Issues

* Advocacy of Illegal Conduct
* Hostile Audience & Fighting words
* Obscenity
* Lewd and Indecent Speech
* Hate Speech

***Advocacy of Illegal Conduct***

* **CASES:**
  + Schenk, Frohwerk, Debs, Dennis: Predecessors that should be noted.
  + Brandenburg v Ohio (1969) : Leader of KKK is prosecuted under Ohio law, KKK statement was broadcasted locally and nationally. Ohio statute knocked down, *KKK WINS THE CASE.* 
    - Court says you need to have pronged test: 1. Imminent Action 2. Likely Action
    - Imminent means immediate
      * Public speech does not pose imminent danger there is room for counterspeech
    - Likely action - this is where “explicit” comes in, even though that word is not mentioned in Brandenburg
      * Even explicit call for violence is still protected unless if the audience will legitimately react
    - Mix of Learned Hand and “Clear and Present Danger” - Hand says only speech that EXPLICITLY advocates dangerous or illegal action is prohibited, “Clear and Present Danger” suggests that govt proves danger is likely given the speech

**Hostile Audience & Fighting words**

* Definition from Chaplinsky: “Words which by their very utterance inflict injury or tend to incite an immediate breach of the peace”
* **CASES**:
  + Chaplinsky v New Hampshire (1942): Chaplinsky was on the street and called people fascists and racketeers. Convicted on New Hampshire statute prohibiting offensive and derisive words. Court **upheld** the conviction, giving New Hampshire the win
    - Established the fighting words doctrine, since fighting words were of “low value” and thus excluded from First Amendment protection, allowing States to regulate them
    - Still rule of law but future cases have significantly cut the scope of fighting words
    - Note: There hasn’t been a conviction upheld on fighting words since Chaplinsky
  + Cohen v California: Guy wearing a “Fuck the Draft” shirt in public courthouse. Convicted of California statute for willfully disturbing public peace. Court **reversed** the conviction, giving Cohen the win.
    - This was both a fighting words and lewd speech case (see below section)
    - "No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult"
      * His shirt was not directed at anyone in particular
    - People who were offended could easily “avert their eyes” (this wasn’t a case of him blasting this down a residential neighborhood)
    - This case limited the fighting doctrine by removing expletives from it
  + Texas v Johnson: Court **invalidated** Texas statute prohibiting anyone from desecrating the American flag in a way that would offend others
    - Court held that “expressive conduct” did not fall within fighting words doctrine
  + Snyder v Phelps: Westboro Baptist Church protested at a gay soldier’s funeral. Snyder filed suit claiming emotional distress. Court of Appeals held that Westboro’s statements were entitled to First Amendment protection. Court **upheld** Westboro’s statements, validating their First Amendment protection.
    - Speech on public issues occupies the highest rung of the hierarchy of First Amendment values -> Content was about gay marriage, which is an issue of interest to society at large
    - Distress and “outrageousness” cannot be determined around the messaging itself, otherwise juries will impose liabilities based on their tastes or views

**Obscenity -** def: (the breakdown of consensus)

* **CASES**:
  + Roth v United States (1957): Roth was convicted of federal statute prohibiting mailing “obscene” publications. Court **affirmed** his conviction.
    - First case to carve out obscenity exception from First Amendment
      * Obscenity is material “utterly without redeeming social importance”
    - Proposed test: If average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest
    - This case has been superceded by Miller v California
  + Miller v California (1973): Miller sent mass mailing campaign sending adult material. Convicted of a State obscenity statute banning sexually explicit materials from being thrust upon unwilling recipients. Court remanded the lower court to use this test and reapply the case, which again found Miller **guilty**
    - Upheld Roth case that obscene material does not have blanket First Amendment protection, and that contemporary community standards need to determine whether material is obscene. However they reject the Roth requirement that “utterly without redeeming social value” as too vague of a requirement.
    - Current test on obscenity, the Miller test:
      * Whether the “average person applying contemporary community standards” would find the work, taken as a whole, appeals to the prurient interest (i.e must be sexual)
      * Whether the work depicts in a patently offensive way, sexual conduct specifically defined by applicable state law
      * *Work lacks serious literary, artistic, political, or scientific value*
    - Examples given by the opinion of what would be “patently offensive” would be: ultimate sexual acts, masturbation, excretory functions, and lewd exhibition of the genitals
    - The test requires failing both community standards (around what would be offensive and prurient), and national standard (on value) to be exempt from First Amendment protection
  + Paris Adult Theatre I v Slaton: An adult theater showed very pornographic films to consenting adults. The theater put up reasonable warning outside of the establishment. Slaton wanted two of the films to be declared obscene and prohibited from being shown. Injunction declared by lower courts was **upheld** by the Supreme Court, giving Slaton a victory.
    - Court held that obscene films do not get First Amendment exemption from State regulation just because they are only shown to consenting adults
    - There is a legitimate State interest in this situation, since exposure to obscenity impacts “the interest of the public in the quality of life and the total community environment”
  + Cases about obscenity on the Internet
    - Child pornography is illegal because there are legitimate “state interest in safeguarding the physical and psychological well-being of a minor” (New York v Ferber)
      * The New York state statute was legal because it targeted the production of the work, not its content
      * Cited this case in Stevens case: Market for child pornography was “intrinsically related” to the underlying abuse
    - Ashcroft v Free Speech Coalition: Court invalidated Child Pornography Prevention Act of 1996, which prohibited porn of people that appeared to be minors (adults that looked young, or animations)
      * "Prospect of crime by itself does not justify laws suppressing protected speech”
      * Cannot ban speech because of the tendency of the people watching it (equivalent to advocacy of illegal conduct)
      * Unlike the Ferber case, this places unconstitutional restrictions to the content of the work, not the production
    - US v Stevens: Stevens sold videos of dogfights and was convicted with criminal code that bans creating, selling, or possessing animal cruelty videos for commercial gain
      * Animal cruelty survives the “ad hoc balancing of relative social costs and benefits”
      * Animal cruelty is not as much of a concern as the wellbeing of minors
      * Serious value argument from the Miller can only apply to cases of sex and obscenity, and not as a precondition for other types of speech
    - Video games qualify for First Amendment protection (Brown v Entertainment Merchants Association)
      * Can’t ban kids from purchasing violent video games

