

MODULE 3

Infringement of Speech

Prior restraints · Unconstitutional conditions · Compelled speech · Government speech

First Amendment Law · Fall 2026 · Professor Jorge R. Roig

Where we are on the map

Module 3 is the branch that asks what counts as an infringement at all.

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

Note the mismatch: vagueness and overbreadth were Module 2. Government speech lives in the coverage branch.

What triggers the analysis

One test, and then the list it produces. This is the board, and it is the shape of the module.

The test: a direct and substantial effect on the exercise of the right.

PROHIBITIONS

Criminal penalties for speaking. The easy case.

CIVIL LIABILITY

Defamation. IIED. Invasion of privacy. A private plaintiff — and a court enforcing it.

TAKING THE MONEY

Son of Sam laws. A general sales tax is fine; a tax on the ink or on movie projectors is not.

PRIOR RESTRAINTS

Licences and injunctions. The rest of today, and the heaviest presumption.

COMPELLED SPEECH

The forced flag salute. Disclosure requirements, which sometimes survive.

UNCONSTITUTIONAL CONDITIONS

One right conditioned on waiver of another. Rust and Velazquez.

GOVERNMENT PRESSURE

A list of “objectionable” books, with nobody prosecuted. Still a restraint.

ONLY ONE IS A BAN

Everything else makes speech costlier, riskier or less possible.

What counts as an infringement?

Module 2 assumed the answer. Today is the prior question — and it gets harder as it goes.

1 THE EASY CASE

A prohibition backed by punishment.

Nobody argues about whether this is an infringement. The argument is which tier applies — and that was last week.

2 THE SPECIAL CASE

A licence, or an injunction.

The speech never happens at all. Decided in advance, by an administrator or a judge, without the safeguards of a trial. Hence a heavier presumption.

3 THE HARD CASES

A refusal to fund. A requirement to speak.

Neither looks like a prohibition. “Not with our money.” “We have only required you to say this.” Both arguments are serious; both sometimes win.

Is the First Amendment a rule about what government may PREVENT, or about what it may DO to speech?

Near v. Minnesota

The chief purpose of the guaranty — and the sentence everyone stops reading after.

283 U.S. AT 713

“...it is the chief purpose of the guaranty to prevent previous restraints upon publication.”

THE STATUTE

Permanent injunction, as a public nuisance, against any “malicious, scandalous and defamatory” newspaper. The Saturday Press had accused Minneapolis officials of colluding with gangsters.

THE VICE

Suppression IN ADVANCE — not liability afterwards. Hughes takes it from Blackstone: press liberty “consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.”

The four dissenters are named in the opinion. The “5–4” tally and the majority names are a database’s metadata — say which is which.

What Near actually reserved

Near is taught as an absolute bar. The opinion says the opposite, in terms, on the next page.

“...the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases...”

1 WAR

“Actual obstruction to its recruiting service, or the publication of the sailing dates of transports...”

2 OBSCENITY

“The primary requirements of decency may be enforced against obscene publications.”

3 VIOLENCE

“The security of the community life may be protected against incitements to acts of violence...”

4 OVERTHROW

“...and the overthrow by force of orderly government.”

And at 716: press liberty has meant immunity from previous restraint “principally although not exclusively.” Both hedges are in the opinion and out of its reputation.

Lovell v. City of Griffin, 1938

And the ordinance told you what “press” means.

303 U.S. AT 452 — WHAT “PRESS” MEANS

“The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets... The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.”

A LICENCE IS WORSE THAN AN INJUNCTION

An injunction issues from a court after adversary proceedings. A licence issues from an administrator, in advance, with no proceeding at all. And it fails FACIALLY — no need to show the permit would have been denied.

NOT A FREE EXERCISE CASE

Alma Lovell was a Jehovah’s Witness and the case is decided on press and speech under the Fourteenth Amendment. Second time today the religious framing is not the holding. It will not be the last.

“The struggle for the freedom of the press was primarily directed against the power of the licensor.” Hughes pin cites his own Near at 713–716 — both halves.

When a permit scheme is allowed

A licence is a prior restraint. It survives only if three things are true — and this is the practical doctrine.

