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FIRST AMENDMENT

RELIGION AND FREE EXPRESSION

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RELIGION AND FREE EXPRESSION

FIRST AMENDMENT

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.

RELIGION

An Overview

Madison's original proposal for a bill of rights provision concerning religion read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretence, infringed."[1] The language was altered in the House to read: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[2] In the Senate, the section adopted read: "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion. . . ."[3] It was in the conference committee of the two bodies, chaired by Madison, that the present language was written with

[1] 1 ANNALS OF CONGRESS 434 (June 8, 1789).

[2] The committee appointed to consider Madison's proposals, and on which Madison served, with Vining as chairman, had rewritten the religion section to read: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." After some debate during which Madison suggested that the word "national" might be inserted before the word "religion" as "point[ing] the amendment directly to the object it was intended to prevent," the House adopted a substitute reading: "Congress shall make no laws touching religion, or infringing the rights of conscience." 1 ANNALS OF CONGRESS 729–31 (August 15, 1789). On August 20, on motion of Fisher Ames, the language of the clause as quoted in the text was adopted. Id. at 766. According to Madison's biographer, "[t]here can be little doubt that this was written by Madison." I. BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 1787–1800 at 271 (1950).

[3] This text, taken from the Senate Journal of September 9, 1789, appears in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1153 (B. Schwartz ed., 1971). It was at this point that the religion clauses were joined with the freedom of expression clauses.

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its somewhat more indefinite "respecting" phraseology.[4] Debate in Congress lends little assistance in interpreting the religion clauses; Madison's position, as well as that of Jefferson, who influenced him, is fairly clear,[5] but the intent, insofar as there was one, of the others in Congress who voted for the language and those in the states who voted to ratify is subject to speculation.

Scholarly Commentary.—The explication of the religion clauses by scholars in the nineteenth century gave a restrained sense of their meaning. Story, who thought that "the right of a society or government to interfere in matters of religion will hardly be contested by any persons, who believe that piety, religion, and morality are intimately connected with the well being of the state, and indispensable to the administration of civil justice,"[6] looked upon the prohibition simply as an exclusion from the Federal Government of all power to act upon the subject. "The situation . . . of the different states equally proclaimed the policy, as well as the necessity of such an exclusion. In some of the states, episcopalians constituted the predominant sect; in others presbyterians; in others, congregationalists; in others, quakers; and in others again, there was a close numerical rivalry among contending sects. It was impossible, that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by a

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[4] 1 ANNALS OF CONGRESS 913 (September 24, 1789). The Senate concurred the same day. *See* I. BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 1787–1800 at 271–72 (1950).

[5] During House debate, Madison told his fellow Members that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any Manner contrary to their conscience." 1 ANNALS OF CONGRESS 730 (August 15, 1789). That his conception of "establishment" was quite broad is revealed in his veto as President in 1811 of a bill which in granting land reserved a parcel for a Baptist Church in Salem, Mississippi; the action, explained President Madison, "comprises a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.'" 8 THE WRITINGS OF JAMES MADISON (G. Hunt, ed.) 132–33 (1904). Madison's views were no doubt influenced by the fight in the Virginia legislature in 1784–1785 in which he successfully led the opposition to a tax to support teachers of religion in Virginia and in the course of which he drafted his "Memorial and Remonstrance against Religious Assessments" setting forth his thoughts. Id. at 183–91; I. BRANT, JAMES MADISON: THE NATIONALIST 1780–1787 at 343–55 (1948). Acting on the momentum of this effort, Madison secured passage of Jefferson's "Bill for Religious Liberty". Id. at 354; D. MALONE, JEFFERSON THE VIRGINIAN 274–280 (1948). The theme of the writings of both was that it was wrong to offer public support of any religion in particular or of religion in general.

[6] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1865 (1833).

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declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of all religious tests. Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship." [7]

"Probably," Story also wrote, "at the time of the adoption of the constitution and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation." [8] The object, then, of the religion clauses in this view was not to prevent general governmental encouragement of religion, of Christianity, but to prevent religious persecution and to prevent a national establishment.[9]

Not until the Supreme Court held the religion clauses applicable to the states in the 1940s [10] did it have much opportunity to interpret them. But it quickly gave them a broad construction. In *Everson v. Board of Education*,[11] the Court, without dissent on this point, declared that the Establishment Clause forbids not only practices that "aid one religion" or "prefer one religion over another," but also those that "aid all religions." With respect to the Free Exercise Clause, it asserted in *Wisconsin v. Yoder* [12] that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

More recent decisions, however, evidence a narrower interpretation of the religion clauses. Indeed, in *Employment Division, Oregon Department of Human Resources v. Smith* [13] the Court abandoned its earlier view and held that the Free Exercise Clause *never* "relieve[s] an individual of the obligation to comply with a 'valid

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[7] Id. at 1873.

[8] Id. at 1868.

[9] For a late expounding of this view, *see* T. Cooley, General Principles of Constitutional Law in the United States 224–25 (3d ed. 1898).

[10] Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause); Everson v. Board of Education, 330 U.S. 1 (1947) (Establishment Clause).

[11] 330 U.S. 1, 15 (1947). Establishment Clause jurisprudence since, whatever its twists and turns, maintains this view.

[12] 406 U.S. 205, 215 (1972).

[13] 494 U.S. 872, 879 (1990).

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and neutral law of general applicability.'" On the Establishment Clause the Court has not wholly repudiated its previous holdings, but recent decisions have evidenced a greater sympathy for the view that the clause bars "preferential" governmental promotion of some religions but allows governmental promotion of all religion in general.[14] Nonetheless, the Court remains sharply split on how to interpret both clauses.

Court Tests Applied to Legislation Affecting Religion.—Before considering in detail the development of the two religion clauses by the Supreme Court, one should notice briefly the tests the Court has articulated to adjudicate the religion cases. At the same time it should be emphasized that the Court has noted that the language of earlier cases "may have [contained] too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles."[15] While later cases have relied on a series of well-defined, if difficult-to-apply, tests, the Court has cautioned that "the purpose [of the religion clauses] was to state an objective, not to write a statute."[16]

In 1802, President Jefferson wrote a letter to a group of Baptists in Danbury, Connecticut, in which he declared that it was the purpose of the First Amendment to build "a wall of separation between Church and State."[17] In *Reynolds v. United States*,[18] Chief Justice Waite for the Court characterized the phrase as "almost an authoritative declaration of the scope and effect of the amendment." In its first encounters with religion-based challenges to state programs, the Court looked to Jefferson's metaphor for substantial guidance.[19] But a metaphor may obscure as well as illuminate, and the Court soon began to emphasize neutrality and voluntarism as

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[14] *See* Agostini v. Felton, 521 U.S. 203 (1997); Mitchell v. Helms, 530 U.S. 793 (2000); and Zelman v. Simmons-Harris, 536 U.S. 639 (2002). The fullest critique of the Court's broad interpretation of the Establishment Clause was given by then-Justice Rehnquist in dissent in Wallace v. Jaffree, 472 U.S. 38, 91 (1985).

[15] Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

[16] 397 U.S. at 668.

[17] 16 THE WRITINGS OF THOMAS JEFFERSON 281 (A. Libscomb ed., 1904).

[18] 98 U.S. 145, 164 (1879).

[19] Everson v. Board of Education, 330 U.S. 1, 16 (1947); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 211, 212 (1948); *cf.* Zorach v. Clauson, 343 U.S. 306, 317 (1952) (Justice Black dissenting). In Lemon v. Kurtzman, 403 U.S. 602, 614 (1971), Chief Justice Burger remarked that "the line of separation, far from being a 'wall,' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." In his opinion for the Court, the Chief Justice repeated similar observations in Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (the metaphor is not "wholly accurate"; the Constitution does not "require complete separation of church and state [but] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

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the standard of restraint on governmental action.[20] The concept of neutrality itself is "a coat of many colors,"[21] and three standards that seemingly could be stated in objective fashion emerged as tests of Establishment Clause validity. The first two standards emerged together. "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[22] The third test emerged several years later and asks whether the governmental program results in "an excessive government entanglement with religion. The test is inescapably one of degree . . . [T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement."[23] In 1971, these three tests were combined and restated in Chief Justice Burger's opinion for the Court in *Lemon v. Kurtzman*,[24] and are frequently referred to by reference to that case name.

Although at one time accepted in principle by all the Justices,[25] the tests have sometimes been difficult to apply,[26] have re-

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[20] Zorach v. Clauson, 343 U.S. 306, 314 (1952); Engel v. Vitale, 370 U.S. 421 (1962); Sherbert v. Verner, 374 U.S. 398 (1963); Abington School District v. Schempp, 374 U.S. 203, 305 (1963) (Justice Goldberg concurring); Walz v. Tax Comm'n, 397 U.S. 664, 694–97 (1970) (Justice Harlan concurring). In the opinion of the Court in *Walz*, Chief Justice Burger wrote: "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Id. at 669.

[21] Board of Education v. Allen, 392 U.S. 236, 249 (1968) (Justice Harlan concurring).

[22] Abington School District v. Schempp, 374 U.S. 203, 222 (1963).

[23] Walz v. Tax Comm'n, 397 U.S. 664, 674–75 (1970).

[24] 403 U.S. 602, 612–13 (1971).

[25] *E.g.*, Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 653 (1980), and id. at 665 (dissenting opinion); Stone v. Graham, 449 U.S. 39, 40 (1980), and id. at 43 (dissenting opinion).

[26] The tests provide "helpful signposts," Hunt v. McNair, 413 U.S. 734, 741 (1973), and are at best "guidelines" rather than a "constitutional caliper"; they must be used to consider "the cumulative criteria developed over many years and applying to a wide range of governmental action." Inevitably, "no 'bright line' guidance is afforded." Tilton v. Richardson, 403 U.S. 672, 677–78 (1971). *See also* Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 761 & n.5, 773 n.31 (1973);

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cently come under direct attack by some Justices,[27] and in several instances the Court has not applied them at all.[28] Nonetheless, the Court employed the *Lemon* tests in several recent Establishment Clause decisions,[29] and those tests remain the primary standard of Establishment Clause validity. Other tests, however, have also been formulated and used. Justice Kennedy has proffered "coercion" as an alternative test for violations of the Establishment Clause,[30] and the Court has used that test as the basis for decision from time to time.[31] But that test has been criticized on the grounds that it would eliminate a principal distinction between the Establishment Clause

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Committee for Public Educ. and Religious Liberty v. Regan, 444 U.S. 646, 662 (1980), and id. at 663 (Justice Blackmun dissenting).

[27] *See*, *e.g.*, Edwards v. Aguillard, 482 U.S. 578, 636–40 (1987) (Justice Scalia, joined by Chief Justice Rehnquist, dissenting) (advocating abandonment of the "purpose" test); Wallace v. Jaffree, 472 U.S. 38, 108–12 (1985) (Justice Rehnquist dissenting); Aguilar v. Felton, 473 U.S. 402, 426–30 (1985) (Justice O'Connor, dissenting) (addressing difficulties in applying the entanglement prong); Roemer v. Maryland Bd. of Public Works, 426 U.S. 736, 768–69 (Justice White concurring in judgment) (objecting to entanglement test). Justice Kennedy has also acknowledged criticisms of the *Lemon* tests, while at the same time finding no need to reexamine them. *See*, *e.g.*, Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 655–56 (1989). At least with respect to public aid to religious schools, Justice Stevens would abandon the tests and simply adopt a "no-aid" position. Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980).

[28] *See* Marsh v. Chambers, 463 U.S. 783 (1983) (upholding legislative prayers on the basis of historical practice); Lee v. Weisman, 505 U.S. 577, 587 (1992) (rejecting a request to reconsider *Lemon* because the practice of invocations at public high school graduations was invalid under established school prayer precedents). The Court has also held that the tripartite test is not applicable when law grants a denominational preference, distinguishing between religions; rather, the distinction is to be subjected to the strict scrutiny of a suspect classification. Larson v. Valente, 456 U.S. 228, 244–46 (1982). *See also* Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) (upholding provision of sign-language interpreter to deaf student attending parochial school); Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687 (1994) (invalidating law creating special school district for village composed exclusively of members of one religious sect); Rosenberger v. University of Virginia, 515 U.S. 819 (1995) (upholding the extension of a university subsidy of student publications to a student religious publication).

[29] Agostini v. Felton, 521 U.S. 203 (1997) (upholding under the *Lemon* tests the provision of remedial educational services by public school teachers to sectarian elementary and secondary schoolchildren on the premises of the sectarian schools); Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000) (holding unconstitutional under the *Lemon* tests as well as under the coercion and endorsement tests a school district policy permitting high school students to decide by majority vote whether to have a student offer a prayer over the public address system prior to home football games); and Mitchell v. Helms, 530 U.S. 793 (2000) (upholding under the *Lemon* tests a federally funded program providing instructional materials and equipment to public and private elementary and secondary schools, including sectarian schools).

[30] County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 655 (1989) (Justice Kennedy concurring in part and dissenting in part); and Lee v. Weisman, 505 U.S. 577 (1992).

[31] Lee v. Weisman, 505 U.S. 577 (1992), and Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).

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and the Free Exercise Clause and make the former a "virtual nullity."[32] Justice O'Connor has suggested "endorsement" as a clarification of the *Lemon* test; *i.e.*, that the Establishment Clause is violated if the government intends its action to endorse or disapprove of religion or if a "reasonable observer" would perceive the government's action as such an endorsement or disapproval.[33] But others have criticized that test as too amorphous to provide adequate guidance.[34] Justice O'Connor has also suggested that it may be inappropriate to try to shoehorn all Establishment Clause cases into one test, and has called instead for recognition that different contexts may call for different approaches.[35] In two Establishment Clause decisions, the Court employed all three tests in one decision[36] and relied primarily on a modified version of the *Lemon* tests in the other.[37]

In interpreting and applying the Free Exercise Clause, the Court has consistently held religious beliefs to be absolutely immune from governmental interference.[38] But it has used a number of standards to review government action restrictive of religiously motivated conduct, ranging from formal neutrality[39] to clear and present danger[40] to strict scrutiny.[41] For cases of intentional governmental discrimination against religion, the Court still employs strict scrutiny[42] But for most other free exercise cases it has now reverted to a standard of formal neutrality. "[T]he right of free exercise," it has stated, "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground

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[32] Lee v. Weisman, 505 U.S. 577, 621 (Souter, J., concurring). *See also* County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 623 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

[33] Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (concurring); Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 625 (1989) (concurring); Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 712 (1994) (concurring).

[34] County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 655 (1989) (Justice Kennedy, concurring in the judgment in part and dissenting in part); and Capitol Square Review Bd. v. Pinette, 515 U.S. 753, 768 n.3 (1995) (Justice Scalia).

[35] Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 718–723 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

[36] Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).

[37] Mitchell v. Helms, 530 U.S. 793 (2000).

[38] Reynolds v. United States, 98 U.S. (8 Otto) 145 (1878); Cantwell v. Connecticut, 310 U.S. 296 (1940); Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

[39] Reynolds v. United States, 98 U.S. (8 Otto) 145 (1879); Braunfeld v. Brown, 366 U.S. 599 (1961).

[40] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[41] Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

[42] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

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the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[43]

Government Neutrality in Religious Disputes.—One value that both religion clauses serve is to enforce governmental neutrality in deciding controversies arising out of religious disputes. Schisms sometimes develop within churches or between a local church and the general church, resulting in secession or expulsion of one faction or of the local church. A dispute over which body is to control the property of the church will then often be taken into the courts. It is now established that both religion clauses prevent governmental inquiry into religious doctrine in settling such disputes, and instead require courts simply to look to the decision-making body or process in the church and to give effect to whatever decision is officially and properly made.

The first such case was *Watson v. Jones*,[44] which was decided on common-law grounds in a diversity action without explicit reliance on the First Amendment. A constitutionalization of the rule was made in *Kedroff v. St. Nicholas Cathedral*,[45] in which the Court held unconstitutional a state statute that recognized the autonomy and authority of those North American branches of the Russian Orthodox Church that had declared their independence from the general church. Recognizing that *Watson v. Jones* had been decided on nonconstitutional grounds, the Court thought nonetheless that the opinion "radiates . . . a spirit of freedom for religious organizations, and independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[46] The power of civil courts to resolve church property disputes was severely circumscribed, the Court held, because to permit resolution of doctrinal disputes in court was to jeopardize First Amendment values. What a court must do, it held, is to look at the church rules: if the church is a hierarchical one that reposes determination of ecclesiastical issues in a certain body, the resolution by that body is determinative, whereas if the church is a congregational one that prescribes action by a majority vote, that determina-

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[43] Employment Div. v. Smith, 494 U.S. 872, 879 (1990), quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Justice Stevens concurring in the judgment).

[44] 80 U.S. (13 Wall.) 679 (1872).

[45] 344 U.S. 94 (1952). *Kedroff* was grounded on the Free Exercise Clause. Id. at 116. But the subsequent cases used a collective "First Amendment" designation.

[46] 344 U.S. at 116. On remand, the state court adopted the same ruling on the merits but relied on a common-law rule rather than the statute. This too was struck down. Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960).

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tion will prevail.[47] On the other hand, a court confronted with a church property dispute could apply "neutral principles of law, developed for use in all property disputes," when to do so would not require resolution of doctrinal issues.[48] In a 1976 case, the Court elaborated on the limits of proper inquiry, holding that an argument over a matter of internal church government—the power to reorganize the dioceses of a hierarchical church in this country—was "at the core of ecclesiastical affairs" and a court could not interpret the church constitution to make an independent determination of the power but must defer to the interpretation of the church body authorized to decide.[49]

In *Jones v. Wolf*,[50] however, a divided Court, while formally adhering to these principles, appeared to depart in substance from their application. A schism had developed in a local church that was a member of a hierarchical church, and the majority voted to withdraw from the general church. The proper authority of the general church determined that the minority constituted the "true congregation" of the local church and awarded them authority over it. But rather than requiring deference to the decision of the church body, the Court approved the approach of the state court in applying neutral principles by examining the deeds to the church property, state statutes, and provisions of the general church's constitution concerning ownership and control of church property in order to determine that no language of trust in favor of the general church was contained in any of them and that the property thus belonged to the local congregational majority.[51] Further, the Court held, the First Amendment did not prevent the state court from applying a pre-

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[47] Presbyterian Church v. Hull Memorial Presbyterian Church, 393 U.S. 440, 447, 450–51 (1969); Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, 396 U.S. 367 (1970). For a similar rule of neutrality in another context, *see* United States v. Ballard, 322 U.S. 78 (1944) (denying defendant charged with mail fraud through dissemination of purported religious literature the right to present to the jury evidence of the truthfulness of the religious views he urged).

[48] Presbyterian Church v. Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969); Maryland and Virginia Eldership of the Churches of God v. Church of God of Sharpsburg, 396 U.S. 367, 368 (1970). *See also* id. at 368–70 (Justice Brennan concurring).

[49] The Serbian Eastern Orthodox Diocese v. Dionisije Milivojevich, 426 U.S. 697, 720–25 (1976). In Gonzalez v. Archbishop, 280 U.S. 1 (1929), the Court had permitted limited inquiry into the legality of the actions taken under church rules. In *Serbian Eastern* the Court disapproved of this inquiry with respect to concepts of "arbitrariness," although it reserved decision on the "fraud" and "collusion" exceptions. 426 U.S. at 708–20.

[50] 443 U.S. 595 (1979). In the majority were Justices Blackmun, Brennan, Marshall, Rehnquist, and Stevens. Dissenting were Justices Powell, Stewart, White, and Chief Justice Burger.

[51] 443 U.S. at 602–06.

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sumption of majority rule to award control to the majority of the local congregation, provided that it permitted defeasance of the presumption upon a showing that the identity of the local church is to be determined by some other means as expressed perhaps in the general church charter.[52] The dissent argued that to permit a court narrowly to view only the church documents relating to property ownership permitted it to ignore the fact that the dispute was over ecclesiastical matters and that the general church had decided which faction of the congregation was the local church.[53]

Thus, it is unclear where the Court is on this issue. *Jones v. Wolf* restated the rule that it is improper to review an ecclesiastical dispute and that deference is required in those cases, but, by approving a neutral principles inquiry which in effect can filter out the doctrinal issues underlying a church dispute, the Court seems to have approved at least an indirect limitation of the authority of hierarchical churches.[54]

Establishment of Religion

"[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[55] "[The] Court has long held that the First Amendment reaches more than classic, 18th-century establishments."[56] However, the Court's reading of the clause has never resulted in the barring of all assistance that aids, however incidentally, a religious institution. Outside this area, the decisions generally have more rigorously prohibited what may be deemed governmental promotion of religious doctrine.[57]

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[52] 443 U.S. at 606–10. Because it was unclear whether the state court had applied such a rule and applied it properly, the Court remanded.

[53] 443 U.S. at 610.

[54] The Court indicated that the general church could always expressly provide in its charter or in deeds to property the proper disposition of disputed property. But here the general church had decided which faction was the "true congregation," and this would appear to constitute as definitive a ruling as the Court's suggested alternatives. 443 U.S. at 606.

[55] Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970). "Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools . . . . In my opinion both avenues were closed by the Constitution." Everson v. Board of Education, 330 U.S. 1, 63 (1947) (Justice Rutledge dissenting).

[56] Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 709 (1994) (citing Torcaso v. Watkins, 367 U.S. 488, 492–95 (1961)).

[57] For a discussion of standing to sue in Establishment Clause cases, see Article III, Taxpayer Suits, *supra*.

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Financial Assistance to Church-Related Institutions.—The Court's first opportunity to rule on the validity of governmental financial assistance to a religiously affiliated institution occurred in 1899, the assistance being a federal grant for the construction of a wing of a hospital owned and operated by a Roman Catholic order that was to be devoted to the care of the poor. The Court viewed the hospital primarily as a secular institution so chartered by Congress and not as a religious or sectarian body, and thus avoided the constitutional issue.[58] But, when the right of local authorities to provide free transportation for children attending parochial schools reached the Court, it adopted a very broad view of the restrictions imposed by the Establishment Clause. "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"[59]

But, despite this interpretation, the majority sustained the provision of transportation. Although recognizing that "it approaches the verge" of the state's constitutional power, Justice Black found that the transportation was a form of "public welfare legislation" that was being extended "to all its citizens without regard to their religious belief."[60] "It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own

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[58] Bradfield v. Roberts, 175 U.S. 291 (1899). *Cf.* Abington School District v. Schempp, 374 U.S. 203, 246 (1963) (Justice Brennan concurring). In Cochran v. Louisiana Board of Education, 281 U.S. 370 (1930), a state program furnishing textbooks to parochial schools was sustained under a due process attack without reference to the First Amendment. *See also* Quick Bear v. Leupp, 210 U.S. 50 (1908) (statutory limitation on expenditures of public funds for sectarian education does not apply to treaty and trust funds administered by the government for Indians).

[59] Everson v. Board of Education, 330 U.S. 1, 15–16 (1947).

[60] 330 U.S. at 16.

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pockets when transportation to a public school would have been paid for by the State."[61] Transportation benefited the child, just as did police protection at crossings, fire protection, connections for sewage disposal, public highways and sidewalks. Thus was born the "child benefit" theory.[62]

The Court in 1968 relied on the "child benefit" theory to sustain state loans of textbooks to parochial school students.[63] Using the secular purpose and effect tests,[64] the Court determined that the purpose of the loans was the "furtherance of the educational opportunities available to the young," while the effect was hardly less secular. "The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the state. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools. Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution."[65]

From these beginnings, the case law on the discretion of state and federal governmental assistance to sectarian elementary and secondary schools as well as other religious entities has multiplied. Through the 1970s, at least, the law became as restrictive in fact as the dicta in the early cases suggested, except for the provision of some assistance to children under the "child benefit" theory. Since that time, the Court has gradually adopted a more accommodating approach. It has upheld direct aid programs that have been of only marginal benefit to the religious mission of the recipient elementary and secondary schools, tax benefit and scholarship aid programs where the schools have received the assistance as the result of the independent decisions of the parents or students who initially receive the aid, and in its most recent decisions direct aid programs which substantially benefit the educational function of such

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[61] 330 U.S. at 17. It was in *Everson* that the Court, without much discussion of the matter, held that the Establishment Clause applied to the states through the Fourteenth Amendment and limited both national and state governments equally. Id. at 8, 13, 14–16. The issue is discussed at some length by Justice Brennan in Abington School Dist. v. Schempp, 374 U.S. 203, 253–58 (1963).

[62] *See also* Zorach v. Clauson, 343 U.S. 306, 312–13 (1952) (upholding program allowing public schools to excuse students to attend religious instruction or exercises).

[63] Board of Education v. Allen, 392 U.S. 236 (1968).

[64] *See* discussion under "Court Tests Applied to Legislation Affecting Religion," *supra*.

[65] 392 U.S. at 243–44 (1968).

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schools. Indeed, in its most recent decisions the Court has overturned several of the most restrictive school aid precedents from its earlier jurisprudence. Throughout, the Court has allowed greater discretion with respect to aid programs benefiting religiously affiliated colleges and social services agencies.

A secular purpose is the first requirement of the *Lemon* tripartite test to sustain the validity of legislation touching upon religion, and upon this standard the Justices display little disagreement. There are adequate legitimate, non-sectarian bases for legislation to assist nonpublic, religious schools: preservation of a healthy and safe educational environment for all school children, promotion of pluralism and diversity among public and nonpublic schools, and prevention of overburdening of the public school system that would accompany the financial failure of private schools.[66]

The primary secular effect and no excessive entanglement aspects of the *Lemon* test, however, have proven much more divisive. As a consequence, the Court's applications of these tests have not always been consistent, and the rules guiding their application have not always been easy to decipher. Moreover, in its most recent decisions the Court has substantially modified the strictures these tests have previously imposed on public aid to pervasively sectarian entities.

In applying the primary effect and excessive entanglement tests, the Court has drawn a distinction between public aid programs that directly aid sectarian entities and those that do so only indirectly. Aid provided directly, the Court has said, must be limited to secular use lest it have a primary effect of advancing religion. The Establishment Clause "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."[67] The government may provide direct support to the secular services and programs sponsored by religious entities, but it cannot directly subsidize such organizations' religious activities or proselytizing.[68] Thus, the Court struck down as unconstitutional a program providing grants for the maintenance and repair of sectarian elementary and secondary school facilities, because the grants had no restrictions to prevent their use for such purposes as defraying the costs of building or maintaining chapels

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[66] Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973). *See also* id. at 805 (Chief Justice Burger dissenting), 812–13 (Justice Rehnquist dissenting), 813 (Justice White dissenting). *See also* Wolman v. Walter, 433 U.S. 229, 240 (1977) (plurality opinion); Committee for Public Educ. and Religious Liberty v. Regan, 444 U.S. 646, 653–54 (1980), and id. at 665 (Justice Blackmun dissenting).

[67] Grand Rapids School District v. Ball, 473 U.S. 373, 385 (1985).

[68] Lemon v. Kurtzman, 403 U.S. 602 (1971); Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Mitchell v. Helms, 530 U.S. 793 (2000).

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or classrooms in which religion is taught.[69] It also struck down a program subsidizing field trip transportation for children attending sectarian elementary and secondary schools, because field trips are inevitably interwoven with the schools' educational functions.[70]

But the Court has not imposed a secular use limitation on aid programs that benefit sectarian entities only indirectly, *i.e.*, as the result of decisions by someone other than the government itself. The initial beneficiaries of the public aid must be determined on the basis of religiously neutral criteria, and they must have a genuine choice about whether to use the aid at sectarian or nonsectarian entities. But, where those standards have been met, the Court has upheld indirect aid programs even though the sectarian institutions that ultimately benefit may use the aid for religious purposes. Moreover, the Court has gradually broadened its understanding of what constitutes a genuine choice so that now most voucher or tax benefit programs benefiting the parents of children attending sectarian schools seem able to pass constitutional muster.

Thus, the Court initially struck down tax benefit and educational voucher programs where the initial beneficiaries were limited to the universe of parents of children attending sectarian schools and where the aid, as a consequence, was virtually certain to go to sectarian schools.[71] Subsequently, however, it upheld a state program that allowed taxpayers to take a deduction from their gross income for educational expenses, including tuition, incurred in sending their children to public or private schools, because the deduction was "available for educational expenses incurred by all parents" and the aid became available to sectarian schools "only as a result of numerous, private choices of individual parents of school-age children."[72] It upheld for the same reasons a vocational rehabilitation program that made a grant to a blind person for training at a Bible college for a religious vocation[73] and another program that provided a sign-language interpreter for a deaf student attending a sectarian secondary school.[74] Most recently, it upheld as constitutional a tuition voucher program made available to the parents of children attending failing public schools, notwithstanding that most of the private schools at which the vouchers could be used

[69] Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).
[70] Wolman v. Walter, 433 U.S. 229 (1977).
[71] Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), and Sloan v. Lemon, 413 U.S. 825 (1973).
[72] Mueller v. Allen, 463 U.S. 388, 397–399 (1983).
[73] Witters v. Washington Dep't of Social Services, 474 U.S. 481 (1986). In this decision the Court also cited as important the factor that the program was not likely to provide "any significant portion of the aid expended under the . . . program" for religious education. Id. at 488.
[74] Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

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were sectarian in nature.[75] Whether the parents had a genuine choice among religious and secular options in using the vouchers, the Court said, had to be evaluated on the basis not only of the private schools where the vouchers could be redeemed but also by examining the full range of educational options open to them, including various public school options.

In applying the primary effect and excessive entanglement tests, the Court has also, until recently, drawn a distinction between religious institutions that are pervasively sectarian and those that are not. Organizations that are permeated by a religious purpose and character in all that they do have often been held by the Court to be constitutionally ineligible for direct public aid. Direct aid to religion-dominated institutions inevitably violates the primary effect test, the Court has said, because such aid generally cannot be limited to secular use in such entities and, as a consequence, it has a primary effect of advancing religion.[76] Moreover, any effort to limit the use of public aid by such entities to secular use inevitably falls afoul of the excessive entanglement test, according to the Court, because the risk of diversion of the aid to religious use is so great that it necessitates an intrusive government monitoring.[77] But, direct aid to religious entities that are not pervasively sectarian, the Court held, is constitutionally permissible, because the secular functions of such entities can be distinguished from their religious ones for purposes of public aid and because the risk of diversion of the aid to religious use is attenuated and does not require an intrusive government monitoring. As a practical matter, this distinction has had its most serious consequences for programs providing aid directly to sectarian elementary and secondary schools, because the Court has, until recently, presumed such schools to be pervasively sectarian and direct aid, as a consequence, to be severely limited.[78] The Court has presumed to the contrary with respect to religiously affiliated colleges, hospitals, and social services providers; and as a

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[75] Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[76] *See*, *e.g.*, Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (grants for the maintenance and repair of sectarian school facilities); Meek v. Pittenger, 421 U.S. 349 (1975) (loan of secular instructional materials and equipment); Grand Rapids School Dist. v. Bal, 473 U.S. 373 (1985) (hiring of parochial school teachers to provide after-school instruction to the students attending such schools).

[77] *See*, *e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971) (subsidies for teachers of secular subjects) and Aguilar v. Felton, 473 U.S. 402 (1985) (provision of remedial and enrichment services by public school teachers to eligible children attending sectarian elementary and secondary schools on the premises of those schools).

[78] See cases cited in the preceding two footnotes.

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consequence it has found direct aid programs to such entities to be permissible.[79]

In its most recent decisions the Court has modified both the primary effect and excessive entanglement prongs of the *Lemon* test as they apply to aid programs directly benefiting sectarian elementary and secondary schools; and in so doing it has overturned several prior decisions imposing tight constraints on aid to pervasively sectarian institutions. In *Agostini v. Felton*[80] the Court, in a 5–4 decision, abandoned the presumptions that public school teachers giving instruction on the premises of sectarian elementary and secondary schools will be so affected by the religiosity of the environment that they will inculcate religion and that, consequently, an excessively entangling monitoring of their services is constitutionally necessary. In *Mitchell v. Helms*,[81] in turn, the Court abandoned the presumptions that such schools are so pervasively sectarian that their secular educational functions cannot be differentiated from their religious educational functions and that direct aid to their educational functions, consequently, violates the Establishment Clause. In reaching these conclusions and upholding the aid programs in question, the Court overturned its prior decision in *Aguilar v. Felton*[82] and parts of its decisions in *Meek v. Pittenger*,[83] *Wolman v. Walter*,[84] and *Grand Rapids School District v. Ball*.[85]

Thus, the Court's jurisprudence concerning public aid to sectarian organizations has evolved, particularly as it concerns public aid to sectarian elementary and secondary schools. That evolution has given some uncertainty to the rules that apply to any given form of aid; and in both *Agostini v. Felton*[86] and *Mitchell v. Helms*[87] the Court left open the possibility of a further evolution in its thinking. Nonetheless, the cases give substantial guidance.

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[79] Bradfield v. Roberts, 175 U.S. 291 (1899) (public subsidy of the construction of a wing of a Catholic hospital on condition that it be used to provide care for the poor upheld); Tilton v. Richardson, 403 U.S. 672 (1971) (program of grants to colleges, including religiously affiliated ones, for the construction of academic buildings upheld); Roemer v. Maryland Bd. of Pub. Works, 426 U.S. 736 (1976) (program of general purpose grants to colleges in the state, including religiously affiliated ones, upheld); and Bowen v. Kendrick, 487 U.S. 589 (1988) (program of grants to public and private nonprofit organizations, including religious ones, for the prevention of adolescent pregnancies upheld).

[80] 521 U.S. 203 (1997).

[81] 530 U.S. 793 (2000).

[82] 473 U.S. 402 (1985).

[83] 421 U.S. 349 (1975).

[84] 433 U.S. 229 (1977).

[85] 473 U.S. 373 (1985).

[86] 521 U.S. 203 (1994).

[87] 530 U.S. 793 (2000).

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State aid to church-connected schools was first found to have gone over the "verge" [88] in *Lemon v. Kurtzman*.[89] The Court struck down two state statutes, one of which authorized the "purchase" of secular educational services from nonpublic elementary and secondary schools, a form of reimbursement for the cost to religious schools of the teaching of such things as mathematics, modern foreign languages, and physical sciences, and the other of which provided salary supplements to nonpublic school teachers who taught courses similar to those found in public schools, used textbooks approved for use in public schools, and agreed not to teach any classes in religion. Accepting the secular purpose attached to both statutes by the legislature, the Court did not pass on the secular effect test, but found excessive entanglement. This entanglement arose because the legislature "has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion . . . ." [90] Because the schools concerned were religious schools, because they were under the control of the church hierarchy, and because the primary purpose of the schools was the propagation of the faith, a "comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions [on religious use of aid] are obeyed and the First Amendment otherwise respected." [91] Moreover, the provision of public aid inevitably will draw religious conflict into the public arena as the contest for adequate funding goes on. Thus, the Court held, both programs were unconstitutional because the state supervision necessary to ensure a secular purpose and a secular effect inevitably involved the state authorities too deeply in the religious affairs of the aided institutions.[92]

Two programs of assistance through the provision of equipment and services to private, including sectarian, schools were invalidated in *Meek v. Pittenger*.[93] First, the loan of instructional material and equipment directly to nonpublic elementary and secondary schools was voided as constituting impermissible assistance to reli-

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[88] Everson v. Board of Education, 330 U.S. 1, 16 (1947).

[89] 403 U.S. 602 (1971).

[90] 403 U.S. at 619.

[91] 403 U.S. at 619.

[92] Only Justice White dissented. 403 U.S. at 661. In Lemon v. Kurtzman, 411 U.S. 192 (1973), the Court held that a state could reimburse schools for expenses incurred in reliance on the voided program up to the date the Supreme Court held the statute unconstitutional. *But see* New York v. Cathedral Academy, 434 U.S. 125 (1977).

[93] 421 U.S. 349 (1975). Chief Justice Burger and Justices Rehnquist and White dissented. Id. at 385, 387.

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gion. This holding was based on the fact that 75 percent of the qualifying schools were church-related or religiously affiliated educational institutions, and that the assistance was available without regard to the degree of religious activity of the schools. The materials and equipment loaned were religiously neutral, but the substantial assistance necessarily constituted aid to the sectarian school enterprise as a whole and thus had a primary effect of advancing religion.[94] Second, the provision of auxiliary services—remedial and accelerated instruction, guidance counseling and testing, speech and hearing services—by public employees on nonpublic school premises was invalidated because the Court found that, even though the teachers under this program—unlike those under one of the programs struck down in *Lemon v. Kurtzman*—were public employees rather than employees of the religious schools, the continuing surveillance necessary to ensure that the teachers remained religiously neutral gave rise to a constitutionally intolerable degree of entanglement between church and state.[95]

In two 1985 cases, the Court again struck down programs of public subsidy of instructional services provided on the premises of sectarian schools, and relied on the effects test as well as the entanglement test. In *Grand Rapids School District v. Ball*,[96] the Court invalidated two programs conducted in leased private school classrooms, one taught during the regular school day by public school teachers,[97] and the other taught after regular school hours by part-time "public" teachers otherwise employed as full-time teachers by the sectarian school.[98] Both programs, the Court held, had the effect of promoting religion in three distinct ways. The teachers might be influenced by the "pervasively sectarian nature" of the environment and might "subtly or overtly indoctrinate the students in particular religious tenets at public expense"; use of the parochial school classrooms "threatens to convey a message of state support for religion" through "the symbolic union of government and religion in

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[94] 421 U.S. at 362–66. *See also* Wolman v. Walter, 433 U.S. 229, 248–51 (1977). The Court in Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 661–62 (1980), held that *Meek* did not forbid all aid that benefited religiously pervasive schools to some extent, so long as it was conferred in such a way as to prevent any appreciable risk of being used to transmit or teach religious views. *See also* Wolman v. Walter, 433 U.S. at 262 (Justice Powell concurring in part and dissenting in part).

[95] Meek v. Pittenger, 421 U.S. 349, 367–72 (1975). *But see* Wolman v. Walter, 433 U.S. 229, 238–48 (1977).

[96] 473 U.S. 373 (1985).

[97] The vote on this "Shared Time" program was 5–4, the opinion of the Court by Justice Brennan being joined by Justices Marshall, Blackmun, Powell, and Stevens. The Chief Justice, and Justices White, Rehnquist, and O'Connor dissented.

[98] The vote on this "Community Education" program was 7–2, Chief Justice Burger and Justice O'Connor concurring with the "Shared Time" majority.

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one sectarian enterprise"; and "the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." [99] In *Aguilar v. Felton*,[100] the Court invalidated a program under which public school employees provided instructional services on parochial school premises to educationally deprived children. The program differed from those at issue in *Grand Rapids* because the classes were closely monitored for religious content. This "pervasive monitoring" did not save the program, however, because, by requiring close cooperation and day-to-day contact between public and secular authorities, the monitoring "infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement." [101]

A state program to reimburse nonpublic schools for a variety of services mandated by state law was voided because the statute did not distinguish between secular and potentially religious services, the costs of which the state would reimburse.[102] Similarly, a program of direct monetary grants to nonpublic schools to be used for the maintenance of school facilities and equipment failed to survive the primary effect test because it did not restrict payment to those expenditures related to the upkeep of facilities used exclusively for secular purposes and because "within the context of these religion-oriented institutions" the Court could not see how such restrictions could effectively be imposed.[103] But a plan of direct monetary grants to nonpublic schools to reimburse them for the costs of state-mandated record-keeping and of administering and grading state-prepared tests and that contained safeguards against religious use of the tests was sustained even though the Court recognized the incidental benefit to the schools.[104]

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[99] 473 U.S. at 397.

[100] 473 U.S. 402 (1985). This was another 5–4 decision, with Justice Brennan's opinion of the Court being joined by Justices Marshall, Blackmun, Powell, and Stevens, and with Chief Justice Burger and Justices White, Rehnquist, and O'Connor dissenting.

[101] 473 U.S. at 413.

[102] Levitt v. Committee for Public Educ. & Religious Liberty, 413 U.S. 472 (1973). Justice White dissented, id. at 482. The most expensive service to be reimbursed for nonpublic schools was the "administration, grading and the compiling and reporting of the results of tests and examinations." Id. at 474–75. In New York v. Cathedral Academy, 434 U.S. 125 (1977), the Court struck down a new statutory program entitling private schools to obtain reimbursement for expenses incurred during the school year in which the prior program was voided in *Levitt*.

[103] Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 774–80 (1973). Chief Justice Burger and Justice Rehnquist concurred, id. at 798, and Justice White dissented, id. at 820.

[104] Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980). Justices Blackmun, Brennan, Marshall, and Stevens dissented. Id. at 662, 671. The

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The "child benefit" theory, under which it is permissible for government to render ideologically neutral assistance and services to pupils in sectarian schools without being deemed to be aiding the religious mission of the schools, has not proved easy to apply. Several different forms of assistance to students were at issue in *Wolman v. Walter*.[105] The Court approved the following: standardized tests and scoring services used in the public schools, with private school personnel not involved in the test drafting and scoring; speech, hearing, and psychological diagnostic services provided in the private schools by public employees; and therapeutic, guidance, and remedial services for students provided off the premises of the private schools. In all these, the Court thought the program contained adequate built-in protections against religious use. But, though the Court adhered to its ruling permitting the states to lend secular textbooks used in the public schools to pupils attending religious schools,[106] it declined to extend the precedent to permit the states to lend to pupils or their parents instructional materials and equipment, such as projectors, tape recorders, maps, globes and science kits, even though the materials and equipment were identical to those used in the public schools.[107] Nor was a state permitted to

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dissenters thought that the authorization of direct reimbursement grants was distinguishable from previously approved plans that had merely relieved the private schools of the costs of preparing and grading state-prepared tests. *See* Wolman v. Walter, 433 U.S. 229, 238–41 (1977).

[105] 433 U.S. 229 (1977). The Court deemed the situation in which these services were performed and the nature of the services to occasion little danger of aiding religious functions and thus requiring little supervision that would give rise to entanglement. All the services fell "within that class of general welfare services for children that may be provided by the States regardless of the incidental benefit that accrues to church-related schools." Id. at 243, quoting Meek v. Pittenger, 421 U.S. 349, 371 n.21 (1975). Justice Brennan would have voided all the programs because, considered as a whole, the amount of assistance was so large as to constitute assistance to the religious mission of the schools. 433 U.S. at 255. Justice Marshall would have approved only the diagnostic services, id. at 256, while Justice Stevens would generally approve closely administered public health services. Id. at 264.

[106] Meek v. Pittenger, 421 U.S. 349, 359–72 (1975); Wolman v. Walter, 433 U.S. 229, 236–38 (1977). *Allen* was explained as resting on "the unique presumption" that "the educational content of textbooks is something that can be ascertained in advance and cannot be diverted to sectarian uses." There was "a tension" between *Nyquist*, *Meek*, and *Wolman*, on the one hand, and *Allen* on the other; although *Allen* was to be followed "as a matter of stare decisis," the "presumption of neutrality" embodied in *Allen* would not be extended to other similar assistance. Id. at 251 n.18. A later Court majority revived the *Allen* presumption, however, applying it to uphold tax deductions for tuition and other school expenses in Mueller v. Allen, 463 U.S. 388 (1983). Justice Rehnquist wrote the Court's opinion, joined by Justices White, Powell, and O'Connor, and by Chief Justice Burger.

[107] 433 U.S. at 248–51. *See also* id. at 263–64 (Justice Powell concurring in part and dissenting in part).

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pay the costs to religious schools of field trip transportation, such as it did to public school students.[108]

The Court's later decisions, however, rejected the reasoning and overturned the results of several of these decisions. In two rulings, the Court reversed course with respect to the constitutionality of public school personnel's providing educational services on the premises of pervasively sectarian schools. First, in *Zobrest v. Catalina Foothills School District*[109] the Court held that the public subsidy of a sign-language interpreter for a deaf student attending a parochial school created no primary effect or entanglement problems. The payment did not relieve the school of an expense that it would otherwise have borne, the Court stated, and the interpreter had no role in selecting or editing the content of any of the lessons. Reviving the child benefit theory of its earlier cases, the Court wrote: "The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as 'disabled' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends."[110]

Second, and more pointedly, the Court in *Agostini v. Felton*[111] overturned its decision in *Aguilar v. Felton*,[112] which had struck down the Title I program as administered in New York City, as well as the analogous parts of its decisions in *Meek v. Pittenger*[113] and *Grand Rapids School District v. Ball*.[114] The assumptions on which those decisions had rested, the Court stated, had been "undermined" by its more recent decisions. Decisions such as *Zobrest* and *Witters v. Washington Department of Social Services*,[115] it said, had repudiated the notions that the placement of a public employee in a sectarian school creates an "impermissible symbolic link" between government and religion, that "all government aid that directly aids the educational function of religious schools" is constitutionally forbidden, that public teachers in a sectarian school necessarily pose a serious risk of inculcating religion, and that "pervasive monitoring of [such] teachers is required." The proper criterion under the primary effect prong of the *Lemon* test, the Court asserted, is religious neutrality, *i.e.*, whether "aid is allocated on the basis of neu-

[108] 433 U.S. at 252–55. Justice Powell joined the other three dissenters who would have approved this expenditure. Id. at 264.
[109] 509 U.S. 1 (1993).
[110] 509 U.S. at 10.
[111] 521 U.S. 203 (1997).
[112] 473 U.S. 402 (1985).
[113] 421 U.S. 349 (1975).
[114] 473 U.S. 373 (1985).
[115] 474 U.S. 481 (1986).

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tral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." [116] Finding the Title I program to meet that test, the Court concluded that "accordingly, we must acknowledge that *Aguilar*, as well as the portion of *Ball* addressing Grand Rapids' Shared Time program, are no longer good law." [117]

Later, in *Mitchell v. Helms* [118] the Court abandoned the presumptions that religious elementary and secondary schools are so pervasively sectarian that they are constitutionally ineligible to participate in public aid programs directly benefiting their educational functions and that direct aid to such institutions must be subject to an intrusive and constitutionally fatal monitoring. At issue in the case was a federal program that distributed funds to local educational agencies to provide instructional materials and equipment, such as computer hardware and software, library books, movie projectors, television sets, VCRs, laboratory equipment, maps, and cassette recordings, to public and private elementary and secondary schools. Virtually identical programs had previously been held unconstitutional by the Court in *Meek v. Pittenger* [119] and *Wolman v. Walter*.[120] But in this case the Court overturned those decisions and held the program to be constitutional.

Mitchell had no majority opinion. The opinions of Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, and of Justice O'Connor, joined by Justice Breyer, found the program constitutional. They agreed that to pass muster under the primary effect prong of the *Lemon* test direct public aid has to be secular in nature and distributed on the basis of religiously neutral criteria. They also agreed, in contrast to past rulings, that sectarian elementary and secondary schools should not be deemed constitutionally ineligible for direct aid on the grounds that their secular educational functions are "inextricably intertwined" with their religious educational functions, *i.e.*, that they are pervasively sectarian. But their rationales for the program's constitutionality then di-

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[116] In *Agostini*, the Court nominally eliminated entanglement as a separate prong of the *Lemon* test. "[T]he factors we use to assess whether an entanglement is 'excessive,'" the Court stated, "are similar to the factors we use to examine 'effect.'" "Thus," it concluded, "it is simplest to recognize why entanglement is significant and treat it—as we did in *Walz*—as an aspect of the inquiry into a statute's effect." 521 U.S. at 232, 233.

[117] Justice Souter, joined by Justices Stevens and Ginsburg, dissented from the Court's ruling, contending that the Establishment Clause mandates a "flat ban on [the] subsidization" of religion (521 U.S. at 243) and that the Court's contention that recent cases had undermined the reasoning of *Aguilar* was a "mistaken reading" of the cases. Id. at 248. Justice Breyer joined in the second dissenting argument.

[118] 530 U.S. 793 (2000).

[119] 421 U.S. 349 (1975).

[120] 433 U.S. 229 (1977).

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verged. For Justice Thomas it was sufficient that the instructional materials were secular in nature and were distributed according to neutral criteria. It made no difference whether the schools used the aid for purposes of religious indoctrination or not. But that was not sufficient for Justice O'Connor. She adhered to the view that direct public aid has to be limited to secular use by the recipient institutions. She further asserted that a limitation to secular use could be honored by the teachers in the sectarian schools and that the risk that the aid would be used for religious purposes was not so great as to require an intrusive and entangling government monitoring.[121]

Justice Souter, joined by Justices Stevens and Ginsburg, dissented on the grounds that the Establishment Clause bars "aid supporting a sectarian school's religious exercise or the discharge of its religious mission." Adhering to the "substantive principle of no aid" first articulated in *Everson*, he contended that direct aid to pervasively sectarian institutions inevitably results in the diversion of the aid for purposes of religious indoctrination. He further argued that the aid in this case had been so diverted.

As the opinion upholding the program's constitutionality on the narrowest grounds, Justice O'Connor's provides the most current guidance on the standards governing the constitutionality of aid programs directly benefiting sectarian elementary and secondary schools.

The Court has similarly loosened the constitutional restrictions on public aid programs indirectly benefiting sectarian elementary and secondary schools. Initially, the Court in 1973 struck down substantially similar programs in New York and Pennsylvania providing for tuition reimbursement to parents of religious school children. New York's program provided reimbursements out of general tax revenues for tuition paid by low-income parents to send their children to nonpublic elementary and secondary schools; the reimbursements were of fixed amounts but could not exceed 50 percent of actual tuition paid. Pennsylvania provided fixed-sum reimbursement for parents who sent their children to nonpublic elementary and secondary schools, so long as the amount paid did not exceed actual tuition, the funds to be derived from cigarette tax revenues. Both programs, it was held, constituted public financial assistance

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[121] Justice O'Connor also cited several other factors as "sufficient" to ensure the program's constitutionality, without saying whether they were "constitutionally necessary"—that the aid supplemented rather than supplanted the school's educational functions, that no funds ever reached the coffers of the sectarian schools, and that there were various administrative regulations in place providing for some degree of monitoring of the schools' use of the aid.

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to sectarian institutions with no attempt to segregate the benefits so that religion was not advanced.[122]

New York had also enacted a separate program providing tax relief for low-income parents who did not qualify for the tuition reimbursements; here relief was in the form of a deduction or credit bearing no relationship to the amounts of tuition paid, but keyed instead to adjusted gross income. This too was invalidated in *Nyquist*. "In practical terms there would appear to be little difference, for purposes of determining whether such aid has the effect of advancing religion, between the tax benefit allowed here and the tuition [reimbursement] grant. . . . The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. We see no answer to Judge Hays' dissenting statement below that '[i]n both instances the money involved represents a charge made upon the state for the purpose of religious education.'"[123] Some difficulty, however, was experienced in distinguishing this program from the tax exemption approved in *Walz*.[124]

The Court rejected two subsidiary arguments in these cases. The first, in the New York case, was that the tuition reimbursement program promoted the free exercise of religion in that it permitted low-income parents desiring to send their children to school in accordance with their religious views to do so. The Court agreed that "tension inevitably exists between the Free Exercise and the Establishment Clauses," but explained that the tension is ordinarily resolved through application of the "neutrality" principle: government may neither advance nor inhibit religion. The tuition program inescapably advanced religion and thereby violated this prin-

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[122] Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789–798 (1973) (New York); Sloan v. Lemon, 413 U.S. 825 (1973) (Pennsylvania). The Court distinguished *Everson* and *Allen* on the grounds that in those cases the aid was given to all children and their parents and that the aid was in any event religiously neutral, so that any assistance to religion was purely incidental. 413 U.S. at 781–82. Chief Justice Burger thought that *Everson* and *Allen* were controlling. Id. at 798.

[123] Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 790–91 (1973).

[124] 413 U.S. at 791–94. Principally, *Walz* was said to be different because of the longstanding nature of the property tax exemption it dealt with, because the *Walz* exemption was granted in the spirit of neutrality whereas the tax credit under consideration was not, and the fact that the *Walz* exemption promoted less entanglement whereas the credit would promote more.

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ciple.[125] The second subsidiary argument that the Court rejected was that, because the Pennsylvania program reimbursed parents who sent their children to nonsectarian schools as well as to sectarian ones, the portion respecting the former parents was valid and "parents of children who attended sectarian schools are entitled to the same aid as a matter of equal protection."[126] The Court found the argument "thoroughly spurious," adding, "The Equal Protection Clause has never been regarded as a bludgeon with which to compel a State to violate other provisions of the Constitution."[127]

In 1983, the Court clarified the limits of the *Nyquist* holding. In *Mueller v. Allen*,[128] the Court upheld a Minnesota deduction from state income tax available to parents of elementary and secondary school children for expenses incurred in providing tuition, transportation, textbooks, and various other school supplies. Because the Minnesota deduction was available to parents of public and private schoolchildren alike, the Court termed it "vitally different from the scheme struck down in *Nyquist*," and more similar to the benefits upheld in *Everson* and *Allen* as available to *all* schoolchildren.[129] The Court declined to look behind the "facial neutrality" of the law and consider empirical evidence of its actual impact, citing a need for "certainty" and the lack of "principled standards" by which to evaluate such evidence.[130] Also important to the Court's refusal to consider

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[125] 413 U.S. at 788–89. *But cf.* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (Free Exercise Clause "affirmatively mandates accommodation, not merely tolerance, of all religions").

[126] Sloan v. Lemon, 413 U.S. 825, 834 (1973).

[127] 413 U.S. at 834. In any event, the Court sustained the district court's refusal to sever the program and save that portion as to children attending nonsectarian schools on the basis that, because so large a portion of the children benefited attended religious schools, it could not be assumed the legislature would have itself enacted such a limited program.

In Wheeler v. Barrera, 417 U.S. 402 (1974), the Court held that states receiving federal educational funds were required by federal law to provide "comparable" but not equal services to both public and private school students within the restraints imposed by state constitutional restrictions on aid to religious schools. In the absence of specific plans, the Court declined to review First Amendment limitations on such services.

[128] 463 U.S. 388 (1983).

[129] 463 U.S. at 398. *Nyquist* had reserved the question of "whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." 413 U.S. at 783 n.38.

[130] 463 U.S. at 401. Justice Marshall's dissenting opinion, joined by Justices Brennan, Blackmun, and Stevens, argued that the tuition component of the deduction, unavailable to parents of most public schoolchildren, was by far the most significant, and that the deduction as a whole "was little more that a subsidy of tuition masquerading as a subsidy of general educational expenses." 463 U.S. at 408–09. *Cf.* Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985), where the Court emphasized that 40 of 41 nonpublic schools at which publicly funded programs operated

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the alleged disproportionate benefits to parents of parochial school children was the assertion that, "whatever unequal effect may be attributed to the statutory classification can fairly be regarded as a rough return for the benefits . . . provided to the State and all taxpayers by parents sending their children to parochial schools." [131]

A second factor important in *Mueller*, which had been present but not controlling in *Nyquist*, was that the financial aid was provided to the parents of schoolchildren rather than to the school. In the Court's view, therefore, the aid was "attenuated" rather than direct; because it was "available only as a result of decisions of individual parents," there was no "imprimatur of state approval." The Court noted that, with the exception of *Nyquist*, "all . . . of our recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the State to the schools themselves." [132] Thus, *Mueller* apparently stands for the proposition that state subsidies of tuition expenses at sectarian schools are permissible if contained in a facially neutral scheme providing benefits, at least nominally, to parents of public and private schoolchildren alike.

The Court confirmed this proposition three years later in *Witters v. Washington Department of Social Services for the Blind*.[133] At issue was the constitutionality of a grant made by a state vocational rehabilitation program to a blind person who wanted to use the grant to attend a religious school and train for a religious ministry. Again, the Court emphasized that, in the vocational rehabilitation program "any aid provided is 'made available without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited'" and "ultimately flows to religious institutions . . . only as a result of the genuinely independent and private choices of aid recipients." [134] The program, the Court stated, did not have the purpose of providing support for nonpublic, sectarian institutions; created no financial incentive for students to undertake religious education; and gave recipients "full opportunity to expend vocational rehabiiltation aid on wholly secular education." "In this case," the Court found, "the fact that the aid goes to individuals means that the decision to support religious education is made by

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were sectarian in nature; and Widmar v. Vincent, 454 U.S. 263, 275 (1981), holding that a college's open forum policy had no primary effect of advancing religion "[a]t least in the absence of evidence that religious groups will dominate [the] forum." *But cf.* Bowen v. Kendrick, 487 U.S. 589 (1988), permitting religious institutions to be recipients under a "facially neutral" direct grant program.

[131] 463 U.S. at 402.

[132] 463 U.S. at 399.

[133] 474 U.S. 481 (1986).

[134] 474 U.S. at 487.

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the individual, not by the State." Finally, the Court concluded, there was no evidence that "any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education." [135]

In *Zobrest v. Catalina Foothills School District* [136] the Court reaffirmed this line of reasoning. The case involved the provision of a sign language interpreter pursuant to the Individuals with Disabilities Education Act (IDEA) [137] to a deaf high school student who wanted to attend a Catholic high school. In upholding the assistance as constitutional, the Court emphasized that "[t]he service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as 'disabled' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends." Thus, it held that the presence of the interpreter in the sectarian school resulted not from a decision of the state but from the "private decision of individual parents." [138]

Finally, in *Zelman v. Simmons-Harris* [139] the Court reinterpreted the genuine private choice criterion in a manner that seems to render most voucher programs constitutional. At issue was an Ohio program that provided vouchers to the parents of children in failing public schools in Cleveland for use at private schools in the city. The Court upheld the program notwithstanding that, as in *Nyquist*, most of the schools at which the vouchers could be redeemed were religious and most of the voucher students attended such schools. But the Court found that the program nevertheless involved "true private choice." [140] "Cleveland schoolchildren," the Court said, "enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school. That 46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause. The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleve-

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[135] 474 U.S. at 488.
[136] 509 U.S. 1 (1993).
[137] 20 U.S.C. §§ 1400 *et seq*.
[138] 509 U.S. at 10.
[139] 536 U.S. at 639 (2002).
[140] 536 U.S. at 653.

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land schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school." [141]

In contrast to its rulings concerning direct aid to sectarian elementary and secondary schools, the Court, although closely divided at times, has from the start approved quite extensive public assistance to institutions of higher learning. On the same day that it first struck down an assistance program for elementary and secondary private schools, the Court sustained construction grants to church-related colleges and universities.[142] The specific grants in question were for the construction of two library buildings, a science building, a music, drama, and arts building, and a language laboratory. The law prohibited the financing of any facility for, or the use of any federally financed building for, religious purposes, although the restriction on use ran for only twenty years.[143] The Court found that the purpose and effect of the grants were secular and that, unlike elementary and secondary schools, religious colleges were not so devoted to inculcating religion.[144] The supervision required to ensure conformance with the non-religious-use requirement was found not to constitute "excessive entanglement," inasmuch as a building is nonideological in character, and the construction grants were one-time rather than continuing.

Also sustained was a South Carolina program under which a state authority would issue revenue bonds for construction projects on campuses of private colleges and universities. The Court did not decide whether this special form of assistance could be otherwise sustained, because it concluded that religion was neither advanced nor inhibited; nor was there any impermissible public entanglement. "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." [145] The colleges involved, though affiliated with religious institutions, were

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[141] 536 U.S. at 655–56.

[142] Tilton v. Richardson, 403 U.S. 672 (1971). This was a 5–4 decision.

[143] Because such buildings would still have substantial value after twenty years, the Court found that a religious use then would be an unconstitutional aid to religion, and it struck down the period of limitation. 403 U.S. at 682–84.

[144] It was no doubt true, Chief Justice Burger conceded, that construction grants to religious-related colleges did in some measure benefit religion, because the grants freed money that the colleges would be required to spend on the facilities for which the grants were made. Bus transportation, textbooks, and tax exemptions similarly benefited religion and had been upheld. "The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." 403 U.S. at 679.

[145] Hunt v. McNair, 413 U.S. 734, 743 (1973).

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not shown to be too pervasively religious—no religious qualifications existed for faculty or student body, a substantial part of the student body was not of the religion of the affiliation, and state rules precluded the use of any state-financed project for religious activities.[146]

The kind of assistance permitted by *Tilton* and by *Hunt v. McNair* seems to have been broadened when the Court sustained a Maryland program of annual subsidies to qualifying private institutions of higher education; the grants were noncategorical but could not be used for sectarian purposes, a limitation to be policed by the administering agency.[147] The plurality opinion found a secular purpose; found that the limitation of funding to secular activities was meaningful,[148] since the religiously affiliated institutions were not so pervasively sectarian that secular activities could not be separated from sectarian ones; and determined that excessive entanglement was improbable, given the fact that aided institutions were not pervasively sectarian. The annual nature of the subsidy was recognized as posing the danger of political entanglement, but the plurality thought that the character of the aided institutions—"capable of separating secular and religious functions"—was more important.[149]

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[146] 413 U.S. at 743–44. Justices Brennan, Douglas, and Marshall, dissenting, rejected the distinction between elementary and secondary education and higher education and foresaw a greater danger of entanglement than did the Court. Id. at 749.

[147] Roemer v. Maryland Public Works Bd., 426 U.S. 736 (1976). Justice Blackmun's plurality opinion was joined only by Chief Justice Burger and Justice Powell. Justices White and Rehnquist concurred on the basis of secular purpose and no primary religious benefit, rejecting entanglement. Id. at 767. Four justices dissented.

[148] 426 U.S. at 755. In some of the schools mandatory religion courses were taught, the significant factor in Justice Stewart's view, id. at 773, but overweighed by other factors in the plurality's view.

[149] 426 U.S. at 755–66. The plurality also relied on the facts that the student body was not local but diverse, and that large numbers of non-religiously affiliated institutions received aid. A still further broadening of governmental power to extend aid affecting religious institutions of higher education occurred in several subsequent decisions. First, the Court summarily affirmed two lower-court decisions upholding programs of assistance—scholarships and tuitions grants—to students at college and university as well as vocational programs in both public and private—including religious—institutions; one of the programs contained no secular use restriction at all and in the other one the restriction seemed somewhat pro forma. Smith v. Board of Governors of Univ. of North Carolina, 434 U.S. 803 (1977), aff'g 429 F. Supp. 871 (W.D.N.C. 1977); Americans United v. Blanton, 434 U.S. 803 (1977), aff'g 433 F. Supp. 97 (M.D. Tenn. 1977). Second, in Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986), the Court upheld use of a vocational rehabilitation scholarship at a religious college, emphasizing that the religious institution received the public money as a result of the "genuinely independent and private choices of the aid recipients," and not as the result of any decision by the state to sponsor or subsidize religion. Third, in Rosenberger v. The Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995), the Court held that a public university cannot exclude a student religious publication from a program subsidizing the printing costs

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Finally, in the first case since *Bradfield v. Roberts* [150] to challenge the constitutionality of public aid to non-educational religious institutions, the Court in *Bowen v. Kendrick*,[151] by a 5–4 vote, upheld the Adolescent Family Life Act (AFLA) [152] against facial challenge. The Act permits direct grants to religious organizations for the provision of health care and for counseling of adolescents on matters of pregnancy prevention and abortion alternatives, and requires grantees to involve other community groups, including religious organizations, in the delivery of services. All the Justices agreed that AFLA had valid secular purposes; their disagreement related to application of the effects and entanglement tests. The Court relied on analogy to the higher education cases rather than to the cases involving aid to elementary and secondary schools.[153] The case presented conflicting factual considerations. On the one hand, the class of beneficiaries was broad, with religious groups not predominant among the wide range of eligible community organizations. On the other hand, there were analogies to the parochial school aid cases: secular and religious teachings might easily be mixed, and the age of the targeted group (adolescents) suggested susceptibility. The Court resolved these conflicts by holding that AFLA is facially valid, there being insufficient indication that a significant proportion of the AFLA funds would be disbursed to "pervasively sectarian" institutions, but by remanding to the district court to determine whether particular grants to pervasively sectarian institutions were invalid. The Court emphasized in both parts of its opinion that the fact that "views espoused [during counseling] on matters of premarital sex, abortion, and the like happen to coincide with the religious views of the AFLA grantee would not be sufficient to show [an Establishment Clause violation]." [154]

At the time it was rendered, *Bowen* differed from the Court's decisions concerning direct aid to sectarian elementary and secondary schools primarily in that it refused to presume that religiously affiliated social welfare entities are pervasively sectarian. That difference had the effect of giving greater constitutional latitude to public aid to such entities than was afforded direct aid to religious elementary and secondary schools. As noted above, the Court in its recent decisions eliminated the presumption that such religious schools

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of all other student publications. The Court said the fund was essentially a religiously neutral subsidy promoting private student speech without regard to content.

[150] 175 U.S. 291 (1899).

[151] 487 U.S. 589 (1988).

[152] Pub. L. 97–35, 95 Stat. 578 (1981), codified at 42 U.S.C. §§ 300z *et seq*.

[153] The Court also noted that the 1899 case of Bradfield v. Roberts had established that religious organizations may receive direct aid for support of secular social-welfare cases.

[154] 487 U.S. at 621.

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are pervasively sectarian and has extended the same constitutional latitude to aid programs benefiting such schools as it gives to aid programs benefiting religiously affiliated social welfare programs.

Governmental Encouragement of Religion in Public Schools: Released Time.—Introduction of religious education into the public schools, one of Justice Rutledge's "great drives," [155] has also occasioned a substantial amount of litigation in the Court. In its first two encounters, the Court voided one program and upheld another, in which the similarities were at least as significant as the differences. Both cases involved "released time" programs, the establishing of a period during which pupils in public schools were to be allowed, upon parental request, to receive religious instruction. In the first, the religious classes were conducted during regular school hours in the school building by outside teachers furnished by a religious council representing the various faiths, subject to the approval or supervision of the superintendent of schools. Attendance reports were kept and reported to the school authorities in the same way as for other classes, and pupils not attending the religious instruction classes were required to continue their regular studies. "The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment . . . ." [156] The case was also noteworthy because of the Court's express rejection of the contention "that historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions." [157]

Four years later, the Court upheld a different released-time program.[158] In this one, schools released pupils during school hours, on written request of their parents, so that they might leave the school building and go to religious centers for religious instruction or devotional exercises. The churches reported to the schools the names of children released from the public schools who did not re-

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[155] Everson v. Board of Education, 330 U.S. 1, 63 (Justice Rutledge dissenting) (quoted under "Establishment of Religion," *supra*).

[156] Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 209–10 (1948).

[157] 333 U.S. at 211.

[158] Zorach v. Clauson, 343 U.S. 306 (1952). Justices Black, Frankfurter, and Jackson dissented. Id. at 315, 320, 323.

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port for religious instruction; children not released remained in the classrooms for regular studies. The Court found the differences between this program and the program struck down in *McCollum* to be constitutionally significant. Unlike *McCollum*, where "the classrooms were used for religious instruction and force of the public school was used to promote that instruction," religious instruction was conducted off school premises and "the public schools do no more than accommodate their schedules." [159] "We are a religious people whose institutions presuppose a Supreme Being," Justice Douglas wrote for the Court. "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe."

Governmental Encouragement of Religion in Public Schools: Prayers and Bible Reading.—Upon recommendation of the state governing board, a local New York school required each class to begin each school day by reading aloud the following prayer in the presence of the teacher: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers and our country." Students who wished to do so could remain silent or leave the room. The Court wrote: "We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. . . . [W]e think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." [160] "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the

[159] 343 U.S. at 315. *See also* Abington School Dist. v. Schempp, 374 U.S. 203, 261–63 (1963) (Justice Brennan concurring) (suggesting that the important distinction was that "the *McCollum* program placed the religious instruction in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects, while the *Zorach* program did not").

[160] Engel v. Vitale, 370 U.S. 421, 424, 425 (1962).

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Establishment Clause, as it might from the Free Exercise Clause. . . . The Establishment Clause . . . does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." [161]

Following the prayer decision came two cases in which parents and their school age children challenged the validity under the Establishment Clause of requirements that each school day begin with readings of selections from the Bible. Scripture reading, like prayers, the Court found, was a religious exercise. "Given that finding the exercises and the law requiring them are in violation of the Establishment Clause." [162] Rejected were contentions by the state that the object of the programs was the promotion of secular purposes, such as the expounding of moral values, the contradiction of the materialistic trends of the times, the perpetuation of traditional institutions, and the teaching of literature [163] and that to forbid the particular exercises was to choose a "religion of secularism" in their place.[164] Though the "place of religion in our society is an exalted one," the Establishment Clause, the Court continued, prescribed that in "the relationship between man and religion," the state must be "firmly committed to a position of neutrality." [165]

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[161] 370 U.S. at 430. Justice Black for the Court rejected the idea that the prohibition of religious services in public schools evidenced "a hostility toward religion or toward prayer." Id. at 434. Rather, such an application of the First Amendment protected religion from the coercive hand of government and government from control by a religious sect. Dissenting alone, Justice Stewart could not "see how an 'official religion' is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation." Id. at 444, 445.

[162] Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963). "[T]he States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools. None of these factors, other than compulsory school attendance, was present in the program upheld in Zorach v. Clausen." Id.

[163] 374 U.S. at 223–24. The Court thought the exercises were clearly religious.

[164] 374 U.S. at 225. "We agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" Zorach v. Clauson, 343 U.S. at 314. "We do not agree, however, that this decision in any sense has that effect."

[165] 374 U.S. at 226. Justice Brennan contributed a lengthy concurrence in which he attempted to rationalize the decisions of the Court on the religion clauses and to delineate the principles applicable. He concluded that what the Establishment Clause foreclosed "are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious

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In *Wallace v. Jaffree*,[166] the Court held invalid an Alabama statute authorizing a 1-minute period of silence in all public schools "for meditation or prayer." Because the only evidence in the record indicated that the words "or prayer" had been added to the existing statute by amendment for the sole purpose of returning voluntary prayer to the public schools, the Court found that the first prong of the *Lemon* test had been violated, *i.e.*, that the statute was invalid as being entirely motivated by a purpose of advancing religion. The Court characterized the legislative intent to return prayer to the public schools as "quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday,"[167] and both Justices Powell and O'Connor in concurring opinions suggested that other state statutes authorizing moments of silence might pass constitutional muster.[168]

The school prayer decisions served as precedent for the Court's holding in *Lee v. Weisman*[169] that a school-sponsored invocation at a high school commencement violated the Establishment Clause. The Court rebuffed a request to reexamine the *Lemon* test, finding "[t]he government involvement with religious activity in this case [to be] pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school." State officials not only determined that an invocation and benediction should be given, but also selected the religious participant and provided him with guidelines for the content of nonsectarian prayers. The Court, in an opinion by Justice Kennedy, viewed this state participation as coercive

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means to serve governmental ends, where secular means would suffice." Id. at 230, 295. Justice Stewart again dissented alone, feeling that the claims presented were essentially free exercise contentions which were not supported by proof of coercion or of punitive official action for nonparticipation.

While numerous efforts were made over the years to overturn these cases, through constitutional amendment and through limitations on the Court's jurisdiction, the Supreme Court itself has had no occasion to review the area again. *But see* Stone v. Graham, 449 U.S. 39 (1980) (summarily reversing state court and invalidating statute requiring the posting of the Ten Commandments, purchased with private contributions, on the wall of each public classroom, on the grounds the Ten Commandments are "undeniably a sacred text" and the "pre-eminent purpose" of the posting requirement was "plainly religious in nature").

[166] 472 U.S. 38 (1985).

[167] 472 U.S. at 59.

[168] Justice O'Connor's concurring opinion is notable for its effort to synthesize and refine the Court's Establishment and Free Exercise tests (*see also* the Justice's concurring opinion in Lynch v. Donnelly), and Justice Rehnquist's dissent for its effort to redirect Establishment Clause analysis by abandoning the tripartite test, discarding any requirement that government be neutral between religion and "irreligion," and confining the scope to a prohibition on establishing a national church or otherwise favoring one religious group over another.

[169] 505 U.S. 577 (1992).

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in the elementary and secondary school setting.[170] The state "in effect required participation in a religious exercise," since the option of not attending "one of life's most significant occasions" was no real choice. "At a minimum," the Court concluded, the Establishment Clause "guarantees that government may not coerce anyone to support or participate in religion or its exercise."

In *Santa Fe Independent School District v. Doe* [171] the Court held a school district's policy permitting high school students to vote on whether to have an "invocation and/or prayer" delivered prior to home football games by a student elected for that purpose to violate the Establishment Clause. It found the policy to violate each of the tests it has formulated for Establishment Clause cases. The preference given for an "invocation" in the text of the school district's policy, the long history of pre-game prayer led by a student "chaplain" in the school district, and the widespread perception that "the policy is about prayer," the Court said, made clear that its purpose was not secular but was to preserve a popular state-sponsored religious practice in violation of the first prong of the *Lemon* test. Moreover, it said, the policy violated the coercion test by forcing unwilling students into participating in a religious exercise. Some students—the cheerleaders, the band, football players—had to attend, it noted, and others were compelled to do so by peer pressure. "The constitutional command will not permit the District 'to exact religious conformity from a student as the price' of joining her classmates at a varsity football game," the Court held.[172] Finally, it said, the speech sanctioned by the policy was not private speech but government-sponsored speech that would be perceived as a government endorsement of religion. The long history of pre-game prayer, the bias toward religion in the policy itself, the fact that the message would be "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school prop-

[170] The Court distinguished *Marsh v. Chambers*, 463 U.S. 783, 792 (1983), holding that the opening of a state legislative session with a prayer by a state-paid chaplain does not offend the Establishment Clause. The *Marsh* Court had distinguished *Abington* on the basis that state legislators, as adults, are "presumably not readily susceptible to 'religious indoctrination' or 'peer pressure'" and the *Lee* Court reiterated this distinction. 505 U.S. at 596–97. This distinction was again relied on by a plurality of Justices in *Town of Greece v. Galloway*, *see* 572 U.S. ___, No. 12–696, slip op. at 18–24 (2014), in a decision upholding the use of legislative prayer at a town board meeting. Justice Kennedy, on behalf of himself and Chief Justice Roberts and Justice Alito, distinguished the situation in *Lee*, in that with legislative prayer, at least in the context of *Town of Greece*, those claiming offense at the prayer were "mature adults" who are not "susceptible to religious indoctrination or peer pressure" and were free to leave a town meeting during the prayer without any adverse implications. *Id.* at 22–23 (quoting *Marsh*, 463 U.S. at 792).

[171] 530 U.S. 290 (2000).

[172] 530 U.S. at 312.

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erty" [173] and over the school's public address system, the Court asserted, all meant that the speech was not genuine private speech but would be perceived as "stamped with [the] school's seal of approval." [174] The Court concluded that "[t]he policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events." [175]

Governmental Encouragement of Religion in Public Schools: Curriculum Restriction.—In *Epperson v. Arkansas*,[176] the Court struck down a state statute that made it unlawful for any teacher in any state-supported educational institution "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals," or "to adopt or use in any such institution a textbook that teaches" this theory. Agreeing that control of the curriculum of the public schools was largely in the control of local officials, the Court nonetheless held that the motivation of the statute was a fundamentalist belief in the literal reading of the Book of Genesis and that this motivation and result required the voiding of the law. "The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read. Plainly, the law is contrary to the mandate of the First . . . Amendment to the Constitution." [177]

Similarly invalidated as having the improper purpose of advancing religion was a Louisiana statute mandating balanced treatment of "creation-science" and "evolution-science" in the public schools. "The preeminent purpose of the Louisiana legislature," the Court found in *Edwards v. Aguillard*, "was clearly to advance the religious viewpoint that a supernatural being created humankind." [178] The Court viewed as a "sham" the stated purpose of protecting academic freedom, and concluded instead that the legislature's purpose was to narrow the science curriculum in order to discredit evolution "by counterbalancing its teaching at every turn with the teaching of creation science." [179]

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[173] 530 U.S. at 307.
[174] 530 U.S. at 308.
[175] 530 U.S. at 317.
[176] 393 U.S. 97 (1968).
[177] 393 U.S. at 109.
[178] 482 U.S. 578, 591 (1987).
[179] 482 U.S. at 589. The Court's conclusion was premised on its finding that "the term 'creation science,' as used by the legislature . . . embodies the religious belief that a supernatural creator was responsible for the creation of humankind." Id. at 592.

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Access of Religious Groups to Public Property.—Although government may not promote religion through its educational facilities, it may not bar student religious groups from meeting on public school property if it makes its facilities available to nonreligious student groups. In *Widmar v. Vincent*,[180] the Court held that allowing student religious groups equal access to a public college's facilities would further a secular purpose, would not constitute an impermissible benefit to religion, and would pose little hazard of entanglement. Subsequently, the Court held that these principles apply to public secondary schools as well as to institutions of higher learning. In 1990, in *Westside Community Board of Education v. Mergens*,[181] the Court upheld application of the Equal Access Act [182] to prevent a secondary school from denying access to school premises to a student religious club while granting access to such other "noncurriculum" related student groups as a scuba diving club, a chess club, and a service club.[183] Justice O'Connor stated in a plurality opinion that "there is a crucial difference between *government* speech endorsing religion and *private* speech endorsing religion. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." [184]

Similarly, public schools may not rely on the Establishment Clause as grounds to discriminate against religious groups in after-hours use of school property otherwise available for non-religious social, civic, and recreational purposes. In *Lamb's Chapel v. Center Moriches School District*,[185] the Court held that a school district could not,

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[180] 454 U.S. 263, 270–75 (1981).

[181] 496 U.S. 226 (1990). The Court had noted in *Widmar* that university students "are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion," 454 U.S. at 274 n.14. The *Mergens* plurality ignored this distinction, suggesting that secondary school students are also able to recognize that a school policy allowing student religious groups to meet in school facilities is one of neutrality toward religion. 496 U.S. at 252.

[182] Pub. L. 98–377, title VIII, 98 Stat. 1302 (1984); 20 U.S.C. §§ 4071–74. The Act requires secondary schools that receive federal financial assistance to allow student religious groups to meet in school facilities during noncurricular time to the same extent as other student groups and had been enacted by Congress in 1984 to apply the *Widmar* principles to the secondary school setting.

[183] There was no opinion of the Court on Establishment Clause issues, a plurality of four led by Justice O'Connor applying the three-part *Lemon* test, and concurring Justices Kennedy and Scalia proposing a less stringent test under which "neutral" accommodations of religion would be permissible as long as they do not in effect establish a state religion, and as long as there is no coercion of students to participate in a religious activity.

[184] 496 U.S. at 242.

[185] 508 U.S. 384 (1993).

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consistent with the free speech clause, refuse to allow a religious group to use school facilities to show a film series on family life when the facilities were otherwise available for community use. "It discriminates on the basis of viewpoint," the Court ruled, "to permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious viewpoint." In response to the school district's claim that the Establishment Clause required it to deny use of its facilities to a religious group, the Court said that there was "no realistic danger" in this instance that "the community would think that the District was endorsing religion or any particular creed" and that such permission would satisfy the requirements of the *Lemon* test.[186] Similarly, in *Good News Club v. Milford Central School*,[187] the Court held the free speech clause to be violated by a school policy that barred a religious children's club from meeting on school premises after school. Given that other groups teaching morals and character development to young children were allowed to use the school's facilities, the exclusion, the Court said, "constitutes unconstitutional viewpoint discrimination." Moreover, it said, the school had "no valid Establishment Clause interest" because permitting the religious club to meet would not show any favoritism toward religion but would simply "ensure neutrality."

Finally, the Court has made clear that public colleges may not exclude student religious organizations from benefits otherwise provided to a full spectrum of student "news, information, opinion, entertainment, or academic communications media groups." In *Rosenberger v. Board of Visitors of the University of Virginia*,[188] the Court struck down a university policy that afforded a school subsidy to all student publications except religious ones. Once again, the Court held the denial of the subsidy to constitute viewpoint discrimination in violation of the free speech clause of the First Amendment. In response to the University's argument that the Establishment Clause required it not to subsidize an enterprise that promotes religion, the Court emphasized that the forum created by the University's subsidy policy had neither the purpose nor the effect of

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[186] 508 U.S. at 395. Concurring opinions by Justice Scalia, joined by Justice Thomas, and by Justice Kennedy, criticized the Court's reference to *Lemon*. Justice Scalia lamented that "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District." Id. at 398. Justice White pointedly noted, however, that "*Lemon* . . . has not been overruled." Id at 395 n.7.

[187] 533 U.S. 98 (2001).

[188] 515 U.S. 819 (1995).

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advancing religion and, because it was open to a variety of viewpoints, was neutral toward religion.

These cases make clear that the Establishment Clause does not necessarily trump the First Amendment's protection of freedom of speech. In regulating private speech in a public forum, government may not justify discrimination against religious viewpoints as necessary to avoid creating an "establishment" of religion.

Tax Exemptions of Religious Property.—Every state and the District of Columbia provide for tax exemptions for religious institutions, and the history of such exemptions goes back to the time of our establishment as a polity. The only expression by a Supreme Court Justice prior to 1970 was by Justice Brennan, who deemed tax exemptions constitutional because the benefit conferred was incidental to the religious character of the institutions concerned.[189] Then, in 1970, a nearly unanimous Court sustained a state exemption from real or personal property taxation of "property used exclusively for religious, educational or charitable purposes" owned by a corporation or association which was conducted exclusively for one or more of these purposes and did not operate for profit.[190] The first prong of a two-prong argument saw the Court adopting Justice Brennan's rationale. Using the secular purpose and effect test, Chief Justice Burger noted that the purpose of the exemption was not to single out churches for special favor; instead, the exemption applied to a broad category of associations having many common features and all dedicated to social betterment. Thus, churches as well as museums, hospitals, libraries, charitable organizations, professional associations, and the like, all non-profit, and all having a beneficial and stabilizing influence in community life, were to be encouraged by being treated specially in the tax laws. The primary effect of the exemptions was not to aid religion; the primary effect was secular and any assistance to religion was merely incidental.[191]

For the second prong, the Court created a new test, the entanglement test,[192] by which to judge the program. There was some entanglement whether there were exemptions or not, Chief Justice Burger continued, but with exemptions there was minimal involvement. But termination of exemptions would deeply involve government in the internal affairs of religious bodies, because evaluation

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[189] "If religious institutions benefit, it is in spite of rather than because of their religious character. For religious institutions simply share benefits which government makes generally available to educational, charitable, and eleemosynary groups." Abington School Dist. v. Schempp, 374 U.S. 203, 301 (1963) (concurring opinion).

[190] Walz v. Tax Comm'n, 397 U.S. 664 (1970). Justice Douglas dissented.

[191] 397 U.S. at 672–74.

[192] *See* discussion under "Court Tests Applied to Legislation Affecting Religion," *supra*.