**Lewd and Indecent Speech**

* **CASES**:
  + Cohen v California: (see facts above) The lewd speech portion of the case questions if vulgarity like “fuck” is low value speech and if states should be able to regulate it
    - Emotional expression that has societal value makes it NOT speech of low value: “one man’s vulgarity is another’s lyric”
    - States have no right to “cleanse public debate”
    - Banning particular words also runs the risk of “suppressing ideas in the process”
  + Erznoznik v Jacksonville: Jacksonville ordinance that declared a public nuisance for any drive-in movie theater to exhibit nude body parts visible from a public area. Court **invalidated** this ordinance.
    - This ordinance shields some speech from public based on the ground that they are more offensive than others, which is a fundamental 1A violation
    - Burden falls on the viewer to “avert his eyes”
    - City's attempt to protect children is unwarranted since it is not directed at sexually explicit graphics, but any visibility of nude body parts in any context (even if it's inoffensive)
  + FCC v Pacifica: George Carlin’s “Filthy Words” monologue was broadcast by Pacifica. FCC fined him violating the rule banning airing sexual or excretory activities that are patently offensive by contemporary community standards at times of day when children are likely to be in the audience. Court **upheld** the fine and the Commission’s rule.
    - Court said Commission didn’t object to Carlin’s political ideas or opinions, but only to the way he expressed those ideas
    - The ease at which children of all ages were able to access broadcast justify "special treatment of indecent broadcasting"
      * Cited in Reno v ACLU: Broadcast “received the most limited First Amendment protection”, since warnings could not adequately protect the listener from unexpected program content
    - Commission does not prevent willing adults from listening at night, or from purchasing Carlin’s record, attending his performances, or reading a transcript
    - Dissent: Radio can be turned it off (but not relevant argument)
  + Other mediums for distribution lewd speech
    - Laws against interstate transmission of indecent telephone messages was struck down (Sable Communications vs FCC) -- since user requires taking “affirmative steps” to receive the message
    - Law prohibiting indecent communication over Internet to underage people was struck down (Reno v ACLU)
      * User again needs to undergo “affirmative steps” on the Internet to encounter indecent material
      * CDA also suppresses a “large amount of speech that adults have the constitutional right to receive and address one another”
    - Ashcroft v ACLU
      * Another case around COPA, Child Online Protection Act, made in response to the Reno ruling.
      * Court ruled that COPA was not restrictive enough (e.g filtering)

**Hate Speech**

* A subgroup of lewd speech that is primarily targeted at specific groups, often for political purposes. The current consensus is that this type of speech is protected on the grounds that it would be viewpoint discrimination to ban it.
* **CASES**:
  + Beauharnais v Illinois: Beauharnais organized a racist leaflet distribution, convicted under Illinois statute declaring it unlawful for any person to distribute materials that portray depravity of any citizen by race, color, creed, or religion. Court **affirmed** the conviction.
    - Created group libel theory
    - “Libelous utterances are no essential part of any exposition of ideas” -> Drew upon Chaplinsky saying that the harm of these ideas outweighs any benefits it brings to “finding the truth” (low-value speech)
    - Illinois has a reason for this ban because of its history of racial tension
    - Libel crimes against individuals (which can be regulated by States) can be applied to groups and thus States can regulate it
  + RAV v St Paul - teenager burned a cross on a black man’s lawn, violated St. Paul’s hate speech ordinance. Court **struck** **down** St Paul’s hate speech ordinance.
    - While fighting words are not permitted, you cannot ban them for speech that is doing other things (Scalia), you are allowed to do a generic fighting words ban that is content neutral
    - Cannot ban speech just because of what the subject of speech is (the ordinance is not a content-neutral ban)
      * Everything *should* be content-neutral
  + VA v Black (2003): VA had a statute that banned cross-burning, individuals were found to have committed cross-burning on two separate occasions. Statute was declared **unconstitutional**
    - MAY ban cross-burning if it is intent to intimidate, but the burden of proof is on the defendant to prove he wasn’t intimidating.
      * Thats WHY it got struck down - cannot place burden of proof on defendant
    - Speech that is a general personal threat is NOT protected, but advocacy still is
    - Cross-burning does not inherently carry a message, it could purely be meant to intimidate, which is why it is okay to regulate it
    - If done in a way that is a threat against a person, state can and should intervene to protect that person