1

AN IMPORTANT REASON

And not one about the message.
Traffic management is the standard example — two parades cannot have the same street at the same hour.

2

CLEAR GUIDELINES

The official has little or no discretion.
A standardless permit ordinance is invalid on its face, and you need not have applied and been refused.

3

PROCEDURAL SAFEGUARDS

A decision on a short timetable,
prompt judicial review of a denial,
and the burden on the government rather than the speaker.

AND THE RULE THAT SURPRISES EVERYONE — THE COLLATERAL BAR

Violate an injunction against speaking and you are punished for contempt even if the injunction is later held unconstitutional. With a criminal statute you can speak, be prosecuted, and win by showing the statute is invalid. With an order you cannot — its invalidity is no defence. That is why a restraint is treated as worse than a punishment.

Gag orders, and who is being gagged

The same order is nearly impossible against the press and routinely available against the participants.

AGAINST THE PRESS

Highly disfavored, and effectively unavailable. The competing interest is real — the defendant's right to an impartial jury — and it still loses almost always.

AGAINST THE PARTICIPANTS

Parties, witnesses, lawyers, court personnel. Routinely available: the order restrains people the court already controls.

BEFORE A COURT MAY GAG THE PRESS — BOTH, NOT EITHER

That every alternative will fail — venue change, continuance, searching voir dire, instructions, sequestration, gagging the participants instead. And that the gag will actually work, which in a nationally covered case it usually will not.

Two constitutional rights genuinely conflict here, and the doctrine resolves it by moving the remedy onto the trial rather than onto the coverage.

The Pentagon Papers per curiam

And it coins neither of its two famous phrases.

“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.’ ... The Government ‘thus carries a heavy burden of showing justification for the imposition of such a restraint.’ ... [The courts below] held that the Government had not met that burden. We agree.”

“HEAVY PRESUMPTION”

Bantam Books, Inc. v. Sullivan

372 U.S. 58, 70 (1963)

“HEAVY BURDEN”

Organization for a Better Austin v. Keefe

402 U.S. 415, 419 (1971) — earlier the same Term

WHAT IS NEW HERE

Nothing but the application.

“We agree.” That, and the disposition, is the whole per curiam.

The holding is not “the government may never enjoin the press.” It is: on this record, the Government did not carry its burden.

Nine Justices, nine separate opinions

Six concurring, three dissenting, plus the per curiam. There is no majority rationale.

BRENNAN

“...tolerates absolutely no prior judicial restraints... predicated upon surmise or conjecture...”

But then: only proof of “an event kindred to imperiling the safety of a transport already at sea” supports even an interim order.

That is NEAR at 715, adopted as a standard.

STEWART

“...will surely result in direct, immediate, and irreparable damage to our Nation or its people.”

A test that can be met, not a prohibition. Cited here as 403 U.S. at 729–30 because free sources disagree on the page.

Only Black and Douglas were absolutist — two of six.

The most-quoted absolutist passage in the case names a category in which a restraint would stand.

So what is the prior restraint doctrine?

Assemble it from what the three cases actually say, not from what they are remembered for.

1

HEAVY PRESUMPTION

...against constitutional validity, and a heavy burden on the government. From *Bantam Books*.

2

BUT NOT ABSOLUTE

Near reserves four categories in terms. Brennan adopts one of them, forty years later, as his standard.

3

LICENSING FAILS FACIALLY

Lovell. No need to show the permit would have been refused — vulnerability to the licensor is the injury.

4

AND NO STATED TEST

The 1971 Court had the chance and did not take it. Separate formulations, none commanding a majority.

Is a heavy presumption with no stated test for rebutting it a doctrine — or a thumb on the scale plus discretion?

The reason for the heavier presumption is structural, not moral: subsequent punishment brings a trial, a jury, proof beyond reasonable doubt — and the speech has already reached the public. A restraint has none of that.

Infringement without prohibition

Nobody has been stopped from saying anything. Two ways that can still be a First Amendment problem.

FAMILY ONE

Conditions and subsidies

The government funds a programme and attaches a string. Rust says fine. Velazquez says no, on facts that look similar. The art is in seeing what separates them.

