



Lee Burgess: Welcome back to the Law School Toolbox podcast. Today, we are doing another in our “Listen and Learn” series – this one is on the First Amendment. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the law school and early legal career experience, so you’ll be the best law student and lawyer you can be. We’re the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl’s Guide to Law School](#). If you enjoy the show, please leave a review or rating on your favorite listening app. And if you have any questions, don’t hesitate to reach out to us. You can reach us via the [contact form](#) on LawSchoolToolBox.com, and we’d love to hear from you. And with that, let’s get started.

Lee Burgess: Hello, and welcome back to the “Listen and Learn” series from the Law School Toolbox podcast! Today we are going to talk a little bit about when, where, and how the government can regulate speech. That’s right, the First Amendment!

Lee Burgess: The First Amendment has been a hot topic and the subject of much debate in recent news. And there are a lot of misconceptions surrounding the First Amendment – when it applies, when it doesn’t, and who is protected. I would not be surprised if we see a First Amendment issue on your upcoming exams. Even outside of this being a topic of interest in the news, professors love testing First Amendment issues. This is usually because it is one of the last things covered in your Constitutional Law class. And professors are pretty sure at that point you may not be reading every case carefully or really reviewing what is happening in class. So, they often test the First Amendment to keep everyone honest. Just because it is the last topic covered doesn’t mean it’s not fair game for your exams. So, we thought we would take a look today at a very specific issue under the First Amendment – content-neutral time, place, and manner restrictions on speech. Who remembers this from first year Con Law?

Lee Burgess: Now, with any First Amendment issue, the first thing we want to ask is: Is there a government actor? If there is no government actor, the First Amendment does not apply. For example, the First Amendment does not apply to Facebook or Twitter, since neither Facebook nor Twitter is a government entity. So first we must make sure there is a government entity that is doing the regulating.

Lee Burgess: Now, assuming we are looking at a government actor and have found the First Amendment to apply, under what parameters can the government regulate speech?

Lee Burgess: Content-based restrictions on speech are typically subject to strict judicial scrutiny. This means that there is usually a requirement that the restriction serve a compelling state interest and there is no way of serving the interest that is less speech-restrictive – for example, fighting words and obscenities. However, we are not talking about these types of speech or content-based



restrictions today. Today we are talking about content-neutral speech regulations.

Lee Burgess: Content-neutral restrictions on speech are subject to only intermediate scrutiny, not strict scrutiny. Under the First Amendment, the government may reasonably regulate speech-related conduct through content-neutral time, place, and manner restrictions. Well, what exactly does that mean? Let's take a closer look. And it might mean something slightly different depending on exactly where the speech is being regulated.

Lee Burgess: So, let's start with regulation of speech in a typical public forum – streets, sidewalks, parks, that sort of thing. The government may regulate speech in a public forum as long as the following three conditions are met: one, the regulation is content-neutral. This means the rule does not discriminate based on subject matter or viewpoint. Two, the regulation is narrowly tailored to serve a significant government interest. This means it does not burden substantially more speech than necessary. And three, the regulation leaves open alternative channels to communication. So, other means of communicating the idea must be available. Note, even if a government regulation passes this test, it could still be struck down for being overbroad or vague.

Lee Burgess: So far, we have been talking about traditional public forums – like a park, sidewalk, or a public street. Would the analysis change for a school building or other government-owned property which is sometimes, but not always, open to the public? This type of forum is called a limited public forum or designated public forum. This is an area that a government entity could close to speech but chooses to open to speech – for example, a school building open to after-school clubs. Once the area is open to speech, it is treated the same as a traditional public forum and we use our same three-prong test. In other words, any regulation in a limited public forum must be content-neutral, narrowly tailored to serve a significant government interest, and leave open alternative channels of communication.

