

MODULE 7:
FIRST AMENDMENT ANALYTICAL STRUCTURE
In-Class Overhead Notes
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Mass Media Law
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Does constitutional analysis even apply?

Alternatively, is there a “[state] mak[ing] [a] law” or an “abridge[ment]”?

(situation coverage / personal jurisdiction / state-action requirement)

Is the challenged action an action of the state? (The government or an agency of the government?)

If no, then the First Amendment doesn’t come into play at all.

But the state-action requirement can sometimes be met just by a private right of action being enforceable in court, in which case the court itself (or the sheriff or marshal acting pursuant to a court order) is the state actor.

Is it “speech”?

(inherent subject-matter coverage / jurisdiction)

May or may not be:

- money, donations
- symbolic speech (flag burning)
- nude dancing, “performance art”

(But this is unlikely to be an issue in the mass-media context.)

Is the speech entitled to First Amendment protection?
(construed subject-matter coverage / jurisdiction)

Excluded:

- obscenity
- fighting words
- incitement
- true threats
- defamation not regarding a public figure or matter of public concern

if not protected, then apply rational-basis scrutiny (as applies to all regulation)
must be rationally related to a legitimate state interest
(in other words, almost always will be upheld)

But, viewpoint-discrimination with respect to unprotected speech is subject to strict scrutiny

If protected, what level of scrutiny will the restriction get?

Is the regulation content-based or content-neutral?

if content-based regulation, then apply strict scrutiny
must be proved necessary to achieve a compelling
government interest
(in other words, almost always will be struck down)

if content-neutral, then apply more-or-less intermediate
scrutiny
must be substantially related to an important
government interest

but it also matters what category the speech falls into

- political speech draws the strictest scrutiny
- commercial speech draws lesser scrutiny,
sometimes said to be “intermediate” (but in
practice, content-based restrictions on commercial
speech have received something close to strict
scrutiny at SCOTUS)