

Analyzing Constitutionality Under the First Amendment's Free Speech Clause

This Infographic illustrates the analytical steps a court might follow to determine whether a particular government action or application of law complies with the Free Speech Clause of the First Amendment. A key step in that analysis is deciding which level of constitutional scrutiny (i.e., legal test) to apply to balance the government's regulatory interests against the individual rights of affected speakers. Strict and intermediate scrutiny (defined below) are the two most common levels of scrutiny in First Amendment cases.



Begin with the question, **“Is the government regulating speech?”** Continue responding to the questions, following the arrows, until a response includes a symbol corresponding to a specific level of scrutiny. Different legal standards might apply in particular contexts (e.g., schools, government programs). The party challenging a law on free speech grounds may have to satisfy additional legal tests for particular types of claims (e.g., vagueness, overbreadth).



Is the government regulating speech?

Speech

- Including books, movies, music, photos
- Some forms of expressive conduct (see below)

Conduct

- Non-expressive
- Inherently expressive
- Has expressive and non-expressive elements

What kind of speech is the government regulating?

Protected Speech

- Commercial

Certain commercial disclosure requirements may receive a less-stringent standard of review under *Zauderer v. Off. of Disciplinary Counsel*, 471 U.S. 626 (1985).

- Noncommercial

Unprotected Speech

- Strictly defined categories such as defamation, true threats, and obscenity

Some content-based distinctions within a category of unprotected speech may trigger strict scrutiny. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

Mix of Protected Speech and Unprotected Speech

What is the basis for regulating this speech?

Content Based

- Viewpoint
- Subject matter or topic
- Substantive message

Courts sometimes invalidate viewpoint-based laws without undertaking strict scrutiny.

Content Neutral

- Nonsubstantive aspect of speech (e.g., location)
- Time, place, or manner of speech

LEVELS OF SCRUTINY

Rational basis
Rationally related to a legitimate governmental interest

Intermediate scrutiny
Directly advances an important or substantial governmental interest and is narrowly tailored (i.e., not substantially broader than necessary) to achieve that interest; sometimes requires ample alternative channels for communication of the information

Strict scrutiny
Serves a compelling governmental interest and is narrowly tailored—that is, the least restrictive means of achieving that interest

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