

MODULE 2

Free Speech Methodology

First Amendment Law · Fall 2026 · FlexTime, Manhattan

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Where we are on the map

Same board as Tuesday. Today is the second branch, and it is the one that governs the rest.

MODULE 1

First Amendment Values

Truth • democracy • autonomy • tolerance

MODULE 1

Speech vs. Conduct

Pure speech • expressive conduct • government speech

MODULE 2

Content-Based vs. Content-Neutral

Strict against intermediate — and the exceptions

MODULES 4-6

Disfavored Categories

Incitement • solicitation of crime • threats • fighting words • defamation • commercial • sexual speech

MODULE 7

Place of Speech

Public forum doctrine. Where it happens does the work.

MODULE 3

Four Facial Failures

Prior restraint • vagueness • overbreadth • compelled speech

THROUGHOUT

Related Protections

Press • assembly → association • petition — and the religion clauses

It looks like a decision tree. It does not behave like one, and I will say so all semester.

Where we stopped on 30 August

Two minutes of orientation. We are finishing this module, then starting the next one.

DONE — 30 AUGUST

The sorting rule, out of Mosley.

Reed, and what makes a law content-based on its face.

Subject matter and viewpoint — both content-based, both strict scrutiny.

Time, place and manner: Kovacs, Ward, sound trucks.

Government speech and funding as exceptions.

TODAY

The content-neutral side: Kovacs, Ward, and the two intermediate tests.

Secondary effects — promised twice and not reached.

City of Austin, and the limit on Reed.

The drafting problem the five cases leave you.

Vagueness and overbreadth.

Every item on today's list is the sorting rule leaking. The rule is real, and it does not hold its shape.

Then Module 3 — Infringement of Speech — in the second half of the session.

Module 2 — Free Speech Methodology. Chemerinsky 1064–99.

The first question in every free speech case

One question, asked first, that sets the terms of most free speech cases before the merits.

“But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”

CONTENT-BASED

Strict scrutiny.
The government usually loses.

CONTENT-NEUTRAL

Intermediate scrutiny.
The government usually wins.

Usually is not always. The tier opens the argument — it does not end it — and the sorting rule itself leaks badly.

The two tiers, stated properly

Learn both cold. The exam question is which one applies.

STRICT — REED

**Content-based on its face →
strict scrutiny, regardless of
a benign motive.**

“if a law applies to particular speech because of the
topic discussed or the idea or message expressed.”

INTERMEDIATE — WARD

**Justified without reference
to content · narrowly tailored
to a significant interest ·
ample alternative channels.**

Narrow tailoring is NOT least-restrictive-means — only
“not substantially broader than necessary.”

Reed was unanimous in the judgment, 9–0. Six joined the opinion. Kagan’s concurrence is the best short critique of it.

What counts as content-based

Reed gives two routes in, and a rule about the order you take them.

ROUTE ONE — ON ITS FACE

**By particular subject matter —
or by function or purpose.**

The obvious shape and the subtle one. Motive is irrelevant here — a benign purpose does not save it.

ROUTE TWO — IN APPLICATION

**Unjustifiable without reference
to content — or adopted because
of disagreement with the message.**

Facially neutral, still content based. Here motive is the whole question.

Decide the face first. “In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.”

GOVERNMENT SPEECH

Not an exception — a hole in coverage.
The clause does not apply.

GOVERNMENT FUNDING

A real exception, with its own line of cases. *Finley*, *Rust*, *Velazquez*.

DISFAVORED CATEGORIES

The bridge to Modules 4–6, and why that box on the map is so big.

The board lists all three together as exceptions. They are not alike, and the differences matter more than the list.

Viewpoint discrimination is always out

Everything else moves. This does not.

PERMITTED — SUBJECT MATTER

**Gardening and car mechanics,
but no particle physics.**

NEVER — VIEWPOINT

**I'm taking out that Capital
from Marx.**

“St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”

True even inside a category the government could ban outright. But is the line stable? Choose a different level of generality and a subject becomes a side.

When the viewpoint line actually matters

In the ordinary case it is idle — both trigger strict scrutiny. It matters only here.

1

Government funding

Finley. Rust. Velazquez.

2

Designated and limited forums

Rosenberger.

3

The classroom

Confining the topic is fine.
Grading the position is not.

4

Government speech

The clause does not apply at
all.

The four settings where subject-matter selection is PERMITTED. That is the whole principle.

Before you invest in the viewpoint characterization, ask whether subject-matter selection would have been allowed here.

When the government is the speaker

The largest of the three exceptions, and the one with no test — because the clause simply does not reach it.

SUMMUM — 2009

Monuments in a park.

Curating privately donated monuments makes the message the city's own.

WALKER — 2015

Specialty licence plates.