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of religious properties for tax purposes would be required and there would be tax liens and foreclosures and litigation concerning such matters.[193]

Although the general issue is now settled, it is to be expected that variations of the exemption upheld in *Walz* will present the Court with an opportunity to elaborate the field still further.[194] For example, the Court determined that a sales tax exemption applicable only to religious publications constituted a violation of the Establishment Clause,[195] and, on the other hand, that application of a general sales and use tax provision to religious publications violates neither the Establishment Clause nor the Free Exercise Clause.[196]

Exemption of Religious Organizations from Generally Applicable Laws.—The Civil Rights Act's exemption of religious organizations from the prohibition against religious discrimination in employment [197] does not violate the Establishment Clause when applied to a religious organization's secular, nonprofit activities. In *Corporation of the Presiding Bishop v. Amos*,[198] the Court held that a church-run gymnasium operated as a nonprofit facility open to the public could require that its employees be church members. Declaring that "there is ample room for accommodation of religion under the Establishment Clause," [199] the Court identified a legitimate purpose in freeing a religious organization from the burden of predicting which of its activities a court will consider to be secular and which religious. The rule applying across-the-board to nonprofit activities and thereby "avoid[ing] . . . intrusive inquiry into religious belief" also serves to lessen entanglement of church and state.[200]

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[193] 397 U.S. at 674–76.

[194] For example, the Court subsequently accepted for review a case concerning property tax exemption for church property used as a commercial parking lot, but state law was changed, denying exemption for purely commercial property and requiring a pro rata exemption for mixed use, and the Court remanded so that the change in the law could be considered. Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972).

[195] Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

[196] Jimmy Swaggart Ministries v. California Bd. of Equalization, 493 U.S. 378 (1990). Similarly, there is no constitutional impediment to straightforward application of 26 U.S.C. § 170 to disallow a charitable contribution for payments to a church found to represent a reciprocal exchange rather than a contribution or gift. Hernandez v. Commissioner, 490 U.S. 680 (1989).

[197] Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2, makes it unlawful for any employer to discriminate in employment practices on the basis of an employee's religion. Section 702, 42 U.S.C. § 2000e–1, exempts from the prohibition "a religious corporation . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation . . . of its activities."

[198] 483 U.S. 327 (1987).

[199] 483 U.S. at 338.

[200] 483 U.S. at 339.

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The exemption itself does not have a principal effect of advancing religion, the Court concluded, but merely allows churches to advance religion.[201]

Sunday Closing Laws.—The history of Sunday Closing Laws goes back into United States colonial history and far back into English history.[202] Commonly, the laws require the observance of the Christian Sabbath as a day of rest, although in recent years they have tended to become honeycombed with exceptions. The Supreme Court rejected an Establishment Clause challenge to Sunday Closing Laws in *McGowan v. Maryland*.[203] The Court acknowledged that historically the laws had a religious motivation and were designed to effectuate concepts of Christian theology. However, "[i]n light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion. . . ."[204] "[T]he fact that this [prescribed day of rest] is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State."[205] The choice of Sunday as the day of rest, although originally religious, now reflected simple legislative inertia or recognition that Sunday was a traditional day for the choice.[206] Valid secular reasons existed for not simply requiring one day of rest and leaving to each individual to choose the day,

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[201] "For a law to have forbidden 'effects' . . . it must be fair to say that the *government itself* has advanced religion through its own activities and influence." 483 U.S. at 337. Justice O'Connor's concurring opinion suggests that practically any benefit to religion can be "recharacterized as simply 'allowing' a religion to better advance itself," and that a "necessary second step is to separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations." Id. at 347, 348.

[202] The history is recited at length in the opinion of the Court in McGowan v. Maryland, 366 U.S. 420, 431–40 (1961), and in Justice Frankfurter's concurrence. Id. at 459, 470–551 and appendix.

[203] 366 U.S. 420 (1961). Decision on the establishment question in this case also controlled the similar decision on that question in Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582 (1961), Braunfeld v. Brown, 366 U.S. 599 (1961), and Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961). On free exercise in Sunday Closing cases, *see* "Free Exercise Exemption From General Governmental Requirements," *infra*.

[204] McGowan v. Maryland, 366 U.S. 420, 444 (1961).

[205] 366 U.S. at 445.

[206] 366 U.S. at 449–52.

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reasons of ease of enforcement and of assuring a common day in the community for rest and leisure.[207] Later, a state statute mandating that employers honor the Sabbath day of the employee's choice was held invalid as having the primary effect of promoting religion by weighing the employee's Sabbath choice over all other interests.[208]

Conscientious Objection.—Historically, Congress has provided for alternative service for men who had religious scruples against participating in either combat activities or in all forms of military activities; the fact that Congress chose to draw the line of exemption on the basis of religious belief confronted the Court with a difficult constitutional question, which, however, the Court chose to avoid by a somewhat disingenuous interpretation of the statute.[209] In *Gillette v. United States*,[210] a further constitutional problem arose in which the Court did squarely confront and validate the congressional choice. Congress had restricted conscientious objection status to those who objected to "war in any form" and the Court conceded that there were religious or conscientious objectors who were not opposed to all wars but only to particular wars based upon evaluation of a number of factors by which the "justness" of any particular war could be judged; "properly construed," the Court said, the statute did draw a line relieving from military service some religious objectors while not relieving others.[211] Purporting to apply the secular purpose and effect test, the Court looked almost exclusively to purpose and hardly at all to effect. Although it is not clear, the Court seemed to require that a classification must be religiously based "on its face" [212] or lack any "neutral, secular basis for the lines gov-

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[207] 366 U.S. at 449–52. Justice Frankfurter, with whom Justice Harlan concurred, arrived at the same conclusions by a route that did not require approval of Everson v. Board of Education, from which he had dissented.

[208] Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

[209] In United States v. Seeger, 380 U.S. 163 (1965), a unanimous Court construed the language of the exemption limiting the status to those who by "religious training and belief" (that is, those who believed in a "Supreme Being"), to mean that a person must have some belief which occupies in his life the place or role which the traditional concept of God occupies in the orthodox believer. After the "Supreme Being" clause was deleted, a plurality in Welsh v. United States, 398 U.S. 333 (1970), construed the religion requirement as inclusive of moral, ethical, or religious grounds. Justice Harlan concurred on constitutional grounds, believing that the statute was clear that Congress had intended to restrict conscientious objection status to those persons who could demonstrate a traditional religious foundation for their beliefs and that this was impermissible under the Establishment Clause. Id. at 344. The dissent by Justices White and Stewart and Chief Justice Burger rejected both the constitutional and the statutory basis. 398 U.S. at 367.

[210] 401 U.S. 437 (1971).

[211] 401 U.S. at 449.

[212] 401 U.S. at 450.

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ernment has drawn"[213] in order that it be held to violate the Establishment Clause. The classification here was not religiously based "on its face," and served "a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions."[214] These purposes, related to the difficulty in separating sincere conscientious objectors to particular wars from others with fraudulent claims, included the maintenance of a fair and efficient selective service system and protection of the integrity of democratic decision-making.[215]

Regulation of Religious Solicitation.—Although the solicitation cases have generally been decided under the free exercise or free speech clauses,[216] in one instance the Court, intertwining establishment and free exercise principles, voided a provision in a state charitable solicitations law that required only those religious organizations that received less than half their total contributions from members or affiliated organizations to comply with the registration and reporting sections of the law.[217] Applying strict scrutiny equal protection principles, the Court held that, by distinguishing between older, well-established churches that had strong membership financial support and newer bodies lacking a contributing constituency or that may favor public solicitation over general reliance on financial support from the members, the statute granted denominational preference forbidden by the Establishment Clause.[218]

Religion in Governmental Observances.—The practice of opening legislative sessions with prayers by paid chaplains was upheld in *Marsh v. Chambers*,[219] a case involving prayers in the Nebraska legislature. The Court relied almost entirely on historical practice. Congress had paid a chaplain and opened sessions with prayers for almost 200 years; the fact that Congress had continued the practice after considering constitutional objections in the Court's view strengthened rather than weakened the historical argument. Similarly, the practice was well rooted in Nebraska and in most other

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[213] 401 U.S. at 452.

[214] 401 U.S. at 452.

[215] 401 U.S. at 452–60.

[216] *See* discussion under "Door-to-Door Solicitation and Charitable Solicitation," *infra*.

[217] Larson v. Valente, 456 U.S. 228 (1982). Two Justices dissented on the merits, id. at 258 (Justices White and Rehnquist), while two other Justices dissented on a standing issue. Id. at 264 (Chief Justice Burger and Justice O'Connor).

[218] 456 U.S. at 246–51. *Compare* Heffron v. ISKCON, 452 U.S. 640, 652–53 (1981), *and* id. at 659 n.3 (Justice Brennan, concurring in part and dissenting in part) (dealing with a facially neutral solicitation rule distinguishing between religious groups that have a religious tenet requiring peripatetic solicitation and those who do not).

[219] 463 U.S. 783 (1983). *Marsh* was a 6–3 decision, with Chief Justice Burger's opinion for the Court being joined by Justices White, Blackmun, Powell, Rehnquist, and O'Connor, and with Justices Brennan, Marshall, and Stevens dissenting.

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states. Most importantly, the First Amendment had been drafted in the First Congress with an awareness of the chaplaincy practice, and this practice was not prohibited or discontinued. The Court did not address the lower court's findings,[220] amplified in Justice Brennan's dissent, that each aspect of the *Lemon v. Kurtzman* tripartite test had been violated. Instead of constituting an application of the tests, therefore, *Marsh* can be read as representing an exception to their application.[221]

The Court likewise upheld the use of legislative prayers in the context of a challenge to the use of sectarian prayers to open a town meeting. In *Town of Greece v. Galloway*,[222] the Court considered whether such legislative prayers needed to be "ecumenical" and "inclusive." The challenge arose when the upstate New York Town of Greece recruited local clergy, who were almost exclusively Christian, to deliver prayers at monthly town board meetings. Basing its holding largely on the nation's long history of using prayer to open legislative sessions as a means to lend gravity to the occasion and to reflect long-held values, the Court concluded that the prayer practice in the Town of Greece fit within this tradition.[223] The Court also voiced pragmatic concerns with government scrutiny respecting the content of legislative prayers.[224] As a result, after *Town of Greece*, absent a "pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose," First Amendment challenges based solely on the content of a legislative prayer appear unlikely to be successful.[225] Moreover, absent situations in which a legislative body discriminates against minority faiths, governmental entities that allow for sectarian legislative prayer do not appear to violate the Constitution.[226]

Religious Displays on Government Property.—A different form of governmentally sanctioned religious observance—inclusion of religious symbols in governmentally sponsored holiday displays—was

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[220] Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982).

[221] School prayer cases were distinguished on the basis that legislators, as adults, are presumably less susceptible than are schoolchildren to religious indoctrination and peer pressure, 463 U.S. at 792, but there was no discussion of the tests themselves.

[222] 572 U.S. ___, No. 12–696, slip op. (2014).

[223] *Id.* at 9–18. The Court did suggest that a pattern of prayers that over time "denigrate, proselytize, or betray an impermissible government purpose" could establish a constitutional violation. *Id.* at 17.

[224] *Id.* at 12 ("To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice . . . .").

[225] *Id.* at 17.

[226] *Id.*

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twice before the Court, with varying results. In 1984, in *Lynch v. Donnelly*,[227] the Court found that the Establishment Clause was not violated by inclusion of a Nativity scene (creche) in a city's Christmas display; in 1989, in *Allegheny County v. Greater Pittsburgh ACLU*,[228] inclusion of a creche in a holiday display was found to constitute a violation. Also at issue in *Allegheny County* was inclusion of a menorah in a holiday display; here the Court found no violation. The setting of each display was crucial to the different results in these cases, the determinant being whether the Court majority believed that the overall effect of the display was to emphasize the religious nature of the symbols, or whether instead the emphasis was primarily secular. Perhaps equally important for future cases, however, was the fact that the four dissenters in *Allegheny County* would have upheld both the creche and menorah displays under a more relaxed, deferential standard.

Chief Justice Burger's opinion for the Court in *Lynch* began by expanding on the religious heritage theme exemplified by *Marsh*; other evidence that "'[w]e are a religious people whose institutions presuppose a Supreme Being'"[229] was supplied by reference to the national motto "In God We Trust," the affirmation "one nation under God" in the pledge of allegiance, and the recognition of both Thanksgiving and Christmas as national holidays. Against that background, the Court then determined that the city's inclusion of the creche in its Christmas display had a legitimate secular purpose in recognizing "the historical origins of this traditional event long recognized as a National Holiday,"[230] and that its primary effect was not to advance religion. The benefit to religion was called "indirect, remote, and incidental," and in any event no greater than the benefit resulting from other actions that had been found to be permissible, such as the provision of transportation and textbooks to parochial school students, various assistance to church-supported colleges, Sunday closing laws, and legislative prayers.[231] The Court also re-

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[227] 465 U.S. 668 (1984). *Lynch* was a 5–4 decision, with Justice Blackmun, who voted with the majority in *Marsh*, joining the *Marsh* dissenters in this case. Again, Chief Justice Burger wrote the opinion of the Court, joined by the other majority Justices, and again Justice Brennan wrote a dissent, joined by the other dissenters. A concurring opinion was added by Justice O'Connor, and a dissenting opinion was added by Justice Blackmun.

[228] 492 U.S. 573 (1989).

[229] 465 U.S. at 675, quoting Zorach v. Clausen, 343 U.S. 306, 313 (1952).

[230] 465 U.S. at 680.

[231] 465 U.S. at 681–82. Although the extent of benefit to religion was an important factor in earlier cases, it was usually balanced against the secular effect of the same practice rather than the religious effects of other practices.

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versed the lower court's finding of entanglement based only on "political divisiveness." [232]

Allegheny County was also decided by a 5–4 vote, Justice Blackmun writing the opinion of the Court on the creche issue, and there being no opinion of the Court on the menorah issue.[233] To the majority, the setting of the creche was distinguishable from that in *Lynch*. The creche stood alone on the center staircase of the county courthouse, bore a sign identifying it as the donation of a Roman Catholic group, and also had an angel holding a banner proclaiming "Gloria in Exclesis Deo." Nothing in the display "detract[ed] from the creche's religious message," and the overall effect was to endorse that religious message.[234] The menorah, on the other hand, was placed outside a government building alongside a Christmas tree and a sign saluting liberty, and bore no religious messages. To Justice Blackmun, this grouping merely recognized "that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status"; [235] to concurring Justice O'Connor, the display's "message of pluralism" did not endorse religion over nonreligion even though Chanukah is primarily a religious holiday and even though the menorah is a religious symbol.[236] The dissenters, critical of the endorsement test proposed by Justice O'Connor and of the three-part *Lemon* test, would instead distill two principles from the Establishment Clause: "government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a state religion or religious faith, or tends to do so.'" [237]

In *Capitol Square Review Bd. v. Pinette*,[238] the Court distinguished privately sponsored from governmentally sponsored reli-

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[232] 465 U.S. at 683–84.

[233] Justice O'Connor, who had concurred in *Lynch*, was the pivotal vote, joining the *Lynch* dissenters to form the majority in *Allegheny County*. Justices Scalia and Kennedy, not on the Court in 1984, replaced Chief Justice Burger and Justice Powell in voting to uphold the creche display; Justice Kennedy authored the dissenting opinion, joined by the other three.

[234] 492 U.S. at 598, 600.

[235] 492 U.S. at 616.

[236] 492 U.S. at 635.

[237] 492 U.S. at 659.

[238] 515 U.S. 753 (1995). The Court was divided 7–2 on the merits of *Pinette*, a vote that obscured continuing disagreement over analytical approach. The portions of Justice Scalia's opinion that formed the opinion of the Court were joined by Chief Justice Rehnquist and by Justices O'Connor, Kennedy, Souter, Thomas, and Breyer. A separate part of Justice Scalia's opinion, joined only by the Chief Justice and by Justices Kennedy and Thomas, disputed the assertions of Justices O'Connor, Souter, and Breyer that the "endorsement" test should be applied. Dissenting Justice Stevens thought that allowing the display on the Capitol grounds did carry "a clear

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gious displays on public property. There the Court ruled that Ohio violated free speech rights by refusing to allow the Ku Klux Klan to display an unattended cross in a publicly owned plaza outside the Ohio Statehouse. Because the plaza was a public forum in which the state had allowed a broad range of speakers and a variety of unattended displays, the state could regulate the expressive content of such speeches and displays only if the restriction was necessary, and narrowly drawn, to serve a compelling state interest. The Court recognized that compliance with the Establishment Clause can be a sufficiently compelling reason to justify content-based restrictions on speech, but saw no need to apply this principle when permission to display a religious symbol is granted through the same procedures, and on the same terms, required of other private groups seeking to convey non-religious messages.

Displays of the Ten Commandments on government property occasioned two decisions in 2005. As in *Allegheny County*, a closely divided Court determined that one display violated the Establishment Clause and one did not. And again, context and imputed purpose made the difference. The Court struck down display of the Ten Commandments in courthouses in two Kentucky counties,[239] but held that a display on the grounds of the Texas State Capitol was permissible.[240] The displays in the Kentucky courthouses originally "stood alone, not part of an arguably secular display."[241] Moreover, the history of the displays revealed "a predominantly religious purpose" that had not been eliminated by steps taken to give the appearance of secular objectives.[242]

There was no opinion of the Court in *Van Orden*. Justice Breyer, the swing vote in the two cases,[243] distinguished the Texas Capitol grounds display from the Kentucky courthouse displays. In some contexts, the Ten Commandments can convey a moral and histori-

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image of endorsement" (id. at 811), and Justice Ginsburg's brief opinion seemingly agreed with that conclusion.

[239] McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005).

[240] Van Orden v. Perry, 545 U.S. 677 (2005).

[241] 545 U.S. at 868. The Court in its previous Ten Commandments case, Stone v. Graham, 449 U.S. 39, 41 (1980) (invalidating display in public school classrooms) had concluded that the Ten Commandments are "undeniably a sacred text," and the 2005 Court accepted that characterization. *McCreary*, 545 U.S. at 859.

[242] 545 U.S. at 881. An "indisputable" religious purpose was evident in the resolutions authorizing a second display, and the Court characterized statements of purpose accompanying authorization of the third displays as "only . . . a litigating position." 545 U.S. at 870, 871.

[243] Only Justice Breyer voted to invalidate the courthouse displays and uphold the capitol grounds display. The other eight Justices were split evenly, four (Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas) voting to uphold both displays, and four (Justices Stevens, O'Connor, Souter, and Ginsburg) voting to invalidate both.

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cal message as well as a religious one, the Justice explained. Although it was "a borderline case" turning on "a practical matter of *degree*," the capitol display served "a primarily nonreligious purpose."[244] The monument displaying the Ten Commandments was one of 17 monuments and 21 historical markers on the Capitol grounds; it was paid for by a private, civic, and primarily secular organization; and it had been in place, unchallenged, for 40 years. Under the circumstances, Justice Breyer thought that few would be likely to understand the monument to represent an attempt by government to favor religion.[245]

The Court has also considered an Establishment Clause challenge to the display of a Latin Cross—erected to honor American soldiers who died in World War I—on federal land located in a remote section of the Mojave Desert.[246] The legal proceedings leading up to the decision, however, were complicated by congressional attempts to influence the final disposition of the case, including the attempted transfer of the federal land in question to private hands.[247] As a result, a splintered Court failed to reach the merits of the underlying challenge, and instead remanded the case for further consideration.[248]

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[244] 545 U.S. at 700, 704, 703.

[245] 545 U.S. at 702. In Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 1140 (2009), Justice Scalia, in a concurring opinion joined by Justice Thomas, wrote that, "[e]ven accepting the narrowest reading of the narrowest opinion necessary to the judgment in *Van Orden*," he would find that a Ten Commandments monument displayed in a Utah public park for 38 years amidst 15 permanent displays would not violate the Establishment Clause, even though the monument constituted government speech. The majority opinion did not consider the question, but decided the case on free-speech grounds. *See* The Public Forum, *infra*.

[246] Salazar v. Buono, 559 U.S. ___, No. 08–472, slip op. (2010).

[247] During the course of the litigation, Congress variously passed an appropriations bill forbidding the use of governmental funds to remove the cross, designating the cross and its adjoining land as a "national memorial," prohibitng the spending of governmental funds to remove the cross, and directing the Secretary of the Interior to transfer the land to the Veterans of Foreign Wars (VFW) as long as the property was maintained as a memorial commemorating World War I veterans. A federal court of appeals ordered the removal of the cross, holding that a reasonable observer would perceive a cross on federal land as governmental endorsement of religion, Buono v. Norton, 371 F.3d 543 (9th Cir. 2004), and the government did not seek review of this decision. Subsequently, the court of appeals affirmed a lower court injunction against the transfer of land to the VFW, holding that the underlying statute was an invalid attempt to keep the cross in its existing location. Buono v. Kempthorne, 502 F.3d 1069 (9th Cir. 2007).

[248] Justice Kennedy, joined in full by Chief Justice Roberts and in part by Justice Alito, found that the plaintiff, based on the existing injunction, had standing to challenge the land transfer. The case, however, was remanded to the district court to consider the legitimate congressional interest in reconciling Establishment Clause concerns with respect for the commemoration of military veterans, id. at 10–13, and to evaluate whether the land transfer would lead a "reasonable observer" to perceive government endorsement of religion. Id. at 16–17. Justice Alito would have

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Miscellaneous.—In *Larkin v. Grendel's Den*,[249] the Court held that the Establishment Clause is violated by a delegation of governmental decisionmaking to churches. At issue was a state statute permitting any church or school to block issuance of a liquor license to any establishment located within 500 feet of the church or school. Although the statute had a permissible secular purpose of protecting churches and schools from the disruptions often associated with liquor establishments, the Court indicated that these purposes could be accomplished by other means, *e.g.*, an outright ban on liquor outlets within a prescribed distance, or the vesting of discretionary authority in a governmental decisionmaker required to consider the views of affected parties. However, the conferral of a veto authority on churches had a primary effect of advancing religion both because the delegation was standardless (thereby permitting a church to exercise the power to promote parochial interests), and because "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some."[250] Moreover, the Court determined, because the veto "enmeshes churches in the exercise of substantial governmental powers," it represented an entanglement offensive to "the core rationale underlying the Establishment Clause [—] preventing 'a fusion of governmental and religious functions.'"[251]

Using somewhat similar reasoning, the Court in *Board of Education of Kiryas Joel Village v. Grumet*,[252] invalidated a New York law creating a special school district for an incorporated village composed exclusively of members of one small religious sect. The statute failed "the test of neutrality," the Court concluded, since it delegated power "to an electorate defined by common religious belief and practice, in a manner that fails to foreclose religious favoritism." It was the "anomalously case-specific nature of the legislature's exercise of authority" that left the Court "without any direct

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upheld the land transfer, suggesting that a reasonable observer deemed to be aware of the history and all other pertinent facts relating to a challenged display would not find the transfer to be an endorsement of religion. Id. at 6 (Alito, J., concurring in part and in judgement). Justice Scalia, joined by Justice Thomas, held that the plaintiff had no standing to seek the expansion of the existing injunction to the display of the cross on private lands. Id. at 3–6 (Scalia, J., concurring in judgement).

[249] 459 U.S. 116 (1982).

[250] 459 U.S. at 125–26. *But cf.* Marsh v. Chambers, 463 U.S. 783 (1983), involving no explicit consideration of the possible symbolic implication of opening legislative sessions with prayers by paid chaplains.

[251] 459 U.S. at 126, quoting *Abington*, 374 U.S. 203, 222 (1963).

[252] 512 U.S. 687 (1994). Only four Justices (Souter, Blackmun, Stevens, and Ginsburg) thought that the *Grendel's Den* principle applied; in their view the distinction that the delegation was to a village electorate rather than to a religious body "lack[ed] constitutional significance" under the peculiar circumstances of the case.

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way to review such state action" for conformity with the neutrality principle. Because the village did not receive its governmental authority simply as one of many communities eligible under a general law, the Court explained, there was no way of knowing whether the legislature would grant similar benefits on an equal basis to other religious and nonreligious groups.

Free Exercise of Religion

"The Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions there by civil authority."[253] It bars "governmental regulation of religious *beliefs* as such,"[254] prohibiting misuse of secular governmental programs "to impede the observance of one or all religions or . . . to discriminate invidiously between religions . . . even though the burden may be characterized as being only indirect."[255] Freedom of conscience is the basis of the Free Exercise Clause, and government may not penalize or discriminate against an individual or a group of individuals because of their religious views nor may it compel persons to affirm any particular beliefs.[256] Interpretation is complicated, however, by the fact that exercise of religion usually entails ritual or other practices that constitute "conduct" rather than pure "belief." When it comes to protecting conduct as free exercise, the Court has been inconsistent.[257] It has long been held that the Free Exercise Clause does not necessarily prevent the government from requiring the doing of some act or forbidding the doing of some act merely because religious beliefs underlie the conduct in question.[258] What has changed over the years is the Court's willingness to hold that some reli-

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[253] Abington School District v. Schempp, 374 U.S. 203, 222–23 (1963).

[254] Sherbert v. Verner, 374 U.S 398, 402 (1963) (emphasis in original).

[255] Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

[256] Sherbert v. Verner, 374 U.S. 398, 402 (1963); Torcaso v. Watkins, 367 U.S. 488 (1961).

[257] Academics as well as the Justices grapple with the extent to which religious practices as well as beliefs are protected by the Free Exercise Clause. For contrasting academic views of the origins and purposes of the Free Exercise Clause, *compare* McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990) (concluding that constitutionally compelled exemptions from generally applicable laws are consistent with the Clause's origins in religious pluralism) *with* Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1989–90) (arguing that such exemptions establish an invalid preference for religious beliefs over non-religious beliefs).

[258] *E.g.*, Reynolds v. United States, 98 U.S. 145 (1879); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Prince v. Massachusetts, 321 U.S. 158 (1944); Braunfeld v. Brown, 366 U.S. 599 (1961); United States v. Lee, 455 U.S. 252 (1982); Employment Division v. Smith, 494 U.S. 872 (1990).

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giously motivated conduct is protected from generally applicable prohibitions.

The relationship between the Free Exercise and Establishment Clauses varies with the expansiveness of interpretation of the two clauses. In a general sense both clauses proscribe governmental involvement with and interference in religious matters, but there is possible tension between a requirement of governmental neutrality derived from the Establishment Clause and a Free-Exercise-derived requirement that government accommodate some religious practices.[259] So far, the Court has harmonized interpretation by denying that free-exercise-mandated accommodations create establishment violations, and also by upholding some legislative accommodations not mandated by free exercise requirements. "This Court has long recognized that government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."[260] "There is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without [governmental] sponsorship and without interference."[261]

In holding that a state could not deny unemployment benefits to Sabbatarians who refused Saturday work, for example, the Court denied that it was "fostering an 'establishment' of the Seventh-Day Adventist religion, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall."[262] Legislation granting religious ex-

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[259] "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." Walz v. Tax Comm'n, 397 U.S. 668–69 (1970).

[260] Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144–45 (1987).

[261] Walz v. Tax Comm'n, 397 U.S. at 669. *See also* Locke v. Davey, 540 U.S. 712, 718 (2004); Cutter v. Wilkinson, 544 U.S. 709, 713 (2005).

[262] Sherbert v. Verner, 374 U.S. 398, 409 (1963). *Accord*, Thomas v. Review Bd., 450 U.S. 707, 719–20 (1981). Dissenting in *Thomas*, Justice Rehnquist argued that *Sherbert* and *Thomas* created unacceptable tensions between the Establishment and Free Exercise Clauses, and that requiring the states to accommodate persons like Sherbert and Thomas because of their religious beliefs ran the risk of "establishing" religion under the Court's existing tests. He argued further, however, that less expansive interpretations of both clauses would eliminate this artificial tension. Thus, Justice Rehnquist would have interpreted the Free Exercise Clause as not requiring government to grant exemptions from general requirements that may burden religious exercise but that do not prohibit religious practices outright, and would have interpreted the Establishment Clause as not preventing government from voluntarily granting religious exemptions. 450 U.S. at 720–27. By 1990 these views had apparently gained ascendancy, Justice Scalia's opinion for the Court in the "peyote"

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emptions not held to have been required by the Free Exercise Clause has been upheld against Establishment Clause challenge,[263] although it is also possible for legislation to go too far in promoting free exercise.[264] Government need not, however, offer the same accommodations to secular entities that it extends to religious practitioners in order to facilitate their religious exercise; "[r]eligious accommodations . . . need not 'come packaged with benefits to secular entities.' "[265]

"Play in the joints" can work both ways, the Court ruled in upholding a state's exclusion of theology students from a college scholarship program.[266] Although the state could have included theology students in its scholarship program without offending the Establishment Clause, its choice "not to fund" religious training did not offend the Free Exercise Clause even though that choice singled out theology students for exclusion.[267] Refusal to fund religious training, the Court observed, was "far milder" than restrictions on religious practices that have been held to offend the Free Exercise Clause.[268]

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case suggesting that accommodation should be left to the political process, *i.e.*, that states could constitutionally provide exceptions in their drug laws for sacramental peyote use, even though such exceptions are not constitutionally required. Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

[263] *See*, *e.g.*, Walz v. Tax Comm'n, 397 U.S. 664 (upholding property tax exemption for religious organizations); Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (upholding Civil Rights Act exemption allowing religious institutions to restrict hiring to members of religion); Gillette v. United States, 401 U.S. 437, 453–54 (1971) (interpreting conscientious objection exemption from military service); Cutter v. Wilkinson, 544 U.S. 709 (2005) (upholding a provision of the Religious Land Use and Institutionalized Persons Act of 2000 that prohibits governments from imposing a "substantial burden on the religious exercise" of an institutionalized person unless the burden furthers a "compelling governmental interest").

[264] *See*, *e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788–89 (1973) (tuition reimbursement grants to parents of parochial school children violate Establishment Clause in spite of New York State's argument that program was designed to promote free exercise by enabling low-income parents to send children to church schools); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (state sales tax exemption for religious publications violates the Establishment Clause) (plurality opinion); Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 706–07 (1994) ("accommodation is not a principle without limits;" one limit is that "neutrality as among religions must be honored").

[265] Cutter v. Wilkinson, 544 U.S. 709, 724 (2005) (quoting Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987)).

[266] Locke v. Davey, 540 U.S. 712 (2004).

[267] 540 U.S. at 720–21. Excluding theology students but not students training for other professions was permissible, the Court explained, because "[t]raining someone to lead a congregation is an essentially religious endeavor," and the Constitution's special treatment of religion finds "no counterpart with respect to other callings or professions." Id. at 721.

[268] 540 U.S. at 720–21 (distinguishing Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (law aimed at restricting ritual of a single religious

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The Belief-Conduct Distinction.—Although the Court has consistently affirmed that the Free Exercise Clause protects religious beliefs, protection for religiously motivated conduct has waxed and waned over the years. The Free Exercise Clause "embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be."[269] In its first free exercise case, involving the power of government to prohibit polygamy, the Court invoked a hard distinction between the two, saying that although laws "cannot interfere with mere religious beliefs and opinions, they may with practices."[270] The rule thus propounded protected only belief, inasmuch as religiously motivated action was to be subjected to the police power of the state to the same extent as would similar action springing from other motives. The *Reynolds* no-protection rule was applied in a number of cases,[271] but later cases established that religiously grounded conduct is not always outside the protection of the Free Exercise Clause.[272] Instead, the Court began to balance the secular interest asserted by the government against the claim of religious liberty asserted by the person affected; only if the governmental interest was "compelling" and if no alternative forms of regulation would serve that interest was the claimant required to yield.[273] Thus, although free-

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group); McDaniel v. Paty, 435 U.S. 618 (1978) (law denying ministers the right to serve as delegates to a constitutional convention); and Sherbert v. Verner, 374 U.S. 398 (1963) (among the cases prohibiting denial of benefits to Sabbatarians)).

[269] Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

[270] Reynolds v. United States, 98 U.S. 145, 166 (1879). "Crime is not the less odious because sanctioned by what any particular sect may designate as 'religion.'" Davis v. Beason, 133 U.S. 333, 345 (1890). In another context, Justice Sutherland in United States v. Macintosh, 283 U.S. 605, 625 (1931), suggested a plenary governmental power to regulate action in denying that recognition of conscientious objection to military service was of a constitutional magnitude, saying that "unqualified allegiance to the Nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God."

[271] Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination); Prince v. Massachusetts, 321 U.S. 158 (1944) (child labor); Cleveland v. United States, 329 U.S. 14 (1946) (polygamy). In Sherbert v. Verner, 374 U.S. 398, 403 (1963), Justice Brennan asserted that the "conduct or activities so regulated [in the cited cases] have invariably posed some substantial threat to public safety, peace or order."

[272] Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); *cf.* Braunfeld v. Brown, 366 U.S. 599, 607 (1961): "[I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."

[273] Sherbert v. Verner, 374 U.S. 398, 403, 406–09 (1963). In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court recognized compelling state interests in provision of public education, but found insufficient evidence that those interests (preparing children for citizenship and for self-reliance) would be furthered by requiring Amish children to attend public schools beyond the eighth grade. Instead, the evidence showed

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dom to engage in religious practices was not absolute, it was entitled to considerable protection.

Later cases evidence a narrowing of application of the compelling interest test, and a corresponding constriction of the freedom to engage in religiously motivated conduct. First, the Court purported to apply strict scrutiny, but upheld the governmental action anyhow.[274] Next, the Court held that the test is inappropriate in the contexts of military and prison discipline.[275] Then, more importantly, the Court ruled in *Employment Division v. Smith* that "if prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[276] Therefore, the Court concluded, the Free Exercise Clause does not prohibit a state from applying generally applicable criminal penalties to the use of peyote in a religious ceremony, or from denying unemployment benefits to persons dismissed from their jobs because of religious ceremonial use of peyote. Accommodation of such religious practices must be found in "the political process," the Court noted; statutory religious-practice exceptions are permissible, but not "constitutionally required."[277] The result is tantamount to a return to the *Reynolds* belief-conduct distinction.[278]

The Mormon Cases.—The Court's first encounter with free exercise claims occurred in a series of cases in which the Federal Government and the territories moved against the Mormons because of their practice of polygamy. Actual prosecutions and convictions for bigamy presented little problem for the Court, as it could distinguish between beliefs and acts.[279] But the presence of large num-

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that the Amish system of vocational education prepared their children for life in their self-sufficient communities.

[274] United States v. Lee, 455 U.S. 252 (1982) (holding mandatory participation in the Social Security system by an Amish employer religiously opposed to such social welfare benefits to be "indispensable" to the fiscal vitality of the system); Bob Jones Univ. v. United States, 461 U.S. 754 (1983) (holding government's interest in eradicating racial discrimination in education to outweigh the religious interest of a private college whose racial discrimination was founded on religious beliefs); and Hernandez v. Commissioner, 490 U.S. 680 (1989) (holding that government has a compelling interest in maintaining a uniform tax system "free of 'myriad exceptions flowing from a wide variety of religious beliefs'")

[275] Goldman v. Weinberger, 475 U.S. 503 (1986); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

[276] 494 U.S. 872, 878 (1990).

[277] 494 U.S. at 890.

[278] Employment Division v. Smith is discussed under "Free Exercise Exemption From General Governmental Requirements," *infra*, as is the Religious Freedom Restoration Act, which was enacted in response to the case.

[279] Reynolds v. United States, 98 U.S. 145 (1879); *cf.* Cleveland v. United States, 329 U.S. 14 (1946) (no religious-belief defense to Mann Act prosecution for transporting a woman across state line for the "immoral purpose" of polygamy).

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bers of Mormons in some of the territories made convictions for bigamy difficult to obtain, and in 1882 Congress enacted a statute that barred "bigamists," "polygamists," and "any person cohabiting with more than one woman" from voting or serving on juries. The Court sustained the law, even as applied to persons entering the state prior to enactment of the original law prohibiting bigamy and to persons as to whom the statute of limitations had run.[280] Subsequently, an act of a territorial legislature that required a prospective voter not only to swear that he was not a bigamist or polygamist but also that "I am not a member of any order, organization or association which teaches, advises, counsels or encourages its members, devotees or any other person to commit the crime of bigamy or polygamy . . . or which practices bigamy, polygamy or plural or celestial marriage as a doctrinal rite of such organization; that I do not and will not, publicly or privately, or in any manner whatever teach, advise, counsel or encourage any person to commit the crime of bigamy or polygamy . . . ," was upheld in an opinion that condemned plural marriage and its advocacy as equal evils.[281] And, finally, the Court sustained the revocation of the charter of the Mormon Church and confiscation of all church property not actually used for religious worship or for burial.[282]

The Jehovah's Witnesses Cases.—In contrast to the Mormons, the sect known as Jehovah's Witnesses, in many ways as unsettling to the conventional as the Mormons were,[283] provoked from the Court a lengthy series of decisions[284] expanding the rights of religious proselytizers and other advocates to use the streets and parks to broadcast their ideas, though the decisions may be based more squarely on the speech clause than on the Free Exercise Clause.

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[280] Murphy v. Ramsey, 114 U.S. 15 (1885).

[281] Davis v. Beason, 133 U.S. 333 (1890). "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. . . . To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases." Id. at 341–42.

[282] The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890). "[T]he property of the said corporation . . . [is to be used to promote] the practice of polygamy—a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world. . . . The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world." Id. at 48–49.

[283] For later cases dealing with other religious groups discomfiting to the mainstream, *see* Heffron v. ISKCON, 452 U.S. 640 (1981) (Hare Krishnas); Larson v. Valente, 456 U.S. 228 (1982) (Unification Church). Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (Santeria faith).

[284] Most of the cases are collected and categorized by Justice Frankfurter in Niemotko v. Maryland, 340 U.S. 268, 273 (1951) (concurring opinion).

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The leading case is *Cantwell v. Connecticut*.[285] Three Jehovah's Witnesses were convicted under a statute that forbade the unlicensed soliciting of funds for religious or charitable purposes, and also under a general charge of breach of the peace. The solicitation count was voided as an infringement on religion because the issuing officer was authorized to inquire whether the applicant's cause was "a religious one" and to decline to issue a license if he determined that it was not.[286] Such power amounted to a prior restraint upon the exercise of religion and was invalid, the Court held.[287] The breach of the peace count arose when the three accosted two Catholics in a strongly Catholic neighborhood and played them a phonograph record which grossly insulted the Christian religion in general and the Catholic Church in particular. The Court voided this count under the clear-and-present danger test, finding that the interest sought to be upheld by the state did not justify the suppression of religious views that simply annoyed listeners.[288]

A series of sometimes-conflicting decisions followed. At first, the Court sustained the application of a non-discriminatory license fee to vendors of religious books and pamphlets,[289] but eleven months later it vacated the decision and struck down such fees.[290] A city ordinance making it unlawful for anyone distributing literature to ring a doorbell or otherwise summon the dwellers of a residence to the door to receive such literature was held to violate the First Amendment when applied to distributors of leaflets advertising a religious

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[285] 310 U.S. 296 (1940).

[286] 310 U.S. at 305.

[287] 310 U.S. at 307. "The freedom to act must have appropriate definition to preserve the enforcement of that protection [of society]. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. . . . [A] State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment." Id. at 304.

[288] 310 U.S. at 307–11. "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probabilities of excesses and abuses, these liberties are in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." Id. at 310.

[289] Jones v. Opelika, 316 U.S. 584 (1942).

[290] Jones v. Opelika, 319 U.S. 103 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943). *See also* Follett v. Town of McCormick, 321 U.S. 573 (1944) (invalidating a flat licensing fee for booksellers). *Murdock* and *Follett* were distinguished in Jimmy Swaggart Ministries v. California Bd. of Equalization, 493 U.S. 378, 389 (1990), as applying "only where a flat license fee operates as a prior restraint"; upheld in *Swaggart* was application of a general sales and use tax to sales of religious publications.

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meeting.[291] A state child labor law, however, was held to be validly applied to punish the guardian of a nine-year old child who permitted her to engage in "preaching work" and the sale of religious publications after hours.[292] The Court decided a number of cases involving meetings and rallies in public parks and other public places by upholding licensing and permit requirements which were premised on nondiscriminatory "times, places, and manners" terms and which did not seek to regulate the content of the religious message to be communicated.[293] In 2002, the Court struck down on free speech grounds a town ordinance requiring door-to-door solicitors, including persons seeking to proselytize about their faith, to register with the town and obtain a solicitation permit.[294] The Court stated that the requirement was "offensive . . . to the very notion of a free society."

Free Exercise Exemption From General Governmental Requirements.—As described above, the Court gradually abandoned its strict belief-conduct distinction, and developed a balancing test to determine when a uniform, nondiscriminatory requirement by government mandating action or nonaction by citizens must allow exceptions for citizens whose religious scruples forbid compliance. Then, in 1990, the Court reversed direction in *Employment Division v. Smith*,[295] confining application of the "compelling interest" test to a narrow category of cases.

In early cases the Court sustained the power of a state to exclude from its schools children who because of their religious beliefs would not participate in the salute to the flag,[296] only within a short time to reverse itself and condemn such exclusions, but on speech grounds rather than religious grounds.[297] Also, the Court seemed to be clearly of the view that government could compel those

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[291] Martin v. City of Struthers, 319 U.S. 141 (1943). *But cf.* Breard v. City of Alexandria, 341 U.S. 622 (1951) (similar ordinance sustained in commercial solicitation context).

[292] Prince v. Massachusetts, 321 U.S. 158 (1944).

[293] *E.g.*, Niemotko v. Maryland, 340 U.S. 268 (1951); Kunz v. New York, 340 U.S. 290 (1951); Fowler v. Rhode Island, 345 U.S. 67 (1953); Poulos v. New Hampshire, 345 U.S. 395 (1953). *See also* Larson v. Valente, 456 U.S. 228 (1982) (solicitation on state fair ground by Unification Church members).

[294] Watchtower Bible & Tract Soc'y v. Village of Stratton, 536 U.S. 150 (2002).

[295] 494 U.S. 872 (1990).

[296] Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

[297] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). On the same day, the Court held that a state may not forbid the distribution of literature urging and advising on religious grounds that citizens refrain from saluting the flag. Taylor v. Mississippi, 319 U.S. 583 (1943). In 2004, the Court rejected for lack of standing an Establishment Clause challenge to recitation of the Pledge of Allegiance in public schools. Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004).

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persons religiously opposed to bearing arms to take an oath to do so or to receive training to do so,[298] only in later cases to cast doubt on this resolution by statutory interpretation,[299] and still more recently to leave the whole matter in some doubt.[300]

Braunfeld v. Brown[301] held that the Free Exercise Clause did not mandate an exemption from Sunday Closing Laws for an Orthodox Jewish merchant who observed Saturday as the Sabbath and was thereby required to be closed two days of the week rather than one. This requirement did not prohibit any religious practices, the Court's plurality pointed out, but merely regulated secular activity in a manner making religious exercise more expensive.[302] "If the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."[303]

Within two years the Court in *Sherbert v. Verner*[304] reversed this line of analysis to require a religious exemption from a secular, regulatory piece of economic legislation. Sherbert was disqualified from receiving unemployment compensation because, as a Seventh Day Adventist, she would not accept Saturday work; according to state officials, this meant she was not complying with the statutory requirement to stand ready to accept suitable employment. If this denial of benefits is to be upheld, the Court said, "it must be

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[298] *See* United States v. Schwimmer, 279 U.S. 644 (1929); United States v. Macintosh, 283 U.S. 605 (1931); and United States v. Bland, 283 U.S. 636 (1931) (all interpreting the naturalization law as denying citizenship to a conscientious objector who would not swear to bear arms in defense of the country), all three of which were overruled by Girouard v. United States, 328 U.S. 61 (1946), on strictly statutory grounds. *See also* Hamilton v. Board of Regents, 293 U.S. 245 (1934) (upholding expulsion from state university for a religiously based refusal to take a required course in military training); *In re* Summers, 325 U.S. 561 (1945) (upholding refusal to admit applicant to bar because as conscientious objector he could not take required oath).

[299] United States v. Seeger, 380 U.S. 163 (1965); *see* id. at 188 (Justice Douglas concurring); Welsh v. United States, 398 U.S. 333 (1970); *see also* id. at 344 (Justice Harlan concurring).

[300] Gillette v. United States, 401 U.S. 437 (1971) (holding that secular considerations overbalanced free exercise infringement of religious beliefs of objectors to particular wars).

[301] 366 U.S. 599 (1961). *See* "Sunday Closing Laws," *supra*, for application of the Establishment Clause.

[302] 366 U.S. at 605–06.

[303] 366 U.S. at 607 (plurality opinion). The concurrence balanced the economic disadvantage suffered by the Sabbatarians against the important interest of the state in securing its day of rest regulation. McGowan v. Maryland, 366 U.S. at 512–22. Three Justices dissented. Id. at 561 (Justice Douglas); Braunfeld v. Brown, 366 U.S. at 610 (Justice Brennan), 616 (Justice Stewart).

[304] 374 U.S. 398 (1963).

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either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religions may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . .'" [305] First, the disqualification was held to impose a burden on the free exercise of Sherbert's religion; it was an indirect burden and it did not impose a criminal sanction on a religious practice, but the disqualification derived solely from her practice of her religion and constituted a compulsion upon her to forgo that practice.[306] Second, there was no compelling interest demonstrated by the state. The only interest asserted was the prevention of the possibility of fraudulent claims, but that was merely a bare assertion. Even if there was a showing of demonstrable danger, "it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." [307]

Sherbert was reaffirmed and applied in subsequent cases involving denial of unemployment benefits. *Thomas v. Review Board* [308] involved a Jehovah's Witness who quit his job when his employer transferred him from a department making items for industrial use to a department making parts for military equipment. While his belief that his religion proscribed work on war materials was not shared by all other Jehovah's Witnesses, the Court held that it was inappropriate to inquire into the validity of beliefs asserted to be religious so long as the claims were made in good faith (and the beliefs were at least arguably religious). The same result was reached in a 1987 case, the fact that the employee's religious conversion rather than a job reassignment had created the conflict between work and Sabbath observance not being considered material to the determination that free exercise rights had been burdened by the denial of unemployment compensation.[309] Also, a state may not deny unemployment benefits solely because refusal to work on the Sabbath was

[305] 374 U.S. at 403, quoting NAACP v. Button, 371 U.S. 415, 438 (1963).

[306] 374 U.S. at 403–06.

[307] 374 U.S. at 407. *Braunfeld* was distinguished because of "a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers." That secular objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. Requiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable. Id. at 408–09. Other Justices thought that *Sherbert* overruled *Braunfeld*. Id. at 413, 417 (Justice Stewart concurring), 418 (Justice Harlan and White dissenting).

[308] 450 U.S. 707 (1981).

[309] Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987).

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based on sincere religious beliefs held independently of membership in any established religious church or sect.[310]

The Court applied the *Sherbert* balancing test in several areas outside of unemployment compensation. The first two such cases involved the Amish, whose religion requires them to lead a simple life of labor and worship in a tight-knit and self-reliant community largely insulated from the materialism and other distractions of modern life. *Wisconsin v. Yoder*[311] held that a state compulsory attendance law, as applied to require Amish children to attend ninth and tenth grades of public schools in contravention of Amish religious beliefs, violated the Free Exercise Clause. The Court first determined that the beliefs of the Amish were indeed religiously based and of great antiquity.[312] Next, the Court rejected the state's arguments that the Free Exercise Clause extends no protection because the case involved "action" or "conduct" rather than belief, and because the regulation, neutral on its face, did not single out religion.[313] Instead, the Court analyzed whether a "compelling" governmental interest required such "grave interference" with Amish belief and practices.[314] The governmental interest was not the general provision of education, as the state and the Amish agreed as to education through the first eight grades and as the Amish provided their children with additional education of a primarily vocational nature. The state's interest was really that of providing two additional years of public schooling. Nothing in the record, the Court found, showed that this interest outweighed the great harm that it would do to traditional Amish religious beliefs to impose the compulsory ninth and tenth grade attendance.[315]

But a subsequent decision involving the Amish reached a contrary conclusion. In *United States v. Lee*,[316] the Court denied the Amish exemption from compulsory participation in the Social Security system. The objection was that payment of taxes by Amish employers and employees and the receipt of public financial assistance were forbidden by their religious beliefs. Accepting that this was true, the Court nonetheless held that the governmental inter-

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[310] Frazee v. Illinois Dep't of Employment Security, 489 U.S. 829 (1989). *Cf.* United States v. Seeger, 380 U.S. 163 (1965) (interpreting the religious objection exemption from military service as encompassing a broad range of formal and personal religious beliefs).

[311] 406 U.S. 205 (1972).

[312] 406 U.S. at 215–19. Why the Court felt impelled to make these points is unclear, as it is settled that it is improper for courts to inquire into the interpretation of religious belief. *E.g.*, United States v. Lee, 455 U.S. 252, 257 (1982).

[313] 406 U.S. at 219–21.

[314] 406 U.S. at 221.

[315] 406 U.S. at 221–29.

[316] 455 U.S. 252 (1982).

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est was compelling and therefore sufficient to justify the burdening of religious beliefs.[317] Compulsory payment of taxes was necessary for the vitality of the system; either voluntary participation or a pattern of exceptions would undermine its soundness and make the program difficult to administer.

"A compelling governmental interest" was also found to outweigh free exercise interests in *Bob Jones University v. United States*,[318] in which the Court upheld the I.R.S.'s denial of tax exemptions to church-run colleges whose racially discriminatory admissions policies derived from religious beliefs. The Federal Government's "fundamental, overriding interest in eradicating racial discrimination in education"—found to be encompassed in common law standards of "charity" underlying conferral of the tax exemption on "charitable" institutions—"substantially outweighs" the burden on free exercise. Nor could the schools' free exercise interests be accommodated by less restrictive means.[319]

In other cases, the Court found reasons not to apply compelling interest analysis. Religiously motivated speech, like other speech, can be subjected to reasonable time, place, or manner regulation serving a "substantial" rather than "compelling" governmental interest.[320] *Sherbert's* threshold test, inquiring "whether government has placed a substantial burden on the observation of a central religious belief or practice,"[321] eliminates other issues. As long as a particular religion does not proscribe the payment of taxes (as was the case with the Amish in *Lee*), the Court has denied that there is any constitutionally significant burden resulting from "imposition of a generally applicable tax [that] merely decreases the amount of money [adherents] have to spend on [their] religious activities."[322]

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[317] The Court's formulation was whether the limitation on religious exercise was "essential to accomplish an overriding governmental interest." 455 U.S. at 257–58. *Accord*, Hernandez v. Commissioner, 490 U.S. 680, 699–700 (1989) (any burden on free exercise imposed by disallowance of a tax deduction was "justified by the 'broad public interest in maintaining a sound tax system' free of 'myriad exceptions flowing from a wide variety of religious beliefs' ").

[318] 461 U.S. 574 (1983).

[319] 461 U.S. at 604.

[320] Heffron v. ISKCON, 452 U.S. 640 (1981). Requiring Krishnas to solicit at fixed booth sites on county fair grounds is a valid time, place, and manner regulation, although, as the Court acknowledged, id. at 652, peripatetic solicitation was an element of Krishna religious rites.

[321] As restated in Hernandez v. Commissioner, 490 U.S. 680, 699 (1989).

[322] Jimmy Swaggart Ministries v. California Bd. of Equalization, 493 U.S. 378, 391 (1990). *See also* Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985) (the Court failing to perceive how application of minimum wage and overtime requirements would burden free exercise rights of employees of a religious foundation, there being no assertion that the *amount* of compensation was a matter of religious import); and Hernandez v. Commissioner, 490 U.S. 680 (1989) (questioning but not deciding whether any burden was imposed by administrative disallowal of a

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The one caveat the Court left—that a generally applicable tax might be so onerous as to "effectively choke off an adherent's religious practices" [323]—may be a moot point in light of the Court's general ruling in *Employment Division v. Smith*, discussed below.

The Court also drew a distinction between governmental regulation of individual conduct, on the one hand, and restraint of governmental conduct as a result of individuals' religious beliefs, on the other. *Sherbert's* compelling interest test has been held inapplicable in cases viewed as involving attempts by individuals to alter governmental actions rather than attempts by government to restrict religious practices. Emphasizing the absence of coercion on religious adherents, the Court in *Lyng v. Northwest Indian Cemetery Protective Ass'n* [324] held that the Forest Service, even absent a compelling justification, could construct a road through a portion of a national forest held sacred and used by Indians in religious observances. The Court distinguished between governmental actions having the indirect effect of frustrating religious practices and those actually prohibiting religious belief or conduct: "'the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" [325] Similarly, even a sincerely held religious belief that assignment of a social security number would rob a child of her soul was held insufficient to bar the government from using the number for purposes of its own recordkeeping.[326] It mattered not how easily the government could accommodate the religious beliefs or practices (an exemption from the social security number requirement might have been granted with only slight impact on the government's recordkeeping capabilities), since the nature of the governmental actions did not implicate free exercise protections.[327]

Compelling interest analysis is also wholly inapplicable in the context of military rules and regulations, where First Amendment review "is far more deferential than . . . review of similar laws or regulations designed for civilian society." [328] Thus the Court did not question the decision of military authorities to apply uniform dress code standards to prohibit the wearing of a yarmulke by an officer

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deduction for payments deemed to be for commercial rather than religious or charitable purposes).

[323] *Jimmy Swaggart Ministries*, 493 U.S. at 392.

[324] 485 U.S. 439 (1988).

[325] 485 U.S. at 451, quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring).

[326] Bowen v. Roy, 476 U.S. 693 (1986).

[327] "In neither case . . . would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity." *Lyng*, 485 U.S. at 449.

[328] Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

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compelled by his Orthodox Jewish religious beliefs to wear the yarmulke.[329]

A high degree of deference is also due decisions of prison administrators having the effect of restricting religious exercise by inmates. The general rule is that prison regulations impinging on exercise of constitutional rights by inmates are "'valid if . . . reasonably related to legitimate penological interests.'"[330] Thus because general prison rules requiring a particular category of inmates to work outside of buildings where religious services were held, and prohibiting return to the buildings during the work day, could be viewed as reasonably related to legitimate penological concerns of security and order, no exemption was required to permit Muslim inmates to participate in Jumu'ah, the core ceremony of their religion.[331] The fact that the inmates were left with no alternative means of attending Jumu'ah was not dispositive, the Court being "unwilling to hold that prison officials are required by the Constitution to sacrifice legitimate penological objectives to that end."[332]

Finally, in *Employment Division v. Smith*[333] the Court indicated that the compelling interest test may apply only in the field of unemployment compensation, and in any event does not apply to require exemptions from generally applicable criminal laws. Criminal laws are "generally applicable" when they apply across the board regardless of the religious motivation of the prohibited conduct, and are "not specifically directed at . . . religious practices."[334] The unemployment compensation statute at issue in *Sherbert* was peculiarly suited to application of a balancing test because denial of benefits required a finding that an applicant had refused work "without good cause." *Sherbert* and other unemployment compensation cases thus "stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling rea-

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[329] Congress reacted swiftly by enacting a provision allowing military personnel to wear religious apparel while in uniform, subject to exceptions to be made by the Secretary of the relevant military department for circumstances in which the apparel would interfere with performance of military duties or would not be "neat and conservative." Pub. L. 100–180, § 508(a)(2), 101 Stat. 1086 (1987); 10 U.S.C. § 774.

[330] O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

[331] O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

[332] 482 U.S. at 351–52 (also suggesting that the ability of the inmates to engage in other activities required by their faith, *e.g.*, individual prayer and observance of Ramadan, rendered the restriction reasonable).

[333] 494 U.S. 872 (1990) (holding that state may apply criminal penalties to use of peyote in a religious ceremony, and may deny unemployment benefits to persons dismissed from their jobs because of religiously inspired use of peyote).

[334] 494 U.S. at 878.

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son."[335] *Wisconsin v. Yoder* and other decisions holding "that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action" were distinguished as involving "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections" such as free speech or "parental rights."[336] Except in the relatively uncommon circumstance when a statute calls for individualized consideration, the Free Exercise Clause affords no basis for exemption from a "neutral, generally applicable law." As the Court concluded in *Smith*, accommodation for religious practices incompatible with general requirements must ordinarily be found in "the political process."[337]

Smith has potentially widespread ramifications. The Court has apparently returned to a belief-conduct dichotomy under which religiously motivated conduct is not entitled to special protection. Laws may not single out religiously motivated conduct for adverse treatment,[338] but formally neutral laws of general applicability may regulate religious conduct (along with other conduct) regardless of the adverse or prohibitory effects on religious exercise. That the Court views the principle as a general one, not limited to criminal laws, seems evident from its restatement in *Church of Lukumi Babalu Aye v. City of Hialeah*: "our cases establish the general proposition that a law that is neutral and of general application need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[339]

Similar rules govern taxation. Under the Court's rulings in *Smith* and *Swaggart*, religious exemptions from most taxes are a matter of legislative grace rather than constitutional command, since most important taxes (*e.g.*, income, property, sales and use) satisfy the criteria of formal neutrality and general applicability, and are not license fees that can be viewed as prior restraints on expression.[340] The result is equal protection, but not substantive protection, for

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[335] 494 U.S. at 884.

[336] 494 U.S. at 881.

[337] 494 U.S. at 890.

[338] This much was made clear by Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993), which struck down a city ordinance that prohibited ritual animal sacrifice but that allowed other forms of animal slaughter.

[339] 508 U.S. 520, 531 (1993).

[340] This latter condition derives from the fact that the Court in *Swaggart* distinguished earlier decisions by characterizing them as applying only to flat license fees. 493 U.S. at 386. *See also* Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 39–41.

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religious exercise.[341] The Court's approach also accords less protection to religiously based conduct than is accorded expressive conduct that implicates speech but not religious values.[342] On the practical side, relegation of free exercise claims to the political process may, as concurring Justice O'Connor warned, result in less protection for small, unpopular religious sects.[343]

It does appear that, despite *Smith*, the Court is still inclined to void the application of generally applicable laws to religious conduct when the prohibited activity is engaged in, not by an individual adherant, but by a religious institution. For instance, in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*,[344] the Court established a "ministerial exception" that precludes the application of employment discrimination laws[345] to claims arising out of an employment relationship between a religious institution and its ministers.[346] The Court found that even where such law is a "valid and neutral law of general applicability," and even if the basis for the employment decision is not religious doctrine, the Free Exercise Clause prohibits the application of an employment discrimination law, since enforcement of such law would involve "government interference with an internal church decision that affects the faith and mission of the church itself."[347]

Because of the broad ramifications of *Smith*, the political processes were soon used in an attempt to provide additional legislative protection for religious exercise. In the Religious Freedom Restoration Act of 1993 (RFRA),[348] Congress sought to supersede *Smith* and substitute a statutory rule of decision for free exercise cases.

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[341] Justice O'Connor, concurring in *Smith*, argued that "the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause." 494 U.S. at 901.

[342] Although neutral laws affecting expressive conduct are not measured by a "compelling interest" test, they are "subject to a balancing, rather than categorical, approach." *Smith*, 494 U.S. at 902 (O'Connor, J., concurring).

[343] 494 U.S. at 902–03.

[344] 565 U.S. ___, No. 10–553, slip op. (2012).

[345] In this case, the employee, who suffered from narcolepsy, alleged that she had been fired in retaliation for threatening to bring a legal action against the church under the Americans with Disabilities Act, 104 Stat. 327, 42 U.S.C. § 12101 *et seq*.

[346] An important issue in the case was determining when an employee of a religious institution was a "minister." The Court declined to create a uniform standard, but suggested deference to the position of the religious institution in making such a determinination. In this case, a "called" elementary school teacher (as opposed to a "contract" teacher) was found to be a "minister" based on her title, the religious education qualifications required for the position, how the church and the employee represented her position to others, and the religious functions performed by the employee as part of her job responsibilities. 565 U.S. ___, No. 10–553, slip op. at 15–20.

[347] 565 U.S. ___, No. 10–553, slip op. at 15.

[348] Pub. L. 103–141, 107 Stat. 1488 (1993); 42 U.S.C. §§ 2000bb to 2000bb–4.

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The Act provides that laws of general applicability—federal, state, and local—may substantially burden free exercise of religion only if they further a compelling governmental interest and constitute the least restrictive means of doing so. The purpose, Congress declared in the Act itself, was "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened."[349] But this legislative effort was partially frustrated in 1997 when the Court in *City of Boerne v. Flores*[350] held the Act unconstitutional as applied to the states. In applying RFRA to the states, Congress had exercised its power under § 5 of the Fourteenth Amendment to enact "appropriate legislation" to enforce the substantive protections of the Amendment, including the religious liberty protections incorporated in the Due Process Clause. But the Court held that RFRA exceeded Congress's power under § 5, because the measure did not simply enforce a constitutional right but substantively altered that right. "Congress," the Court said, "does not enforce a constitutional right by changing what the right is."[351] Moreover, it said, RFRA "reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved . . . [and] is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[352] "RFRA," the Court concluded, "contradicts vital principles necessary to maintain separation of powers and the federal balance."[353]

Boerne did not close the books on *Smith*, however, or even on RFRA. Although *Boerne* held that RFRA was not a valid exercise of Fourteenth Amendment enforcement power as applied to restrict states, it remained an open issue whether RFRA may be applied to the Federal Government, and whether its requirements could be imposed pursuant to other powers. Several lower courts answered these questions affirmatively,[354] and the Supreme Court has applied RFRA

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[349] Pub. L. 103–141, § 2(b)(1) (citations omitted). Congress also avowed a purpose of providing "a claim or defense to persons whose religious exercise is substantially burdened by government." § 2(b)(2).

[350] 521 U.S. 507 (1997).

[351] 521 U.S. at 519.

[352] 521 U.S. at 533–34.

[353] 521 U.S. at 536.

[354] *See*, *e.g.*, *In re* Young, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998) (RFRA is a valid exercise of Congress's bankruptcy powers as applied to insulate a debtor's church tithes from recovery by the bankruptcy trustee); O'Bryan v. Bureau of Prisons, 349 F.3d 399 (7th Cir. 2003) (RFRA may be applied to require the Bureau of Prisons to accommodate religious exercise by prisoners); Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001) (RFRA applies to Bureau of Prisons).

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to the Federal Government without addressing any constitutional questions.[355]

Congress responded to *Boerne* by enacting a new law purporting to rest on its commerce and spending powers. The Religious Land Use and Institutionalized Persons Act (RLUIPA)[356] imposes the same strict scrutiny test struck down in *Boerne* but limits its application to certain land use regulations and to religious exercise by persons in state institutions.[357] In *Cutter v. Wilkinson*,[358] the Court upheld RLUIPA's prisoner provision against a facial challenge under the Establishment Clause, but it did not rule on congressional power to enact RLUIPA. The Court held that RLUIPA "does not, on its face, exceed the limits of permissible government accommodation of religious practices."[359] Rather, the provision "fits within the corridor" between the Free Exercise and Establishment Clauses, and is "compatible with the [latter] because it alleviates exceptional government-created burdens on private religious exercise."[360]

Religious Test Oaths.—Although the Court has been divided in dealing with religiously based conduct and governmental compulsion of action or nonaction, it was unanimous in voiding a state constitutional provision which required a notary public, as a condition of perfecting his appointment, to declare his belief in the existence of God. The First Amendment, considered with the religious oath provision of Article VI, makes it impossible "for government, state or federal, to restore the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly, pro-

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[355] Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006) (affirming preliminary injunction issued under RFRA against enforcement of the Controlled Substances Act to prevent the drinking of a sacramental tea that contains a hallucinogen regulated under the Act). *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ___, No. 13–354, slip op. (2014) (holding that RFRA applied to for-profit corporations and that a mandate that certain employers provide their employees with "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity" violated RFRA's general provisions).

[356] Pub. L. 106–274, 114 Stat. 804 (2000); 42 U.S.C. §§ 2000cc *et seq*.

[357] The Act requires that state and local zoning and landmark laws and regulations which impose a substantial burden on an individual's or institution's exercise of religion be measured by a strict scrutiny test, and applies the same strict scrutiny test for any substantial burdens imposed on the exercise of religion by persons institutionalized in state or locally run prisons, mental hospitals, juvenile detention facilities, and nursing homes. Both provisions apply if the burden is imposed in a program that receives federal financial assistance, or if the burden or its removal would affect commerce.

[358] 544 U.S. 709 (2005).

[359] 544 U.S. at 714.

[360] 544 U.S. at 720.

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fess to have, a belief in some particular kind of religious concept."[361]

Religious Disqualification.—Unanimously, but with great differences of approach, the Court declared invalid a Tennessee statute barring ministers and priests from service in a specially called state constitutional convention.[362] The Court's decision necessarily implied that the constitutional provision on which the statute was based, barring ministers and priests from service as state legislators, was also invalid.

FREEDOM OF EXPRESSION—SPEECH AND PRESS

Adoption and the Common Law Background

Madison's version of the speech and press clauses, introduced in the House of Representatives on June 8, 1789, provided: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[363] The special committee rewrote the language to some extent, adding other provisions from Madison's draft, to make it read: "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed."[364] In this form it went to the Senate, which rewrote it to read: "That Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances."[365] Subsequently, the religion clauses and these

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[361] Torcaso v. Watkins, 367 U.S. 488, 494 (1961).

[362] McDaniel v. Paty, 435 U.S. 618 (1978). The plurality opinion by Chief Justice Burger, joined by Justices Powell, Rehnquist, and Stevens, found the case governed by Sherbert v. Verner's strict scrutiny test. The state had failed to show that its view of the dangers of clergy participation in the political process had any validity; Torcaso v. Watkins was distinguished because the state was acting on the status of being a clergyman rather than on one's beliefs. Justice Brennan, joined by Justice Marshall, found *Torcaso* controlling because imposing a restriction upon one's status as a religious person did penalize his religious belief, his freedom to profess or practice that belief. Id. at 629. Justice Stewart also found *Torcaso* dispositive, id. at 642, and Justice White found an equal protection violation because of the restraint upon seeking political office. Id. at 643.

[363] 1 Annals of Congress 434 (1789). Madison had also proposed language limiting the power of the states in a number of respects, including a guarantee of freedom of the press. Id. at 435. Although passed by the House, the amendment was defeated by the Senate. *See* "Amendments to the Constitution, Bill of Rights and the States," *supra*.

[364] Id. at 731 (August 15, 1789).

[365] The Bill of Rights: A Documentary History 1148–49 (B. Schwartz ed. 1971).

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clauses were combined by the Senate.[366] The final language was agreed upon in conference.

Debate in the House is unenlightening with regard to the meaning the Members ascribed to the speech and press clause, and there is no record of debate in the Senate.[367] In the course of debate, Madison warned against the dangers that would arise "from discussing and proposing abstract propositions, of which the judgment may not be convinced. I venture to say, that if we confine ourselves to an enumeration of simple, acknowledged principles, the ratification will meet with but little difficulty."[368] That the "simple, acknowledged principles" embodied in the First Amendment have occasioned controversy without end both in the courts and out should alert one to the difficulties latent in such spare language.

Insofar as there is likely to have been a consensus, it was no doubt the common law view as expressed by Blackstone. "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. But to punish as the law does at present any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus, the will of individuals is still left free: the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left; the disseminating, or making public,

[366] Id. at 1153.

[367] The House debate insofar as it touched upon this amendment was concerned almost exclusively with a motion to strike the right to assemble and an amendment to add a right of the people to instruct their Representatives. 1 ANNALS OF CONGRESS 731–749 (August 15, 1789). There are no records of debates in the states on ratification.

[368] Id. at 738.

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of bad sentiments, destructive to the ends of society, is the crime which society corrects." [369]

Whatever the general unanimity on this proposition at the time of the proposal of and ratification of the First Amendment,[370] it appears that there emerged in the course of the Jeffersonian counterattack on the Sedition Act [371] and the use by the Adams Administration of the Act to prosecute its political opponents,[372] something of a libertarian theory of freedom of speech and press,[373] which, however much the Jeffersonians may have departed from it upon assum-

[369] 4 W. Blackstone's Commentaries on the Laws of England 151–52 (T. Cooley, 2d rev. ed. 1872). *See* 3 J. Story, Commentaries on the Constitution of the United States 1874–86 (1833). The most comprehensive effort to assess theory and practice in the period prior to and immediately following adoption of the Amendment is L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History (1960), which generally concluded that the Blackstonian view was the prevailing one at the time and probably the understanding of those who drafted, voted for, and ratified the Amendment.

[370] It would appear that Madison advanced libertarian views earlier than his Jeffersonian compatriots, as witness his leadership of a move to refuse officially to concur in Washington's condemnation of "[c]ertain self-created societies," by which the President meant political clubs supporting the French Revolution, and his success in deflecting the Federalist intention to censure such societies. I. Brant, James Madison: Father of the Constitution 1787–1800 at 416–20 (1950). "If we advert to the nature of republican government," Madison told the House, "we shall find that the censorial power is in the people over the government, and not in the government over the people." 4 Annals of Congress 934 (1794). On the other hand, the early Madison, while a member of his county's committee on public safety, had enthusiastically promoted prosecution of Loyalist speakers and the burning of their pamphlets during the Revolutionary period. 1 Papers of James Madison 147, 161–62, 190–92 (W. Hutchinson & W. Rachal, eds., 1962). There seems little doubt that Jefferson held to the Blackstonian view. Writing to Madison in 1788, he said: "A declaration that the Federal Government will never restrain the presses from printing anything they please, will not take away the liability of the printers for false facts printed." 13 Papers of Thomas Jefferson 442 (J. Boyd ed., 1955). Commenting a year later to Madison on his proposed amendment, Jefferson suggested that the free speech-free press clause might read something like: "The people shall not be deprived or abridged of their right to speak, to write or otherwise to publish anything but false facts affecting injuriously the life, liberty, property, or reputation of others or affecting the peace of the confederacy with foreign nations." 15 Papers, *supra*, at 367.

[371] The Act, 1 Stat. 596 (1798), punished anyone who would "write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute." *See* J. Smith, Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties (1956).

[372] Id. at 159 et seq.

[373] L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History ch. 6 (1960); New York Times Co. v. Sullivan, 376 U.S. 254, 273–76 (1964). *But compare* L. Levy, Emergence of a Free Press (1985), a revised and enlarged edition of Legacy of Expression, in which Professor Levy modifies his earlier views, arguing that while the intention of the Framers to outlaw the crime of seditious libel, in pursuit of a free speech principle, cannot be established and may not have been the goal, there was a tradition of robust and rowdy expression during the period of

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ing power,[374] was to blossom into the theory undergirding Supreme Court First Amendment jurisprudence in modern times. Full acceptance of the theory that the Amendment operates not only to bar most prior restraints of expression but subsequent punishment of all but a narrow range of expression, in political discourse and indeed in all fields of expression, dates from a quite recent period, although the Court's movement toward that position began in its consideration of limitations on speech and press in the period following World War I.[375] Thus, in 1907, Justice Holmes could observe that, even if the Fourteenth Amendment embodied prohibitions similar to the First Amendment, "still we should be far from the conclusion that the plaintiff in error would have us reach. In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart

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the framing that contradicts his prior view that a modern theory of free expression did not begin to emerge until the debate over the Alien and Sedition Acts.

[374] L. Levy, Jefferson and Civil Liberties: The Darker Side (1963). Thus President Jefferson wrote to Governor McKean of Pennsylvania in 1803: "The federalists having failed in destroying freedom of the press by their gag-law, seem to have attacked it in an opposite direction; that is, by pushing its licentiousness and its lying to such a degree of prostitution as to deprive it of all credit. . . . This is a dangerous state of things, and the press ought to be restored to its credibility if possible. The restraints provided by the laws of the States are sufficient for this if applied. And I have, therefore, long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses. Not a general prosecution, for that would look like persecution; but a selected one." 9 Works of Thomas Jefferson 449 (P. Ford ed., 1905).

[375] New York Times Co. v. Sullivan, 376 U.S. 254 (1964), provides the principal doctrinal justification for the development, although the results had long since been fully applied by the Court. In *Sullivan*, Justice Brennan discerned in the controversies over the Sedition Act a crystallization of "a national awareness of the central meaning of the First Amendment," id. at 273, which is that the "right of free public discussion of the stewardship of public officials . . . [is] a fundamental principle of the American form of government." Id. at 275. This "central meaning" proscribes either civil or criminal punishment for any but the most maliciously, knowingly false criticism of government. "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. . . . [The historical record] reflect[s] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." Id. at 276. Madison's Virginia Resolutions of 1798 and his *Report* in support of them brought together and expressed the theories being developed by the Jeffersonians and represent a solid doctrinal foundation for the point of view that the First Amendment superseded the common law on speech and press, that a free, popular government cannot be libeled, and that the First Amendment absolutely protects speech and press. 6 Writings of James Madison, 341–406 (G. Hunt ed., 1908).

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from statute in most cases, if not in all."[376] But as Justice Holmes also observed, "[t]here is no constitutional right to have all general propositions of law once adopted remain unchanged."[377]

But, in *Schenck v. United States*,[378] the first of the post-World War I cases to reach the Court, Justice Holmes, in his opinion for the Court upholding convictions for violating the Espionage Act by attempting to cause insubordination in the military service by circulation of leaflets, suggested First Amendment restraints on subsequent punishment as well as on prior restraint. "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose . . . . We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words used are used in such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Justice Holmes, along with Justice Brandeis, soon went into dissent in their views that the majority of the Court was misapplying the legal standards thus expressed to uphold suppression of speech that offered no threat to organized institutions.[379] But it was with

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[376] Patterson v. Colorado, 205 U.S. 454, 462 (1907) (emphasis in original, citation omitted). Justice Frankfurter had similar views in 1951: "The historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest. . . . 'The law is perfectly well settled,' this Court said over fifty years ago, 'that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed.' Robertson v. Baldwin, 165 U.S. 275, 281. That this represents the authentic view of the Bill of Rights and the spirit in which it must be construed has been recognized again and again in cases that have come here within the last fifty years." Dennis v. United States, 341 U.S. 494, 521–522, 524 (1951) (concurring opinion).

[377] Patterson v. Colorado, 205 U.S. 454, 461 (1907).

[378] 249 U.S. 47, 51–52 (1919) (citations omitted).

[379] Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919); Schaefer v. United States, 251 U.S. 466 (1920); Pierce v. United States, 252 U.S. 239 (1920); United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407 (1921). A state statute similar to the federal one was upheld in Gilbert v. Minnesota, 254 U.S. 325 (1920).

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the Court's assumption that the Fourteenth Amendment restrained the power of the states to suppress speech and press that the doctrines developed.[380] At first, Holmes and Brandeis remained in dissent, but, in *Fiske v. Kansas*,[381] the Court sustained a First Amendment type of claim in a state case, and in *Stromberg v. California*,[382] voided a state statute on grounds of its interference with free speech.[383] State common law was also voided, with the Court in an opinion by Justice Black asserting that the First Amendment enlarged protections for speech, press, and religion beyond those enjoyed under English common law.[384]

Development over the years since has been uneven, but by 1964 the Court could say with unanimity: "we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." [385] And, in 1969, the Court said that the cases "have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." [386] This development and its myriad applications are elaborated in the following sections.

The First Amendment by its terms applies only to laws enacted by Congress and not to the actions of private persons.[387] As such, the First Amendment is subject to a "state action" (or "governmental action") limitation similar to that applicable to the Fifth and

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[380] Gitlow v. New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927). The Brandeis and Holmes dissents in both cases were important formulations of speech and press principles.

[381] 274 U.S. 380 (1927).

[382] 283 U.S. 359 (1931). By contrast, it was not until 1965 that a federal statute was held unconstitutional under the First Amendment. Lamont v. Postmaster General, 381 U.S. 301 (1965). *See also* United States v. Robel, 389 U.S. 258 (1967).

[383] *See also* Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931); Herndon v. Lowry, 301 U.S. 242 (1937); DeJonge v. Oregon, 299 U.S. 353 (1937); Lovell v. City of Griffin, 303 U.S. 444 (1938).

[384] Bridges v. California, 314 U.S. 252, 263–68 (1941) (overturning contempt convictions of newspaper editor and others for publishing commentary on pending cases).

[385] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[386] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[387] Through interpretation of the Fourteenth Amendment, the prohibition extends to the states as well. *See* Bill of Rights: The Fourteenth Amendment and Incorporation, *infra*. Of course, the First Amendment also applies to the nonlegislative branches of government—to every "government agency—local, state, or federal." Herbert v. Lando, 441 U.S. 153, 168 n.16 (1979).

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Fourteenth Amendments.[388] The limitation has seldom been litigated in the First Amendment context, but there appears to be no obvious reason why the analysis should differ markedly from Fifth or Fourteenth Amendment governmental action analysis.[389] Both contexts require "cautious analysis of the quality and degree of Government relationship to the particular acts in question."[390] In holding that the National Railroad Passenger Corporation (Amtrak) is a governmental entity for purposes of the First Amendment, the Court declared that "[t]he Constitution constrains governmental action 'by whatever instruments or in whatever modes that action may be taken' . . . [a]nd under whatever congressional label."[391]

Freedom of Expression: The Philosophical Basis

Probably no other provision of the Constitution has given rise to so many different views with respect to its underlying philosophical foundations, and hence proper interpretive framework, as has the guanantee of freedom of expression.[392] The argument has been fought out among the commentators. "The outstanding fact about the First Amendment today is that the Supreme Court has never

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[388] *See* Fourteenth Amendment: Equal Protection of the Laws: Scope and Application: State Action, *infra*.

[389] *Compare* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 399 (1995) (holding that, with respect to Amtrak, because "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, [Amtrak] is part of the Government for purposes of the First Amendment") *with,* Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. ___, No. 13–1080, slip op. at 11 (2015) (extending the holding of *Lebron*, such that Amtrak is considered a governmental entity "for purposes of" the Fifth Amendment Due Process and separation of powers claims presented by the case).

[390] CBS v. Democratic Nat'l Comm., 412 U.S. 94, 115 (1973).

[391] *See Lebron*, 513 U.S. at 392 (quoting *Ex parte* Virginia, 100 U.S. 339, 346–47 (1880)). The Court refused to be bound by the statement in Amtrak's authorizing statute that the corporation is "not . . . an agency or establishment of the United States Government." This assertion can be effective only "for purposes of matters that are within Congress's control," the Court explained. "[I]t is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions." *Id.* at 392.

[392] Although "expression" is not found in the text of the First Amendment, it is used herein, first, as a shorthand term for the freedoms of speech, press, assembly, petition, association, and the like, that are covered by the Amendment, and, second, as a recognition of the fact that judicial interpretation of the clauses of the First Amendment has greatly enlarged the definition commonly associated with "speech," as the following discussion will reveal. The term seems well settled, *see*, *e.g.*, T. Emerson, The System of Freedom of Expression (1970), although it has been criticized. F. Schauer, Free Speech: A Philosophical Inquiry 50–52 (1982). The term also, as used here, conflates the speech and press clauses, explicitly assuming they are governed by the same standards of interpretation and that, in fact, the press clause itself adds nothing significant to the speech clause as interpreted, an assumption briefly defended in the next topic.

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developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases."[393] Some commentators argue on behalf of a complex of values, none of which by itself is sufficient to support a broad-based protection of freedom of expression.[394] Others would limit the basis of the First Amendment to only one among a constellation of possible values and would therefore limit the coverage or the degree of protection of the speech and press clauses.

For example, one school of thought believes that, because of the constitutional commitment to free self-government, only political speech is within the core protected area,[395] although some commentators tend to define more broadly the concept of "political" than one might suppose from the word alone. Others recur to the writings of Milton and Mill and argue that protecting speech, even speech in error, is necessary for the eventual ascertainment of the truth through the conflict of ideas in the marketplace—a view skeptical of our ability ever to know the truth.[396] A broader-grounded view is expounded by scholars who argue that freedom of expression is necessary to promote individual self-fulfillment—that, when speech is freely chosen by the speaker to persuade others, it defines and expresses the speaker's "self" and promotes his liberty[397] and "self-realization" by enabling him to develop his powers and abilities and

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[393] T. Emerson, The System of Freedom of Expression 15 (1970). The practice in the Court is largely to itemize all the possible values the First Amendment has been said to protect. *See*, *e.g.*, Consolidated Edison Co. v. PSC, 447 U.S. 530, 534–35 (1980); First Nati'l Bank of Boston v. Bellotti, 435 U.S. 765, 776–77 (1978).

[394] T. Emerson, The System of Freedom of Expression 6–7 (1970). For Emerson, the four values are (1) assuring individuals self-fulfillment, (2) promoting discovery of truth, (3) providing for participation in decisionmaking by all members of society, and (4) promoting social stability through discussion and compromise of differences. For a persuasive argument in favor of an "eclectic" approach, *see* Shriffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 Nw. U.L. Rev. 1212 (1983). A compressive discussion of all the theories may be found in F. Schauer, Free Speech: A Philosophical Inquiry (1982).

[395] *E.g.*, A. Meiklejohn, Political Freedom (1960); Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971); BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 Stan. L. Rev. 299 (1978). This contention does not reflect the Supreme Court's view. "It is no doubt true that a central purpose of the First Amendment 'was to protect the free discussion of governmental affairs.' . . . But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexclusive list of labels—is not entitled to full First Amendment protection." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977).

[396] The "marketplace of ideas" metaphor is attributable to Justice Holmes' opinion in Abrams v. United States, 250 U.S. 616, 630 (1919). *See* Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. Pitt. L. Rev. 519 (1979). The theory has been the dominant one in scholarly and judicial writings. Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964, 967–74 (1978).

[397] *E.g.*, C. Edwin Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. Cal. L. Rev. 293 (1982); C. Edwin Baker, *Realizing Self-*

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to make and influence decisions regarding his destiny.[398] The literature is enormous and no doubt the Justices as well as the larger society are influenced by it, and yet the decisions, probably in large part because they are the collective determination of nine individuals, seldom clearly reflect a principled and consistent acceptance of any philosophy.

Freedom of Expression: Is There a Difference Between Speech and Press?

Use of the single word "expression" to reach speech, press, petition, association, and the like, raises the question of whether the free speech clause and the free press clause are coextensive, or whether one reaches where the other does not. It has been much debated, for example, whether the "institutional press" is entitled to greater freedom from governmental regulations or restrictions than are nonpress individuals, groups, or associations. Justice Stewart has argued: "That the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively." [399] But, as Chief Justice Burger wrote: "The Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others." [400]

Several Court holdings do firmly point to the conclusion that the press clause does not confer on the press the power to compel government to furnish information or otherwise give the press access to information that the public generally does not have.[401] Nor, in many respects, is the press entitled to treatment different in kind from the treatment to which any other member of the public may

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Realization: Corporate Political Expenditures and Redish's The Value of Free Speech, 130 U. PA. L. REV. 646 (1982).

