or sometimes a "**non-public forum**." That is any public property not considered a traditional or designated public forum under Rule 1. In other words, a limited or non-public forum is government property not opened generally to public speech-related activities, such as military bases, government workplaces, post offices, schools, public libraries, and airport terminals. Government is permitted to reserve such property for its intended purposes, and enjoys broad powers to regulate speech and assembly occurring therein.

2. Government regulation of the time, place, or manner of speech and assembly in **limited** or **non-public forums** (such as government workplaces, schools, military bases) is permitted if it is **viewpoint neutral** and meets **rational basis review**.

   Using this standard of review, the Supreme Court has upheld general and selective restrictions on access to military bases [*United States v. Albertini*, 472 U.S. 675 (1985); *Greer v. Spock*, 424 U.S. 828 (1976)] and airport terminals [*International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992)]; a refusal to sell advertising space on public buses to political candidates [*Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)]; the denial of access to teachers' school mail boxes for a union challenging the designated collective bargaining representative [*Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37 (1983)]; a ban on the posting of signs on utility poles [*Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984)]; the exclusion of political candidates from a publicly sponsored debate [*Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998)], among other cases.

Finally, Rule 3 applies to **private property**, where the First Amendment recognizes no public right of access.

3. Government may adopt **reasonable** regulations to limit access to **private property** for speech or assembly purposes.

   For example, a privacy law requiring a **homeowner's permission for any commercial solicitation** would be a valid time, place, and manner regulation of private forums. See, e.g., *Breard v. City of Alexandria*, 341 U.S. 622 (1951) (upholding ordinance prohibiting door-to-door solicitation without advance consent of the homeowner as applied to magazine salesmen); *Rowan v. United States Post Office*, 397 U.S. 728 (1970) (validating federal statute authorizing homeowners to stop offensive mailings to home mailbox).

The "Issue Trio:" Even if a regulation of speech-related conduct meets all of the time, place, and manner requirements, it could still be invalid if it is **unduly vague** or **substantially overbroad**, or if it gives **excessive discretion** to government officials. Remember that all free speech challenges eventually lead to the "issue trio" before they finally terminate in a finding of validity or invalidity.

4. Campaign Funding: Contributions & Expenditures

First Amendment doctrine in the area of campaign funding is complex and nuanced. Nonetheless, it is important that you have a general understanding of the basic principles that govern this area.

Rule: Government cannot limit the amounts that a person can spend on his/her **own campaign,** or on **independent expenditures** to get a candidate elected. However, government can limit **contributions** to political candidates, and can require that candidates **disclose** the names of contributors and the amounts that they contributed.

Independent expenditures are funds spent for political campaign expression that are **not coordinated** with candidates or their campaign committees. In other words, these expenditures must be **truly independent**, and not just **disguised contributions** to candidates.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court first developed the First Amendment doctrine distinguishing between contributions to a political candidate or campaign that can be regulated and independent expenditures that cannot be.

More recently, in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Supreme Court determined that corporations, unions, and other business associations, as "persons" under the Constitution, have the same First Amendment rights as individuals in the area of campaign funding, and can spend independently whatever they desire to promote the election of candidates from their general treasury funds.

5. Freedom of the Press

The First Amendment's text mentions more than the freedom of speech. It explicitly protects the **freedom of the press**, as well. Review of press liberties will be brief because of the basic principle that governs this area: typically, the media enjoy **no greater free speech freedoms** than do other private citizens or corporations.

Rule: General regulations or taxes imposed on businesses apply to the media, as well. **Special** regulations or taxes targeting the media specifically must meet **strict scrutiny**.

In these regards, compare *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) ("Generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.") with *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976) (constituting a virtual death knell for a judicial gag order against media publication).

Publication of Unlawfully Obtained Information: Special First Amendment rules have developed for the press regarding the **publication of unlawfully obtained information**. It is now settled that the media have a right to publish information that originally had been obtained unlawfully under three conditions.

Rule: The media may publish information originally obtained unlawfully if: (1) the information is **truthful** and a matter of **public concern**; (2) the media did not obtain it **unlawfully** or know who did; and (3) the original speaker of the truthful information had **reduced expectations** of **privacy**.

For example, the Supreme Court held that state and federal wiretap laws violated the First Amendment as applied to a radio station that played a tape of a cell phone call of serious public interest mailed to it by an unknown person. See *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

Standards of Review for Media: The standards of review that courts apply in First Amendment challenges to media regulations will differ depending on the type of media involved.

Rules:

1. **Content-based** regulations of **all** media are subject to **strict scrutiny**.

2. **Content-neutral** regulations of **print,** the **Internet**, and **cable television** are typically reviewed under **strict scrutiny**.

3. But content-neutral regulations of **radio** and **television** broadcasts are generally subject only to **intermediate-level scrutiny**

   For example, given the government's greater power to regulate public and commercial radio and TV, broadcasters can be forbidden to schedule sexually oriented programs considered indecent for minors during day-time, drive-time or prime-time hours. See *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) ("Of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.").

6. Freedom of Association

Unlike the freedoms of speech and press, the First Amendment's text does not explicitly include the freedom of association. Yet, association now is recognized as a fundamental right implied by the other freedoms protected under the First Amendment.

- **Association for Speech Activities**: At the core of this fundamental right is **association for political speech purposes** (such as political meetings, electioneering, protests and parades). Government cannot forbid politically unpopular groups or burden a person's right to belong to such groups. Any such government restrictions on such association must meet **strict scrutiny**. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) ("Infringements [may] be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.").

- **Association for Illegal Activities**: Nevertheless, government may entirely prohibit **association for illegal purposes** and punish membership in such a group.

Rule: Association for illegal purposes may be prohibited (and membership in such a group punished) provided the government proves that the person: (1) **actively participated** in the group, (2) **knowing** of its illegal activities, and (3) **specifically intending** to further those illegal activities.

See, e.g., *Noto v. United States*, 367 U.S. 290 (1961) (invalidating a conviction for membership in the Communist Party on the ground that the evidence was insufficient to establish the required *scienter* and specific intent to engage in illegal conduct).