Plates are “essentially, government IDs.” Texas may refuse the design.

GARCETTI — 2006

Speech within the job.

Pursuant to official duties is not speech “as a citizen.” No protection.

There is no scrutiny here. Win the characterization and you have not won the case — you have removed it.

Alito writes Summum and dissents in Walker — so what can the characterization not absorb?

Walker v. Texas Div., Sons of Confederate Veterans, 576 U.S. 200 (2015) (Breyer, J., 5–4) · Pleasant Grove City v. Summum, 555 U.S. 460 (2009) (Alito, J., 8–1) · Garcetti v. Ceballos, 547 U.S. 410 (2006) (Kennedy, J., 5–4).

Four doctrines that turn on scarcity

One idea. Four doctrines. Watch what happens when the scarcity disappears.

Shelves

Finite. So selection by subject is unavoidable.

Terminals

No scarcity. If you can, you must.

Grants

Finite money. Merit means content.

Spectrum

Finite in 1969. Not after cable.

AND THE COURT WENT THE OTHER WAY

The ALA plurality upheld filtering by analogizing terminals to the book stack — “no more than a technological extension.”

If scarcity was the justification, what survives when the scarcity does not?

Why manner restrictions are neutral

Before Clark — the intuition the whole content-neutral tier rests on, and it is on the board.

THE SPEECH PART

The message.

Regulate this and you are in the other tier.

THE CONDUCT PART

Speaking aloud → noise.

Leafleting → litter.

Neither one is the message. Regulate the residue and you are neutral.

Time, place or manner — the where, the when and the how. NOT the what.

KOVACS v. COOPER — 1949

Sound trucks emitting “loud and raucous noises” banned from the public streets.

Upheld — the ordinance does not care what comes out of the loudspeaker.

Black, Douglas and Rutledge dissent: if amplification is how you reach a crowd, banning it is not regulating the how.

That dissent is the objection to the sleeping ban on the Mall, forty years early — and it is where the tier leaks.

Kovacs v. Cooper, 336 U.S. 77 (1949) • Ward v. Rock Against Racism, 491 U.S. 781 (1989) • Board: Day 18.4 — Content-Neutral Regulations.

The two intermediate tests, side by side

Put the two intermediate standards side by side and look at what is actually different.

O'BRIEN

expressive conduct

Within constitutional power

Substantial or important state interest

Unrelated to suppression of expression

Incidental restriction as small as possible

(subsumed)

WARD

time, place and manner

(not stated — assumed)

Substantial interest

Content-neutral

Narrow tailoring

Ample alternative channels

“...in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.”

The Court said “little, if any, different.” It did not say “the same test.” Keep the hedge — it is doing work.

Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984), quoted in Ward, 491 U.S. at 798

What you do about it in practice

Two tests, one analysis, and a filing convention.

PURE SPEECH

Cite Ward.

EXPRESSIVE CONDUCT

Cite O'Brien.

— just to keep judges happy. But you should know in your head it doesn't really make a difference.

SO WHEN YOU ARE LOSING

Don't argue for the other intermediate test. Argue that the regulation is content-based and belongs in a different tier.

When is the manner the message?

First discussion. Take three answers and do not resolve it.

A permit for tents on the Mall — but not for sleeping in them. Upheld as a content-neutral manner restriction serving an interest in keeping the parks intact.

OBJECTION ONE

The Mall has a meaning.

Ample alternative channels — to petition the nation about national policy?

OBJECTION TWO

The point about homelessness was the sleepover.

Not the manner of the message. The message.

If the answer is “whenever the speaker says so,” the content-neutral tier collapses. If “never,” Johnson was wrong.

Secondary effects — prove them

Second discussion. The doctrine that lets a content-referencing law count as neutral.

THE MOVE

A law that cannot be applied without knowing what the film shows — held content-neutral, because it targets effects rather than the message.

Show me that there are secondary effects. Do not just assume the world always works like the Sopranos.

Reed says facially content-based means strict scrutiny regardless of motive. How do Reed and Renton coexist?

Barnes and Pap's A.M. are solid law that almost everyone who writes about them thinks is wrongly decided. Hold both.

City of Austin v. Reagan National, 2022

The limit on Reed. Reading a sign is not the same as regulating what it says.

THE ORDINANCE

Austin barred new off-premises signs — signs advertising something not on the same property. On-premises signs were unrestricted. Reagan National, a billboard company, was refused permits to digitise its boards.

THE HOLDING

The on-/off-premises distinction is facially content neutral. It draws a line by location, not by topic, and does not single out any subject matter for different treatment.

“This rule, which holds that a regulation cannot be content neutral if it requires reading the sign at issue, is too extreme an interpretation of this Court's precedent.”