[398] Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

[399] Houchins v. KQED, 438 U.S. 1, 17 (1978) (concurring opinion). Justice Stewart initiated the debate in a speech, subsequently reprinted as Stewart, *Or of the Press*, 26 HASTINGS L. J. 631 (1975). Other articles are cited in First National Bank of Boston v. Bellotti, 435 U.S. 765, 798 (1978) (Chief Justice Burger concurring).

[400] 435 U.S. at 798. The Chief Justice's conclusion was that the institutional press had no special privilege as the press.

[401] Houchins v. KQED, 438 U.S. 1 (1978), and id. at 16 (Justice Stewart concurring); Saxbe v. Washington Post, 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974); Nixon v. Warner Communications, 435 U.S. 589 (1978). The trial access cases, whatever they may precisely turn out to mean, recognize a right of access of both public and press to trials. Richmond Newspapers v. Virginia, 448 U.S. 555 (1980); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

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be subjected.[402] "Generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects."[403] Yet, it does seem clear that, to some extent, the press, because of its role in disseminating news and information, is entitled to deference that others are not entitled to—that its role constitutionally entitles it to governmental "sensitivity," to use Justice Stewart's word.[404] What difference such "sensitivity" might make in deciding cases is difficult to say.

The most interesting possibility lies in the First Amendment protection of good-faith defamation.[405] Justice Stewart argued that the *Sullivan* privilege is exclusively a free press right, denying that the "constitutional theory of free speech gives an individual any immunity from liability for libel or slander."[406] To be sure, in all the cases to date that the Supreme Court has resolved, the defendant has been, in some manner, of the press,[407] but the Court's decision in *First National Bank of Boston v. Bellotti* that corporations are entitled to assert First Amendment speech guarantees against federal and, through the Fourteenth Amendment, state, regulations causes the evaporation of the supposed "conflict" between speech clause protection of individuals only and press clause protection of press corporations as well as of press individuals.[408] The issue, the Court

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[402] Branzburg v. Hayes, 408 U.S. 665 (1972) (grand jury testimony be newspaper reporter); Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (search of newspaper offices); Herbert v. Lando, 441 U.S. 153 (1979) (defamation by press); Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (newspaper's breach of promise of confidentiality).

[403] Cohen v. Cowles Media, 501 U.S. 663, 669 (1991).

[404] *E.g.*, Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974); Landmark Communications v. Virginia, 435 U.S. 829 (1978). *See also* Zurcher v. Stanford Daily, 436 U.S. 547, 563–67 (1978), and id. at 568 (Justice Powell concurring); Branzburg v. Hayes, 408 U.S. 665, 709 (1972) (Justice Powell concurring). Several concurring opinions in Richmond Newspapers v. Virginia, 448 U.S. (1980), imply recognition of some right of the press to gather information that apparently may not be wholly inhibited by nondiscriminatory constraints. Id. at 582–84 (Justice Stevens), 586 n.2 (Justice Brennan), 599 n.2 (Justice Stewart). Yet the Court has also suggested that the press is protected in order to promote and to protect the exercise of free speech in society at large, including peoples' interest in receiving information. *E.g.*, Mills v. Alabama, 384 U.S. 214, 218–19 (1966); CBS v. FCC, 453 U.S. 367, 394–95 (1981).

[405] New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See* discussion of "Defamation," *infra*.

[406] Stewart, *Or of the Press*, 26 HASTINGS L. J. 631, 633–35 (1975).

[407] In Hutchinson v. Proxmire, 443 U.S. 111, 133 n.16 (1979), the Court noted that it has never decided whether the *Times* standard applies to an individual defendant. Some think they discern in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), intimations of such leanings by the Court.

[408] 435 U.S. 765 (1978). The decision, addressing a question not previously confronted, was 5-to-4. Justice Rehnquist would have recognized no protected First Amendment rights of corporations because, as entities entirely the creation of state law, they were not to be accorded rights enjoyed by natural persons. Id. at 822. Justices White, Brennan, and Marshall thought the First Amendment implicated but not dispositive because of the state interests asserted. Id. at 802. Previous decisions recogniz-

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wrote in *Bellotti*, was not what constitutional rights corporations have but whether the speech that is being restricted is protected by the First Amendment because of its societal significance. Because the speech in *Bellotti* concerned the enunciation of views on the conduct of governmental affairs, it was protected regardless of its source; while the First Amendment protects and fosters individual self-expression as a worthy goal, it also and as importantly affords the public access to discussion, debate, and the dissemination of information and ideas. Despite *Bellotti's* emphasis upon the political nature of the contested speech, it is clear that the same principle—the right of the public to receive information—governs nonpolitical, corporate speech.[409]

With some qualifications, therefore, the speech and press clauses may be analyzed under an umbrella "expression" standard, with little, if any, hazard of missing significant doctrinal differences.

The Doctrine of Prior Restraint

"[L]iberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship."[410] "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[411] Government "thus carries a heavy burden of showing justification for the imposition of such a restraint."[412] Under the English licensing system, which expired in 1695, all printing presses and printers were licensed and nothing could be published without prior approval of the state or church authorities. The great struggle for liberty of the press was for the right to publish without a license what for a long time could be published only with a license.[413]

The United States Supreme Court's first encounter with a law imposing a prior restraint came in *Near v. Minnesota ex rel. Ol-*

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ing corporate free speech had involved either press corporations, id. at 781–83; *see also* id. at 795 (Chief Justice Burger concurring), or corporations organized especially to promote the ideological and associational interests of their members. *E.g.*, NAACP v. Button, 371 U.S. 415 (1963).

[409] Commercial speech when engaged in by a corporation is subject to the same standards of protection as when natural persons engage in it. Consolidated Edison Co. v. PSC, 447 U.S. 530, 533–35 (1980). Nor does the status of a corporation as a government-regulated monopoly alter the treatment. Id. at 534 n.1; Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 566–68 (1980).

[410] Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931).

[411] Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963).

[412] Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

[413] Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713–14 (1931); Lovell v. Griffin, 303 U.S. 444, 451 (1938).

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son,[414] in which a five-to-four majority voided a law authorizing the permanent enjoining of future violations by any newspaper or periodical once found to have published or circulated an "obscene, lewd and lascivious" or a "malicious, scandalous and defamatory" issue. An injunction had been issued after the newspaper in question had printed a series of articles tying local officials to gangsters. Although the dissenters maintained that the injunction constituted no prior restraint, because that doctrine applied to prohibitions of publication without advance approval of an executive official,[415] the majority deemed it "the essence of censorship" that, in order to avoid a contempt citation, the newspaper would have to clear future publications in advance with the judge.[416] Liberty of the press to scrutinize closely the conduct of public affairs was essential, said Chief Justice Hughes for the Court. "[T]he administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."[417] The Court did not explore the kinds of restrictions to which the term "prior restraint" would apply, nor do more than assert that only in "exceptional cases" would prior restraint be permissible.[418]

Nor did subsequent cases substantially illuminate the murky interior of the doctrine. The doctrine of prior restraint was called upon by the Court as it struck down restrictions on First Amendment rights, including a series of loosely drawn statutes and ordinances requiring licenses to hold meetings and parades and to distribute literature, with uncontrolled discretion in the licensor whether or not to issue them.[419] The doctrine that generally emerged was that permit systems and prior licensing are constitutionally valid

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[414] 283 U.S. 697 (1931).

[415] 283 U.S. at 723, 733–36 (Justice Butler dissenting).

[416] 283 U.S. at 713.

[417] 283 U.S. at 719–20.

[418] 283 U.S. at 716.

[419] *E.g.*, Lovell v. Griffin, 303 U.S. 444 (1938); Cantwell v. Connecticut, 310 U.S. 296 (1940); Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Staub v. City of Baxley, 355 U.S. 313 (1958). For other applications, *see* Grosjean v. American Press Co., 297 U.S. 233 (1936); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Follett v. McCormick, 321 U.S. 573 (1944).

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so long as the discretion of the issuing official was limited to questions of time, place, and manner.[420] "[*O*]*nly* content-based injunctions are subject to prior restraint analysis."[421]

The most recent Court encounter with the doctrine in the national security area occurred when the government attempted to enjoin press publication of classified documents pertaining to the Vietnam War[422] and, although the Court rejected the effort, at least five and perhaps six Justices concurred on principle that, in some circumstances, prior restraint of publication would be constitutional.[423] But no cohesive doctrine relating to the subject, its applications, and its exceptions has emerged.

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[420] Cox v. New Hampshire, 312 U.S. 569 (1941); Poulos v. New Hampshire, 345 U.S. 395 (1953). In Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968), the Court held invalid the issuance of an ex parte injunction to restrain the holding of a protest meeting, holding that usually notice must be given the parties to be restrained and an opportunity for them to rebut the contentions presented to justify the sought-for restraint. In Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), the Court held invalid as a prior restraint an injunction preventing the petitioners from distributing 18,000 pamphlets attacking respondent's alleged "blockbusting" real estate activities; he was held not to have borne the "heavy burden" of justifying the restraint. "No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court. Designating the conduct as an invasion of privacy . . . is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record." Id. at 419–20. *See also* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) (ordinance vesting in the mayor unbridled discretion to grant or deny annual permit for location of newsracks on public property is facially invalid as prior restraint).

The necessity of immediate appellate review of orders restraining the exercise of First Amendment rights was strongly emphasized in National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977), and seems to explain the Court's action in Philadelphia Newspapers v. Jerome, 434 U.S. 241 (1978). *But see* Moreland v. Sprecher, 443 U.S. 709 (1979) (party can relinquish right to expedited review through failure to properly request it).

[421] DVD Copy Control Association, Inc. v. Bunner, 75 P.3d 1, 17 (Cal. 2003) ("[a] prior restraint is a *content-based* restriction on speech *prior to its occurrence*," id. at 17–18). Regarding the standard for content-neutral injunctions, *see* "Public Issue Picketing and Parading," *infra*.

[422] New York Times Co. v. United States, 403 U.S. 713 (1971). The vote was 6-to-3, with Justices Black, Douglas, Brennan, Stewart, White, and Marshall in the majority and Chief Justice Burger and Justices Harlan and Blackmun in the minority. Each Justice issued an opinion.

[423] The three dissenters thought such restraint appropriate in this case. Id. at 748, 752, 759. Justice Stewart thought restraint would be proper if disclosure "will surely result in direct, immediate, and irreparable damage to our Nation or its people," id. at 730, while Justice White did not endorse any specific phrasing of a standard. Id. at 730–33. Justice Brennan would preclude even interim restraint except upon "governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea." Id. at 712–13.

The same issues were raised in United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979), in which the United States obtained an injunction prohibiting

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The Supreme Court has written that "[t]he special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment."[424] The prohibition on prior restraint, thus, is essentially a limitation on restraints until a final judicial determination that the restricted speech is not protected by the First Amendment. It is a limitation, for example, against temporary restraining orders and preliminary injunctions pending final judgment, not against permanent injunctions after a final judgment is made that the restricted speech is not protected by the First Amendment.[425]

The Supreme Court has also written "that traditional prior restraint doctrine may not apply to [commercial speech],"[426] and "[t]he vast majority of [federal] circuits . . . do not apply the doctrine of prior restraint to commercial speech."[427] "Some circuits [however] have explicitly indicated that the requirement of procedural safeguards in the context of a prior restraint indeed applies to commercial speech."[428] In addition, prior restraint is generally permitted, even in the form of preliminary injunctions, in intellectual property cases, such as those for infringements of copyright or trademark.[429]

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publication of an article it claimed would reveal information about nuclear weapons, thereby increasing the dangers of nuclear proliferation. The injunction was lifted when the same information was published elsewhere and thus there was no appellate review of the order.

With respect to the right of the Central Intelligence Agency to prepublication review of the writings of former agents and its enforcement through contractual relationships, *see* Snepp v. United States, 444 U.S. 507 (1980); Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975); United States v. Marchetti, 446 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

[424] Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 390 (1973); *see also* Vance v. Universal Amusement Co., 445 U.S. 308, 315–316 (1980) ("the burden of supporting an injunction against a future exhibition [of allegedly obscene motion pictures] is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication").

[425] *See* Mark A. Lemley and Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke Law Journal 147, 169–171 (1998).

[426] Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557 (1980), citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 772 n.24 (1976).

[427] Bosley v. WildWetT.com, 310 F. Supp. 2d 914, 930 (N.D. Ohio 2004).

[428] New York Magazine v. Metropolitan Transportation Authority, 136 F.3d 123, 131 (2d Cir. 1998), *cert. denied*, 525 U.S. 824 (1998), citing Desert Outdoor Adver. v. City of Moreno Valley, 103 F.3d 814, 818 (9th Cir. 1996); *In re* Search of Kitty's East, 905 F.2d 1367, 1371–72 & n.4 (10th Cir. 1990).

[429] *See* Bosley v. WildWetT.com, 310 F. Supp. 2d 914, 930 (N.D. Ohio 2004). *See also* Mark A. Lemley and Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke Law Journal 147 (1998) (arguing that intellectual property should have the same First Amendment protection from preliminary injunctions that other speech does).

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Injunctions and the Press in Fair Trial Cases.—Confronting a claimed conflict between free press and fair trial guarantees, the Court unanimously set aside a state court injunction barring the publication of information that might prejudice the subsequent trial of a criminal defendant.[430] Though agreed as to the result, the Justices were divided as to whether "gag orders" were ever permissible and if so what the standards for imposing them were. The Court used the Learned Hand formulation of the "clear and present danger" test[431] and considered as factors in any decision on the imposition of a restraint upon press reporters "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."[432] Though the Court found that one seeking a restraining order must meet "the heavy burden of demonstrating, in advance of trial, that without a prior restraint a fair trial would be denied," it refused to "rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint."[433] Justice Brennan's concurring opinion flatly took the position that such restraining orders were never permissible. Commentary and reporting on the criminal justice system is at the core of First Amendment values, he would have held, and secrecy can do so much harm "that there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained."[434] The only circumstance in

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[430] Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

[431] 427 U.S. at 562, quoting Dennis v. United States, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494, 510 (1951).

[432] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976) (opinion of Chief Justice Burger, concurred in by Justices Blackmun and Rehnquist, and, also writing brief concurrences, Justices White and Powell). Applying the tests, the Chief Justice agreed that (a) there was intense and pervasive pretrial publicity and more could be expected, but that (b) the lower courts had made little effort to assess the prospects of other methods of preventing or mitigating the effects of such publicity and that (c) in any event the restraining order was unlikely to have the desired effect of protecting the defendant's rights. Id. at 562–67.

[433] 427 U.S. at 569–70. The Court distinguished between reporting on judicial proceedings held in public and reporting of information gained from other sources, but found that a heavy burden must be met to secure a prior restraint on either. Id. at 570. *See also* Oklahoma Pub. Co. v. District Court, 430 U.S. 308 (1977) (setting aside injunction restraining news media from publishing name of juvenile involved in pending proceeding when name has been learned at open detention hearing that could have been closed but was not); Smith v. Daily Mail Pub. Co., 443 U.S. 97 (1979).

[434] 427 U.S. at 572, 588. Justices Stewart and Marshall joined this opinion and Justice Stevens noted his general agreement except that he reserved decision in particularly egregious situations, even though stating that he might well agree with

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which prior restraint of protected speech might be permissible is when publication would cause "virtually certain, direct, and immediate" national harm, Justice Brennan continued, but "the harm to a fair trial that might otherwise eventuate from publications which are suppressed . . . must inherently remain speculative."[435] Although the result in the case does not foreclose the possibility of future "gag orders," it does lessen the number to be expected and shifts the focus to other alternatives for protecting trial rights.[436] On a different level, however, are orders that restrain the press as a party to litigation in the dissemination of information obtained through pretrial discovery. In *Seattle Times Co. v. Rhinehart*,[437] the Court determined that such orders protecting parties from abuses of discovery require "no heightened First Amendment scrutiny."[438]

Obscenity and Prior Restraint.—Only in the obscenity area has there emerged a substantial consideration of the doctrine of prior restraint, and the doctrine's use there may be based upon the fact that obscenity is not a protected form of expression.[439] In *Kingsley Books v. Brown*,[440] the Court upheld a state statute that, though it embodied some features of prior restraint, was seen as having little more restraining effect than an ordinary criminal statute; that is, the law's penalties applied only after publication. But, in *Times Film Corp. v. City of Chicago*,[441] a divided Court specifically affirmed that, at least in the case of motion pictures, the First Amendment did not proscribe a licensing system under which a board of censors could refuse to license for public exhibition films that it found obscene. Books and periodicals may also be subjected to some forms of prior restraint,[442] but the thrust of the Court's opinions in this area with

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Justice Brennan there also. Id. at 617. Justice White, while joining the opinion of the Court, noted that he had grave doubts that "gag orders" could ever be justified but he would refrain from so declaring in the Court's first case on the issue. Id. at 570.

[435] 427 U.S. at 599.

[436] One such alternative is the banning of communication with the press on trial issues by prosecution and defense attorneys, police officials, and court officers. This, of course, also raises First Amendment issues. *See*, *e.g.*, Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

[437] 467 U.S. 20 (1984).

[438] 467 U.S. at 36. The decision was unanimous, all other Justices joining Justice Powell's opinion for the Court, but Justices Brennan and Marshall noting additionally that under the facts of the case important interests in privacy and religious freedom were being protected. Id. at 37, 38.

[439] *See* discussion of "Obscenity," *infra*. *See also* Justice Brennan's concurrence in Nebraska Press Ass'n v. Stuart, 427 U.S. at 590.

[440] 354 U.S. 436 1957). *See also* Bantam Books v. Sullivan, 372 U.S. 58 (1963).

[441] 365 U.S. 43 (1961). *See also* Young v. American Mini Theatres, 427 U.S. 50 (1976) (zoning ordinance prescribing distances adult theaters may be located from residential areas and other theaters is not an impermissible prior restraint).

[442] *Cf.* Kingsley Books v. Brown, 354 U.S. 436 (1957).

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regard to all forms of communication has been to establish strict standards of procedural protections to ensure that the censoring agency bears the burden of proof on obscenity, that only a judicial order can restrain exhibition, and that a prompt final judicial decision is assured.[443]

Subsequent Punishment: Clear and Present Danger and Other Tests

Granted that the controversy over freedom of expression at the time of the ratification of the First Amendment was limited almost exclusively to the problem of prior restraint, nevertheless the words speak of laws "abridging" the freedom of speech and press, and the modern cases have been largely fought over subsequent punishment. "[T]he mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications . . . ."

"[The purpose of the speech and press clause] has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. . . . The

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[443] Freedman v. Maryland, 380 U.S. 51 (1965); Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968); Interstate Circuit v. City of Dallas, 390 U.S. 676 (1968); Blount v. Rizzi, 400 U.S. 410 (1971); United States v. Thirty-seven Photographs, 402 U.S. 363, 367–375 (1971); Southeastern Promotions v. Conrad, 420 U.S. 546 (1975); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 229 (1990) (ordinance requiring licensing of "sexually oriented business" "does not provide for an effective limitation on the time within which the licensor's decision must be made [and] also fails to provide an avenue for prompt judicial review"); City of Littleton v. Z.J. Gifts D–4, L.L.C., 541 U.S. 774, 784 (2004) ("Where (as here and as in *FW/PBS*) the regulation simply conditions the operation of an adult business on compliance with neutral and nondiscretionary criteria . . . and does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision of the *Freedman* type"); Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) (seizure of books and films based on *ex parte* probable cause hearing under state RICO law's forfeiture procedures constitutes invalid prior restraint; instead, there must be a determination in an adversarial proceeding that the materials are obscene or that a RICO violation has occurred). *But cf.* Alexander v. United States, 509 U.S. 544 (1993) (RICO forfeiture of the entire adult entertainment book and film business of an individual convicted of obscenity and racketeering offenses, based on the predicate acts of selling four magazines and three videotapes, does not constitute a prior restraint and is not invalid as "chilling" protected expression that is not obscene).

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evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." [444] A rule of law permitting criminal or civil liability to be imposed upon those who speak or write on public issues would lead to self-censorship, which would not be relieved by permitting a defense of truth. "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so . . . . The rule thus dampens the vigor and limits the variety of public debate." [445]

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution." [446] "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of

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[444] 2 T. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Powers of the States of the American Union 885–86 (8th ed. 1927).

[445] New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964). *See also* Speiser v. Randall, 357 U.S. 513, 526 (1958); Smith v. California, 361 U.S. 147, 153–54 (1959); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

[446] Abrams v. United States, 250 U.S. 616, 630 (1919) (Justice Holmes dissenting).

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noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."[447]

"But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral."[448] The fixing of a standard is necessary, by which to determine what degree of evil is "sufficiently substantial to justify resort to abridgment of speech and press and assembly as a means of protection" and how clear and imminent and likely the danger is.[449] That standard has fluctuated over the years, as the cases discussed below demonstrate.

Clear and Present Danger.—Certain expression, oral or written, may incite, urge, counsel, advocate, or importune the commission of criminal conduct; other expression, such as picketing, demonstrating, and engaging in certain forms of "symbolic" action, may either counsel the commission of criminal conduct or itself constitute criminal conduct. Leaving aside for the moment the problem of "speech-plus" communication, it becomes necessary to determine when expression that may be a nexus to criminal conduct is subject to punishment and restraint. At first, the Court seemed disposed in the few cases reaching it to rule that if the conduct could be made criminal, the advocacy of or promotion of the conduct could be made criminal.[450] Then, in *Schenck v. United States*,[451] in which the defendants had been convicted of seeking to disrupt recruitment of military personnel by disseminating leaflets, Justice Holmes

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[447] Whitney v. California, 274 U.S. 357, 375–76 (1927) (Justice Brandeis concurring).

[448] 274 U.S. at 373.

[449] 274 U.S. at 374.

[450] Davis v. Beason, 133 U.S. 333 (1890); Fox v. Washington, 236 U.S. 273 (1915).

[451] 249 U.S. 47 (1919).

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formulated the "clear and present danger" test that has ever since been the starting point of argument. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[452] The convictions were unanimously affirmed. One week later, the Court again unanimously affirmed convictions under the same act with Justice Holmes writing, "we think it necessary to add to what has been said in *Schenck v. United States* only that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."[453] And, in *Debs v. United States*,[454] Justice Holmes upheld a conviction because "the natural and intended effect" and the "reasonably probable effect" of the speech for which the defendant was prosecuted was to obstruct military recruiting.

In *Abrams v. United States*,[455] however, Justices Holmes and Brandeis dissented upon affirmance of the convictions of several alien anarchists who had printed leaflets seeking to encourage discontent with the United States' participation in World War I. The majority simply referred to *Schenck* and *Frohwerk* to rebut the First Amendment argument, but the dissenters urged that the government had made no showing of a clear and present danger. Another affirmance by the Court of a conviction, the majority simply saying that "[t]he tendency of the articles and their efficacy were enough for the offense," drew a similar dissent.[456] Moreover, in *Gitlow v. New York*,[457] a conviction for distributing a manifesto in violation of a law making it criminal to advocate, advise, or teach the duty, necessity, or propriety of overthrowing organized government by force or violence, the Court affirmed in the absence of any evidence regarding the effect of the distribution and in the absence of any contention that it created any immediate threat to the security of the state. In so doing, the Court discarded Holmes' test. "It is clear that the question in such cases [as this] is entirely different from that

[452] 249 U.S. at 52.
[453] Frohwerk v. United States, 249 U.S. 204, 206 (1919) (citations omitted).
[454] 249 U.S. 211, 215–16 (1919).
[455] 250 U.S. 616 (1919).
[456] Schaefer v. United States, 251 U.S. 466, 479 (1920). *See also* Pierce v. United States, 252 U.S. 239 (1920).
[457] 268 U.S. 652 (1925).

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involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. . . . In such cases it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent. . . . And the general statement in the *Schenck Case* . . . was manifestly intended . . . to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character."[458] Thus, a state legislative determination "that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power" was almost conclusive to the Court.[459] It is not clear what test, if any, the majority would have used, although the "bad tendency" test has usually been associated with the case. In *Whitney v. California*,[460] the Court affirmed a conviction under a criminal syndicalism statute based on the defendant's association with and membership in an organization that advocated the commission of illegal acts, finding again that the determination of a legislature that such advocacy involves "danger to the public peace and the security of the State" was entitled to almost conclusive weight. In a technical concurrence, which was in fact a dissent from the opinion of the Court, Justice Brandeis restated the "clear and present danger" test. "[E]ven advocacy of violation [of the law] . . . is not a justification for denying free speech where the advocacy fails short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. . . .

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[458] 268 U.S. at 670–71.

[459] 268 U.S. at 668. Justice Holmes dissented. "If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." Id. at 673.

[460] 274 U.S. 357, 371 (1927).

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In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated." [461]

The Adoption of Clear and Present Danger.—The Court did not invariably affirm convictions during this period in cases like those under consideration. In *Fiske v. Kansas*,[462] it held that a criminal syndicalism law had been invalidly applied to convict one against whom the only evidence was the "class struggle" language of the constitution of the organization to which he belonged. A conviction for violating a "red flag" law was voided because the statute was found unconstitutionally vague.[463] Neither case mentioned clear and present danger. An "incitement" test seemed to underlie the opinion in *DeJonge v. Oregon*,[464] upsetting a conviction under a criminal syndicalism statute for attending a meeting held under the auspices of an organization that was said to advocate violence as a political method, although the meeting was orderly and no violence was advocated during it. In *Herndon v. Lowry*,[465] the Court narrowly rejected the contention that the standard of guilt could be made the "dangerous tendency" of one's words, and indicated that the power of a state to abridge speech "even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government."

Finally, in *Thornhill v. Alabama*,[466] a state anti-picketing law was invalidated because "no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter." During the same term, the Court reversed the breach of the peace conviction of a Jehovah's Witness who had played an inflammatory phonograph record to persons on the street, the Court discerning no clear and present danger of disorder.[467]

The stormiest fact situation the Court faced in applying the clear and present danger test occurred in *Terminiello v. City of Chi-*

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[461] 274 U.S. at 376.

[462] 274 U.S. 380 (1927).

[463] Stromberg v. California, 283 U.S. 359 (1931).

[464] 299 U.S. 353 (1937). *See* id. at 364–65.

[465] 301 U.S. 242, 258 (1937). At another point, clear and present danger was alluded to without any definite indication it was the standard. Id. at 261.

[466] 310 U.S. 88, 105 (1940). The Court admitted that the picketing did result in economic injury to the employer, but found such injury "neither so serious nor so imminent" as to justify restriction. The doctrine of clear and present danger was not to play a future role in the labor picketing cases.

[467] Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

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cago,[468] in which a five-to-four majority struck down a conviction obtained after the judge instructed the jury that a breach of the peace could be committed by speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." "A function of free speech under our system of government," wrote Justice Douglas for the majority, "is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." [469] The dissenters focused on the disorders that had actually occurred as a result of Terminiello's speech, Justice Jackson saying: "Rioting is a substantive evil, which I take it no one will deny that the State and the City have the right and the duty to prevent and punish . . . . In this case the evidence proves beyond dispute that danger of rioting and violence in response to the speech was clear, present and immediate." [470] The Jackson position was soon adopted in *Feiner v. New York*,[471] in which Chief Justice Vinson said that "[t]he findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech."

Contempt of Court and Clear and Present Danger.—The period during which clear and present danger was the standard by which to determine the constitutionality of governmental suppression of or punishment for expression was a brief one, extending roughly from *Thornhill* to *Dennis*.[472] But in one area it was vigorously, though not without dispute, applied to enlarge freedom of utterance and it is in this area that it remains viable. In early contempt-of-court cases in which criticism of courts had been punished as contempt, the Court generally took the position that, even if freedom of speech and press was protected against governmental abridgment, a publication tending to obstruct the administration of justice was punish-

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[468] 337 U.S. 1 (1949).
[469] 337 U.S. at 4–5.
[470] 337 U.S. at 25–26.
[471] 340 U.S. 315, 321 (1951).
[472] Thornhill v. Alabama, 310 U.S. 88 (1940); Dennis v. United States, 341 U.S. 494 (1951).

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able, irrespective of its truth.[473] In *Bridges v. California*,[474] however, in which contempt citations had been brought against a newspaper and a labor leader for statements made about pending judicial proceedings, Justice Black, for a five-to-four majority, began by applying the clear and present danger test, which he interpreted to require that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[475] He noted that "[t]he substantive evil here sought to be averted . . . appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice." As for the first evil, Justice Black rejected "[t]he assumption that respect for the judiciary can be won by shielding judges from published criticism . . . ."[476] As for "[t]he other evil feared, disorderly and unfair administration of justice, [it] is more plausibly associated with restricting publications which touch upon pending litigation." But the "degree of likelihood" of the evil being accomplished was not "sufficient to justify summary punishment."[477] In dissent, Justice Frankfurter accepted the application of the clear and present danger, but he interpreted it as meaning no more than a "reasonable tendency" test. "Comment however forthright is one thing. Intimidation with respect to specific matters still in judicial suspense, quite another. . . . A publication intended to teach the judge a lesson, or to vent spleen, or to discredit him, or to influence him in his future conduct, would not justify exercise of the contempt power. . . . It must refer to a matter under consideration and constitute in effect a threat to its impartial disposition. It must be calculated to create an atmospheric pressure incompatible with rational, impartial adjudication. But to interfere with justice it need not succeed. As with other offenses, the state should be able to proscribe attempts that fail because of the danger that attempts may succeed."[478]

A unanimous Court next struck down the contempt conviction arising out of newspaper criticism of judicial action already taken, although one case was pending after a second indictment. Specifically alluding to clear and present danger, while seeming to regard it as stringent a test as Justice Black had in the prior case, Justice Reed wrote that the danger sought to be averted, a "threat to the impartial and orderly administration of justice," "has not the clearness and immediacy necessary to close the door of permissible pub-

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[473] Patterson v. Colorado, 205 U.S. 454 (1907); Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).
[474] 314 U.S. 252 (1941).
[475] 314 U.S. at 263.
[476] 314 U.S. at 270.
[477] 314 U.S. at 271.
[478] 314 U.S. at 291.

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lic comment."[479] Divided again, the Court a year later set aside contempt convictions based on publication, while a motion for a new trial was pending, of inaccurate and unfair accounts and an editorial concerning the trial of a civil case. "The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, and not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."[480]

In *Wood v. Georgia*,[481] the Court again divided, applying clear and present danger to upset the contempt conviction of a sheriff who had been cited for criticizing the recommendation of a county court that a grand jury look into African-American bloc voting, vote buying, and other alleged election irregularities. No showing had been made, said Chief Justice Warren, of "a substantive evil actually designed to impede the course of justice." The case presented no situation in which someone was on trial, there was no judicial proceeding pending that might be prejudiced, and the dispute was more political than judicial.[482] A unanimous Court in 1972 apparently applied the standard to set aside a contempt conviction of a defendant who, arguing his own case, alleged before the jury that the trial judge by his bias had prejudiced his trial and that he was a political prisoner. Though the defendant's remarks may have been disrespectful of the court, the Supreme Court noted that "[t]here is no indication . . . that petitioner's statements were uttered in a boisterous tone or in any wise actually disrupted the court proceeding" and quoted its previous language about the imminence of the threat necessary to constitute contempt.[483]

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[479] Pennekamp v. Florida, 328 U.S. 331, 336, 350 (1946). To Justice Frankfurter, the decisive consideration was whether the judge or jury is, or presently will be, pondering a decision that comment seeks to affect. Id. at 369.

[480] Craig v. Harney, 331 U.S. 367, 376 (1947). Dissenting with Chief Justice Vinson, Justice Frankfurter said: "We cannot say that the Texas Court could not properly find that these newspapers asked of the judge, and instigated powerful sections of the community to ask of the judge, that which no one has any business to ask of a judge, except the parties and their counsel in open court, namely, that he should decide one way rather than another." Id. at 390. Justice Jackson also dissented. Id. at 394. *See also* Landmark Communications v. Virginia, 435 U.S. 829, 844 (1978); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562–63 (1976).

[481] 370 U.S. 375 (1962).

[482] 370 U.S. at 383–85, 386–90. Dissenting, Justices Harlan and Clark thought that the charges made by the defendant could well have influenced the grand jurors in their deliberations and that the fact that laymen rather than judicial officers were subject to influence should call forth a less stringent test than when the latter were the object of comment. Id. at 395.

[483] *In re* Little, 404 U.S. 553, 555 (1972). The language from Craig v. Harney, 331 U.S. 367, 376 (1947), is quoted in the previous paragraph of text, *supra*.

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Clear and Present Danger Revised: Dennis.—In *Dennis v. United States*,[484] the Court sustained the constitutionality of the Smith Act,[485] which proscribed advocacy of the overthrow by force and violence of the government of the United States, and upheld convictions under it. *Dennis*' importance here is in the rewriting of the clear and present danger test. For a plurality of four, Chief Justice Vinson acknowledged that the Court had in recent years relied on the Holmes-Brandeis formulation of clear and present danger without actually overruling the older cases that had rejected the test; but while clear and present danger was the proper constitutional test, that "shorthand phrase should [not] be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case." It was a relative concept. Many of the cases in which it had been used to reverse convictions had turned "on the fact that the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech."[486]

Here, by contrast, "[o]verthrow of the government by force and violence is certainly a substantial enough interest for the government to limit speech."[487] And in combating that threat, the government need not wait to act until the putsch is about to be executed and the plans are set for action. "If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the government is required."[488] Therefore, what does the phrase "clear and present danger" import for judgment? "Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' 183 F.2d at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words."[489]

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[484] 341 U.S. 494 (1951).

[485] 54 Stat. 670 (1940), 18 U.S.C. § 2385.

[486] Dennis v. United States, 341 U.S. 494, 508 (1951).

[487] 341 U.S. at 509.

[488] 341 U.S. at 508, 509.

[489] 341 U.S. at 510. Justice Frankfurter, concurring, adopted a balancing test, id. at 517, discussed in the next topic. Justice Jackson appeared to proceed on a conspiracy approach rather than one depending on advocacy. Id. at 561. Justices Black and Douglas dissented, reasserting clear and present danger as the standard. Id. at 579, 581. Note the recurrence to the Learned Hand formulation in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976), although the Court appeared in fact to apply balancing.

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The "gravity of the evil, discounted by its improbability" was found to justify the convictions.[490]

Balancing.—Clear and present danger as a test, it seems clear, was a pallid restriction on governmental power after *Dennis*, and it virtually disappeared from the Court's language over the next twenty years.[491] Its replacement for part of this period was the much disputed "balancing" test, which made its appearance the year before *Dennis* in *American Communications Ass'n v. Douds*.[492] There the Court sustained a law barring from access to the NLRB any labor union if any of its officers failed to file annually an oath disclaiming membership in the Communist Party and belief in the violent overthrow of the government.[493] Chief Justice Vinson, for the Court, rejected reliance on the clear and present danger test. "Government's interest here is not in preventing the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced. Its interest is in protecting the free flow of commerce from what Congress considers to be substantial evils of conduct that are not the products of speech at all. Section 9(h), in other words, does not interfere with speech because Congress fears the consequences of speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political affiliations and beliefs. The Board does not contend that political strikes, the substantive evil at which § 9(h) is aimed, are the

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[490] In Yates v. United States, 354 U.S. 298 (1957), the Court substantially limited both the Smith Act and the *Dennis* case by interpreting the Act to require advocacy of unlawful action, to require the urging of doing something now or in the future, rather than merely advocacy of forcible overthrow as an abstract doctrine, and by finding the evidence lacking to prove the former. Of *Dennis*, Justice Harlan wrote: "The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence as 'a rule or principle of action,' and employing 'language of incitement,' id. at 511–12, is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur." Id. at 321.

[491] *Cf.* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 8 (1965). *See* Garner v. Louisiana, 368 U.S. 157, 185–207 (1961) (Justice Harlan concurring).

[492] 339 U.S. 382 (1950). *See also* Osman v. Douds, 339 U.S. 846 (1950). Balancing language was used by Justice Black in his opinion for the Court in Martin v. City of Struthers, 319 U.S. 141, 143 (1943), but it seems not to have influenced the decision. Similarly, in Schneider v. Irvington, 308 U.S. 147, 161–62 (1939), Justice Roberts used balancing language that he apparently did not apply.

[493] The law, § 9(h) of the Taft-Hartley Act, 61 Stat. 146 (1947), was repealed, 73 Stat. 525 (1959), and replaced by a section making it a criminal offense for any person "who is or has been a member of the Communist Party" during the preceding five years to serve as an officer or employee of any union. § 504, 73 Stat. 536 (1959); 29 U.S.C. § 504. It was held unconstitutional in United States v. Brown, 381 U.S. 437 (1965).

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present or impending products of advocacy of the doctrines of Communism or the expression of belief in overthrow of the Government by force. On the contrary, it points out that such strikes are called by persons who, so Congress has found, have the will and power to do so *without* advocacy or persuasion that seeks acceptance in the competition of the market." [494]

The test, rather, must be one of balancing of interests. "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." [495] As the interest in the restriction, the government's right to prevent political strikes and the disruption of commerce, was much more substantial than the limited interest on the other side in view of the relative handful of persons affected in only a partial manner, the Court perceived no difficulty upholding the statute.[496]

Justice Frankfurter, in his concurring opinion in *Dennis v. United States*,[497] rejected the applicability of clear and present danger and adopted a balancing test. "The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interest, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved." [498] But the "careful weighing of conflicting interests" [499] not only placed in the scale the disparately weighed interest of government in self-preservation and the interest of defendants in advocating illegal action, which alone would have determined the balance, it also involved the Justice's philosophy of the "confines of the judicial process" within which the role of courts, in First Amendment litigation as in other, is severely limited. Thus, "[f]ull responsibility" may not be placed in the courts "to balance the relevant factors and ascertain which interest in the circumstances [is] to prevail." "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society." Rather, "[p]rimary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress." [500] Therefore, after considering at some length the factors to be balanced, Justice Frankfurter concluded:

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[494] American Communications Ass'n v. Douds, 339 U.S. 382, 396 (1950).
[495] 339 U.S. at 399.
[496] 339 U.S. at 400–06.
[497] 341 U.S. 494, 517 (1951).
[498] 341 U.S. at 524–25.
[499] 341 U.S. at 542.
[500] 341 U.S. at 525.

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"It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours. Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech. The determination was made after due deliberation, and the seriousness of the congressional purpose is attested by the volume of legislation passed to effectuate the same ends." [501] Only if the balance struck by the legislature is "outside the pale of fair judgment" [502] could the Court hold that Congress was deprived by the Constitution of the power it had exercised.[503]

Thereafter, during the 1950s and the early 1960s, the Court used the balancing test in a series of decisions in which the issues were not, as they were not in *Douds* and *Dennis*, matters of expression or advocacy as a threat but rather were governmental inquiries into associations and beliefs of persons or governmental regulation of associations of persons, based on the idea that beliefs and associations provided adequate standards for predicting future or intended conduct that was within the power of government to regulate or to prohibit. Thus, in the leading case on balancing, *Konigsberg v. State Bar of California*,[504] the Court upheld the refusal of the state to certify an applicant for admission to the bar. Required to satisfy the Committee of Bar Examiners that he was of "good moral character," Konigsberg testified that he did not believe in the violent overthrow of the government and that he had never knowingly been a member of any organization that advocated such action, but he declined to answer any question pertaining to membership in the Communist Party.

For the Court, Justice Harlan began by asserting that freedom of speech and association were not absolutes but were subject to various limitations. Among the limitations, "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved." [505] The governmental interest involved was the assurance that those admitted to the practice of law were committed to lawful change in society and it was proper for the state to be-

[501] 341 U.S. at 550–51.
[502] 341 U.S. at 540.
[503] 341 U.S. at 551.
[504] 366 U.S. 36 (1961).
[505] 366 U.S. at 50–51.

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lieve that one possessed of "a belief, firm enough to be carried over into advocacy, in the use of illegal means to change the form" of government did not meet the standard of fitness.[506] On the other hand, the First Amendment interest was limited because there was "minimal effect upon free association occasioned by compulsory disclosure" under the circumstances. "There is here no likelihood that deterrence of association may result from foreseeable private action . . . for bar committee interrogations such as this are conducted in private. . . . Nor is there the possibility that the State may be afforded the opportunity for imposing undetectable arbitrary consequences upon protected association . . . for a bar applicant's exclusion by reason of Communist Party membership is subject to judicial review, including ultimate review by this Court, should it appear that such exclusion has rested on substantive or procedural factors that do not comport with the Federal Constitution." [507]

Balancing was used to sustain congressional and state inquiries into the associations and activities of individuals in connection with allegations of subversion [508] and to sustain proceedings against the Communist Party and its members.[509] In certain other cases, involving state attempts to compel the production of membership lists of the National Association for the Advancement of Colored People and to investigate that organization, use of the balancing test resulted in a finding that speech and associational rights outweighed the governmental interest claimed.[510] The Court used a balancing test in the late 1960s to protect the speech rights of a public employee who had criticized his employers.[511] Balancing, however, was not used when the Court struck down restrictions on receipt of materials mailed from Communist countries,[512] and it was not used in cases involving picketing, pamphleteering, and demonstrating in pub-

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[506] 366 U.S. at 52.

[507] 366 U.S. at 52–53. *See also In re* Anastaplo, 366 U.S. 82 (1961). The status of these two cases is in doubt after Baird v. State Bar, 401 U.S. 1 (1971), and *In re* Stolar, 401 U.S. 23 (1971), in which neither the plurality nor the concurring Justice making up the majority used a balancing test.

[508] Barenblatt v. United States, 360 U.S. 109 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959); Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961).

[509] Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961); Scales v. United States, 367 U.S. 203 (1961).

[510] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964); Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963).

[511] Pickering v. Board of Education, 391 U.S. 563 (1968).

[512] Lamont v. Postmaster General, 381 U.S. 301 (1965).

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lic places.[513] But the only case in which it was specifically rejected involved a statutory regulation like those that had given rise to the test in the first place. *United States v. Robel* [514] held invalid under the First Amendment a statute that made it unlawful for any member of an organization that the Subversive Activities Control Board had ordered to register to work in a defense establishment.[515] Although Chief Justice Warren for the Court asserted that the vice of the law was that its proscription operated *per se* "without any need to establish that an individual's association poses the threat feared by the Government in proscribing it," [516] the rationale of the decision was not clear and present danger but the existence of less restrictive means by which the governmental interest could be accomplished.[517] In a concluding footnote, the Court said: "It has been suggested that this case should be decided by 'balancing' the governmental interests . . . against the First Amendment rights asserted by the appellee. This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other. Our inquiry is more circumscribed. Faced with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights, we have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. In making this determination we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way 'balanced' those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict." [518]

The "Absolutist" View of the First Amendment, With a Note on "Preferred Position".—During much of this period, the opposition to the balancing test was led by Justices Black and Douglas, who espoused what may be called an "absolutist" position, denying

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[513] *E.g.*, Cox v. Louisiana, 379 U.S. 536 and 559 (1965) (2 cases); Edwards v. South Carolina, 372 U.S. 229 (1963); Adderley v. Florida, 385 U.S. 39 (1966); Brown v. Louisiana, 383 U.S. 131 (1966). *But see* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), where balancing reappears and in which other considerations overbalance the First Amendment claims.

[514] 389 U.S. 258 (1967).

[515] Subversive Activities Control Act of 1950, § 5(a)(1)(D), 64 Stat. 992, 50 U.S.C. § 784(a)(1)(D).

[516] United States v. Robel, 389 U.S. 258, 265 (1967).

[517] 389 U.S. at 265–68.

[518] 389 U.S. at 268 n.20.

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the government any power to abridge speech. But the beginnings of such a philosophy may be gleaned in much earlier cases in which a rule of decision based on a preference for First Amendment liberties was prescribed. Thus, Chief Justice Stone in his famous *Carolene Products* "footnote 4" suggested that the ordinary presumption of constitutionality that prevailed when economic regulation was in issue might be reversed when legislation is challenged that restricts "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or that reflects "prejudice against discreet and insular minorities . . . tend[ing] seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[519] Then, in *Murdock v. Pennsylvania*,[520] in striking down a license tax on religious colporteurs, the Court remarked that "[f]reedom of press, freedom of speech, freedom of religion are in a preferred position." Two years later the Court indicated that its decision with regard to the constitutionality of legislation regulating individuals is "delicate . . . [especially] where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions."[521] The "preferred-position" language was sharply attacked by Justice Frankfurter in *Kovacs v. Cooper*,[522] and it dropped from the opinions, although its philosophy did not.

Justice Black expressed his position in many cases but his *Konigsberg* dissent contains one of the lengthiest and clearest expositions of it.[523] That a particular governmental regulation abridged speech or deterred it was to him "sufficient to render the action of

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[519] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). In other words, whereas economic regulation need have merely a rational basis to be constitutional, legislation of the sort to which Chief Justice Stone referred might be subject to "more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment . . . ." Id. Justice Powell later wrote that footnote 4 "is recognized as a primary source of 'strict scrutiny' judicial review." Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 Columbia L. Rev. 1087, 1088 (1982).

[520] 319 U.S. 105, 115 (1943). *See also* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

[521] Thomas v. Collins, 323 U.S. 516, 529–30 (1945).

[522] 336 U.S. 77, 89 (1949) (collecting cases with critical analysis).

[523] Konigsberg v. State Bar of California, 366 U.S. 36, 56 (1961) (dissenting opinion). *See also* Braden v. United States, 365 U.S. 431, 441 (1961) (dissenting); Wilkinson v. United States, 365 U.S. 399, 422 (1961) (dissenting); Uphaus v. Wyman, 364 U.S. 388, 392 (1960) (dissenting); Barenblatt v. United States, 360 U.S. 109, 140 (1959) (dissenting); American Communications Ass'n v. Douds, 339 U.S. 382, 445 (1950); Communist Party v. SACB, 367 U.S. 1, 137 (1961) (dissenting); Beauharnais v. Illinois, 343 U.S. 250, 267 (1952) (dissenting); New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (concurring); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (concurring). For Justice Douglas' position, *see* New York Times Co.

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the State unconstitutional" because he did not subscribe "to the doctrine that permits constitutionally protected rights to be 'balanced' away whenever a majority of this Court thinks that a State might have an interest sufficient to justify abridgment of those freedoms . . . I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." [524] As he wrote elsewhere: "First Amendment rights are beyond abridgment either by legislation that directly restrains their exercise or by suppression or impairment through harassment, humiliation, or exposure by government." [525] But the "First and Fourteenth Amendments . . . take away from government, state and federal, all power to restrict freedom of speech, press, and assembly *where people have a right to be for such purposes*. This does not mean, however, that these amendments also grant a constitutional right to engage in the conduct of picketing or patrolling, whether on publicly owned streets or on privately owned property." [526] Thus, in his last years on the Court, Justice Black, while maintaining an "absolutist" position, increasingly drew a line between "speech" and "conduct which involved communication." [527]

Modern Tests and Standards: Vagueness, Overbreadth, Strict Scrutiny, Intermediate Scrutiny, and Effectiveness of Speech Restrictions.—Vagueness is a due process vice that can be brought into play with regard to any criminal and many civil statutes,[528] but it has a special signficance when applied to governmental restrictions of speech: fear that a vague restriction may apply to one's speech may deter constitutionally protected speech as well as constitutionally unprotected speech. Vagueness has been the basis for voiding numerous such laws, especially in the fields of loyalty oaths,[529]

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v. United States, 403 U.S. at 720 (concurring); Roth v. United States, 354 U.S. 476, 508 (1957) (dissenting); Brandenburg v. Ohio, 395 U.S. 444, 450 (1969) (concurring).

[524] Konigsberg v. State Bar of California, 366 U.S. 36, 60–61 (1961).

[525] Bates v. City of Little Rock, 361 U.S. 516, 528 (1960) (concurring).

[526] Cox v. Louisiana, 379 U.S. 559, 578 (1965) (dissenting) (emphasis in original).

[527] These cases involving important First Amendment issues are dealt with *infra*, under "Speech Plus." *See* Brown v. Louisiana, 383 U.S. 131 (1966); Adderley v. Florida, 385 U.S. 39 (1966).

[528] The vagueness doctrine generally requires that a statute be precise enough to give fair warning to actors that contemplated conduct is criminal, and to provide adequate standards to enforcement agencies, factfinders, and reviewing courts. *See*, *e.g.*, Connally v. General Const. Co., 269 U.S. 385 (1926); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Colautti v. Franklin, 439 U.S. 379 (1979); Village of Hoffman Estates v. The Flipside, 455 U.S. 489 (1982).

[529] *E.g.*, Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Baggett v. Bullitt, 377 U.S. 360 (1964); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

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obscenity and indecency,[530] and restrictions on public demonstrations.[531] It is usually combined with the overbreadth doctrine, which focuses on the need for precision in drafting a statute that may affect First Amendment rights;[532] an overbroad statute that sweeps under its coverage both protected and unprotected speech and conduct will normally be struck down as facially invalid, although in a non-First Amendment situation the Court would simply void its application to protected conduct.[533]

But, even in a First Amendment situation, the Court has written, "there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do now swallow the social benefits of declaring a law 'overbroad,' we have insisted that a law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, before applying the 'strong medicine' of overbreadth invalidation. . . . Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)."[534]

See also Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) (attorney discipline, extrajudicial statements).

[530] *E.g.*, Winters v. New York, 333 U.S. 507 (1948); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Interstate Circuit v. City of Dallas, 390 U.S. 676 (1968); Reno v. ACLU, 521 U.S. 844, 870–874 (1997). In National Endowment for the Arts v. Finley, 524 U.S. 569 (1998), the Court held that a "decency" criterion for the awarding of grants, which "in a criminal statute or regulatory scheme . . . could raise substantial vagueness concerns," was not unconstitutionally vague in the context of a condition on public subsidy for speech.

[531] *E.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940); Gregory v. City of Chicago, 394 U.S. 111 (1969); Coates v. City of Cincinnati, 402 U.S. 611 (1971). *See also* Smith v. Goguen, 415 U.S. 566 (1974) (flag desecration law); Lewis v. City of New Orleans, 415 U.S. 130 (1974) (punishment of opprobrious words); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) (door-to-door canvassing). For an evident narrowing of standing to assert vagueness, *see* Young v. American Mini Theatres, 427 U.S. 50, 60 (1976).

[532] NAACP v. Button, 371 U.S. 415, 432–33 (1963).

[533] *E.g.*, Kunz v. New York, 340 U.S. 290 (1951); Aptheker v. Secretary of State, 378 U.S. 500 (1964); United States v. Robel, 389 U.S. 258 (1967); Zwickler v. Koota, 389 U.S. 241 (1967); Lewis v. City of New Orleans, 415 U.S. 130 (1974); Massachusetts v. Oakes, 491 U.S. 576, 581 (1989). *But see* Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184, 1190 (2008) (facial challenge to burden on right of association rejected "where the statute has a 'plainly legitimate sweep'").

[534] Virginia v. Hicks, 539 U.S. 113, 119–20, 124 (2003) (italics in original; citations omitted) (upholding, as not addressed to speech, an ordinance banning from streets within a low-income housing development any person who is not a resident or employee and who "cannot demonstrate a legitimate business or social purpose for being on the premises"). Virginia v. Hicks cited Broadrick v. Oklahoma, 413 U.S.

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Out of a concern that is closely related to that behind the overbreadth doctrine, the Court has insisted that when the government seeks to carry out a permissible goal and it has available a variety of effective means to do so, "[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort." [535] Thus, the Court applies "strict scrutiny" to content-based regulations of fully protected speech; this means that it requires that such regulations "promote a compelling interest" and use "the least restrictive means to further the articulated interest." [536]

With respect to most speech restrictions to which the Court does not apply strict scrutiny, the Court applies intermediate scrutiny; *i.e.*, scrutiny that is "midway between the 'strict scrutiny' demanded for content-based regulation of speech and the 'rational basis' standard that is applied—under the Equal Protection Clause—to government regulation of nonspeech activities." [537] Intermediate scrutiny requires that the governmental interest be "significant" or "substantial" or "important" (but not necessarily "compelling"), and it requires that the restriction be narrowly tailored (but not necessarily the least restrictive means to advance the governmental interest). Speech restrictions to which the Court does not apply strict scrutiny include those that are not content-based (time, place, or manner restrictions; incidental restrictions) and those that restrict categories of speech to which the Court accords less than full First

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601 (1973), which, in the majority opinion and in Justice Brennan's dissent, id. at 621, contains extensive discussion of the overbreadth doctrine. Other restrictive decisions include Arnett v. Kennedy, 416 U.S. 134, 158–64 (1974); Parker v. Levy, 417 U.S. 733, 757–61 (1974); and New York v. Ferber, 458 U.S. 747, 766–74 (1982). Nonetheless, the doctrine continues to be used across a wide spectrum of First Amendment cases. Bigelow v. Virginia, 421 U.S. 809, 815–18 (1975); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Doran v. Salem Inn, 422 U.S. 922, 932–34 (1975); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 633–39 (1980); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984) (charitable solicitation statute placing 25 percent cap on fundraising expenditures); City of Houston v. Hill, 482 U.S. 451 (1987) (city ordinance making it unlawful to "oppose, molest, abuse, or interrupt" police officer in performance of duty); Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987) (resolution banning all "First Amendment activities" at airport); Reno v. ACLU, 521 U.S. 844, 874–879 (1997) (statute banning "indecent" material on the Internet).

[535] Thompson v. Western States Medical Center, 535 U.S. 357, 373 (2002).

[536] Sable Communications of California v. FCC, 492 U.S. 115, 126 (1989).

[537] Madsen v. Women's Health Center, Inc., 512 U.S. 753, 790 (1994) (parentheses omitted). The Court, however, applied a rational basis standard to uphold a state statute that banned the sale of sexually explicit material to minors. Ginsberg v. New York, 390 U.S. 629, 641 (1968). Of course, governmental restrictions on some speech, such as obscenity and fighting words, receive no First Amendment scrutiny, except that particular instances of such speech may not be discriminated against on the basis of hostility "towards the underlying message expressed." R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).

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Amendment protection (campaign contributions; commercial speech).[538] Note that restrictions on expression may be content-based, but will not receive strict scrutiny if they "are *justified* without reference to the content of the regulated speech."[539] Examples are bans on nude dancing, and zoning restrictions on pornographic theaters or bookstores, both of which, although content-based, receive intermediate scrutiny on the ground that they are "aimed at combating crime and other negative secondary effects," and not at the content of speech.[540]

The Court uses tests closely related to one another in free speech cases in which it applies intermediate scrutiny. It has indicated that the test for determining the constitutionality of an incidental restriction on speech "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions,"[541] and that "the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context."[542]

In addition, the Supreme Court generally requires—even when applying less than strict scrutiny—that, "[w]hen the government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct

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[538] *E.g.*, Frisby v. Schultz, 487 U.S. 474, 481 (1988) (time, place, and manner restriction upheld as "narrowly tailored to serve a significant government interest, and leav[ing] open ample alternative channels of communication"); Ward v. Rock Against Racism, 491 U.S. 781, 798–799 (1989) (incidental restriction upheld as "promot[ing] a substantial governmental interest that would be achieved less effectively absent the regulation"); Buckley v. Valeo, 424 U.S. 1, 25 (1976) (campaign contribution ceiling "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedom"); Board of Trustees v. Fox, 492 U.S. 469, 480 (1989) (commercial speech restrictions need not be "absolutely the least severe that will achieve the desired end," but must exhibit a "'fit' between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable . . . " (internal quotation mark and citation omitted)). *But see* Thompson v. Western States Medical Center, 535 U.S. 357, 371 (2002) (commercial speech restriction struck down as "more extensive than necessary to serve" the government's interests).

[539] Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (emphasis in original).

[540] Erie v. Pap's A.M., 529 U.S. 277, 291 (2000) (upholding ban on nude dancing); Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986) (upholding zoning of "adult motion picture theaters"). Zoning and nude dancing cases are discussed below under "Non-obscene But Sexually Explicit and Indecent Expression."

[541] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984).

[542] United States v. Edge Broadcasting Co., 509 U.S. 418, 430 (1993).

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and material way."[543] The Court has held, however, that to sustain a denial of a statute denying minors access to sexually explicit material "requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors."[544]

In certain other contexts, the Court has relied on "common sense" rather than requiring the government to demonstrate that a recited harm was real and not merely conjectural. For example, it held that a rule prohibiting high school coaches from recruiting middle school athletes did not violate the First Amendment, finding that it needed "no empirical data to credit [the] common-sense conclusion that hard-sell [speech] tactics directed at middle school students could lead to exploitation . . . ."[545] On the use of common sense in free speech cases, Justice Souter wrote: "It is not that common sense is always illegitimate in First Amendment demonstration. The need for independent proof varies with the point that has to be established . . . . But we must be careful about substituting common assumptions for evidence when the evidence is as readily available

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[543] Turner Broadcasting System v. FCC, 512 U.S. 622, 664 (1994) (federal "must-carry" provisions, which require cable television systems to devote a portion of their channels to the transmission of local broadcast television stations, upheld as a content-neutral, incidental restriction on speech, not subject to strict scrutiny). The Court has applied the same principle in weighing the constitutionality of two other types of speech restrictions to which it does not apply strict scrutiny: restrictions on commercial speech, Edenfield v. Fane, 507 U.S. 761, 770–771 (1993) ("a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real"), and restrictions on campaign contributions, Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden").

[544] Ginsberg v. New York, 390 U.S. 629, 641 (1968) (upholding a ban on sale to minors of "girlie" magazines, and noting that, although "studies all agree that a causal link [between 'minors' reading and seeing 'sexual material' and an impairment in their 'ethical and moral development'] has not been demonstrated, they are equally agreed that a causal link has not been disproved either," id. at 641–42). In a case involving a federal statute that restricted "signal bleed" of sexually explicit programming on cable television, a federal district court wrote, "We recognize that the Supreme Court's jurisprudence does not require empirical evidence. Only some minimal amount of evidence is required when sexually explicit programming and children are involved." Playboy Entertainment Group, Inc. v. U.S., 30 F. Supp. 2d 702, 716 (D. Del. 1998), *aff'd*, 529 U.S. 803 (2000). In a case upholding a statute that, to shield minors from "indecent" material, limited the hours that such material may be broadcast on radio and television, a federal court of appeals wrote, "Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material. . . ." Action for Children's Television v. FCC, 58 F.3d 654, 662 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996). A dissenting opinion complained, "[t]here is not one iota of evidence in the record . . . to support the claim that exposure to indecency is harmful—indeed, the nature of the alleged 'harm' is never explained." Id. at 671 (Edwards, C.J., dissenting).

[545] Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 551 U.S. 291, 300 (2007).

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as public statistics and municipal property evaluations, lest we find out when the evidence is gathered that the assumptions are highly debatable." [546]

Is There a Present Test?.—Complexities inherent in the myriad varieties of expression encompassed by the First Amendment guarantees of speech, press, and assembly probably preclude any single standard for determining the presence of First Amendment protection. For certain forms of expression for which protection is claimed, the Court engages in "definitional balancing" to determine that those forms are outside the range of protection.[547] Balancing is in evidence to enable the Court to determine whether certain covered speech is entitled to protection in the particular context in which the question arises.[548] Use of vagueness, overbreadth, and less intrusive means may very well operate to reduce the number of occasions when questions of protection must be answered squarely on the merits. What is observable, however, is the re-emergence, at least in a tentative fashion, of something like the clear and present danger standard in advocacy cases, which is the context in which it was first developed. Thus, in *Brandenburg v. Ohio*,[549] a conviction under a criminal syndicalism statute of advocating the necessity or propriety of criminal or terrorist means to achieve political change was reversed. The prevailing doctrine developed in the Communist Party cases was that "mere" advocacy was protected but that a call for concrete, forcible action even far in the future was not protected speech and knowing membership in an organization calling for such action was not protected association, regardless of the probability of success.[550] In *Brandenburg*, however, the Court reformulated these

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[546] City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 459 (2002) (Souter, J., dissenting).

[547] Thus, obscenity, by definition, is outside the coverage of the First Amendment, Roth v. United States, 354 U.S. 476 (1957); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), as are malicious defamation, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and "fighting words," Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The Court must, of course, decide in each instance whether the questioned expression, as a matter of definition, falls within one of these or another category. *See*, *e.g.*, Jenkins v. Georgia, 418 U.S. 153 (1974); Gooding v. Wilson, 405 U.S. 518 (1972).

[548] *E.g.*, the multifaceted test for determining when commercial speech is protected, Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 566 (1980); the standard for determining when expressive conduct is protected, United States v. O'Brien, 391 U.S. 367, 377 (1968); the elements going into decision with respect to access at trials, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606–10 (1982); and the test for reviewing press "gag orders" in criminal trials, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562–67 (1976), are but a few examples.

[549] 395 U.S. 444 (1969).

[550] Yates v. United States, 354 U.S. 298 (1957); Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 290 (1961). *See also* Bond v. Floyd, 385 U.S. 116 (1966); Watts v. United States, 394 U.S. 705 (1969).

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and other rulings to mean "that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." [551] The Court has not revisited these issues since *Brandenburg*, so the long-term significance of the decision is yet to be determined.[552]

Freedom of Belief

The First Amendment does not expressly speak in terms of liberty to hold such beliefs as one chooses, but in both the religion and the expression clauses, it is clear, liberty of belief is the foundation of the liberty to practice what religion one chooses and to express oneself as one chooses.[553] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." [554] Speaking in the context of religious freedom, the Court said that, although the freedom to act on one's beliefs could be limited, the freedom to believe what one will "is absolute." [555] But matters are not so simple.

Flag Salutes and Other Compelled Speech.—One question that has arisen is whether the government may compel a person to publicly declare or affirm a personal belief. In *Minersville School District v. Gobitis*,[556] the Court had upheld the power of Pennsylva-

[551] 395 U.S. at 447. Subsequent cases relying on *Brandenburg* indicate the standard has considerable bite, but do not elaborate sufficiently enough to begin filling in the outlines of the test. Hess v. Indiana, 414 U.S. 105 (1973); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982). *But see* Haig v. Agee, 453 U.S. 280, 308–09 (1981).

[552] In Stewart v. McCoy, 537 U.S. 993 (2002), Justice Stevens, in a statement accompanying a denial of certiorari, wrote that, while *Brandenburg's* "requirement that the consequence be 'imminent' is justified with respect to mere advocacy, the same justification does not necessarily adhere to some speech that performs a teaching function. . . . Long range planning of criminal enterprises—which may include oral advice, training exercises, and perhaps the preparation of written materials—involve speech that should not be glibly characterized as mere 'advocacy' and certainly may create significant public danger. Our cases have not yet considered whether, and if so to what extent, the First Amendment protects such instructional speech." Id. at 995.

[553] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940); United States v. Ballard, 322 U.S. 78 (1944); Torcaso v. Watkins, 367 U.S. 488 (1961); American Communications Ass'n v. Douds, 339 U.S. 382, 408 (1950); Bond v. Floyd, 385 U.S. 116, 132 (1966); Speiser v. Randall, 357 U.S. 513 (1958); Baird v. State Bar of Arizona, 401 U.S. 1, 5–6 (1971), and id. at 9–10 (Justice Stewart concurring).

[554] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[555] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[556] 310 U.S. 586 (1940).

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nia to expel from its schools certain children—Jehovah's Witnesses—who refused upon religious grounds to join in a flag salute ceremony and recite the pledge of allegiance. "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs." [557] But three years later, in *West Virginia State Bd. of Educ. v. Barnette*,[558] a six-to-three majority of the Court overturned *Gobitis*.[559] Justice Jackson, writing for the Court, chose to ignore the religious argument and to ground the decision upon freedom of speech. The state policy, he said, constituted "a compulsion of students to declare a belief. . . . It requires the individual to communicate by word and sign his acceptance of the political ideas [the flag] bespeaks." [560] The power of a state to follow a policy that "requires affirmation of a belief and an attitude of mind," however, is limited by the First Amendment, which, under the standard then prevailing, required the state to prove that for the students to remain passive during the ritual "creates a clear and present danger that would justify an effort even to muffle expression." [561]

The rationale of *Barnette* became the basis for the Court's decision in *Wooley v. Maynard*,[562] which voided a requirement by the state of New Hampshire that motorists display passenger vehicle license plates bearing the motto "Live Free or Die." [563] Acting on the complaint of a Jehovah's Witness, the Court held that the plaintiff could not be compelled by the state to display a message making an ideological statement on his private property. In a subsequent case, however, the Court found that compelling property owners to facilitate the speech of others by providing access to their property did not violate the First Amendment.[564] Nor was there a con-

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[557] 310 U.S. at 594. Justice Stone alone dissented, arguing that the First Amendment religion and speech clauses forbade coercion of "these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions." Id. at 601.

[558] 319 U.S. 624 (1943).

[559] Justice Frankfurter dissented at some length, denying that the First Amendment authorized the Court "to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen." 319 U.S. at 646, 647. Justices Roberts and Reed simply noted their continued adherence to *Gobitis*. Id. at 642.

[560] 319 U.S. at 631, 633.

[561] 319 U.S. at 633, 634.

[562] 430 U.S. 705 (1977).

[563] The state had prosecuted vehicle owners who covered the motto on their vehicle's license plate.

[564] As to the question of whether one can be required to allow others to speak on his property, compare the Court's opinion in PruneYard Shopping Center v. Rob-

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stitutional violation where compulsory fees were used to subsidize the speech of others.[565]

Other governmental efforts to compel speech have also been held by the Supreme Court to violate the First Amendment; these include a North Carolina statute that required professional fundraisers for charities to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations,[566] a Florida statute that required newspapers to grant political candidates equal space to reply to the newspapers' criticism and attacks on their records,[567] an Ohio statute that prohibited the distribution of anonymous campaign literature,[568] and a Massachusetts statute that required private citizens who organized a parade to include among the marchers a group imparting a message—in this case support for gay rights—that the organizers did not wish to convey.[569]

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ins, 447 U.S. 74, 85–88 (1980) (upholding a state requirement that privately owned shopping centers permit others to engage in speech or petitioning on their property) *with* Justice Powell's concurring opinion in the same case, id. at 96 (would limit the holding to situations where a property owner did not feel compelled to disassociate themselves from the permitted speech).

[565] The First Amendment does not preclude a public university from charging its students an activity fee that is used to support student organizations that engage in extracurricular speech, provided that the money is allocated to those groups by use of viewpoint-neutral criteria. Board of Regents of the Univ. of Wisconsin System v. Southworth, 529 U.S. 217 (2000) (upholding fee except to the extent a student referendum substituted majority determinations for viewpoint neutrality in allocating funds). Nor does the First Amendment preclude the government from "compel[ling] financial contributions that are used to fund advertising," provided that such contributions do not finance "political or ideological" views. Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 471, 472 (1997) (upholding Secretary of Agriculture's marketing orders that assessed fruit producers to cover the expenses of generic advertising of California fruit). But, for compelled financial contributions to be constitutional, the advertising they fund must be, as in *Glickman*, "ancillary to a more comprehensive program restricting marketing autonomy" and not "the principal object of the regulatory scheme." United States v. United Foods, Inc., 533 U.S. 405, 411, 412 (2001) (striking down Secretary of Agriculture's mandatory assessments, used for advertising, upon handlers of fresh mushrooms). The First Amendment is, however, not violated when the government compels financial contributions to fund *government* speech, even if the contributions are raised through a targeted assessment rather than through general taxes. Johanns v. Livestock Marketing Ass'n, 544 U.S. 550 (2005).

[566] Riley v. National Fed'n of the Blind of North Carolina, 487 U.S. 781 (1988). In Illinois ex rel. Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 605 (2003), the Supreme Court held that a fundraiser who has retained 85 percent of gross receipts from donors, but falsely represented that "a significant amount of each dollar donated would be paid over to" a charitable organization, could be sued for fraud.

[567] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). In Pacific Gas & Electric Co. v. Public Utilities Comm'n, 475 U.S. 1 (1986), a Court plurality held that a state could not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees.

[568] McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995).

[569] Hurley v. Irish-American Gay Group, 514 U.S. 334 (1995).

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The principle of *Barnette*, however, does not extend so far as to bar a government from requiring of its employees or of persons seeking professional licensing or other benefits an oath generally but not precisely based on the oath required of federal officers, which is set out in the Constitution, that the taker of the oath will uphold and defend the Constitution.[570] It is not at all clear, however, to what degree the government is limited in probing the sincerity of the person taking the oath.[571]

By contrast, the Supreme Court has found no First Amendment violation when government compels disclosures in commercial speech, or when it compels the labeling of foreign political propaganda. Regarding compelled disclosures in commercial speech, the Court held that an advertiser's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. . . . [A]n advertiser's rights are reasonably protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers. . . . The right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right."[572] Regarding compelled labeling of foreign political propaganda, the Court upheld a provision of the Foreign Agents Registration Act of 1938 that required that, when an agent of a foreign principal seeks to disseminate foreign "political propaganda," he must label such material with certain information, including his identity, the principal's identity, and the fact that he has registered with the Department of Justice. The Court found that "Congress did not prohibit, edit, or restrain the distribution of advocacy materials. . . . To the contrary, Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda."[573]

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[570] Cole v. Richardson, 405 U.S. 676 (1972); Connell v. Higginbotham, 403 U.S. 207 (1971); Bond v. Floyd, 385 U.S. 116 (1966); Knight v. Board of Regents, 269 F. Supp. 339 (S.D.N.Y. 1967) (three-judge court), *aff'd*, 390 U.S. 36 (1968); Hosack v. Smiley, 276 F. Supp. 876 (C.D. Colo. 1967) (three-judge court), *aff'd*, 390 U.S. 744 (1968); Ohlson v. Phillips, 304 F. Supp. 1152 (C.D. Colo. 1969) (three-judge court), *aff'd*, 397 U.S. 317 (1970); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 161 (1971); Fields v. Askew, 279 So. 2d 822 (Fla. 1973), *aff'd per curiam*, 414 U.S. 1148 (1974).

[571] *Compare* Bond v. Floyd, 385 U.S. 116 (1966), *with* Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971).

[572] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651, 652 n.14 (1985). *See* Milavetz, Gallop, & Milavetz v. United States, 559 U.S. ___, No. 08–1119 (2010), slip op. at 19–23 (requiring advertisement for certain "debt relief" businesses to disclose that the services offered include bankruptcy assistance).

[573] Meese v. Keene, 481 U.S. 465, 480 (1987).

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Imposition of Consequences for Holding Certain Beliefs.—Despite the *Cantwell* dictum that freedom of belief is absolute,[574] government has been permitted to inquire into the holding of certain beliefs and to impose consequences on the believers, primarily with regard to its own employees and to licensing certain professions.[575] It is not clear what precise limitations the Court has placed on these practices.

In its disposition of one of the first cases concerning the federal loyalty-security program, the Court of Appeals for the District of Columbia asserted broadly that "so far as the Constitution is concerned there is no prohibition against dismissal of Government employees because of their political beliefs, activities or affiliations."[576] On appeal, this decision was affirmed by an equally divided Court, its being impossible to determine whether this issue was one treated by the Justices.[577] Thereafter, the Court dealt with the loyalty-security program in several narrow decisions not confronting the issue of denial or termination of employment because of beliefs or "beliefs plus." But the same issue was also before the Court in related fields. In *American Communications Ass'n v. Douds*,[578] the Court was again evenly divided over a requirement that, in order for a union to have access to the NLRB, each of its officers must file an affidavit that he neither believed in, nor belonged to an organization that believed in, the overthrow of government by force or by illegal means. Chief Justice Vinson thought the requirement reasonable because it did not prevent anyone from believing what he chose

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[574] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[575] The issue has also arisen in the context of criminal sentencing. Evidence that racial hatred was a motivation for a crime may be taken into account, Barclay v. Florida, 463 U.S. 939, 949 (1983); Wisconsin v. Mitchell, 508 U.S. 476 (1993) (criminal sentence may be enhanced because the defendant intentionally selected his victim on account of the victim's race), but evidence of the defendant's membership in a racist group is inadmissible where race was not a factor and no connection had been established between the defendant's crime and the group's objectives. Dawson v. Delaware, 503 U.S. 159 (1992). *See also* United States v. Abel, 469 U.S. 45 (1984) (defense witness could be impeached by evidence that both witness and defendant belonged to group whose members were sworn to lie on each other's behalf).

[576] Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950). The premise of the decision was that government employment is a privilege rather than a right and that access thereto may be conditioned as the government pleases. But this basis, as the Court has said, "has been thoroughly undermined in the ensuing years." Board of Regents v. Roth, 408 U.S. 564, 571 n.9 (1972). For the vitiation of the right-privilege distinction, *see* "Government as Employer: Free Speech Generally," *infra*.

[577] Bailey v. Richardson, 341 U.S. 918 (1951). *See also* Washington v. McGrath, 341 U.S. 923 (1951), aff'g by an equally divided Court, 182 F.2d 375 (D.C. Cir. 1950). Although no opinions were written in these cases, several Justices expressed themselves on the issues in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951), decided the same day.

[578] 339 U.S. 382 (1950). In a later case raising the same point, the Court was again equally divided. Osman v. Douds, 339 U.S. 846 (1950).

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but only prevented certain people from being officers of unions, and because Congress could reasonably conclude that a person with such beliefs was likely to engage in political strikes and other conduct that Congress could prevent.[579] Dissenting, Justice Frankfurter thought the provision too vague,[580] Justice Jackson thought that Congress could impose no disqualification upon anyone for an opinion or belief that had not manifested itself in any overt act,[581] and Justice Black thought that government had no power to penalize beliefs in any way.[582] Finally, in *Konigsberg v. State Bar of California*,[583] a majority of the Court supported dictum in Justice Harlan's opinion in which he justified some inquiry into beliefs, saying that "[i]t would indeed be difficult to argue that a belief, firm enough to be carried over into advocacy, in the use of illegal means to change the form of the State or Federal Government is an unimportant consideration in determining the fitness of applicants for membership in a profession in whose hands so largely lies the safekeeping of this country's legal and political institutions."

When the same issue returned to the Court years later, three five-to-four decisions left the principles involved unclear.[584] Four Justices endorsed the view that beliefs could not be inquired into as a basis for determining qualifications for admission to the bar;[585] four Justices endorsed the view that while mere beliefs might not be sufficient grounds to debar one from admission, the states were not precluded from inquiring into them for purposes of determining whether one was prepared to advocate violent overthrow of the government and to act on his beliefs.[586] The decisive vote in each case was cast by a single Justice who would not permit denial of admission based on beliefs alone but would permit inquiry into those beliefs to an unspecified extent for purposes of determining that the required oath to uphold and defend the Constitution could be taken

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[579] 339 U.S. at 408–09, 412.

[580] 339 U.S. at 415.

[581] 339 U.S. at 422.

[582] 339 U.S. at 445.

[583] 336 U.S. 36, 51–52 (1961). *See also In re* Anastaplo, 336 U.S. 82, 89 (1961). Justice Black, joined by Justice Douglas and Chief Justice Warren, dissented on the ground that the refusal to admit the two to the state bars was impermissibly based upon their beliefs. Id. at 56, 97.

[584] Baird v. State Bar of Arizona, 401 U.S. 1 (1971); *In re* Stolar, 401 U.S. 23 (1971); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971).

[585] 401 U.S. at 5–8; 401 U.S. at 28–29 (plurality opinions of Justices Black, Douglas, Brennan, and Marshall in *Baird* and *Stolar*, respectively); 401 U.S. at 174–76, 178–80 (Justices Black and Douglas dissenting in *Wadmond*), 186–90 (Justices Marshall and Brennan dissenting in *Wadmond*).

[586] 401 U.S. at 17–19, 21–22 (Justices Blackmun, Harlan, and White, and Chief Justice Burger dissenting in *Baird*).

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in good faith.[587] Changes in Court personnel following this decision would seem to leave the questions presented open to further litigation.

Right of Association

"It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[588] It appears from the Court's opinions that the right of association is derivative from the First Amendment guarantees of speech, assembly, and petition,[589] although it has at times been referred to as an independent freedom protected by the First Amendment.[590] The doctrine is a fairly recent construction, the problems associated with it having previously arisen primarily in the context of loyalty-security investigations of Communist Party membership, and these cases having been resolved without giving rise to any separate theory of association.[591]

Freedom of association as a concept thus grew out of a series of cases in the 1950s and 1960s in which certain states were attempting to curb the activities of the National Association for the Advancement of Colored People. In the first case, the Court unanimously set aside a contempt citation imposed after the organization refused to comply with a court order to produce a list of its members within the state. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."[592] "[T]hese indispensable liberties, whether of speech, press,

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[587] 401 U.S. at 9–10; 401 U.S. at 31 (Justice Stewart concurring in *Baird* and *Stolar*, respectively). How far Justice Stewart would permit government to go is not made clear by his majority opinion in *Wadmond*. 401 U.S. at 161–66.

[588] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460–61 (1958).

[589] 357 U.S. at 460; Bates v. City of Little Rock, 361 U.S. 516, 522–23 (1960); United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 578–79 (1971); Healy v. James, 408 U.S. 169, 181 (1972).

[590] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 461, 463 (1958); NAACP v. Button, 371 U.S. 415, 429–30 (1963); Cousins v. Wigoda, 419 U.S. 477, 487 (1975); *In re* Primus, 436 U.S. 412, 426 (1978); Democratic Party v. Wisconsin, 450 U.S. 107, 121 (1981).

[591] *See* "Maintenance of National Security and the First Amendment," *infra*.

[592] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958).

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or association,"[593] may be abridged by governmental action either directly or indirectly, wrote Justice Harlan, and the state had failed to demonstrate a need for the lists which would outweigh the harm to associational rights which disclosure would produce.

Applying the concept in subsequent cases, the Court, in *Bates v. City of Little Rock*,[594] again held that the disclosure of membership lists, because of the harm to "the right of association," could be compelled only upon a showing of a subordinating interest; ruled in *Shelton v. Tucker*[595] that, though a state had a broad interest to inquire into the fitness of its school teachers, that interest did not justify a regulation requiring all teachers to list all organizations to which they had belonged within the previous five years; again struck down an effort to compel membership lists from the NAACP;[596] and overturned a state court order barring the NAACP from doing any business within the state because of alleged improprieties.[597] Certain of the activities condemned in the latter case, the Court said, were protected by the First Amendment and, though other actions might not have been, the state could not infringe on the "right of association" by ousting the organization altogether.[598]

A state order prohibiting the NAACP from urging persons to seek legal redress for alleged wrongs and from assisting and representing such persons in litigation opened up new avenues when the Court struck the order down as violating the First Amendment.[599] "[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. . . . In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. . . ."

"We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record, whereby Negroes seek through lawful means to achieve legitimate political ends, subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect

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[593] 357 U.S. at 461.
[594] 361 U.S. 516 (1960).
[595] 364 U.S. 479 (1960).
[596] Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961).
[597] NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964).
[598] 377 U.S. at 308, 309.
[599] NAACP v. Button, 371 U.S. 415 (1963).

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certain forms of orderly group activity."[600] This decision was followed in three cases in which the Court held that labor unions enjoyed First Amendment protection in assisting their members in pursuing their legal remedies to recover for injuries and other actions. In the first case, the union advised members to seek legal advice before settling injury claims and recommended particular attorneys;[601] in the second the union retained attorneys on a salaried basis to represent members;[602] in the third, the union recommended certain attorneys whose fee would not exceed a specified percentage of the recovery.[603] Justice Black wrote: "[T]he First Amendment guarantees of free speech, petition, and assembly give railroad workers the rights to cooperate in helping and advising one another in asserting their rights. . . ."[604]

Thus, a right to associate to further political and social views is protected against unreasonable burdening,[605] but the evolution of this right in recent years has passed far beyond the relatively narrow contexts in which it was born.

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[600] 371 U.S. at 429–30. *Button* was applied in *In re* Primus, 436 U.S. 412 (1978), in which the Court found foreclosed by the First and Fourteenth Amendments the discipline visited upon a volunteer lawyer for the American Civil Liberties Union who had solicited someone to use the ACLU to bring suit to contest the sterilization of Medicaid recipients. Both the NAACP and the ACLU were organizations that engaged in extensive litigation as well as lobbying and educational activities, all of which were means of political expression. "[T]he efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants." Id. at 431. "[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." Id. at 426. However, ordinary law practice for commercial ends is not given special protection. "A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 459 (1978). *See also* Bates v. State Bar of Arizona, 433 U.S. 350, 376 n.32 (1977), and see the comparison of *Ohralik* and *Bates* in Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 551 U.S. 291, 296–98 (2007) ("solicitation ban was more akin to a conduct regulation than a speech restriction").

[601] Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964).

[602] United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

[603] United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971).

[604] 401 U.S. at 578–79. These cases do not, however, stand for the proposition that individuals are always entitled to representation of counsel in administrative proceedings. *See* Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985) (upholding limitation to $10 of fee that may be paid attorney in representing veterans' death or disability claims before VA).

[605] *E.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907–15 (1982) (concerted activities of group protesting racial bias); Healy v. James, 408 U.S. 169 (1972) (denial of official recognition to student organization by public college without justification abridged right of association). The right does not, however, protect the decision of entities not truly private to exclude minorities. Runyon v. McCrary, 427 U.S. 160, 175–76 (1976); Norwood v. Harrison, 413 U.S. 455, 469–70 (1973); Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

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Social contacts that do not occur in the context of an "organized association" may be unprotected, however. In holding that a state may restrict admission to certain licensed dance halls to persons between the ages of 14 and 18, the Court declared that there is no "generalized right of 'social association' that includes chance encounters in dance halls." [606]

In a series of three decisions, the Court explored the extent to which associational rights may be burdened by nondiscrimination requirements. First, *Roberts v. United States Jaycees* [607] upheld application of the Minnesota Human Rights Act to prohibit the United States Jaycees from excluding women from full membership. Three years later in *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*,[608] the Court applied *Roberts* in upholding application of a similar California law to prevent Rotary International from excluding women from membership. Then, in *New York State Club Ass'n v. New York City*,[609] the Court upheld against facial challenge New York City's Human Rights Law, which prohibits race, creed, sex, and other discrimination in places "of public accommodation, resort, or amusement," and applies to clubs of more than 400 members providing regular meal service and supported by nonmembers for trade or business purposes. In *Roberts*, both the Jaycees' nearly indiscriminate membership requirements and the state's compelling interest in prohibiting discrimination against women were important to the Court's analysis. The Court found that "the local chapters of the Jaycees are large and basically unselective groups," age and sex being the only established membership criteria in organizations otherwise entirely open to public participation. The Jaycees, therefore, "lack the distinctive characteristics [*e.g.*, small size, identifiable purpose, selectivity in membership, perhaps seclusion from the public eye] that might afford constitutional protection to the decision of its members to exclude women." [610] Similarly, the Court determined in *Rotary International* that Rotary Clubs, designed as community service organizations representing a cross section of business and professional occupations, also do not represent "the kind of intimate or private relation that warrants constitutional protection." [611] And, in *New York City*, the fact "that the antidiscrimina-

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[606] City of Dallas v. Stanglin, 490 U.S. 19, 24, 25 (1989). The narrow factual setting—a restriction on adults dancing with teenagers in public—may be contrasted with the Court's broad assertion that "coming together to engage in recreational dancing . . . is not protected by the First Amendment." Id. at 25.