FAMILY TWO

Compelled speech

The government does not silence you; it requires you to speak. Salute the flag. Make the website. 1943 and 2023, same answer.

In both families the government's argument has the same shape: "we have not prohibited anything." In both, that argument is sometimes right.

"You may say what you like — just not with our money." And: "We have not silenced you. We have only required you to say this."

Rust v. Sullivan — the subsidy is not a penalty

Three sentences, all on one page, and they carry the whole doctrine.

THE SELECTIVE-FUNDING PRINCIPLE

“The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program...”

THE VIEWPOINT DENIAL

“In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.”

THE PENALTY DENIAL

“A refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity.”

The phrase that does the work is “without more.” What would “more” be?

That question is the whole of *Velazquez*, ten years later. Note also the quotation marks around ‘penalty’ — they are in the reporter and usually dropped.

The sentence Rust depends on

The subsidy argument only runs because the grantee stays free outside the programme.

500 U.S. AT 197 — THE PREMISE

“The Title X grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.”

THE TEST TO CARRY FORWARD

Draw the boundary of the funded programme. Does the condition operate inside it, or outside it? That one question resolves more subsidy cases than any amount of talk about coercion.

THE HONEST OBJECTION

Separation is only meaningful if it is feasible. For a small clinic it may not be — in which case the formal freedom to speak elsewhere is not a real one. Legal fact, or empirical assumption? And whose burden?

Rust is remembered as blessing a flat gag rule. Its own logic depends on the opposite premise.

Rust never said “government speech”

The Court said so itself, ten years later, in the case that distinguishes it.

“The Court in Rust did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained Rust on this understanding.”

1991

RUST DECIDED

No government-speech rationale anywhere in the majority.

1995 • 2000

THE GLOSS

Rosenberger and Southworth re-explain Rust as government speech.

2001

SAID OUT LOUD

Velazquez states the retrofit in terms — and then distinguishes on it.

A case can acquire a holding it did not have — not by being overruled, but by later Courts explaining it in terms it never used.

When you cite an old case, know whether the proposition is in the opinion or in the gloss.

Velazquez — whose speech is it?

Kennedy distinguishes Rust rather than cutting it down. The line is the speaker, not the size of the string.

GROUND ONE — WHOSE SPEECH

“The LSC program was designed to facilitate private speech, not to promote a governmental message... The lawyer is not the government’s speaker.”

Not big string versus small string. Not coercive versus not.
WHOSE speech is being funded.

GROUND TWO — THE JUDICIAL FUNCTION

“...prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power.”

Separation of powers, not free speech at large. Justia truncates this sentence and drops exactly the words that make it so.

It distinguishes Rust; it does not cut it down. A deck that calls this the anti-Rust case has overstated it.

What makes government speech legitimate

The latitude is not free. It is purchased with political accountability.

“[W]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.”

THE PUZZLE

Viewpoint discrimination is the cardinal sin everywhere else in this course. Why may the government do it when it speaks?

THE ANSWER

Because there is a remedy. You can vote them out. The First Amendment steps back where democratic politics can do the work.

THE TEST IT GIVES YOU

Can the electorate identify this as the government’s message and hold someone accountable? If not, the justification for the latitude is missing.

No accountability, no latitude. That is the principle — and it is the test for every government-speech claim you will meet.

West Virginia v. Barnette, 1943

Jackson's sentence is the most quoted in the field, and the most misquoted.

319 U.S. AT 642

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.”

THE PRINCIPLE — AT 633-634

“...a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.”

THE OVERRULING

Gobitis, 310 U.S. 586, decided 3 June 1940 — Frankfurter for an 8-1 Court. Barnette, 14 June 1943. Three years and eleven days. Frankfurter wrote the first and dissented from the second.

The most-copied online version inserts a comma after “other matters of opinion.” The reporter has none — and without it, the sentence is one prohibition with two limbs rather than a list.

Barnette is not a religion case

Which is why it is in this module rather than in Module 8, and why secular objectors can use it.

WHAT JACKSON SAYS

“Nor does the issue as we see it turn on one’s possession of particular religious views or the sincerity with which they are held.”

