

Introduction

I. Doctrine

A. 2 Questions

1. scope of the right
2. strength of the right

B. Variables:

1. character of the speech or definition of religion
2. nature of the government restriction
3. importance of state interest

II. Themes in first am law

A. Values served by free speech/religion and dangers of suppression

B. Expression v. action/ religion v. non-religion

C. Content-neutrality/nondiscrimination

D. Categorization

E. Role of government as facilitator

III. Issues in constitutional adjudication generally

A. The political problem: countermajoritarianism

B. The linguistic problem: ambiguity and interpretation

C. The sociological problem: change v. tradition

History and Constitutional Interpretation

- I. The framers' intent
 - A. Blackstonian definition of free speech
 - B. Seditious libel
 - 1. Zengerian principles
 - 2. Democratic theory
 - 3. Is seditious libel really central?
 - C. Federalism
 - D. Impact of the Alien and Sedition Acts
 - E. Relevance of actual press practice
- II. Why is the framers' intent relevant to constitutional interpretation?
 - A. Objectivity
 - 1. The value of objectivity
 - 2. The possibility of objectivity
 - B. Binds us -- contract metaphor
- III. Alternative sources of constitutional restraint (besides framers intent)
 - A. Natural law
 - B. Social engineering
 - C. Social cohesion and identity

Truth Theory

- I. Assumptions
 - A. Fallibility
 - B. Value of truth
 - C. Ability of people to recognize and accept truth
- II. Criticisms
 - A. Application problems
 - 1. market imperfections
 - 2. time
 - B. Theoretical problems
 - 1. Empirical claim -- no support
 - 2. Analytical claim
 - a. Implausible assumptions
 - b. Tautological or self-contradictory
- III. Implications for constitutional problems
 - A. Countermajoritarianism
 - B. Interpretation
 - C. Change v. tradition

Democracy Theory

- I. Argument (e.g. Meiklejohn)
 - A. Democracy means people control
 - B. People need speech to control
 - 1. information
 - 2. participation
 - C. Purpose of 1st am: to protect speech necessary to democracy
- II. Implications
 - A. Countermajoritarianism
 - B. Interpretation
 - 1. Scope of right
 - a. Types of speech
 - b. Types of environment
 - 2. Strength of right
- III. Criticisms
 - A. Ambiguous definition of democracy requires value choice
 - B. Public/private distinction untenable or unacceptable
 - C. Decision to suppress may itself be democratic

Variations on Democracy Theory

- I. Bork
 - A. The theory
 - 1. Value of speech-- "search for political truth"
 - 2. Scope of right
 - a. explicitly political speech
 - b. no advocacy of illegality
 - B. The criticisms
 - 1. Scope doesn't match value
 - 2. Value not unique to speech
 - 3. Advocacy of illegality serves value
- II. Sunstein
 - A. Republican model of democracy
 - B. Role of free speech in this model
 - C. Requirements for a free speech system: ideal and minimum
 - D. Role of government in the system

Self-fulfillment theory

- I. The theory
 - A. Value defined
 - B. Source of values
 - 1. Philosophy (Baker) or
 - 2. Choice of Democracy (Redish)
 - C. Scope of right -- why is speech different from other acts?
 - D. Strength of right
 - 1. Absolute -- deontological theory
 - 2. Not absolute -- teleological theory
- II. Criticisms
 - A. Values controversial
 - B. Scope -- No distinction between speech and action
 - C. Problems with strength of right

Sociological Theories

- I. Utilitarian Theories
 - A. The theories
 - 1. Mental fitness
 - 2. Suppression won't work
 - 3. Social stability
 - 4. Dangers of censorship
 - B. Criticisms
 - 1. Doubtful assumptions
 - 2. Limited application
- II. Tolerance theory
 - A. The theory
 - 1. Intolerance as expression
 - 2. Applies to all acts
 - 3. Free speech teaches tolerance
 - B Criticisms
 - 1. Scope of the right
 - 2. Strength of the right

Modern Mixtures (e.g. Robert Post)

- I. Domains of Speech
 - A. Community
 - 1. Nature of the domain/image of the person
 - 2. Speech issues
 - B. Management
 - 1. Nature of the domain/image of the person
 - 2. Speech issues
 - C. Democracy
 - 1. Nature of the domain/image of the person
 - 2. Speech issues
- II. Need different 1st Am theories and doctrines for different domains—there is not one unified theory of free speech
- III. Relation to other theories
- IV. Criticisms
 - A. Can't keep domains neatly separate
 - B. What about conflict between domains?

Regulation of Subversive Speech

- I. Consequences of speech
 - A. C+P danger v. bad tendency (or rational basis)
 - B. Interpretive issues (Whitney)
 - 1. Size of harm
 - 2. Likelihood of harm
 - 3. Imminence of harm
 - 4. Relation between size and likelihood
- II. Role of intent (Schenk, Abrams)
 - A. Evidence of danger
 - B. Attempt analogy
 - C. Statutory interpretation v. constitutional requirement
 - D. Subjective v. Objective
- III. Character of speech -- incitement v. advocacy (Masses)
 - A. Statutory interpretation v. constitutional requirement
 - B. Judicial competence argument
- IV. Application of standard to: (Gitlow & Whitney)
 - A. Schenk-type statute
 - B. General legislative judgment of harm
 - C. "As applied" judgment
- V. Conspiracy issues: group v. Individual action (Dennis, Yates, Scales)
 - A. Nature of harm changes?
 - B. Imminence requirement?
 - C. Nature of membership?