[607] 468 U.S. 609 (1984).

[608] 481 U.S. 537 (1987).

[609] 487 U.S. 1 (1988).

[610] 468 U.S. at 621.

[611] 481 U.S. at 546.

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tion provisions of the Human Rights Law certainly could be constitutionally applied at least to some of the large clubs, under the Court's decisions in *Rotary* and *Roberts*," and the fact that the clubs were "'commercial' in nature," helped to defeat the facial challenge.[612]

Some amount of First Amendment protection is still due such organizations; the Jaycees had taken public positions on a number of issues, and, the Court in *Roberts* noted, "regularly engage[d] in a variety of civic, charitable, lobbying, fundraising, and other activities worthy of constitutional protection under the First Amendment. There is, however, no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views."[613] Moreover, the state had a "compelling interest to prevent . . . acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages. . . ."[614]

Because of the near-public nature of the Jaycees and Rotary Clubs—the Court in *Roberts* likening the situation to a large business attempting to discriminate in hiring or in selection of customers—the cases may be limited in application, and should not be read as governing membership discrimination by private social clubs.[615] In *New York City*, the Court noted that "opportunities for individual associations to contest the constitutionality of the Law as it may be applied against them are adequate to assure that any overbreadth . . . will be curable through case-by-case analysis of specific facts."[616]

When application of a public accommodations law was viewed as impinging on an organization's ability to present its message, the Court found a First Amendment violation. Massachusetts could not require the private organizers of Boston's St. Patrick's Day parade to allow a group of gays and lesbians to march as a unit proclaiming its members' gay and lesbian identity, the Court held in *Hurley v. Irish-American Gay Group*.[617] To do so would require parade organizers to promote a message they did not wish to promote. *Roberts* and *New York City* were distinguished as not involving "a trespass on the organization's message itself."[618] Those cases

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[612] 487 U.S. at 11–12.
[613] 468 U.S. at 626–27 (citations omitted).
[614] 468 U.S. at 628.
[615] The Court in *Rotary* rejected an assertion that *Roberts* had recognized that Kiwanis Clubs are constitutionally distinguishable, and suggested that a case-by-case approach is necessary to determine whether "the 'zone of privacy' extends to a particular club or entity." 481 U.S. at 547 n.6.
[616] 487 U.S. at 15.
[617] 514 U.S. 334 (1995).
[618] 515 U.S. at 580.

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stood for the proposition that the state could require equal access for individuals to what was considered the public benefit of organization membership. But even if individual access to the parade might similarly be mandated, the Court reasoned, the gay group "could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." [619]

In *Boy Scouts of America v. Dale*,[620] the Court held that application of New Jersey's public accommodations law to require the Boy Scouts of America to admit an avowed homosexual as an adult member violated the organization's "First Amendment right of expressive association." [621] Citing *Hurley*, the Court held that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." [622] The Boy Scouts, the Court found, engages in expressive activity in seeking to transmit a system of values, which include being "morally straight" and "clean." [623] The Court "accept[ed] the Boy Scouts' assertion" that the organization teaches that homosexual conduct is not morally straight.[624] The Court also gave "deference to [the] association's view of what would impair its expression." [625] Allowing a gay rights activist to serve in the Scouts would "force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." [626]

Political Association.—The major expansion of the right of association has occurred in the area of political rights. "There can no longer be any doubt that freedom to associate with others for the

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[619] 515 U.S. at 580–81.
[620] 530 U.S. 640 (2000).
[621] 530 U.S. at 644.
[622] 530 U.S. at 648.
[623] 530 U.S. at 650.
[624] 530 U.S. at 651.
[625] 530 U.S. at 653.
[626] 530 U.S. at 653. In Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 69 (2006), the Court held that the Solomon Amendment's forcing law schools to allow military recruiters on campus does not violate the schools' freedom of expressive association because "[r]ecruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association. This distinction is critical. Unlike the public accommodations law in *Dale*, the Solomon Amendment does not force a law school 'to accept members it does not desire.'" *Rumsfeld* is discussed below under "Government and the Power of the Purse." *See also* ANDREW KOPPELMAN AND TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE?: HOW THE CASE OF BOY SCOUTS OF AMERICAN V. JAMES DALE WARPED THE LAW OF FREE ASSOCIATION (Yale University Press, 2009).

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common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." [627] Usually in combination with an equal protection analysis, the Court since *Williams v. Rhodes* [628] has passed on numerous state restrictions that limit the ability of individuals or groups to join one or the other of the major parties or to form and join an independent political party to further political, social, and economic goals.[629] Of course, the right is not absolute. The Court has recognized that there must be substantial state regulation of the election process, which will necessarily burden the individual's right to vote and to join with others for political purposes. The validity of governmental regulation must be determined by assessing the degree of infringement of the right of association against the legitimacy, strength, and necessity of the governmental interests and the means of implementing those interests.[630] Many restrictions upon political association have survived this sometimes-exacting standard of review, in large measure upon the basis of some of the governmental interests having been found compelling.[631]

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[627] Kusper v. Pontikes, 414 U.S. 51, 56–57 (1973) (citation omitted).

[628] 393 U.S. 23 (1968).

[629] *E.g.*, Rosario v. Rockefeller, 410 U.S. 752 (1973) (time deadline for enrollment in party in order to vote in next primary); Kusper v. Pontikes, 414 U.S. 51 (1973) (barring voter from party primary if he voted in another party's primary within preceding 23 months); American Party of Texas v. White, 415 U.S. 767 (1974) (ballot access restriction); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (number of signatures to get party on ballot); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) (limit on contributions to associations formed to support or oppose referendum measure); Clements v. Fashing, 457 U.S. 957 (1982) (resign-to-run law).

[630] Williams v. Rhodes, 393 U.S. 23, 30–31 (1968); Bullock v. Carter, 405 U.S. 134, 142–143 (1972); Storer v. Brown, 415 U.S. 724, 730 (1974); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 183 (1979).

[631] Thus, in Storer v. Brown, 415 U.S. 724, 736 (1974), the Court found "compelling" the state interest in achieving stability through promotion of the two-party system, and upheld a bar on any independent candidate who had been affiliated with any other party within one year. *Compare* Williams v. Rhodes, 393 U.S. 23, 31–32 (1968) (casting doubt on state interest in promoting Republican and Democratic voters). The state interest in protecting the integrity of political parties was held to justify requiring enrollment of a person in the party up to eleven months before a primary election, Rosario v. Rockefeller, 410 U.S. 752 (1973), but not to justify requiring one to forgo one election before changing parties. Kusper v. Pontikes, 414 U.S. 51 (1973). *See also* Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (efficient operation of government justifies limits on employee political activity); Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982) (permitting political party to designate replacement in office vacated by elected incumbent of that party serves valid governmental interests). Storer v. Brown was distinguished in Anderson v. Celebrezze, 460 U.S. 780 (1983), holding invalid a requirement that independent candidates for President and Vice-President file nominating petitions by March 20 in order to qualify for the November ballot; state interests in assuring

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If people have a First Amendment right to associate with others to form a political party, then it follows that "[a] political party has a First Amendment right to limit its membership as it wishes, and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform. These rights are circumscribed, however, when the State gives a party a role in the election process—as . . . by giving certain parties the right to have their candidates appear on the general-election ballot. Then, for example, the party's racially discriminatory action may become state action that violates the Fifteenth Amendment. And then also the State acquires a legitimate governmental interest in assuring the fairness of the party's nominating process, enabling it to prescribe what that process must be." [632]

A political party's First Amendment right to limit its membership as it wishes does not render invalid a state statute that allows a candidate to designate his party preference on a ballot, even when the candidate "is unaffiliated with, or even repugnant to, the party" he designates.[633] This is because the statute in question "never

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voter education, treating all candidates equally (candidates participating in a party primary also had to declare candidacy in March), and preserving political stability, were deemed insufficient to justify the substantial impediment to independent candidates and their supporters. *See also* Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) (state interests are insubstantial in imposing "closed primary" under which a political party is prohibited from allowing independents to vote in its primaries); California Democratic Party v. Jones, 530 U.S. 567, 577 (2000) (requirement of a "blanket" primary, in which all registered voters, regardless of political affiliation, may participate, unconstitutionally "forces political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival."); Clingman v. Beaver, 544 U.S. 581 (2005) (Oklahoma statute that allowed only registered members of a political party, and registered independents, to vote in the party's primary does not violate freedom of association; Oklahoma's "semiclosed primary system" distinguished from Connecticut's closed primary that the Court struck down in *Tashjian*).

[632] New York State Bd. of Elections v. Lopez Torres, 128 S. Ct. 791, 797–98 (2008) (citations omitted). In *Lopez Torres*, the Court upheld a state statute that required political parties to select judicial candidates at a convention of delegates chosen by party members in a primary election, rather than to select candidates in direct primary elections. The statute was challenged by party members who had not been selected and who claimed "that the convention process that follows the delegate election does not give them a realistic chance to secure the party's nomination." Id. at 799. The Court rejected their challenge, holding that, although a state may require "party-candidate selection through processes more favorable to insurgents, such as primaries," id. at 799, the Constitution does not demand that a state do so. "Party conventions, with their attendant 'smoke-filled rooms' and domination by party leaders, have long been an accepted manner of selecting party candidates." Id. at 799. The plaintiffs had an associational right to join the party but not to have a certain degree of influence in the party. Id. at 798.

[633] Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184, 1189 (2008). This was a 7-to-2 decision written by Justice Thomas, with Justices Scalia and Kennedy dissenting.

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refers to the candidates as nominees of any party, nor does it treat them as such"; it merely allows them to indicate their party preference.[634] The Court acknowledged that "it is *possible* that voters will misinterpret the candidates' party-preference designations as reflecting endorsement by the parties," but "whether voters will be confused by the party-preference designations will depend in significant part on the form of the ballot."[635] If the form of the ballot used in a particular election is such as to confuse voters, then an as-applied challenge to the statute may be appropriate, but a facial challenge, the Court held, is not.[636]

A significant extension of First Amendment association rights in the political context occurred when the Court curtailed the already limited political patronage system. At first holding that a nonpolicymaking, nonconfidential government employee cannot be discharged from a job that he is satisfactorily performing upon the sole ground of his political beliefs or affiliations,[637] the Court subsequently held that "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[638] The Court thus abandoned the concept of policymaking, confidential positions, noting that some such positions would nonetheless be protected, whereas some people filling positions not reached by the description would not be.[639] The Court's opinion makes it difficult to evaluate the ramifications of the decision, but it seems clear that a majority of the Justices adhere to a doctrine of broad associational political

[634] 128 S. Ct. at 1192.

[635] 128 S. Ct. at 1193. The Court saw "simply no basis to presume that a well-informed electorate will interpret a candidate's party preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." Id.

[636] A ballot could avoid confusion by, for example, "includ[ing] prominent disclaimers explaining that party preference reflects only the self-designation of the candidate and not an official endorsement by the party." 128 S. Ct. at 1194. Justice Scalia, joined by Justice Kennedy in dissent, wrote that "[a]n individual's endorsement of a party shapes the voter's view of what the party stands for," and that it is "quite impossible for the ballot to satisfy a reasonable voter that the candidate is 'not associated' with the party for which he has expressed a preference." Id. at 1200.

[637] Elrod v. Burns, 427 U.S. 347 (1976). The limited concurrence of Justices Stewart and Blackmun provided the qualification for an otherwise expansive plurality opinion. Id. at 374.

[638] Branti v. Finkel, 445 U.S. 507, 518 (1980). On the same page, the Court refers to a position in which "party membership was *essential* to the discharge of the employee's governmental responsibilities." (Emphasis added.) A great gulf separates "appropriate" from "essential," so that much depends on whether the Court was using the two words interchangeably or whether the stronger word was meant to characterize the position noted and not to particularize the standard.

[639] Justice Powell's dissents in both cases contain lengthy treatments of and defenses of the patronage system as a glue strengthening necessary political parties. 445 U.S. at 520.

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freedom that will have substantial implications for governmental employment. Refusing to confine *Elrod* and *Branti* to their facts, the court in *Rutan v. Republican Party of Illinois* [640] held that restrictions on patronage apply not only to dismissal or its substantial equivalent, but also to promotion, transfer, recall after layoffs, and hiring of low-level public employees. In 1996, the Court extended *Elrod* and *Branti* to protect independent government contractors.[641]

The protected right of association enables a political party to assert against some state regulation an overriding interest sufficient to overcome the legitimate interests of the governing body. Thus, a Wisconsin law that mandated an open primary election, with party delegates bound to support at the national convention the wishes of the voters expressed in that primary election, although legitimate and valid in and of itself, had to yield to a national party rule providing for the acceptance of delegates chosen only in an election limited to those voters who affiliated with the party.[642]

Provisions of the Federal Election Campaign Act requiring the reporting and disclosure of contributions and expenditures to and by political organizations, including the maintenance by such organizations of records of everyone contributing more than $10 and the reporting by individuals and groups that are not candidates or political committees who contribute or expend more than $100 a year for the purpose of advocating the election or defeat of an identified candidate, were sustained.[643] "[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment. . . . We long have recognized the significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. . . . We have required that the subordinating interests of the State must survive exacting scru-

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[640] 497 U.S. 62 (1990). *Rutan* was a 5–4 decision, with Justice Brennan writing the Court's opinion. The four dissenters indicated, in an opinion by Justice Scalia, that they would not only rule differently in *Rutan*, but that they would also overrule *Elrod* and *Branti*.

[641] O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996) (allegation that city removed petitioner's company from list of those offered towing business on a rotating basis, in retaliation for petitioner's refusal to contribute to mayor's campaign, and for his support of mayor's opponent, states a cause of action under the First Amendment); Board of County Comm'rs v. Umbehr, 518 U.S. 668 (1996) (termination or non-renewal of a public contract in retaliation for the contractor's speech on a matter of public concern can violate the First Amendment).

[642] Democratic Party v. Wisconsin ex rel. LaFollette, 450 U.S. 107 (1981). *See also* Cousins v. Wigoda, 419 U.S. 477 (1975) (party rules, not state law, governed which delegation from state would be seated at national convention; national party had protected associational right to sit delegates it chose).

[643] Buckley v. Valeo, 424 U.S. 1, 60–84 (1976).

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tiny. We have also insisted that there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." [644] The governmental interests effectuated by these requirements—providing the electorate with information, deterring corruption and the appearance of corruption, and gathering data necessary to detect violations—were found to be of sufficient magnitude to be validated even though they might incidentally deter some persons from contributing.[645] A claim that contributions to minor parties and independents should have a blanket exemption from disclosure was rejected inasmuch as an injury was highly speculative; but any such party making a showing of a reasonable probability that compelled disclosure of contributors' names would subject them to threats or reprisals could obtain an exemption from the courts.[646] The *Buckley* Court also narrowly construed the requirement of reporting independent contributions and expenditures in order to avoid constitutional problems.[647]

Conflict Between Organization and Members.—It is to be expected that disputes will arise between an organization and some of its members, and that First Amendment principles may be implicated. Of course, unless there is some governmental connection, there will be no federal constitutional application to any such controversy.[648] But, in at least some instances, when government compels membership in an organization or in some manner lends its authority to such compulsion, there may be constitutional limitations. For example, such limitations can arise in connection with union shop labor agreements permissible under the National Labor Relations Act and the Railway Labor Act.[649]

Union shop agreements generally require, as a condition of employment, membership in the union on or after the thirtieth day

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[644] 424 U.S. at 64 (footnote citations omitted).

[645] 424 U.S. at 66–68.

[646] 424 U.S. at 68–74. Such a showing, based on past governmental and private hostility and harassment, was made in Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982).

[647] 424 U.S. at 74–84.

[648] The Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 537, 29 U.S.C. §§ 411–413, enacted a bill of rights for union members, designed to protect, among other things, freedom of speech and assembly and the right to participate in union meetings on political and economic subjects.

[649] Section 8(a)(3) of the Labor-Management Relations Act of 1947, 61 Stat. 140, 29 U.S.C. § 158(a)(3), permits the negotiation of union shop agreements. Such agreements, however, may be outlawed by state "right to work" laws. Section 14(b), 61 Stat. 151, 29 U.S.C. § 164(b). *See* Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); AFL v. American Sash & Door Co., 335 U.S. 538 (1949). In industries covered by the Railway Labor Act, union shop agreements may be negotiated regardless of contrary state laws. 64 Stat. 1238, 45 U.S.C. § 152, Eleventh; *see* Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956).

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following the beginning of employment. In *Railway Employes' Dep't v. Hanson*, the Supreme Court upheld the constitutionality of such agreements, noting that the record in the case did not indicate that union dues were being "used as a cover for forcing ideological conformity or other action in contravention of the First Amendment," such as by being spent to support political candidates.[650] In *International Ass'n of Machinists v. Street*, where union dues had been collected pursuant to a union shop agreement and had been spent to support political candidates, the Court avoided the First Amendment issue by construing the Railway Labor Act to prohibit the use of compulsory union dues for political causes.[651]

In *Abood v. Detroit Bd. of Education*,[652] the Court found *Hanson* and *Street* applicable to the public employment context.[653] Recognizing that any system of compelled support restricted employees' right not to associate and not to support, the Court nonetheless found the governmental interests served by an "agency shop" agreement[654]—the promotion of labor peace and stability of employer-employee relations—to be of overriding importance and to justify the impact upon employee freedom.[655] But the Court drew a different balance when it considered whether employees compelled to support the union were constitutionally entitled to object to the use of those exacted funds to support political candidates or to advance ideological causes not germane to the union's duties as collective-bargaining representative. To compel one to expend funds in such a way is to violate his freedom of belief and the right to act on those beliefs just as

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[650] 351 U.S. 225, 238 (1956).

[651] 367 U.S. 740, 749–50 (1961). Justices Douglas, Black, Frankfurter, and Harlan would have reached the constitutional issue, with differing results. On the same day that it decided *Street*, the Court, in Lathrop v. Donohue, 367 U.S. 820 (1961), declined to reach the constitutional issues presented by roughly the same fact situation in a suit by lawyers compelled to join an "integrated bar." These issues, however, were faced squarely in Keller v. State Bar of California, 496 U.S. 1, 14 (1990), which held that an integrated state bar may not, against a members' wishes, devote compulsory dues to ideological or other political activities not "necessarily or reasonably related to the purpose of regulating the legal profession or improving the quality of legal service available to the people of the State."

[652] 431 U.S. 209 (1977).

[653] That a public entity was the employer and the employees consequently were public employees was deemed constitutionally immaterial for the application of the principles of *Hanson* and *Street*, id. at 226–32, but, in a concurring opinion joined by Chief Justice Burger and Justice Blackmun, Justice Powell found the distinction between public and private employment crucial. Id. at 244.

[654] An agency shop agreement requires all employees, regardless of union membership, to pay a fee to the union that reflects the union's efforts in obtaining employment benefits through collective bargaining. The Court in *Abood* noted that it is the "practical equivalent" of a union shop agreement. 431 U.S. at 217 n.10.

[655] 431 U.S. at 217–23. For a similar argument over the issue of corporate political contributions and shareholder rights, *see* First National Bank v. Bellotti, 435 U.S. 765, 792–95 (1978), and id. at 802, 812–21 (Justice White dissenting).

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much as if government prohibited him from acting to further his own beliefs.[656] The remedy, however, was not to restrain the union from making non-collective-bargaining-related expenditures, but was to require that those funds come only from employees who do not object. Therefore, the lower courts were directed to oversee development of a system under which employees could object generally to such use of union funds and could obtain either a proportionate refund or a reduction of future exactions.[657] Later, the Court further tightened the requirements. A proportionate refund is inadequate because "even then the union obtains an involuntary loan for purposes to which the employee objects";[658] an advance reduction of dues corrects the problem only if accompanied by sufficient information by which employees may gauge the propriety of the union's fee.[659] Therefore, the union procedure must also "provide for a reasonably prompt decision by an impartial decisionmaker."[660]

In *Davenport v. Washington Education Ass'n*,[661] the Court noted that, although *Chicago Teachers Union v. Hudson* had "set forth various procedural requirements that public-sector unions collecting agency fees must observe in order to ensure that an objecting nonmember can prevent the use of his fees for impermissible purposes,"[662] it "never suggested that the First Amendment is implicated whenever governments place limitations on a union's entitlement to agency fees above and beyond what *Abood* and *Hudson* require. To the contrary, we have described *Hudson* as 'outlin[ing] a *minimum* set of procedures by which a [public-sector] union in an agency-shop relationship could meet its requirements under *Abood*.'"[663] Thus, the Court held in *Davenport* that the State of Washington could prohibit "expenditure of a nonmember's agency fees for election-related purposes unless the nonmember affirmatively consents."[664]

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[656] 431 U.S. at 232–37.

[657] 431 U.S. at 237–42. On the other hand, nonmembers may be charged for such general union expenses as contributions to state and national affiliates, expenses of sending delegates to state and national union conventions, and costs of a union newsletter. Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991). A local union may also charge nonmembers a fee that goes to the national union to pay for litigation expenses incurred on behalf of other local units, but only if (1) the litigation is related to collective bargaining rather than political activity, and (2) the litigation charge is reciprocal in nature, *i.e.*, other locals contribute similarly. Locke v. Karass, 129 S. Ct. 798, 802 (2009).

[658] Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, 466 U.S. 435, 444 (1984).

[659] Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986).

[660] 475 U.S. at 309.

[661] 551 U.S. 177 (2007).

[662] 551 U.S. at 181, citing 475 U.S. 292, 302, 304–310.

[663] 551 U.S. at 185, quoting Keller v. State Bar of Cal., 496 U.S. 1, 17 (1990), and adding emphasis.

[664] 551 U.S. at 184.

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The Court added that "Washington could have gone much further, restricting public-sector agency fees to the portion of union dues devoted to collective bargaining. Indeed, it is uncontested that it would be constitutional for Washington to eliminate agency fees entirely." [665]

And then, in *Knox v. Service Employees International Union*,[666] the Court did suggest constitutional limits on a public union assessing political fees in an agency shop other than through a voluntary opt in system. The union in *Knox* had proposed and implemented a special fee to fund political advocacy before providing formal notice with an opportunity for non-union employees to opt out. Five Justices characterized agency shop arrangements in the public sector as constitutionally problematic in the first place, and, then, charged that requiring non-union members to affirmatively opt out of contributing to political activities was "a remarkable boon for unions." Continuing to call opt-out arrangements impingements on the First Amendment rights of non-union members, the majority more specifically held that the Constitution required that separate notices be sent out for special political assessments that allowed non-union employees to opt in rather than requiring them to opt out.[667] Two concurring Justices, echoed by the dissenters, heavily criticized the majority for reaching "significant constitutional issues not contained in the questions presented, briefed, or argued." Rather, the concurrence more narrowly found that unions may not collect special political assesments from non-union members who earlier objected to nonchargeable (*i.e.*, political) expenses, and could only collect from nonobjecting nonmembers after giving notice and an opportunity to opt out.[668]

Doubts on the constitutionality of mandatory union dues in the public sector intensified in *Harris v. Quinn*.[669] The Court openly expressed reservations on *Abood*'s central holding that the collection of an agency fee from public employees withstood First Amendment scrutiny because of the desirability of "labor peace" and the problem of "free ridership." Specifically, the Court questioned (1) the scope of the precedents (like *Hanson* and *Street*) that the *Abood* Court relied on; (2) *Abood*'s failure to appreciate the distinctly political context of public sector unions; and (3) *Abood*'s dismissal of the administrative difficulties in distinguishing between public union ex-

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[665] 551 U.S. at 184 (citations omitted).

[666] 567 U.S. ___, No. 10–1121, slip op. (2012).

[667] Id. at 17 (Alito, J., joined by Roberts, C.J., and by Scalia, Kennedy, and Thomas, JJ.).

[668] 567 U.S. ___, No. 10–1121, slip op. (2012) (Sotomayor, J., joined by Ginsburg, J., concurring).

[669] 573 U.S. ___, No. 11–681, slip op. (2014).

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penditures for collective bargaining and expenditures for political purposes.[670] Notwithstanding these concerns about *Abood*'s core holding, the Court in *Harris* declined to overturn *Abood* outright. Instead, the Court focused on the peculiar status of the employees at issue in the case before it: home health care assistants subsidized by Medicaid. These "partial-public employees" were under the direction and control of their individual clients and not the state, had little direct interaction with state agencies or employees, and derived only limited benefits from the union.[671] As a consequence, the Court concluded that *Abood*'s rationale—the labor peace and free rider concerns—did not justify compelling dissenting home health care assistants to subsidize union speech.[672] The question that remains after *Harris* is whether the Court will, given its open criticism of *Abood*, overturn the 1977 ruling in the future, or whether the Court will continue to limit *Abood* to its facts.[673]

In *Ysursa v. Pocatello Education Ass'n*,[674] the Court upheld an Idaho statute that prohibited payroll deductions for union political activities. Because the statute did not restrict political speech, but merely declined to subsidize it by providing for payroll deductions, the state did not abridge the union's First Amendment right and therefore could justify the ban merely by demonstrating a rational basis for it. The Court found that it was "justified by the State's interest in avoiding the reality or appearance of government favoritism or entanglement with partisan politics."[675]

The Court has held that a labor relations body may not prevent a union member or employee represented exclusively by a union from speaking out at a public meeting on an issue of public concern, simply because the issue was a subject of collective bargaining between the union and the employer.[676]

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[670] *Id.* at 8–20.
[671] *Id.* at 24–27.
[672] *Id.* at 27.
[673] In *Friedrichs v. California Teachers Association*, the Court was equally divided on the question of whether to overrule *Abood*, signaling that *Abood*'s continued viability may be a subject of future debate at the Supreme Court. 578 U.S. ___, No. 14–915, slip op. at 1 (2016).
[674] 129 S. Ct. 1093 (2009).
[675] 129 S. Ct. at 1098. The unions had argued that, even if the limitation was valid as applied at the state level, it violated their First Amendment rights when applied to local public employers. The Court held that a political subdivision, "created by the state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." Id. at 1101, quoting Williams v. Mayor of Baltimore, 289 U.S. 36, 40 (1933).
[676] Madison School Dist. v. WERC, 429 U.S. 167 (1976).

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Maintenance of National Security and the First Amendment

Preservation of the security of the Nation from its enemies, foreign and domestic, is the obligation of government and one of the foremost reasons for government to exist. Pursuit of this goal may lead government officials at times to trespass in areas protected by the guarantees of speech and press and may require the balancing away of rights that might be preserved inviolate at other times. The drawing of the line is committed, not exclusively but finally, to the Supreme Court. In this section, we consider a number of areas in which the necessity to draw lines has arisen.

Punishment of Advocacy.—Criminal punishment for the advocacy of illegal or of merely unpopular goals and ideas did not originate in the United States with the post-World War II concern with Communism. Enactment of and prosecutions under the Sedition Act of 1798[677] and prosecutions under the federal espionage laws[678] and state sedition and criminal syndicalism laws[679] in the 1920s and early 1930s have been alluded to earlier.[680] But it was in the 1950s and the 1960s that the Supreme Court confronted First Amendment concepts fully in determining the degree to which government could proceed against persons and organizations that it believed were plotting and conspiring both to advocate the overthrow of government and to accomplish that goal.

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[677] Ch. 74, 1 Stat. 596 (1798).

[678] The cases included Schenck v. United States, 249 U.S. 47 (1919) (affirming conviction for attempting to disrupt conscription by circulation of leaflets bitterly condemning the draft); Debs v. United States, 249 U.S. 211 (1919) (affirming conviction for attempting to create insubordination in armed forces based on one speech advocating socialism and opposition to war, and praising resistance to the draft); Abrams v. United States, 250 U.S. 616 (1919) (affirming convictions based on two leaflets, one of which attacked President Wilson as a coward and hypocrite for sending troops into Russia and the other of which urged workers not to produce materials to be used against their brothers).

[679] The cases included Gitlow v. New York, 268 U.S. 652 (1925) (affirming conviction based on publication of "manifesto" calling for the furthering of the "class struggle" through mass strikes and other mass action); Whitney v. California, 274 U.S. 357 (1927) (affirming conviction based upon adherence to party which had platform rejecting parliamentary methods and urging a "revolutionary class struggle," the adoption of which defendant had opposed).

[680] *See* discussion under "Adoption and the Common Law Background," and "Clear and Present Danger," *supra*. *See also* Taylor v. Mississippi, 319 U.S. 583 (1943), setting aside convictions of three Jehovah's Witnesses under a statute that prohibited teaching or advocacy intended to encourage violence, sabotage, or disloyalty to the government after the defendants had said that it was wrong for the President "to send our boys across in uniform to fight our enemies" and that boys were being killed "for no purpose at all." The Court found no evil or sinister purpose, no advocacy of or incitement to subversive action, and no threat of clear and present danger to government.

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The Smith Act of 1940[681] made it a criminal offense to knowingly or willfully to advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing the government of the United States or of any state by force or violence, or to organize any association that teaches, advises, or encourages such an overthrow, or to become a member of or to affiliate with any such association. No case involving prosecution under this law was reviewed by the Supreme Court until, in *Dennis v. United States*,[682] it considered the convictions of eleven Communist Party leaders on charges of conspiracy to violate the advocacy and organizing sections of the statute. Chief Justice Vinson's plurality opinion applied a revised clear and present danger test[683] and concluded that the evil sought to be prevented was serious enough to justify suppression of speech. "If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase 'clear and present danger' of the utterances bringing about the evil within the power of Congress to punish. Obviously, the words cannot mean that before the government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the government is required."[684] "The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score."[685]

Justice Frankfurter in concurrence developed a balancing test, which, however, he deferred to the congressional judgment in applying, concluding that "there is ample justification for a legislative judgment that the conspiracy now before us is a substantial threat

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[681] 54 Stat. 670, 18 U.S.C. § 2385.
[682] 341 U.S. 494 (1951).
[683] 341 U.S. at 510.
[684] 341 U.S. at 509.
[685] 341 U.S. at 510–11.

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to national order and security."[686] Justice Jackson's concurrence was based on his reading of the case as involving "a conviction of conspiracy, after a trial for conspiracy, on an indictment charging conspiracy, brought under a statute outlawing conspiracy." Here the government was dealing with "permanently organized, well-financed, semi-secret, and highly disciplined organizations" plotting to overthrow the Government; under the First Amendment "it is not forbidden to put down force and violence, it is not forbidden to punish its teaching or advocacy, and the end being punishable, there is no doubt of the power to punish conspiracy for the purpose."[687] Justices Black and Douglas dissented separately, the former viewing the Smith Act as an invalid prior restraint and calling for reversal of the convictions for lack of a clear and present danger, the latter applying the Holmes-Brandeis formula of clear and present danger to conclude that "[t]o believe that petitioners and their following are placed in such critical positions as to endanger the Nation is to believe the incredible."[688]

In *Yates v. United States*,[689] the convictions of several second-string Communist Party leaders were set aside, a number ordered acquitted, and others remanded for retrial. The decision was based upon construction of the statute and appraisal of the evidence rather than on First Amendment claims, although each prong of the ruling seems to have been informed with First Amendment considerations. Thus, Justice Harlan for the Court wrote that the trial judge had given faulty instructions to the jury in advising that all advocacy and teaching of forcible overthrow was punishable, whether it was language of incitement or not, so long as it was done with an intent to accomplish that purpose. But the statute, the Justice continued, prohibited "advocacy of action," not merely "advocacy in the realm of ideas." "The essential distinction is that those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something."[690] Second, the Court found the evidence insufficient to establish that the Communist Party had engaged in the required advocacy of action, requiring the Government to prove such advocacy in each instance rather than presenting evidence generally about the Party. Additionally, the Court found the evidence insufficient to link five of the de-

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[686] 341 U.S. at 517, 542.
[687] 341 U.S. at 561, 572, 575.
[688] 341 U.S. at 579 (Justice Black dissenting), 581, 589 (Justice Douglas dissenting).
[689] 354 U.S. 298 (1957).
[690] 354 U.S. at 314, 315–16, 320, 324–25.

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fendants to advocacy of action, but sufficient with regard to the other nine.[691]

Compelled Registration of Communist Party.—The Internal Security Act of 1950 provided for a comprehensive regulatory scheme by which "Communist-action organizations" and "Communist-front organizations" could be curbed.[692] Organizations found to fall within one or the other of these designations were required to register and to provide for public inspection membership lists, accountings of all money received and expended, and listings of all printing presses and duplicating machines; members of organizations which failed to register were required to register and members were subject to comprehensive restrictions and criminal sanctions. After a lengthy series of proceedings, a challenge to the registration provisions reached the Supreme Court, which sustained the constitutionality of the section under the First Amendment, only Justice Black dissenting on this ground.[693] Employing the balancing test, Justice Frankfurter for himself and four other Justices concluded that the threat to national security posed by the Communist conspiracy outweighed considerations of individual liberty, the impact of the registration provision in this area in any event being limited to whatever "public opprobrium and obloquy" might attach.[694] Three Justices based their conclusion on findings that the Communist Party was an anti-democratic, secret organization that was subservient to a foreign power and that used more than speech in attempting to achieve its ends, and was therefore subject to extensive governmental regulation.[695]

Punishment for Membership in an Organization That Engages in Proscribed Advocacy.—The Smith Act provision making it a crime to organize or become a member of an organization

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[691] 354 U.S. at 330–31, 332. Justices Black and Douglas would have held the Smith Act unconstitutional. Id. at 339. Justice Harlan's formulation of the standard by which certain advocacy could be punished was noticeably stiffened in Brandenburg v. Ohio, 395 U.S. 444 (1969).

[692] Ch. 1024, 64 Stat. 987. Sections of the Act requiring registration of Communist-action and Communist-front organizations and their members were repealed in 1968. Pub. L. 90–237, § 5, 81 Stat. 766.

[693] Communist Party v. SACB, 367 U.S. 1 (1961). The Court reserved decision on the self-incrimination claims raised by the Party. The registration provisions ultimately floundered on this claim. Albertson v. SACB, 382 U.S. 70 (1965).

[694] 367 U.S. at 102.

[695] 367 U.S. at 170–75 (Justice Douglas dissenting on other grounds), 191 (Justice Brennan and Chief Justice Warren dissenting on other grounds). Justice Black's dissent on First Amendment grounds argued that "Congress has [no] power to outlaw an association, group or party either on the ground that it advocates a policy of violent overthrow of the existing Government at some time in the distant future or on the ground that it is ideologically subservient to some foreign country." Id. at 147.

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that teaches, advocates, or encourages the overthrow of government by force or violence was used by the government against Communist Party members. In *Scales v. United States*,[696] the Court affirmed a conviction under this section and held it constitutional against First Amendment attack. Advocacy such as the Communist Party engaged in, Justice Harlan wrote for the Court, was unprotected under *Dennis*, and he could see no reason why membership that constituted a purposeful form of complicity in a group engaging in such advocacy should be a protected form of association. Of course, "[i]f there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired, but the membership clause . . . does not make criminal all association with an organization which has been shown to engage in illegal advocacy."[697] Only an "active" member of the Party—one who with knowledge of the proscribed advocacy intends to accomplish the aims of the organization—was to be punished, the Court said, not a "nominal, passive, inactive or purely technical" member.[698]

Disabilities Attaching to Membership in Proscribed Organizations.—The consequences of being or becoming a member of a proscribed organization can be severe. Aliens are subject to deportation for such membership.[699] Congress made it unlawful for any member of an organization required to register as a "Communist-action" or a "Communist-front" organization to apply for a passport

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[696] 367 U.S. 203 (1961). Justices Black and Douglas dissented on First Amendment grounds, id. at 259, 262, while Justice Brennan and Chief Justice Warren dissented on statutory grounds. Id. at 278

[697] 367 U.S. at 229.

[698] 367 U.S. at 220. In Noto v. United States, 367 U.S. 290 (1961), the Court reversed a conviction under the membership clause because the evidence was insufficient to prove that the Party had engaged in unlawful advocacy. "[T]he mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it." Id. at 297–98.

[699] *See* 66 Stat. 205 (1952), 8 U.S.C. § 1251(a)(6). "Innocent" membership in an organization that advocates violent overthrow of the government is apparently insufficient to save an alien from deportation. Galvan v. Press, 347 U.S. 522 (1954). Later cases, however, seem to impose a high standard of proof on the government to show a "meaningful association," as a matter of statutory interpretation. Rowoldt v. Perfetto, 355 U.S. 115 (1957); Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963).

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or to use a passport.[700] A now-repealed statute required as a condition of access to NLRB processes by any union that each of its officers must file affidavits that he was not a member of the Communist Party or affiliated with it.[701] The Court has sustained state bar associations in their efforts to probe into applicants' membership in the Communist Party in order to determine whether there was knowing membership on the part of one sharing a specific intent to further the illegal goals of the organization.[702] A section of the Communist Control Act of 1954 was designed to keep the Communist Party off the ballot in all elections.[703] The most recent interpretation of this type of disability is *United States v. Robel*,[704] in which the Court held unconstitutional under the First Amendment a section of the Internal Security Act that made it unlawful for any member of an organization compelled to register as a "Communist-action" or "Communist-front" organization to work in any defense facility. For the Court, Chief Justice Warren wrote that a statute that so infringed upon freedom of association must be much more narrowly drawn to take precise account of the evils at which it permissibly could be aimed. One could be disqualified from holding sensitive positions on the basis of active, knowing membership with a specific intent to further the unlawful goals of an organization, but that membership that was passive or inactive, or by a person unaware of the organization's unlawful aims, or by one who disagreed with

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[700] Subversive Activities Control Act of 1950, § 6, 64 Stat. 993, 50 U.S.C. § 785. The section was declared unconstitutional in Aptheker v. Secretary of State, 378 U.S. 500 (1964), as an infringement of the right to travel, a liberty protected by the Due Process Clause of the Fifth Amendment. But the Court considered the case as well in terms of its restrictions on "freedom of association," emphasizing that the statute reached membership whether it was with knowledge of the organization's illegal aims or not, whether it was active or not, and whether the member intended to further the organization's illegal aims. Id. at 507–14. *But see* Zemel v. Rusk, 381 U.S. 1, 16–17 (1965), in which the Court denied that State Department area restrictions in its passport policies violated the First Amendment, because the policy inhibited action rather than expression, a distinction the Court continued in Haig v. Agee, 453 U.S. 280, 304–10 (1981).

[701] This part of the oath was sustained in American Communications Ass'n v. Douds, 339 U.S. 382 (1950), and Osman v. Douds, 339 U.S. 846 (1950).

[702] Konigsberg v. State Bar of California, 366 U.S. 36 (1961); *In re* Anastaplo, 366 U.S. 82 (1961); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971). Membership alone, however, appears to be an inadequate basis on which to deny admission. Id. at 165–66; Baird v. State Bar of Arizona, 401 U.S. 1 (1971); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

[703] Ch. 886, § 3, 68 Stat. 775, 50 U.S.C. § 842. The section was at issue without a ruling on the merits in Mitchell v. Donovan, 290 F. Supp. 642 (D. Minn. 1968) (ordering names of Communist Party candidates put on ballot); 300 F. Supp. 1145 (D. Minn. 1969) (dismissing action as moot); 398 U.S. 427 (1970) (dismissing appeal for lack of jurisdiction).

[704] 389 U.S. 258 (1967).

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those aims, could not be grounds for disqualification, certainly not for a non-sensitive position.[705]

A somewhat different matter is disqualifying a person for public benefits of some sort because of membership in a proscribed organization or because of some other basis ascribable to doubts about his loyalty. The First Amendment was raised only in dissent when in *Flemming v. Nestor*[706] the Court sustained a statute that required the termination of Social Security old-age benefits to an alien who was deported on grounds of membership in the Communist Party. Proceeding on the basis that no one was "entitled" to Social Security benefits, Justice Harlan for the Court concluded that a rational justification for the law might be the deportee's inability to aid the domestic economy by spending the benefits locally, although a passage in the opinion could be read to suggest that termination was permissible because alien Communists are undeserving of benefits.[707] Of considerable significance in First Amendment jurisprudence is *Speiser v. Randall*,[708] in which the Court struck down a state scheme for denying veterans' property tax exemptions to "disloyal" persons. The system, as interpreted by the state courts, denied the exemption only to persons who engaged in speech that could be criminally punished consistently with the First Amendment, but the Court found the vice of the provision to be that, after each claimant had executed an oath disclaiming his engagement in unlawful speech, the tax assessor could disbelieve the oath taker and deny the exemption, thereby placing on the claimant the burden of proving that he was loyal. "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact-finding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens . . . . In practical operation, therefore, this procedural device must necessarily produce a result which

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[705] 389 U.S. at 265–66. *See also* Schneider v. Smith, 390 U.S. 17 (1968).

[706] 363 U.S. 603 (1960).

[707] 363 U.S. at 612. The passage reads: "Nor . . . can it be deemed irrational for Congress to have concluded that the public purse should not be utilized to contribute to the support of those deported on the grounds specified in the statute." Id. *But see* Sherbert v. Verner, 374 U.S. 398, 404–05, 409 n.9 (1963). Although the right-privilege distinction is all but moribund, *Flemming* was strongly reaffirmed in later cases by emphasis on the noncontractual nature of such benefits. Richardson v. Belcher, 404 U.S. 78, 80–81 (1971); United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 174 (1980).

[708] 357 U.S. 513 (1958).

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the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free." [709]

Employment Restrictions and Loyalty Oaths.—An area in which significant First Amendment issues are often raised is the establishment of loyalty-security standards for government employees. Such programs generally take one of two forms or may combine the two. First, government may establish a system investigating employees or prospective employees under standards relating to presumed loyalty. Second, government may require its employees or prospective employees to subscribe to a loyalty oath disclaiming belief in or advocacy of, or membership in an organization that stands for or advocates, unlawful or disloyal action. The Federal Government's security investigation program has been tested numerous times and First Amendment issues raised, but the Supreme Court has never squarely confronted the substantive constitutional issues, and it has not dealt with the loyalty oath features of the federal program.[710] The Court has, however, had a long running encounter with state loyalty oath programs.[711]

First encountered [712] was a loyalty oath for candidates for public office rather than one for public employees. Accepting the state court construction that the law required each candidate to "make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government by *force or violence*,' and that he is not knowingly a member of an organization engaged in such an attempt," the Court unanimously sustained the provi-

[709] 357 U.S. at 526. For a possible limiting application of the principle, *see* Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 162–64 (1971), and id. at 176–78 (Justices Black and Douglas dissenting), id. at 189 n.5 (Justices Marshall and Brennan dissenting).

[710] The federal program is primarily grounded in two Executive Orders by President Truman and President Eisenhower, E.O. 9835, 12 Fed. Reg. 1935 (1947), and E.O. 10450, 18 Fed. Reg. 2489 (1953), and a significant amendatory Order issued by President Nixon, E.O. 11605, 36 Fed. Reg. 12831 (1971). Statutory bases include 5 U.S.C. §§ 7311, 7531–32. Cases involving the program were decided either on lack of authority for the action being reviewed, *e.g.*, Cole v. Young, 351 U.S. 536 (1956); and Peters v. Hobby, 349 U.S. 331 (1955), or on procedural due process grounds, Greene v. McElroy, 360 U.S. 474 (1959); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961). *But cf.* United States v. Robel, 389 U.S. 258 (1967); Schneider v. Smith, 390 U.S. 17 (1968). A series of three-judge district court decisions, however, invalidated federal loyalty oaths and inquiries. Soltar v. Postmaster General, 277 F. Supp. 579 (N.D. Calif. 1967); Haskett v. Washington, 294 F. Supp. 912 (D.D.C. 1968); Stewart v. Washington, 301 F. Supp. 610 (D.D.C. 1969); National Ass'n of Letter Carriers v. Blount, 305 F. Supp. 546 (D.D.C. 1969) (no-strike oath).

[711] So-called negative oaths or test oaths are dealt with in this section; for the positive oaths, *see* "Imposition of Consequences for Holding Certain Beliefs," *supra*.

[712] Test oaths had first reached the Court in the period following the Civil War, at which time they were voided as *ex post facto* laws and bills of attainder. Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867).

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sion in a one-paragraph *per curiam* opinion.[713] Less than two months later, the Court upheld a requirement that employees take an oath that they had not within a prescribed period advised, advocated, or taught the overthrow of government by unlawful means, nor been a member of an organization with similar objectives; every employee was also required to swear that he was not and had not been a member of the Communist Party.[714] For the Court, Justice Clark perceived no problem with the inquiry into Communist Party membership but cautioned that no issue had been raised whether an employee who was or had been a member could be discharged merely for that reason.[715] With regard to the oath, the Court did not discuss First Amendment considerations but stressed that it believed the appropriate authorities would not construe the oath adversely against persons who were innocent of an organization's purpose during their affiliation, or persons who had severed their associations upon knowledge of an organization's purposes, or persons who had been members of an organization at a time when it was not unlawfully engaged.[716] Otherwise, the oath requirement was valid as "a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty" and as being "reasonably designed to protect the integrity and competency of the service."[717]

In the following Term, the Court sustained a state statute disqualifying for government employment persons who advocated the overthrow of government by force or violence or persons who were members of organizations that so advocated; the statute had been supplemented by a provision applicable to teachers calling for the drawing up of a list of organizations that advocated violent overthrow and making membership in any listed organization *prima fa-*

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[713] Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951) (emphasis original). In Indiana Communist Party v. Whitcomb, 414 U.S. 411 (1974), a requirement that parties and candidates seeking ballot space subscribe to a similar oath was voided because the oath's language did not comport with the advocacy standards of Brandenburg v. Ohio, 395 U.S. 444 (1969). Four Justices concurred more narrowly. 414 U.S. at 452 n.3. *See also* Whitcomb v. Communist Party of Indiana, 410 U.S. 976 (1973).

[714] Garner v. Board of Pub. Works, 341 U.S. 716 (1951)). Justice Frankfurter dissented in part on First Amendment grounds, id. at 724, Justice Burton dissented in part, id. at 729, and Justices Black and Douglas dissented completely, on bill of attainder grounds, id. at 731.

[715] 341 U.S. at 720. Justices Frankfurter and Burton agreed with this ruling. Id. at 725–26, 729–30.

[716] 341 U.S. at 723–24.

[717] 341 U.S. at 720–21. Justice Frankfurter objected that the oath placed upon the takers the burden of assuring themselves that every organization to which they belonged or had been affiliated with for a substantial period of time had not engaged in forbidden advocacy.

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cie evidence of disqualification.[718] Justice Minton observed that everyone had a right to assemble, speak, think, and believe as he pleased, but had no right to work for the state in its public school system except upon compliance with the state's reasonable terms. "If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not."[719] A state could deny employment based on a person's advocacy of overthrow of the government by force or violence or based on unexplained membership in an organization so advocating with knowledge of the advocacy.[720] With regard to the required list, the Justice observed that the state courts had interpreted the law to provide that a person could rebut the presumption attached to his mere membership.[721]

Invalidated the same year was an oath requirement, addressed to membership in the Communist Party and other proscribed organizations, which the state courts had interpreted to disqualify from employment "solely on the basis of organizational membership." Stressing that membership might be innocent, that one might be unaware of an organization's aims, or that he might have severed a relationship upon learning of its aims, the Court struck the law down; one must be or have been a member with knowledge of illegal aims.[722] But subsequent cases firmly reiterated the power of governmental agencies to inquire into the associational relationships of their employees for purposes of determining fitness and upheld dismissals for refusal to answer relevant questions.[723] In *Shelton v. Tucker*,[724] however, a five-to-four majority held that, although a state could inquire into the fitness and competence of its teachers, a requirement that every teacher annually list every organization to which he belonged or had belonged in the previous five years was invalid

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[718] Adler v. Board of Educ., 342 U.S. 485 (1952). Justice Frankfurter dissented because he thought no party had standing. Id. at 497. Justices Black and Douglas dissented on First Amendment grounds. Id. at 508.

[719] 342 U.S. at 492.

[720] 342 U.S. at 492.

[721] 342 U.S. at 494–96.

[722] Wieman v. Updegraff, 344 U.S. 183 (1952).

[723] Beilan v. Board of Education, 357 U.S. 399 (1958); Lerner v. Casey, 357 U.S. 468 (1958); Nelson v. County of Los Angeles, 362 U.S. 1 (1960). *Compare* Slochower v. Board of Higher Education, 350 U.S. 551 (1956). For the self-incrimination aspects of these cases, see Fifth Amendment, "Self-Incrimination: Development and Scope," *infra*.

[724] 364 U.S. 479 (1960). "It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." Id. at 485–86. Justices Frankfurter, Clark, Harlan, and Whittaker dissented. Id. at 490, 496.

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because it was too broad, bore no rational relationship to the state's interests, and had a considerable potential for abuse.

The Court relied on vagueness when loyalty oaths aimed at "subversives" next came before it. In *Cramp v. Board of Public Instruction*,[725] it unanimously held an oath too vague that required one to swear, *inter alia*, that "I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party." Similarly, in *Baggett v. Bullitt*,[726] the Court struck down two oaths, one requiring teachers to swear that they "will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government," and the other requiring all state employees to swear, *inter alia*, that they would not "aid in the commission of any act intended to overthrow, destroy, or alter or assist in the overthrow, destruction, or alteration" of government. Although couched in vagueness terms, the Court's opinion stressed that the vagueness was compounded by its effect on First Amendment rights and seemed to emphasize that the state could not deny employment to one simply because he unintentionally lent indirect aid to the cause of violent overthrow by engaging in lawful activities that he knew might add to the power of persons supporting illegal overthrow.[727]

More precisely drawn oaths survived vagueness attacks but fell before First Amendment objections in the next three cases. *Elfbrandt v. Russell* [728] involved an oath that as supplemented would have been violated by one who "knowingly and willfully becomes or remains a member of the communist party . . . or any other organization having for its purposes the overthrow by force or violence of the government" with "knowledge of said unlawful purpose of said organization." The law's blanketing in of "knowing but guiltless" membership was invalid, wrote Justice Douglas for the Court, because one could be a knowing member but not subscribe to the illegal goals of the organization; moreover, it appeared that one must also have participated in the unlawful activities of the organization before public employment could be denied.[729] Next, in *Keyishian v. Board of Re-*

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[725] 368 U.S. 278 (1961). For further proceedings on this oath, *see* Connell v. Higginbotham, 305 F. Supp. 445 (M.D. Fla. 1970), *aff'd in part and rev'd in part*, 403 U.S. 207 (1971).

[726] 377 U.S. 360 (1964). Justices Clark and Harlan dissented. Id. at 380

[727] 377 U.S. at 369–70.

[728] 384 U.S. 11 (1966). Justices White, Clark, Harlan, and Stewart dissented. Id. at 20.

[729] 384 U.S. at 16, 17, 19. "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities pose no threat, either as citizens or public employees." Id. at 17.

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gents,[730] the oath provisions sustained in *Adler*[731] were declared unconstitutional. A number of provisions were voided as vague,[732] but the Court held invalid a new provision making Communist Party membership *prima facie* evidence of disqualification for employment because the opportunity to rebut the presumption was too limited. It could be rebutted only by denying membership, denying knowledge of advocacy of illegal overthrow, or denying that the organization advocates illegal overthrow. But "legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations."[733] Similarly, in *Whitehill v. Elkins*,[734] an oath was voided because the Court thought it might include within its proscription innocent membership in an organization that advocated illegal overthrow of government.

More recent cases do not illuminate whether membership changes in the Court presage a change in view with regard to the loyalty-oath question. In *Connell v. Higginbotham*[735] an oath provision reading "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence" was invalidated because the statute provided for summary dismissal of an employee refusing to take the oath, with no opportunity to explain that refusal. *Cole v. Richardson*[736] upheld a clause in an oath "that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence, or by any illegal or unconstitutional method" upon the construction that this clause was mere "repetition, whether for emphasis or cadence," of the first part of the oath, which was a valid "uphold and defend" positive oath.

Legislative Investigations and the First Amendment.—The power of inquiry by congressional and state legislative committees in order to develop information as a basis for legislation[737] is subject to some uncertain limitation when the power as exercised results in deterrence or penalization of protected beliefs, associations, and conduct. Although the Court initially indicated that it

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[730] 385 U.S. 589 (1967). Justices Clark, Harlan, Stewart, and White dissented. Id. at 620.

[731] Adler v. Board of Education, 342 U.S. 485 (1952).

[732] Keyishian v. Board of Regents, 385 U.S. 589, 597–604 (1967).

[733] 385 U.S. at 608. The statement here makes specific intent or active membership alternatives in addition to knowledge, whereas Elfbrandt v. Russell, 384 U.S. 11, 19 (1966), requires both in addition to knowledge.

[734] 389 U.S. 54 (1967). Justices Harlan, Stewart, and White dissented. Id. at 62.

[735] 403 U.S. 207 (1971).

[736] 405 U.S. 676, 683–84 (1972).

[737] *See* subtopics under "Investigations in Aid of Legislation," *supra*.

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would scrutinize closely such inquiries in order to curb First Amendment infringement,[738] later cases balanced the interests of the legislative bodies in inquiring about both protected and unprotected associations and conduct against what were perceived to be limited restraints upon the speech and association rights of witnesses, and upheld wide-ranging committee investigations.[739] Later, the Court placed the balance somewhat differently and required that the investigating agency show "a subordinating interest which is compelling" to justify the restraint on First Amendment rights that the Court found would result from the inquiry.[740] The issues in this field, thus, remain unsettled.

Interference With Vietnam War Effort.—Possibly the most celebrated governmental action in response to dissent to the Vietnam War—the prosecution of Dr. Benjamin Spock and four others for conspiring to counsel, aid, and abet persons to evade the draft—failed to reach the Supreme Court.[741] Aside from a comparatively minor case,[742] the Court's sole encounter with a Vietnam War protest allegedly involving protected "symbolic conduct" was *United States v. O'Brien*.[743] That case affirmed a conviction and upheld a congressional prohibition against destruction of draft registration certificates; O'Brien had publicly burned his draft card. "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a

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[738] *See* United States v. Rumely, 345 U.S. 41 (1953); Watkins v. United States, 354 U.S. 178, 197–98 (1957); Sweezy v. New Hampshire, 354 U.S. 234, 249–51 (1957). Concurring in the last case, Justices Frankfurter and Harlan would have ruled that the inquiry there was precluded by the First Amendment. Id. at 255.

[739] Barenblatt v. United States, 360 U.S. 109 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959); Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961). Chief Justice Warren and Justices Black, Douglas, and Brennan dissented in each case.

[740] Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963). Justices Harlan, Clark, Stewart, and White dissented. Id. at 576, 583. *See also* DeGregory v. Attorney General of New Hampshire, 383 U.S. 825 (1966).

[741] United States v. Spock, 416 F.2d 165 (1st Cir. 1969).

[742] In Schacht v. United States, 398 U.S. 58 (1970), the Court reversed a conviction under 18 U.S.C. § 702 for wearing a military uniform without authority. The defendant had worn the uniform in a skit in an on-the-street anti-war demonstration, and 10 U.S.C. § 772(f) authorized the wearing of a military uniform in a "theatrical production" so long as the performance did not "tend to discredit" the military. This last clause the Court held an unconstitutional limitation of speech.

[743] 391 U.S. 367 (1968).

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sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[744] Finding that the government's interest in having registrants retain their cards at all times was an important one and that the prohibition of destruction of the cards worked no restriction of First Amendment freedoms broader than necessary to serve the interest, the Court upheld the statute. Subsequently, the Court upheld a "passive enforcement" policy singling out for prosecution for failure to register for the draft those young men who notified authorities of an intention not to register for the draft and those reported by others.[745]

Suppression of Communist Propaganda in the Mails.—A 1962 statute authorizing the Post Office Department to retain all mail from abroad that was determined to be "communist political propaganda" and to forward it to an addressee only upon his request was held unconstitutional in *Lamont v. Postmaster General*.[746] The Court held that to require anyone to request receipt of mail determined to be undesirable by the government was certain to deter and inhibit the exercise of First Amendment rights to receive information.[747] Distinguishing *Lamont*, the Court in 1987 upheld statutory classification as "political propaganda" of communications or expressions by or on behalf of foreign governments, foreign "principals," or their agents, and reasonably adapted or intended to influence United States foreign policy.[748] "The physical detention of materials, not their mere designation as 'communist political propaganda,' was the offending element of the statutory scheme [in *Lamont*]."[749]

Exclusion of Certain Aliens as a First Amendment Problem.—Although a nonresident alien might be able to present no claim, based on the First Amendment or on any other constitutional pro-

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[744] 391 U.S. at 376–77. The Court applied the *O'Brien* test less deferentially in Turner Broadcasting System v. FCC, 512 U.S. 622 (1994).

[745] Wayte v. United States, 470 U.S. 598 (1985). The incidental restriction on First Amendment rights to speak out against the draft was no greater than necessary to further the government's interests in "prosecutorial efficiency," obtaining sufficient proof prior to prosecution, and promoting general deterrence (or not appearing to condone open defiance of the law). *See also* United States v. Albertini, 472 U.S. 675 (1985) (order banning a civilian from entering military base upheld as applied to attendance at base open house by individual previously convicted of destroying military property).

[746] 381 U.S. 301 (1965). The statute, 76 Stat. 840, was the first federal law the Court ever struck down as an abridgment of the First Amendment speech and press clauses.

[747] 381 U.S. at 307. Justices Brennan, Harlan, and Goldberg concurred, spelling out in some detail the rationale of the protected right to receive information as the basis for the decision.

[748] Meese v. Keene, 481 U.S. 465 (1987).

[749] 481 U.S. at 480.

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vision, to overcome a governmental decision to exclude him from the country, it was arguable that United States citizens who could assert a First Amendment interest in hearing the alien and receiving information from him, such as the right recognized in *Lamont*, could be able to contest such exclusion.[750] But the Court declined to reach the First Amendment issue and to place it in balance when it found that a governmental refusal to waive a statutory exclusion [751] was on facially legitimate and neutral grounds; the Court's emphasis, however, upon the "plenary" power of Congress over admission or exclusion of aliens seemed to indicate where such a balance might be drawn.[752]

Material Support of Terrorist Organizations

Congress may bar supporting the legitimate activities of certain foreign terrorist organizations through speech made to, under the direction of, or in coordination with those groups. So held the Court in *Holder v. Humanitarian Law Project*,[753] a case challenging an effective prohibition on giving training in peaceful dispute resolution, teaching how to petition the United Nations for relief, providing legal expertise in negotiating peace agreements, and the like.[754] Without express reliance on wartime precedents, and yet also without extended discussion of plaintiffs' free speech interests, the Court emphasized findings by the political branches that support meant to promote peaceful conduct can nevertheless further terrorism by designated groups in multiple ways. The Court also cited the narrowness of the proscription imposed. Only carefully defined activities done in concert with previously designated organizations were barred. Independent advocacy and mere membership were not restricted. Given the national security and foreign affairs concerns at stake, Congress had adequately balanced the competing inter-

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[750] The right to receive information has been prominent in the rationale of several cases, *e.g.*, Martin v. City of Struthers, 319 U.S. 141 (1943); Thomas v. Collins, 323 U.S. 516 (1945); Stanley v. Georgia, 394 U.S. 557 (1969).

[751] By §§ 212(a)(28)(D) and (G) of the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1182(a)(28)(D) and (G), aliens who advocate or write and publish "the economic, international, and governmental doctrines of world communism" are made ineligible to receive visas and are thus excluded from the United States. Upon the recommendation of the Secretary of State, however, the Attorney General is authorized to waive these provisions and to admit such an alien temporarily into the country. INA § 212(d)(3)(A), 8 U.S.C. § 1182(d)(3)(A).

[752] Kleindienst v. Mandel, 408 U.S. 753 (1972).

[753] 561 U.S. ___, No. 08–1498, slip op. (2010).

[754] The six-Justice majority also held that the statute at issue gave adequate notice of what conduct was prohibited, a conclusion with which the dissenting Justices agreed, and basic First Amendment rights of association and assembly were not implicated, a conclusion about which the dissent was less sanguine. 561 U.S. ___, No. 08–1498, slip op. at 13–20, 34–35 (2010). *See also* 561 U.S. ___, No. 08–1498, slip op. 1, 3–5 (2010) (Breyer, J., dissenting).

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ests of individual speech and government regulation, deference to the informed judgment of the political branches being due even absent an extensive record of concrete evidence.[755]

Particular Governmental Regulations That Restrict Expression

Government adopts and enforces many measures that are designed to further a valid interest but that may restrict freedom of expression. As an employer, government is interested in attaining and maintaining full production from its employees in a harmonious environment. As enforcer of the democratic method of carrying out the selection of public officials, it is interested in outlawing "corrupt practices" and promoting a fair and smoothly functioning electoral process. As regulator of economic affairs, its interests are extensive. As educator, it desires to impart knowledge and training to the young with as little distraction as possible. All these interests may be achieved with some restriction upon expression, but, if the regulation goes too far, then it will violate the First Amendment.[756]

Government as Employer: Political and Other Outside Activities.—Abolition of the "spoils system" in federal employment brought with it restrictions on political activities by federal employees. In 1876, federal employees were prohibited from requesting from, giving to, or receiving from any other federal employee money for political purposes, and the Civil Service Act of 1883 more broadly forbade civil service employees to use their official authority or influence to coerce political action of any person or to interfere with

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[755] The majority purported to apply a level of scrutiny more rigorous than the intermediate scrutiny test applied in cases in which conduct, rather than the content of speech, is the primary target of regulation. 561 U.S. ___, No. 08–1498, slip op. at 22–23 (2010). The dissent found the majority's analysis to be too deferential and insufficiently exacting, and also thought the case might be susceptible to resolution on statutory grounds if remanded. 561 U.S. ___, No. 08–1498, slip op. 7–22 (2010) (Breyer, J., dissenting).

[756] Highly relevant in this and subsequent sections dealing with governmental incidental restraints upon expression is the distinction the Court has drawn between content-based and content-neutral regulations—a distinction between regulations that serve legitimate governmental interests and those that are imposed because of disapproval of the content of particular expression. *Compare* Police Dep't of Chicago v. Mosle, 408 U.S. 92 (1972); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); *and* Schacht v. United States, 398 U.S. 58 (1970), *with* Greer v. Spock, 424 U.S. 828 (1976); Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973); and United States v. O'Brien, 391 U.S. 367 (1968). Content-based regulations are subject to strict scrutiny, but content-neutral regulations are subject to lesser scrutiny. See "Modern Tests and Standards: Vagueness, Overbreadth, Strict Scrutiny, Intermediate Scrutiny, and Effectiveness of Speech Restrictions," *supra*.

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elections.[757] By the Hatch Act, federal employees, and many state employees as well, are forbidden to "take any active part in political management or in political campaigns."[758] As applied through the regulations and rulings of the Office of Personnel Management, formerly the Civil Service Commission, the Act prevents employees from running for public office, distributing campaign literature, playing an active role at political meetings, circulating nomination petitions, attending a political convention except as a spectator, publishing a letter soliciting votes for a candidate, and all similar activity.[759] The question is whether government, which may not prohibit citizens in general from engaging in these activities, may nonetheless so control the off-duty activities of its own employees.

In *United Public Workers v. Mitchell*,[760] the Court answered in the affirmative. While the Court refused to consider the claims of persons who had not yet engaged in forbidden political activities, it ruled against a mechanical employee of the Mint who had done so. The Court's opinion, by Justice Reed, recognized that the restrictions of political activities imposed by the Act did in some measure impair First Amendment and other constitutional rights,[761] but it based its decision upon the established principle that no right is absolute. The standard by which the Court judged the validity of the permissible impairment of First Amendment rights was a due process standard of reasonableness.[762] Thus, changes in the standards of judging incidental restrictions on expression suggested the possibility of a reconsideration of *Mitchell*.[763] In *Civil Service Commission v. National Association of Letter Carriers*, however, a divided Court, reaffirming *Mitchell*, sustained the Act's limitations upon

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[757] 19 Stat. 143, § 6, 18 U.S.C. §§ 602–03, sustained in *Ex parte* Curtis, 106 U.S. 371 (1882); 22 Stat. 403, as amended, 5 U.S.C. § 7323.

[758] 53 Stat. 1147 § 9(a), (1939), as amended, 5 U.S.C. § 7324(a)(2). By 54 Stat. 767 (1940), as amended, 5 U.S.C. §§ 1501–08, the restrictions on political activity were extended to state and local governmental employees working in programs financed in whole or in part with federal funds. This provision was sustained against federalism challenges in Oklahoma v. Civil Service Comm'n, 330 U.S. 127 (1947). All the states have adopted laws patterned on the Hatch Act. *See* Broadrick v. Oklahoma, 413 U.S. 601, 604 (1973).

[759] The Commission on Political Activity of Government Personnel, Findings and Recommendations 11, 19–24 (Washington: 1968).

[760] 330 U.S. 75, 94–104 (1947). The decision was 4-to-3, with Justice Frankfurter joining the Court on the merits only after arguing that the Court lacked jurisdiction.

[761] 330 U.S. at 94–95.

[762] 330 U.S. at 101–02.

[763] The Act was held unconstitutional by a divided three-judge district court. National Ass'n of Letter Carriers v. Civil Service Comm'n, 346 F. Supp. 578 (D.D.C. 1972).

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political activity against a range of First Amendment challenges.[764] The Court emphasized that the interest of the government in forbidding partisan political activities by its employees was so substantial that it overrode the rights of those employees to engage in political activities and association;[765] therefore, a statute that barred in plain language a long list of activities would clearly be valid.[766] The issue in *Letter Carriers*, however, was whether the language that Congress had enacted, forbidding employees to take "an active part in political management or in political campaigns,"[767] was unconstitutional on its face, either because the statute was too imprecise to allow government employees to determine what was forbidden and what was permitted, or because the statute swept in under its coverage conduct that Congress could not forbid as well as conduct subject to prohibition or regulation. With respect to vagueness, plaintiffs contended and the lower court had held that the quoted proscription was inadequate to provide sufficient guidance and that the only further elucidation Congress had provided was in a section stating that the forbidden activities were the same activities that the Commission had as of 1940, and reaching back to 1883, "determined are at the time of the passage of this act prohibited on the part of employees . . . by the provisions of the civil-service rules. . . ."[768] This language had been included, it was contended, to deprive the Commission of power to alter thousands of rulings it had made that were not available to employees and that were in any event mutually inconsistent and too broad.

The Court held, on the contrary, that Congress had intended to confine the Commission to the boundaries of its rulings as of 1940 but had further intended the Commission by a process of case-by-case adjudication to flesh out the prohibition and to give content to it. The Commission had done that. It had regularly summarized in understandable terms the rules that it applied, and it was authorized as well to issue advisory opinions to employees uncertain of the propriety of contemplated conduct. "[T]here are limitations in the English language with respect to being both specific and man-

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[764] 413 U.S. 548 (1973). In Broadrick v. Oklahoma, 413 U.S. 601 (1973), the Court refused to consider overbreadth attacks on a state statute of much greater coverage because the plaintiffs had engaged in conduct that the statute clearly could constitutionally proscribe.

[765] The interests the Court recognized as served by the proscription on partisan activities were (1) the interest in the efficient and fair operation of governmental activities and the appearance of such operation, (2) the interest in fair elections, and (3) the interest in protecting employees from improper political influences. 413 U.S. at 557–67.

[766] 413 U.S. at 556.

[767] 413 U.S. at 554, 570 n.17.

[768] 413 U.S. at 570 n.17.

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ageably brief," said the Court, but it thought the prohibitions as elaborated in Commission regulations and rulings were "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interests."[769] There were conflicts, the Court conceded, between some of the things forbidden and some of the protected expressive activities, but these were at most marginal. Thus, some conduct arguably protected did under some circumstances so partake of partisan activities as to be properly proscribable. But the Court would not invalidate the entire statute for this degree of overbreadth.[770] Subsequently, in *Bush v. Lucas*[771] the Court held that the civil service laws and regulations constitute a sufficiently "elaborate, comprehensive scheme" to afford federal employees an adequate remedy for deprivation of First Amendment rights as a result of disciplinary actions by supervisors, and that therefore there is no need to create an additional judicial remedy for the constitutional violation.

The Hatch Act cases were distinguished in *United States v. National Treasury Employees Union (NTEU)*,[772] in which the Court struck down an honoraria ban as applied to lower-level employees of the Federal Government. The honoraria ban suppressed employees' right to free expression while the Hatch Act sought to protect that right, and also there was no evidence of improprieties in acceptance of honoraria by members of the plaintiff class of federal employees.[773] The Court emphasized further difficulties with the "crudely crafted" honoraria ban: it was limited to expressive activities and had no application to other sources of outside income, it applied when neither the subjects of speeches and articles nor the persons or groups paying for them bore any connection to the employee's job responsibilities, and it exempted a "series" of speeches or articles without also exempting individual articles and speeches. These "anomalies" led the Court to conclude that the "speculative benefits" of the ban were insufficient to justify the burdens it imposed on expressive activities.[774]

Government as Employer: Free Expression Generally.—In recent decades, the Court has eliminated the "right-privilege" dis-

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[769] 413 U.S. at 578–79.
[770] 413 U.S. at 580–81.
[771] 462 U.S. 367, 385 (1983).
[772] 513 U.S. 454 (1995).
[773] See 513 U.S. at 471. The plaintiff class consisted of all Executive Branch employees below grade GS–16. Also covered by the ban were senior executives, Members of Congress, and other federal officers, but the possibility of improprieties by these groups did not justify application of the ban to "the vast rank and file of federal employees below grade GS–16."Id. at 472.
[774] 513 U.S. at 477.

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tinction with respect to public employees' free speech rights. Application of that distinction to the public employment context was epitomized in the famous sentence of Justice Holmes': "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." [775] The Supreme Court embraced this application in the early 1950s, first affirming a lower court decision by an evenly divided vote,[776] and soon after applying the distinction itself. Upholding a prohibition on employment as teachers of persons who advocated the desirability of overthrowing the government, the Court declared that "[i]t is clear that such persons have the right under our law to assemble, speak, think and believe as they will. . . . It is equally clear that they have no right to work for the state in the school system on their own terms. They may work for the school system under reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not." [777]

The same year, however, the Court expressly rejected the right-privilege doctrine in another loyalty case. Voiding a loyalty oath requirement conditioned on mere membership in suspect organizations, the Court reasoned that the interest of public employees in being free of such an imposition was substantial. "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. . . . [W]e need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclu-

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[775] McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 2d 517 (1892).

[776] Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an evenly divided Court*, 341 U.S. 918 (1951). The appeals court majority, upholding the dismissal of a government employee against due process and First Amendment claims, asserted that "the plain hard fact is that so far as the Constitution is concerned there is no prohibition against the dismissal of Government employees because of their political beliefs, activities or affiliations. . . . The First Amendment guarantees free speech and assembly, but it does not guarantee Government employ." Id. at 59. Although the Supreme Court issued no opinion in *Bailey*, several Justices touched on the issues in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951). Justices Douglas and Jackson in separate opinions rejected the privilege doctrine as applied by the lower court in *Bailey*. Id. at 180, 185. Justice Black had previously rejected the doctrine in United Public Workers v. Mitchell, 330 U.S. 75, 105 (1947) (dissenting opinion).

[777] Adler v. Board of Education, 342 U.S. 458, 492–93 (1952). Justices Douglas and Black dissented, again rejecting the privilege doctrine. Id. at 508. Justice Frankfurter, who dissented on other grounds, had previously rejected the doctrine in another case, Garner v. Board of Public Works, 341 U.S. 716, 725 (1951) (concurring in part and dissenting in part).

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sion pursuant to a statute is patently arbitrary or discriminatory." [778] The premise here—that there is a constitutional claim against dismissal or rejection—has faded in subsequent cases; the rationale now is that, although government may deny employment, or any benefit for that matter, for any number of reasons, it may not deny employment or other benefits on a basis that infringes a person's constitutionally protected interests. "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible." [779]

However, the fact that government does not have carte blanche in dealing with the constitutional rights of its employees does not mean that it has no power at all. "[I]t cannot be gainsaid," the Court said in *Pickering v. Board of Education*, "that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." [780] *Pickering* concerned the dismissal of a high school teacher who had written a critical letter to a local newspaper reflecting on the administration of the school system. The letter also contained several factual errors. "The problem in any case," Justice Marshall wrote for the Court, "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." [781] The Court laid down no general standard, but undertook a suggestive analy-

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[778] Wieman v. Updegraff, 344 U.S. 183, 190–91, 192 (1952). Some earlier cases had used a somewhat qualified statement of the privilege. United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947); Garner v. Board of Public Works, 341 U.S. 716, 722 (1951).

[779] Perry v. Sindermann, 408 U.S. 593, 597 (1972) (citation omitted). In a companion case, the Court noted that the privilege basis for the appeals court's due process holding in *Bailey* "has been thoroughly undermined in the ensuing years." Board of Regents v. Roth, 408 U.S. 564, 571 n.9 (1972). The test now in due process and other such cases is whether government has conferred a property right in employment which it must respect, but the inquiry when it is alleged that an employee has been penalized for the assertion of a constitutional right is that stated in the text. A finding, however, that protected expression or conduct played a substantial part in the decision to dismiss or punish does not conclude the case; the employer may show by a preponderance of the evidence that the same decision would have been reached in the absence of the protected expression or conduct. Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 416 (1979). *See* Amendment 14, "The Property Interest," *infra*.

[780] 391 U.S. 563, 568 (1968).

[781] 391 U.S. at 568.

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sis. Dismissal of a public employee for criticism of his superiors was improper, the Court indicated, where the relationship of employee to superior was not so close, such as day-to-day personal contact, that problems of discipline or of harmony among coworkers, or problems of personal loyalty and confidence, would arise.[782] The school board had not shown that any harm had resulted from the false statements in the letter, and it could not proceed on the assumption that the false statements were per se harmful, inasmuch as the statements primarily reflected a difference of opinion between the teacher and the board about the allocation of funds. Moreover, the allocation of funds is a matter of important public concern about which teachers have informed and definite opinions that the community should be aware of. "In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." [783]

Combining a balancing test of governmental interest and employee rights with a purportedly limiting statutory construction, the Court, in *Arnett v. Kennedy*,[784] sustained the constitutionality of a federal law that authorized the removal or suspension without pay of an employee "for such cause as will promote the efficiency of the service" when the "cause" cited concerned speech by the employee. He had charged that his superiors had made an offer of a bribe to a private person. The quoted statutory phrase, the Court held, "is without doubt intended to authorize dismissal for speech as well as other conduct." But, recurring to its *Letter Carriers* analysis,[785] it noted that the authority conferred was not impermissibly vague, in-

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[782] 391 U.S. at 568–70. *Contrast* Connick v. Myers, 461 U.S. 138 (1983), where *Pickering* was distinguished on the basis that the employee, an assistant district attorney, worked in an environment where a close personal relationship involving loyalty and harmony was important. "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." Id. at 151–52.

[783] 391 U.S. at 573. *Pickering* was extended to private communications of an employee's views to the employer in Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979), although the Court recognized that different considerations might arise in different contexts. That is, with respect to public speech, content may be determinative in weighing impairment of the government's interests, whereas, with private speech, as "[w]hen a government employee personally confronts his immediate superior, . . . the manner, time, and place in which it is delivered" may also be relevant. Id. at 415 n.4. As discussed below, however, in Garcetti v. Ceballos, 547 U.S. 410 (2006), the Court held that there is no First Amendment protection at all for government employees when they make statements pursuant to their official duties.

[784] 416 U.S. 134 (1974). The quoted language is from 5 U.S.C. § 7501(a).

[785] Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 578–79 (1973).

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asmuch as it is not possible to encompass within a statutory enactment all the myriad situations that arise in the course of employment, and inasmuch as the language used was informed by developed principles of agency adjudication coupled with a procedure for obtaining legal counsel from the agency on the interpretation of the law.[786] Nor was the language overbroad, continued the Court, because it "proscribes only that public speech which improperly damages and impairs the reputation and efficiency of the employing agency, and it thus imposes no greater controls on the behavior of federal employees than are necessary for the protection of the government as an employer. . . . We hold that the language 'such cause as will promote the efficiency of the service' in the Act excludes constitutionally protected speech, and that the statute is therefore not overbroad." [787]

Pickering was distinguished in *Connick v. Myers*,[788] involving what the Court characterized in the main as an employee grievance rather than an effort to inform the public on a matter of public concern. The employee, an assistant district attorney involved in a dispute with her supervisor over transfer to a different section, was fired for insubordination after she circulated a questionnaire among her peers soliciting views on matters relating to employee morale. The Court found this firing permissible. "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." [789] Whether an employee's speech addresses a matter of public concern, the Court indicated, must be determined not only by its content, but also by its form and context.[790] Because one aspect of the employee's speech did raise matters of public concern, *Connick* also applied *Pickering's* balancing test, holding that "a wide degree of deference is appropriate" when "close work-

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[786] Arnett v. Kennedy, 416 U.S. 134, 158–64 (1974).

[787] 416 U.S. at 162. In dissent, Justice Marshall argued: "The Court's answer is no answer at all. To accept this response is functionally to eliminate overbreadth from the First Amendment lexicon. No statute can reach and punish constitutionally protected speech. The majority has not given the statute a limiting construction but merely repeated the obvious." Id. at 229.

[788] 461 U.S. 138 (1983).

[789] 461 U.S. at 146. *Connick* was a 5–4 decision. Justice Brennan wrote the dissent, arguing that information concerning morale at an important government office is a matter of public concern, and that the Court extended too much deference to the employer's judgment as to disruptive effect. Id. at 163–65.

[790] 461 U.S. at 147–48. Justice Brennan objected to this introduction of context, admittedly relevant in balancing interests, into the threshold issue of public concern.

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ing relationships" between employer and employee are involved.[791] The issue of public concern is not only a threshold inquiry, but, under *Connick*, still figures in the balancing of interests: "the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression" and its importance to the public.[792]

On the other hand, the Court has indicated that an employee's speech may be protected as relating to matters of public concern even in the absence of any effort or intent to inform the public.[793] In *Rankin v. McPherson* [794] the Court held protected an employee's comment, made to a co-worker upon hearing of an unsuccessful attempt to assassinate the President, and in a context critical of the President's policies, "If they go for him again, I hope they get him." Indeed, the Court in *McPherson* emphasized the clerical employee's lack of contact with the public in concluding that the employer's interest in maintaining the efficient operation of the office (including public confidence and good will) was insufficient to outweigh the employee's First Amendment rights.[795]

In *City of San Diego v. Roe*,[796] the Court held that a police department could fire a police officer who sold a video on the adults-only section of eBay that showed him stripping off a police uniform and masturbating. The Court found that the officer's "expression does not qualify as a matter of public concern . . . and *Pickering* balancing does not come into play." [797] The Court also noted that the officer's speech, unlike federal employees' speech in *United States v. National Treasury Employees Union (NTEU)*,[798] "was linked to his official status as a police officer, and designed to exploit his employer's image," and therefore "was detrimental to the mission and func-

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[791] 461 U.S. at 151–52.

[792] 461 U.S. at 150. The Court explained that "a stronger showing [of interference with governmental interests] may be necessary if the employee's speech more substantially involve[s] matters of public concern." Id. at 152.

[793] This conclusion was implicit in *Givhan*, 439 U.S. 410 (1979), characterized by the Court in *Connick* as involving "an employee speak[ing] out as a citizen on a matter of general concern, not tied to a personal employment dispute, but . . . [speaking] privately." 461 U.S. at 148, n.8.

[794] 483 U.S. 378 (1987). This was a 5–4 decision, with Justice Marshall's opinion of the Court being joined by Justices Brennan, Blackmun, Powell, and Stevens, and with Justice Scalia's dissent being joined by Chief Justice Rehnquist and by Justices White and O'Connor. Justice Powell added a separate concurring opinion.

[795] "Where . . . an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful function from that employee's private speech is minimal." 483 U.S. at 390–91.

[796] 543 U.S. 77 (2004) (per curiam).

[797] 543 U.S. at 84.

[798] 513 U.S. 454 (1995) (discussed under "Government as Employer: Political and Other Outside Activities," *supra*).

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tions of his employer."[799] The Court, therefore, had "little difficulty in concluding that the City was not barred from terminating Roe under either line of cases [*i.e.*, *Pickering* or *NTEU*]."[800] This leaves uncertain whether, had the officer's expression not been linked to his official status, the Court would have overruled his firing under *NTEU* or would have upheld it under *Pickering* on the ground that his expression was not a matter of public concern.

In *Garcetti v. Ceballos*, the Court cut back on First Amendment protection for government employees by holding that there is no protection—*Pickering* balancing is not to be applied—"when public employees make statements pursuant to their official duties," even if those statements are about matters of public concern.[801] In this case, a deputy district attorney had presented his supervisor with a memo expressing his concern that an affidavit that the office had used to obtain a search warrant contained serious misrepresentations. The deputy district attorney claimed that he was subjected to retaliatory employment actions, and he sued. The Supreme Court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[802] The fact that the employee's speech occurred inside his office, and the fact that the speech concerned the subject matter of his employment, were not sufficient to foreclose First Amendment protection.[803] Rather, the "controlling factor" was "that his expressions were made pursuant to his duties."[804] Therefore, another employee in the office, with different duties, might have had a First Amendment right to utter the speech in question, and the deputy district attorney himself might have had a First Amendment right to communicate the information that

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[799] 543 U.S. at 84.

[800] 543 U.S. at 80.

[801] 547 U.S. 410, 421 (2006).

[802] 547 U.S. at 421. However, "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." Id. at 419. Such necessity, however, may be based on a "common-sense conclusion" rather than on "empirical data." Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 551 U.S. 291, 300 (2007) (citing *Garcetti*).

[803] The Court cited Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979), for these points. In *Givhan*, the Court had upheld the First Amendment right of a public school teacher to complain to the school principal about "employment policies and practices at [the] school which [she] conceived to be racially discriminatory in purpose or effect." Id. at 413. The difference between *Givhan* and *Ceballos* was apparently that Givhan's complaints were not made pursuant to her job duties, whereas Ceballos' were. Therefore, Givhan spoke as a citizen whereas Ceballos spoke as a government employee. See *Ceballos*, 547 U.S. at 420–21.

[804] 547 U.S. at 421.

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he had in a letter to the editor of a newspaper. In these two instances, a court would apply *Pickering* balancing.

