

1st Amendment Law – The Freedom of Speech

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble*, and to petition the government for a redress of grievances.”

I. “Speech”

- A. Defined as speech or conduct meant to convey a message to others.
- B. “Speech” is written or spoken utterances.
- C. “Conduct” are actions meant to act as speech, such as burning a flag or wearing an objectionable costume (ex: wearing a Nazi uniform to a city council meeting).

II. Type of Speech

- A. *Whitney v. California* (1927) – Member of the Communist Party advocated overthrow of the US with violence. Supreme Court held that speech advocating *illegal conduct*, or the advocacy of illegal conduct, was outside the protection of the First Amendment.
- B. *Brandenburg v. Ohio* (1969) – Overturned *Whitney*. Armed Ohio KKK members held a rally in which they publically advocated violence against minorities & a march to take over Congress.
 - 1. Court created the **Brandenburg Test** (also called the *Imminent Lawless Action* test), deciding that in order to punish the speaker, the speech must be:
 - a. *intended* to incite or produce
 - b. *imminent lawless action*, and;
 - c. *likely* to incite such action.
- C. *Stewart v. McCoy* (2002) – Court overturned conviction of an Arizona person advising members of a street gang how to organize themselves.

III. Time, Place, and Manner

- A. *Perry Educ. Ass'n v. Perry Educators' Ass'n*, 460 U.S. 37 (1983) - Supreme Court divided forums into **three types**:
- B. **Traditional Public Forums** (Strict Scrutiny) – Parks, sidewalks, & other places traditionally used for public speech. Strict scrutiny dictates that restrictions are allowed only if:
1. They serve a *compelling state interest* and;
 2. Are *narrowly tailored to meet the needs of that interest*.
- C. **Designated Forums** – *Minnesota Voters Alliance v. Mansky*, 585 U.S. (2018). Government opens a place for public speech, such as theatres or meeting rooms at state universities. *They are given the same protections as traditional forums*, but the state is not obligated to keep the forum open.
- D. **Nonpublic Forums** – *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). Places not traditionally used for speech, such as airport terminal or internal mail system of a school.
1. Government *may restrict contents of a speech*, as long as the restriction is:
 2. *Reasonable* and;
 3. *The restriction does not discriminate based on speakers' viewpoints*.

IV. “Fighting Words”

- A. **Generally** – Those words intended to provoke a retaliatory act of violence against the speaker
1. Today (post-*Brandenburg*), the doctrine relates more to the protections of the law held by all citizens rather than government actions against the speaker.
 2. Uttering “fighting words” to another may cause one to lose that the protection of the law, i.e. they listener may be legally justified in attacking the speaker (or at least legally excusable).

B. Cases:

1. *Chaplinsky v New Hampshire* (1942)
2. *Terminiello v. Chicago* (1949)
3. *Feiner v. People of State of New York* (1951)
4. *Texas v. Johnson* (1989)