Libel

- I. Group libel -- Beauharnais
- II. Individual Libel
 - A. Character of Plaintiff
 - 1. Public figure (N.Y. Times)
 - a. What is a pub fig?
 - b. General v. limited purpose
 - 2. Private figure
 - a. Issue of public interest -- Gertz
 - b. issue not of public interest -- Dunn & Bradstreet
 - B. Character of defendant -- media v. Non-media?
- III. Explanation
 - A. Purposes of false speech
 - B. Government interest?
 - C. Theories of free speech

Libel

	Public Figure	Private Figure
Matter of Public Concern	New York Times	Gertz
Matter of Private Concern	?	Dunn & Bradstreet

Invasion of Privacy

- I. False Light -- Time v. Hill
- II. True privacy -- Florida Star; Bartnicki
 - A. Illegally obtained?
 - B. Matter of pub concern?
 - C. Pub v. priv fig?
 - D. comprehensive scheme
- III. Emotional distress -- Falwell

Fighting Words

- I. Definition
 - A. face to face and individual
 - B. personal insult
 - C. likely to incite imminent breach
- II. Explanation
 - A. purposes of speech
 - B. government interest

Hostile Audience

- I. Clear and Present danger analysis
 - A. Intent relevant?
 - B. How large and likely a harm?
- II. Controlling crowd v. controlling speaker?

Overbreadth and Vagueness

- I. Overbreadth
 - A. Distinguished from facial or as applied challenges
 - B. Substantial overbreadth requirement
 - C. Application to lower value speech
 - D. Relation to LRM
- II. Vagueness
 - A. Distinguished from overbreadth
 - B. 1st Amendment chill issue

Obscenity

- I. Definition of obscenity
 - A. Elements
 - 1. Prurience -- community standards
 - 2. specified acts/offensive manner
 - 3. social value
 - B. Problems
 - 1. Vagueness
 - 2. Overbreadth
- II. State interests in reg
 - A. Moral interests
 - 1. individual's thoughts
 - 2. moral tone of community
 - B. Other interests
 - 1. preventing crime
 - 2. preventing offense to unconsenting adults
 - 3. protecting minors
 - 4. physical changes in community
- III. Justification for exclusion
 - A. No contrib to purposes of speech
 - B. Method -- physical not mental or emotional

Child Pornography

- I. State interest different from obscenity
 - A. Distribution v. production (Ferber)
 - B. Distribution v. possession (Osborne)
 - C. Real children only (Ashcroft)
- II. Social value -- how small must it be? (Ferber)
- III. Overbreadth issues

Offensive, Non-obscene Speech

- I. Character of speech -- 1st am value -- lower level
- II. Nature of regulation
 - A. Content but not viewpoint-based
 - B. Restriction but not ban
- III. Nature of Government interest
 - A. Primary effects (communicative)
 - 1. Offensiveness, only if:
 - a. Privacy and/or
 - b. Intolerable manner of invasion (e.g. captivity)
 - 2. Other – e.g. persuasion to immorality – illegit
 - B. Secondary effects (non-communicative)
 - 1. Content-neutral (e.g. noise) -- ok
 - 2. Content-based (e.g. urban blight) -- ok

Commercial Speech

- I. First amendment value
 - A. Misleading speech or illegal activity -- excluded category
 - B. True and legal -- protected but lower value category
- II. Government interest
 - A. must be substantial
 - B. is paternalist interest in influencing legally free decisions even legitimate?
- III. Nature of restriction
 - A. content distinction must be directly related to state interest
 - B. narrowly tailored, but not least restrictive means

Hate Speech

- I. Group Libel
 - A. Is Beauharnais still good law?
 - B. Any limits?
- II. Fighting Words
 - A. Chaplinsky and later cases
 - B. Are the requirements met?
 - C. C-D within excluded category -- RAV
- III. Threats (Virginia v. Black)
 - A. Cross burning as subcategory – does it meet RAV?
 - B. Proof of intent
 - C. Role of government motive
- !V. New excluded category
 - A. Ferber analogy
 - B. 1st am value?
 - C. State interest?
- V. Context
 - A. University
 - B. General public and public spaces

Right to Silence

- I. Explanation
 - A. Misinterpretation
 - B. Hateful support --> dignity
 - C. Mind control
- II. Government speech v. coerced speech
 - A. Rehnquist view: affirmation v. support
 - B. Scalia view: speech v. subsidy
 - C. No "establishment" clause for speech

Speech in Exchange for Government Benefits

I. Right v. Privilege

- II. Unconstitutional Condition doctrine
- III. Continuum
 - A. Endpoints: government as speaker v. public forum
 - B. Factors in the middle
 - 1. How public is the forum?
 - 2. What is the purpose of the program? What is the relationship of the content-distinction to that purpose?
 - 3. Is it view-point or subject-matter discrimination?