In distinguishing between wholly unprotected "employee speech" and quasi-protected "citizen speech," sworn testimony outside of the scope of a public employee's ordinary job duties appears to be "citizen speech." In *Lane v. Franks*,[805] the director of a state government program for underprivileged youth was terminated from his job following his testimony regarding the alleged fraudulent activities of a state legislator that occurred during the legislator's employment in the government program. The employee challenged the termination on First Amendment grounds. The Court held generally that testimony by a subpoenaed public employee made outside the scope of his ordinary job duties is to be treated as speech by a citizen, subject to the *Pickering-Connick* balancing test.[806] The Court noted that "[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation to the court and society at large, to tell the truth."[807] In so holding, the Court confirmed that *Garcetti*'s holding is limited to speech made in accordance with an employee's official job duties and does not extend to speech that merely concerns information learned during that employment.

The Court in *Lane* ultimately found that the plaintiff's speech deserved protection under the *Pickering-Connick* balancing test because the speech was both a matter of public concern (the speech was testimony about misuse of public funds) and the testimony did not raise concerns for the government employer.[808] After *Lane*, some question remains about the scope of protection for public employees, such as police officers or official representatives of an agency of government, who testify pursuant to their official job duties, and whether such speech falls within the scope of *Garcetti*.

The protections applicable to government employees have been extended to independent government contractors, the Court announcing that "the *Pickering* balancing test, adjusted to weigh the government's interests as contractor rather than as employer, determines the extent of their protection."[809]

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[805] 573 U.S. ___, No. 13–483, slip op. (2014).

[806] *Id.* at 9.

[807] *Id.*

[808] *Id.* at 12–13.The Court, however, held that because no relevant precedent in the lower court or in the Supreme Court clearly established that the government employer could not fire an employee because of testimony the employee gave, the defendant was entitled to qualified immunity. *Id.* at 13–17.

[809] Board of County Comm'rs v. Umbehr, 518 U.S. 668, 673 (1996). *See also* O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 715 (1996) (government may

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In sum, although a public employer may not muzzle its employees or penalize them for their expressions and associations to the same extent that a private employer can,[810] the public employer nonetheless has broad leeway in restricting employee speech. If the employee speech does not relate to a matter of "public concern," then *Connick* applies and the employer is largely free of constitutional restraint.[811] If the speech does relate to a matter of public concern, then, unless the speech was made by an employee pursuant to his duties, *Pickering's* balancing test is applied, with the governmental interests in efficiency, workplace harmony, and the satisfactory performance of the employee's duties [812] balanced against the employee's First Amendment rights. Although the general approach is easy to describe, it has proven difficult to apply.[813] The First Amend-

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not "retaliate[ ] against a contractor, or a regular provider of services, for the exercise of rights of political association or the expression of political allegiance").

[810] *See*, *e.g.*, Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980) (political patronage systems impermissibly infringe protected belief and associational rights of employees); Madison School Dist. v. WERC, 429 U.S. 167 (1977) (school teacher may not be prevented from speaking at a public meeting in opposition to position advanced by union with exclusive representation rights). The public employer may, as may private employers, permit collective bargaining and confer on representatives of its employees the right of exclusive representation, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 223–32 (1977), but the fact that its employees may speak does not compel government to listen to them. *See* Smith v. Arkansas State Highway Employees, 441 U.S. 463 (1979) (employees have right to associate to present their positions to their employer but employer not constitutionally required to engage in collective bargaining). *See also* Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984) (public employees not members of union have no First Amendment right to meet separately with public employers compelled by state law to "meet and confer" with exclusive bargaining representative). Government may also inquire into the fitness of its employees and potential employees, but it must do so in a manner that does not needlessly endanger the expression and associational rights of those persons. *See*, *e.g.*, Shelton v. Tucker, 364 U.S. 479 (1969).

[811] In *Connick*, the Court noted that it did not suggest "that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment." Rather, it was beyond First Amendment protection "absent the most unusual of circumstances." 461 U.S. at 147. In *Ceballos*, however, the Court, citing *Connick* at 147, wrote that, if an employee did not speak as a citizen on a matter of public concern, then "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." 547 U.S. at 418.

[812] In some contexts, the governmental interest is more far-reaching. *See* Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (interest in protecting secrecy of foreign intelligence sources).

[813] For analysis of efforts of lower courts to apply *Pickering* and *Connick*, *see* Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1 (1987); and Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 (1988). In *Waters v. Churchill*, 511 U.S. 661 (1994), a plurality of a divided Court concluded that a public employer does not violate the First Amendment if the employer (1) had reasonably believed that the employee's conversation involved personal matters and (2) dismissed the employee because of that reasonable belief, even if the belief was mistaken. *Id.* at 679–80 (plurality opinion) (O'Connor, J., joined by Rehnquist, C.J., Souter & Ginsburg, JJ.). More than two decades later, a six-Justice majority approvingly cited to the

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ment, however, does not stand alone in protecting the speech of public employees; statutory protections for "whistleblowers" add to the mix.[814]

Government as Educator.—Although the Court had previously made clear that students in public schools are entitled to some constitutional protection,[815] as are minors generally,[816] its first attempt to establish standards of First Amendment expression guarantees against curtailment by school authorities came in *Tinker v. Des Moines Independent Community School District*.[817] There, high school principals had banned the wearing of black armbands by students in school as a symbol of protest against United States' actions in Vietnam. Reversing the refusal of lower courts to reinstate students who had been suspended for violating the ban, the Court set out the balance to be drawn. "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. . . . On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to pre-

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plurality opinion from *Waters*, concluding that the employer's motive is dispositive in determining whether a public employee's First Amendment rights had been violated as a result of the employer's conduct. *See* Heffernan v. City of Paterson, 578 U.S. ___, No. 14–1280, slip op. at 5 (2016). In so doing, the Court held that the converse of the situation in *Waters*—a public employer's firing of an employee based on the mistaken belief that the employee *had* engaged in activity *protected* by the First Amendment—was actionable as a violation of the Constitution. *See id.* at 6 ("After all, in the law, what is sauce for the goose is normally sauce for the gander."). Put another way, when an employer demotes an employee to prevent the employee from engaging in protected political activity, the employee is entitled to challenge that unlawful action under the First Amendment, "even if . . . the employer makes a factual mistake about the employee's behavior." *Id.* The Court concluded that the employer's motivation is central with respect to public employee speech issues because of (1) the text of the First Amendment—which "focus[es] upon the activity of the Government"; and (2) the underlying purposes of the public employee speech doctrine, which is to prevent the chilling effect that results when an employee is discharged for having engaged in protected activity. *Id.* at 6–7.

[814] The principal federal law is the Whistleblower Protection Act of 1989, Pub. L. 101–12, 103 Stat. 16, 5 U.S.C. § 1201 note.

[815] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (flag salute); Meyer v. Nebraska, 262 U.S. 390 (1923) (limitation of language curriculum to English); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (compulsory school attendance in public rather than choice of public or private schools).

[816] *In re* Gault, 387 U.S. 1 (1967). Of course, children are in some respects subject to restrictions that could not constitutionally be applied to adults. *E.g.*, Ginsberg v. New York, 390 U.S. 629 (1968) (access to material deemed "harmful to minors," although not obscene as to adults).

[817] 393 U.S. 503 (1969).

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scribe and control conduct in the schools."[818] Restriction on expression by school authorities is only permissible to prevent disruption of educational discipline. "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."[819]

The Court reaffimed *Tinker* in *Healy v. James*,[820] in which it held that the withholding of recognition by a public college administration from a student organization violated the students' right of association, which is implicit in the First Amendment. Denial of recognition, the Court held, was impermissible if it had been based on the local organization's affiliation with the national SDS, or on disagreement with the organization's philosophy, or on a fear of disruption with no evidentiary support. Furthermore, the Court wrote, "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' . . . The college classroom with its surrounding environs is peculiarly the 'market place of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."[821] A college administration may, however, impose a requirement "that a group seeking offical recognition affirm in advance its willingness to adhere to reasonable campus law."[822]

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[818] 393 U.S. at 506, 507.

[819] 393 U.S. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966). *See also* Papish v. Board of Curators, 410 U.S. 667 (1973) (state university could not expel a student for using "indecent speech" in campus newspaper). However, offensive "indecent" speech in the context of a high school assembly is punishable by school authorities. *See* Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (upholding 2-day suspension, and withdrawal of privilege of speaking at graduation, for student who used sophomoric sexual metaphor in speech given to school assembly).

[820] 408 U.S. 169 (1972).

[821] 408 U.S. at 180–81 (internal quotation marks omitted).

[822] Healy v. James, 408 U.S. at 193. Because a First Amendment right was in issue, the burden was on the college to justify its rejection of a request for recognition rather than upon the requesters to justify affirmatively their right to be recognized. Id. at 184. Justice Rehnquist concurred in the result, because in his view a school administration could impose upon students reasonable regulations that would be impermissible if imposed by the government upon all citizens; consequently, he

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Although a public college may not be required to open its facilities generally for use by student groups, once it has done so it must justify any discrimination and exclusions under applicable constitutional norms, such as those developed under the public forum doctrine. Thus, it was constitutionally impermissible for a college to close off its facilities, otherwise open, to students wishing to engage in religious speech.[823]

While it is unclear whether this holding would extend beyond the college level to students in high school or below who are more "impressionable" and perhaps less able to appreciate that equal access does not compromise a school's neutrality toward religion,[824] Congress has done so by statute.[825] On the other hand, a public university that imposed an "accept-all-comers" policy on student groups as a condition of receiving the financial and other benefits of official school recognition did not impair a student religious group's right to expressive association, because the school's policy was reasonable and viewpoint neutral.[826]

When faced with another conflict between a school system's obligation to inculcate community values in students and the free-speech rights of those students, the Court splintered badly, remanding for full trial a case challenging the authority of a school board

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did not think that cases the Court cited that had arisen in the latter situation were controlling. Id. at 201. *See also* Grayned v. City of Rockford, 408 U.S. 104 (1972), in which the Court upheld an anti-noise ordinance that forbade persons on grounds adjacent to a school to willfully make noise or to create any other diversion during school hours that "disturbs or tends to disturb" normal school activities.

[823] Widmar v. Vincent, 454 U.S. 263 (1981). To permit access by religious groups does not violate the Establishment Clause, and, even if the Missouri Constitution "has gone further than the Federal Constitution in proscribing indirect state support for religion, . . . the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well." Id. at 275–276.

[824] 454 U.S. at 274 n.14; *see* Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

[825] By enactment of the Equal Access Act in 1984, Pub. L. 98–377, title VIII, 98 Stat. 1302, 20 U.S.C. §§ 4071–74, Congress applied the same "limited open [public] forum" principles to public high schools, and the Court upheld the Act against First Amendment challenge. Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226 (1990).

[826] Christian Legal Society v. Martinez, 561 U.S. ___, No. 08–1371, slip op. (2010). The Court did not address the more difficult question raised by the school's written policy, which forbade discrimination, among other things, based on religion or sexual orientation, because the parties stipulated that in practice student groups were required to accept all students who complied with neutral membership requirements (e.g., payment of dues). Id. at 11–12. Thus, the Court did not address whether the application of the narrower written anti-discrimination policies constituted viewpoint discrimination against a student group that required its members to adhere to its religious tenets, including the belief that sexual activity should only occur in the context of marriage between a man and a woman. Id. at 21–23 (Alito, J., dissenting).

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to remove certain books from high school and junior high school libraries.[827] In dispute were the school board's reasons for removing the books—whether, as the board alleged, because of vulgarity and other content-neutral reasons, or whether also because of political disagreement with contents. The plurality conceded that school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." At the same time, the plurality thought that students retained substantial free-speech protections and that among these was the right to receive information and ideas. Carefully limiting its discussion to the removal of books from a school library, and excluding the question of the acquisition of books as well as questions of school curricula, the plurality held a school board constitutionally disabled from removing library books in order to deny access to ideas with which it disagrees for political reasons.[828] The four dissenters rejected the contention that school children have a right to receive information and ideas and thought that the proper role of education was to inculcate the community's values, a function into which the federal courts could rarely intrude.[829] The decision provides little guidance to school officials and to the lower courts and may necessitate a revisiting of the controversy by the Supreme Court.

The Court distinguished *Tinker* in *Hazelwood School District v. Kuhlmeier*,[830] in which it relied on public forum analysis to hold that editorial control and censorship of a student newspaper sponsored by a public high school need be only "reasonably related to legitimate pedagogical concerns."[831] "The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."[832] The student newspaper had been created by school officials as a part of the school curriculum, and served "as a supervised learning experience for journalism students."[833] Because no public forum had been created, school officials could maintain editorial control subject only to a reasonable-

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[827] Board of Education v. Pico, 457 U.S. 853 (1982).

[828] 457 U.S. at 862, 864–69, 870–72. Only Justices Marshall and Stevens joined fully Justice Brennan's opinion.

[829] The principal dissent was by Justice Rehnquist. 457 U.S. at 904. *See also* id. at 885 (Chief Justice Burger), 893 (Justice Powell), 921 (Justice O'Connor).

[830] 484 U.S. 260 (1988).

[831] 484 U.S. at 273.

[832] 484 U.S. at 270–71.

[833] 484 U.S. at 270.

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ness standard. Thus, a principal's decision to excise from the publication an article describing student pregnancy in a manner believed inappropriate for younger students, and another article on divorce critical of a named parent, were upheld.

The category of school-sponsored speech subject to *Kuhlmeier* analysis appears to be far broader than the category of student expression still governed by *Tinker*. School-sponsored activities, the Court indicated, can include "publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[834] Because most primary, intermediate, and secondary school environments are tightly structured, with few opportunities for unsupervised student expression,[835] *Tinker* apparently has limited applicability. It may be, for example, that students are protected for off-premises production of "underground" newspapers (but not necessarily for attempted distribution on school grounds) as well as for non-disruptive symbolic speech. For most student speech at public schools, however, *Tinker's* tilt in favor of student expression, requiring school administrators to premise censorship on likely disruptive effects, has been replaced by *Kuhlmeier's* tilt in favor of school administrators' pedagogical discretion.[836]

In *Morse v. Frederick*,[837] the Court held that a school could punish a pupil for displaying a banner that said, "BONG HiTS 4 JESUS," because these words could reasonably be interpreted as "promoting illegal drug use."[838] The Court indicated that it might have reached a different result if the banner had addressed the issue of

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[834] 484 U.S. at 271. Selection of materials for school libraries may fall within this broad category, depending upon what is meant by "designed to impart *particular* knowledge or skills." *See generally* Stewart, *The First Amendment, the Public Schools, and the Inculcation of Community Values*, 18 J. LAW & EDUC. 23 (1989).

[835] The Court in *Kuhlmeier* declined to decide "whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." 484 U.S. at 274, n.7.

[836] One exception may exist for student religious groups covered by the Equal Access Act; in this context the Court seemed to step back from *Kuhlmeier's* broad concept of curriculum-relatedness, seeing no constitutionally significant danger of perceived school sponsorship of religion arising from application of the Act's requirement that high schools provide meeting space for student religious groups on the same basis that they provide such space for student clubs. Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226 (1990).

[837] 127 S. Ct. 2618 (2007).

[838] 127 S. Ct. at 2624.

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"the criminalization of drug use or possession."[839] Justice Alito, joined by Justice Kennedy, wrote a concurring opinion stating that they had joined the majority opinion "on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction on speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'"[840] As *Morse v. Frederick* was a 5-to-4 decision, Justices Alito and Kennedy's votes were necessary for a majority and therefore should be read as limiting the majority opinion with respect to future cases.

Governmental regulation of school and college administration can also implicate the First Amendment. But the Court dismissed as too attenuated a claim to a First Amendment-based academic freedom privilege to withhold peer review materials from EEOC subpoena in an investigation of a charge of sex discrimination in a faculty tenure decision.[841]

Government as Regulator of the Electoral Process: Elections and Referendums.—Government has increasingly regulated the electoral system by which candidates are nominated and elected, requiring disclosure of contributions and certain expenditures, limiting contributions and expenditures, and imposing other regulations.[842] These regulations can restrict freedom of expression and association, which include the rights to join together for political purposes, to promote candidates and issues, and to participate in the political process.[843] The Court is divided with respect to the constitutionality of many of these federal and state restrictions, but it has been consistent in not permitting the government to bar or penalize political speech directly. Thus, it held that the Minnesota Supreme Court could not prohibit candidates for judicial election from announcing their views on disputed legal and political is-

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[839] 127 S. Ct. at 2625.

[840] 127 S. Ct. at 2636.

[841] University of Pennsylvania v. EEOC, 493 U.S. 182 (1990).

[842] The basic federal legislation regulating campaign finances is spread over several titles of the United States Code. The relevant, principal modern laws are the Federal Election Campaign Act of 1971, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263, the Federal Election Campaign Act Amendments of 1979, 93 Stat. 1339, and the Bipartisan Campaign Reform Act of 2002, 116 Stat. 81, found at 2 U.S.C. 431 et seq., and sections of Titles 18 and 26. The Federal Corrupt Practices Act of 1925, 43 Stat. 1074, was upheld in Burroughs v. United States, 290 U.S. 534 (1934), but there was no First Amendment challenge. All states, of course, extensively regulate elections.

[843] *See*, *e.g.*, Mills v. Alabama, 384 U.S. 214, 218–19 (1966); Buckley v. Valeo, 424 U.S. 1, 14, 19 (1976); First National Bank of Boston v. Bellotti, 435 U.S. 765, 776–78 (1978); Brown v. Hartlage, 456 U.S. 45, 52–54 (1982).

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sues.[844] And, when Kentucky attempted to void an election on the ground that the winner's campaign promise to serve at a lower salary than that affixed to the office violated a law prohibiting candidates from offering material benefits to voters in consideration for their votes, the Court ruled unanimously that the state's action violated the First Amendment.[845]

Similarly, California could not prohibit official governing bodies of political parties from endorsing or opposing candidates in primary elections.[846] Minnesota, however, could prohibit a candidate from appearing on the ballot as the candidate of more than one party.[847] The Court wrote that election "[r]egulations imposing severe burdens on plaintiffs' [associational] rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable nondiscriminatory restrictions."[848] Minnesota's ban on "fusion" candidates was not severe, as a party that could not place another party's candidate on the ballot was free to communicate its preference for that candidate by other means, and the ban served "valid state interests in ballot integrity and political stability."[849]

In the Federal Election Campaign Act of 1971, as amended in 1974, Congress imposed new and stringent regulation of and limitations on contributions to and expenditures by political campaigns, as well as disclosure of most contributions and expenditures, setting the stage for the landmark case of *Buckley v. Valeo*.[850]

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[844] *See* Republican Party of Minn. v. White, 536 U.S. 765 (2002). In the only case post-*White* concerning speech restrictions on candidates for judicial office, however, the Court in *Williams-Yulee v. Florida Bar*, upheld a more narrow restriction on candidate speech. *See* 575 U.S. ___, No. 13–1499, slip op. (2015). The *Williams-Yulee* Court held that a provision within Florida's Code of Judicial Conduct that prohibited judicial candidates from personally soliciting campaign funds served a compelling interest in preserving public confidence in the judiciary through a means that was "narrowly tailored to avoid unnecessarily abridging speech." *Id.* at 8–9.

[845] Brown v. Hartlage, 456 U.S. 45 (1982). *See also* Mills v. Alabama, 384 U.S. 214 (1966) (setting aside a conviction and voiding a statute that punished electioneering or solicitation of votes for or against any proposition on the day of the election, applied to publication of a newspaper editorial on election day supporting an issue on the ballot); Vanasco v. Schwartz, 401 F. Supp. 87 (E.D.N.Y. 1975) (three-judge court), *aff'd*, 423 U.S. 1041 (1976) (statute barring malicious, scurrilous, and false and misleading campaign literature is unconstitutionally overbroad).

[846] Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214 (1989). *Cf.* Burson v. Freeman, 504 U.S. 191 (1992) (upholding Tennessee law prohibiting solicitation of votes and distribution of campaign literature within 100 feet of the entrance to a polling place; plurality found a "compelling" interest in preventing voter intimidation and election fraud).

[847] Timmons v. Twin City Area New Party, 520 U.S. 351 (1997).

[848] 520 U.S. at 538 (internal quotation marks omitted).

[849] 520 U.S. at 369–70.

[850] 424 U.S. 1 (1976).

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Acting in basic unanimity, the Court sustained the contribution and disclosure sections of the statute (although several Justices felt that the sustained provisions trenched on protected expression), but voided the limitations on expenditures.[851] Although "contribution and expenditure limitations both implicate fundamental First Amendment interests," the Court found, "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions."[852]

As to contribution limitations, the Court in *Buckley* recognized that political contributions "serve[ ] to affiliate a person with a candidate" and "enable[ ] like-minded persons to pool their resources in furtherance of common political goals." Contribution ceilings, therefore, "limit one important means of associating with a candidate or committee. . . ."[853] Yet "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."[854]

As to expenditure limitations, the Court wrote, "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[855] The expenditure of money in political campaigns may involve speech alone, conduct alone, or mixed speech-conduct, the Court noted, but all forms of it involve communication, and when governmental regulation is aimed directly at suppressing communication it does not matter how that communication is defined. As such, the regulation must be subjected to close scrutiny and justified by compelling governmental interests.

Applying this strict scrutiny standard, the contribution limitations, with some construed exceptions, survived, but the expenditure limitation did not. The contribution limitation was seen as imposing only a marginal restriction upon the contributor's ability to engage in free communication, inasmuch as the contribution shows merely a generalized expression of support for a candidate without communicating reasons for the support; "the size of the contribu-

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[851] The Court's lengthy opinion was denominated *per curiam*, but five Justices filed separate opinions.

[852] 424 U.S. at 23.

[853] 424 U.S. at 22.

[854] 424 U.S. at 25 (internal quotation marks omitted).

[855] 424 U.S. at 19.

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tion provides a very rough index of the intensity of the contributors' support for the candidate."[856] The political expression really occurs when the funds are spent by a candidate; only if the restrictions were set so low as to impede this communication would there arise a constitutional infringement. This incidental restraint upon expression may therefore be justified by Congress's purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions.[857]

Of considerable importance to the contributions analysis, the Court voided a section restricting the aggregate expenditure anyone could make to advocate the election or defeat of a "clearly identified candidate" to $1,000 a year. Though the Court treated the restricted spending as purely an expenditure, the activity seems to partake equally of the nature of a contribution spent on behalf of a candidate (although not given to him or her directly). However, "[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation."[858] The Court found that none of the justifications offered in support of a restriction on such expression was adequate; independent expenditures did not appear to pose the dangers of corruption that contributions did, and it was an impermissible purpose to attempt to equalize the ability of some individuals and groups to express themselves by restricting the speech of other individuals and groups.[859]

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[856] 424 U.S. at 21.

[857] 424 U.S. at 14–38. Chief Justice Burger and Justice Blackmun would have struck down the contribution limitations. Id. at 235, 241–46, 290. *See also* California Medical Ass'n v. FEC, 453 U.S. 182 (1981), sustaining a provision barring individuals and unincorporated associations from contributing more than $5,000 per year to any multicandidate political action committee, on the basis of the standards applied to contributions in *Buckley*; and FEC v. National Right to Work Comm., 459 U.S. 197 (1982), sustaining a provision barring nonstock corporations from soliciting contributions from persons other than their members when the corporation uses the funds for designated federal election purposes.

[858] 424 U.S. at 48.

[859] 424 U.S. at 39–51. Justice White dissented. Id. at 257. In an oblique return to the right-privilege distinction, the Court agreed that Congress could condition receipt of public financing funds upon acceptance of expenditure limitations. Id. at 108–09. In Common Cause v. Schmitt, 512 F. Supp. 489 (D.D.C. 1980), *aff'd by an equally divided Court*, 455 U.S. 129 (1982), a provision was invalidated that limited independent political committees to expenditures of no more than $1,000 to further the election of any presidential candidate who received public funding. An equally divided affirmance is of limited precedential value. When the validity of this provision, 26 U.S.C. § 9012(f), was again before the Court in 1985, the Court invalidated it. FEC v. National Conservative Political Action Comm., 470 U.S. 480 (1985). In an opinion by Justice Rehnquist, the Court determined that the governmental interest in preventing corruption or the appearance of corruption was insufficient justification for restricting the First Amendment rights of committees interested in making indepen-

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Similarly, limitations upon the amount of funds a candidate could spend out of his own resources or those of his immediate family were voided. A candidate, no less than any other person, has a First Amendment right to advocate.[860] The limitations upon total expenditures by candidates seeking nomination or election to federal office could not be justified: the evil associated with dependence on large contributions was met by limitations on contributions, the purpose of equalizing candidate financial resources was impermissible, and the First Amendment did not permit government to determine that expenditures for advocacy were excessive or wasteful.[861]

The government not only may not limit the amount that a candidate may spend out of his own resources, but, if a candidate spends more than a particular amount, the government may not penalize the candidate by authorizing the candidate's opponent to receive individual contributions at higher than the normal limit. In *Davis v. Federal Election Commission*, the Court struck down, as lacking a compelling governmental interest, a federal statute that provided that, if a "self-financing" candidate for the House of Representatives spends more than a specified amount, then his opponent may accept more individual contributions than otherwise permitted. The statute, the Court wrote, imposed "a special and potentially significant burden" on a candidate "who robustly exercises [his] First Amendment right."[862] Citing *Buckley*, the Court stated that a burden "on the expenditure of personal funds is not justified by any governmental interest in eliminating corruption or the perception of corruption." This is because "reliance on personal funds *reduces* the threat of corruption, and therefore . . . discouraging use of personal funds[ ] disserves the anticorruption interest."[863] Citing *Buckley* again, the

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dent expenditures on behalf of a candidate, since "the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." Id. at 498. *See also* Colorado Republican Campaign Comm. v. FEC, 518 U.S. 604 (1996) (the First Amendment bars application of the Party Expenditure Provision of the Federal Election Campaign Act, 2 U.S.C. § 441a(d)(3), to expenditures that the political party makes independently, without coordination with the candidate).

[860] 424 U.S. at 51–54. Justices Marshall and White disagreed with this part of the decision. Id. at 286.

[861] 424 U.S. at 54–59.

[862] 128 S. Ct. 2759, 2771, 2772 (2008). The statute was § 319(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. 107–155, 116 Stat. 109, 2 U.S.C. § 441a–1(a), which was part of the so-called "Millionaire's Amendment."

[863] 128 S. Ct. at 2773 (emphasis in original). Justice Stevens, in the part of his dissenting opinion joined by Justices Souter, Ginsburg, and Breyer, found that the Millionaire's Amendment does not cause self-funding candidates "any First Amendment injury whatsoever. The Millionaire's Amendment quiets no speech at all. On the contrary, it does no more than assist the opponent of a self-funding candidate in his attempts to make his voice heard. . . . Enhancing the speech of the millionaire's

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Court added that the governmental interest in equalizing the financial resources of candidates does not provide a justification for restricting expenditures, and, in fact, to restrict expenditures "has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office. . . . Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to the outcome of an election." [864]

A related question is whether the government violates the First Amendment rights of a candidate running a privately funded campaign when it provides public "equalization" funds to opposition candidates. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,[865] the Court considered an Arizona voluntary public financing system which granted an initial allotment to the campaigns of candidates for state office who agreed to certain requirements and limitations.[866] In addition, matching funds were made available to the campaign if the expenditures of a privately financed opposing candidate, combined with the expenditures of any independent groups supporting that opposing candidacy, exceeded the campaign's initial allotment. Citing *Davis*, the Court found the scheme unconstitutional because it forced the privately financed candidate to "shoulder a special and potentially significant burden" in choosing to exercise his First Amendment right to spend funds on behalf of his candidacy.[867] Although the dissent argued that the provision of benefits to one speaker had not previously been considered by the Court as a significant burden to another,[868] the majority distinguished those cases as not having involved the provision of subsidies to directly counter the triggering speech.[869]

It was mentioned above that the Court in *Buckley* upheld the disclosure requirements of the Federal Election Campaign Act. The

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opponent, far from contravening the First Amendment, actually advances its core principles." Id. at 2780.

[864] 128 S. Ct. at 2773–74. The Court also struck down the disclosure requirements in § 319(b) of BCRA because they "were designed to implement the asymmetrical contribution limits provided for in § 319(a), and . . . § 319(a) violates the First Amendment." Id. at 2775.

[865] 564 U.S. ___, No. 10–238, slip op. (2011).

[866] These included limiting the expenditure of personal funds to $500, participating in at least one public debate, adhering to an over all expenditure cap, and returning all unspent public moneys to the State.

[867] *Bennett*, 564 U.S. ___, No. 10–238, slip op. at 11 quoting *Davis,* 554 U.S. at 739.

[868] Slip op. 10–11 (Kagan, J., dissenting).

[869] Slip op. at 17.

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Court found that, although compelled disclosure "cannot be justified by a mere showing of some legitimate governmental interest," the governmental interests in the disclosure that the statute in *Buckley* mandated were "sufficiently important to outweigh the possibility of infringement" of the First Amendment.[870] Disclosure, the Court found, "provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' "; it deters "actual corruption and the appearance of corruption"; and it is "an essential means of gathering the data necessary to detect violations of the contribution limitations" that the statute imposed.[871]

The Court indicated, however that, under some circumstances, the First Amendment might require exemption for minor parties that were able to show "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." [872] This standard was applied both to disclosure of contributors' names and to disclosure of recipients of campaign expenditures in *Brown v. Socialist Workers '74 Campaign Committee*,[873] in which the Court held that the minor party had established the requisite showing of likely reprisals through proof of past governmental and private hostility and harassment. Disclosure of recipients of campaign expenditures, the Court reasoned, could not only dissuade supporters and workers who might receive reimbursement for expenses, but could also dissuade various entities from performing routine commercial services for the party and thereby "cripple a minor party's ability to operate effectively." [874]

The Court has apparently extended the reasoning of these cases to include not just disclosure related to political contributions, but also to disclosure related to legally "qualifying" a measure for the ballot. In *Doe v. Reed*,[875] the Court found that signing a petition to initiate a referendum was a protected form of political expression,[876] and that a state requirement to disclose the names and addresses on those petitions to the public would be subjected to "ex-

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[870] 424 U.S. at 64, 66. *See also* Amendment I, "Political Association," *supra*.
[871] 424 U.S. at 66, 67, 68.
[872] 424 U.S. at 74.
[873] 459 U.S. 87 (1982).
[874] 459 U.S. at 97–98.
[875] 561 U.S. ___, No. 09–559, slip op. (2010).
[876] Note, however, that the Court subsequently declined to extend the reasoning of this case to find that a legislator's vote was a form of expression protected by the First Amendment. Nevada Comm'n on Ethics v. Carrigan, 564 U.S. ___, No. 10–568, slip op. (2011) (upholding law prohibiting legislator with a conflict of interest from voting on a proposal or advocating its passage or failure).

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acting scrutiny."[877] The Court upheld the disclosure requirement on its face, finding that it furthered the state's interest in detecting fraud and mistake in the petitioning process, while also providing for transparency and accountability. The case was remanded, however, to ascertain whether in this particular instance (a referendum to overturn a law conferring rights to gay couples) there was a "reasonable probability" that the compelled disclosures would subject the signatories to threats, harassment, or reprisals from either Government officials or private parties.[878]

In *Nixon v. Shrink Missouri Government PAC*,[879] the Court held that *Buckley v. Valeo* "is authority for state limits on contributions to state political candidates," but state limits "need not be pegged to *Buckley's* dollars."[880] The Court in *Nixon* justified the limits on contributions on the same grounds that it had in *Buckley*: "preventing corruption and the appearance of it that flows from munificent campaign contributions."[881] Further, *Nixon* did "not present a close call requiring further definition of whatever the State's evidentiary obligation may be" to justify the contribution limits, as "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters."[882] As for the amount of the contribution limits, Missouri's fluctuated in accordance with the consumer price index, and, when suit was filed, ranged from $275 to $1,075, depending on the state office or size of constituency. The Court upheld these limits, writing that, in *Buckley*, it had "rejected the contention that $1,000, or any other amount, was a constitutional minimum below which legislatures could not regulate."[883] The relevant inquiry, rather, was "whether the contribution limitation was so radical in effect as to render political associa-

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[877] *Reed*, No. 09–559, slip op. at 7. Five Justices joined the majority opinion written by Chief Justice Roberts—Justices Kennedy, Ginsburg, Breyer, Alito and Sotomayor. One might question, however, what level of scrutiny Justice Breyer would support, since he also joined a concurrence by Justice Stevens, which suggested that the disclosure of the name and addresses on the petitions is not "a regulation of pure speech," and consequently should be subjected to a lesser standard of review. Slip op. at 1 (Stevens, J., concurring in part and in judgment). Justice Breyer, in his own concurrence, suggests that "in practice [the standard articulated in both the majority and Justice Steven's concurrence] has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others." Slip op. at 1 (Breyer, J., concurring). Justice Scalia, on the other hand, questioned whether "signing a petition that has the effect of suspending a law fits within 'freedom of speech' at all." Slip op. at 1 (Scalia, J., concurring in judgement).

[878] Slip op. at 12–13 (citation omitted).

[879] 528 U.S. 377 (2000).

[880] 528 U.S. at 381–82.

[881] 528 U.S. at 390.

[882] 528 U.S. at 393, 395.

[883] 528 U.S. at 397.

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tion ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless."[884]

In *McCutcheon v. FEC*,[885] however, a plurality of the Court[886] appeared to signal an intent to scrutinize limits on contributions more closely to ensure a "fit" between governmental objective and the means utilized.[887] Considering aggregate limits on individual contributions—that is, the limits on the amount an individual can give in one campaign cycle[888]—the plurality opinion distinguished between the government interest in avoiding even the appearance of quid pro quo corruption and the government interest in avoiding potential "'influence over or access to' elected officials of political parties" as the result of large contributions; only the interest in preventing actual or apparent quid pro quo corruption constituted a legitimate objective sufficient to satisfy the First Amendment.[889] Given the more narrow interest of the government, the *McCutcheon* Court struck down the limits on aggregate contributions by an individual donor. The plurality opinion viewed the provision in question as impermissibly restricting an individual's participation in the political process by limiting the number of candidates and organizations to which the individual could contribute (once that individual had reached the aggregate limit).[890] Moreover, the plurality opinion held that the aggregate limits on individual contributions were not narrowly tailored to prevent quid pro quo corruption, as the limits prevent any contributions (regardless of size) to any individual or organization once the limits are reached.[891] The plurality likewise rejected the argument that the restriction prevented circumvention of a separate restriction on base contributions to individual candidates, as such circumvention was either illegal (because of various anti-circumvention rules) or simply improbable.[892] Collectively, the Court

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[884] 528 U.S. at 397.

[885] 572 U.S. ___, No. 12–536, slip op. (2014).

[886] Chief Justice Roberts wrote the plurality opinion, joined by Justices Scalia, Kennedy and Alito. Justice Thomas, concurring in the judgment, declined to join the reasoning of the plurality, arguing that, to the extent that *Buckley* afforded a lesser standard of review to restrictions on contributions than to expenditures, it should be overruled.

[887] The Court declined to revisit the differing standards between contributions and expenditures established in *Buckley*, holding that the issue in question, aggregate spending limits, did not meet the demands of either test. 572 U.S. ___, slip op. at 10.

[888] In 2014, these aggregate limits capped total contributions per election cycle to $48,600 to all federal candidates and $74,600 to all other political committees, of which only $48,600 could be contributed to state or local party committees and PACs. 2 U.S.C. § 441a(a)(3) (2012); 78 Fed. Reg. 8,532 (Feb. 6, 2013).

[889] 572 U.S. ___, No. 12–536, slip op. at 19.

[890] *Id.* at 15.

[891] *Id.* at 21–22.

[892] *Id.* at 21–30.

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concluded that the aggregate limits violate the First Amendment because of the poor "fit" between the interests proffered by the government and the means by which the limits attempt to serve those interests.[893]

Outside the context of contributions to candidates, however, the Court has not been convinced of the justifications for limiting such uses of money for political purposes. Thus, a municipal ordinance regulating the maximum amount that could be contributed to or accepted by an association formed to take part in a city referendum was invalidated.[894] Although *Buckley* had sustained limits on contributions as a prophylactic measure to prevent corruption or its appearance, no risk of corruption was found in giving or receiving funds in connection with a referendum. Similarly, the Court invalidated a criminal prohibition on payment of persons to circulate petitions for a ballot initiative.[895]

Venturing into the area of the constitutional validity of governmental limits upon political activities by corporations, a closely divided Court struck down a state law that prohibited corporations from expending funds to influence referendum votes on any measure save proposals that materially affected corporate business, property, or assets. In *First National Bank of Boston v. Bellotti*, the Court held that the free discussion of governmental affairs "is the type of speech indispensable to decisionmaking in a democracy," and that "this is no less true because the speech comes from a corporation rather than an individual."[896] The Court held that it is the nature

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[893] *Id.* at 30.

[894] Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1980). It is not clear from the opinion whether the Court was applying a contribution or an expenditure analysis to the ordinance, *see* id. at 301 (Justice Marshall concurring), or whether it makes any difference in this context.

[895] Meyer v. Grant, 486 U.S. 414 (1988). The Court subsequently struck down a Colorado statute that required ballot-initiative proponents, if they pay circulators, to file reports disclosing circulators' names and addresses and the total amount paid to each circulator. Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999). Although the Court upheld a requirement that *proponents'* names and the total amount they have spent to collect signatures be disclosed, as this served "as a control or check on domination of the initiative process by affluent special interest groups" (id. at 202), it found that "[t]he added benefit of revealing the names of paid circulators and the amounts paid to each circulator . . . is hardly apparent and has not been demonstrated." Id. at 203. The Court also struck down a requirement that circulators be registered voters, as the state's interest in ensuring that circulators would be amenable to subpoenas was served by the requirement that they be residents a requirement on which the Court had no occasion to rule.

[896] 435 U.S. 765, 777 (1978). Justice Powell wrote the opinion of the Court. Dissenting, Justices White, Brennan, and Marshall argued that while corporations were entitled to First Amendment protection, they were subject to more regulation than were individuals, and substantial state interests supported the restrictions. Id. at 802. Justice Rehnquist went further in dissent, finding no corporate constitutional protection. Id. at 822.

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of the speech, not the status of the speaker, that is relevant for First Amendment analysis, thus allowing it to pass by the question of the rights a corporate person may have. The "materially affecting" requirement was found to be an impermissible proscription of speech based on the content of the speech and the identity of the interests that the speaker represented. The "exacting scrutiny" that restrictions on speech must pass was not satisfied by any of the justifications offered and the Court in any event found some of them impermissible.

Bellotti called into some question the constitutionality of the federal law that makes it unlawful for any corporation or labor union "to make a contribution or expenditure in connection with any election" for federal office or "in connection with any primary election or political convention or caucus held to select candidates" for such office.[897] The Court had previously passed on several opportunities to assess this restriction,[898] and one of the dissents in *Bellotti* noted the potential conflict.[899] While the dissent's concerns were ultimately realized in *Citizens United v. FEC*,[900] it was only after many years of the Court either distinguishing *Bellotti* or applying it narrowly.

During that interim, the Court first considered challenges to different aspects of the federal statute and to related state statutes, upholding some restrictions on corporate electoral activities, but limiting others. In *FEC v. National Right to Work Committee*,[901] the Court considered the operation of "separate segregated funds" (in common parlance, a Political Action Committee or "PAC"), through which, according to federal law, corporations can engage in specified political activities. The Court unanimously upheld a prohibition on a corporation soliciting money from other corporations for a

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[897] 2 U.S.C. § 441b. The provision began as § 313 of the Federal Corrupt Practices Act of 1925, 43 Stat. 1074, prohibiting contributions by corporations. It was made temporarily applicable to labor unions in the War Labor Disputes Act of 1943, 57 Stat. 167, and became permanently applicable in § 304 of the Taft-Hartley Act. 61 Stat. 159.

[898] All three cases involved labor unions and were decided on the basis of statutory interpretation, apparently informed with some constitutional doubts. United States v. CIO, 335 U.S. 106 (1948); United States v. United Automobile Workers, 352 U.S. 567 (1957); Pipefitters v. United States, 407 U.S. 385 (1972).

[899] *Bellotti*, 435 U.S. at 811–12 (Justice White dissenting). The majority opinion, however, saw several distinctions between the federal law and the law at issue in *Bellotti*. The Court emphasized that *Bellotti* was a referendum case, not a case involving corporate expenditures in the context of partisan candidate elections, in which the problem of corruption of elected representatives was a weighty problem. "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." Id. at 787–88 & n.26.

[900] 558 U.S. ___, No. 08–205, slip op. (2010).

[901] 459 U.S. 197 (1982).

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PAC in order to make contributions or expenditures in relation to federal elections. Relying on *Bellotti* for the proposition that the government may act to prevent "both actual corruption and the appearance of corruption of elected representatives," the Court saw no reason that Congress could not, in its legislative judgment, treat unions, corporations, and similar organizations differently from individuals.[902]

However, an exception to this general principle was recognized by a divided Court in *FEC v. Massachusetts Citizens for Life, Inc.*,[903] holding the section's requirement that independent expenditures be financed by voluntary contributions to a PAC unconstitutional as applied to a corporation organized to promote political ideas, having no stockholders, and not serving as a front for a "business corporation" or union. The Court found that one of the rationales for the special rules on corporate participation in elections—elimination of "the potential for unfair deployment of [corporate] wealth for political purposes"—had no applicability to a corporation "formed to disseminate political ideas, not to amass capital."[904] The other principal rationale—protection of corporate shareholders and other contributors from having their money used to support political candidates to whom they may be opposed—was also deemed inapplicable. The Court distinguished *National Right to Work Committee* because "restrictions on contributions require less compelling justification than restrictions on independent spending," and also explained that, "given a contributor's awareness of the political activity of [MCFL], as well as the readily available remedy of refusing further donations, the interest protecting contributors is simply insufficient to support § 441b's restriction on . . . independent spending."[905] What the Court did not address directly was whether the same analysis could have led to a different result in *National Right to Work Committee*.[906]

Clarification of *Massachusetts Citizens for Life* was provided by *Austin v. Michigan State Chamber of Commerce*,[907] in which the Court upheld application to a nonprofit corporation of Michigan's restrictions on independent expenditures by corporations. The Michigan

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[902] 459 U.S. at 210–11.

[903] 479 U.S. 238 (1986). Justice Brennan's opinion for the Court was joined by Justices Marshall, Powell, O'Connor, and Scalia; Chief Justice Rehnquist, author of the Court's opinion in *National Right to Work Comm.*, dissented from the constitutional ruling, and was joined by Justices White, Blackmun, and Stevens.

[904] 479 U.S. at 259.

[905] 479 U.S. at 259–60, 262.

[906] The Court did not spell out whether there was any significant distinction between the two organizations, NRWC and MCFL; Chief Justice Rehnquist's dissent suggested that there was not. *See* 479 U.S. at 266.

[907] 494 U.S. 652 (1990).

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law, like federal law, prohibited such expenditures from corporate treasury funds, but allowed them to be made from a corporation's PAC funds. This arrangement, the Court decided, serves the state's compelling interest in ensuring that expenditure of corporate wealth, accumulated with the help of special advantages conferred by state law, does not "distort" the election process.[908] The law was sufficiently "narrowly tailored" because it permits corporations to make independent political expenditures through segregated funds that "accurately reflect contributors' support for the corporation's political views."[909] Also, the Court concluded that the Chamber of Commerce was unlike the MCFL in each of the three distinguishing features that had justified an exemption from operation of the federal law. Unlike MCFL, the Chamber was not organized solely to promote political ideas; although it had no stockholders, the Chamber's members had similar disincentives to forgo benefits of membership in order to protest the Chamber's political expression; and, by accepting corporate contributions, the Chamber could serve as a conduit for corporations to circumvent prohibitions on direct corporate contributions and expenditures.[910]

In *FEC v. Beaumont*,[911] the Court held that the federal law that bars corporations from contributing directly to candidates for federal office, but allows contributions though PACs, may constitutionally be applied to nonprofit advocacy corporations. The Court in *Beaumont* wrote that, in *National Right to Work*, it had "specifically rejected the argument . . . that deference to congressional judgments about proper limits on corporate contributions turns on details of corporate form or the affluence of particular corporations."[912] Though nonprofit advocacy corporations, the Court held in *Massachusetts Citizens for Life*, have a First Amendment right to make independent expenditures, the same is not true for direct contributions to candidates.

In *McConnell v. FEC*,[913] the Court upheld against facial constitutional challenges key provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA). A majority opinion coauthored by Justices Stevens and O'Connor upheld two major provisions of BCRA: (1) the prohibition on "national party committees and their agents

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[908] Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990) *Austin* found the law helped prevent "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S. at 660.

[909] 494 U.S. at 660–61.

[910] 494 U.S. at 661–65.

[911] 539 U.S. 146 (2003).

[912] 539 U.S. at 157.

[913] 540 U.S. 93 (2003).

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from soliciting, receiving, directing, or spending any soft money,"[914] which is money donated for the purpose of influencing state or local elections, or money for "mixed-purpose activities—including get-out-the-vote drives and generic party advertising,"[915] and (2) the prohibition on corporations and labor unions' using funds in their treasuries to finance "electioneering communications,"[916] which BCRA defines as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal Office," made within 60 days before a general election or 30 days before a primary election. Electioneering communications thus include both "express advocacy and so-called issue advocacy."[917]

As for the soft-money prohibition on national party committees, the Court applied "the less rigorous scrutiny applicable to contribution limits"[918] and found it "closely drawn to match a sufficiently important interest."[919] The Court's decision to use less rigorous scrutiny, it wrote, "reflects more than the limited burdens they [*i.e.*, the contribution restrictions] impose on First Amendment freedoms. It also reflects the importance of the interests that underlie contribution limits—interests in preventing 'both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.'"[920]

As for the prohibition on corporations and labor unions' using their general treasury funds to finance electioneering communications, the Court applied strict scrutiny, but found a compelling governmental interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideals."[921] These corrosive and distorting effects result both from express advocacy and from so-called issue advocacy. The Court also noted that, because corporations and unions "remain free to organize and administer segregated funds, or PACs," for electioneering communications, the provision was not a complete ban on expression.[922] In response to the argument that the justifications for a ban on express advocacy did not apply to issue advocacy, the Court found that

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[914] 540 U.S. at 133.
[915] 540 U.S. at 123.
[916] 540 U.S. at 204.
[917] 540 U.S. at 190.
[918] 540 U.S. at 141.
[919] 540 U.S. at 136 (internal quotation marks omitted).
[920] 540 U.S. at 136.
[921] 540 U.S. at 205 (quoting Austin v. Michigan State Chamber of Commerce, 494 U.S. at 660).
[922] 540 U.S. at 204.

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the "argument fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." [923]

The limitations on electioneering communication, however, soon faced renewed examination by the Court. In *Wisconsin Right to Life, Inc. v. Federal Election Comm'n* (WRTL I),[924] the Court vacated a lower court decision that had denied plaintiffs the opportunity to bring an as-applied challenge to BCRA's regulation of electioneering communications. Subsequently, in *Federal Election Commission v. Wisconsin Right to Life* (WRTL II),[925] the Court considered what standard should be used for such a challenge. Chief Justice Roberts, in the controlling opinion,[926] rejected the suggestion that an issue ad broadcast during the specified periods before elections should be considered the "functional equivalent" of express advocacy if the "intent and effect" of the ad was to influence the voter's decision in an election.[927] Rather, Chief Justice Roberts' opinion held that an issue ad is the functional equivalent of express advocacy only if the ad is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." [928]

Then came the case of *Citizens United v. FEC*,[929] which significantly altered the Supreme Court's jurisprudence on corporations and election law. In *Citizens United*, a non-profit corporation released a film critical of then-Senator Hillary Clinton, a candidate in the Democratic Party's 2008 Presidential primary elections, and sought to make it available to cable television subscribers within 30 days of that primary. The case began as another as-applied challenge to BCRA, but the Court asked for reargument, and, in a 5–4 decision, not only struck down the limitations on electioneering communication on its face (overruling *McConnell*) but also rejected the use of the antidistortion rationale (overruling *Austin*).

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[923] 540 U.S. at 206.

[924] 546 U.S. 410 (2006).

[925] 127 S. Ct. 2652 (2007).

[926] Only Justice Alito joined Parts III and IV of Chief Justice Roberts' opinion, which addressed the issue of as-applied challenges to BCRA. Justices Scalia (joined by Kennedy and Thomas) concurred in the judgment, but would have overturned *McConnell* and struck down BCRA's limits on issue advocacy on its face.

[927] The suggestion was made that an "intent and effect" standard had been endorsed by the Court in *McConnell*, which stated that "[t]he justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect." 540 U.S. at 206. While acknowledging that an evaluation of the "intent and effect" had been relevant to the rejection of a facial challenge, Chief Justice Roberts' opinion in WRTL II denied that such a standard had been endorsed for as-applied challenges. 127 S. Ct. at 2664–66.

[928] 127 S. Ct. at 2667.

[929] 558 U.S. ___, No. 08–205, slip op. (2010).

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In *Citizens United*, the Court argued that there was a tension between the right of corporations to engage in political speech, as articulated in *Bellotti* and its progeny, and the limitations on such speech allowed in *Austin* to avoid the disproportionate economic power of corporations. Reasoning that the Court had rejected similar attempts to level the playing field among differing voices with disparate economic resources,[930] the Court held that the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity of necessity prevents distinctions based on wealth.[931] In particular, the Court noted that media corporations, although statutorily exempted from these restrictions, do not receive special constitutional protection under the First Amendment,[932] and thus would be constitutionally vulnerable under an antidistortion rationale.

The Court also held that the ability of a corporation to form a PAC neither allowed that corporation to speak directly, nor did it provide a sufficient alternative method of speech. The Court, found that PACs are burdensome alternatives that are "expensive to administer and are subject to extensive regulation." [933] The Court noted that the difficulty in establishing a PAC might explain why fewer than 2,000 of the millions of corporations in the country have PACs. Further, the Court argued that even if a corporation did want to establish a PAC to speak to an urgent issue, that such corporation might not be able to establish one in time to address issues in a current campaign.

While the holding of *Citizens United* would appear to diminish the need for corporations to create PACs in order to engage in political speech, it is not clear what level of regulation will now be

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[930] *See Buckley*, 424 U.S. at 49 (First Amendment's protections do not depend on the speaker's "financial ability to engage in public discussion."); Davis v. Federal Election Commission, 554 U.S. ___, No. 07–320, slip op. (2008) (invalidating the cap on contributions to one candidate if the opponent made certain expenditures from personal funds.

[931] *Citizens United*, slip op. at 34. The Court concluded that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.", slip op. at 42. The State of Montana had had a long-standing bar on independent political expenditures by corporations founded on a record that those expenditures in fact could lead to corruption or the appearance of corruption. In a *per curiam* opinion, with four justices dissenting, the Court struck down the Montana law as contrary to *Citizens United*. American Tradition Partnership, Inc. v. Bullock, 567 U.S. ___, No. 11–1179, slip op. (2012).

[932] Slip. op. at 35–37.

[933] 558 U.S. ___, slip op. at 21. For example, a PAC must appoint a treasurer, keep detailed records of persons making donations, preserve receipts for three years, must report changes to its organizational statement within 10 days, and must file detailed monthly reports with the FEC. Id.

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allowed over speech made directly by a corporation.[934] The Court did uphold the requirements under BCRA that electioneering communications funded by anyone other than a candidate must include a disclaimer regarding who is responsible for the content of the communication, and that the person making the expenditure must disclose to the FEC the amount of the expenditure and the names of certain contributors. The Court held that these requirements could be justified based on a governmental interest in "provid[ing] the electorate with information" about the sources of election-related spending, helping citizens "make informed choices in the political marketplace," and facilitate the ability of shareholders to hold corporations accountable for such political speech.[935]

In *Randall v. Sorrell*, a plurality of the Court struck down a Vermont campaign finance statute's limitations on both expenditures and contributions.[936] As for the statute's expenditure limitations, the plurality found *Buckley* to control and saw no reason to overrule it and no adequate basis upon which to distinguish it. As for the statute's contribution limitations, the plurality, following *Buckley*, considered whether the "contribution limits prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy'; whether they magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage; in a word, whether they are too low and too strict to survive First Amendment scrutiny."[937] The plurality found that they were.[938] Vermont's limit of $200 per gubernatorial election "(with significantly lower limits for contributions to candidates for State Senate and House of Representatives) . . . are well below the limits this Court upheld in *Buckley*," and "are the lowest in the Na-

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[934] For instance, while the Court in *National Right to Work* allowed restrictions on corporate solicitation of other corporations for PAC funds, the Court might be disinclined to allow restrictions on corporations soliciting other corporations for funds to use for direct independent expenditures.

[935] 558 U.S. ___, slip op. at 50–51 (citations omitted). The Court had previously acknowledged that as-applied challenges would be available to a group if it could show a "reasonable probability" that disclosure of its contributors' names would "subject them to threats, harassment, or reprisals from either Government officials or private parties." *McConnell*, 540 U.S. at 198 (quoting Buckley, 427 U.S. at 74).

[936] 548 U.S. 230 (2006). Justice Breyer wrote the plurality opinion, with only Chief Justice Roberts joining it in full. Justice Alito joined the opinion as to the contribution limitations but not as to the expenditure limitations. Justice Alito and three other Justices concurred in the judgment as to the limitations on both expenditures and contributions, and three Justices dissented.

[937] 548 U.S. at 248 (citation omitted).

[938] Although, as here, limits on contributions may be so low as to violate the First Amendment, "there is no constitutional basis for attacking contribution limits on the ground that they are too high. Congress has no constitutional obligation to limit contributions at all . . . ." Davis v. Federal Election Commission, 128 S. Ct. 2759, 2771 (2008) (dictum).

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tion." [939] But the plurality struck down Vermont's contribution limits "based not merely on the low dollar amounts of the limits themselves, but also on the statute's effect on political parties and on volunteer activity in Vermont elections." [940]

Government as Regulator of the Electoral Process: Lobbying.—Legislators may depend upon representations made to them and information supplied to them by interested parties, and therefore may desire to know what the real interests of those parties are, what groups or persons they represent, and other such information. But everyone is constitutionally entitled to write his congressman or his state legislator, to cause others to write or otherwise contact legislators, and to make speeches and publish articles designed to influence legislators. Conflict is inherent. In the Federal Regulation of Lobbying Act,[941] Congress, by broadly phrased and ambiguous language, seemed to require detailed reporting and registration by all persons who solicited, received, or expended funds for purposes of lobbying; that is, to influence congressional action directly or indirectly. In *United States v. Harriss*,[942] the Court, stating that it was construing the Act to avoid constitutional doubts,[943] interpreted covered lobbying as meaning only direct attempts to influence legislation through direct communication with members of Congress.[944] So construed, the Act was constitutional; Congress had "merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose," and this was simply a measure of "self-protection." [945]

Other statutes and governmental programs affect lobbying and lobbying activities. It is not impermissible for the Federal Government to deny a business expense tax deduction for money spent to defeat legislation that would adversely affect one's business.[946] But the antitrust laws may not be applied to a concert of business enterprises that have joined to lobby the legislative branch to pass and the executive branch to enforce laws that would have a detri-

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[939] 548 U.S. at 249 (citation omitted). The plurality noted that, "in terms of real dollars (*i.e.*, adjusting for inflation)," they were lower still. Id. at 250.

[940] 548 U.S. at 253.

[941] 60 Stat. 812, 839 (1946), 2 U.S.C. §§ 261–70.

[942] 347 U.S. 612 (1954).

[943] 347 U.S. at 623.

[944] 347 U.S. at 617–24.

[945] 347 U.S. at 625. Justices Douglas, Black, and Jackson dissented. Id. at 628, 633. They thought the Court's interpretation too narrow and would have struck the statute down as being too broad and too vague, but would not have denied Congress the power to enact narrow legislation to get at the substantial evils of the situation. *See also* United States v. Rumely, 345 U.S. 41 (1953).

[946] Cammarano v. United States, 358 U.S. 498 (1959).

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mental effect upon competitors, even if the lobbying was conducted unethically.[947] On the other hand, allegations that competitors combined to harass and deter others from having free and unlimited access to agencies and courts by resisting before those bodies all petitions of competitors for purposes of injury to competition are sufficient to implicate antitrust principles.[948]

Government as Regulator of Labor Relations.—Numerous problems may arise in this area,[949] but the issue here considered is the balance to be drawn between the free speech rights of an employer and the statutory rights of his employees to engage or not engage in concerted activities free of employer coercion, which may well include threats or promises or other oral or written communications. The Court has upheld prohibitions against employer interference with union activity through speech so long as the speech is coercive,[950] and that holding has been reduced to statutory form.[951] Nonetheless, there is a First Amendment tension in this area, with its myriad variations of speech forms that may be denominated "predictions," especially because determination whether particular utterances have an impermissible impact on workers is vested with an agency with no particular expertise in the protection of freedom of expression.[952]

Government as Investigator: Reporter's Privilege.—News organizations have claimed that the First Amendment compels a recognition by government of an exception to the ancient rule that every citizen owes to his government a duty to give what testimony he is capable of giving.[953] The argument for a limited exemption to permit reporters to conceal their sources and to keep confidential certain information they obtain and choose at least for the moment

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[947] Eastern R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961). *See also* UMW v. Pennington, 381 U.S. 657, 669–71 (1965).

[948] California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). Justices Stewart and Brennan thought that joining to induce administrative and judicial action was as protected as the concert in *Noerr* but concurred in the result because the complaint could be read as alleging that defendants had sought to forestall access to agencies and courts by plaintiffs. Id. at 516.

[949] *E.g.*, the speech and associational rights of persons required to join a union, Railway Employees Dep't v. Hanson, 351 U.S. 225 (1956); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (public employees), restrictions on picketing and publicity campaigns, Babbitt v. United Farm Workers, 442 U.S. 289 (1979), and application of collective bargaining laws in sensitive areas, NLRB v. Yeshiva Univ., 444 U.S. 672 (1980) (faculty collective bargaining in private universities); NLRB v. Catholic Bishop, 440 U.S. 490 (1979) (collective bargaining in religious schools).

[950] NLRB v. Virginia Electric & Power Co., 314 U.S. 469 (1941).

[951] 61 Stat. 142, § 8(c) (1947), 29 U.S.C. § 158(c).

[952] *Cf.* NLRB v. Gissel Packing Co., 395 U.S. 575, 616–20 (1969).

[953] 8 J. WIGMORE, EVIDENCE 2192 (3d ed. 1940). *See* Blair v. United States, 250 U.S. 273, 281 (1919); United States v. Bryan, 339 U.S. 323, 331 (1950).

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not to publish was rejected in *Branzburg v. Hayes*[954] by a closely divided Court. "Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering which is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial."[955] Not only was it uncertain to what degree confidential informants would be deterred from providing information, said Justice White for the Court, but the conditional nature of the privilege claimed might not mitigate the deterrent effect, leading to claims for an absolute privilege. Confidentiality could be protected by the secrecy of grand jury proceedings and by the experience of law enforcement officials in themselves dealing with informers. Difficulties would arise as well in identifying who should have the privilege and who should not. But the principal basis of the holding was that the investigation and exposure of criminal conduct was a governmental function of such importance that it overrode the interest of reporters in avoiding the incidental burden on their newsgathering activities occasioned by such governmental inquiries.[956]

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[954] 408 U.S. 665 (1972). "The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them." Id. at 682.

[955] 408 U.S. at 690–91. The cases consolidated in *Branzburg* all involved grand juries, so the reference to criminal trials should be considered dictum.

[956] Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist joined the Court's opinion. Justice Powell, despite having joined the majority opinion, also submitted a concurring opinion in which he suggested a privilege might be available if, in a particular case, "the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement." 408 U.S. at 710. Justice Stewart's dissenting opinion in *Branzburg* referred to Justice Powell's concurring opinion as "enigmatic." Id. at 725. Judge Tatel of the D.C. Circuit wrote, "Though providing the majority's essential fifth vote, he [Powell] wrote separately to outline a 'case-by-case' approach that fits uncomfortably, to say the least, with the *Branzburg* majority's categorical rejection of the reporters' claims." *In re*: Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 987 (D.C. Cir. 2005) (Tatel, J., concurring) (citation omitted), *rehearing en banc denied*, 405 F.3d 17 (D.C. Cir. 2005 (Tatel, J., concurring), *cert. denied*, 545 U.S. 1150 (2005), *reissued with unredacted material*, 438 F.3d 1141 (D.C. Cir. 2006).

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The Court observed that Congress, as well as state legislatures and state courts, are free to adopt privileges for reporters.[957] Although efforts in Congress have failed, 49 states have done so—33 (plus the District of Columbia) by statute and 16 by court decision, with Wyoming the sole holdout.[958] As for federal courts, Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." [959] The federal courts have not resolved whether the common law provides a journalists' privilege.[960]

Nor does the status of an entity as a newspaper (or any other form of news medium) protect it from issuance and execution on probable cause of a search warrant for evidence or other material properly sought in a criminal investigation.[961] The press had argued that to permit searches of newsrooms would threaten the ability to gather, analyze, and disseminate news, because searches would be disruptive, confidential sources would be deterred from coming forward with information because of fear of exposure, reporters would

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"[C]ourts in almost every circuit around the country interpreted Justice Powell's concurrence, along with parts of the Court's opinion, to create a balancing test when faced with compulsory process for press testimony and documents outside the grand jury context." Association of the Bar of the City of New York, The Federal Common Law of Journalists' Privilege: A Position Paper (2005) at 4–5 [http://www.abcny.org/pdf/report/White%20paper%20on%20reporters%20privilege.pdf] (citing examples).

[957] 408 U.S. at 706.

[958] The 33rd state statute enacted was the State of Washington's, which took effect on July 22, 2007. See the website of the Reporters Committee for Freedom of the Press for information on the state laws. The greatest difficulty these laws experience is the possibility of a constitutional conflict with the Fifth and Sixth Amendment rights of criminal defendants. *See Matter of Farber*, 78 N.J. 259, 394 A.2d 330, *cert. denied sub nom.* New York Times v. New Jersey, 439 U.S. 997 (1978). *See also* New York Times v. Jascalevich, 439 U.S. 1301, 1304, 1331 (1978) (applications to Circuit Justices for stay), and id. at 886 (vacating stay).

[959] Rule 501 also provides that, in civil actions and proceedings brought in federal court under state law, the availability of a privilege shall be determined in accordance with state law.

[960] See, e.g., *In re*: Grand Jury Subpoena. Judith Miller, 397 F.3d 964, 972 (D.C. Cir. 2005) (Tatel, J., concurring) (citation omitted), *rehearing en banc denied*, 405 F.3d 17 (D.C. Cir. 2005 (Tatel, J., concurring), *cert. denied*, 545 U.S. 1150 (2005), *reissued with unredacted material*, 438 F.3d 1141 (D.C. Cir. 2006) (U.S. Court of Appeals for the District of Columbia "is not of one mind on the existence of a common law privilege").

[961] Zurcher v. Stanford Daily, 436 U.S. 547, 563–67 (1978). Justice Powell thought it appropriate that "a magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment" when he assesses the reasonableness of a warrant in light of all the circumstances. Id. at 568 (concurring). Justices Stewart and Marshall would have imposed special restrictions upon searches when the press was the object, id. at 570 (dissenting), and Justice Stevens dissented on Fourth Amendment grounds. Id. at 577.

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decline to put in writing their information, and internal editorial deliberations would be exposed. The Court thought that First Amendment interests were involved, but it seemed to doubt that the consequences alleged would occur, and it observed that the built-in protections of the warrant clause would adequately protect those interests and noted that magistrates could guard against abuses when warrants were sought to search newsrooms by requiring particularizations of the type, scope, and intrusiveness that would be permitted in the searches.[962]

Government and the Conduct of Trials.—Conflict between constitutional rights is not uncommon. One of the most difficult to resolve is the conflict between a criminal defendant's Fifth and Sixth Amendment rights to a fair trial and the First Amendment's protection of the rights to obtain and publish information about defendants and trials. Convictions obtained in the context of prejudicial pre-trial publicity[963] and during trials that were media "spectaculars"[964] have been reversed, but the prevention of such occurrences is of paramount importance to the governmental and public interest in the finality of criminal trials and the successful prosecution of criminals. However, the imposition of "gag orders" on press publication of information directly confronts the First Amendment's bar on prior restraints,[965] although the courts have a good deal more discretion in preventing the information from becoming public in the first place.[966] Perhaps the most profound debate that has arisen in recent years concerns the right of access of the public and the press to trial and pre-trial proceedings, and the Court has addressed the issue.

When the Court held that the Sixth Amendment right to a public trial did not guarantee access of the public and the press to pretrial suppression hearings,[967] a major debate flowered concerning the extent to which, if at all, the speech and press clauses pro-

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[962] Congress enacted the Privacy Protection Act of 1980, Pub. L. 96–440, 94 Stat. 1879, 42 U.S.C. § 2000aa, to protect the press and other persons having material intended for publication from federal or state searches in specified circumstances, and creating damage remedies for violations.

[963] Irvin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963).

[964] Sheppard v. Maxwell, 384 U.S. 333 (1966); *compare* Estes v. Texas, 381 U.S. 532 (1965), *with* Chandler v. Florida, 449 U.S. 560 (1981).

[965] Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

[966] *See*, *e.g.*, Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) (disciplinary rules restricting extrajudicial comments by attorneys are void for vagueness, but such attorney speech may be regulated if it creates a "substantial likelihood of material prejudice" to the trial of a client); Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (press, as party to action, restrained from publishing information obtained through discovery).

[967] Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

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tected the public and the press in seeking to attend trials.[968] The right of access to criminal trials against the wishes of the defendant was held protected in *Richmond Newspapers v. Virginia*,[969] but the Justices could not agree upon a majority rationale that would permit principled application of the holding to other areas in which access is sought.

Chief Justice Burger pronounced the judgment of the Court, but his opinion was joined by only two other Justices (and one of them in a separate concurrence drew conclusions probably going beyond the Chief Justice's opinion).[970] Basic to the Chief Justice's view was an historical treatment that demonstrated that trials were traditionally open. This openness, moreover, was no "quirk of history" but "an indispensable attribute of an Anglo-American trial." This characteristic flowed from the public interest in seeing fairness and proper conduct in the administration of criminal trials; the "therapeutic value" to the public of seeing its criminal laws in operation, purging the society of the outrage felt at the commission of many crimes, convincingly demonstrated why the tradition had developed and been maintained. Thus, "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." The presumption has more than custom to command it. "[I]n the context of trials . . . the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that amendment was adopted."[971]

Justice Brennan, joined by Justice Marshall, followed a significantly different route to the same conclusion. In his view, "the First Amendment . . . has a *structural* role to play in securing and fostering our republican system of self-government. Implicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust, and wide-open,' but the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy

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[968] *DePasquale* rested solely on the Sixth Amendment, the Court reserving judgment on whether there is a First Amendment right of public access. 443 U.S. at 392.

[969] 448 U.S. 555 (1980). The decision was 7 to 1, with Justice Rehnquist dissenting, id. at 604, and Justice Powell not participating. Justice Powell, however, had taken the view in Gannett Co. v. DePasquale, 443 U.S. 368, 397 (1979) (concurring), that the First Amendment did protect access to trials.

[970] *See* Richmond Newspapers v. Virginia, 448 U.S. 555, 582 (1980) (Justice Stevens concurring).

[971] 448 U.S. at 564–69. The emphasis on experience and history was repeated by the Chief Justice in his opinion for the Court in Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (Press-Enterprise II).

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to survive, and thus entails solicitude not only for communication itself but also for the indispensable conditions of meaningful communication."[972]

The trial court in *Richmond Newspapers* had made no findings of necessity for closure, and neither Chief Justice Burger nor Justice Brennan found the need to articulate a standard for determining when the government's or the defendant's interests could outweigh the public right of access. That standard was developed two years later. *Globe Newspaper Co. v. Superior Court*[973] involved a statute, unique to one state, that mandated the exclusion of the public and the press from trials during the testimony of a sex-crime victim under the age of 18. For the Court, Justice Brennan wrote that the First Amendment guarantees press and public access to criminal trials, both because of the tradition of openness[974] and because public scrutiny of a criminal trial serves the valuable functions of enhancing the quality and safeguards of the integrity of the factfinding process, of fostering the appearance of fairness, and of permitting public participation in the judicial process. The right is not absolute, but in order to close all or part of a trial government must show that "the denial is necessitated by a compelling governmental interest, and [that it] is narrowly tailored to serve that interest."[975] The Court was explicit that the right of access was to *criminal* trials,[976] so that the question of the openness of civil trials remains.

The Court next applied and extended the right of access in several other areas, striking down state efforts to exclude the public from *voir dire* proceedings, from a suppression hearing, and from a

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[972] 448 U.S. at 587–88 (emphasis in original, citations omitted).

[973] 457 U.S. 596 (1982). Joining Justice Brennan's opinion of the Court were Justices White, Marshall, Blackmun, and Powell. Justice O'Connor concurred in the judgment. Chief Justice Burger, with Justice Rehnquist, dissented, arguing that the tradition of openness that underlay *Richmond Newspapers*, was absent with respect to sex crimes and youthful victims and that *Richmond Newspapers* was unjustifiably extended. Id. at 612. Justice Stevens dissented on the ground of mootness. Id. at 620.

[974] That there was no tradition of openness with respect to the testimony of minor victims of sex crimes was irrelevant, the Court argued. As a general matter, all criminal trials have been open. The presumption of openness thus attaches to all criminal trials and to close any particular kind or part of one because of a particular reason requires justification on the basis of the governmental interest asserted. 457 U.S. at 605 n.13.

[975] 457 U.S. at 606–07. Protecting the well-being of minor victims was a compelling interest, the Court held, and might justify exclusion in specific cases, but it did not justify a mandatory closure rule. The other asserted interest—encouraging minors to come forward and report sex crimes—was not well served by the statute.

[976] The Court throughout the opinion identifies the right as access to *criminal trials*, even italicizing the words at one point. 457 U.S. at 605.

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preliminary hearing. The Court determined in *Press-Enterprise I*[977] that historically *voir dire* had been open to the public, and that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[978] No such findings had been made by the state court, which had ordered closed, in the interest of protecting the privacy interests of some prospective jurors, 41 of the 44 days of *voir dire* in a rape-murder case. The trial court also had not considered the possibility of less restrictive alternatives, *e.g.*, *in camera* consideration of jurors' requests for protection from publicity. In *Waller v. Georgia*,[979] the Court held that "under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out in *Press Enterprise*,"[980] and noted that the need for openness at suppression hearings "may be particularly strong" because the conduct of police and prosecutor is often at issue.[981] And, in *Press Enterprise II*,[982] the Court held that there is a similar First Amendment right of the public to access to most criminal proceedings (here a preliminary hearing) even when the accused requests that the proceedings be closed. Thus, an accused's Sixth Amendment-based request for closure must meet the same stringent test applied to governmental requests to close proceedings: there must be "specific findings . . . demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."[983] Openness of preliminary hearings was deemed important because, under California law, the hearings can be "the final and most important step in the criminal proceeding" and therefore may be "the sole occasion for public observation of the criminal justice system," and also because the safeguard of a jury is unavailable at preliminary hearings.[984]

Government as Administrator of Prisons.—A prison inmate retains only those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penologi-

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[977] Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984).
[978] 464 U.S. at 510.
[979] 467 U.S. 39 (1984).
[980] Gannett Co. v. DePasquale, 443 U.S. 368 (1979), did not involve assertion *by the accused* of his 6th Amendment right to a public trial; instead, the accused in that case had requested closure. "[T]he constitutional guarantee of a public trial is for the benefit of the defendant." Id. at 381.
[981] 467 U.S. at 47.
[982] Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986).
[983] 478 U.S. at 14.
[984] 478 U.S. at 12.

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cal objectives of the corrections system.[985] The identifiable governmental interests at stake in administration of prisons are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners.[986] In applying these general standards, the Court at first arrived at somewhat divergent points in assessing prison restrictions on mail and on face-to-face news interviews between reporters and prisoners. The Court's more recent deferential approach to regulation of prisoners' mail has lessened the differences.

First, in *Procunier v. Martinez*,[987] the Court invalidated mail censorship regulations that permitted authorities to hold back or to censor mail to and from prisoners whenever they thought that the letters "unduly complain," express "inflammatory . . . views," or were "defamatory" or "otherwise inappropriate."[988] The Court based this ruling not on the rights of the prisoner, but instead on the outsider's right to communicate with the prisoner either by sending or by receiving mail. Under this framework, the Court held, regulation of mail must further an important interest unrelated to the suppression of expression; regulation must be shown to further the substantial interest of security, order, and rehabilitation; and regulation must not be used simply to censor opinions or other expressions. Further, a restriction must be no greater than is necessary to the protection of the particular government interest involved.

In *Turner v. Safley*,[989] however, the Court made clear that a standard that is more deferential to the government is applicable when the free speech rights only of inmates are at stake. In upholding a Missouri restriction on correspondence between inmates at different institutions, while striking down a prohibition on inmate marriages absent a compelling reason such as pregnancy or birth of a child, the Court announced the appropriate standard: "[W]hen a regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[990] Four factors "are relevant in determining the reasonable-

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[985] Pell v. Procunier, 417 U.S. 817, 822 (1974).

[986] Procunier v. Martinez, 416 U.S. 396, 412 (1974).

[987] 416 U.S. 396 (1974). *But see* Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977), in which the Court sustained prison regulations barring solicitation of prisoners by other prisoners to join a union, banning union meetings, and denying bulk mailings concerning the union from outside sources. The reasonable fears of correctional officers that organizational activities of the sort advocated by the union could impair discipline and lead to possible disorders justified the regulations.

[988] 416 U.S. at 396.

[989] 482 U.S. 78 (1987).

[990] 482 U.S. at 89. In Overton v. Bazzetta, 539 U.S. 126 (2003), the Court applied *Turner* to uphold various restrictions on visitation by children and by former

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ness of a regulation at issue."[991] "First, is there a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it? Second, are there alternative means of exercising the right that remain open to prison inmates? Third, what impact will accommodation of the asserted constitutional right . . . have on guards and other inmates, and on the allocation of prison resources generally? And, fourth, are ready alternatives for furthering the governmental interest available?"[992] Two years after *Turner v. Safley*, in *Thornburgh v. Abbott*, the Court restricted *Procunier v. Martinez* to the regulation of *outgoing* correspondence, finding that the needs of prison security justify a more deferential standard for prison regulations restricting incoming material, whether those incoming materials are correspondence from other prisoners, correspondence from nonprisoners, or outside publications.[993]

In *Beard v. Banks*, a plurality of the Supreme Court upheld "a Pennsylvania prison policy that 'denies newspapers, magazines, and photographs' to a group of specially dangerous and recalcitrant inmates."[994] These inmates were housed in Pennsylvania's Long Term Segregation Unit and one of the prison's penological rationales for its policy, which the plurality found to satisfy the four *Turner* factors, was to motivate better behavior on the part of the prisoners by providing them with an incentive to move back to the regular prison population.[995] Applying the four *Turner* factors to this rationale, the plurality found that (1) there was a logical connection between depriving inmates of newspapers and magazines and providing an incentive to improve behavior; (2) the Policy provided no alternatives to the deprivation of newspapers and magazines, but this was "not 'conclusive' of the reasonableness of the Policy"; (3) the impact of accommodating the asserted constitutional right would

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inmates, and on all visitation except attorneys and members of the clergy for inmates with two or more substance-abuse violations; an inmate subject to the latter restriction could apply for reinstatement of visitation privileges after two years. "If the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations." Id. at 137.

[991] 482 U.S. at 89.

[992] Beard v. Banks, 548 U.S. 521, 529 (2006) (citations and internal quotation marks omitted; this quotation quotes language from Turner v. Safley, 482 U.S. at 89–90).

[993] 490 U.S. 401, 411–14 (1989). Thornburgh v. Abbott noted that, if regulations deny prisoners publications on the basis of their content, but the grounds on which the regulations do so is content-neutral (*e.g.*, to protect prison security), then the regulations will be deemed neutral. Id. at 415–16.

[994] 548 U.S. 521, 524–25 (2006). This was a 4–2–2 decision, with Justice Alito, who had written the court of appeals decision, not participating.

[995] 548 U.S. at 531.

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be negative; and (4) no alternative would "fully accommodate the prisoner's rights at *de minimis* cost to valid penological interests." [996] The plurality believed that its "real task in this case is not balancing these factors, but rather determining whether the Secretary shows more than simply a logical relation, that is, whether he shows a *reasonable* relation" between the Policy and legitimate penological objections, as *Turner* requires.[997] The plurality concluded that he had. Justices Thomas and Scalia concurred in the result but would do away with the *Turner* factors because they believe that "States are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivation—*provided only that those deprivations are consistent with the Eighth Amendment*." [998]

Neither prisoners nor reporters have any affirmative First Amendment right to face-to-face interviews, when general public access to prisons is restricted and when there are alternatives by which the news media can obtain information respecting prison policies and conditions.[999] Prison restrictions on such interviews do indeed implicate the First Amendment rights of prisoners, the Court held, but such rights must be balanced against "the legitimate penological objectives of the corrections system" and "internal security within the corrections facilities," taking into account available alternative means of communications, such as mail and "limited visits from members of [prisoners'] families, the clergy, their attorneys, and friends of prior acquaintance." [1000]

While agreeing with a previous affirmation that "news gathering is not without its First Amendment protections," [1001] the Court denied that the First Amendment imposed upon the government any affirmative obligation to the press. "The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally." [1002] *Pell* and *Saxbe* did not delineate whether

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[996] 548 U.S. at 531–32.

[997] 548 U.S. at 533.

[998] 548 U.S. at 537 (Thomas, J., concurring), quoting Overton v. Bazzetta, 539 U.S. at 139 (Thomas, J., concurring) (emphasis originally in *Overton*).

[999] Pell v. Procunier, 417 U.S. 817 (1974). Justices Douglas, Brennan, and Marshall dissented. Id. at 836.

[1000] 417 U.S. at 822–25.

[1001] Branzburg v. Hayes, 408 U.S. 665, 707 (1972), *quoted in* Pell v. Procunier, 417 U.S. 817, 833 (1974).

[1002] 417 U.S. at 834. The holding was applied to federal prisons in Saxbe v. Washington Post, 417 U.S. 843 (1974). Dissenting, Justices Powell, Brennan, and Marshall argued that "at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs," that the press's role was

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the "equal access" rule applied only in cases in which there was public access, so that a different rule for the press might follow when general access was denied; nor did they purport to define what the rules of equal access are. No greater specificity emerged from *Houchins v. KQED*,[1003] in which a broadcaster had sued for access to a prison from which public and press alike were barred and as to which there was considerable controversy over conditions of incarceration. Following initiation of the suit, the administrator of the prison authorized limited public tours. The tours were open to the press, but cameras and recording devices were not permitted, there was no opportunity to talk to inmates, and the tours did not include the maximum security area about which much of the controversy centered. The Supreme Court overturned the injunction obtained in the lower courts, the plurality reiterating that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control. . . . [U]ntil the political branches decree otherwise, as they are free to do, the media have no special right of access to the Alameda County Jail different from or greater than that accorded the public generally."[1004] Justice Stewart, whose vote was necessary to the disposition of the case, agreed with the equal access holding but would have approved an injunction more narrowly drawn to protect the press's right to use cameras and recorders so as to enlarge public access to the information.[1005] Thus, any question of special press access appears settled by the decision; yet the questions raised above remain: May everyone be barred from access and, if access is accorded, does the Constitution necessitate any limitation on the discretion of prison administrators?[1006]

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to make this discussion informed, and that the ban on face-to-face interviews unconstitutionally fettered this role of the press. Id. at 850, 862.

[1003] 438 U.S. 1 (1978). The decision's imprecision of meaning is partly attributable to the fact that there was no opinion of the Court. A plurality opinion represented the views of only three Justices; two Justices did not participate, three Justices dissented, and one Justice concurred with views that departed somewhat from the plurality.

[1004] 438 U.S. at 15–16.

[1005] 438 U.S. at 16.

[1006] The dissenters, Justices Stevens, Brennan, and Powell, believed that the Constitution protects the public's right to be informed about conditions within the prison and that total denial of access, such as existed prior to institution of the suit, was unconstitutional. They would have sustained the more narrowly drawn injunctive relief to the press on the basis that no member of the public had yet sought access. 438 U.S. at 19. It is clear that Justice Stewart did not believe that the Constitution affords any relief. Id. at 16. Although the plurality opinion of the Chief Justice Burger and Justices White and Rehnquist may be read as not deciding whether any public right of access exists, overall it appears to proceed on the unspoken basis that there is none. The second question, when Justice Stewart's concurring opinion and the dissenting opinion are combined, appears to be answerable qualifiedly in

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Government and the Power of the Purse.—In exercise of the spending power, Congress may refuse to subsidize the exercise of First Amendment rights, but may not deny benefits solely on the basis of the exercise of such rights. The distinction between these two closely related principles seemed, initially at least, to hinge on the severity and pervasiveness of the restriction placed on exercise of First Amendment rights. What has emerged is the principle that Congress may condition the receipt of federal funds on acceptance of speech limitations on persons working for the project receiving the federal funding—even if the project also receives non-federal funds—provided that the speech limitations do not extend to the use of non-federal funds outside of the federally funded project. In *Regan v. Taxation With Representation*,[1007] the Court held that Congress could constitutionally limit tax-exempt status under § 501(c)(3) of the Internal Revenue Code to charitable organizations that do not engage in lobbying. "Congress has merely refused to pay for the lobbying out of public moneys," the Court concluded.[1008] The effect of the ruling on the organization's lobbying activities was minimal, however, since it could continue to receive tax-deductible contributions by creating a separate affiliate to conduct the lobbying.

In *FCC v. League of Women Voters*,[1009] by contrast, the Court held that the First Amendment rights of public broadcasting stations were abridged by a prohibition on all editorializing by any recipient of public funds. There was no alternative means, as there had been in *Taxation With Representation*, by which the stations could continue to receive public funding and create an affiliate to engage in the prohibited speech. The Court rejected dissenting Justice Rehnquist's argument that the general principles of *Taxation With Representation* and *Oklahoma v. Civil Service Comm'n* [1010] should be controlling.[1011] In *Rust v. Sullivan*, however, Chief Justice Rehnquist asserted for the Court that restrictions on abortion counseling and referral imposed on recipients of family planning funding under the Public Health Service Act did not constitute discrimination on the basis of viewpoint, but instead represented government's decision

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the direction of constitutional constraints upon the nature of access limitation once access is granted.