Lee Burgess: In addition to public and limited public forums, there is a third category called non-public forums. This category is for government property that is not typically associated with speech and assembly, and where the general public is not typically permitted. This would include military bases or other government buildings which are not open to the general public. The government may impose time, place, and manner restrictions on non-public forums, but the test is slightly different. When a non-public forum is involved, government regulations on time, place, and manner of speech will be upheld if they are: one, viewpoint-neutral; and two, reasonably related to a legitimate government purpose.



Lee Burgess: For example, a school newspaper is considered a non-public forum. Therefore, a school board could decide to prohibit articles in school newspapers on vaccines. This is viewpoint-neutral – in other words, it does not limit the content to one view or another. The school board could not, however, limit the articles to only pro-vaccine or only anti-vaccine articles. This regulation would not be viewpoint-neutral and would fail the first prong of the test. The school could limit the content of its newspaper for a reasonable purpose. Preventing misinformation or controlling divisiveness in the school community could be considered a reasonable purpose.

Lee Burgess: Let's look at another quick example. In an effort to control noise in a public amphitheater, the City of New York adopted a regulation that required concert performers to use sound amplification and a sound technician provided by the City. The regulation was passed after many complaints of excessive noise by nearby residents. Is this regulation a proper regulation of speech under the First Amendment?

Lee Burgess: These are the facts of a case called [Ward v. Rock Against Racism](#), where the United States Supreme Court clarified the three-prong test that is the focus of today's discussion on time, place, and manner restrictions. Under the test, this regulation was upheld. It is important to clarify and note that the Supreme Court emphasized that the sound regulations were a time, place, and manner restriction as opposed to a content-based restriction. Again, any content-based restriction on speech is analyzed under strict scrutiny. Going back to our sound regulation here by the City of New York, let's go through each prong.

Lee Burgess: First, is the regulation content-neutral? Yes. The goal of the regulation is not to censor content, but the manner in which it was being broadcast. Second, is the regulation narrowly tailored to serve a significant government interest? Yes, the City of New York has an interest in moderating noise levels and keeping its residents happy. And finally, are there alternative channels of communication available? Yes, the amphitheater was still available for concerts. The regulation passes the three-prong time, place, and manner restriction test for content-neutral regulation of speech.

Lee Burgess: Alright, good job on that one! Let's take a deeper dive into a longer hypothetical. This question is from the [2012 California bar exam](#):

Lee Burgess: "City recently opened a new central bus station. Within the central bus station, City has provided a large bulletin board that is available for free posting of documents. City requires that all free-posted documents be in both English and Spanish, because City's population is about equally divided between English and Spanish-speaking people.



- Lee Burgess: City refused to allow the America for Americans Organization (AAO) to use the bulletin board because AAO sought to post a flyer describing itself in English only. The flyer stated that AAO's primary goal is the restriction of immigration. The flyer also advertised of the time and place of meetings and solicited memberships at \$10 each.
- Lee Burgess: Does City's refusal to allow AAO to use the bulletin board violate the rights of AAO's members under the First Amendment to the Constitution?"
- Lee Burgess: Our analysis will start with a general application of how the First Amendment applies to this situation. Under the First Amendment as applied to the states via the Fourteenth Amendment, all persons have the right to free speech. While this right is not absolute, there are only certain instances when the government may infringe upon this right.
- Lee Burgess: One way a government may validly regulate speech is by controlling the time, place, and manner of the speech. Unlike content-based regulations, these types of content-neutral regulations are put under less scrutiny because they are not limiting what people can say, but rather how and where they can say it.
- Lee Burgess: A public forum is a place that is traditionally open to the public and allows somewhat unrestricted speech. These include parks, open fields, the bus station. Bulletin boards are likely not considered a public forum. Limited public forums are not traditionally open to public speech, but the government opens them up to the public. Therefore, they receive the treatment of a public forum while open.
- Lee Burgess: AAO will claim this is a limited forum because the boards, while not traditionally open to public speech, are open here to post documents for free. And the court's going to likely agree.
- Lee Burgess: While open to public speech, a limited public forum may only regulate the time, place, and manner of speech if the regulation is: one, content-neutral; two, narrowly tailored to achieve a significant government interest; and three, leaves open alternative channels of communication. So, let's look at each prong separately.
- Lee Burgess: First, is the regulation content-neutral? AAO will claim that the requirement that all posted documents be both in English and Spanish is a regulation based on the content of the speech. City will claim that it's content-neutral because it doesn't matter exactly what you say, just how you say it. City will claim this regulates the manner of the speech.
- Lee Burgess: AAO may counter by saying that since the organization has a primary goal of restricting immigration, the regulation goes to the content of their speech



