

**FREEDOM OF SPEECH  
IN A BOMBSHELL**  
Liberty University School of Law  
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**Framework for analysis**

1. Is it speech?
2. If speech, is the regulation content based or content neutral?
3. If content based is it unprotected, semi-protected, or protected?
4. If unprotected or semi-protected is it viewpoint based?
5. If content neutral, which of three categories?
6. Does the regulation impose a substantial burden on speech?
7. Apply the requisite standard of review

**Standards of review**

Strict scrutiny

1. Compelling governmental interest
2. Least restrictive alternative/narrowly tailored/necessary

Intermediate scrutiny

1. Important/significant/substantial governmental interest
2. Substantial relation, closely tailored, narrowly tailored

Balancing (a form of intermediate)

Speaker's interest (and maybe other interests)  
vs.

Government's interest

Minimal scrutiny

1. Legitimate governmental interest
2. Rational relation

**Unprotected** (stop)

1. Violence (incitement, threats, fighting words, hostile audience, hate speech)
2. Sexual (obscenity, child pornography)
3. Falsity (perjury, false official statements)
4. New categories?
5. Commercial speech (misrep, illegal acts)
6. Government employee (sometimes)
7. Compelled payment (collective bargaining, gov speech, incident to regulatory scheme)
8. Associations (criminal syndicates)

**Semi-protected**

1. Indecency (balance)
2. Defamation (*NY Times* malice)
3. Commercial (intermed)
4. Forum analysis (some) (intermed, reasonable)
5. Government employee (balance, sometimes)
6. Association (sometimes, intermed or balance)
7. Student speech (variety of standards)
8. Campaign contributions (intermed)

**Protected** (strict)

1. All other speech
2. Offensive speech
3. Pornography
4. Virtual child pornography
5. False speech that doesn't harm or benefit
6. IIED of public figure (absolute)
7. Compelled speech
8. Association (sometimes)
9. Forum analysis (sometimes)
10. Prior restraints
11. Campaign expenditures
12. Judicial campaign speech

**Content based**

(facial, purpose, as-applied)

**Content neutral** (intermed)

1. Time, place, and manner
2. Expressive conduct
3. Secondary effects

**Doctrines applying to all regulation**

1. Overbreadth
2. Vagueness

**Restrict speech**

Is it speech? (objective and subjective tests)

Targets speech

Incidental burden

**Outside Speech Clause**

1. Governments as speaker
2. Agent speaks for government
3. Government subsidizes private speech