[1007] 461 U.S. 540 (1983).

[1008] 461 U.S. at 545. *See also* Cammarano v. United States, 358 U.S. 498, 512–13 (1959) (exclusion of lobbying expenses from income tax deduction for ordinary and necessary business expenses is not a regulation aimed at the suppression of dangerous ideas, and does not violate the First Amendment).

[1009] 468 U.S. 364 (1984).

[1010] 330 U.S. 127 (1947).

[1011] 468 U.S. at 399–401, & n.27.

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"to fund one activity to the exclusion of the other." [1012] In addition, the Court noted, the "regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. Title X expressly distinguishes between a Title X *grantee* and a Title X *project*. . . . The regulations govern the scope of the Title X *project's* activities, and leave the grantee unfettered in its other activities." [1013] It remains to be seen what application this decision will have outside the contentious area of abortion regulation.[1014]

In *National Endowment for the Arts v. Finley*, the Supreme Court upheld the constitutionality of a federal statute requiring the NEA, in awarding grants, to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." [1015] The Court acknowledged that, if the statute were "applied in a manner that raises concern about the suppression of disfavored viewpoints," [1016] then such application might be unconstitutional. The statute on its face, however, is constitutional because it "imposes no categorical requirement," being merely "advisory." [1017] "Any content-based considerations that may be taken into account in the grant-making process are a consequence of the na-

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[1012] 500 U.S. 173, 193 (1991). Dissenting Justice Blackmun contended that *Taxation With Representation* was easily distinguishable because its restriction was on all lobbying activity regardless of content or viewpoint. Id. at 208–09.

[1013] 500 U.S. at 196 (emphasis in original). Dissenting Justice Blackmun wrote: "Under the majority's reasoning, the First Amendment could be read to tolerate *any* governmental restriction is limited to the funded workplace. This is a dangerous proposition, and one the Court has rightly rejected in the past." Id. at 213 (emphasis in original).

[1014] The Court attempted to minimize the potential sweep of its ruling in *Rust*. "This is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipient to speak outside the scope of the Government-funded project, is invariably sufficient to justify government control over the content of expression." 500 U.S. at 199. The Court noted several possible exceptions to the general principle: government ownership of a public forum does not justify restrictions on speech; the university setting requires heightened protections through application of vagueness and overbreadth principles; and the doctor-patient relationship may also be subject to special First Amendment protection. (The Court denied, however, that the doctor-patient relationship was significantly impaired by the regulatory restrictions at issue.) Lower courts were quick to pick up on these suggestions. *See*, *e.g.*, *Stanford Univ. v Sullivan*, 773 F. Supp. 472, 476–78 (D.D.C. 1991) (confidentiality clause in federal grant research contract is invalid because, *inter alia*, of application of vagueness principles in a university setting); Gay Men's Health Crisis v. Sullivan, 792 F. Supp. 278 (S.D.N.Y. 1992) ("offensiveness" guidelines restricting Center for Disease Control grants for preparation of AIDS-related educational materials are unconstitutionally vague).

[1015] 524 U.S. 569, 572 (1998).

[1016] 524 U.S. at 587.

[1017] 524 U.S. at 581. Justice Scalia, in a concurring opinion joined by Justice Thomas, claimed that this interpretation of the statute "gutt[ed] it." Id. at 590. He believed that the statute "establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated. And that is perfectly constitutional." Id.

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ture of arts funding. . . . The 'very assumption' of the NEA is that grants will be awarded according to the 'artistic worth of competing applications,' and absolute neutrality is simply 'inconceivable.'" [1018] The Court also found that the terms of the statute, "if they appeared in a criminal statute or regulatory scheme, . . . could raise substantial vagueness concerns. . . . But when the government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." [1019]

In contrast, in *Agency for International Development v. Alliance for Open Society International*,[1020] the Court found that the federal government could not explicitly require a federal grantee to adopt a public policy position as a condition of receiving federal funds. In *Alliance for Open Society International*, organizations that received federal dollars to combat HIV/AIDS internationally were required (1) to ensure that such funds were not being used "to promote or advocate the legalization or practice of prostitution or sex trafficking" and (2) to have a policy "explicitly opposing prostitution." [1021] While the first condition legitimately ensured that the government was not funding speech which conflicted with the purposes of the grant, the second requirement, in the view of the Court, improperly affected the recipient's protected conduct outside of the federal program.[1022] Further, the Court concluded that the organization could not, as in previous cases, avoid the requirement by establishing an affiliate to engage in opposing advocacy because of the "evident hypocrisy" that would entail.[1023]

In *Legal Services Corp. v. Valazquez*,[1024] the Court struck down a provision of the Legal Services Corporation Act that prohibited recipients of Legal Services Corporation (LSC) funds (*i.e.*, legal-aid organizations that provide lawyers to the poor in civil matters) from representing a client who seeks "to amend or otherwise challenge existing [welfare] law." This meant that, even with non-federal funds, a recipient of federal funds could not argue that a state welfare statute violated a federal statute or that a state or federal welfare law violated the Constitution. If a case was underway when such a challenge became apparent, the attorney had to withdraw. The Court distinguished this situation from that in *Rust v. Sullivan* on the ground "that the counseling activities of the doctors under Title X amounted to governmental speech," whereas "an LSC-funded attor-

[1018] 524 U.S. at 585.
[1019] 524 U.S. at 588–89.
[1020] 570 U.S. ___, No. 12–10, slip op. (2013).
[1021] 22 U.S.C. § 7631(e), (f) (2012).
[1022] See *All. for Int'l Dev.*, slip op. at 6.
[1023] *Id.* at 13.
[1024] 531 U.S. 533 (2001).

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ney speaks on behalf of the client in a claim against the government for welfare benefits." [1025] Furthermore, the restriction in this case "distorts the legal system" by prohibiting "speech and expression upon which courts must depend for the proper exercise of the judicial power," and thereby is "inconsistent with accepted separation-of-powers principles." [1026]

In *United States v. American Library Association, Inc.*, a four-Justice plurality of the Supreme Court upheld the Children's Internet Protection Act (CIPA), which, as the plurality summarized it, provides that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them." [1027] The plurality considered whether CIPA imposes an unconstitutional condition on the receipt of federal assistance by requiring public libraries (public schools were not involved in the case) to limit their freedom of speech if they accept federal funds. The plurality, citing *Rust v. Sullivan*, found that, assuming that government entities have First Amendment rights (it did not decide the question), CIPA does not infringe them. This is because CIPA does not deny a benefit to libraries that do not agree to use filters; rather, the statute "simply insist[s] that public funds be spent for the purposes for which they were authorized." [1028] The plurality distinguished *Legal Services Corporation v. Velazquez* on the ground that public libraries have no role comparable to that of legal aid attorneys "that pits them against the Government, and there is no comparable assumption that they must be free of any conditions that their benefactors might attach to the use of donated funds or other assistance." [1029]

In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, the Supreme Court upheld the Solomon Amendment, which provides, in the Court's summary, "that if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds." [1030] FAIR, the group that challenged the Solomon Amendment, is an association of law schools that barred military recruiting on their campuses because of the military's

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[1025] 531 U.S. at 541, 542.
[1026] 531 U.S. at 544, 546.
[1027] 539 U.S. 194, 199 (2003).
[1028] 539 U.S. at 211.
[1029] 539 U.S. at 213 (emphasis in original). Other grounds for the plurality decision are discussed under "Non-obscene But Sexually Explicit and Indecent Expression" and "The Public Forum."
[1030] 547 U.S. 47, 51 (2006).

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discrimination against homosexuals. FAIR challenged the Solomon Amendment as violating the First Amendment because it forced schools to choose between enforcing their nondiscrimination policy against military recruiters and continuing to receive specified federal funding. The Court concluded: "Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds." [1031] The Court found that "[t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything. . . . It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." [1032] The law schools' conduct in barring military recruiters, the Court found, "is not inherently expressive," and, therefore, unlike flag burning, for example, is not "symbolic speech." [1033] Applying the *O'Brien* test for restrictions on conduct that have an incidental effect on speech, the Court found that the Solomon Amendment clearly "promotes a substantial government interest that would be achieved less effectively absent the regulation." [1034]

The Court also found that the Solomon Amendment did not unconstitutionally compel schools to speak, or even to host or accommodate the government's message. As for compelling speech, law schools must "send e-mails and post notices on behalf of the military to comply with the Solomon Amendment. . . . This sort of recruiting assistance, however, is a far cry from the compelled speech in *Barnette* and *Wooley*. . . . [It] is plainly incidental to the Solomon Amendment's regulation of conduct." [1035] As for forcing one speaker to host or accommodate another, "[t]he compelled-speech violation in each of our prior cases . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." [1036] By contrast, the Court wrote, "Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." [1037] Finally, the Court found that the Solomon Amendment was not analogous to the New Jersey law that had required the Boy Scouts to accept

[1031] 547 U.S. at 60. The Court stated that Congress's authority to directly require campus access for military recruiters comes from its Article I, section 8, powers to provide for the common defense, to raise and support armies, and to provide and maintain a navy. Id. at 58.
[1032] 547 U.S. at 60.
[1033] 547 U.S. at 64, 65.
[1034] 547 U.S. at 67.
[1035] 547 U.S. at 61, 62.
[1036] 547 U.S. at 63.
[1037] 547 U.S. at 65.

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a homosexual scoutmaster, and that the Supreme Court struck down as violating the Boy Scouts' "right of expressive association." [1038] Recruiters, unlike the scoutmaster, are "outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association." [1039]

The Government Speech Doctrine.—As an outgrowth of the government subsidy cases, such as *Rust v. Sullivan*,[1040] the Court has established the "government speech doctrine" that recognizes that a government entity "is entitled to say what it wishes" [1041] and to select the views that it wants to express.[1042] In this vein, when the government speaks, the government is not barred by the Free Speech Clause of the First Amendment from determining the content of what it says and can engage in viewpoint discrimination.[1043] The underlying rationale for the government speech doctrine is that the government could not "function" if the government could not favor or disfavor points of view in enforcing a program.[1044] And the Supreme Court has recognized that the government speech doctrine even extends to when the government receives private assistance in helping deliver a government controlled message.[1045] As a consequence, the Court, relying on the government speech doctrine, has rejected First Amendment challenges to (1) regulations prohibiting recipients of government funds from advocating, counseling, or referring patients for abortion; [1046] (2) disciplinary actions taken as a result of statements made by public employees pursuant to their official duties; [1047] (3) mandatory assessments made against cattle merchants when used to fund advertisements whose message was controlled by the government; [1048] (4) a city's decision to reject a monument for placement in a public park; [1049]

[1038] 547 U.S. at 68, quoting Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000).

[1039] 547 U.S. at 69.

[1040] 500 U.S. 173 (1991).

[1041] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

[1042] *Id.* at 833.

[1043] *See* Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009). Nonetheless, while the First Amendment's Free Speech Clause has no applicability with regard to government speech, it is important to note that other constitutional provisions—such as the Equal Protection principles of the Fifth and Fourteenth Amendments—may constrain what the government can say. *Id.* at 468–69.

[1044] *See id.* at 468 ("Indeed, it is not easy to imagine how government could function if it lacked this freedom.").

[1045] *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005).

[1046] *See Rust*, 500 U.S. at 194.

[1047] *See* Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006).

[1048] *See Livestock Mktg. Ass'n*, 544 U.S. at 562.

[1049] *See Pleasant Grove City*, 555 U.S. at 472.

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and (5) a state's decision to reject a design for a specialty license plate for an automobile.[1050]

A central issue prompted by the government speech doctrine is determining when speech is that of the government, which can be difficult when the government utilizes or relies on private parties to relay a particular message. In *Johanns v. Livestock Marketing Association*, the Court held that the First Amendment did not prohibit the compelled subsidization of advertisements promoting the sale of beef because the underlying message of the advertisements was "effectively controlled" by the government.[1051] Four years later, in *Pleasant Grove City v. Summum*, the Court shifted from an exclusive focus on the "effective control" test in holding that "permanent monuments displayed on public property," even when provided by private parties, generally "represent government speech." [1052] In so concluding, the Court relied not only on the fact that a government, in selecting monuments for display in a park, generally exercises "effective control" and has "final approval authority" over the monument, but also on (1) the government's long history of "us-[ing] monuments to speak for the public"; and (2) the public's common understanding as to monuments and their role in conveying a message from the government.[1053] In *Walker v. Texas Division, Sons of Confederate Veterans*, the Court relied on the same analysis used in *Pleasant Grove City* to conclude that the State of Texas, in approving privately crafted designs for specialty license plates, could reject designs the state found offensive without running afoul of the Free Speech Clause.[1054] Specifically, the *Walker* Court held that license plate designs amounted to government speech because (1) states historically used license plates to convey government messages; (2) the public closely identifies license plate designs with the state; and (3) the State of Texas maintained effective control over the messages conveyed on its specialty license plates.[1055] *Walker*, therefore, appears to indicate that the Court has settled on a more flexible approach to determining what constitutes government speech.

Governmental Regulation of Communications Industries

As in the previous section, the governmental regulations here considered may have only the most indirect relation to freedom of expression, or may clearly implicate that freedom even though the

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[1050] *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. ___, No. 14–144, slip op. at 1 (2015).
[1051] *See Livestock Mktg. Ass'n*, 544 U.S. at 560.
[1052] *See Pleasant Grove City*, 555 U.S. at 470.
[1053] *Id.* at 470–73.
[1054] *See Walker*, slip op. at 1.
[1055] *See id.* at 7–12.

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purpose of the particular regulation is not to reach the content of the message. First, however, the judicially formulated doctrine distinguishing commercial expression from other forms is briefly considered.

Commercial Speech.—Starting in the 1970s, the Court's treatment of "commercial speech" underwent a transformation from total nonprotection under the First Amendment to qualified protection. The conclusion that a communication proposing a commercial transaction is a different order of speech underserving of First Amendment protection was arrived at almost casually in 1942 in *Valentine v. Chrestensen*.[1056] In *Chrestensen*, the Court upheld a city ordinance prohibiting distribution on the street of "commercial and business advertising matter," as applied to an exhibitor of a submarine who distributed leaflets describing his submarine on one side and on the other side protesting the city's refusal of certain docking facilities. The doctrine was in any event limited to promotion of commercial activities; the fact that expression was disseminated for profit or through commercial channels did not expose it to any greater regulation than if it were offered for free.[1057] The doctrine lasted in this form for more than twenty years.

The Court later modified this position so that commercial speech is protected "from unwarranted governmental regulation," although its nature makes it subject to greater limitations than may be imposed on expression not solely related to the economic interests of the speaker and its audience.[1058] The change to its earlier holdings was accomplished within a brief span of time in which the Justices haltingly but then decisively moved to a new position. Applying the doctrine in a narrow five-to-four decision, the Court sustained the application of a city's ban on employment discrimination to bar sex-designated employment advertising in a newspaper.[1059] Suggesting that speech does not lose its constitutional protection simply because it appears in a commercial context, Justice Powell,

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[1056] 316 U.S. 52 (1942). *See also* Breard v. City of Alexandria, 341 U.S. 622 (1951). The doctrine was one of the bases upon which the banning of all commercials for cigarettes from radio and television was upheld. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971) (three-judge court), *aff'd per curiam*, 405 U.S. 1000 (1972).

[1057] Books that are sold for profit, Smith v. California, 361 U.S. 147, 150 (1959); Ginzburg v. United States, 383 U.S. 463, 474–75 (1966), advertisements dealing with political and social matters which newspapers carry for a fee, New York Times Co. v. Sullivan, 376 U.S. 254, 265–66 (1964), motion pictures which are exhibited for an admission fee, United States v. Paramount Pictures, 334 U.S. 131, 166 (1948); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952), were all during this period held entitled to full First Amendment protection regardless of the commercial element involved.

[1058] Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 561 (1980).

[1059] Pittsburgh Press Co. v. Comm'n on Human Relations, 413 U.S. 376 (1973).

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for the Court, did find the placing of want-ads in newspapers to be "classic examples of commercial speech," devoid of expressions of opinions with respect to issues of social policy; so the "did no more than propose a commercial transaction." But the Justice also noted that employment discrimination, which was facilitated by the advertisements, was itself illegal.[1060]

Next, the Court overturned a conviction under a state statute that made it illegal, by sale or circulation of any publication, to encourage or prompt the procuring of an abortion. The Court held the statute unconstitutional as applied to an editor of a weekly newspaper who published an advertisement announcing the availability of legal and safe abortions in another state and detailing the assistance that would be provided state residents in obtaining abortions in the other state.[1061] The Court discerned that the advertisements conveyed information of other than a purely commercial nature, that they related to services that were legal in the other jurisdiction, and that the state could not prevent its residents from obtaining abortions in the other state or punish them for doing so.

Then, the Court swept all these distinctions away as it voided a statute that declared it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs.[1062] In a suit brought by consumers to protect their right to receive information, the Court held that speech that does no more than propose a commercial transaction is nonetheless of such social value as to be entitled to protection. Consumers' interests in receiving factual information about prices may even be of greater value than political debate, but in any event price competition and access to information about it is in the public interest. State interests asserted in support of the ban—protection of professionalism and the quality of prescription goods—were found either badly served or not served by the statute.[1063]

Turning from the interests of consumers to receive information to the asserted right of advertisers to communicate, the Court voided several restrictions. The Court voided a municipal ordinance that barred the display of "For sale" and "Sold" signs on residential lawns, purportedly so as to limit "white flight" resulting from a "fear psychology" that developed among white residents following sale of homes

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[1060] 413 U.S. at 385, 389. The Court continues to hold that government may ban commercial speech related to illegal activity. Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 563–64 (1980).

[1061] Bigelow v. Virginia, 421 U.S. 809 (1975).

[1062] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). Justice Rehnquist dissented. Id. at 781.

[1063] 425 U.S. at 763–64 (consumers' interests), 764–65 (social interest), 766–70 (justifications for the ban).

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to nonwhites. The right of owners to communicate their intention to sell a commodity and the right of potential buyers to receive the message was protected, the Court determined; the community interest could have been achieved by less restrictive means and in any event may not be achieved by restricting the free flow of truthful information.[1064] Similarly, deciding a question it had reserved in the *Virginia Pharmacy* case, the Court held that a state could not forbid lawyers from advertising the prices they charged for the performance of routine legal services.[1065] None of the proffered state justifications for the ban was deemed sufficient to overcome the private and societal interest in the free exchange of this form of speech.[1066] Nor may a state categorically prohibit attorney advertising through mailings that target persons known to face particular legal problems,[1067] or prohibit an attorney from holding himself out as a certified civil trial specialist,[1068] or prohibit a certified public accountant from holding herself out as a certified financial planner.[1069]

However, a state has been held to have a much greater countervailing interest in regulating person-to-person solicitation of clients by attorneys; therefore, especially because in-person solicitation is "a business transaction in which speech is an essential but subordinate component," the state interest need only be important rather than compelling.[1070] Similarly, the Court upheld a rule prohibiting

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[1064] Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977).

[1065] Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Chief Justice Burger and Justices Powell, Stewart, and Rehnquist dissented. Id. at 386, 389, 404.

[1066] 433 U.S. at 368–79. *See also In re* R.M.J., 455 U.S. 191 (1982) (invalidating sanctions imposed on attorney for deviating in some respects from rigid prescriptions of advertising style and for engaging in some proscribed advertising practices, because the state could show neither that his advertising was misleading nor that any substantial governmental interest was served by the restraints).

[1067] Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988). *Shapero* was distinguished in Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995), a 5–4 decision upholding a prohibition on targeted direct-mail solicitations to victims and their relatives for a 30-day period following an accident or disaster. "*Shapero* dealt with a broad ban on *all* direct mail solicitations" (id. at 629), the Court explained, and was not supported, as Florida's more limited ban was, by findings describing the harms to be prevented by the ban. Dissenting Justice Kennedy disagreed that there was a valid distinction, pointing out that in *Shapero* the Court had said that "the mode of communication [mailings versus potentially more abusive in-person solicitation] makes all the difference," and that mailings were at issue in both *Shapero* and *Florida Bar*. 515 U.S. at 637 (quoting *Shapero*, 486 U.S. at 475).

[1068] Peel v. Illinois Attorney Disciplinary Comm'n, 496 U.S. 91 (1990).

[1069] Ibanez v. Florida Bd. of Accountancy, 512 U.S. 136 (1994) (also ruling that Accountancy Board could not reprimand the CPA, who was also a licensed attorney, for truthfully listing her CPA credentials in advertising for her law practice).

[1070] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). *But compare In re* Primus, 426 U.S. 412 (1978). The distinction between in-person and other attorney advertising was continued in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) ("print advertising . . . in most cases . . . will lack the coercive force of the personal presence of the trained advocate").

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high school coaches from recruiting middle school athletes, finding that "the dangers of undue influence and overreaching that exist when a lawyer chases an ambulance are also present when a high school coach contacts an eighth grader." [1071] The Court later refused, however, to extend this principle to in-person solicitation by certified public accountants, explaining that CPAs, unlike attorneys, are not professionally "trained in the art of persuasion," and that the typical business executive client of a CPA is "far less susceptible to manipulation" than was the accident victim in *Ohralik*.[1072] A ban on personal solicitation is "justified only in situations 'inherently conducive to overreaching and other forms of misconduct.'" [1073] To allow enforcement of such a broad prophylactic rule absent identification of a serious problem such as ambulance chasing, the Court explained, would dilute commercial speech protection "almost to nothing." [1074]

Moreover, a statute prohibiting the practice of optometry under a trade name was sustained because there was "a significant possibility" that the public might be misled through deceptive use of the same or similar trade names.[1075] But a state regulatory commission prohibition of utility advertisements "intended to stimulate the purchase of utility services" was held unjustified by the asserted interests in energy consumption and avoidance of subsidization of additional energy costs by all consumers.[1076]

Although commercial speech is entitled to First Amendment protection, the Court has clearly held that it is different from other forms of expression; it has remarked on the commonsense differences between speech that does no more than propose a commercial transaction and other varieties.[1077] The Court has developed the

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[1071] Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 551 U.S. 291, 298 (2007).

[1072] Edenfield v. Fane, 507 U.S. 761, 775 (1993).

[1073] Edenfield v. Fane, 507 U.S. at 774, quoting *In re* R.M.J., 455 U.S. at 203, and quoted in Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 551 U.S. 291, 298 (2007).

[1074] 507 U.S. at 777.

[1075] Friedman v. Rogers, 440 U.S. 1 (1979).

[1076] Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557 (1980). *See also* Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980) (voiding a ban on utility's inclusion in monthly bills of inserts discussing controversial issues of public policy). However, the linking of a product to matters of public debate does not thereby entitle an ad to the increased protection afforded noncommercial speech. Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983).

[1077] Commercial speech is viewed by the Court as usually hardier than other speech; because advertising is the *sine qua non* of commercial profits, it is less likely to be chilled by regulation. Thus, the difference inheres in both the nature of the speech and the nature of the governmental interest. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771–72 n.24 (1976); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978). It is, of course, important to

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four-pronged *Central Hudson* test to measure the validity of restraints upon commercial expression.[1078]

Under the first prong of the test, certain commercial speech is not entitled to protection; the informational function of advertising is the First Amendment concern and if an advertisement does not accurately inform the public about lawful activity, it can be suppressed.[1079]

Second, if the speech is protected, the interest of the government in regulating and limiting it must be assessed. The state must assert a substantial interest to be achieved by restrictions on commercial speech.[1080]

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develop distinctions between commercial speech and other speech for purposes of determining when broader regulation is permissible. The Court's definitional statements have been general, referring to commercial speech as that "proposing a commercial transaction," Ohralik v. Ohio State Bar Ass'n, *supra*, or as "expression related solely to the economic interests of the speaker and its audience." Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 561 (1980). It has simply viewed as noncommercial the advertising of views on public policy that would inhere to the economic benefit of the speaker. Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980). So too, the Court has refused to treat as commercial speech charitable solicitation undertaken by professional fundraisers, characterizing the commercial component as "inextricably intertwined with otherwise fully protected speech." Riley v. National Fed'n of the Blind, 487 U.S. 781, 796 (1988). By contrast, a mixing of home economics information with a sales pitch at a "Tupperware" party did not remove the transaction from commercial speech. Board of Trustees v. Fox, 492 U.S. 469 (1989). In Nike, Inc. v. Kasky, 45 P.3d 243 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003), Nike was sued for unfair and deceptive practices for allegedly false statements it made concerning the working conditions under which its products were manufactured. The California Supreme Court ruled that the suit could proceed, and the Supreme Court granted certiorari, but then dismissed it as improvidently granted, with a concurring and two dissenting opinions. The issue left undecided was whether Nike's statements, though they concerned a matter of public debate and appeared in press releases and letters rather than in advertisements for its products, should be deemed " 'commercial speech' because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions." Id. at 657 (Stevens, J., concurring). Nike subsequently settled the suit.

[1078] Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557 (1980). In one case, the Court referred to the test as having three prongs, referring to its second, third, and fourth prongs, as, respectively, its first, second, and third. The Court in that case did, however, apply *Central Hudson's* first prong as well. Florida Bar v. Went For It, Inc., 515 U.S. 618, 624 (1995).

[1079] Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 563, 564 (1980). Within this category fall the cases involving the possibility of deception through such devices as use of trade names, Friedman v. Rogers, 440 U.S. 1 (1979), and solicitation of business by lawyers, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), as well as the proposal of an unlawful transaction, Pittsburgh Press Co. v. Commission on Human Relations, 413 U.S. 376 (1973).

[1080] Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 564, 568–69 (1980). The Court deemed the state's interests to be clear and substantial. The pattern here is similar to much due process and equal protection litigation as well as expression and religion cases in which the Court accepts the proffered interests as legitimate and worthy. *See also* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987) (governmental interest in protecting USOC's exclusive

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Third, the restriction cannot be sustained if it provides only ineffective or remote support for the asserted purpose.[1081] Instead, the regulation must "directly advance" the governmental interest. The Court resolves this issue with reference to aggregate effects, and does not limit its consideration to effects on the challenging litigant.[1082]

Fourth, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restriction cannot survive.[1083] The Court has rejected the idea that a "least restrictive means" test is required. Instead, what is now required is a reasonable "fit" between means and ends, with the means

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use of word "Olympic" is substantial); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (government's interest in curbing strength wars among brewers is substantial, but interest in facilitating state regulation of alcohol is not substantial). *Contrast* United States v. Edge Broadcasting Co., 509 U.S. 418 (1993), finding a substantial federal interest in facilitating state restrictions on lotteries. "Unlike the situation in *Edge Broadcasting*," the *Coors* Court explained, "the policies of some states do not prevent neighboring states from pursuing their own alcohol-related policies within their respective borders." 514 U.S. at 486. However, in Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), the Court deemed insubstantial a governmental interest in protecting postal patrons from offensive but not obscene materials. For deferential treatment of the governmental interest, *see* Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) (Puerto Rico's "substantial" interest in discouraging casino gambling by residents justifies ban on ads aimed at residents even though residents may legally engage in casino gambling, and even though ads aimed at tourists are permitted).

[1081] 447 U.S. at 569. The ban here was found to directly advance one of the proffered interests. *Contrast* this holding *with* Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (prohibition on display of alcohol content on beer labels does not directly and materially advance government's interest in curbing strength wars among brewers, given the inconsistencies and "overall irrationality" of the regulatory scheme); and Edenfield v. Fane, 507 U.S. 761 (1993) (Florida's ban on in-person solicitation by certified public accountants does not directly advance its legitimate interests in protecting consumers from fraud, protecting consumer privacy, and maintaining professional independence from clients), where the restraints were deemed indirect or ineffectual.

[1082] United States v. Edge Broadcasting Co., 509 U.S. 418, 427 (1993) ("this question cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity").

[1083] Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 565, 569–71 (1980). This test is, of course, the "least restrictive means" standard. Shelton v. Tucker, 364 U.S. 479, 488 (1960). In *Central Hudson*, the Court found the ban more extensive than was necessary to effectuate the governmental purpose. *See also* Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), where the Court held that the governmental interest in not interfering with parental efforts at controlling children's access to birth control information could not justify a ban on commercial mailings about birth control products; "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." Id. at 74. *See also* Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (there are less intrusive alternatives—*e.g.*, direct limitations on alcohol content of beer—to prohibition on display of alcohol content on beer label). Note, however, that, in San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 539 (1987), the Court applied the test

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"narrowly tailored to achieve the desired objective." [1084] The Court, however, does "not equate this test with the less rigorous obstacles of rational basis review; . . . the existence of 'numerous and obvious less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the 'between ends and means is reasonable.'" [1085]

The "reasonable fit" standard has some teeth, the Court made clear in *City of Cincinnati v. Discovery Network, Inc.*,[1086] striking down a city's prohibition on distribution of "commercial handbills" through freestanding newsracks located on city property. The city's aesthetic interest in reducing visual clutter was furthered by reducing the total number of newsracks, but the distinction between prohibited "commercial" publications and permitted "newspapers" bore "no relationship *whatsoever*" to this legitimate interest.[1087] The city could not, the Court ruled, single out commercial speech to bear the full onus when "all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault." [1088] By contrast, the Court upheld a federal law that prohibited broadcast of lottery advertisements by a broadcaster in a state that prohibits lotteries, while allowing broadcast of such ads by stations in states that sponsor lotteries. There was a "reasonable fit" between the restriction and the asserted federal interest in supporting state anti-gambling policies without unduly interfering with policies of neighboring states that promote lotteries.[1089] The prohibi-

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in a manner deferential to Congress: "the restrictions [at issue] are not broader than Congress reasonably could have determined to be necessary to further these interests."

[1084] Board of Trustees v. Fox, 492 U.S. 469, 480 (1989). In a 1993 opinion the Court elaborated on the difference between reasonable fit and least restrictive alternative. "A regulation need not be 'absolutely the least severe that will achieve the desired end,' but if there are numerous and obvious less-burdensome alternatives to the restriction . . . , that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13 (1993). *But see* Thompson v. Western States Medical Center, 535 U.S. 357, 368 (2002), in which the Court quoted the fourth prong of the *Central Hudson* test without mentioning its reformulation by *Fox*, and added, again without reference to *Fox*, "In previous cases addressing this final prong of the *Central Hudson* test, we have made clear that if the government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the government must do so." Id. at 371.

[1085] Florida Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995).

[1086] 507 U.S. 410 (1993). *See also* Edenfield v. Fane, 507 U.S. 761 (1993), decided the same Term, relying on the "directly advance" third prong of *Central Hudson* to strike down a ban on in-person solicitation by certified public accountants.

[1087] 507 U.S. at 424.

[1088] 507 U.S. at 426. The Court also noted the "minute" effect of removing 62 "commercial" newsracks while 1,500 to 2,000 other newsracks remained in place. Id. at 418.

[1089] United States v. Edge Broadcasting Co., 509 U.S. 418 (1993).

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tion "directly served" the congressional interest, and could be applied to a broadcaster whose principal audience was in an adjoining lottery state, and who sought to run ads for that state's lottery.[1090]

In 1999, the Court struck down a provision of the same statute as applied to advertisements for private casino gambling that are broadcast by radio and television stations located in a state where such gambling is legal.[1091] The Court emphasized the interrelatedness of the four parts of the *Central Hudson* test: "Each [part] raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three." [1092] For example, although the government has a substantial interest in reducing the social costs of gambling, the fact that the Congress has simultaneously encouraged gambling, because of its economic benefits, makes it more difficult for the government to demonstrate that its restriction on commercial speech materially advances its asserted interest and constitutes a reasonable "fit." [1093] In this case, "[t]he operation of [18 U.S.C.] § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." [1094] Moreoever, "the regulation distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all." [1095]

In *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, the Court asserted that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." [1096] Subsequently, however, the Court eschewed reliance on *Posadas*,[1097] and it seems doubtful that the Court would again embrace the broad principle that government may ban all advertising of an activity that it permits but has power to pro-

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[1090] 507 U.S. at 428.

[1091] Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527 U.S. 173 (1999).

[1092] 527 U.S. at 184.

[1093] 527 U.S. at 186–87.

[1094] 527 U.S. at 190.

[1095] 527 U.S. at 195.

[1096] 478 U.S. 328, 345–46 (1986). For discussion of the case, *see* P. Kurland, *Posadas de Puerto Rico v. Tourism Company: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful,"* 1986 SUP. CT. REV. 1.

[1097] In Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (invalidating a federal ban on revealing alcohol content on malt beverage labels), the Court rejected reliance on *Posadas*, pointing out that the statement in *Posadas* had been made only after a determination that the advertising could be upheld under *Central Hudson*. The Court found it unnecessary to consider the greater-includes-lesser argument in United States v. Edge Broadcasting Co., 509 U.S. 418, 427 (1993), upholding through application of *Central Hudson* principles a ban on broadcast of lottery ads.

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hibit. Indeed, the Court's very holding in *44 Liquormart, Inc. v. Rhode Island*,[1098] striking down the state's ban on advertisements that provide truthful information about liquor prices, is inconsistent with the general proposition. A Court plurality in *44 Liquormart* squarely rejected *Posadas*, calling it "erroneous," declining to give force to its "highly deferential approach," and proclaiming that a state "does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate."[1099] Four other Justices concluded that *Posadas* was inconsistent with the "closer look" that the Court has since required in applying the principles of *Central Hudson*.[1100]

The "different degree of protection" accorded commercial speech has a number of consequences as regards other First Amendment doctrine. For instance, somewhat broader times, places, and manner regulations are to be tolerated,[1101] and the rule against prior restraints may be inapplicable.[1102] Further, disseminators of commercial speech are not protected by the overbreadth doctrine.[1103] On the other hand, there are circumstances in which the nature of the restriction placed on commercial speech may alter the First Amendment analysis, and even result in the application of a heightened level of scrutiny.

For instance, in *Sorrell v. IMS Health, Inc.*,[1104] the Court struck down state restrictions on pharmacies and "data-miners" selling or leasing information on the prescribing behavior of doctors for marketing purposes and related restrictions limiting the use of that in-

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[1098] 517 U.S. 484 (1996).

[1099] 517 U.S. at 510 (opinion of Stevens, joined by Justices Kennedy, Thomas, and Ginsburg). Stevens' opinion also dismissed the *Posadas* "greater-includes-the-lesser argument" as "inconsistent with both logic and well-settled doctrine," pointing out that the First Amendment "presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct." Id. at 511–512.

[1100] 517 U.S. at 531–32 (concurring opinion of O'Connor, joined by Chief Justice Rehnquist and by Justices Souter and Breyer).

[1101] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976); Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977). But, in Linmark Associates v. Township of Willingboro, 431 U.S. 85, 93–94 (1977), the Court refused to accept a times, places, and manner defense of an ordinance prohibiting "For Sale" signs on residential lawns. First, ample alternative channels of communication were not available, and second, the ban was seen rather as a content limitation.

[1102] Central Hudson Gas & Elec. Co. v. PSC, 447 U.S. 557, 571 n.13 (1980), citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 772 n.24 (1976). *See* "The Doctrine of Prior Restraint," *supra*.

[1103] Bates v. State Bar of Arizona, 433 U.S. 350, 379–81 (1977); Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 565 n.8 (1980).

[1104] 564 U.S. ___, No. 10–779, slip op. (2011).

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formation by pharmaceutical companies.[1105] These prohibitions, however, were subject to a number of exceptions, including provisions allowing such prescriber-identifying information to be used for health care research. Because the restrictions only applied to the use of this information for marketing and because they principally applied to pharmaceutical manufacturers of non-generic drugs, the Court found that these restrictions were content-based and speaker-based limits and thus subject to heightened scrutiny.[1106]

Different degrees of protection may also be discerned among different categories of commercial speech. The first prong of the *Central Hudson* test means that false, deceptive, or misleading advertisements need not be permitted; government may require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent deception.[1107] But even truthful, non-misleading commercial speech may be regulated, and the validity of such regulation is tested by application of the remaining prongs of the *Central Hudson* test. The test itself does not make further distinctions based on the content of the commercial message or the nature of the governmental interest (that interest need only be "substantial"). Recent decisions suggest, however, that further distinctions may exist. Measures aimed at preserving "a fair bargaining process" between consumer and advertiser[1108] may be more likely to pass the test[1109] than are regulations designed to implement general health, safety,

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[1105] "Detailers," marketing specialists employed by pharmaceutical manufacturers, used the reports to refine their marketing tactics and increase sales to doctors.

[1106] Although the state put forward a variety of proposed governmental interests to justify the regulations, the Court found these interests (expectation of physician privacy, discouraging harassment of physicians, and protecting the integrity of the doctor-physician relationship) were ill-served by the content-based restrictions. 564 U.S. ___, No. 10–779, slip op. at 17–21. The Court also rejected the argument that the regulations were an appropriate way to reduce health care costs, noting that "[t]he State seeks to achieve its policy objectives through the indirect means of restraining certain speech by certain speakers—that is, by diminishing detailers' ability to influence prescription decisions. Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the 'fear that people would make bad decisions if given truthful information' cannot justify content-based burdens on speech." Id. at 21–22.

[1107] Bates v. State Bar of Arizona, 433 U.S. 350, 383–84 (1977); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). Requirements that advertisers disclose more information than they otherwise choose to are upheld "as long as [they] are reasonably related to the State's interest in preventing deception of consumers," the Court explaining that "[t]he right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right" requiring strict scrutiny of the disclosure requirement. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 & n.14 (1985) (upholding requirement that attorney's contingent fees ad mention that unsuccessful plaintiffs might still be liable for court costs).

[1108] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996).

[1109] *See*, *e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 465 (1978) (upholding ban on in-person solicitation by attorneys due in part to the "potential for over-

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or moral concerns.[1110] As the governmental interest becomes further removed from protecting a fair bargaining process, it may become more difficult to establish the absence of less burdensome regulatory alternatives and the presence of a "reasonable fit" between the commercial speech restriction and the governmental interest.[1111]

Taxation.—Disclaiming any intimation "that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government," the Court voided a state two-percent tax on the gross receipts of advertising in newspapers with a circulation exceeding 20,000 copies a week.[1112] In the Court's view, the tax was analogous to the 18th-century English practice of imposing advertising and stamp taxes on newspapers for the express pur-

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reaching" when a trained advocate "solicits an unsophisticated, injured, or distressed lay person").

[1110] *Compare* United States v. Edge Broadcasting Co., 509 U.S. 418 (1993) (upholding federal law supporting state interest in protecting citizens from lottery information) *and* Florida Bar v. Went For It, Inc., 515 U.S. 618, 631 (1995) (upholding a 30-day ban on targeted, direct-mail solicitation of accident victims by attorneys, not because of any presumed susceptibility to overreaching, but because the ban "forestall[s] the outrage and irritation with the . . . legal profession that the [banned] solicitation . . . has engendered") *with* Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (striking down federal statute prohibiting display of alcohol content on beer labels) *and* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (striking down state law prohibiting display of retail prices in ads for alcoholic beverages).

[1111] "[S]everal Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases." Thompson v. Western States Medical Center, 535 U.S. 357, 367 (2002). Justice Stevens has criticized the *Central Hudson* test because it seemingly allows regulation of any speech propounded in a commercial context regardless of the content of that speech. "[A]ny description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead." Rubin v. Coors Brewing Co., 514 U.S. 476, 494 (1995) (concurring opinion). The Justice repeated these views in 1996: "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (a portion of the opinion joined by Justices Kennedy and Ginsburg). Justice Thomas, similarly, wrote that, in cases "in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the *Central Hudson* test should not be applied because such an interest' is *per se* illegitimate. . . ." Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527 U.S. 173, 197 (1999) (Thomas, J., concurring) (internal quotation marks omitted). Other decisions in which the Court majority acknowledged that some Justices would grant commercial speech greater protection than it has under the *Central Hudson* test include United States v. United Foods, Inc., 533 U.S. 405, 409–410 (2001) (mandated assessments, used for advertising, on handlers of fresh mushrooms struck down as compelled speech, rather than under *Central Hudson*), and Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001) (various state restrictions on tobacco advertising struck down under *Central Hudson* as overly burdensome).

[1112] Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

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pose of pricing the opposition penny press beyond the means of the mass of the population.[1113] The tax at issue focused exclusively upon newspapers, it imposed a serious burden on the distribution of news to the public, and it appeared to be a discriminatorily selective tax aimed almost solely at the opposition to the state administration.[1114] Combined with the standard that government may not impose a tax directly upon the exercise of a constitutional right itself,[1115] these tests seem to permit general business taxes upon receipts of businesses engaged in communicating protected expression without raising any First Amendment issues.[1116]

Ordinarily, a tax singling out the press for differential treatment is highly suspect, and creates a heavy burden of justification on the state. This is so, the Court explained in 1983, because such "a powerful weapon" to single out a small group carries with it a lessened political constraint than do those measures affecting a broader based constituency, and because "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression." [1117] The state's interest in raising revenue is not sufficient justification for differential treatment of the press. Moreover, the Court refused to adopt a rule permitting analysis of the "effective burden" imposed by a differential tax; even if the current effective tax burden could be measured and upheld, the threat of increasing the burden on the press might have "censorial effects," and "courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation." [1118]

[1113] 297 U.S. at 245–48.

[1114] 297 U.S. at 250–51. *Grosjean* was distinguished on this latter basis in Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).

[1115] Murdock v. Pennsylvania, 319 U.S. 105 (1943); Follett v. McCormick, 321 U.S. 573 (1944) (license taxes upon Jehovah's Witnesses selling religious literature invalid).

[1116] *Cf.* City of Corona v. Corona Daily Independent, 115 Cal. App. 2d 382, 252 P.2d 56 (1953), *cert. denied*, 346 U.S. 833 (1953) (Justices Black and Douglas dissenting). *See also* Cammarano v. United States, 358 U.S. 498 (1959) (no First Amendment violation to deny business expense tax deduction for expenses incurred in lobbying about measure affecting one's business); Leathers v. Medlock, 499 U.S. 439 (1991) (no First Amendment violation in applying general gross receipts tax to cable television services while exempting other communications media).

[1117] Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983) (invalidating a Minnesota use tax on the cost of paper and ink products used in a publication, and exempting the first $100,000 of such costs each calendar year; Star & Tribune paid roughly two-thirds of all revenues the state raised by the tax). The Court seemed less concerned, however, when the affected group within the press was not so small, upholding application of a gross receipts tax to cable television services even though other segments of the communications media were exempted. Leathers v. Medlock, 499 U.S. 439 (1991).

[1118] 460 U.S. at 588, 589.

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Also difficult to justify is taxation that targets specific subgroups within a segment of the press for differential treatment. An Arkansas sales tax exemption for newspapers and for "religious, professional, trade, and sports journals" published within the state was struck down as an invalid content-based regulation of the press.[1119] Entirely as a result of content, some magazines were treated less favorably than others. The general interest in raising revenue was again rejected as a "compelling" justification for such treatment, and the measure was viewed as not narrowly tailored to achieve other asserted state interests in encouraging "fledgling" publishers and in fostering communications.

The Court seemed to change course somewhat in 1991, upholding a state tax that discriminated among different components of the communications media, and proclaiming that "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas." [1120]

The general principle that government may not impose a financial burden based on the content of speech underlay the Court's invalidation of New York's "Son of Sam" law, which provided that a criminal's income from publications describing his crime was to be placed in escrow and made available to victims of the crime.[1121] Although the Court recognized a compelling state interest in ensuring that criminals do not profit from their crimes, and in compensating crime victims, it found that the statute was not narrowly tailored to those ends. The statute applied only to income derived from speech, not to income from other sources, and it was significantly overinclusive because it reached a wide range of literature (*e.g.*, the *Confessions of Saint Augustine* and Thoreau's *Civil Disobedience*) "that did not enable a criminal to profit from his crime while a victim remains uncompensated" [1122]

Labor Relations.—Just as newspapers and other communications businesses are subject to nondiscriminatory taxation, they are entitled to no immunity from the application of general laws regulating their relations with their employees and prescribing wage and hour standards. In *Associated Press v. NLRB*,[1123] the application of the National Labor Relations Act to a newsgathering agency was found to raise no constitutional problem. "The publisher of a news-

[1119] Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987).

[1120] Leathers v. Medlock, 499 U.S. 439, 453 (1991) (tax applied to all cable television systems within the state, but not to other segments of the communications media).

[1121] Simon & Schuster v. New York Crime Victims Bd., 502 U.S. 105 (1991).

[1122] 502 U.S. at 122.

[1123] 301 U.S. 103, 132 (1937).

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paper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. . . . The regulation here in question has no relation whatever to the impartial distribution of news." Similarly, the Court has found no problem with requiring newspapers to pay minimum wages and observe maximum hours.[1124]

Antitrust Laws.—Resort to the antitrust laws to break up restraints on competition in the newsgathering and publishing field was found not only to present no First Amendment problem, but to comport with the government's obligation under that Amendment. Justice Black wrote: "It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not." [1125]

Thus, both newspapers and broadcasters, as well as other such industries, may not engage in monopolistic and other anticompetitive activities free of possibility of antitrust law attack,[1126] even if such activities might promote speech.[1127]

[1124] Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946).

[1125] Associated Press v. United States, 326 U.S. 1, 20 (1945).

[1126] Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (refusal of newspaper publisher who enjoyed a substantial monopoly to sell advertising to persons also advertising over a competing radio station violates antitrust laws); United States v. Radio Corp. of America, 358 U.S. 334 (1959) (FCC approval no bar to antitrust suit); United States v. Greater Buffalo Press, 402 U.S. 549 (1971) (monopolization of color comic supplements). *See also* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) (upholding FCC rules prospectively barring, and in some instances requiring divesting to prevent, the common ownership of a radio or television broadcast station and a daily newspaper located in the same community).

[1127] Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) (pooling arrangement between two newspapers violates antitrust laws; First Amendment argument that one paper will fail if arrangement is outlawed rejected). In response to this decision, Congress enacted the Newspaper Preservation Act to sanction certain joint arrangements where one paper is in danger of failing. 84 Stat. 466 (1970), 15 U.S.C. §§ 1801–1804.

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Broadcast Radio and Television.—Because there are a limited number of broadcast frequencies for radio and non-cable television use, the Federal Government licenses access to these frequencies, permitting some applicants to use them and denying the greater number of applicants such permission. Even though this licensing system is in form a variety of prior restraint, the Court has held that it does not present a First Amendment issue because of the unique characteristic of scarcity.[1128] Thus, the Federal Communications Commission has broad authority to determine the right of access to broadcasting,[1129] although, of course, the regulation must be exercised in a manner that is neutral with regard to the content of the materials broadcast.[1130]

In certain respects, however, governmental regulation does implicate First Amendment values, and, in *Red Lion Broadcasting Co. v. FCC*, the Court upheld an FCC regulation that required broadcasters to afford persons an opportunity to reply if they were attacked on the air on the basis of their "honesty, character, integrity or like personal qualities," or if they were legally qualified candidates and a broadcast editorial endorsed their opponent or opposed them.[1131] In *Red Lion*, Justice White explained that "differences in the characteristics of [various] media justify differences in First Amendment standards applied to them."[1132] Thus, although everyone has a right to speak, write, or publish as he will, subject to very few limitations, there is no comparable right of everyone to broadcast. The frequencies are limited and some few must be given the privilege over others. The particular licensee, however, has no First Amendment right to hold that license and his exclusive privilege may be qualified. Qualification by censorship of content is impermissible, but the First Amendment does not prevent a governmental insis-

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[1128] NBC v. United States, 319 U.S. 190 (1943); *see also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375–79, 387–89 (1969); FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 798–802 (1978).

[1129] NBC v. United States, 319 U.S. 190 (1943); Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933; FCC v. Pottsville, 309 U.S. 134 (1940); FCC v. ABC, 347 U.S. 284 (1954); Farmers Union v. WDAY, 360 U.S. 525 (1958).

[1130] "But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views or upon any other capricious basis. If it did, or if the Commission by these regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different." NBC v. United States, 319 U.S. 190, 226 (1943).

[1131] 395 U.S. 367, 373 (1969). "The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine. . . ." Id. at 369. The two issues passed on in *Red Lion* were integral parts of the doctrine.

[1132] 395 U.S. at 386.

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tence that a licensee "conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." [1133] Furthermore, said Justice White, "[b]ecause of the scarcity of radio frequencies, the government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." [1134] The broadcasters had argued that, if they were required to provide equal time at their expense to persons attacked and to points of view different from those expressed on the air, expression would be curbed through self-censorship, for fear of controversy and economic loss. Justice White thought this possibility "at best speculative," but if it should materialize "the Commission is not powerless to insist that they give adequate and fair attention to public issues." [1135]

In *Columbia Broadcasting System v. Democratic National Committee*,[1136] the Court rejected claims of political groups that the broadcast networks were constitutionally required to sell them broadcasting time for the presentation of views on controversial issues. The ruling terminated a broad drive to obtain that result, but the fragmented nature of the Court's multiple opinions precluded a satisfactory evaluation of the constitutional implications of the case. However, in *CBS v. FCC*,[1137] the Court held that Congress had conferred on candidates seeking federal elective office an affirmative, promptly enforceable right of reasonable access to the use of broadcast stations, to be administered through FCC control over license revocations, and held such right of access to be within Congress's power to grant, the First Amendment notwithstanding. The constitutional analysis was brief and merely restated the spectrum scarcity rationale and the role of the broadcasters as fiduciaries for the public interest.

[1133] 395 U.S. at 389.
[1134] 395 U.S. at 390.
[1135] 395 U.S. at 392–93.
[1136] 412 U.S. 94 (1973).
[1137] 453 U.S. 367 (1981). The dissent argued that the FCC had assumed, and the Court had confirmed it in assuming, too much authority under the congressional enactment. In its view, Congress had not meant to do away with the traditional deference to the editorial judgments of the broadcasters. Id. at 397 (Justices White, Rehnquist, and Stevens).

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In *FCC v. League of Women Voters*,[1138] the Court took the same general approach to governmental regulation of broadcasting, but struck down a total ban on editorializing by stations receiving public funding. In summarizing the principles guiding analysis in this area, the Court reaffirmed that Congress may regulate in ways that would be impermissible in other contexts, but indicated that broadcasters are entitled to greater protection than may have been suggested by *Red Lion*. "[A]lthough the broadcasting industry plainly operates under restraints not imposed upon other media, the thrust of these restrictions has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern. . . . [T]hese restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest." [1139] However, the earlier cases were distinguished. "[I]n sharp contrast to the restrictions upheld in *Red Lion* or in [*CBS v. FCC*], which left room for editorial discretion and simply required broadcast editors to grant others access to the microphone, § 399 directly prohibits the broadcaster from speaking out on public issues even in a balanced and fair manner." [1140] The ban on all editorializing was deemed too severe and restrictive a means of accomplishing the governmental purposes—protecting public broadcasting stations from being coerced, through threat or fear of withdrawal of public funding, into becoming "vehicles for governmental propagandizing," and also keeping the stations "from becoming convenient targets for capture by private interest groups wishing to express their own partisan viewpoints." [1141] Expression of editorial opinion was described as a "form of speech . . . that lies at the heart of First Amendment protection," [1142] and the ban was said to be "defined solely on the basis of . . . content," the assumption being that editorial speech is speech directed at "controversial issues of public importance." [1143] Moreover, the ban on editorializing was both overinclusive, applying to commentary on local issues of no likely interest to Congress, and underinclusive, not applying at all to expression of controver-

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[1138] 468 U.S. 364 (1984), holding unconstitutional § 399 of the Public Broadcasting Act of 1967, as amended. The decision was 5–4, with Justice Brennan's opinion for the Court being joined by Justices Marshall, Blackmun, Powell, and O'Connor, and with Justices White, Rehnquist (joined by Chief Justice Burger and by Justice White), and Stevens filing dissenting opinions.

[1139] 468 U.S. at 380. The Court rejected the suggestion that only a "compelling" rather than "substantial" governmental interest can justify restrictions.

[1140] 468 U.S. at 385.

[1141] 468 U.S. at 384–85. Dissenting Justice Stevens thought that the ban on editorializing served an important purpose of "maintaining government neutrality in the free marketplace of ideas." Id. at 409.

[1142] 468 U.S. at 381.

[1143] 468 U.S. at 383.

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sial opinion in the context of regular programming. Therefore, the Court concluded, the restriction was not narrowly enough tailored to fulfill the government's purposes.

Sustaining FCC discipline of a broadcaster who aired a record containing a series of repeated "barnyard" words, considered "indecent" but not obscene, the Court posited a new theory to explain why the broadcast industry is less entitled to full constitutional protection than are other communications entities.[1144] "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizens, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. . . . Second, broadcasting is uniquely accessible to children, even those too young to read. . . . The ease with which children may obtain access to broadcast material . . . amply justif[ies] special treatment of indecent broadcasting." [1145] The Court emphasized the "narrowness" of its holding, which "requires consideration of a host of variables." [1146] The use of more than "an occasional expletive," the time of day of the broadcast, the likely audience, "and differences between radio, television, and perhaps closed-circuit transmissions" were all relevant in the Court's view.[1147]

Governmentally Compelled Right of Reply to Newspapers.— However divided it may have been in dealing with access to the broadcast media, the Court was unanimous in holding void under

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[1144] FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

[1145] 438 U.S. at 748–51. This was the only portion of the constitutional discussion that obtained the support of a majority of the Court. In Denver Area Educational Telecommunications Consortium v. FCC, 518 U.S. 727, 748 (1996), the Court noted that spectrum scarcity "has little to do with a case that involves the effects of television viewing on children."

[1146] 438 U.S. at 750. *See also* id. at 742–43 (plurality opinion), and id. at 755–56 (Justice Powell concurring) ("The Court today reviews only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion.").

[1147] 438 U.S. at 750. Subsequently, the FCC began to apply its indecency standard to fleeting uses of expletives in non-sexual and non-excretory contexts. The U.S. Court of Appeals for the Second Circuit found this practice arbitrary and capricious under the Administrative Procedure Act, but the Supreme Court disagreed and upheld the FCC policy without reaching the First Amendment question. FCC v. Fox Television Stations, Inc., 556 U.S. ___, No. 07–582 (2009). *See also* CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008), vacated and remanded, 129 S. Ct. 2176 (2009) (invalidating, on non-constitutional grounds, a fine against CBS for broadcasting Janet Jackson's exposure of her breast for nine-sixteenths of a second during a Super Bowl halftime show). The Supreme Court vacated and remanded this decision to the Third Circuit for further consideration in light of FCC v. Fox Television Stations, Inc. Decisions regarding legislation to ban "indecent" expression in broadcast and cable media as well as in other contexts are discussed under "Non-obscene But Sexually Explicit and Indecent Expression," *infra*.

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the First Amendment a state law that granted a political candidate a right to equal space to answer criticism and attacks on his record by a newspaper.[1148] Granting that the number of newspapers had declined over the years, that ownership had become concentrated, and that new entries were prohibitively expensive, the Court agreed with proponents of the law that the problem of newspaper responsibility was a great one. But press responsibility, although desirable, "is not mandated by the Constitution," whereas freedom is. The compulsion exerted by government on a newspaper to print what it would not otherwise print, "a compulsion to publish that which 'reason tells them should not be published,'" runs afoul of the free press clause.[1149]

Cable Television

The Court has recognized that cable television "implicates First Amendment interests," because a cable operator communicates ideas through selection of original programming and through exercise of editorial discretion in determining which stations to include in its offering.[1150] Moreover, "settled principles of . . . First Amendment jurisprudence" govern review of cable regulation; cable is not limited by "scarce" broadcast frequencies and does not require the same less rigorous standard of review that the Court applies to regulation of broadcasting.[1151] Cable does, however, have unique characteristics that justify regulations that single out cable for special treatment.[1152] The Court in *Turner Broadcasting System v. FCC* [1153] upheld federal statutory requirements that cable systems carry local com-

[1148] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

[1149] 418 U.S. at 256. The Court also adverted to the imposed costs of the compelled printing of replies but this seemed secondary to the quoted conclusion. The Court has also held that a state may not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees. Although a plurality opinion to which four Justices adhered relied heavily on *Tornillo*, there was no Court majority consensus as to rationale. Pacific Gas & Elec. v. Public Utilities Comm'n, 475 U.S. 1 (1986). *See also* Hurley v. Irish-American Gay Group, 514 U.S. 334 (1995) (state may not compel parade organizer to allow participation by a parade unit proclaiming message that organizer does not wish to endorse).

[1150] City of Los Angeles v. Preferred Communications, 476 U.S. 488 (1986) (leaving for future decision how the operator's interests are to be balanced against a community's interests in limiting franchises and preserving utility space); Turner Broadcasting System v. FCC, 512 U.S. 622, 636 (1994).

[1151] Turner Broadcasting System v. FCC, 512 U.S. 622, 638–39 (1994).

[1152] 512 U.S. at 661 (referring to the "bottleneck monopoly power" exercised by cable operators in determining which networks and stations to carry, and to the resulting dangers posed to the viability of broadcast television stations). *See also* Leathers v. Medlock, 499 U.S. 439 (1991) (application of state gross receipts tax to cable industry permissible even though other segments of the communications media were exempted).

[1153] 512 U.S. 622 (1994).

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mercial and public television stations. Although these "must-carry" requirements "distinguish between speakers in the television programming market," they do so based on the manner of transmission and not on the content the messages conveyed, and hence are content-neutral.[1154] The regulations could therefore be measured by the "intermediate level of scrutiny" set forth in *United States v. O'Brien*.[1155] Two years later, however, a splintered Court could not agree on what standard of review to apply to content-based restrictions of cable broadcasts. Striking down a requirement that cable operators must, in order to protect children, segregate and block programs with patently offensive sexual material, a Court majority in *Denver Area Educational Telecommunications Consortium v. FCC*,[1156] found it unnecessary to determine whether strict scrutiny or some lesser standard applies, because it deemed the restriction invalid under any of the alternative tests. There was no opinion of the Court on the other two holdings in the case,[1157] and a plurality[1158] rejected assertions that public forum analysis,[1159] or a rule giving cable operators' editorial rights "general primacy" over the rights of programmers and viewers,[1160] should govern.

Subsequently, in *United States v. Playboy Entertainment Group, Inc.*,[1161] the Supreme Court made clear, as it had not in *Denver Consortium*, that strict scrutiny applies to content-based speech restrictions on cable television. The Court struck down a federal statute

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[1154] 512 U.S. at 645. "Deciding whether a particular regulation is content-based or content-neutral is not always a simple task," the Court confessed. Id. at 642. Indeed, dissenting Justice O'Connor, joined by Justices Scalia, Ginsburg, and Thomas, viewed the rules as content-based. Id. at 674–82.

[1155] 391 U.S. 367, 377 (1968). The Court remanded *Turner* for further factual findings relevant to the *O'Brien* test. On remand, the district court upheld the must-carry provisions, and the Supreme Court affirmed, concluding that it "cannot displace Congress's judgment respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination." Turner Broadcasting System v. FCC, 520 U.S. 180, 224 (1997).

[1156] 518 U.S. 727, 755 (1996) (invalidating § 10(b) of the Cable Television Consumer Protection and Competition Act of 1992).

[1157] Upholding § 10(a) of the Act, which permits cable operators to prohibit indecent material on leased access channels; and striking down § 10(c), which permits a cable operator to prevent transmission of "sexually explicit" programming on public access channels. In upholding § 10(a), Justice Breyer's plurality opinion cited FCC v. Pacifica Foundation, 438 U.S. 726 (1978), and noted that cable television "is as 'accessible to children' as over-the-air broadcasting, if not more so." 518 U.S. at 744.

[1158] This section of Justice Breyer's opinion was joined by Justices Stevens, O'Connor, and Souter. 518 U.S. at 749.

[1159] Justice Kennedy, joined by Justice Ginsburg, advocated this approach, 518 U.S. at 791, and took the plurality to task for its "evasion of any clear legal standard." 518 U.S. at 784.

[1160] Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, advocated this approach.

[1161] 529 U.S. 803, 813 (2000).

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designed to "shield children from hearing or seeing images resulting from signal bleed," which refers to blurred images or sounds that come through to non-subscribers.[1162] The statute required cable operators, on channels primarily dedicated to sexually oriented programming, either to scramble fully or otherwise fully block such channels, or to not provide such programming when a significant number of children are likely to be viewing it, which, under an FCC regulation meant to transmit the programming only from 10 p.m. to 6 a.m. The Court found that, even without "discount[ing] the possibility that a graphic image could have a negative impact on a young child," it could not conclude that Congress had used "the least restrictive means for addressing the problem."[1163] Congress in fact had enacted another provision that was less restrictive and that served the government's purpose. This other provision requires that, upon request by a cable subscriber, a cable operator, without charge, fully scramble or otherwise fully block any channel to which a subscriber does not subscribe.[1164]

Government Restraint of Content of Expression

As a general matter, government may not regulate speech "because of its message, its ideas, its subject matter, or its content."[1165] "It is rare that a regulation restricting speech because of its content will ever be permissible."[1166] The constitutionality of

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[1162] 529 U.S. at 806.

[1163] 529 U.S. at 826–27. The Court did not state that there is a compelling interest in preventing the possibility of a graphic image's having a negative impact on a young child, and may have implied that there is no compelling interest in preventing the possibility of a graphic image's having a negative impact on an older child. It did state: "Even upon the assumption that the government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech." Id. at 825.

[1164] 47 U.S.C. § 560.

[1165] Police Dep't of Chicago v. Mosle, 408 U.S. 92, 95 (1972). *See also* Erznoznik v. City of Jacksonville, 422 U.S. 205, 208–12 (1975); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Carey v. Brown, 447 U.S. 455 (1980); Metromedia v. City of San Diego, 453 U.S. 490 (1981) (plurality opinion); Widmar v. Vincent, 454 U.S. 263 (1981); Regan v. Time, Inc., 468 U.S. 641 (1984).

[1166] United States v. Playboy Entertainment Group, Inc., 529 U.S. 801, 818 (2000). The distinction between, on the one hand, directly regulating, and, on the other hand, incidentally affecting, the content of expression was sharply drawn by Justice Harlan in Konigsberg v. State Bar of California, 366 U.S. 36, 49–51 (1961): "Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. . . . On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendments forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the gov-

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content-based regulation is determined by a compelling interest test derived from equal protection analysis: the government "must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." [1167] Narrow tailoring in the case of fully protected speech requires that the government "choose[ ] the least restrictive means to further the articulated interest." [1168] Application of this test ordinarily results in invalidation of the regulation.[1169]

The Court has recognized two central ways in which a law can impose content-based restrictions, which include not only restrictions on particular viewpoints, but also prohibitions on public discussions of an entire topic.[1170] First, a government regulation of speech is content-based if the regulation on its face draws distinctions based on the message a speaker conveys.[1171] For example, in *Boos v. Barry*, the Court held that a Washington D.C. ordinance prohibiting the display of signs near any foreign embassy that brought a foreign government into "public odiom" or "public disrepute" drew a content-based distinction on its face.[1172] Second, the Court has recognized that facially content-neutral laws can be considered content-based regulations of speech if a law cannot be "justified without reference to the content of speech" or was adopted "because of disagreement with the message [the speech] conveys." [1173] As a result, in an example provided in *Sorrell v. IMS Health*, the Court noted that if a government "bent on frustrating an impending demonstration" passed a law demanding two years' notice before the issuance of parade permits, such a law, while facially content-neutral, would be content-based because its purpose was to suppress speech on a particular topic.[1174]

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ernmental interest involved." The Court set forth the test for "incidental limitations on First Amendment freedoms" in United States v. O'Brien, 391 U.S. 367, 376 (1968). *See also* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 537 (1987).

[1167] Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

[1168] Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 126 (1989).

[1169] *But see* Williams-Yulee v. Fla. Bar, 575 U.S. ___, No. 13–1499, slip op. (2015) (upholding a provision of the state judicial code prohibiting judicial candidates from personally soliciting campaign funds); Burson v. Freeman, 504 U.S. 191 (1992) (plurality opinion) (upholding state law prohibiting the solicitation of votes and the display or distribution of campaign literature within 100 feet of a polling place).

[1170] *See* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987) (citing Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 537 (1980)).

[1171] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); *see also* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (holding that content-neutral "speech regulations are those that are *justified* without reference to the content of the regulated speech.") (internal quotations and citations omitted).

[1172] *See* 485 U.S. 312, 315 (1988).

[1173] *See Ward*, 491 U.S. at 791.

[1174] *See* 564 U.S. 552, 566 (2011).

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Importantly, for a law that falls within the first category of recognized content-based regulations—those laws that are content-based on their face—the government's justifications or purposes for enacting that law are irrelevant to determine whether the law is subject to strict scrutiny.[1175] Put another way, for laws that facially draw distinctions based on the subject matter of the underlying speech, there is no need for a court to look into the purpose of the underlying law being challenged under the First Amendment; instead, that law is automatically subject to strict scrutiny.[1176] As such, in *Reed v. Town of Gilbert*, the Court, in invalidating provisions of a municipality's sign code that imposed more stringent restrictions on signs directing the public to an event than on signs conveying political or ideological messages, determined the sign code to be content-based and subject to strict scrutiny, notwithstanding the town's "benign," non-speech related motives for enacting the code.[1177] In so holding, the Court reasoned that the First Amendment, by targeting the "abridgement of speech," is centrally concerned with the operations of laws and not the motivations of those who enacted the laws.[1178] In this vein, the Court concluded that the "vice" of content-based legislation is not that it will "always" be used for invidious purposes, but rather that content-based restrictions necessarily lend themselves to such purposes.[1179]

Nonetheless, as discussed below, the Supreme Court has recognized that the First Amendment permits restrictions upon the content of speech in a "few limited areas," including obscenity, defamation, fraud, incitement, fighting words, and speech integral to criminal conduct.[1180] This "two-tier" approach to content-based regulations of speech derives from *Chaplinsky v. New Hampshire*, wherein the Court opined that there exist "certain well-defined and narrowly limited classes of speech [that] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth" such that the government may prevent those utterances and punish those

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[1175] *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 642–43 (1994) ("Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates, based on content.").

[1176] *See* Reed v. Town of Gilbert, 576 U.S. ___, No. 13–502, slip op. at 8 (2015) ("But *Ward*'s framework applies only if a statute is content-neutral.") (internal citations and quotations omitted).

[1177] *Id.* at 8. The *Reed* Court ultimately held that the sign code was not narrowly tailored to further the justifications for the law—aesthetics and traffic safety—because the code did allow many signs that threatened the beauty of the town and because the town could not demonstrate that directional signs posed a greater threat to safety than other types of signs that were treated differently under the code. *Id.* at 14–15.

[1178] *Id*. at 10.

[1179] *Id*.

[1180] *See* United States v. Stevens, 559 U.S. 460, 468 (2010).

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uttering them without raising any constitutional issues.[1181] As the Court has generally applied *Chaplinsky* over the past several decades, if speech fell within one of the "well-defined and narrowly limited" categories, it was unprotected, regardless of its effect. If it did not, it was covered by the First Amendment, and the speech was protected unless the restraint was justified by some test relating to harm, such as the clear and present danger test or the more modern approach of balancing the presumptively protected expression against a compelling governmental interest. In more recent decades, the cases reflect a fairly consistent and sustained movement by the Court toward eliminating or severely narrowing the "two-tier" doctrine. As a result, expression that before would have been held absolutely *unprotected* (e.g., seditious speech and seditious libel, fighting words, defamation, and obscenity) received protection. While the movement was temporarily deflected by a shift in position with respect to obscenity and by the recognition of a new category of non-obscene child pornography,[1182] the most recent decisions of the Court reflect a reluctance to add any new categories of excepted speech and to interpret narrowly the excepted categories of speech that have long-established roots in First Amendment law.[1183]

Even if a category of speech is *unprotected* by the First Amendment, regulation of that speech on the basis of viewpoint may be *impermissible*. In *R.A.V. v. City of St. Paul*,[1184] the Court struck down a hate crimes ordinance that the state courts had construed to apply only to the use of "fighting words." The difficulty, the Court found, was that the ordinance discriminated further, proscribing only those fighting words that "arouse[ ] anger, alarm or resentment in others . . . on the basis of race, color, creed, religion or gender." [1185] This amounted to "special prohibitions on those speakers who express views on disfavored subjects." [1186] The fact that the government may proscribe areas of speech such as obscenity, defamation, or fighting words does not mean that these areas "may be made the vehicles for content discrimination unrelated to their distinctively proscrib-

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[1181] 315 U.S. 568, 571–72 (1942).

[1182] *See* New York v. Ferber, 458 U.S. 747, 759 (1982).

[1183] *See, e.g.*, United States v. Alvarez, 567 U.S. ___, No. 11–210, slip op. at 5 (2012) (plurality opinion) ("Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements."); Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 792 (2011) (holding that the obscenity exception to the First Amendment does not cover violent speech); *Stevens*, 559 U.S. at 472 (declining to "carve out" an exception to First Amendment protections for depictions of illegal acts of animal cruelty); Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988) (refusing to restrict speech based on its level of "outrageousness").

[1184] 505 U.S. 377 (1992).

[1185] *Id.* at 391.

[1186] *Id.*

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able content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." [1187]

Seditious Speech and Seditious Libel.—Opposition to government through speech alone has been subject to punishment throughout much of history under laws proscribing "seditious" utterances. In this country, the Sedition Act of 1798 made criminal, inter alia, malicious writings that defamed, brought into contempt or disrepute, or excited the hatred of the people against the government, the President, or the Congress, or that stirred people to sedition.[1188] In *New York Times Co. v. Sullivan*,[1189] the Court surveyed the controversy surrounding the enactment and enforcement of the Sedition Act and concluded that debate "first crystallized a national awareness of the central meaning of the First Amendment. . . . Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history . . . . [That history] reflect[s] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." The "central meaning" discerned by the Court, quoting Madison's comment that in a republican government "the censorial power is in the people over the Government, and not in the Government over the people," is that "[t]he right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government."

Little opportunity to apply this concept of the "central meaning" of the First Amendment in the context of sedition and criminal syndicalism laws has been presented to the Court. In *Dombrowski v. Pfister* [1190] the Court, after expanding on First Amendment considerations the discretion of federal courts to enjoin state court proceedings, struck down as vague and as lacking due process proce-

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[1187] *Id.* at 383–84.

[1188] Ch. 74, 1 Stat. 596. Note also that the 1918 amendment of the Espionage Act of 1917, ch. 75, 40 Stat. 553, reached "language intended to bring the form of government of the United States . . . or the Constitution . . . or the flag . . . or the uniform of the Army or Navy into contempt, scorn, contumely, or disrepute." *Cf.* Abrams v. United States, 250 U.S. 616 (1919). For a brief history of seditious libel here and in Great Britain, *see* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 19–35, 497–516 (1941).

[1189] 376 U.S. 254, 273–76 (1964). *See also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Justice Holmes dissenting).

[1190] 380 U.S. 479, 492–96 (1965). A number of state laws were struck down by three-judge district courts pursuant to the latitude prescribed by this case. *E.g.*, Ware v. Nichols, 266 F. Supp. 564 (N.D. Miss. 1967) (criminal syndicalism law); Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1966) (insurrection statute); McSurely v. Ratliff, 282 F. Supp. 848 (E.D. Ky. 1967) (criminal syndicalism). This latitude was then circumscribed in cases attacking criminal syndicalism and criminal anarchy laws. Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971).

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dural protections certain features of a state "Subversive Activities and Communist Control Law." In *Brandenburg v. Ohio*,[1191] a state criminal syndicalism statute was held unconstitutional because its condemnation of advocacy of crime, violence, or unlawful methods of terrorism swept within its terms both mere advocacy as well as incitement to imminent lawless action. A seizure of books, pamphlets, and other documents under a search warrant pursuant to a state subversives suppression law was struck down under the Fourth Amendment in an opinion heavy with First Amendment overtones.[1192]

Fighting Words and Other Threats to the Peace.—In *Chaplinsky v. New Hampshire*,[1193] the Court unanimously sustained a conviction under a statute proscribing "any offensive, derisive or annoying word" addressed to any person in a public place under the state court's interpretation of the statute as being limited to "fighting words"—*i.e.*, to words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." The statute was sustained as "narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace." [1194] The case is best known for Justice Murphy's famous dictum. "[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." [1195]

Chaplinsky still remains viable for the principle that "the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those

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[1191] 395 U.S. 444 (1969). *See also* Garrison v. Louisiana, 379 U.S. 64 (1964); Ashton v. Kentucky, 384 U.S. 195 (1966), considered under "Defamation," *infra*.

[1192] Stanford v. Texas, 379 U.S. 476 (1965). In United States v. United States District Court, 407 U.S. 297 (1972), a government claim to be free to wiretap in national security cases was rejected on Fourth Amendment grounds in an opinion that called attention to the relevance of the First Amendment.

[1193] 315 U.S. 568 (1942).

[1194] 315 U.S. at 573.

[1195] 315 U.S. at 571–72.

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personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[1196] But, in actuality, the Court has closely scrutinized statutes on vagueness and overbreadth grounds and set aside convictions as not being within the doctrine. *Chaplinsky* thus remains formally alive but of little vitality.[1197]

On the obverse side, the "hostile audience" situation, the Court once sustained a conviction for disorderly conduct of one who refused police demands to cease speaking after his speech seemingly stirred numbers of his listeners to mutterings and threatened disorders.[1198] But this case has been significantly limited by cases that hold protected the peaceful expression of views that stirs people to anger because of the content of the expression, or perhaps because of the manner in which it is conveyed, and that breach of the peace and disorderly conduct statutes may not be used to curb such expression.

The cases are not clear as to what extent the police must go in protecting the speaker against hostile audience reaction or whether only actual disorder or a clear and present danger of disorder will entitle the authorities to terminate the speech or other expressive conduct.[1199] Nor, in the absence of incitement to illegal action, may

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[1196] Cohen v. California, 403 U.S. 15, 20 (1971). Cohen's conviction for breach of the peace, occasioned by his appearance in public with an "offensive expletive" lettered on his jacket, was reversed, in part because the words were not a personal insult and there was no evidence of audience objection.

[1197] The cases hold that government may not punish profane, vulgar, or opprobrious words simply because they are offensive, but only if they are "fighting words" that have a direct tendency to cause acts of violence by the person to whom they are directed. Gooding v. Wilson, 405 U.S. 518 (1972); Hess v. Indiana, 414 U.S. 105 (1973); Lewis v. City of New Orleans, 415 U.S. 130 (1974); Lucas v. Arkansas, 416 U.S. 919 (1974); Kelly v. Ohio, 416 U.S. 923 (1974); Karlan v. City of Cincinnati, 416 U.S. 924 (1974); Rosen v. California, 416 U.S. 924 (1974); *see also* Eaton v. City of Tulsa, 416 U.S. 697 (1974).

[1198] Feiner v. New York, 340 U.S. 315 (1951). *See also* Milk Wagon Drivers v. Meadowmoor Dairies, 312 U.S. 287 (1941), in which the Court held that a court could enjoin peaceful picketing because violence occurring at the same time against the businesses picketed could have created an atmosphere in which even peaceful, otherwise protected picketing could be illegally coercive. *But compare* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

[1199] The principle actually predates *Feiner*. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940); Terminiello v. Chicago, 337 U.S. 1 (1949). For subsequent application, *see* Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 379 U.S. 536 (1965); Brown v. Louisiana, 383 U.S. 131 (1966); Gregory v. City of Chicago, 394 U.S. 111 (1969); Bachellar v. Maryland, 397 U.S. 564 (1970). Significant is Justice Harlan's statement of the principle reflected by *Feiner*. "Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. Cf. Feiner v. New York, 340 U.S. 315 (1951)." Cohen v. California, 403 U.S. 15, 20 (1970).

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government punish mere expression or proscribe ideas,[1200] regardless of the trifling or annoying caliber of the expression.[1201]

Threats of Violence Against Individuals.—The Supreme Court has cited three "reasons why threats of violence are outside the First Amendment": "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."[1202] In *Watts v. United States*, however, the Court held that only "true" threats are outside the First Amendment.[1203] The defendant in *Watts*, at a public rally at which he was expressing his opposition to the military draft, said, "If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J."[1204] He was convicted of violating a federal statute that prohibited "any threat to take the life of or to inflict bodily harm upon the President of the United States." The Supreme Court reversed. Interpreting the statute "with the commands of the First Amendment clearly in mind,"[1205] it found that the defendant had not made a "true 'threat,'" but had indulged in mere "political hyperbole."[1206]

In *NAACP v. Claiborne Hardware Co.*, white merchants in Claiborne County, Mississippi, sued the NAACP to recover losses caused by a boycott by black citizens of their businesses, and to enjoin future boycott activity.[1207] During the course of the boycott, NAACP Field Secretary Charles Evers had told an audience of "black people that any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people."[1208] The Court acknowledged that this language "might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence . . . ."[1209] Yet, no violence had followed directly from Evers'

[1200] Cohen v. California, 403 U.S. 15 (1971); Bachellar v. Maryland, 397 U.S. 564 (1970); Street v. New York, 394 U.S. 576 (1969); Schacht v. United States, 398 U.S. 58 (1970); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959); Stromberg v. California, 283 U.S. 359 (1931).

[1201] Coates v. City of Cincinnati, 402 U.S. 611 (1971); Cohen v. California, 403 U.S. 15 (1971); Gooding v. Wilson, 405 U.S. 518 (1972).

[1202] R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

[1203] 394 U.S. 705, 708 (1969) (per curiam).

[1204] 394 U.S. at 706.

[1205] 394 U.S. at 707.

[1206] 394 U.S. at 708. In Virginia v. Black, 538 U.S. 343, 359 (2003), the Court, citing *Watts*, upheld a statute that outlawed cross burnings done with the intent to intimidate. A cross burning done as "a statement of ideology, a symbol of group solidarity," or "in movies such as Mississippi Burning," however, would be protected speech. Id. at 365–366.

[1207] 458 U.S. 886 (1982). *Claiborne* is also discussed below under "Public Issue Picketing and Parading."

[1208] 458 U.S. at 900, n.29. See id. at 902 for a similar remark by Evers.

[1209] 458 U.S. at 927.

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speeches, and the Court found that Evers' "emotionally charged rhetoric . . . did not transcend the bounds of protected speech set forth in *Brandenburg*. . . . An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech." [1210] Although it held that, under *Brandenburg*, Evers' speech did not constitute unprotected incitement of lawless action,[1211] the Court also cited *Watts*, thereby implying that Evers' speech also did not constitute a "true threat." [1212]

In *Planned Parenthood v. American Coalition of Life Activists*, the *en banc* Ninth Circuit, by a 6-to-5 vote, upheld a damage award in favor of four physicians and two health clinics that provided medical services, including abortions, to women.[1213] The plaintiffs had sued under a federal statute that gives aggrieved persons a right of action against whoever by "threat of force . . . intentionally . . . intimidates any person because the person is or has been . . . providing reproductive health services." The defendants had published "WANTED," "unWANTED," and "GUILTY" posters with the names, photographs, addresses, and other personal information about abortion doctors, three of whom were subsequently murdered by abortion opponents. The defendants also operated a "Nuremberg Files" website that listed approximately 200 people under the label "ABORTIONIST," with the legend: "Black font (working); Greyed-out Name (wounded); Strikethrough (fatality)." [1214] The posters and the website contained no language that literally constituted a threat, but, the court found, "they connote something they do not literally say," namely "You're Wanted or You're Guilty; You'll be shot or killed," [1215] and the defendants knew that the posters caused abortion doctors to "quit out of fear for their lives." [1216]

The Ninth Circuit concluded that a "true threat" is "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person." [1217] "It is not necessary that the defendant intend to, or be able to carry out his threat;

[1210] 458 U.S. at 928.

[1211] Brandenburg v. Ohio, 395 U.S. 444 (1969). *Brandenburg* is discussed above under "Is There a Present Test?"

[1212] *Claiborne*, 458 U.S. at 928 n.71.

[1213] 290 F.3d 1058 (9th Cir. 2002) (en banc), *cert. denied*, 539 U.S. 958 (2003).

[1214] 290 F.3d at 1065.

[1215] 290 F.3d at 1085.

[1216] 290 F.3d at 1085.

[1217] 290 F.3d at 1077.

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the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat." [1218]

Judge Alex Kozinski, in one of three dissenting opinions, agreed with the majority's definition of a true threat, but believed that the majority had failed to apply it, because the speech in this case had not been "communicated as *a serious expression of intent to inflict bodily harm*. . . ." [1219] "The difference between a true threat and protected expression," Judge Kozinski wrote, "is this: A true threat warns of violence or other harm that the speaker controls. . . . Yet the opinion points to no evidence that defendants who prepared the posters would have been understood by a reasonable listener as saying that *they* will cause the harm. . . . Given this lack of evidence, the posters can be viewed, at most, as a call to arms for *other* abortion protesters to harm plaintiffs. However, the Supreme Court made it clear that under *Brandenburg*, encouragement or even advocacy of violence is protected by the First Amendment. . . ." [1220] Moreover, the Court held in *Claiborne* that "[t]he mere fact the statements could be understood 'as intending to create a fear of violence' was insufficient to make them 'true threats' under *Watts*." [1221]

Group Libel, Hate Speech.—In *Beauharnais v. Illinois*,[1222] relying on dicta in past cases,[1223] the Court upheld a state group libel law that made it unlawful to defame a race or class of people. The defendant had been convicted under this statute after he had distributed a leaflet, part of which was in the form of a petition to his city government, taking a hard-line white-supremacy position, and calling for action to keep African Americans out of white neighborhoods. Justice Frankfurter for the Court sustained the statute along the following reasoning. Libel of an individual, he established, was a common-law crime and was now made criminal by statute in every state in the Union. These laws raise no constitutional difficulty because libel is within that class of speech that is not protected by the First Amendment. If an utterance directed at an individual may be the object of criminal sanctions, then no good reason appears to deny a state the power to punish the same utterances when they are directed at a defined group, "unless we can say that this is a willful and purposeless restriction unrelated to the peace and well-being of the State." [1224] The Justice then re-

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[1218] 290 F.3d at 1075.
[1219] 290 F.3d at 1089 (quoting majority opinion at 1077 and adding emphasis).
[1220] 290 F.3d at 1089, 1091, 1092 (emphasis in original).
[1221] 290 F.3d at 1094 (citation omitted).
[1222] 343 U.S. 250 (1952).
[1223] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); Near v. Minnesota ex rel. Olson, 283 U.S. 697, 707–08 (1931).
[1224] Beauharnais v. Illinois, 343 U.S. 250, 254–58 (1952).