because they're speaking out and trying to make it clear that everyone in America should speak or read English. The court may agree with this point, but will likely side with the City because the overall requirement that documents be in English and Spanish is not regulating content of the documents, but rather the manner in which their speech is conveyed. Therefore, the regulation is likely content-neutral. Prong one of the test is satisfied.

Lee Burgess: Now, next let's analyze under prong two. Is the regulation narrowly tailored to further a significant government interest? City will say that they have a significant interest in communicating with and including the Spanish-speaking population, which make up about half of their population. Because it is necessary to communicate with your residents, the court will likely agree with City that this is a significant interest.

Lee Burgess: AAO may argue that City may have a significant interest in relaying government communications, but its interest shouldn't expand to private communications. Further, the burden it would impose on everyone to translate communications into Spanish would be immense, AAO will say.

Lee Burgess: Even if the court finds the interest in communicating significant, AAO will say this regulation is not narrowly tailored to it. They'll say they could achieve this in other, less restrictive ways, like making communications around heavily populated Spanish-speaking areas be in both English and Spanish.

Lee Burgess: Narrowly tailored means a tight fit. However, because this is a central bus station, it is likely that many Spanish-speaking people use it and therefore need translation. Therefore, so long as the court finds this regulation is content-neutral and is narrowly tailored to a significant government interest, it will likely be able to refuse to post AAO's flyers for not being in Spanish. The second prong is satisfied.

Lee Burgess: Finally, let's look at the last prong. Are there alternative channels of communication available? Yes, City will also likely show that AAO has other channels of communication available. They can post on other boards or directly hand out fliers. The English/Spanish requirement appears to only apply to this bus station's bulletin board. Prong three is also satisfied. The regulation passes the test for government restriction to speech in a limited public forum, and therefore the regulation should be upheld.

Lee Burgess: Great job working through our three-prong test in this hypo! Well, I hope you all feel like experts on content-neutral time, place, and manner restriction to speech under the First Amendment now. Remember to first make sure there is a government actor. Then look at what kind of forum is at play – public, limited public, or non-public. Then, assuming you are looking at a public or limited public forum, apply your three-part test. That is, the regulation is okay as long as



it is: one, content-neutral; two, narrowly tailored to achieve a significant government interest; and three, leaves open alternative channels of communication. If you are dealing with a non-public forum, regulation is okay as long as it is: one, viewpoint-neutral; and two, reasonably related to a legitimate government purpose.

Lee Burgess:

And there you have it – time, place, and manner restrictions under the First Amendment! If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe, so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to Lee or Alison at [lee@lawschooltoolbox.com](mailto:lee@lawschooltoolbox.com) or [alison@lawschooltoolbox.com](mailto:alison@lawschooltoolbox.com). Or you can always contact us via the website [contact form](#) at LawSchoolToolBox.com. Thanks for listening, and we'll talk soon!

#### **RESOURCES:**

["Listen and Learn" series](#)

[February 2012 California Bar Examination](#)

[Ward v. Rock Against Racism, 491 U.S. 781 \(1989\)](#)

[First-Hand Guide to 1L Courses – Constitutional Law](#)

[Favorite Con Law Supplement: Chemerinsky's Constitutional Law: Principles and Policies](#)