AND WHAT THE COURT DID NOT DO — WRITE THIS DOWN

It did not apply intermediate scrutiny. It reversed and remanded, leaving open both whether an improper purpose underlies the ordinance and whether it is narrowly tailored. Austin survived the threshold; it has not won.

TikTok v. Garland, 2025

The Court called it content-neutral. Ask whether naming the speaker names the subject.

WHAT THE COURT HELD

Facially content neutral as applied. Intermediate scrutiny. Satisfied. And “the inherent narrowness of our holding.”

AND THE OBJECTION

A law barring the Communist Party never mentions communism. Identity-based exclusions carry subject matter with them.

I think this is problematic. But it is the law of the land, and for the bar exam you do what the Supreme Court tells you.

Five cases, five different lines

What separates them is not the subject matter. It is what the regulation draws its line on.

REED • 2015

THE TOPIC

Signs sorted by what they say, on the face of the code.

Content-based.

AUSTIN • 2022

THE LOCATION

On- or off-premises. You read the sign only to place it.

Content-neutral.

TIKTOK • 2025

THE OWNERSHIP

Who controls the platform, not what is on it.

Content-neutral.

CHILES • 2026

THE TOPIC, AGAIN

Which subjects a therapist may raise. Colorado called it conduct.

Content-based.

McCULLEN • 2014

THE TAILORING

Conceded neutral, and struck down anyway.

Not a sorting case.

TWO THINGS TO CARRY OFF THIS SLIDE

Renton is the same move, thirty-six years earlier: not the dancing, the effects of the venue. And the run of escapes is not uniform — Chiles is the Court refusing one. Note what Austin and Chiles share: each decided the tier, then reversed and remanded without applying it.

Narrow or broad, and you can fail either way

The sorting rule pushes you one way and narrow tailoring pushes you the other. This is the drafting problem.

DRAFT IT NARROW

A buffer zone only at clinic entrances. Zoning only for adult venues. Divestiture aimed at one owner. Narrow enough to prove the justification.

AND IT LOOKS TARGETED

Specificity is the tell. Singling out one subject, one industry or one owner invites the content-based characterisation — and then you are in strict scrutiny.

DRAFT IT BROAD

All signs, all amplified sound, all sleeping in all parks. Facially neutral, so the sorting rule is satisfied and Reed cannot reach it.

AND IT SWEEPS TOO WIDE

You burden far more speech than the interest needs. McCullen was conceded content-neutral and struck down anyway, on tailoring.

R.A.V. IS THE SHARPEST VERSION, AND IT CUTS THE SAME WAY

St. Paul stayed inside an unprotected category — fighting words — and still lost, because it reached only those directed at race, color, creed, religion or gender. Narrowing within the category was itself the vice. You may ban all of it; you may not ban only the part you like least.

Vagueness and overbreadth

They do not fit the module structure. They are their own thing — and they are not the same thing.

OVERBREADTH

A First Amendment doctrine.

Reaches a substantial amount of protected speech belonging to people not before the court.

“Strong medicine ... a last resort.”

VAGUENESS

Procedural due process.

Fair notice — and explicit standards for those who apply the law.

Near speech it is heightened, not converted.

WHAT THEY SHARE — AND THE EXAMPLE TO USE

Both are facial challenges, and both are about the chilling effect — speech that never happens because nobody can tell where the line is. Ban all nudity on Broadway and you reach an obscene play, which is unprotected, and *Hair* and *Equus*, which are not. The theatre with no valid claim of its own gets to strike the ordinance anyway.

The middle tier is where you will practise

Strict scrutiny cases are decided when the tier is assigned. Rational basis cases are not filed.

You are really haggling over price here — and it is a genuinely good world to practise in.

TIKTOK — JAN. 2025

**Content-neutral as applied.
Intermediate scrutiny.**

PAXTON — JUNE 2025

**Burden on adults is “only
incidental.” Intermediate scrutiny.**

Two 2025 cases, both routing around strict scrutiny by calling the burden on protected speech incidental.

Learn the rule. Then learn the escapes — they are where the last decade of doctrine actually happened.

TikTok Inc. v. Garland, 604 U.S. ____ (2025) (per curiam) • Free Speech Coalition, Inc. v. Paxton, 606 U.S. ____ (2025) (Thomas, J., 6–3)

What we have not settled

Carry these. Every one of them comes back.

- 1 If the two intermediate tests are “little, if any, different,” why keep two?
- 2 Is the viewpoint / subject-matter line stable, or only as stable as a court’s level of generality?
- 3 What constrains a court that can reach intermediate scrutiny by calling a burden “incidental”?
- 4 When is the manner the message — and what stops that answer from swallowing the tier?
- 5 Can Renton and Reed both be right? If not, which one is the carve-out?
- 6 If scarcity justified the old regulation, what justifies regulating platforms now?