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viewed the history of racial strife in Illinois to conclude that the legislature could reasonably have feared substantial evils from unrestrained racial utterances. Nor did the Constitution require the state to accept a defense of truth, because historically a defendant had to show not only truth but publication with good motives and for justifiable ends.[1225] "Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary . . . to consider the issues behind the phrase 'clear and present danger.'" [1226]

Beauharnais has little continuing vitality as precedent. Its holding, premised in part on the categorical exclusion of defamatory statements from First Amendment protection, has been substantially undercut by subsequent developments, not the least of which are the Court's subjection of defamation law to First Amendment challenge and its ringing endorsement of "uninhibited, robust, and wide-open" debate on public issues in *New York Times Co. v. Sullivan*.[1227] In *R.A.V. v. City of St. Paul*, the Court, in an opinion by Justice Scalia, explained and qualified the categorical exclusions for defamation, obscenity, and fighting words. These categories of speech are not "entirely invisible to the Constitution," even though they "can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content*." [1228] Content discrimination unrelated to that "distinctively proscribable content," however, runs afoul of the First Amendment.[1229] Therefore, the city's bias-motivated crime ordinance, interpreted as banning the use of fighting words known to offend on the basis of race, color, creed, religion, or gender, but not on such other possible bases as political affiliation, union membership, or homosexuality, was invalidated for its content discrimination. "The First Amendment does not permit [the city] to impose special prohibitions on those speakers who express views on disfavored subjects." [1230]

[1225] 343 U.S. at 265–66.

[1226] 343 U.S. at 266.

[1227] 376 U.S. 254 (1964). *See also* Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.) (ordinances prohibiting distribution of materials containing racial slurs are unconstitutional), *aff'd*, 578 F.2d 1197 (7th Cir.), *stay denied*, 436 U.S. 953 (1978), *cert. denied*, 439 U.S. 916 (1978) (Justices Blackmun and Rehnquist dissenting on the basis that Court should review case that is in "some tension" with *Beauharnais*). *But see* New York v. Ferber, 458 U.S. 747, 763 (1982) (obliquely citing *Beauharnais* with approval).

[1228] 505 U.S. 377, 383 (1992) (emphasis in original).

[1229] 505 U.S. at 384.

[1230] *Id.* 505 U.S. at 391. On the other hand, the First Amendment permits enhancement of a criminal penalty based on the defendant's motive in selecting a victim of a particular race. Wisconsin v. Mitchell, 508 U.S. 476 (1993). The law has long recognized motive as a permissible element in sentencing, the Court noted. Id. at 485. It distinguished *R.A.V.* as involving a limitation on speech rather than con-

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In *Virginia v. Black*, the Court held that its opinion in *R.A.V.* did not make it unconstitutional for a state to prohibit burning a cross with the intent of intimidating any person or group of persons.[1231] Such a prohibition does not discriminate on the basis of a defendant's beliefs: "as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities. . . . The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages. . . ." [1232]

Defamation.—One of the most seminal shifts in constitutional jurisprudence occurred in 1964 with the Court's decision in *New York Times Co. v. Sullivan*.[1233] The *Times* had published a paid advertisement by a civil rights organization criticizing the response of a Southern community to demonstrations led by Dr. Martin Luther King, and containing several factual errors. The plaintiff, a city commissioner in charge of the police department, claimed that the advertisement had libeled him even though he was not referred to by name or title and even though several of the incidents described had occurred prior to his assumption of office. Unanimously, the Court reversed the lower court's judgment for the plaintiff. To the contention that the First Amendment did not protect libelous publications, the Court replied that constitutional scrutiny could not be foreclosed by the "label" attached to something. "Like . . . the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." [1234] "The general proposition," the Court continued, "that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions . . . . [W]e consider this case against the background of a profound national commitment to the principle that debate on public

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duct, and because the state might permissibly conclude that bias-inspired crimes inflict greater societal harm than do non-bias inspired crimes (*e.g.*, they are more likely to provoke retaliatory crimes). Id. at 487–88. *See generally* Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1.

[1231] 538 U.S. 343 (2003). A plurality held, however, that a statute may not presume, from the fact that a defendant burned a cross, that he had an intent to intimidate. The state must prove that he did, as "a burning cross is not always intended to intimidate," but may constitute a constitutionally protected expression of opinion. Id. at 365–66.

[1232] 538 U.S. at 362–63.

[1233] 376 U.S. 254 (1964).

[1234] 376 U.S. at 269. Justices Black, Douglas, and Goldberg, concurring, would have held libel laws *per se* unconstitutional. Id. at 293, 297.

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issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." [1235] Because the advertisement was "an expression of grievance and protest on one of the major public issues of our time, [it] would seem clearly to qualify for the constitutional protection . . . [unless] it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent." [1236]

Erroneous statement is protected, the Court asserted, there being no exception "for any test of truth." Error is inevitable in any free debate and to place liability upon that score, and especially to place on the speaker the burden of proving truth, would introduce self-censorship and stifle the free expression which the First Amendment protects.[1237] Nor would injury to official reputation afford a warrant for repressing otherwise free speech. Public officials are subject to public scrutiny and "[c]riticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputation." [1238] That neither factual error nor defamatory content could penetrate the protective circle of the First Amendment was the "lesson" to be drawn from the great debate over the Sedition Act of 1798, which the Court reviewed in some detail to discern the "central meaning of the First Amendment." [1239] Thus, it appears, the libel law under consideration failed the test of constitutionality because of its kinship with seditious libel, which violated the "central meaning of the First Amendment." "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." [1240]

In the wake of the *Times* ruling, the Court decided two cases involving the type of criminal libel statute upon which Justice Frankfurter had relied in analogy to uphold the group libel law in

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[1235] 376 U.S. at 269, 270.

[1236] 376 U.S. at 271.

[1237] 376 U.S. at 271–72, 278–79. Of course, the substantial truth of an utterance is ordinarily a defense to defamation. *See* Masson v. New Yorker Magazine, 501 U.S. 496, 516 (1991).

[1238] 376 U.S. at 272–73.

[1239] 376 U.S. at 273.

[1240] 376 U.S. at 279–80. The same standard applies for defamation contained in petitions to the government, the Court having rejected the argument that the petition clause requires absolute immunity. McDonald v. Smith, 472 U.S. 479 (1985).

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Beauharnais.[1241] In neither case did the Court apply the concept of *Times* to void them altogether. *Garrison v. Louisiana* [1242] held that a statute that did not incorporate the *Times* rule of "actual malice" was invalid, while in *Ashton v. Kentucky* [1243] a common-law definition of criminal libel as "any writing calculated to create disturbances of the peace, corrupt the public morals or lead to any act, which, when done, is indictable" was too vague to be constitutional.

The teaching of *Times* and the cases following it is that expression on matters of public interest is protected by the First Amendment. Within that area of protection is commentary about the public actions of individuals. The fact that expression contains falsehoods does not deprive it of protection, because otherwise such expression in the public interest would be deterred by monetary judgments and self-censorship imposed for fear of judgments. But, over the years, the Court has developed an increasingly complex set of standards governing who is protected to what degree with respect to which matters of public and private interest.

Individuals to whom the *Times* rule applies presented one of the first issues for determination. At times, the Court has keyed it to the importance of the position held. "There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." [1244] But this focus seems to have become diffused and the concept of "public official" has appeared to take on overtones of anyone holding public elective or appointive office.[1245] Moreover, candidates for public office were subject to the *Times* rule and comment on their character

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[1241] Beauharnais v. Illinois, 343 U.S. 250, 254–58 (1952).

[1242] 379 U.S. 64 (1964).

[1243] 384 U.S. 195 (1966).

[1244] Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

[1245] *See* Rosenblatt v. Baer, 383 U.S. 75 (1966) (supervisor of a county recreation area employed by and responsible to the county commissioners may be public official within *Times* rule); Garrison v. Louisiana, 379 U.S. 64 (1964) (elected municipal judges); Henry v. Collins, 380 U.S. 356 (1965) (county attorney and chief of police); St. Amant v. Thompson, 390 U.S. 727 (1968) (deputy sheriff); Greenbelt Cooperative Pub. Ass'n v. Bresler, 398 U.S. 6 (1970) (state legislator who was major real estate developer in area); Time, Inc. v. Pape, 401 U.S. 279 (1971) (police captain).

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or past conduct, public or private, insofar as it touches upon their fitness for office, is protected.[1246]

Thus, a wide range of reporting about both public officials and candidates is protected. Certainly, the conduct of official duties by public officials is subject to the widest scrutiny and criticism.[1247] But the Court has held as well that criticism that reflects generally upon an official's integrity and honesty is protected.[1248] Candidates for public office, the Court has said, place their whole lives before the public, and it is difficult to see what criticisms could not be related to their fitness.[1249]

For a time, the Court's decisional process threatened to expand the *Times* privilege so as to obliterate the distinction between private and public figures. First, the Court created a subcategory of "public figure," which included those otherwise private individuals who have attained some prominence, either through their own efforts or because it was thrust upon them, with respect to a matter of public interest, or, in Chief Justice Warren's words, those persons who are "intimately involved in the resolution of important pub-

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The categorization does not, however, include all government employees. Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979).

[1246] Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971).

[1247] Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

[1248] Garrison v. Louisiana, 379 U.S. 64 (1964), involved charges that judges were inefficient, took excessive vacations, opposed official investigations of vice, and were possibly subject to "racketeer influences." The Court rejected an attempted distinction that these criticisms were not of the manner in which the judges conducted their courts but were personal attacks upon their integrity and honesty. "Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation. . . . The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." Id. at 76–77.

[1249] In Monitor Patriot Co. v. Roy, 401 U.S. 265, 274–75 (1971), the Court said: "The principal activity of a candidate in our political system, his 'office,' so to speak, consists in putting before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him. A candidate who, for example, seeks to further his cause through the prominent display of his wife and children can hardly argue that his qualities as a husband or father remain of 'purely private' concern. And the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul' when an opponent or an industrious reporter attempts to demonstrate the contrary. . . . Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks. The clash of reputations is the staple of election campaigns and damage to reputation is, of course, the essence of libel. But whether there remains some exiguous area of defamation against which a candidate may have full recourse is a question we need not decide in this case."

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lic questions or, by reason of their fame, shape events in areas of concern to society at large."[1250] Later, the Court curtailed the definition of "public figure" by playing down the matter of public interest and emphasizing the voluntariness of the assumption of a role in public affairs that will make of one a "public figure."[1251]

Second, in a fragmented ruling, the Court applied the *Times* standard to private citizens who had simply been involved in events of public interest, usually, though not invariably, not through their own choosing.[1252] But, in *Gertz v. Robert Welch, Inc.*[1253] the Court set off on a new path of limiting recovery for defamation by private persons. Henceforth, persons who are neither public officials nor public figures may recover for the publication of defamatory falsehoods so long as state defamation law establishes a standard higher than strict liability, such as negligence; damages may not be presumed, however, but must be proved, and punitive damages will be recoverable only upon the *Times* showing of "actual malice."

The Court's opinion by Justice Powell established competing constitutional considerations. On the one hand, imposition upon the press of liability for every misstatement would deter not only false speech but much truth as well; the possibility that the press might have to prove everything it prints would lead to self-censorship and the consequent deprivation of the public of access to information. On the other hand, there is a legitimate state interest in compensating individuals for the harm inflicted on them by defamatory falsehoods. An individual's right to the protection of his own good name

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[1250] Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967) (Chief Justice Warren concurring in the result). *Curtis* involved a college football coach, and *Associated Press v. Walker*, decided in the same opinion, involved a retired general active in certain political causes. The suits arose from reporting that alleged, respectively, the fixing of a football game and the leading of a violent crowd in opposition to enforcement of a desegregation decree. The Court was extremely divided, but the rule that emerged was largely the one developed in the Chief Justice's opinion. Essentially, four Justices opposed application of the *Times* standard to "public figures," although they would have imposed a lesser but constitutionally based burden on public figure plaintiffs. Id. at 133 (plurality opinion of Justices Harlan, Clark, Stewart, and Fortas). Three Justices applied *Times*, id. at 162 (Chief Justice Warren), and 172 (Justices Brennan and White). Two Justices would have applied absolute immunity. Id. at 170 (Justices Black and Douglas). *See also* Greenbelt Cooperative Pub. Ass'n v. Bresler, 398 U.S. 6 (1970).

[1251] Public figures "[f]or the most part [are] those who . . . have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

[1252] Rosenbloom v. Metromedia, 403 U.S. 29 (1971). *Rosenbloom* had been prefigured by Time, Inc. v. Hill, 385 U.S. 374 (1967), a "false light" privacy case considered *infra*

[1253] 418 U.S. 323 (1974).

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is, at bottom, but a reflection of our society's concept of the worth of the individual. Therefore, an accommodation must be reached. The *Times* rule had been a proper accommodation when public officials or public figures were concerned, inasmuch as by their own efforts they had brought themselves into the public eye, had created a need in the public for information about them, and had at the same time attained an ability to counter defamatory falsehoods published about them. Private individuals are not in the same position and need greater protection. "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[1254] Thus, some degree of fault must be shown.

Generally, juries may award substantial damages in tort for presumed injury to reputation merely upon a showing of publication. But this discretion of juries had the potential to inhibit the exercise of freedom of the press, and moreover permitted juries to penalize unpopular opinion through the awarding of damages. Therefore, defamation plaintiffs who do not prove actual malice—that is, knowledge of falsity or reckless disregard for the truth—will be limited to compensation for actual provable injuries, such as out-of-pocket loss, impairment of reputation and standing, personal humiliation, and mental anguish and suffering. A plaintiff who proves actual malice will be entitled as well to collect punitive damages.[1255]

Subsequent cases have revealed a trend toward narrowing the scope of the "public figure" concept. A socially prominent litigant in a particularly messy divorce controversy was held not to be such a person,[1256] and a person convicted years before of contempt after failing to appear before a grand jury was similarly not a public figure even as to commentary with respect to his conviction.[1257] Also not a public figure for purposes of allegedly defamatory comment about the value of his research was a scientist who sought and received federal grants for research, the results of which were published in scientific journals.[1258] Public figures, the Court reiterated, are those who (1) occupy positions of such persuasive power and influence that they are deemed public figures for all purposes or (2) have thrust themselves to the forefront of particular public con-

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[1254] 418 U.S. at 347.

[1255] 418 U.S. at 348–50. Justice Brennan would have adhered to *Rosenbloom*, id. at 361, while Justice White thought the Court went too far in constitutionalizing the law of defamation. Id. at 369.

[1256] Time, Inc. v. Firestone, 424 U.S. 448 (1976).

[1257] Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979).

[1258] Hutchinson v. Proxmire, 443 U.S. 111 (1979).

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troversies in order to influence the resolution of the issues involved, and are public figures with respect to comment on those issues.[1259]

Commentary about matters of "public interest" when it defames someone is apparently, after *Firestone*[1260] and *Gertz*, to be protected to the degree that the person defamed is a public official or candidate for public office, public figure, or private figure. That there is a controversy, that there are matters that may be of "public interest," is insufficient to make a private person a "public figure" for purposes of the standard of protection in defamation actions.

The Court has elaborated on the principles governing defamation actions brought by private figures. First, when a private plaintiff sues a media defendant for publication of information that is a matter of public concern—the *Gertz* situation, in other words—the burden is on the plaintiff to establish the falsity of the information. Thus, the Court held in *Philadelphia Newspapers v. Hepps*,[1261] the common law rule that defamatory statements are presumptively false must give way to the First Amendment interest that true speech on matters of public concern not be inhibited. This means, as the dissenters pointed out, that a *Gertz* plaintiff must establish falsity in addition to establishing some degree of fault (*e.g.*, negligence).[1262] On the other hand, the Court held in *Dun & Bradstreet v. Greenmoss Builders* that the *Gertz* standard limiting award of presumed and punitive damages applies only in cases involving matters of public concern, and that the sale of credit reporting information to subscribers is not such a matter of public concern.[1263] What significance, if any, is to be attributed to the fact that a media defendant rather than a private defendant has been sued is left unclear. The plurality in *Dun & Bradstreet* declined to follow the lower court's rationale that *Gertz* protections are unavailable to nonmedia defendants, and a majority of Justices agreed on that point.[1264] In *Philadelphia Newspapers*, however, the Court expressly reserved the

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[1259] 443 U.S. at 134 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974)).

[1260] Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976). *See also* Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979).

[1261] 475 U.S. 767 (1986).

[1262] 475 U.S. at 780 (Stevens, J., dissenting).

[1263] 472 U.S. 749 (1985). Justice Powell wrote a plurality opinion joined by Justices Rehnquist and O'Connor, and Chief Justice Burger and Justice White, both of whom had dissented in *Gertz*, added brief concurring opinions agreeing that the *Gertz* standard should not apply to credit reporting. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented, arguing that *Gertz* had not been limited to matters of public concern, and should not be extended to do so.

[1264] 472 U.S. at 753 (plurality); id. at 773 (Justice White); id. at 781–84 (dissent).

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issue of "what standards would apply if the plaintiff sues a nonmedia defendant." [1265]

Other issues besides who is covered by the *Times* privilege are of considerable importance. The use of the expression "actual malice" has been confusing in many respects, because it is in fact a concept distinct from the common law meaning of malice or the meanings common understanding might give to it.[1266] Constitutional "actual malice" means that the defamation was published with knowledge that it was false or with reckless disregard of whether it was false.[1267] Reckless disregard is not simply negligent behavior, but publication with serious doubts as to the truth of what is uttered.[1268] A defamation plaintiff under the *Times* or *Gertz* standard has the burden of proving by "clear and convincing" evidence, not merely by the preponderance of evidence standard ordinarily borne in civil cases, that the defendant acted with knowledge of falsity or with reckless disregard.[1269] Moreover, the Court has held, a *Gertz* plaintiff has the burden of proving the actual falsity of the defamatory publication.[1270] A plaintiff suing the press [1271] for defamation under the *Times* or *Gertz* standards is not limited to attempting to prove his case without resort to discovery of the defendant's edito-

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[1265] 475 U.S. at 779 n.4. Justice Brennan added a brief concurring opinion expressing his view that such a distinction is untenable. Id. at 780.

[1266] *See*, *e.g.*, Herbert v. Lando, 441 U.S. 153, 199 (1979) (Justice Stewart dissenting).

[1267] New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964); Garrison v. Louisiana, 379 U.S. 64, 78 (1964); Cantrell v. Forest City Publishing Co., 419 U.S. 245, 251–52 (1974).

[1268] St. Amant v. Thompson, 390 U.S. 727, 730–33 (1968); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967). A finding of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" is alone insufficient to establish actual malice. Harte-Hanks Communications v. Connaughton, 491 U.S. 657 (1989) (nonetheless upholding the lower court's finding of actual malice based on the "entire record").

[1269] Gertz v. Robert Welch, Inc., 418 U.S. 323, 331–32 (1974); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 83 (1967). *See* New York Times Co. v. Sullivan, 376 U.S. 254, 285–86 (1964) ("convincing clarity"). A corollary is that the issue on motion for summary judgment in a *New York Times* case is whether the evidence is such that a reasonable jury might find that actual malice has been shown with convincing clarity. Anderson v. Liberty Lobby, 477 U.S. 242 (1986).

[1270] Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986) (leaving open the issue of what "quantity" or standard of proof must be met).

[1271] Because the defendants in these cases have typically been media defendants (*but see* Garrison v. Louisiana, 379 U.S. 64 (1964); Henry v. Collins, 380 U.S. 356 (1965)), and because of the language in the Court's opinions, some have argued that only media defendants are protected under the press clause and individuals and others are not protected by the speech clause in defamation actions. *See* discussion, *supra*, under "Freedom of Expression: Is There a Difference Between Speech and Press?"

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rial processes in the establishment of "actual malice." [1272] The state of mind of the defendant may be inquired into and the thoughts, opinions, and conclusions with respect to the material gathered and its review and handling are proper subjects of discovery. As with other areas of protection or qualified protection under the First Amendment (as well as some other constitutional provisions), appellate courts, and ultimately the Supreme Court, must independently review the findings below to ascertain that constitutional standards were met.[1273]

There had been some indications that statements of opinion, unlike assertions of fact, are absolutely protected,[1274] but the Court held in *Milkovich v. Lorain Journal Co.*[1275] that there is no constitutional distinction between fact and opinion, hence no "wholesale defamation exemption" for any statement that can be labeled "opinion." [1276] The issue instead is whether, regardless of the context in which a statement is uttered, it is sufficiently factual to be susceptible of being proved true or false. Thus, if statements of opinion may "reasonably be interpreted as stating actual facts about an individual," [1277] then the truthfulness of the factual assertions may be tested in a defamation action. There are sufficient protections for free public discourse already available in defamation law, the Court concluded, without creating "an artificial dichotomy between 'opinion' and fact." [1278]

Substantial meaning is also the key to determining whether inexact quotations are defamatory. Journalistic conventions allow some alterations to correct grammar and syntax, but the Court in *Masson v. New Yorker Magazine* [1279] refused to draw a distinction on that narrow basis. Instead, "a deliberate alteration of words [in a quotation] does not equate with knowledge of falsity for purposes

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[1272] Herbert v. Lando, 441 U.S. 153 (1979).

[1273] New York Times Co. v. Sullivan, 376 U.S. 254, 284–86 (1964). *See*, *e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933–34 (1982). Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 688 (1989) ("the reviewing court must consider the factual record in full"); Bose Corp. v. Consumers Union of United States, 466 U.S. 485 (1984) (the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a) must be subordinated to this constitutional principle).

[1274] *See*, *e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) ("under the First Amendment there is no such thing as a false idea"); Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) (holding protected the accurate reporting of a public meeting in which a particular position was characterized as "blackmail"); Letter Carriers v. Austin, 418 U.S. 264 (1974) (holding protected a union newspaper's use of epithet "scab").

[1275] 497 U.S. 1 (1990).

[1276] 497 U.S. at 18.

[1277] 497 U.S. at 20. In *Milkovich* the Court held to be actionable assertions and implications in a newspaper sports column that a high school wrestling coach had committed perjury in testifying about a fight involving his team.

[1278] 497 U.S. at 19.

[1279] 501 U.S. 496 (1991).

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of [*New York Times*] unless the alteration results in a material change in the meaning conveyed by the statement." [1280]

False Statements.—As defamatory false statements can lead to legal liability, so can false statements in other contexts run afoul of legal prohibitions. For instance, more than 100 federal criminal statutes punish false statements in areas of concern to federal courts or agencies,[1281] and the Court has often noted the limited First Amendment value of such speech.[1282] The Court, however, has declined to find that all false statements fall outside of First Amendment protection. In *United States v. Alvarez*,[1283] the Court overturned the Stolen Valor Act of 2005,[1284] which imposed criminal penalties for falsely representing oneself to have been awarded a military decoration or medal. In an opinion by Justice Kennedy, four Justices distinguished false statement statutes that threaten the integrity of governmental processes or that further criminal activity, and evaluated the Act under a strict scrutiny standard.[1285]

Noting that the Stolen Valor Act applied to false statements made "at any time, in any place, to any person," [1286] Justice Kennedy suggested that upholding this law would leave the government with the power to punish any false discourse without a clear limiting principle. Justice Breyer, in a separate opinion joined by Justice Kagan, concurred in judgment, but did so only after evaluating the prohibition under an intermediate scrutiny standard. While Justice Breyer was also concerned about the breadth of the act, his opinion went on to suggest that a similar statute, more finely tailored to situations where a specific harm is likely to occur, could withstand legal challenge.[1287]

Invasion of Privacy.—Governmental power to protect the privacy interests of its citizens by penalizing publication or authorizing causes of action for publication implicates directly First Amend-

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[1280] 501 U.S. at 517.

[1281] United States v. Wells, 519 U.S. 482, 505–507, and nn. 8–10 (1997) (Stevens, J., dissenting) (listing statute citations).

[1282] *See, e.g.,* Hustler Magazine, Inc. v. Falwell, 485 U.S. at 52 (1988) ("False statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas."); *Virginia State Bd. of Pharmacy Virginia Citizens Consumer Council*, 425 U.S. at 771 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.").

[1283] 567 U.S. ___, No. 11–210, slip op. (2012).

[1284] 18 U.S.C. § 704.

[1285] *Alvarez*, slip op. at 8–12 (Kenndy, J.). Justice Kennedy was joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor.

[1286] *Alvarez*, slip op. at 10 (Kennedy, J). Justice Kennedy was joined in his opinion by Chief Justice Roberts, and Justices Ginsburg and Sotomayor..

[1287] *Alvarez*, slip op. at 8–9 (Breyer, J).

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ment rights. Privacy is a concept composed of several aspects.[1288] As a tort concept, it embraces at least four branches of protected interests: protection from unreasonable intrusion upon one's seclusion, from appropriation of one's name or likeness, from unreasonable publicity given to one's private life, and from publicity which unreasonably places one in a false light before the public.[1289]

Although the Court has variously recognized valid governmental interests in extending protection to privacy,[1290] it has nevertheless interposed substantial free expression interests in the balance. Thus, in *Time, Inc. v. Hill*,[1291] the *Times* privilege was held to preclude recovery under a state privacy statute that permitted recovery for harm caused by exposure to public attention in any publication which contained factual inaccuracies, although not necessarily defamatory inaccuracies, in communications on matters of public interest. Since *Gertz* held that the *Times* privilege did not limit the recovery of compensatory damages for defamation by private persons, the question arose whether *Hill* applies to all "false-light" cases or only such cases involving public officials or public figures.[1292] And, more important, *Gertz* left unresolved the issue "whether the State may ever define and protect an area of privacy free from unwanted publicity in the press." [1293]

In *Cox Broadcasting*, the Court declined to pass on the broad question, holding instead that the accurate publication of information obtained from public records is absolutely privileged. Thus, the state could not permit a civil recovery for invasion of privacy occasioned by the reporting of the name of a rape victim obtained from court records and from a proceeding in open court.[1294] Neverthe-

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[1288] *See*, *e.g.*, William Prosser, Law of Torts 117 (4th ed. 1971); Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960); J. Thomas McCarthy, The Rights of Publicity and Privacy (1987); Thomas Emerson, The System of Freedom of Expression 544–61 (1970). Note that we do not have here the question of the protection of one's privacy from governmental invasion.

[1289] Restatement (Second), of Torts §§ 652A–652I (1977). These four branches were originally propounded in Prosser's 1960 article, incorporated in the Restatement, and now "routinely accept[ed]." McCarthy, § 5.8[A].

[1290] Time, Inc. v. Hill, 385 U.S. 374, 383 n.7 (1967); and id. at 402, 404 (Justice Harlan, concurring in part and dissenting in part), 411, 412–15 (Justice Fortas dissenting); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 487–89 (1975).

[1291] 385 U.S. 374 (1967). *See also* Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974).

[1292] *Cf.* Cantrell v. Forest City Publishing Co., 419 U.S. 245, 250–51 (1974); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 490 n.19 (1975).

[1293] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975).

[1294] More specifically, the information was obtained "from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection." 420 U.S. at 491. There was thus involved both the First Amendment and the traditional privilege of the press to report the events of judicial proceedings. Id. at 493, 494–96.

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less, the Court in appearing to retreat from what had seemed to be settled principle, that truth is a constitutionally required defense in any defamation action, whether plaintiff be a public official, public figure, or private individual, may have preserved for itself the discretion to recognize a constitutionally permissible tort of invasion of privacy through publication of truthful information.[1295] But in recognition of the conflicting interests—in expression and in privacy—it is evident that the judicial process in this area will be cautious.

Continuing to adhere to "limited principles that sweep no more broadly than the appropriate context of the instant case," the Court invalidated an award of damages against a newspaper for printing the name of a sexual assault victim lawfully obtained from a sheriff's department press release. The state was unable to demonstrate that imposing liability served a "need" to further a state interest of the highest order, since the same interest could have been served by the more limited means of self regulation by the police, since the particular *per se* negligence statute precluded inquiry into the extent of privacy invasion (*e.g.*, inquiry into whether the victim's identity was already widely known), and since the statute singled out "mass communications" media for liability rather than applying evenhandedly to anyone disclosing a victim's identity.[1296]

[1295] Thus, Justice White for the Court noted that the defense of truth is constitutionally required in suits by public officials or public figures. But "[t]he Court has nevertheless carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamatory action brought by a private person as distinguished from a public official or public figure." 420 U.S. at 490. If truth is not a constitutionally required defense, then it would be possible for the states to make truthful defamation of private individuals actionable and, more important, truthful reporting of matters that constitute invasions of privacy actionable. *See* Brasco v. Reader's Digest, 4 Cal.3d 520, 483 P.2d 34, 93 Cal. Rptr. 866 (1971); Commonwealth v. Wiseman, 356 Mass. 251, 249 N.E.2d 610 (1969), *cert. denied*, 398 U.S. 960 (1970). Concurring in *Cohn*, 420 U.S. at 497, Justice Powell contended that the question of truth as a constitutionally required defense was long settled in the affirmative and that *Gertz* itself, which he wrote, was explainable on no other basis. But he too would reserve the question of actionable invasions of privacy through truthful reporting. "In some instances state actions that are denominated actions in defamation may in fact seek to protect citizens from injuries that are quite different from the wrongful damage to reputation flowing from false statements of fact. In such cases, the Constitution may permit a different balance. And, as today's opinion properly recognizes, causes of action grounded in a State's desire to protect privacy generally implicate interests that are distinct from those protected by defamation actions." 420 U.S. at 500.

[1296] The Florida Star v. B.J.F., 491 U.S. 524 (1989). The Court left open the question "whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, the government may ever punish not only the unlawful acquisition, but the ensuing publication as well." Id. at 535 n.8 (emphasis in original). In Bartnicki v. Vopper, 532 U.S. 514 (2001), the Court held that a content-neutral statute prohibiting the publication of illegally intercepted communications (in this case a cell phone conversation) violates free speech where the person who publishes the

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Emotional Distress Tort Actions.—In *Hustler Magazine, Inc. v. Falwell*,[1297] the Court applied the *New York Times v. Sullivan* standard to recovery of damages by public officials and public figures for the tort of intentional infliction of emotional distress. The case involved an advertisement "parody" portraying the plaintiff, described by the Court as a "nationally known minister who has been active as a commentator on politics and public affairs," as stating that he lost his virginity "during a drunken incestuous rendezvous with his mother in an outhouse."[1298] Affirming liability in this case, the Court believed, would subject "political cartoonists and satirists . . . to damage awards without any showing that their work falsely defamed its subject."[1299] A proffered "outrageousness" standard for distinguishing such parodies from more traditional political cartoons was rejected; although not doubting that "the caricature of respondent . . . is at best a distant cousin of [some] political cartoons . . . and a rather poor relation at that," the Court explained that "'[o]utrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views. . . ."[1300] Therefore, proof of intent to cause injury, "the gravamen of the tort," is insufficient "in the area of public debate about public figures." Additional proof that the publication contained a false statement of fact made with actual malice was necessary, the Court concluded, in order "to give adequate 'breathing space' to the freedoms protected by the First Amendment."[1301]

The Court next considered whether an intentional infliction of emotional distress action could be brought by a father against public protestors who picketed the military funeral of his son, where the plaintiff was neither a public official nor a public figure. Based on the reasoning of *Hustler Magazine*, one might presume that the *Times* privilege would not extend to the intentional infliction of emotional distress upon a private citizen. However, in *Snyder v. Phelps*,[1302] the Court avoided addressing this issue, finding that where public protesters are addressing issues of public concern, the fact that such protests occurred in a setting likely to upset private individuals did not reduce the First Amendment protection of that speech. In *Phelps*, the congregation of the Westboro Baptist Church, based on the be-

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material did not participate in the interception, and the communication concerns a public issue.

[1297] 485 U.S. 46 (1988).
[1298] 485 U.S. at 47, 48.
[1299] 485 U.S. at 53.
[1300] 485 U.S. at 55.
[1301] 485 U.S. at 53, 56.
[1302] 562 U.S. ___, No. 09–751, slip op. (March 2, 2011).

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lief that God punishes the United States for its tolerance of homosexuality, particularly in America's armed forces, had engaged in nearly 600 protests at funerals, mostly military. While it was admitted that the plaintiff had suffered emotional distress after a protest at his son's funeral, the Court declined to characterize the protests as directed at the father personally.[1303] Rather, considering the "content, form, and context" of that speech,[1304] the Court found that the dominant themes of the protest went to public concerns, and thus could not serve as the basis for a tort suit.[1305]

"Right of Publicity" Tort Actions.—In *Zacchini v. Scripps-Howard Broadcasting Co.*,[1306] the Court held unprotected by the First Amendment a broadcast of a video tape of the "entire act" of a "human cannonball" in the context of the performer's suit for damages against the company for having "appropriated" his act, thereby injuring his right to the publicity value of his performance. The Court emphasized two differences between the legal action permitted here and the legal actions found unprotected or not fully protected in defamation and other privacy-type suits. First, the interest sought to be protected was, rather than a party's right to his reputation and freedom from mental distress, the right of the performer to remuneration for putting on his act. Second, the other torts if permitted decreased the information that would be made available to the public, whereas permitting this tort action would have an impact only on "who gets to do the publishing."[1307] In both respects, the tort action was analogous to patent and copyright laws in that both provide an economic incentive to persons to make the investment required to produce a performance of interest to the public.[1308]

[1303] Signs displayed at the protest included the phrases "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You." Slip op. at 2.

[1304] Slip op. at 8 (citations omitted).

[1305] Justice Alito, in dissent, argued that statements made by the defendants on signs and on a website could have been reasonably interpreted as directed at the plaintiffs, and that even if public themes were a dominant theme at the protest, that this should not prevent a suit from being brought on those statements arguably directed at private individuals. Slip op. at 9–11 (Alito, J., dissenting).

[1306] 433 U.S. 562 (1977). The "right of publicity" tort is conceptually related to one of the privacy strands: "appropriation" of one's name or likeness for commercial purposes. Id. at 569–72. Justices Powell, Brennan, and Marshall dissented, finding the broadcast protected, id. at 579, and Justice Stevens dissented on other grounds. Id. at 582.

[1307] 433 U.S. at 573–74. Plaintiff was not seeking to bar the broadcast but rather to be paid for the value he lost through the broadcasting.

[1308] 433 U.S. at 576–78. This discussion is the closest the Court has come in considering how copyright laws in particular are to be reconciled with the First Amendment. The Court emphasizes that copyright laws encourage the production of work for the public's benefit.

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Publication of Legally Confidential Information.—Although a state may have valid interests in assuring the confidentiality of certain information, it may not enforce this confidentiality by criminally prosecuting nonparticipant third parties, including the press, who disclose or publish the information.[1309] The case that made this point arose in the context of the investigation of a state judge by an official disciplinary body; both by state constitutional provision and by statute, the body's proceedings were required to be confidential and the statute made the divulging of information about the proceeding a misdemeanor. For publishing an accurate report about an investigation of a sitting judge, the newspaper was indicted and convicted of violating the statute, which the state courts construed to apply to nonparticipants. Although the Court recognized the importance of confidentiality to the effectiveness of such a proceeding, it held that the publication here "lies near the core of the First Amendment" because the free discussion of public affairs, including the operation of the judicial system, is primary and the state's interests were simply insufficient to justify the encroachment on freedom of speech and of the press.[1310] The scope of the privilege thus conferred by this decision on the press and on individuals is, however, somewhat unclear, because the Court appeared to reserve consideration of broader questions than those presented by the facts of the case.[1311] It does appear, however, that government would find it difficult to punish the publication of almost any information by a nonparticipant to the process in which the information was developed to the same degree as it would be foreclosed from obtaining prior restraint of such publication.[1312] There are also limits on the extent to which government may punish dis-

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[1309] Landmark Communications v. Virginia, 435 U.S. 829 (1978). The decision by Chief Justice Burger was unanimous, Justices Brennan and Powell not participating, but Justice Stewart would have limited the holding to freedom of the press to publish. Id. at 848. *See also* Smith v. Daily Mail Pub. Co., 443 U.S. 97 (1979).

[1310] 435 U.S. at 838–42. The Court disapproved of the state court's use of the clear-and-present-danger test: "Mr. Justice Holmes' test was never intended 'to express a technical legal doctrine or to convey a formula for adjudicating cases.'" Id. at 842, quoting from Pennekamp v. Florida, 328 U.S. 331, 353 (1946) (Frankfurter, J. concurring).

[1311] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), in the context of a civil proceeding, had held that the First Amendment did not permit the imposition of liability on the press for truthful publication of information released to the public in official court records, id. at 496, but had expressly reserved the question "whether the publication of truthful information withheld by law from the public domain is similarly privileged," id. at 497 n.27, and *Landmark* on its face appears to answer the question affirmatively. Caution is impelled, however, by the Court's similar reservation. "We need not address all the implications of that question here, but only whether in the circumstances of this case Landmark's publication is protected by the First Amendment." 435 U.S. at 840.

[1312] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

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closures by *participants* in the criminal process, the Court having invalidated a restriction on a grand jury witness's disclosure of his own testimony after the grand jury had been discharged.[1313]

Obscenity.—Although public discussion of political affairs is at the core of the First Amendment, the guarantees of speech and press are broader. "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right."[1314] The right to impart and to receive "information and ideas, regardless of their social worth . . . is fundamental to our free society."[1315] Indeed, it is primarily with regard to the entertaining function of expression that the law of obscenity is concerned, as the Court has rejected any concept of "ideological" obscenity.[1316] However, this function is not the reason that obscenity is outside the protection of the First Amendment, although the Court has never really been clear about what that reason is.

Adjudication over the constitutional law of obscenity began in *Roth v. United States*,[1317] in which the Court in an opinion by Justice Brennan settled in the negative the "dispositive question" "whether obscenity is utterance within the area of protected speech and press."[1318] The Court then undertook a brief historical survey to

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[1313] Butterworth v. Smith, 494 U.S. 624 (1990).

[1314] Winters v. New York, 333 U.S. 507, 510 (1948). Illustrative of the general observation is the fact that "[m]usic, as a form of expression and communication, is protected under the First Amendment." Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989). Nude dancing is also. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 564 (1991).

[1315] Stanley v. Georgia, 394 U.S. 557, 564 (1969).

[1316] Winters v. New York, 333 U.S. 507 (1948); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Commercial Pictures Corp. v. Regents, 346 U.S. 587 (1954); Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959). The last case involved the banning of the movie *Lady Chatterley's Lover* on the ground that it dealt too sympathetically with adultery. "It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." Id. at 688–89.

[1317] 354 U.S. 476 (1957). Heard at the same time and decided in the same opinion was *Alberts v. California*, involving, of course, a state obscenity law. The Court's first opinion in the obscenity field was Butler v. Michigan, 352 U.S. 380 (1957), considered *infra*. Earlier the Court had divided four-to-four and thus affirmed a state court judgment that Edmund Wilson's *Memoirs of Hecate County* was obscene. Doubleday & Co. v. New York, 335 U.S. 848 (1948).

[1318] Roth v. United States, 354 U.S. 476, 481 (1957). Justice Brennan later changed his mind on this score, arguing that, because the Court had failed to develop a work-

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demonstrate that "the unconditional phrasing of the First Amendment was not intended to protect every utterance." All or practically all the states that ratified the First Amendment had laws making blasphemy or profanity or both crimes, and provided for prosecutions of libels as well. It was this history that had caused the Court in *Beauharnais* to conclude that "libelous utterances are not within the area of constitutionally protected speech," and this history was deemed to demonstrate that "obscenity, too, was outside the protection intended for speech and press."[1319] "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people . . . . All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[1320] It was objected that obscenity legislation punishes because of incitation to impure thoughts and without proof that obscene materials create a clear and present danger of antisocial conduct. But because obscenity was not protected at all, such tests as clear and present danger were irrelevant.[1321]

"However," Justice Brennan continued, "sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press . . . . It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."[1322] The standard that the Court thereupon adopted for the designation of material as unprotected obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole ap-

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able standard for distinguishing the obscene from the non-obscene, regulation should be confined to the protection of children and non-consenting adults. *See* Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973).

[1319] 354 U.S. at 482–83. The reference is to Beauharnais v. Illinois, 343 U.S. 250 (1952).

[1320] 354 U.S. at 484. There then followed the well-known passage from Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[1321] 354 U.S. at 486, also quoting Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

[1322] 354 U.S. at 487, 488.

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peals to prurient interest." [1323] The Court defined material appealing to prurient interest as "material having a tendency to excite lustful thoughts," and defined prurient interest as "a shameful or morbid interest in nudity, sex, or excretion." [1324]

In the years after *Roth*, the Court struggled with many obscenity cases with varying degrees of success. The cases can be grouped topically, but, with the exception of those cases dealing with protection of children,[1325] unwilling adult recipients,[1326] and procedure,[1327] these cases are best explicated chronologically.

[1323] 354 U.S. at 489.

[1324] 354 U.S. at 487 n.20. A statute defining "prurient" as "that which incites lasciviousness or lust" covers more than obscenity, the Court later indicated in Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985); obscenity consists in appeal to "a shameful or morbid" interest in sex, not in appeal to "normal, healthy sexual desires." *Brockett* involved a facial challenge to the statute, so the Court did not have to explain the difference between "normal, healthy" sexual desires and "shameful" or "morbid" sexual desires.

[1325] In Butler v. Michigan, 352 U.S. 380 (1957), the Court unanimously reversed a conviction under a statute that punished general distribution of materials unsuitable for children. Protesting that the statute "reduce[d] the adult population of Michigan to reading only what is fit for children," the Court pronounced the statute void. Narrowly drawn proscriptions for distribution or exhibition to children of materials which would not be obscene for adults are permissible, Ginsberg v. New York, 390 U.S. 629 (1968), although the Court insists on a high degree of specificity. Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); Rabeck v. New York, 391 U.S. 462 (1968). Protection of children in this context is concurred in even by those Justices who would proscribe obscenity regulation for adults. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73, 113 (1973) (Justice Brennan dissenting). But children do have First Amendment protection and government may not bar dissemination of everything to them. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." Erznoznik v. City of Jacksonville, 422 U.S. 205, 212–14 (1975) (in context of nudity on movie screen). *See also* FCC v. Pacifica Foundation, 438 U.S. 726, 749–50 (1978); Pinkus v. United States, 436 U.S. 293, 296–98 (1978).

[1326] Protection of unwilling adults was the emphasis in Rowan v. Post Office Dep't, 397 U.S. 728 (1970), which upheld a scheme by which recipients of objectionable mail could put their names on a list and require the mailer to send no more such material. But, absent intrusions into the home, FCC v. Pacifica Foundation, 438 U.S. 726 (1978), or a degree of captivity that makes it impractical for the unwilling viewer or auditor to avoid exposure, government may not censor content, in the context of materials not meeting constitutional standards for denomination as pornography, to protect the sensibilities of some. It is up to offended individuals to turn away. Erznoznik v. City of Jacksonville, 422 U.S. 205, 208–12 (1975). *But see* Pinkus v. United States, 436 U.S. 293, 300 (1978) (jury in determining community standards must include both "'sensitive' and 'insensitive' persons" in the community, but may not "focus[ ] upon the most susceptible or sensitive members when judging the obscenity of materials . . . ").

[1327] The First Amendment requires that procedures for suppressing distribution of obscene materials provide for expedited consideration, for placing the burden of proof on government, and for hastening judicial review. Additionally, Fourth Amendment search and seizure law has been suffused with First Amendment principles, so that the law governing searches for and seizures of allegedly obscene materials is more stringent than in most other areas. Marcus v. Search Warrant, 367 U.S. 717

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Manual Enterprises v. Day [1328] upset a Post Office ban upon the mailing of certain magazines addressed to homosexual audiences, but resulted in no majority opinion of the Court. Nor did a majority opinion emerge in *Jacobellis v. Ohio*, which reversed a conviction for exhibiting a motion picture.[1329] Chief Justice Warren's concurrence in *Roth* [1330] was adopted by a majority in *Ginzburg v. United States*,[1331] in which Justice Brennan for the Court held that in "close" cases borderline materials could be determined to be obscene if the seller "pandered" them in a way that indicated he was catering to prurient interests. The same five-Justice majority, with Justice Harlan concurring, the same day affirmed a state conviction of a distributor of books addressed to a sado-masochistic audience, applying the "pandering" test and concluding that material could be held legally obscene if it appealed to the prurient interests of the deviate group to which it was directed.[1332] Unanimity was shattered,

(1961); A Quantity of Books v. Kansas, 378 U.S. 205 (1964); Heller v. New York, 413 U.S. 483 (1973); Roaden v. Kentucky, 413 U.S. 496 (1973); Lo-Ji Sales v. New York, 442 U.S. 319 (1979); *see also* Walter v. United States, 447 U.S. 649 (1980). Scienter—that is, knowledge of the nature of the materials—is a prerequisite to conviction, Smith v. California, 361 U.S. 147 (1959), but the prosecution need only prove the defendant knew the contents of the material, not that he knew they were legally obscene. Hamling v. United States, 418 U.S. 87, 119–24 (1974). *See also* Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (public nuisance injunction of showing future films on basis of past exhibition of obscene films constitutes impermissible prior restraint); McKinney v. Alabama, 424 U.S. 669 (1976) (criminal defendants may not be bound by a finding of obscenity of materials in prior civil proceeding to which they were not parties). None of these strictures applies, however, to forfeitures imposed as part of a criminal penalty. Alexander v. United States, 509 U.S. 544 (1993) (upholding RICO forfeiture of the entire adult entertainment book and film business of an individual convicted of obscenity and racketeering offenses). Justice Kennedy, dissenting in *Alexander*, objected to the "forfeiture of expressive material that had not been adjudged to be obscene." Id. at 578.

[1328] 370 U.S. 478 (1962).

[1329] 378 U.S. 184 (1964). Without opinion, citing *Jacobellis*, the Court reversed a judgment that Henry Miller's *Tropic of Cancer* was obscene. Grove Press v. Gerstein, 378 U.S. 577 (1964). *Jacobellis* is best known for Justice Stewart's concurrence, contending that criminal prohibitions should be limited to "hard-core pornography." The category "may be indefinable," he added, but "I know it when I see it, and the motion picture involved in this case is not that." Id. at 197. The difficulty with this visceral test is that other members of the Court did not always "see it" the same way; two years later, for example, Justice Stewart was on opposite sides in two obscenity decisions decided on the same day. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Genera, 383 U.S. 413 (1966) (concurring on basis that book was not obscene); Mishkin v. New York, 383 U.S. 502, 518 (1966) (dissenting from finding that material was obscene).

[1330] Roth v. United States, 354 U.S. 476, 494 (1957).

[1331] 383 U.S. 463 (1966). Pandering remains relevant in pornography cases. Splawn v. California, 431 U.S. 595 (1977); Pinkus v. United States, 436 U.S. 293, 303–04 (1978).

[1332] Mishkin v. New York, 383 U.S. 502 (1966). *See* id. at 507–10 for discussion of the legal issue raised by the limited appeal of the material. The Court relied on *Mishkin* in Ward v. Illinois, 431 U.S. 767, 772 (1977).

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however, when on the same day the Court held that *Fanny Hill*, a novel at that point 277 years old, was not legally obscene.[1333] The prevailing opinion again restated the *Roth* tests that, to be considered obscene, material must (1) have a dominant theme in the work considered as a whole that appeals to prurient interest, (2) be patently offensive because it goes beyond contemporary community standards, and (3) be utterly without redeeming social value.[1334]

After the divisions engendered by the disparate opinions in the three 1966 cases, the Court over the next several years submerged its differences by *per curiam* dispositions of nearly three dozen cases, in all but one of which it reversed convictions or civil determinations of obscenity. The initial case was *Redrup v. New York*,[1335] in which, after noting that the cases involved did not present special questions requiring other treatment, such as concern for juveniles, protection of unwilling adult recipients, or proscription of pandering,[1336] the Court succinctly summarized the varying positions of the seven Justices in the majority and said: "[w]hichever of the constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand . . . ." [1337] And so things went for several years.[1338]

Changing membership on the Court raised increasing speculation about the continuing vitality of *Roth*; it seemed unlikely the Court would long continue its *Redrup* approach.[1339] The change when it occurred strengthened the powers of government, federal, state, and local, to outlaw or restrictively regulate the sale and dissemination of materials found objectionable, and developed new standards for determining which objectionable materials are legally obscene.

[1333] A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Genera, 383 U.S. 413 (1966).

[1334] 383 U.S. at 418. On the precedential effect of the *Memoirs* plurality opinion, *see* Marks v. United States, 430 U.S. 188, 192–94 (1977).

[1335] 386 U.S. 767 (1967).

[1336] 386 U.S. at 771.

[1337] 386 U.S. at 770–71. The majority was thus composed of Chief Justice Warren and Justices Black, Douglas, Brennan, Stewart, White, and Fortas.

[1338] *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 82–83 & n.8 (1973) (Justice Brennan dissenting) (describing *Redrup* practice and listing 31 cases decided on the basis of it).

[1339] *See* United States v. Reidel, 402 U.S. 351 (1971) (federal prohibition of dissemination of obscene materials through the mails is constitutional); United States v. Thirty-seven Photographs, 402 U.S. 363 (1971) (customs seizures of obscene materials from baggage of travelers are constitutional). In Grove Press v. Maryland State Bd. of Censors, 401 U.S. 480 (1971), a state court determination that the motion picture "I Am Curious (Yellow)" was obscene was affirmed by an equally divided Court, Justice Douglas not participating. And Stanley v. Georgia, 394 U.S. 557, 560–64, 568 (1969), had insisted that *Roth* remained the governing standard.

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At the end of the October 1971 Term, the Court requested argument on the question whether the display of sexually oriented films or of sexually oriented pictorial magazines, when surrounded by notice to the public of their nature and by reasonable protection against exposure to juveniles, was constitutionally protected.[1340] By a five-to-four vote the following Term, the Court in *Paris Adult Theatre I v. Slaton* adhered to the principle established in *Roth* that obscene material is not protected by the First and Fourteenth Amendments even if access is limited to consenting adults.[1341] Chief Justice Burger for the Court observed that the states have wider interests than protecting juveniles and unwilling adults from exposure to pornography; legitimate state interests, effectuated through the exercise of the police power, exist in protecting and improving the quality of life and the total community environment, in improving the tone of commerce in the cities, and in protecting public safety. It does not matter that the states may be acting on the basis of unverifiable assumptions in arriving at the decision to suppress the trade in pornography; the Constitution does not require in the context of the trade in ideas that governmental courses of action be subject to empirical verification any more than it does in other fields. Nor does the Constitution embody any concept of laissez faire, or of privacy, or of Millsean "free will," that curbs governmental efforts to suppress pornography.[1342]

In *Miller v. California*,[1343] the Court prescribed standards by which unprotected pornographic materials were to be identified. Because of the inherent dangers in undertaking to regulate any form of expression, laws to regulate pornography must be carefully limited; their scope is to be confined to materials that "depict or describe patently offensive 'hard core' sexual conduct specifically de-

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[1340] Paris Adult Theatre I v. Slaton, 408 U.S. 921 (1972); Alexander v. Virginia, 408 U.S. 921 (1972).

[1341] 413 U.S. 49 (1973).

[1342] 413 U.S. at 57, 60–62, 63–64, 65–68. Delivering the principal dissent, Justice Brennan argued that the Court's *Roth* approach allowing the suppression of pornography was a failure, that the Court had not and could not formulate standards by which protected materials could be distinguished from unprotected materials, and that the First Amendment had been denigrated through the exposure of numerous persons to punishment for the dissemination of materials that fell close to one side of the line rather than the other, but more basically by deterrence of protected expression caused by the uncertainty. Id. at 73. "I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." Id. at 113. Justices Stewart and Marshall joined this opinion; Justice Douglas dissented separately, adhering to the view that the First Amendment absolutely protected all expression. Id. at 70.

[1343] 413 U.S. 15 (1973).

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fined by the regulating state law, as written or construed."[1344] The law "must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[1345] The standard that a work must be "utterly without redeeming social value" before it may be suppressed was disavowed and discarded. In determining whether material appeals to a prurient interest or is patently offensive, the trier of fact, whether a judge or a jury, is not bound by a hypothetical national standard but may apply the local community standard where the trier of fact sits.[1346] Prurient interest and patent offensiveness, the Court indicated, "are essentially questions of fact."[1347] By contrast, the third or "value" prong of the *Miller* test is not subject to a community standards test; instead, the appropriate standard is "whether a reasonable person would find [literary, artistic, political, or scientific] value in the material, taken as a whole."[1348]

[1344] Miller v. California, 413 U.S. 15, 27 (1973). The Court stands ready to read into federal statutes the standards it has formulated. United States v. 12 200–Ft. Reels of Film, 413 U.S. 123, 130 n.7 (1973) (Court is prepared to construe statutes proscribing materials that are "obscene," "lewd," "lascivious," "filthy," "indecent," and "immoral" as limited to the types of "hard core" pornography reachable under the *Miller* standards). For other cases applying *Miller* standards to federal statutes, *see* Hamling v. United States, 418 U.S. 87, 110–16 (1974) (use of the mails); United States v. Orito, 413 U.S. 139 (1973) (transportation of pornography in interstate commerce). The Court's insistence on specificity in state statutes, either as written by the legislature or as authoritatively construed by the state court, appears to have been significantly weakened, in fact if not in enunciation, in Ward v. Illinois, 431 U.S. 767 (1977).

[1345] Miller v. California, 413 U.S. at 24.

[1346] It is the unprotected nature of obscenity that allows this inquiry; offensiveness to local community standards is, of course, a principle completely at odds with mainstream First Amendment jurisprudence. *See*, *e.g.*, Texas v. Johnson, 491 U.S. 397 (1989); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[1347] 413 U.S. at 30–34. "A juror is entitled to draw on his knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law." Hamling v. United States, 418 U.S. 87, 104 (1974). The holding does not compel any particular circumscribed area to be used as a "community." In federal cases, it will probably be the judicial district from which the jurors are drawn, id. at 105–106. Indeed, the jurors may be instructed to apply "community standards" without any definition being given of the "community." Jenkins v. Georgia, 418 U.S. 153, 157 (1974). In a federal prosecution for use of the mails to transmit pornography, the fact that the legislature of the state within which the transaction takes place has abolished pornography regulation except for dealings with children does not preclude permitting the jurors in the federal case to make their own definitions of what is offensive to contemporary community standards; they may be told of the legislature's decision but they are not bound by it. Smith v. United States, 431 U.S. 291 (1977).

[1348] Pope v. Illinois, 481 U.S. 497, 500–01 (1987).

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The Court in *Miller* reiterated that it was not permitting an unlimited degree of suppression of materials. Only "hard core" materials were to be deemed without the protection of the First Amendment, and the Court's idea of the content of "hard core" pornography was revealed in its examples: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[1349] Subsequently, the Court held that a publication was not obscene if it "provoked only normal, healthy sexual desires." To be obscene it must appeal to "a shameful or morbid interest in nudity, sex, or excretion."[1350] The Court has also indicated that obscenity is not be limited to pictures; books containing only descriptive language may be suppressed.[1351]

First Amendment values, the Court stressed in *Miller*, "are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."[1352] But the Court had conferred on juries as triers of fact the determination, based upon their understanding of community standards, whether material was "patently offensive." Did not this virtually immunize these questions from appellate review? In *Jenkins v. Georgia*,[1353] the Court, while adhering to the *Miller* standards, stated that "juries [do not] have unbridled discretion in determining what is 'patently offensive.'" *Miller* was intended to make clear that only "hard-core" materials could be suppressed and this concept and the Court's descriptive itemization of some types of hardcore materials were "intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination." The Court's own viewing of the motion picture in question convinced it that "[n]othing in the movie falls within either of the two examples given in *Miller* of material which may constitutionally be found to meet the 'patently offensive' element of those standards, nor is there anything suffi-

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[1349] Miller v. California, 413 U.S. 15, 25 (1973). Quoting *Miller's* language in Hamling v. United States, 418 U.S. 87, 114 (1974), the Court reiterated that it was only "hard-core" material that was unprotected. "While the particular descriptions there contained were not intended to be exhaustive, they clearly indicate that there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is 'patently offensive' within the meaning of the obscenity test set forth in the *Miller* cases." Referring to this language in Ward v. Illinois, 431 U.S. 767 (1977), the Court upheld a state court's power to construe its statute to reach sadomasochistic materials not within the confines of the *Miller* language.

[1350] Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1984).

[1351] Kaplan v. California, 413 U.S. 115 (1973).

[1352] 413 U.S. at 25.

[1353] 418 U.S. 153 (1974).

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ciently similar to such material to justify similar treatment." [1354] But, in a companion case, the Court found that a jury determination of obscenity "was supported by the evidence and consistent with" the standards.[1355]

The decisions from the *Paris Adult Theatre* and *Miller* era were rendered by narrow majorities,[1356] but nonetheless have guided the Court since. In addition, the Court's willingness to allow some regulation of non-obscene but sexually explicit or "indecent" expression reduces the importance (outside the criminal area) of whether material is classified as obscene.

Even as to materials falling within the constitutional definition of obscene, the Court has recognized a limited private, protected interest in possession within the home,[1357] unless those materials constitute child pornography. *Stanley v. Georgia* was an appeal from a state conviction for possession of obscene films discovered in appellant's home by police officers armed with a search warrant for other items which were not found. The Court reversed, holding that the mere private possession of obscene materials in the home cannot be made a criminal offense. The Constitution protects the right to receive information and ideas, the Court said, regardless of their social value, and "that right takes on an added dimension" in the context of a prosecution for possession of something in one's own home. "For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." [1358] Despite the unqualified assertion in *Roth* that obscenity was not protected by the First Amendment, the Court observed, it and the cases following were concerned with the governmental interest in regulating commercial distribution of obscene materials. *Roth* and the cases following that decision are not im-

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[1354] 418 U.S. at 161. The film at issue was *Carnal Knowledge*.

[1355] Hamling v. United States, 418 U.S. 87 (1974). In Smith v. United States, 431 U.S. 291, 305–06 (1977), the Court explained that jury determinations in accordance with their own understanding of the tolerance of the average person in their community are not unreviewable. Judicial review would pass on (1) whether the jury was properly instructed to consider the entire community and not simply the members' own subjective reaction or the reactions of a sensitive or of a callous minority, (2) whether the conduct depicted fell within the examples specified in *Miller*, (3) whether the work lacked serious literary, artistic, political, or scientific value, and (4) whether the evidence was sufficient. The Court indicated that the value test of *Miller* "was particularly amenable to judicial review." The value test is not to be measured by community standards, the Court later held in Pope v. Illinois, 481 U.S. 497 (1987), but instead by a "reasonable person" standard. An erroneous instruction on this score, however, may be "harmless error." Id. at 503.

[1356] For other five-to-four decisions of the era, *see* Marks v. United States, 430 U.S. 188 (1977); Smith v. United States, 431 U.S. 291 (1977); Splawn v. California, 431 U.S. 595 (1977); and Ward v. Illinois, 431 U.S. 767 (1977).

[1357] Stanley v. Georgia, 394 U.S. 557 (1969).

[1358] 394 U.S. at 564.

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paired by today's decision, the Court insisted,[1359] but in its rejection of each of the state contentions made in support of the conviction the Court appeared to be rejecting much of the basis of *Roth*. First, there is no governmental interest in protecting an individual's mind from the effect of obscenity. Second, the absence of ideological content in the films was irrelevant, since the Court will not draw a line between transmission of ideas and entertainment. Third, there is no empirical evidence to support a contention that exposure to obscene materials may incite a person to antisocial conduct; even if there were such evidence, enforcement of laws proscribing the offensive conduct is the answer. Fourth, punishment of mere possession is not necessary to punishment of distribution. Fifth, there was little danger that private possession would give rise to the objections underlying a proscription upon public dissemination, exposure to children and unwilling adults.[1360]

Stanley's broad rationale has been given a restrictive reading, and the holding has been confined to its facts. Any possible implication that *Stanley* was applicable outside the home and recognized a right to obtain pornography or a right in someone to supply it was soon dispelled.[1361] The Court has consistently rejected *Stanley's* theoretical underpinnings, upholding morality-based regulation of the behavior of consenting adults.[1362] Also, *Stanley* has been held inapplicable to possession of child pornography in the home, the Court determining that the state interest in protecting children from sexual exploitation far exceeds the interest in *Stanley* of protecting adults from themselves.[1363] Apparently for this reason, a state's conclusion that punishment of mere possession is a necessary or desirable means of reducing production of child pornography will not be closely scrutinized.[1364]

Child Pornography.—In *New York v. Ferber*,[1365] the Court recognized another category of expression that is outside the coverage

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[1359] 394 U.S. at 560–64, 568.

[1360] 394 U.S. at 565–68.

[1361] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65–68 (1973). Transportation of unprotected material for private use may be prohibited, United States v. Orito, 413 U.S. 139 (1973), and the mails may be closed, United States v. Reidel, 402 U.S. 351 (1971), as may channels of international movement, United States v. Thirty-seven Photographs, 402 U.S. 363 (1971); United States v. 12 200–Ft. Reels of Film, 413 U.S. 123 (1973).

[1362] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65–70 (1973) (commercial showing of obscene films to consenting adults); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (regulation of non-obscene, nude dancing restricted to adults).

[1363] Osborne v. Ohio, 495 U.S. 103 (1990).

[1364] 495 U.S. at 109–10.

[1365] 458 U.S. 747 (1982). Decision of the Court was unanimous, although there were several limiting concurrences. *Compare*, *e.g.*, 775 (Justice Brennan, arguing for

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of the First Amendment: the visual depiction of children in films or still photographs in a variety of sexual activities or exposures of the genitals. The reason that such depictions may be prohibited was the governmental interest in protecting the physical and psychological well-being of children, whose participation in the production of these materials would subject them to exploitation and harm. The state may go beyond a mere prohibition of the use of children, because it is not possible to protect children adequately without prohibiting the exhibition and dissemination of the materials and advertising about them. Thus, "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." [1366] But, because expression is involved, the government must carefully define what conduct is to be prohibited and may reach only "works that *visually* depict sexual conduct by children below a specified age." [1367]

The reach of the state may even extend to private possession of child pornography in the home. In *Osborne v. Ohio* [1368] the Court upheld a state law criminalizing the possession or viewing of child pornography as applied to someone who possessed such materials in his home. Distinguishing *Stanley v. Georgia*, the Court ruled that Ohio's interest in preventing exploitation of children far exceeded what it characterized as Georgia's "paternalistic interest" in protecting the minds of adult viewers of pornography.[1369] Because of the greater importance of the state interest involved, the Court saw less need to require states to demonstrate a strong necessity for regulating private possession as well as commercial distribution and sale.

In *Ashcroft v. Free Speech Coalition*, the Court held unconstitutional the federal Child Pornography Prevention Act (CPPA) to the extent that it prohibited pictures that were not produced with actual minors.[1370] Prohibited pictures included computer-generated ("virtual") child pornography, and photographs of adult actors who appeared to be minors, as well as "a Renaissance painting depicting a scene from classical mythology." [1371] The Court observed that statutes that prohibit child pornography that use real children are constitutional because they target "[t]he production of the work, not

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exemption of "material with serious literary, scientific, or educational value"), *with* 774 (Justice O'Connor, arguing that such material need not be excepted). The Court did not pass on the question, inasmuch as the materials before it were well within the prohibitable category. Id. at 766–74.

[1366] 458 U.S. at 763–64.

[1367] 458 U.S. at 764 (emphasis original). Child pornography need not meet *Miller* obscenity standards to be unprotected by the First Amendment. Id. at 764–65.

[1368] 495 U.S. 103 (1990).

[1369] 495 U.S. at 108.

[1370] 535 U.S. 234 (2002).

[1371] 535 U.S. at 241.

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the content."[1372] The CPPA, by contrast, targeted the content, not the means of production. The government's rationales for the CPPA included that "[p]edophiles might use the materials to encourage children to participate in sexual activity" and might "whet their own sexual appetites" with it, "thereby increasing . . . the sexual abuse and exploitation of actual children."[1373] The Court found these rationales inadequate because the government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts" and "may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'"[1374] The government had also argued that the existence of "virtual" child pornography "can make it harder to prosecute pornographers who do use real minors," because, "[a]s imaging technology improves . . . , it becomes more difficult to prove that a particular picture was produced using actual children."[1375] This rationale, the Court found, "turns the First Amendment upside down. The Government may not suppress lawful speech as a means to suppress unlawful speech."[1376]

In *United States v. Williams*,[1377] the Supreme Court upheld a federal statute that prohibits knowingly advertising, promoting, presenting, distributing, or soliciting material "in a manner that reflects the belief, or that is intended to cause another to believe, that the material" is child pornography that is obscene or that depicts an actual minor (*i.e.*, is child pornography that is not constitutionally protected).[1378] Under the provision, in other words, "an Internet user who solicits child pornography from an undercover agent violates the statute, even if the officer possesses no child pornography. Likewise, a person who advertises virtual child pornography as depicting actual children also falls within the reach of the statute."[1379] The Court found that these activities are not constitutionally protected because "[o]ffers to engage in illegal transactions [as opposed to abstract advocacy of illegality] are categorically excluded from First Amendment protection," even "when the offeror

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[1372] 535 U.S. at 249; *see also* id. at 241.
[1373] 535 U.S. at 241.
[1374] 535 U.S. at 253.
[1375] 535 U.S. at 242.
[1376] 535 U.S. at 255. Following Ashcroft v. Free Speech Coalition, Congress enacted the PROTECT Act, Pub. L. 108–21, 117 Stat. 650 (2003), which, despite the decision in that case, defined "child pornography" so as to continue to prohibit computer-generated child pornography (but not other types of child pornography produced without an actual minor). 18 U.S.C. § 2256(8)(B). In United States v. Williams, 128 S. Ct. 1830, 1836 (2008), the Court, without addressing the PROTECT Act's new definition, cited Ashcroft v. Free Speech Coalition with approval.
[1377] 128 S. Ct. 1830 (2008).
[1378] 18 U.S.C. § 2252A(a)(3)(B).
[1379] 128 S. Ct. at 1839.

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is mistaken about the factual predicate of his offer," such as when the child pornography that one offers to buy or sell does not exist or is constitutionally protected.[1380]

Non-obscene But Sexually Explicit and Indecent Expression.—There is expression, consisting of words or pictures, that some find offensive but that does not constitute obscenity and is protected by the First Amendment. Nudity portrayed in films or stills cannot be presumed obscene;[1381] nor can offensive language ordinarily be punished simply because it offends someone.[1382] Nonetheless, government may regulate sexually explicit but non-obscene expression in a variety of ways. Legitimate governmental interests may be furthered by appropriately narrow regulation, and the Court's view of how narrow regulation must be is apparently influenced not only by its view of the strength of the government's interest in regulation, but also by its view of the importance of the expression it-

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[1380] 128 S. Ct. at 1841, 1842, 1843. Justice Souter, in a dissenting opinion joined by Justice Ginsburg, agreed that "Congress may criminalize proposals unrelated to any extant image," but disagreed with respect to "proposals made with regard to specific, existing [constitutionally protected] representations." Id. at 1849. Justice Souter believed that, "if the Act stands when applied to identifiable, extant [constitutionally protected] pornographic photographs, then in practical terms *Ferber* and *Free Speech Coalition* fall. They are left as empty as if the Court overruled them formally . . . ." Id. at 1854. Justice Scalia's opinion for the majority replied that this "is simply not true . . . . Simulated child pornography will be as available as ever, so long as it is offered and sought *as such*, and not as real child pornography. . . . There is no First Amendment exception from the general principle of criminal law that a person attempting to commit a crime need not be exonerated because he has a mistaken view of the facts." Id. at 1844–45.

[1381] Erznoznik v. City of Jacksonville, 422 U.S. 205, 212–14 (1975).

[1382] *E.g.*, Cohen v. California, 403 U.S. 15 (1971). Special rules apply to broadcast speech, which, because of its pervasive presence in the home and its accessibility to children, is accorded "the most limited First Amendment protection" of all media; non-obscene but indecent language and nudity may be curtailed, with the time of day and other circumstances determining the extent of curtailment. FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978). However, efforts by Congress and the FCC to extend the indecency ban to 24 hours a day were rebuffed by an appeals court. Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) (invalidating regulations promulgated pursuant to Pub. L. 100–459, § 608), *cert. denied*, 503 U.S. 913 (1992). Earlier, the same court had invalidated an FCC restriction on indecent, non-obscene broadcasts from 6 a.m. to midnight, finding that the FCC had failed to adduce sufficient evidence to support the restraint. Action for Children's Television v. FCC, 852 F.2d 1332, 1335 (D.C. Cir. 1988). In 1992, however, Congress imposed a 6 a.m.-to-midnight ban on indecent programming, with a 10 p.m.-to-midnight exception for public radio and television stations that go off the air at or before midnight. Pub. L. 102–356, § 16 (1992), 47 U.S.C. § 303 note. This time, after a three-judge panel found the statute unconstitutional, the en banc court of appeals upheld it, except for its 10 p.m.-to-midnight ban on indecent material on non-public stations. Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996). *See also* "Broadcast Radio and Television," *supra*.

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self. In other words, sexually explicit expression does not receive the same degree of protection afforded purely political speech.[1383]

Government has a "compelling" interest in the protection of children from seeing or hearing indecent material, but total bans applicable to adults and children alike are constitutionally suspect.[1384] In *Reno v. American Civil Liberties Union*,[1385] the Court struck down two provisions of the Communications Decency Act of 1996 (CDA), one of which would have prohibited use of an "interactive computer

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[1383] Justice Scalia, concurring in Sable Communications v. FCC, 492 U.S. 115, 132 (1989), suggested that there should be a "sliding scale" taking into account the definition of obscenity: "The more narrow the understanding of what is 'obscene,' and hence the more pornographic what is embraced within the residual category of 'indecency,' the more reasonable it becomes to insist upon greater assurance of insulation from minors." Barnes v. Glen Theatre, 501 U.S. 560 (1991), upholding regulation of nude dancing even in the absence of a threat to minors, may illustrate a general willingness by the Court to apply soft rather than strict scrutiny to regulation of more sexually explicit expression.

[1384] *See* Sable Communications v. FCC, 492 U.S. 115 (1989) (FCC's "dial-a-porn" rules imposing a total ban on "indecent" speech are unconstitutional, given less restrictive alternatives—*e.g.*, credit cards or user IDs—of preventing access by children). *Pacifica Foundation* is distinguishable, the Court reasoned, because that case did not involve a "total ban" on broadcast, and also because there is no "captive audience" for the "dial-it" medium, as there is for the broadcast medium. 492 U.S. at 127–28. Similar rules apply to regulation of cable TV. In Denver Area Educational Telecommunications Consortium v. FCC, 518 U.S. 727, 755 (1996), the Court, acknowledging that protection of children from sexually explicit programming is a "compelling" governmental interest (but refusing to determine whether strict scrutiny applies), nonetheless struck down a requirement that cable operators segregate and block indecent programming on leased access channels. The segregate-and-block restrictions, which included a requirement that a request for access be in writing, and which allowed for up to 30 days' delay in blocking or unblocking a channel, were not sufficiently protective of adults' speech and viewing interests to be considered either narrowly or reasonably tailored to serve the government's compelling interest in protecting children. In United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000), the Supreme Court, explicitly applying strict scrutiny to a content-based speech restriction on cable TV, struck down a federal statute designed to "shield children from hearing or seeing images resulting from signal bleed." Id. at 806.

The Court seems to be becoming less absolute in viewing the protection of all minors (regardless of age) from all indecent material (regardless of its educational value and parental approval) to be a compelling governmental interest. In striking down the Communications Decency Act of 1996, the Court would "neither accept nor reject the Government's submission that the First Amendment does not forbid a blanket prohibition on all 'indecent' and 'patently offensive' messages communicated to a 17-year-old—no matter how much value the message may have and regardless of parental approval. It is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute." Reno v. American Civil Liberties Union, 521 U.S. 844 (1997). In *Playboy Entertainment Group*, 529 U.S. at 825, the Court wrote: "Even upon the assumption that the government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech." The Court also would "not discount the possibility that a graphic image could have a negative impact on a young child" (id. at 826), thereby suggesting again that it may take age into account when applying strict scrutiny.

[1385] 521 U.S. 844 (1997).

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service" to display indecent material "in a manner available to a person under 18 years of age." [1386] This prohibition would, in effect, have banned indecent material from all Internet sites except those accessible by only by adults. Although intended "to deny minors access to potentially harmful speech . . . , [the CDA's] burden on adult speech," the Court wrote, "is unacceptable if less restrictive alternatives would be at least as effective . . . . [T]he Government may not 'reduc[e] the adult population . . . to . . . only what is fit for children.'" [1387]

In *Reno*, the Court distinguished *FCC v. Pacifica Foundation*,[1388] in which it had upheld the FCC's restrictions on indecent radio and television broadcasts, because (1) "[t]he CDA's broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet," (2) the CDA imposes criminal penalties, and the Court has never decided whether indecent broadcasts "would justify a criminal prosecution," and (3) radio and television, unlike the Internet, have, "as a matter of history . . . 'received the most limited First Amendment protection,' . . . in large part because warnings could not adequately protect the listener from unexpected program content. . . . [On the Internet], the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material." [1389]

After the Supreme Court struck down the CDA, Congress enacted the Child Online Protection Act (COPA), which banned "material that is harmful to minors" on Web sites that have the objective of earning a profit.[1390] The Third Circuit upheld a preliminary injunction against enforcement of the statute on the ground that, "because the standard by which COPA gauges whether material is 'harmful to minors' is based on identifying 'contemporary commu-

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[1386] The other provision the Court struck down would have prohibited indecent communications, by telephone, fax, or e-mail, to minors.

[1387] 521 U.S. at 874–75. The Court did not address whether, if less restrictive alternatives would not be as effective, the government would then be permitted to reduce the adult population to only what is fit for children. Courts of appeals, however, have written that "[t]he State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations." ACLU v. Reno, 217 F.3d 162, 179 (3d Cir. 2000), *vacated and remanded sub nom.*, Ashcroft v. ACLU, 535 U.S. 564 (2002); Carlin Communications, Inc. v. FCC, 837 F.2d 546, 555 (2d Cir. 1988).

[1388] 438 U.S. 726 (1978).

[1389] 521 U.S. at 867.

[1390] "Harmful to minors" statutes ban the distribution of material to minors that is not necessarily obscene under the *Miller* test. In Ginsberg v. New York, 390 U.S. 629, 641 (1968), the Supreme Court, applying a rational basis standard, upheld New York's harmful-to-minors statute.

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nity standards[,]' the inability of Web publishers to restrict access to their Web sites based on the geographic locale of the site visitor, in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech." [1391] This is because it results in communications available to a nationwide audience being judged by the standards of the community most likely to be offended. The Supreme Court vacated and remanded, holding "that COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment." [1392]

Upon remand, the Third Circuit again upheld the preliminary injunction, and the Supreme Court affirmed and remanded the case for trial. The Supreme Court found that the district court had not abused its discretion in granting the preliminary injunction, because the government had failed to show that proposed alternatives to COPA would not be as effective in accomplishing its goal. The primary alternative to COPA, the Court noted, is blocking and filtering software. Filters are less restrictive than COPA because "[t]hey impose selective restrictions on speech at the receiving end, not universal restriction at the source." [1393] Subsequently, the district court found COPA to violate the First Amendment and issued a permanent injunction against its enforcement; the Third Circuit affirmed, and the Supreme Court denied certioriari.[1394]

In *United States v. American Library Association, Inc.*, a four-Justice plurality of the Supreme Court upheld the Children's Internet Protection Act (CIPA), which, as the plurality summarized it, provides that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them." [1395] The plurality asked "whether libraries would violate the First Amendment by employing the filtering software that CIPA requires." [1396] Does CIPA, in other words, effectively violate library *pa-*

[1391] ACLU v. Reno, 217 F.3d 162, 166 (3d Cir. 2000).

[1392] Ashcroft v. ACLU, 535 U.S. 564, 585 (2002) (emphasis in original).

[1393] Ashcroft v. ACLU, 542 U.S. 656, 667 (2004). Justice Breyer, dissenting, wrote that blocking and filtering software is not a less restrictive alternative because "it is part of the status quo" and "[i]t is always less restrictive to do *nothing* than to do *something*." Id. at 684. The majority opinion countered that Congress "may act to encourage the use of filters," and "[t]he need for parental cooperation does not automatically disqualify a proposed less restrictive alternative." Id. at 669.

[1394] American Civil Liberties Union v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff'd sub nom.* American Civil Liberties Union v. Mukasey, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009).

[1395] 539 U.S. 194, 199 (2003).

[1396] 539 U.S. at 203.

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trons' rights? The plurality concluded that it does not, after finding that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum," and that it therefore would not be appropriate to apply strict scrutiny to determine whether the filtering requirements are constitutional.[1397]

The plurality acknowledged "the tendency of filtering software to 'overblock'—that is, to erroneously block access to constitutionally protected speech that falls outside the categories that software users intend to block." [1398] It found, however, that, "[a]ssuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled." [1399]

The plurality also considered whether CIPA imposes an unconstitutional condition on the receipt of federal assistance—in other words, does it violate public *libraries*' rights by requiring them to limit their freedom of speech if they accept federal funds? The plurality found that, assuming that government entities have First Amendment rights (it did not decide the question), "CIPA does not 'penalize' libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, CIPA simply reflects Congress's decision not to subsidize their doing so." [1400]

The government may also take notice of objective conditions attributable to the commercialization of sexually explicit but nonobscene materials. Thus, the Court recognized a municipality's authority to zone land to prevent deterioration of urban areas, upholding an ordinance providing that "adult theaters" showing motion pictures that depicted "specified sexual activities" or "specified anatomical areas" could not be located within 100 feet of any two other establishments included within the ordinance or within 500 feet of a residential area.[1401] Similarly, an adult bookstore was subject to clo-

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[1397] 539 U.S. at 205.

[1398] 539 U.S. at 208.

[1399] 539 U.S. at 209. Justice Kennedy, concurring, noted that, "[i]f some libraries do not have the capacity to unblock specific Web sites or to disable the filter . . . that would be the subject for an as-applied challenge, not the facial challenge made in this case." 539 U.S. at 215. Justice Souter, dissenting, noted that "the statute says only that a library 'may' unblock, not that it must." 539 U.S. at 233.

[1400] 539 U.S. at 212.

[1401] Young v. American Mini Theatres, 427 U.S. 50 (1976). Four of the five majority Justices thought the speech involved deserved less First Amendment protection than other expression, id. at 63–71, while Justice Powell, concurring, thought the ordinance was sustainable as a measure that served valid governmental interests and only incidentally affected expression. Id. at 73. Justices Stewart, Brennan, Marshall, and Blackmun dissented. Id. at 84, 88. *Young* was followed in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), upholding a city ordinance prohibiting lo-

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sure as a public nuisance where it was being used as a place for prostitution and illegal sexual activities, because the closure "was directed at unlawful conduct having nothing to do with books or other expressive activity." [1402] However, a city was held constitutionally powerless to prohibit drive-in motion picture theaters from showing films containing nudity where the screen is visible from a public street or place.[1403] Also, the FCC was unable to justify a ban on transmission of "indecent" but not obscene telephone messages.[1404]

The Court has held, however, that "live" productions containing nudity may be regulated to a greater extent than may films or publications. Whether this represents a distinction between live performances and other entertainment media, or whether it signals a more permissive approach overall to governmental regulation of non-obscene but sexually explicit material, remains to be seen. In *Barnes v. Glen Theatre, Inc.*,[1405] the Court upheld application of Indiana's public indecency statute to require that dancers in public performances of nude, non-obscene erotic dancing wear "pasties" and a "G-string" rather than appear totally nude. There was no opinion of the Court, three Justices viewing the statute as a permissible regulation of "societal order and morality," [1406] one viewing it as a permissible means of regulating supposed secondary effects of prostitution and other criminal activity,[1407] and a fifth Justice seeing no need for special First Amendment protection from a law of general applicability directed at conduct rather than expression.[1408] All but one of the Justices agreed that nude dancing is entitled to some

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cation of adult theaters within 1,000 feet of residential areas, churches, or parks, and within one mile of any school. Rejecting the claim that the ordinance regulated content of speech, the Court indicated that such time, place and manner regulations are valid if "designed to serve a substantial governmental interest" and if "allow-[ing] for reasonable alternative avenues of communication." Id. at 50. The city had a substantial interest in regulating the "undesirable secondary effects" of such businesses. And, although the suitability for adult theaters of the remaining 520 acres within the city was disputed, the Court held that the theaters "must fend for themselves in the real estate market," and are entitled only to "a reasonable opportunity to open and operate." Id. at 54. The Supreme Court also upheld zoning of sexually oriented businesses in FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990), and City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002).

[1402] Arcara v. Cloud Books, 478 U.S. 697, 707 (1986).

[1403] Erznoznik v. City of Jacksonville, 422 U.S. 204 (1975).

[1404] Sable Communications of California v. FCC, 492 U.S. 115 (1989).

[1405] 501 U.S. 560 (1991).

[1406] 501 U.S. at 568 (Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy).

[1407] 501 U.S. at 581 (Justice Souter).

[1408] 501 U.S. at 572 (Justice Scalia). The Justice thus favored application of the same approach applied to free exercise of religion in Employment Division v. Smith, 494 U.S. 872 (1990).

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First Amendment protection,[1409] but the result of *Barnes* was a bare minimum of protection. Numerous questions remain unanswered. In addition to the uncertainty over applicability of *Barnes* to regulation of the content of films or other shows in "adult" theaters,[1410] there is also the issue of its applicability to nudity in operas or theatrical productions not normally associated with commercial exploitation of sex.[1411] But broad implications for First Amendment doctrine are probably unwarranted.[1412] The Indiana statute was not limited in application to barrooms; had it been, then the Twenty-

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[1409] Earlier cases had established as much. *See* California v. LaRue, 409 U.S. 109, 118 (1972); Southeastern Promotions v. Conrad, 420 U.S. 546, 557–58 (1975); Doran v. Salem Inn, 422 U.S. 922, 932 (1975); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981); New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 716, 718 (1981). Presumably, then, the distinction between barroom erotic dancing, entitled to minimum protection, and social "ballroom" dancing, not expressive and hence not entitled to First Amendment protection (*see* City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989)), still hangs by a few threads. Justice Souter, concurring in *Barnes*, 501 U.S. 560, 587 (1991), recognized the validity of the distinction between ballroom and erotic dancing, a validity that had been questioned by a dissent in the lower court. Miller v. Civil City of South Bend, 904 F.2d 1081, 1128–29 (7th Cir. 1990) (Easterbrook, J.).

[1410] Although Justice Souter relied on what were essentially zoning cases (Young v. American Mini Theatres and Renton v. Playtime Theatres) to justify regulation of expression itself, he nonetheless pointed out that a pornographic movie featuring one of the respondent dancers was playing nearby without interference by the authorities. This suggests that, at least with respect to direct regulation of the degree of permissible nudity, he might draw a distinction between "live" and film performances even while acknowledging the harmful "secondary" effects associated with *both*.