Free Speech in the Public Schools and Libraries

- I. Student speech
 - A. Independent student speech (Tinker)
 - B. In a school supported context -- Rational rel to legit educ concern (Hazelwood)
- II. Control over books
 - A. Intent matters (PICO)
 - B. Need for discretion -- Initial choice v. removal? (AmLib)
 - C. Amount of burden on protected speech? (AmLib)

Time, Place or Manner Restrictions in a Public Forum

- I. Content-neutral
 - A. On its face?
 - 1. View-point discrimination
 - 2. Subject matter discrimination
 - 3. Other? (Speech act categories □ e.g. solicitation)
 - B. Non-communicative harm
 - C. Discretion raises content-discrimination issues
- II. Significant state interest and narrowly tailored
- III. Adequate alternatives
 - A. What about cost and conv?
 - B. What about format bans?

Symbolic Speech

- I. When is action expressive? (Spence test)
 - A. Intent
 - B. Receipt
- II. O'Brien standard
 - A. Substantial state interest
 - B. Unrelated to suppression
 - 1. Communicative harm
 - 2. Government's interest in national symbols? Johnson
 - C. Narrowly tailored
- III. Relation to other standards
 - A. TPM standard
 - 1. Court says: identical and apply to same cases Clark
 - 2. Criticism:
 - a. Distinct problems: facilitative v. expressive
 - b. O'Brien deserves more than TPM
 - c. Rejection of precedent?
 - B. Secondary effects
 - 1. Paps majority says related
 - 2. Paps dissent distinguishes
- IV. Incidental regulations with no 1st am issue: Arcara
 - A. Doesn't regulate a facilitative or expressive aspect of speech
 - B. Doesn't single out speech activities (Minneapolis Star)
 - C. No 1st am issue even if impact on speech

Money and Political Speech

- I. Speakers' identity and 1st am values
 - A. Individual
 - B. Political Party
 - C. Corporation
 - 1. For profit
 - 2. Not for profit advocacy
 - 3. Media
- II. Political activity regulated
 - A. Candidate related
 - 1. Campaign contribution
 - 2. Coordinated expenditure
 - 3. Independent expenditure
 - B. PAC related
 - C. Ballot initiatives
- III. State's interests
 - A. Corruption -- reality and appearance
 - B. Democracy -- Is equalizing voices unconstitutional?
 - C. Closing loopholes
 - D. Protecting shareholders' 1st am interests
 - E. Protecting office holders' time?

Freedom of Association

- I. Why protected?
- II. Kinds of association
 - A. Intimate
 - B. Expressive
- III. Standard of review -- strict scrutiny
 - A. Direct v. indirect interference
 - B. Extent of interference
 - C. Source of interference

The Purposes of the Religion Clauses

- I. History and Theory
 - A. Enlightenment Liberalism
 - 1. Nature of Religion
 - 2. Nature of the state
 - 3. Anti-clericalism
 - B. Protecting the Faith
 - 1. Different assumptions?
 - 2. Different implications?
- II. Doctrine
 - A. Three values
 - 1. Voluntarism
 - 2. Separation
 - 3. Neutrality
 - B. How to reconcile them?

The Establishment Clause

- I. Government aid to religious institutions
 - A. Discrimination v. aid to all religions
 - B. Lemon test
 - 1. Secular purpose
 - 2. No primary effect of benefitting religion
 - a. General laws v. targeted ones
 - b. Aid through private actors v. direct aid
 - c. Symbolic aid
 - d. Relieving religious of costs it would otherwise bear
 - e. Aid used for core religious activity– content and/or diversion
 - 3. No entanglement -- including political divisiveness?
- II. Government use of religious symbols
 - A. Endorsement
 - 1. Whose perspective?
 - 2. What about message of hostility?
 - 3. Individual v. government speech
 - B. Coercion
 - 1. Free exercise v. Establishment
 - 2. What kind of coercion?
 - 3. How much?
 - C. Neutrality
 - 1. Does it just mean non-preferentialism?
 - 2. Is accommodation ok, and if so what kind?
 - D. Government purpose -- how to analyze?
 - E. Historical practices
 - 1. Relevance to interpretation
 - 2. Political problems with invalidation

The Free Exercise Clause

- I. Definition of religion
 - A. Statutory
 - B. Constitutional
- II. What is a burden?
 - A. Laws facially directed at religion
 - 1. No discrimination between religions -- Hialeah
 - 2. S.s. even where "non-sectarian" -- is this possible?
 - B. Facially neutral "general" laws
 - 1. Internal government action -- Lyng problem
 - 2. Impact on believer's own action
 - a. Reynolds
 - b. Sherbert exemptions
 - c. Smith decision
 - d. RFRA
 - e. City of Boerne
 - f. What next?

Accommodation of Religion

- I. Impact of Smith -- none required
- II. Permitted but not required
 - A. Lemon test problems
 - B. Alternative standards
 - 1. Alleviates burden created by government
 - 2. No coercion or influence on religious choice
 - 3. No burden on non-believers
 - 4. No endorsement