THE MOVE THAT DOES IT

“In connection with the pledges, the flag salute is a form of utterance.” A salute is speech. Compelled salute is compelled speech.

WHY IT MATTERS

A free exercise holding protects the religious objector. A compelled speech holding protects everyone — the atheist, the political dissenter, the person who simply will not say the words.

Third case today whose religious framing is not its holding. There is a fourth, and it was decided in 2023.

Compare Near this morning: Hughes reserved four exceptions; Jackson says none occur to him. Which style is more honest, and which is more useful to the next court?

What the parties stipulated

The parties agreed the facts away, and what was left was pure speech.

STIPULATED

“WILLING TO WORK WITH ALL PEOPLE regardless of classifications such as race, creed, sexual orientation, and gender.”

STIPULATED

Will decline content that “contradicts biblical truth” — REGARDLESS OF WHO REQUESTS IT.

STIPULATED

All her design services are “EXPRESSIVE.” Her sites are “original, customized” and viewers know them as her “original artwork.”

STIPULATED

“NUMEROUS COMPANIES in the State of Colorado and across the nation offer custom website design services.”

On those stipulations the websites are PURE SPEECH — and once that is agreed, the rest follows almost mechanically: “As surely as Ms. Smith seeks to engage in protected First Amendment speech, Colorado seeks to compel speech Ms. Smith does not wish to provide.”

How much of this survives if the parties had litigated whether a wedding website is expressive? Nobody knows — nobody tried it.

What 303 Creative did not hold

Four things, and the opinion says so in terms.

1

**NOT a licence to
refuse gay
customers**

“Never mind that we do no such thing and Colorado itself has stipulated Ms. Smith will... ‘work with all people regardless of... sexual orientation.’”

2

**NOT a weakening of
public
accommodations law**

“We do not question the vital role public accommodations laws play in realizing the civil rights of all Americans.” A “compelling interest” remains.

3

**NOT a religious
liberty holding**

Decided on free speech. The fourth case today whose religious framing is not its holding.

4

**NOT a general rule
for businesses**

Tethered to the stipulations: expressive, customized, original, pure speech. A caterer, a florist, a baker — each a different case.

The stipulated objection runs to the message, not to the customer. She declines the same content whoever orders it.

Barnette and 303 Creative, side by side

Both arrive dressed as religion cases. Both are decided as compelled speech.

BARNETTE — 1943

Jehovah's Witness schoolchildren. Gobitis had been argued and lost on free exercise.

"Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held."

303 CREATIVE — 2023

A religious objection to content that "contradicts biblical truth," stipulated as sincerely held.

Decided on free speech. The religious motivation is background to the stipulations, not the ground of decision.

Gorsuch welds Jackson's 1943 clause to a 2014 phrase from McCullen: "[i]f there is any fixed star in our constitutional constellation... it is the principle that the government may not interfere with 'an uninhibited marketplace of ideas.'"

Why would a Court do this twice, eighty years apart? Broader · avoids unstable free exercise doctrine · requires no inquiry into anyone's sincerity.

Barnette, 319 U.S. 624 (1943) · 303 Creative, 600 U.S. 570 (2023) (quoting Barnette at 642 and McCullen v. Coakley, 573 U.S. 464, 476 (2014)).

Where this goes

One question, four answers, and a habit worth keeping.

MODULE 4

Categories

Today asked whether this is an infringement. Next Sunday asks whether it is even covered. Incitement, fighting words, true threats.

MODULE 7

Forums

Where the funding logic and the place logic meet. The government's own programme becomes the government's own property.

MODULES 8 • 8A

Free exercise

Three of today's cases could have been free exercise cases and were not. Ask then what that says about how stable the religion clauses are.

THE HABIT — AND IT IS THE REAL TAKEAWAY

Four times today the free transcription of an opinion differed from the official reporter — a comma in *Barnette*, a truncation in *Velazquez*, dropped quotation marks in *Rust*, added commas in *Lovell*. None changed a holding. Every one would be an error in a brief.

For anything you file: Westlaw, Lexis, or the bound volume. Not a free website — and not these slides.