[1411] The Court has not ruled directly on such issues. *See* Southeastern Promotions v. Conrad, 420 U.S. 546 (1975) (invalidating the denial of use of a public auditorium for a production of the musical "Hair," in the absence of procedural safeguards that must accompany a system of prior restraint). Presumably the *Barnes* plurality's public-morality rationale would apply equally to the "adult" stage and to the operatic theater, while Justice Souter's secondary effects rationale would not. But the plurality ducked this issue, reinterpreting the lower court record to deny that Indiana had distinguished between "adult" and theatrical productions. 501 U.S. at 564 n.1 (Chief Justice Rehnquist); id. at 574 n.2 (Justice Scalia). On the other hand, the fact that the state authorities disclaimed any intent to apply the statute to theatrical productions demonstrated to dissenting Justice White (who was joined by Justices Marshall, Blackmun, and Stevens) that the statute was *not* a general prohibition on public nudity, but instead was targeted at "the communicative aspect of the erotic dance." Id. at 591.

[1412] The Court had only recently affirmed that music is entitled to First Amendment protection independently of the message conveyed by any lyrics (Ward v. Rock Against Racism, 491 U.S. 781 (1989)), so it seems implausible that the Court was signaling a narrowing of protection to only ideas and opinions. Rather, the Court seems willing to give government the benefit of the doubt when it comes to legitimate objectives in regulating expressive conduct that is sexually explicit. For an extensive discourse on the expressive aspects of dance and the arts in general, and the striptease in particular, *see* Judge Posner's concurring opinion in the lower court's disposition of *Barnes*. Miller v. Civil City of South Bend, 904 F.2d 1081, 1089 (7th Cir. 1990).

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first Amendment would have afforded additional authority to regulate the erotic dancing.

In *Erie v. Pap's A.M.*,[1413] the Supreme Court again upheld the application of a statute prohibiting public nudity to an "adult" entertainment establishment. Although there was again only a plurality opinion, parts of that opinion were joined by five justices. These five adopted Justice Souter's position in *Barnes*, that the statute satisfied the *O'Brien* test because it was intended "to combat harmful secondary effects," such as "prostitution and other criminal activity."[1414] Justice Souter, however, although joining the plurality opinion, also dissented in part. He continued to believe that secondary effects were an adequate justification for banning nude dancing, but did not believe "that the city has made a sufficient evidentiary showing to sustain its regulation," and therefore would have remanded the case for further proceedings.[1415] He acknowledged his "mistake" in *Barnes* in failing to make the same demand for evidence.[1416]

The plurality opinion found that Erie's public nudity ban "regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis*," because Erie allowed dancers to perform wearing only pasties and G-strings.[1417] It may follow that "requiring dancers to wear pasties and G-strings may not greatly reduce . . . secondary effects, but *O'Brien* requires only that the regulation further the interest of combating such effects," not that it further it to a particular extent.[1418] The plurality opinion did not address the question of whether statutes prohibiting public nudity could be applied to serious theater, but its reliance on secondary effects suggests that they could not.

Speech Plus—The Constitutional Law of Leafleting, Picketing, and Demonstrating

Communication of political, economic, social, and other views is not accomplished solely by face-to-face speech, broadcast speech, or

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[1413] 529 U.S. 277 (2000).
[1414] 529 U.S. at 292, 291.
[1415] 529 U.S. 310–311.
[1416] 529 U.S. at 316.
[1417] 529 U.S. at 301. The plurality said that, though nude dancing is "expressive conduct," we think that it falls "only within the outer ambit of the First Amendment's protection." Id. at 289. The opinion also quotes Justice Stevens to the same effect with regard to erotic materials generally. Id. at 294. In United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 826 (2000), however, the Court wrote that it "cannot be influenced . . . by the perception that the regulation in question is not a major one because the speech ['signal bleed' of sexually oriented cable programming] is not very important."
[1418] 529 U.S. at 301.

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writing in newspapers, periodicals, and pamphlets. There is also "expressive conduct," which includes picketing and marching, distribution of leaflets and pamphlets, addresses to publicly assembled audiences, door-to-door solicitation, and sit-ins. There is also a class of conduct, now only vaguely defined, that has been denominated "symbolic conduct," which includes such actions as flag desecration and draft-card burnings. Because all these ways of expressing oneself involve conduct rather than mere speech, they are all much more subject to regulation and restriction than is simple speech. Some of them may be forbidden altogether. But, to the degree that these actions are intended to communicate a point of view, the First Amendment is relevant and protects some of them to a great extent. Sorting out the conflicting lines of principle and doctrine is the point of this section.

The Public Forum.—In 1895, while on the highest court of Massachusetts, future Justice Oliver Wendell Holmes rejected a contention that public property was by right open to the public as a place where the right of speech could be recognized,[1419] and on review the United States Supreme Court endorsed Holmes' view.[1420] Years later, beginning with *Hague v. CIO*,[1421] the Court reconsidered the issue. Justice Roberts wrote in *Hague*: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." Although this opinion was not itself joined by a majority of the Justices, the Court subsequently endorsed the view in several opinions.[1422]

The Roberts view was called into question in the 1960s, however, when the Court seemed to leave the issue open,[1423] and when a majority endorsed an opinion by Justice Black asserting his own

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[1419] Commonwealth v. Davis, 162 Mass. 510, 511 (1895). "For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of rights of a member of the public than for the owner of a private house to forbid it in the house."

[1420] Davis v. Massachusetts, 167 U.S. 43, 48 (1897).

[1421] 307 U.S. 496 (1939). Only Justice Black joined the Roberts opinion, but only Justices McReynolds and Butler dissented from the result.

[1422] *E.g.*, Schneider v. Town of Irvington, 308 U.S. 147, 163 (1939); Kunz v. New York, 340 U.S. 290, 293 (1951).

[1423] Cox v. Louisiana, 379 U.S. 536, 555 (1965). For analysis of this case in the broader context, *see* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

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narrower view of speech rights in public places.[1424] Later decisions restated and quoted the Roberts language from *Hague*, and that is now the position of the Court.[1425] Public streets and parks,[1426] including those adjacent to courthouses[1427] and foreign embassies,[1428] as well as public libraries[1429] and the grounds of legislative bodies,[1430] are open to public demonstrations, although the uses to which public areas are dedicated may shape the range of permissible expression and conduct that may occur there.[1431] Moreover, not all public properties are public forums. "[T]he First Amendment does not guarantee access to property simply because it is owned or con-

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[1424] Adderley v. Florida, 385 U.S. 39 (1966). *See* id. at 47–48; Cox v. Louisiana, 379 U.S. 559, 578 (1965) (Justice Black concurring in part and dissenting in part); Jamison v. Texas, 318 U.S. 413, 416 (1943) (Justice Black for the Court).

[1425] *E.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Carey v. Brown, 447 U.S. 455, 460 (1980).

[1426] Hague v. CIO, 307 U.S. 496 (1939); Niemotko v. Maryland, 340 U.S. 268 (1951); Kunz v. New York, 340 U.S. 290 (1951); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Coates v. City of Cincinnati, 402 U.S. 611 (1971); Grayned v. City of Rockford, 408 U.S. 104 (1972); Greer v. Spock, 424 U.S. 828, 835–36 (1976); Carey v. Brown, 447 U.S. 455 (1980).

[1427] Narrowly drawn statutes that serve the state's interests in security and in preventing obstruction of justice and influencing of judicial officers are constitutional. Cox v. Louisiana, 379 U.S. 559 (1965). A restriction on carrying signs or placards on the grounds of the Supreme Court is unconstitutional as applied to the public sidewalks surrounding the Court, since it does not sufficiently further the governmental purposes of protecting the building and grounds, maintaining proper order, or insulating the judicial decisionmaking process from lobbying. United States v. Grace, 461 U.S. 171 (1983).

[1428] In Boos v. Barry, 485 U.S. 312 (1988), the Court struck down as content-based a District of Columbia law prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tends to bring the foreign government into "public odium" or "public disrepute." However, another aspect of the District's law, making it unlawful for three or more persons to congregate within 500 feet of an embassy and refuse to obey a police dispersal order, was upheld; under a narrowing construction, the law had been held applicable only to congregations directed at an embassy, and reasonably believed to present a threat to the peace or security of the embassy.

[1429] Brown v. Louisiana, 383 U.S. 131 (1966) (sit-in in library reading room).

[1430] Edwards v. South Carolina, 372 U.S. 229 (1963); Jeanette Rankin Brigade v. Capitol Police Chief, 342 F. Supp. 575 (D.C. 1972) (three-judge court), *aff'd*, 409 U.S. 972 (1972) (voiding statute prohibiting parades and demonstrations on United States Capitol grounds).

[1431] *E.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972) (sustaining ordinance prohibiting noisemaking adjacent to school if that noise disturbs or threatens to disturb the operation of the school); Brown v. Louisiana, 383 U.S. 131 (1966) (silent vigil in public library protected while noisy and disruptive demonstration would not be); Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) (wearing of black armbands as protest protected but not if it results in disruption of school); Cameron v. Johnson, 390 U.S. 611 (1968) (preservation of access to courthouse); Frisby v. Schultz, 487 U.S. 474 (1988) (ordinance prohibiting picketing "before or about" any residence or dwelling, narrowly construed as prohibiting only picketing that targets a particular residence, upheld as furthering significant governmental interest in protecting the privacy of the home).

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trolled by the government." [1432] "The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time." [1433] Thus, by the nature of the use to which the property is put or by tradition, some sites are simply not as open for expression as streets and parks are.[1434] But if government does open non-traditional forums for expressive activities, it may not discriminate on the basis of content or viewpoint in according access.[1435] The Court, however, remains divided with respect to the reach of the public forum doctrine.[1436]

Speech in public forums is subject to time, place, and manner regulations that take into account such matters as control of traffic in the streets, the scheduling of two meetings or demonstrations at the same time and place, the preventing of blockages of building entrances, and the like.[1437] Such regulations are closely scrutinized in order to protect free expression, and, to be valid, must be justified without reference to the content or subject matter of speech,[1438] must serve a significant governmental interest,[1439] and must leave open ample alternative channels for communication of the informa-

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[1432] United States Postal Serv. v. Council of Greenburgh Civic Assn's, 453 U.S. 114 (1981).

[1433] Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

[1434] *E.g.*, Adderley v. Florida, 385 U.S. 39 (1966) (jails); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (advertising space in city rapid transit cars); Greer v. Spock, 424 U.S. 828 (1976) (military bases); United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (private mail boxes); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (interschool mail system); ISKCON v. Lee, 505 U.S. 672 (1992) (publicly owned airport terminal).

[1435] *E.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (municipal theater); Madison School District v. WERC, 429 U.S. 167 (1976) (school board meeting); Heffron v. ISKCON, 452 U.S. 640 (1981) (state fair grounds); Widmar v. Vincent, 454 U.S. 263 (1981) (university meeting facilities).

[1436] *Compare* United States Postal Service v. Council of Greenburgh Civic Ass'ns, 454 U.S. 114, 128–31 (1981), *with* id. at 136–40 (Justice Brennan concurring), and 142 (Justice Marshall dissenting). For evidence of continuing division, *compare* ISKCON v. Lee, 505 U.S. 672 (1992) *with* id. at 693 (Justice Kennedy concurring).

[1437] *See*, *e.g.*, Heffron v. ISKCON, 452 U.S. 640, 647–50 (1981), and id. at 656 (Justice Brennan concurring in part and dissenting in part) (stating law and discussing cases); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (prohibition of sleep-in demonstration in area of park not designated for overnight camping).

[1438] Niemotko v. Maryland, 340 U.S. 268 (1951); Cox v. Louisiana, 379 U.S. 536 (1965); Police Dep't of Chicago v. Mosle, 408 U.S. 92 (1972); Madison School District v. WERC, 429 U.S. 167 (1976); Carey v. Brown, 447 U.S. 455 (1980); Widmar v. Vincent, 454 U.S. 263 (1981). In Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), a divided Court permitted the city to sell commercial advertising space on the walls of its rapid transit cars but to refuse to sell political advertising space.

[1439] *E.g.*, the governmental interest in safety and convenience of persons using public forum, Heffron v. ISKCON, 452 U.S. 640, 650 (1981); the interest in preservation of a learning atmosphere in school, Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); and the interest in protecting traffic and pedestrian safety in the streets, Cox v. Louisiana, 379 U.S. 536, 554–55 (1965); Kunz v. New York, 340 U.S. 290, 293–94 (1951); Hague v. CIO, 307 U.S. 496, 515–16 (1939).

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tion.[1440] The Court has written that a time, place, or manner regulation "must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied . . . [s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . ." [1441] A content-neutral time, place, and manner regulation of the use of a public forum must also "contain adequate standards to guide the official's decision and render it subject to effective judicial review." [1442] Unlike a content-based licensing scheme, however, it need not "adhere to the procedural requirements set forth in *Freedman*." [1443] These requirements include that the "burden of proving that the film [or other speech] is unprotected expression must rest on the censor," and that the censor must, "within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." [1444]

A corollary to the rule forbidding regulation based on content is the principle—a merging of free expression and equal protection standards—that government may not discriminate between different kinds of messages in affording access.[1445] In order to ensure against

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[1440] Heffron v. ISKCON, 452 U.S. 640, 654–55 (1981); Consolidated Edison Co. v. PSC, 447 U.S. 530, 535 (1980).

[1441] Ward v. Rock Against Racism, 491 U.S. 781, 798–99, 800 (1989).

[1442] Thomas v. Chicago Park Dist., 534 U.S. 316, 323 (2002).

[1443] 534 U.S. at 322, citing Freedman v. Maryland, 380 U.S. 51 (1965). *See* National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977).

[1444] Freedman v. Maryland, 380 U.S. 51, 58–59 (1965).

[1445] Police Dep't of Chicago v. Mosle, 408 U.S. 92 (1972) (ordinance void that barred all picketing around school building except labor picketing); Carey v. Brown, 447 U.S. 455 (1980) (same); Widmar v. Vincent, 454 U.S. 263 (1981) (striking down college rule permitting access to all student organizations except religious groups); Niemotko v. Maryland, 340 U.S. 268 (1951) (striking down denial of permission to use parks for some groups but not for others); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (striking down ordinance that prohibited symbols, such as burning crosses, that constituted fighting words that insult on the basis of some factors, such as race, but not on the basis of other factors). These principles apply only to the traditional public forum and to the governmentally created "limited public forum." Government may, without creating a limited public forum, place "reasonable" restrictions on access to nonpublic areas. *See*, *e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 48 (1983) (use of school mail system); and Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S. 788 (1985) (charitable solicitation of federal employees at workplace). *See also* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (city may sell commercial advertising space on the walls of its rapid transit cars but refuse to sell political advertising space); Capitol Square Review Bd. v. Pinette, 515 U.S. 753 (1995) (denial of permission to Ku Klux Klan, allegedly in order to avoid Establishment Clause violation, to place a cross in plaza on grounds of state capitol); Rosenberger v. University of Virginia, 515 U.S. 819 (1995) (Univer-

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covert forms of discrimination against expression and between different kinds of content, the Court has insisted that licensing systems be constructed as free as possible of the opportunity for arbitrary administration.[1446] The Court has also applied its general strictures against prior restraints in the contexts of permit systems and judicial restraint of expression.[1447]

It appears that government may not deny access to the public forum for demonstrators on the ground that the past meetings of these demonstrators resulted in violence,[1448] and may not vary a

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sity's subsidy for printing costs of student publications, available for student "news, information, opinion, entertainment, or academic communications," could not be withheld because of the religious content of a student publication); Lamb's Chapel v. Center Moriches School Dist., 508 U.S. 384 (1993) (school district rule prohibiting after-hours use of school property for showing of a film presenting a religious perspective on child-rearing and family values, but allowing after-hours use for non-religious social, civic, and recreational purposes).

[1446] *E.g.*, Hague v. CIO, 307 U.S. 496, 516 (1939); Schneider v. Town of Irvington, 308 U.S. 147, 164 (1939); Cox v. New Hampshire, 312 U.S. 569 (1941); Poulos v. New Hampshire, 345 U.S. 395 (1953); Staub v. City of Baxley, 355 U.S. 313, 321–25 (1958); Cox v. Louisiana, 379 U.S. 536, 555–58 (1965); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–53 (1969). Justice Stewart for the Court described these and other cases as "holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license without narrow, objective, and definite standards to guide the licensing authority is unconstitutional." Id. at 150–51. A person faced with an unconstitutional licensing law may ignore it, engage in the desired conduct, and challenge the constitutionality of the permit system upon a subsequent prosecution for violating it. Id. at 151; Jones v. Opelika, 316 U.S. 584, 602 (1942) (Chief Justice Stone dissenting), adopted per curiam on rehearing, 319 U.S. 103 (1943). *See also* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) (upholding facial challenge to ordinance vesting in the mayor unbridled discretion to grant or deny annual permit for location of newsracks on public property); Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988) (invalidating as permitting "delay without limit" licensing requirement for professional fundraisers); Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992). *But see* Walker v. City of Birmingham, 388 U.S. 307 (1967) (same rule not applicable to injunctions).

[1447] In Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969), the Court reaffirmed the holdings of the earlier cases, and, additionally, both Justice Stewart, for the Court, id. at 155 n.4, and Justice Harlan concurring, id. at 162–64, asserted that the principles of Freedman v. Maryland, 380 U.S. 51 (1965), governing systems of prior censorship of motion pictures, were relevant to permit systems for parades and demonstrations. The Court also voided an injunction against a protest meeting that was issued ex parte, without notice to the protestors and with, of course, no opportunity for them to rebut the representations of the seekers of the injunction. Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968).

[1448] The only precedent is Kunz v. New York, 340 U.S. 290 (1951). The holding was on a much narrower basis, but in dictum the Court said: "The court below has mistakenly derived support for its conclusions from the evidence produced at the trial that appellant's religious meetings had, in the past, caused some disorder. There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder and violence." Id. at 294. A different rule applies to labor picketing. *See* Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, 312 U.S. 287 (1941) (background of violence supports prohibition of all peaceful picketing). The military may ban a civilian, previously convicted of destroying government property, from reentering a military base, and may apply the ban to

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demonstration licensing fee based on an estimate of the amount of hostility likely to be engendered,[1449] but the Court's position with regard to the "heckler's veto," the governmental termination of a speech or demonstration because of hostile crowd reaction, remains unclear.[1450]

The Court has defined three categories of public property for public forum analysis. First, there is the traditional public forum—places such as streets and parks that have traditionally been used for public assembly and debate, where the government may not prohibit all communicative activity and must justify content-neutral time, place, and manner restrictions as narrowly tailored to serve a legitimate interest.[1451] Second, there is the designated public forum, where the government opens property for communicative activity and thereby creates a public forum. Such a forum may be limited—hence the expression "limited public forum"—for "use by certain groups, *e.g.*, *Widmar v. Vincent* (student groups), or for discussion of certain subjects, *e.g.*, *City of Madison Joint School District v. Wisconsin PERC* (school board business)," [1452] but, within the framework of such legitimate limitations, "a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." [1453] Third, with respect to "[p]ublic property which is not by tradition or designation a forum for public communication," the government "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on [sic] speech is reasonable and

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prohibit the civilian from reentering the base for purposes of peaceful demonstration during an Armed Forces Day "open house." United States v. Albertini, 472 U.S. 675 (1985).

[1449] Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) (a fee based on anticipated crowd response necessarily involves examination of the content of the speech, and is invalid as a content regulation).

[1450] Dicta indicate that a hostile reaction will not justify suppression of speech, Hague v. CIO, 307 U.S. 496, 502 (1939); Cox v. Louisiana, 379 U.S. 536, 551 (1965); Bachellar v. Maryland, 397 U.S. 564, 567 (1970), and one holding appears to point this way. Gregory v. City of Chicago, 394 U.S. 111 (1969). Yet the Court upheld a breach of the peace conviction of a speaker who refused to cease speaking upon the demand of police who feared imminent violence. Feiner v. New York, 340 U.S. 315 (1951). In Niemotko v. Maryland, 340 U.S. 268, 273 (1951) (concurring opinion), Justice Frankfurter wrote: "It is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd whatever its size and temper and not against the speaker."

[1451] "[A]lthough a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause." Pleasant Grove City, Utah v. Summum, 555 U.S. at 464..

[1452] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 46 n.7 (1983).

[1453] 460 U.S. at 46.

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not an effort to suppress expression merely because public officials oppose the speaker's view." [1454] The distinction between the first and second categories, on the one hand, and third category, on the other, can therefore determine the outcome of a case, because speakers may be excluded from the first and second categories only for a "compelling" governmental interest, whereas exclusion from the third category need only be "reasonable."

The Court held that a school system did not create a limited public forum by opening an interschool mail system to use by selected civic groups "that engage in activities of interest and educational relevance to students," and that, in any event, if a limited public forum had thereby been created a teachers union rivaling the exclusive bargaining representative could still be excluded as not being "of a similar character" to the civic groups.[1455] Less problematic was the Court's conclusion that utility poles and other municipal property did not constitute a public forum for the posting of signs.[1456] More problematic was the Court's conclusion that the Combined Federal Campaign, the Federal Government's forum for coordinated charitable solicitation of federal employees, is not a limited public forum. Exclusion of various advocacy groups from participation in the Campaign was upheld as furthering "reasonable" governmental interests in offering a forum to "traditional health and welfare charities," avoiding the appearance of governmental favoritism of particular groups or viewpoints, and avoiding disruption of the federal workplace by controversy.[1457] The Court pinpointed the gov-

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[1454] 460 U.S. at 46. Candidate debates on public television are an example of this third category of public property: the "nonpublic forum." Arkansas Educational Television Comm'n v. Forbes, 523 U.S. 666, 679 (1998). "Although public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine [*i.e.*, public broadcasters ordinarily are entitled to the editorial discretion to engage in viewpoint discrimination], candidate debates present the narrow exception to this rule." Id. at 675. A public broadcaster, therefore, may not engage in viewpoint discrimination in granting or denying access to candidates. Under the third type of forum analysis, however, it may restrict candidate access for "a reasonable, viewpoint-neutral" reason, such as a candidate's "objective lack of support." Id. at 683.

[1455] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). This was a 5–4 decision, with Justice White's opinion of the Court being joined by Chief Justice Burger and by Justices Blackmun, Rehnquist, and O'Connor, and with Justice Brennan's dissent being joined by Justices Marshall, Powell, and Stevens. *See also* Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (student newspaper published as part of journalism class is not a public forum).

[1456] City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding an outright ban on use of utility poles for signs). The Court noted that "it is of limited utility in the context of this case to focus on whether the tangible property itself should be deemed a public forum." Id. at 815 n.32.

[1457] Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S. 788 (1985). The precedential value of *Cornelius* may be subject to question, because it was decided by 4–3 vote, the non-participating Justices (Marshall and Powell) having dissented in *Perry*. Justice O'Connor wrote the opinion of the Court, joined by Chief

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ernment's intention as the key to whether a public forum has been created: "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." [1458] Under this categorical approach, the government has wide discretion in maintaining the nonpublic character of its forums, and may regulate in ways that would be impermissible were it to designate a limited public forum.[1459]

Application of the doctrine continues to create difficulty. A majority of Justices could not agree on the public forum status of a sidewalk located entirely on Postal Service property.[1460] The Court was also divided over whether nonsecured areas of an airport terminal, including shops and restaurants, constituted a public forum. Holding that the terminal was not a public forum, the Court upheld restrictions on the solicitation and receipt of funds.[1461] But the Court also invalidated a ban on the sale or distribution of literature to passers-by within the same terminal, four Justices believing that the terminal constituted a public forum, and Justice O'Connor [1462] contending that the multipurpose nature of the forum (shopping mall as well as airport) made restrictions on expression less "reasonable." [1463]

In *United States v. American Library Association, Inc.*, a four-Justice plurality of the Supreme Court found that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum." [1464] The plurality therefore did not apply "strict scrutiny" in upholding the Children's Internet Protection Act, which, as the plurality summarized it, provides that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or

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Justice Burger and by Justices White and Rehnquist. Justice Blackmun, joined by Justice Brennan, dissented, and Justice Stevens dissented separately.

[1458] 473 U.S. at 802. Justice Blackmun criticized "the Court's circular reasoning that the CFC is not a limited public forum because the Government intended to limit the forum to a particular class of speakers." Id. at 813–14.

[1459] Justice Kennedy criticized this approach in ISKCON v. Lee, 505 U.S. 672, 695 (1992) (concurring), contending that recognition of government's authority to designate the forum status of property ignores the nature of the First Amendment as "a limitation on government, not a grant of power." Justice Brennan voiced similar misgivings in his dissent in United States v. Kokinda: "public forum categories—originally conceived of as a way of *preserving* First Amendment rights—have been used . . . as a means of upholding restrictions on speech." 497 U.S. at 741 (citation omitted).

[1460] United States v. Kokinda, 497 U.S. 720 (1990) (upholding a ban on solicitation on the sidewalk).

[1461] ISKCON v. Lee, 505 U.S. 672 (1992).

[1462] 505 U.S. at 690.

[1463] Lee v. ISKCON, 505 U.S. 830 (1992) (per curiam).

[1464] 539 U.S. 194, 205 (2003).

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child pornography, and to prevent minors from obtaining access to material that is harmful to them." [1465] The plurality found that Internet access in public libraries is not a "traditional" public forum because "[w]e have 'rejected the view that traditional public forum status extends beyond its historical confines.'" [1466] And Internet access at public libraries is not a "designated" public forum because "[a] public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access, not to 'encourage a diversity of views from private speakers,' but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality." [1467]

Nevertheless, although Internet access in public libraries is not a public forum, and particular Web sites, like particular newspapers, would not constitute public forums, the Internet as a whole might be viewed as a public forum, despite its lack of a historic tradition. The Supreme Court has not explicitly held that the Internet as a whole is a public forum, but, in *Reno v. ACLU*, which struck down a prohibition in the Communications Decency Act of 1996 on "indecent" material on the Internet, the Court noted that the Internet "constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can 'publish' information." [1468]

Quasi-Public Places.—The First Amendment precludes government restraint of expression and it does not require individuals to turn over their homes, businesses, or other property to those wish-

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[1465] 539 U.S. at 199.

[1466] 539 U.S. at 206.

[1467] 539 U.S. at 206 (citation omitted).

[1468] 521 U.S. at 853. A federal court of appeals wrote: "Aspects of cyberspace may, in fact, fit into the public forum category, although the Supreme Court has also suggested that the category is limited by tradition. *Compare Forbes*, 523 U.S. at 679 ('reject[ing] the view that traditional public forum status extends beyond its historic confines' [to a public television station]) *with* Reno v. ACLU, 521 U.S. 844, 851–53 (1997) (recognizing the communicative potential of the Internet, specifically the World Wide Web)." Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 843 (6th Cir. 2000) (alternate citations to *Forbes* and *Reno* omitted). In *Putnam Pit*, the city denied a private Web site's request that the city's Web site establish a hyperlink to it, even though the city's Web site had established hyperlinks to other private Web sites. The court of appeals found that the city's Web site was a nonpublic forum, but that even nonpublic forums must be viewpoint neutral, so it remanded the case for trial on the question of whether the city's denial of a hyperlink had discriminated on the basis of viewpoint.

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ing to communicate about a particular topic.[1469] But it may be that in some instances private property is so functionally akin to public property that private owners may not forbid expression upon it. In *Marsh v. Alabama*,[1470] the Court held that the private owner of a company town could not forbid distribution of religious materials by a Jehovah's Witness on a street in the town's business district. The town, wholly owned by a private corporation, had all the attributes of any American municipality, aside from its ownership, and was functionally like any other town. In those circumstances, the Court reasoned, "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[1471] This precedent lay unused for some twenty years until the Court first indicated a substantial expansion of it, and then withdrew to a narrow interpretation.

First, in *Food Employees Union v. Logan Valley Plaza*,[1472] the Court held constitutionally protected the picketing of a store located in a shopping center by a union objecting to the store's employment of nonunion labor. Finding that the shopping center was the functional equivalent of the business district involved in *Marsh*, the Court announced there was "no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the 'business district' is not under the same ownership."[1473] "[T]he State," said Justice Marshall, "may not delegate the power, through the use

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[1469] In Garner v. Louisiana, 368 U.S. 157, 185, 201–07 (1961), Justice Harlan, concurring, would have reversed breach of the peace convictions of "sit-in" demonstrators who conducted their sit-in at lunch counters of department stores. He asserted that the protesters were sitting at the lunch counters where they knew they would not be served in order to demonstrate that segregation at such counters existed. "Such a demonstration . . . is as much a part of the 'free trade in ideas' . . . as is verbal expression, more commonly thought of as 'speech.'" Conviction for breach of peace was void in the absence of a clear and present danger of disorder. The Justice would not, however protect "demonstrations conducted on private property over the objection of the owner . . . , just as it would surely not encompass verbal expression in a private home if the owner has not consented." He had read the record to indicate that the demonstrators were invitees in the stores and that they had never been asked to leave by the owners or managers. *See also* Frisby v. Schultz, 487 U.S. 474 (1988) (government may protect residential privacy by prohibiting altogether picketing that targets a single residence).

[1470] 326 U.S. 501 (1946).

[1471] 326 U.S. at 506.

[1472] Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968).

[1473] 391 U.S. at 319. Justices Black, Harlan, and White dissented. Id. at 327, 333, 337.

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of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put." [1474] The Court observed that it would have been hazardous to attempt to distribute literature at the entrances to the center and it reserved for future decision "whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put." [1475]

Four years later, the Court answered the reserved question in the negative.[1476] Several members of an antiwar group had attempted to distribute leaflets on the mall of a large shopping center, calling on the public to attend a protest meeting. Center guards invoked a trespass law against them, and the Court held that they could rightfully be excluded. The center had not dedicated its property to a public use, the Court said; rather, it had invited the public in specifically to carry on business with those stores located in the center. Plaintiffs' leafleting, not directed to any store or to the customers *qua* customers of any of the stores, was unrelated to any activity in the center. Unlike the situation in *Logan Valley Plaza*, there were reasonable alternatives by which plaintiffs could reach those who used the center. Thus, in the absence of a relationship between the purpose of the expressive activity and the business of the shopping center, the property rights of the center owner will overbalance the expressive rights to persons who would use their property to communicate.

Then, the Court formally overruled *Logan Valley Plaza*, holding that shopping centers are not functionally equivalent to the company town involved in *Marsh*.[1477] Suburban malls may be the "new town squares" in the view of sociologists, but they are private property in the eye of the law. The ruling came in a case in which a union of employees engaged in an economic strike against one store in a shopping center was barred from picketing the store within the mall. The rights of employees in such a situation are generally to be governed by federal labor laws [1478] rather than the First Amendment, although there is also the possibility that state constitu-

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[1474] 391 U.S. at 319–20.

[1475] 391 U.S. at 320 n.9.

[1476] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

[1477] Hudgens v. NLRB, 424 U.S. 507 (1976). Justice Stewart's opinion for the Court asserted that *Logan Valley* had in fact been overruled by *Lloyd Corp.*, 424 U.S. at 517–18, but Justice Powell, the author of the *Lloyd Corp.* opinion, did not believe that to be the case, id. at 523.

[1478] *But see* Sears, Roebuck & Co. v. Carpenters, 436 U.S. U.S. 180 (1978).

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tional provisions may be interpreted more expansively by state courts to protect some kinds of public issue picketing in shopping centers and similar places.[1479] Henceforth, only when private property "'has taken on *all* the attributes of a town'" is it to be treated as a public forum.[1480]

Picketing and Boycotts by Labor Unions.—Though "logically relevant" to what might be called "public issue" picketing, the cases dealing with application of economic pressures by labor unions are set apart by different "economic and social interests,"[1481] and consequently are dealt with separately here.

It was in a labor case that the Court first held picketing to be entitled to First Amendment protection.[1482] Striking down a flat prohibition on picketing to influence or induce someone to do something, the Court said: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . ."[1483] The Court further reasoned that "the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."[1484]

The Court soon recognized several caveats. Peaceful picketing may be enjoined if it is associated with violence and intimidation.[1485] Although initially the Court continued to find picketing pro-

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[1479] In PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), the Court held that a state court interpretation of the state constitution to protect picketing in a privately owned shopping center did not deny the property owner any federal constitutional rights. *But cf.* Pacific Gas & Elec. v. Public Utilities Comm'n, 475 U.S. 1 (1986), holding that a state may not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees, a majority of Justices distinguishing *PruneYard* as not involving such forced association with others' beliefs.

[1480] Hudgens v. NLRB, 424 U.S. 507, 516–17 (1976) (quoting Justice Black's dissent in *Logan Valley Plaza*, 391 U.S. 308, 332–33 (1968)).

[1481] Niemotko v. Maryland, 340 U.S. 268, 276 (1951).

[1482] Thornhill v. Alabama, 310 U.S. 88 (1940). Picketing as an aspect of communication was recognized in Senn v. Tile Layers Union, 301 U.S. 468 (1937).

[1483] 310 U.S. at 102.

[1484] 310 U.S. at 104–05. *See also* Carlson v. California, 310 U.S. 106 (1940). In AFL v. Swing, 312 U.S. 321 (1941), the Court held unconstitutional an injunction against peaceful picketing based on a state's common-law policy against picketing in the absence of an immediate dispute between employer and employee.

[1485] Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941).

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tected in the absence of violence,[1486] it soon decided a series of cases recognizing a potentially far-reaching exception: injunctions against peaceful picketing in the course of a labor controversy may be enjoined when such picketing is counter to valid state policies in a domain open to state regulation.[1487] These cases proceeded upon a distinction drawn by Justice Douglas. "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulations." [1488] The apparent culmination of this course of decision was the *Vogt* case, in which Justice Frankfurter broadly rationalized all the cases and derived the rule that "a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." [1489] Although the Court has not disavowed this broad language, the *Vogt* exception has apparently not swallowed the entire *Thornhill* rule.[1490] The Court has indicated that "a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." [1491]

[1486] Bakery & Pastry Drivers Local v. Wohl, 315 U.S. 769 (1942); Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942); Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943).

[1487] Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (upholding on basis of state policy forbidding agreements in restraint of trade an injunction against picketing to persuade business owner not to deal with non-union peddlers); International Bhd. of Teamsters v. Hanke, 339 U.S. 470 (1950) (upholding injunction against union picketing protesting non-union proprietor's failure to maintain union shop card and observe union's limitation on weekend business hours); Building Service Emp. Intern. Union v. Gazzam, 339 U.S. 532 (1950) (injunction against picketing to persuade innkeeper to sign contract that would force employees to join union in violation of state policy that employees' choice not be coerced); Local 10, United Ass'n of Journeymen Plumbers v. Graham, 345 U.S. 192 (1953) (injunction against picketing in conflict with state's right-to-work statute).

[1488] Bakery & Pastry Drivers Local v. Wohl, 315 U.S. 769, 776–77 (1942) (concurring opinion).

[1489] International Bhd. of Teamsters v. Vogt, 354 U.S. 284, 293 (1957). *See also* American Radio Ass'n v. Mobile Steamship Ass'n, 419 U.S. 215, 228–32 (1974); NLRB v. Retail Store Employees, 447 U.S. 607 (1980); International Longshoremens' Ass'n v. Allied International, 456 U.S. 212, 226–27 (1982).

[1490] The dissenters in *Vogt* asserted that the Court had "come full circle" from *Thornhill*. 354 U.S. at 295 (Justice Douglas, joined by Chief Justice Warren and Justice Black).

[1491] NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 63 (1964) (requiring—and finding absent in NLRA—"clearest indication" that Congress intended to prohibit all consumer picketing at secondary establishments). *See also* Youngdahl v. Rainfair, 355 U.S. 131, 139 (1957) (indicating that, where violence is scattered through time and much of it was unconnected with the picketing, the state should proceed against the violence rather than the picketing).

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Public Issue Picketing and Parading.—The early cases held that picketing and parading were forms of expression entitled to some First Amendment protection.[1492] Those early cases did not, however, explicate the difference in application of First Amendment principles that the difference between mere expression and speech-plus would entail. Many of these cases concerned disruptions or feared disruptions of the public peace occasioned by the expressive activity and the ramifications of this on otherwise protected activity.[1493] A series of other cases concerned the permissible characteristics of permit systems in which parades and meetings were licensed, and expanded the procedural guarantees that must accompany a permissible licensing system.[1494] In one case, however, the Court applied the rules developed with regard to labor picketing to uphold an injunction against the picketing of a grocery chain by a black group to compel the chain to adopt a quota-hiring system for blacks. The Supreme Court affirmed the state court's ruling that, although no law prevented the chain from hiring blacks on a quota basis, picketing to coerce the adoption of racially discriminatory hiring was contrary to state public policy.[1495]

A series of civil rights picketing and parading cases led the Court to formulate standards much like those it has established in the labor field, but more protective of expressive activity. The process began with *Edwards v. South Carolina*,[1496] in which the Court reversed a breach of the peace conviction of several blacks for their refusal to disperse as ordered by police. The statute was so vague, the Court concluded, that demonstrators could be convicted simply because their presence "disturbed" people. Describing the demonstration upon the grounds of the legislative building in South Carolina's capital, Justice Stewart observed that "[t]he circumstances in this case reflect an exercise of these basic [First Amendment] constitutional rights in their most pristine and classic form."[1497] In subsequent cases, the Court observed: "We emphatically reject the no-

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[1492] Hague v. CIO, 307 U.S. 496 (1939); Cox v. New Hampshire, 312 U.S. 569 (1941); Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951).

[1493] Cantwell v. Connecticut, 310 U.S. 296 (1940); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Terminiello v. City of Chicago, 337 U.S. 1 (1949); Feiner v. New York, 340 U.S. 315 (1951).

[1494] *See*, *e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977); Carroll v. President & Commr's of Princess Anne, 393 U.S. 175 (1968).

[1495] Hughes v. Superior Court, 339 U.S. 460 (1950). This ruling, allowing content-based restriction, seems inconsistent with NAACP v. Claiborne Hardware, discussed under this topic, *infra*.

[1496] 372 U.S. 229 (1963).

[1497] 372 U.S. at 235. *See also* Fields v. South Carolina, 375 U.S. 44 (1963); Henry v. City of Rock Hill, 376 U.S. 776 (1964).

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tion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as those amendments afford to those who communicate ideas by pure speech." [1498] "The conduct which is the subject to this statute—picketing and parading—is subject to regulation even though intertwined with expression and association. The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited." [1499]

The Court must determine, of course, whether the regulation is aimed primarily at conduct, as is the case with time, place, and manner regulations, or whether instead the aim is to regulate the content of speech. In a series of decisions, the Court refused to permit restrictions on parades and demonstrations, and reversed convictions imposed for breach of the peace and similar offenses, when, in the Court's view, disturbance had resulted from opposition to the messages being uttered by demonstrators.[1500] Subsequently, however, the Court upheld a ban on residential picketing in *Frisby v. Shultz*,[1501] finding that the city ordinance was narrowly tailored to serve the "significant" governmental interest in protecting residential privacy. As interpreted, the ordinance banned only picketing that targeted a single residence, and it is unclear whether the Court would uphold a broader restriction on residential picketing.[1502]

In 1982, the Justices confronted a case, that, like *Hughes v. Superior Court*,[1503] involved a state court injunction on picketing, although this one also involved a damage award. *NAACP v. Claiborne Hardware Co.*[1504] may join in terms of importance such cases as *New York Times Co. v. Sullivan* [1505] in requiring the states to observe enhanced constitutional standards before they may impose liability upon persons for engaging in expressive conduct that implicates the First Amendment. The case arose in the context of a protest against racial conditions by black citizens of Claiborne County, Mis-

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[1498] Cox v. Louisiana, 379 U.S. 536, 555 (1965).

[1499] 379 U.S. at 563.

[1500] Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 379 U.S. 536 (1965); Gregory v. City of Chicago, 394 U.S. 111 (1969); Bachellar v. Maryland, 397 U.S. 564 (1970). *See also* Collin v. Smith, 447 F. Supp. 676 (N.D.Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *stay denied*, 436 U.S. 953, *cert. denied*, 439 U.S. 916 (1978).

[1501] 487 U.S. 474 (1988).

[1502] An earlier case involving residential picketing had been resolved on equal protection rather than First Amendment grounds, the ordinance at issue making an exception for labor picketing. Carey v. Brown, 447 U.S. 455 (1980).

[1503] 339 U.S. 460 (1950).

[1504] 458 U.S. 886 (1982).

[1505] 376 U.S. 254 (1964).

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sissippi. Listing demands that included desegregation of public facilities, hiring of black policemen, hiring of more black employees by local stores, and ending of verbal abuse by police, a group of several hundred blacks unanimously voted to boycott the area's white merchants. The boycott was carried out through speeches and nonviolent picketing and solicitation of others to cease doing business with the merchants. Individuals were designated to watch stores and identify blacks patronizing the stores; their names were then announced at meetings and published. Persuasion of others included social pressures and threats of social ostracism. Acts of violence did occur from time to time, directed in the main at blacks who did not observe the boycott.

The state Supreme Court imposed joint and several liability upon leaders and participants in the boycott, and upon the NAACP, for all of the merchants' lost earnings during a seven-year period on the basis of the common law tort of malicious interference with the merchants' business, holding that the existence of acts of physical force and violence and the use of force, violence, and threats to achieve the ends of the boycott deprived it of any First Amendment protection.

Reversing, the Court observed that the goals of the boycotters were legal and that most of their means were constitutionally protected; although violence was not protected, its existence alone did not deprive the other activities of First Amendment coverage. Thus, speeches and nonviolent picketing, both to inform the merchants of grievances and to encourage other blacks to join the boycott, were protected activities, and association for those purposes was also protected.[1506] That some members of the group might have engaged in violence or might have advocated violence did not result in loss of protection for association, absent a showing that those associating had joined with intent to further the unprotected activities.[1507] Nor was protection to be denied because nonparticipants had been urged to join by speech, by picketing, by identification, by threats of social ostracism, and by other expressive acts: "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."[1508] The boycott had a disruptive

[1506] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907–08 (1982).

[1507] 458 U.S. at 908.

[1508] 458 U.S. at 910. The Court cited Thomas v. Collins, 323 U.S. 516, 537 (1945), a labor picketing case, and Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971), a public issues picketing case, which had also relied on the labor cases. *Compare* NLRB v. Retail Store Employees, 447 U.S. 607, 618–19 (1980) (Justice Stevens concurring) (labor picketing that coerces or "signals" others to engage in activity that violates valid labor policy, rather than attempting to engage reason, prohibitable). To the contention that liability could be imposed on "store watchers" and on a group

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effect upon local economic conditions and resulted in loss of business for the merchants, but these consequences did not justify suppression of the boycott. Government may certainly regulate certain economic activities having an incidental effect upon speech (*e.g.*, labor picketing or business conspiracies to restrain competition),[1509] but that power of government does not extend to suppression of picketing and other boycott activities involving, as this case did, speech upon matters of public affairs with the intent of affecting governmental action and motivating private actions to achieve racial equality.[1510]

The critical issue, however, had been the occurrence of violent acts and the lower court's conclusion that they deprived otherwise protected conduct of protection. "The First Amendment does not protect violence . . . . No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, 'precision of regulation' is demanded . . . . Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages."[1511] In other words, the states may impose damages for the consequences of violent conduct, but they may not award compensation for the consequences of nonviolent, protected activity.[1512] Thus, the state courts had to compute, upon proof by the merchants, what damages had been the result of violence, and could not include losses suffered as a result of all the other activities comprising the boycott. And only those nonviolent persons who associated with others with an awareness of violence

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known as "Black Hats" who also patrolled stores and identified black patronizers of the businesses, the Court did not advert to the "signal" theory. "There is nothing unlawful in standing outside a store and recording names. Similarly, there is nothing unlawful in wearing black hats, although such apparel may cause apprehension in others." 458 U.S. at 925.

[1509] *See*, *e.g.*, FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) (upholding application of *per se* antitrust liability to trial lawyers association's boycott designed to force higher fees for representation of indigent defendants by court-appointed counsel).

[1510] In evaluating the permissibility of government regulation in this context that has an incidental effect on expression, the Court applied the standards of United States v. O'Brien, which permits a regulation "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restiction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 458 U.S. at 912, n.47, quoting *O'Brien*, 391 U.S. 367, 376–77 (1968) (footnotes omitted).

[1511] 458 U.S. at 916–17.

[1512] 458 U.S. at 917–18.

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and an intent to further it could similarly be held liable.[1513] Because most of the acts of violence had occurred early on, in 1966, there was no way constitutionally that much if any of the later losses of the merchants could be recovered in damages.[1514] As to the field secretary of the local NAACP, the Court refused to permit imposition of damages based upon speeches that could be read as advocating violence, because any violent acts that occurred were some time after the speeches, and a "clear and present danger" analysis of the speeches would not find them punishable.[1515] The award against the NAACP fell with the denial of damages against its local head, and, in any event, the protected right of association required a rule that would immunize the NAACP without a finding that it "authorized—either actually or apparently—or ratified unlawful conduct."[1516]

Claiborne Hardware is, thus, a seminal decision in the Court's effort to formulate standards governing state power to regulate or to restrict expressive conduct that comes close to or crosses over the line to encompass some violent activities; it requires great specificity and the drawing of fine discriminations by government so as to reach only that portion of the activity that does involve violence or the threat of violence, and forecloses the kind of "public policy" limit on demonstrations that was approved in *Hughes v. Superior Court*.[1517]

[1513] 458 U.S. at 918–29, relying on a series of labor cases and on the subversive activities association cases, *e.g.*, Scales v. United States, 367 U.S. 203 (1961), and Noto v. United States, 367 U.S. 290 (1961).

[1514] 458 U.S. at 920–26. The Court distinguished Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941), in which an injunction had been sustained against both violent and nonviolent activity, not on the basis of special rules governing labor picketing, but because the violence had been "pervasive." 458 U.S. at 923.

[1515] 458 U.S. at 926–29. The field secretary's "emotionally charged rhetoric . . . did not transcend the bounds of protected speech set forth in *Brandenburg v. Ohio*, 395 U.S. 444 (1969)."

[1516] 458 U.S. at 931. In ordinary business cases, the rule of liability of an entity for actions of its agents is broader. *E.g.*, American Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982). The different rule in cases of organizations formed to achieve political purposes rather than economic goals appears to require substantial changes in the law of agency with respect to such entities. Note, 96 HARV. L. REV. 171, 174–76 (1982).

[1517] "Concerted action is a powerful weapon. History teaches that special dangers are associated with conspiratorial activity. And yet one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means."

"[P]etitioners' ultimate objectives were unquestionably legitimate. The charge of illegality . . . derives from the means employed by the participants to achieve those goals. The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection."

"The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden

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More recently, disputes arising from anti-abortion protests outside abortion clinics have occasioned another look at principles distinguishing lawful public demonstrations from proscribable conduct. In *Madsen v. Women's Health Center*,[1518] the Court refined principles governing issuance of "content-neutral" injunctions that restrict expressive activity.[1519] The appropriate test, the Court stated, is "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant governmental interest." [1520] Regular time, place, and manner analysis (requiring that regulation be narrowly tailored to serve a significant governmental interest) "is not sufficiently rigorous," the Court explained, "because injunctions create greater risk of censorship and discriminatory application, and because of the established principle that an injunction should be no broader than necessary to achieve its desired goals." [1521] Applying its new test, the Court upheld an injunction prohibiting protesters from congregating, picketing, patrolling, demonstrating, or entering any portion of the public right-of-way within 36 feet of an abortion clinic. Similarly upheld were noise restrictions designed to ensure the health and well-being of clinic patients. Other aspects of the injunction, however, did not pass the test. Inclusion of private property within the 36-foot buffer was not adequately justified, nor was inclusion in the noise restriction of a ban on "images observable" by clinic patients. A ban on physically approaching any person within 300 feet of the clinic unless that person indicated a desire to communicate burdened more speech than necessary. Also, a ban on demonstrating within 300 feet of the residences of clinic staff was not sufficiently justified, the restriction covering a much larger zone than an earlier residential picketing ban that the Court had upheld.[1522]

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of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. [The burden can be met only] by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognizes the importance of avoiding the imposition of punishment for constitutionally protected activity. . . . A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees." 458 U.S. at 933–34.

[1518] 512 U.S. 753 (1994).

[1519] The Court rejected the argument that the injunction was necessarily content-based or viewpoint-based because it applied only to anti-abortion protesters. "An injunction by its very nature applies only to a particular group (or individuals) . . . . It does so, however, because of the group's past actions in the context of a specific dispute between real parties." There had been no similarly disruptive demonstrations by pro-abortion factions at the abortion clinic. 512 U.S. at 762.

[1520] 512 U.S. at 765.

[1521] 512 U.S. at 765.

[1522] Referring to Frisby v. Schultz, 487 U.S. 474 (1988).

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In *Schenck v. Pro-Choice Network of Western New York*,[1523] the Court applied *Madsen* to another injunction that placed restrictions on demonstrating outside an abortion clinic. The Court upheld the portion of the injunction that banned "demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities" what the Court called "fixed buffer zones." [1524] It struck down a prohibition against demonstrating "within fifteen feet of any person or vehicles seeking access to or leaving such facilities" what it called "floating buffer zones." [1525] The Court cited "public safety and order" [1526] in upholding the fixed buffer zones, but it found that the floating buffer zones "burden more speech than is necessary to serve the relevant governmental interests" [1527] because they make it "quite difficult for a protester who wishes to engage in peaceful expressive activity to know how to remain in compliance with the injunction." [1528] The Court also upheld a "provision, specifying that once sidewalk counselors who had entered the buffer zones were required to 'cease and desist' their counseling, they had to retreat 15 feet from the people they had been counseling and had to remain outside the boundaries of the buffer zones." [1529]

In *Hill v. Colorado*,[1530] the Court upheld a Colorado statute that made it unlawful, within 100 feet of the entrance to any health care facility, to "knowingly approach" within eight feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." [1531] This decision is notable because it upheld a statute, and not, as in *Madsen* and *Schenck*, merely an injunction directed to particular parties. The Court found the statute to be a content-neutral time, place, and manner regulation of speech that "reflects an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners . . . ." [1532] The restrictions were content-neutral because they regulated only the places where some speech may occur, and because they applied equally to all demonstrators, regardless of viewpoint. Although the restrictions did not apply to all speech, the "kind of cursory examination" that might

[1523] 519 U.S. 357 (1997).
[1524] 519 U.S. at 366 n.3.
[1525] 519 U.S. at 366 n.3.
[1526] 519 U.S. at 376.
[1527] 519 U.S. at 377.
[1528] 519 U.S. at 378.
[1529] 519 U.S. at 367.
[1530] 530 U.S. 703 (2000).
[1531] 530 U.S. at 707.
[1532] 530 U.S. at 714.

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be required to distinguish casual conversation from protest, education, or counseling is not "problematic."[1533] The law was narrowly tailored to achieve the state's interests. The eight-foot restriction did not significantly impair the ability to convey messages by signs, and ordinarily allowed speakers to come within a normal conversational distance of their targets. Because the statute allowed the speaker to remain in one place, persons who wished to hand out leaflets could position themselves beside entrances near the path of oncoming pedestrians, and consequently were not deprived of the opportunity to get the attention of persons entering a clinic.

In *McCullen v. Coakley*, the Court retained a content-neutral analysis similar to that in *Hill*, but nonetheless struck down a statutory 35-foot buffer zone at entrances and driveways of abortion facilities.[1534] The Court concluded that the buffer zone was not narrowly tailored to serve governmental interests in maintaining public safety and preserving access to reproductive healthcare facilities, the concerns claimed by Massachusetts to underlie the law.[1535] The opinion cited several alternatives to the buffer zone that would not curtail the use of public sidewalks as traditional public fora for speech, nor significantly burden the ability of those wishing to provide "sidewalk counseling" to women approaching abortion clinics. Specifically, the Court held that, to preserve First Amendment rights, targeted measures, such as injunctions, enforcement of antiharassment ordinances, and use of general crowd control authority, as needed, are preferable to broad, prophylactic measures.[1536]

Different types of issues were presented by *Hurley v. Irish-American Gay Group*,[1537] in which the Court held that a state's public accommodations law could not be applied to compel private organizers of a St. Patrick's Day parade to accept in the parade a unit that would proclaim a message that the organizers did not wish to promote. Each participating unit affects the message conveyed by the parade organizers, the Court observed, and application of the public accommodations law to the content of the organizers' message contravened the "fundamental rule . . . that a speaker has the autonomy to choose the content of his own message."[1538]

Leafleting, Handbilling, and the Like.—In *Lovell v. City of Griffin*,[1539] the Court struck down a permit system applying to the distribution of circulars, handbills, or literature of any kind. The

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[1533] 530 U.S. at 722.
[1534] 573 U.S. ___, No. 12–1168, slip op. at 11–18 (2014).
[1535] *Id.* at 19–23.
[1536] *Id.* at 23–29.
[1537] 515 U.S. 557 (1995).
[1538] 515 U.S. at 573.
[1539] 303 U.S. 444 (1938).

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First Amendment, the Court said, "necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest." [1540] State courts, responding to what appeared to be a hint in *Lovell* that prevention of littering and other interests might be sufficient to sustain a flat ban on literature distribution,[1541] upheld total prohibitions and were reversed. "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions . . . . We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press." [1542] In *Talley v. California*,[1543] the Court struck down an ordinance that banned all handbills that did not carry the name and address of the author, printer, and sponsor; conviction for violating the ordinance was set aside on behalf of one distributing leaflets urging boycotts against certain merchants because of their employment discrimination. The basis of the decision is not readily ascertainable. On the one hand, the Court celebrated anonymity. "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all . . . . [I]dentification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." [1544] On the other hand, responding to the city's defense that the ordinance was aimed at providing a means to identify those responsible for fraud, false advertising, and the like, the Court noted that "the ordinance is in no manner so lim-

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[1540] 303 U.S. at 452.

[1541] 303 U.S. at 451.

[1542] Schneider v. Town of Irvington, 308 U.S. 147, 161, 162 (1939). The Court noted that the right to distribute leaflets was subject to certain obvious regulations, id. at 160, and called for a balancing, with the weight inclined to the First Amendment rights. *See also* Jamison v. Texas, 318 U.S. 413 (1943).

[1543] 362 U.S. 60 (1960).

[1544] 362 U.S. at 64, 65.

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ited . . . .Therefore we do not pass on the validity of an ordinance limited to these or any other supposed evils." [1545]

Talley's anonymity rationale was strengthened in *McIntyre v. Ohio Elections Comm'n*,[1546] invalidating Ohio's prohibition on the distribution of anonymous campaign literature. There is a "respected tradition of anonymity in the advocacy of political causes," the Court noted, and neither of the interests asserted by Ohio justified the limitation. The state's interest in informing the electorate was "plainly insufficient," and, although the more weighty interest in preventing fraud in the electoral process may be accomplished by a direct prohibition, it may not be accomplished indirectly by an indiscriminate ban on a whole category of speech. Ohio could not apply the prohibition, therefore, to punish anonymous distribution of pamphlets opposing a referendum on school taxes.[1547]

The handbilling cases were distinguished in *City Council v. Taxpayers for Vincent*,[1548] in which the Court held that a city may prohibit altogether the use of utility poles for posting of signs. Although a city's concern over visual blight could be addressed by an anti-littering ordinance not restricting the expressive activity of distributing handbills, in the case of utility pole signs "it is the medium of expression itself" that creates the visual blight. Hence, the city's prohibition, unlike a prohibition on distributing handbills, was narrowly tailored to curtail no more speech than necessary to accomplish the city's legitimate purpose.[1549] Ten years later, however, the Court unanimously invalidated a town's broad ban on residential signs that permitted only residential identification signs, "for

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[1545] 362 U.S. at 64. In Zwickler v. Koota, 389 U.S. 241 (1967), the Court directed a lower court to consider the constitutionality of a statute which made it a criminal offense to publish or distribute election literature without identification of the name and address of the printer and of the persons sponsoring the literature. The lower court voided the law, but changed circumstances on a new appeal caused the Court to dismiss. Golden v. Zwickler, 394 U.S. 103 (1969).

[1546] 514 U.S. 334 (1995).

[1547] In Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999), the Court struck down a Colorado statute requiring initiative-petition circulators to wear identification badges. It found that "the restraint on speech in this case is more severe than was the restraint in *McIntyre*" because "[p]etition circulation is a less fleeting encounter, for the circulator must endeavor to persuade electors to sign the petition. . . . [T]he badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest." Id. at 199. In Watchtower Bible & Tract Soc'y v. Village of Stratton, 536 U.S. 150, 166 (2002), concern for the right to anonymity was one reason that the Court struck down an ordinance that made it a misdemeanor to engage in door-to-door advocacy without first registering with the mayor and receiving a permit.

[1548] 466 U.S. 789 (1984).

[1549] Justice Brennan argued in dissent that adequate alternative forms of communication were not readily available because handbilling or other person-to-person methods would be substantially more expensive, and that the regulation for the sake of aesthetics was not adequately justified.

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sale" signs, and signs warning of safety hazards.[1550] Prohibiting homeowners from displaying political, religious, or personal messages on their own property entirely foreclosed "a venerable means of communication that is unique and important," and that is "an unusually cheap form of communication" without viable alternatives for many residents.[1551] The ban was thus reminiscent of total bans on leafleting, distribution of literature, and door-to-door solicitation that the Court had struck down in the 1930s and 1940s. The prohibition in *Vincent* was distinguished as not removing a "uniquely valuable or important mode of communication," and as not impairing citizens' ability to communicate.[1552]

Sound Trucks, Noise.—Physical disruption may occur by other means than the presence of large numbers of demonstrators. For example, the use of sound trucks to convey a message on the streets may disrupt the public peace and may disturb the privacy of persons off the streets. The cases, however, afford little basis for a general statement of constitutional principle. *Saia v. New York*,[1553] while it spoke of "loud-speakers as today indispensable instruments of effective public speech," held only that a particular prior licensing system was void. A five-to-four majority upheld a statute in *Kovacs v. Cooper*,[1554] which was ambiguous with regard to whether all sound trucks were banned or only "loud and raucous" trucks and which the state court had interpreted as having the latter meaning. In another case, the Court upheld an antinoise ordinance which the state courts had interpreted narrowly to bar only noise that actually or immediately threatened to disrupt normal school activity during school hours.[1555] But the Court was careful to tie its ruling to the principle that the particular requirements of education necessitated observance of rules designed to preserve the school environment.[1556] More recently, reaffirming that government has "a substantial interest in protecting its citizens from unwelcome noise," the Court applied time, place, and manner analysis to uphold New York City's sound amplification guidelines designed to prevent excessive noise and assure sound quality at outdoor concerts in Central Park.[1557]

[1550] City of Ladue v. Gilleo, 512 U.S. 43 (1994).

[1551] 512 U.S. at 54, 57.

[1552] 512 U.S. at 54. The city's legitimate interest in reducing visual clutter could be addressed by "more temperate" measures, the Court suggested. Id. at 58.

[1553] 334 U.S. 558, 561 (1948).

[1554] 336 U.S. 77 (1949).

[1555] Grayned v. City of Rockford, 408 U.S. 104 (1972).

[1556] 408 U.S. at 117. Citing *Saia* and *Kovacs* as examples of reasonable time, place, and manner regulation, the Court observed: "If overamplified loudspeakers assault the citizenry, government may turn them down." Id. at 116.

[1557] Ward v. Rock Against Racism, 491 U.S. 781 (1989).

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Door-to-Door Solicitation and Charitable Solicitation.—In one of the Jehovah's Witness cases, the Court struck down an ordinance forbidding solicitors or distributors of literature from knocking on residential doors in a community, the aims of the ordinance being to protect privacy, to protect the sleep of many who worked night shifts, and to protect against burglars posing as canvassers. The five-to-four majority concluded that on balance "[t]he dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." [1558]

Later, although striking down an ordinance because of vagueness, the Court observed that it "has consistently recognized a municipality's power to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing. A narrowly drawn ordinance, that does not vest in municipal officers the undefined power to determine what messages residents will hear, may serve these important interests without running afoul of the First Amendment." [1559] The Court indicated that its precedents supported measures that would require some form of notice to officials and the obtaining of identification in order that persons could canvas house-to-house for charitable or political purposes.

However, an ordinance that limited solicitation of contributions door-to-door by charitable organizations to those that use at least 75% of their receipts directly for charitable purposes, defined so as to exclude the expenses of solicitation, salaries, overhead, and other administrative expenses, was invalidated as overbroad.[1560] A privacy rationale was rejected, as just as much intrusion was likely by permitted as by non-permitted solicitors. A rationale of prevention of fraud was unavailing, as it could not be said that all associations that spent more than 25% of their receipts on overhead were actually engaged in a profit-making enterprise, and, in any event, more narrowly drawn regulations, such as disclosure requirements, could serve this governmental interest.

[1558] Martin v. City of Struthers, 319 U.S. 141, 147 (1943).

[1559] Hynes v. Mayor of Oradell, 425 U.S. 610, 616–17 (1976).

[1560] Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980). *See also* Larson v. Valente, 456 U.S. 228 (1982) (state law distinguishing between religious organizations and their solicitation of funds on basis of whether organizations received more than half of their total contributions from members or from public solicitation violates the Establishment Clause). Meyer v. Grant, 486 U.S. 414 (1988) (criminal penalty on use of paid circulators to obtain signatures for ballot initiative suppresses political speech in violation of First and Fourteenth Amendments).

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Schaumburg was extended in *Secretary of State v. Joseph H. Munson Co.*,[1561] and *Riley v. National Federation of the Blind*.[1562] In *Munson*, the Court invalidated a Maryland statute limiting professional fundraisers to 25% of the amount collected plus certain costs, and allowing waiver of this limitation if it would effectively prevent the charity from raising contributions. In *Riley*, the Court invalidated a North Carolina fee structure containing even more flexibility.[1563] The Court saw "no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent," and was similarly hostile to any scheme that shifts the burden to the fundraiser to show that a fee structure is reasonable.[1564] Moreover, a requirement that fundraisers disclose to potential donors the percentage of donated funds previously used for charity was also invalidated in *Riley*, the Court indicating that the "more benign and narrowly tailored" alternative of disclosure to the state (accompanied by state publishing of disclosed percentages) could make the information publicly available without so threatening the effectiveness of solicitation.[1565]

In *Watchtower Bible & Tract Soc'y v. Village of Stratton*, the Court struck down an ordinance that made it a misdemeanor to engage in door-to-door advocacy—religious, political, or commercial—without first registering with the mayor and receiving a permit.[1566] "It is offensive to the very notion of a free society," the Court wrote, "that a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so."[1567] The ordinance violated the right to anonymity, burdened the freedom of speech of those who hold "religious or patriotic views" that prevent them from applying for a license, and effectively banned "a signifi-

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[1561] 467 U.S. 947 (1984).

[1562] 487 U.S. 781 (1988).

[1563] A fee of up to 20% of collected receipts was deemed reasonable, a fee of between 20 and 35% was permissible if the solicitation involved advocacy or the dissemination of information, and a fee in excess of 35% was presumptively unreasonable, but could be upheld upon one of two showings: that advocacy or dissemination of information was involved, or that otherwise the charity's ability to collect money or communicate would be significantly diminished.

[1564] 487 U.S. at 793.

[1565] 487 U.S. at 800. North Carolina's requirement for licensing of professional fundraisers was also invalidated in *Riley*, id. at 801–02. In Illinois ex rel. Madigan v. Telemarketing Assocs., 538 U.S. 600 (2003), the Court held unanimously that the First Amendment does not prevent a state from bringing fraud actions against charitable solicitors who falsely represent that a "significant" amount of each dollar donated would be used for charitable purposes.

[1566] 536 U.S. 150 (2002).

[1567] 536 U.S. at 165–66.

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cant amount of spontaneous speech" that might be engaged in on a holiday or weekend when it was not possible to obtain a permit.[1568]

The Problem of "Symbolic Speech".—Very little expression is "mere" speech. If it is oral, it may be noisy enough to be disturbing,[1569] and, if it is written, it may be litter;[1570] in either case, it may amount to conduct that is prohibitable in specific circumstances.[1571] Moving beyond these simple examples, one may see as well that conduct may have a communicative content, intended to express a point of view. Expressive conduct may consist in flying a particular flag as a symbol[1572] or in refusing to salute a flag as a symbol.[1573] Sit-ins and stand-ins may effectively express a protest about certain things.[1574]

Justice Jackson wrote: "There is no doubt that, in connection with the pledge, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a short cut from mind to mind."[1575] When conduct or action has a communicative content to it, governmental regulation or prohibition implicates the First Amendment, but this does not mean that such conduct or action is necessarily immune from governmental process. Thus, although the Court has had few opportunities to formulate First Amendment standards in this area, in upholding a congressional prohibition on draft-card burnings, it has stated the generally applicable rule. "[A] government regulation is sufficiently justified if it is within the constitutional power of Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged

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[1568] 536 U.S. at 167.

[1569] *E.g.*, Saia v. New York, 334 U.S. 558 (1948); Kovacs v. Cooper, 336 U.S. 77 (1949).

[1570] *E.g.*, Schneider v. Town of Irvington, 308 U.S. 147 (1939).

[1571] *Cf.* Cohen v. California, 403 U.S. 15 (1971).

[1572] Stromberg v. California, 283 U.S. 359 (1931).

[1573] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[1574] In Brown v. Louisiana, 383 U.S. 131 (1966), the Court held protected a peaceful, silent stand-in in a segregated public library. Speaking of speech and assembly, Justice Fortas said for the Court: "As this Court has repeatedly stated, these rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities." Id. at 141–42. *See also* Garner v. Louisiana, 368 U.S. 157, 185, 201 (1961) (Justice Harlan concurring). On a different footing is expressive conduct in a place where such conduct is prohibited for reasons other than suppressing speech. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (upholding Park Service restriction on overnight sleeping as applied to demonstrators wishing to call attention to the plight of the homeless).

[1575] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

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First Amendment freedom is no greater than is essential to the furtherance of that government interest." [1576] The Court has suggested that this standard is virtually identical to that applied to time, place, or manner restrictions on expression.[1577]

Although almost unanimous in formulating and applying the test in *O'Brien*, the Court splintered when it had to deal with one of the more popular forms of "symbolic" conduct of the late 1960s and early 1970s—flag burning and other forms of flag desecration. No unifying theory capable of application to a wide range of possible flag abuse actions emerged from the early cases. Thus, in *Street v. New York*,[1578] the defendant had been convicted under a statute punishing desecration "by words or act" upon evidence that when he burned the flag he had uttered contemptuous words. The conviction was set aside because it might have been premised on his words alone or on his words and the act together, and no valid governmental interest supported penalizing verbal contempt for the flag.[1579]

A few years later the Court reversed two other flag desecration convictions, one on due process/vagueness grounds, the other under the First Amendment. These cases were decided by the Court in a manner that indicated an effort to begin to resolve the standards of First Amendment protection of "symbolic conduct." In *Smith v. Goguen*,[1580] a statute punishing anyone who "publicly . . . treats contemptuously the flag of the United States" was held unconstitutionally vague, and a conviction for wearing trousers with a small United States flag sewn to the seat was overturned. The language subjected the defendant to criminal liability under a standard "so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag." [1581]

The First Amendment was the basis for reversal in *Spence v. Washington*,[1582] which set aside a conviction under a statute punishing the display of a United States flag to which something is

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[1576] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[1577] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 & n.8 (1984).

[1578] 394 U.S. 576 (1969).

[1579] 394 U.S. at 591–93. Four dissenters concluded that the First Amendment did not preclude a flat proscription of flag burning or flag desecration for expressive purposes. Id. at 594 (Chief Justice Warren), 609 (Justice Black), 610 (Justice White), and 615 (Justice Fortas). In Radich v. New York, 401 U.S. 531 (1971), *aff'g*, 26 N.Y.2d 114, 257 N.E.2d 30 (1970), an equally divided Court, Justice Douglas not participating, sustained a flag desecration conviction of one who displayed sculptures in a gallery, using the flag in apparently sexually bizarre ways to register a social protest. Defendant subsequently obtained his release on habeas corpus, United States ex rel. Radich v. Criminal Court, 459 F.2d 745 (2d Cir. 1972), *cert. denied*, 409 U.S. 115 (1973).

[1580] 415 U.S. 566 (1974).

[1581] 415 U.S. at 578.

[1582] 418 U.S. 405 (1974).

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attached or superimposed; Spence had hung his flag from his apartment window upside down with a peace symbol taped to the front and back. The act, the Court thought, was a form of communication, and because of the nature of the act, and the factual context and environment in which it was undertaken, the Court held it to be protected. The context included the fact that the flag was privately owned, that it was displayed on private property, and that there was no danger of breach of the peace. The nature of the act was that it was intended to express an idea and it did so without damaging the flag. The Court assumed that the state had a valid interest in preserving the flag as a national symbol, but left unclear whether that interest extended beyond protecting the physical integrity of the flag.[1583]

The underlying assumption that flag burning could be prohibited as a means of protecting the flag's symbolic value was later rejected. Twice, in 1989 and again in 1990, the Court held that prosecutions for flag burning at a public demonstration violated the First Amendment. First, in *Texas v. Johnson* [1584] the Court rejected a state desecration statute designed to protect the flag's symbolic value, and then in *United States v. Eichman* [1585] rejected a more limited federal statute purporting to protect only the flag's physical integrity. Both cases were decided by 5-to-4 votes, with Justice Brennan writing the Court's opinions.[1586] The Texas statute invalidated in *Johnson* defined the prohibited act of "desecration" as any physical mistreatment of the flag that the actor knew would seriously offend other persons. This emphasis on causing offense to others meant that the law was not "unrelated to the suppression of free expression" and that consequently the deferential standard of *United States v. O'Brien* was inapplicable. Applying strict scrutiny, the Court ruled that the state's prosecution of someone who burned a flag at a po-

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[1583] 418 U.S. at 408–11, 412–13. Subsequently, the Court vacated, over the dissents of Chief Justice Burger and Justices White, Blackmun, and Rehnquist, two convictions for burning flags and sent them back for reconsideration in the light of *Goguen* and *Spence*. Sutherland v. Illinois, 418 U.S. 907 (1974); Farrell v. Iowa, 418 U.S. 907 (1974). The Court, however, dismissed, "for want of a substantial federal question," an appeal from a flag desecration conviction of one who, with no apparent intent to communicate but in the course of "horseplay," blew his nose on a flag, simulated masturbation on it, and finally burned it. Van Slyke v. Texas, 418 U.S. 907 (1974).

[1584] 491 U.S. 397 (1989).

[1585] 496 U.S. 310 (1990).

[1586] In each case Justice Brennan's opinion for the Court was joined by Justices Marshall, Blackmun, Scalia, and Kennedy, and in each case Chief Justice Rehnquist and Justices White, Stevens, and O'Connor dissented. In *Johnson* the Chief Justice's dissent was joined by Justices White and O'Connor, and Justice Stevens dissented separately. In *Eichman* Justice Stevens wrote the only dissenting opinion, to which the other dissenters subscribed.

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litical protest was not justified under the state's asserted interest in preserving the flag as a symbol of nationhood and national unity. The Court's opinion left little doubt that the existing federal statute, 18 U.S.C. § 700, and the flag desecration laws of 47 other states would suffer a similar fate in a similar case. Doubt remained, however, as to whether the Court would uphold a "content-neutral" statute protecting the physical integrity of the flag.

Immediately following *Johnson*, Congress enacted a new flag protection statute providing punishment for anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States."[1587] The law was designed to be content-neutral and to protect the "physical integrity" of the flag.[1588] Nonetheless, in overturning convictions of flag burners, the Court found that the law suffered from "the same fundamental flaw" as the Texas law in *Johnson*. The government's underlying interest, characterized by the Court as resting upon "a perceived need to preserve the flag's status as a symbol of our Nation and certain national ideals,"[1589] still related to the suppression of free expression. Support for this interpretation was found in the fact that most of the prohibited acts are usually associated with disrespectful treatment of the flag; this suggested to the Court "a focus on those acts likely to damage the flag's symbolic value."[1590] As in *Johnson*, such a law could not withstand "most exacting scrutiny" analysis.

The Court's ruling in *Eichman* rekindled congressional efforts, postponed with enactment of the Flag Protection Act, to amend the Constitution to authorize flag desecration legislation at the federal and state levels. In both the House and the Senate these measures failed to receive the necessary two-thirds vote.[1591]

[1587] The Flag Protection Act of 1989, Pub. L. 101–131 (1989).

[1588] *See* H.R. REP. NO. 231, 101st Cong., 1st Sess. 8 (1989) ("The purpose of the bill is to protect the physical integrity of American flags in all circumstances, regardless of the motive or political message of any flag burner").

[1589] United States v. Eichman, 496 U.S. at 316.

[1590] 496 U.S. at 317.

[1591] In the 101st Congress, the House defeated H.J. Res. 350 by vote of 254 in favor to 177 against (136 CONG. REC. H4086 (daily ed. June 21, 1990), and the Senate defeated S.J. Res. 332 by vote of 58 in favor to 42 against (136 CONG. REC. S8737 (daily ed. June 26, 1990). In every Congress since then (though the 111th in 2009), constitutional amendments to allow Congress or the states to prohibit flag desecration have been proposed. In each Congress from the 104th through the 109th (1995–2006), the House passed such a proposal, but the Senate either rejected it or did not vote on it.

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RIGHTS OF ASSEMBLY AND PETITION

Background and Development

The right of petition took its rise from the modest provision made for it in chapter 61 of the Magna Carta (1215).[1592] To this meager beginning are traceable, in some measure, Parliament itself and its procedures for the enactment of legislation, the equity jurisdiction of the Lord Chancellor, and proceedings against the Crown by "petition of right." Thus, while the King summoned Parliament for the purpose of supply, the latter—but especially the House of Commons—petitioned the King for a redress of grievances as its price for meeting the financial needs of the Monarch, and as it increased in importance, it came to claim the right to dictate the form of the King's reply, until, in 1414, Commons declared itself to be "as well assenters as petitioners." Two hundred and fifty years later, in 1669, Commons further resolved that every commoner in England possessed "the inherent right to prepare and present petitions" to it "in case of grievance," and of Commons "to receive the same" and to judge whether they were "fit" to be received. Finally Chapter 5 of the Bill of Rights of 1689 asserted the right of the subjects to petition the King and "all commitments and prosecutions for such petitioning to be illegal." [1593]

Historically, therefore, the right of petition is the primary right, the right peaceably to assemble a subordinate and instrumental right, as if the First Amendment read: "the right of the people peaceably to assemble" in order to "petition the government." [1594] Today, however, the right of peaceable assembly is, in the language of the Court, "cognate to those of free speech and free press and is equally fundamental. . . . [It] is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions,—principles which the Fourteenth Amendment embodies in the general terms of its due process clause. . . . The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question . . . is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of

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[1592] C. Stephenson & F. Marcham, Sources of English Constitutional History 125 (1937).

[1593] 12 Encyclopedia of the Social Sciences 98 (1934).

[1594] United States v. Cruikshank, 92 U.S. 542, 552 (1876), reflects this view.

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speech which the Constitution protects." [1595] Furthermore, the right of petition has expanded. It is no longer confined to demands for "a redress of grievances," in any accurate meaning of these words, but comprehends demands for an exercise by the government of its powers in furtherance of the interest and prosperity of the petitioners and of their views on politically contentious matters.[1596] The right extends to the "approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." [1597]

The right of petition recognized by the First Amendment first came into prominence in the early 1830s, when petitions against slavery in the District of Columbia began flowing into Congress in a constantly increasing stream, which reached its climax in the winter of 1835. Finally on January 28, 1840, the House adopted as a standing rule: "That no petition, memorial, resolution, or other paper praying the abolition of slavery in the District of Columbia, or any State or Territories of the United States in which it now exists, shall be received by this House, or entertained in any way whatever." Because of efforts of John Quincy Adams, this rule was repealed five years later.[1598] For many years now the rules of the House of Representatives have provided that Members having petitions to present may deliver them to the Clerk and the petitions, except such as in the judgment of the Speaker are of an obscene or insulting character, shall be entered on the Journal and the Clerk shall furnish a transcript of such record to the official reporters of debates for publication in the Record.[1599] Even so, petitions for the repeal of the espionage and sedition laws and against military measures for recruiting resulted, in World War I, in imprisonment.[1600] Proces-

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[1595] DeJonge v. Oregon, 299 U.S. 353, 364, 365 (1937). *See also* Herndon v. Lowry, 301 U.S. 242 (1937).

[1596] *See* Eastern R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961).

[1597] California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). *See also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913–15 (1982); Missouri v. NOW, 620 F.2d 1301 (8th Cir. 1980), *cert. denied*, 449 U.S. 842 (1980) (because of its political nature, a boycott of states not ratifying the Equal Rights Amendment may not be subjected to antitrust suits).

[1598] The account is told in many sources. *E.g.*, Samuel flagg Bemis, John Quincy Adams and the Union, chs. 17, 18 and pp. 446–47 (1956); William Lee Miller, Arguing About Slavery: The Great Battle in the United States Congress (1996), 465–487; David P. Currie, The Constitution in Congress: Descent into the Maelstrom, 1829–1861 (2005), 3–23.

[1599] Rule 22, ¶ 1, Rules of the House of Representatives, H.R. Doc. No. 256, 101st Congress, 2d Sess. 571 (1991).

[1600] 1918 Att'y Gen. Ann. Rep. 48.

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sions for the presentation of petitions in the United States have not been particularly successful. In 1894 General Coxey of Ohio organized armies of unemployed to march on Washington and present petitions, only to see their leaders arrested for unlawfully walking on the grass of the Capitol. The march of the veterans on Washington in 1932 demanding bonus legislation was defended as an exercise of the right of petition. The Administration, however, regarded it as a threat against the Constitution and called out the army to expel the bonus marchers and burn their camps. Marches and encampments have become more common since, but the results have been mixed.

The Cruikshank Case.—The right of assembly was first before the Supreme Court in 1876[1601] in the famous case of *United States v. Cruikshank*.[1602] The Enforcement Act of 1870[1603] forbade conspiring or going onto the highways or onto the premises of another to intimidate any other person from freely exercising and enjoying any right or privilege granted or secured by the Constitution of the United States. Defendants had been indicted under this Act on charges of having deprived certain citizens of their right to assemble together peaceably with other citizens "for a peaceful and lawful purpose." Although the Court held the indictment inadequate because it did not allege that the attempted assembly was for a purpose related to the Federal Government, its *dicta* broadly declared the outlines of the right of assembly. "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States."[1604] Absorption of the assembly and petition clauses into the liberty protected by

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[1601] *See*, however, Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868), in which the Court gave as one of its reasons for striking down a tax on persons leaving the state its infringement of the right of every citizen to come to the seat of government and to transact any business he might have with it.

[1602] 92 U.S. 542 (1876).

[1603] Act of May 31, 1870, ch. 114, 16 Stat. 141 (1870).

[1604] United States v. Cruikshank, 92 U.S. 542, 552–53 (1876).

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the due process clause of the Fourteenth Amendment means, of course, that the *Cruikshank* limitation is no longer applicable.[1605]

The Hague Case.—Illustrative of this expansion is *Hague v. CIO*,[1606] in which the Court, though splintered with regard to reasoning and rationale, struck down an ordinance that vested an uncontrolled discretion in a city official to permit or deny any group the opportunity to conduct a public assembly in a public place. Justice Roberts, in an opinion that Justice Black joined and with which Chief Justice Hughes concurred, found protection against state abridgment of the rights of assembly and petition in the Privileges and Immunities Clause of the Fourteenth Amendment. "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."[1607] Justices Stone and Reed invoked the Due Process Clause of the Fourteenth Amendment for the result, thereby claiming the rights of assembly and petition for aliens as well as citizens. "I think respondents' right to maintain it does not depend on their citizenship and cannot rightly be made to turn on the existence or non-existence of a purpose to disseminate information about the National Labor Relations Act. It is enough that petitioners have prevented respondents from holding meetings and disseminating information whether for the organization of labor unions or for any other lawful purpose."[1608] This due process view of Justice Stone's has carried the day over the privileges and immunities approach.

Later cases tend to merge the rights of assembly and petition into the speech and press clauses, and, indeed, all four rights may well be considered as elements of an inclusive right to freedom of expression. While certain conduct may still be denominated as either petition[1609] or assembly[1610] rather than speech, there seems

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[1605] DeJonge v. Oregon, 299 U.S. 353 (1937); Hague v. CIO, 307 U.S. 496 (1939); Bridges v. California, 314 U.S. 252 (1941); Thomas v. Collins, 323 U.S. 516 (1945).

[1606] 307 U.S. 496 (1939).

[1607] 307 U.S. at 515. For another holding that the right to petition is not absolute, *see* McDonald v. Smith, 472 U.S. 479 (1985) (the fact that defamatory statements were made in the context of a petition to government does not provide absolute immunity from libel).

[1608] 307 U.S. at 525.

[1609] *E.g.*, United States v. Harriss, 347 U.S. 612 (1954); Eastern R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961); BE & K Construction Co. v. NLRB, 536 U.S. 516 (2002).

[1610] *E.g.*, Coates v. City of Cincinnati, 402 U.S. 611 (1971).

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little question that similar standards will be applied in most cases.[1611] For instance, as discussed earlier, where a public employee sues a government employer under the First Amendment's Speech Clause, the employee must show that he or she spoke as a citizen on a matter of public concern.[1612] In *Borough of Duryea, Pennsylvania v. Guarnieri*,[1613] the Court similarly held that a police chief who alleged retaliation for having filed a union grievance challenging his termination was not protected by the right to petition, because his complaints did not go to matters of public concern.[1614]

[1611] *See, e.g.*, Borough of Duryea, Pennsylvania v. Guarnieri, 564 U.S. ___, No. 09–1476, slip op. at 7 (2011) ("It is not necessary to say that the [Speech and Petition] Clauses are identical in their mandate or their purpose and effect to acknowledge that the rights of speech and petition share substantial common ground"); *But see* id. ("Courts should not presume there is always an essential equivalence in the [Speech and Petition] Clauses or that Speech Clause precedents necessarily and in every case resolve Petition Clause claims").

[1612] Connick v. Myers, 461 U.S. 138 (1983).

[1613] 564 U.S. ___, No. 09–1476, slip op. (2011).

[1614] Justice Scalia, in dissent, disputed the majority's suggestion that a petition need be of "public concern" to be protected, noting that the Petition Clause had historically been a route for seeking relief of private concerns. Slip op. at 5–7 (2011) (Scalia, J., dissenting). Justice Scalia also suggested that the Clause should be limited to petitions directed to an executive branch or legislature, and that grievances submitted to an adjuciatory body are not so protected. Id. at 1–3.

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