**Lecture 9/18 –**

Advocacy vs Inciting – kind of question we should be asking

Brandenburg is where Modern First Amendment Theory begins

Final exam – hypothetical case, you need to figure out all the possible arguments

* Consider stare decisis, and implications that a future court is bound by your decision, what facts do I want to know that makes a difference?
* Courts may also follow the dissents of preior cases
* Do 5-4 decisions hold less weight than a 9-0 decision? In theory, no.

**Case:** Big rally of White Nationalist group is speaking at the podium in a large public venue, protesters against the White Nationalists start gathering and raise placards and create noise, the White Nationalist speaker says “Lets take them down.” Supporters yell in support and move towards the protesters and become physically violent; police arrest the assaulters AND the speaker.

* Question: Is the speech protected? Suppose you represent the White Nationalist Speaker
* Speaker is being arrested for incitement – speaking in a way that caused supporters to engage in illegal actions (assault)
  + Begin with Brandenburg: Brandenburg laid down the three-pronged test, speech was directing lawless action that was imminent
  + Case: “Lets take them down, show them what we feel” might be a lot more abstract
    - The opposite side can suggest that “Let’s take them down” is a call to violent action
    - We can say this was not explicit, however
    - It is wrong to say that any call to violence is not protected by 1st amendment – that is not true
  + If Schenck, Frohwerk, and Debs had still been the precedent, what would the decision have been?
    - Holmes – if you were interested in truth, you will protect speech, recall “marketplace of ideas”
    - Hand – anytime someone opposes government policy, they lose free speech protection? That cant be right