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Freedom of Speech and Press: Exceptions to the First Amendment

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Summary

The First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." This language restricts government's ability to constrain the speech of citizens. The prohibition on abridgment of the freedom of speech is not absolute. Certain types of speech may be prohibited outright. Some types of speech may be more easily constrained than others. Furthermore, speech may be more easily regulated depending upon the location at which it takes place.

This report provides an overview of the major exceptions to the First Amendment—of the ways that the Supreme Court has interpreted the guarantee of freedom of speech and press to provide no protection or only limited protection for some types of speech. For example, the Court has decided that the First Amendment provides no protection for obscenity, child pornography, or speech that constitutes what has become widely known as "fighting words." The Court has also decided that the First Amendment provides less than full protection to commercial speech, defamation (libel and slander), speech that may be harmful to children, speech broadcast on radio and television (as opposed to speech transmitted via cable or the Internet), and public employees' speech.

Even speech that enjoys the most extensive First Amendment protection may be subject to "regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Furthermore, even speech that enjoys the most extensive First Amendment protection may be restricted on the basis of its content if the restriction passes "strict scrutiny" (i.e., if the government shows that the restriction serves "to promote a compelling interest" and is "the least restrictive means to further the articulated interest").

This report will outline many of the standards the government must meet when attempting to regulate speech in a constitutional manner. The report will be updated periodically to reflect new developments in the case law.

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Introduction

The First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." This language restricts government's ability to constrain the speech of citizens. The prohibition on abridgment of the freedom of speech is not absolute. Certain types of speech may be prohibited outright. Some types of speech may be more easily constrained than others. Furthermore, speech may be more easily regulated depending upon the location at which it takes place.

This report provides an overview of the major exceptions to the First Amendment—of the ways that the Supreme Court has interpreted the guarantee of freedom of speech and press to provide no protection or only limited protection for some types of speech.[1] For example, the Court has decided that the First Amendment provides no protection for obscenity, child pornography, or speech that constitutes what has become widely known as "fighting words." The Court has also decided that the First Amendment provides less than full protection to commercial speech, defamation (libel and slander), speech that may be harmful to children, speech broadcast on radio and television (as opposed to speech transmitted via cable or the Internet), and public employees' speech.

Even speech that enjoys the most extensive First Amendment protection may be subject to "regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Furthermore, even speech that enjoys the most extensive First Amendment protection may be restricted on the basis of its content if the restriction passes "strict scrutiny" (i.e., if the government shows that the restriction serves "to promote a compelling interest" and is "the least restrictive means to further the articulated interest").

Unprotected Speech

The Supreme Court has identified categories of speech that are unprotected by the First Amendment and may be prohibited entirely. Among them are obscenity, child pornography, and speech that constitutes so-called "fighting words" or "true threats." In a 2010 case, the Court made clear that it would not be likely to add more categories to the list of types of speech that currently fall outside the First Amendment's purview, but it did not entirely rule out the possibility that other forms of unprotected speech exist.[2]

[1] Supreme Court cases supporting all the prohibitions and restrictions on speech noted in this and the next paragraph are cited in footnotes accompanying the subsequent discussion of these prohibitions and restrictions.

[2] U.S. v. Stevens, 559 U.S. 460 (2010) ("Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that "depictions of animal cruelty" is among them. We need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them.").

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Obscenity[3]

Obscenity is unique in being the only type of speech to which the Supreme Court has denied First Amendment protection without regard to whether it is harmful to individuals. According to the Court, there is evidence that, at the time of the adoption of the First Amendment, obscenity "was outside the protection intended for speech and press."[4] Consequently, obscenity may be banned simply because a legislature concludes that banning it protects "the social interest in order and morality."[5] No actual harm, let alone compelling governmental interest, need be shown in order to ban it.

The fundamental question in obscenity cases is whether the speech at issue actually constitutes obscenity. This determination is by no means a simple one. Obscenity is not synonymous with pornography, as most pornography is not legally obscene. Most pornography, in fact, is protected by the First Amendment. To be obscene, pornography must, at a minimum, "depict or describe patently offensive 'hard core' sexual conduct."[6] The Supreme Court has created a three-part test, known as the *Miller* test, to determine whether a work is obscene. The *Miller* test asks:

> (a) whether the "average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[7]

The Supreme Court has clarified that only "the first and second prongs of the *Miller* test—appeal to prurient interest and patent offensiveness—are issues of fact for the jury to determine applying contemporary community standards."[8] As for the third prong, "[t]he proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole."[9]

The Supreme Court has allowed one exception to the rule that obscenity is not protected by the First Amendment: one has a constitutional right to possess obscene material "in the privacy of his

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[3] CRS Report 98-670, *Obscenity, Child Pornography, and Indecency: Brief Background and Recent Developments*, by Kathleen Ann Ruane.

[4] Roth v. United States, 354 U.S. 476, 483 (1957). However, Justice Douglas, dissenting, wrote: "[T]here is no special historical evidence that literature dealing with sex was intended to be treated in a special manner by those who drafted the First Amendment." *Id.* at 514.

[5] *Id.* at 485.

[6] Miller v. California, 413 U.S. 15, 27 (1973).

[7] *Id.* at 24 (citation omitted).

[8] Pope v. Illinois, 481 U.S. 497, 500 (1987). In *Hamling v. United States*, 418 U.S. 87, 105 (1974), the Court noted that a "community" was not any "precise geographic area," and suggested that it might be less than an entire state. In *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 577 (2002), the Supreme Court recognized that "Web publishers currently lack the ability to limit access to their sites on a geographic basis," and that therefore the use of community standards to define "obscenity" "would effectively force all speakers on the Web to abide by the 'most puritan' community's standards." Nevertheless, the Court found that use of community standards "does not *by itself* render" a statute unconstitutional." *Id.* at 585 (emphasis in original).

[9] *Pope*, 481 U.S. at 500-501.

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own home."[10] However, there is no constitutional right to provide obscene material for private use[11] or even to acquire it for private use.[12]

Child Pornography[13]

Child pornography is material that visually depicts sexual conduct by children.[14] It is unprotected by the First Amendment even when it is not obscene; that is, child pornography need not meet the *Miller* test to be banned. Because of the legislative interest in destroying the market for the exploitative use of children, there is no constitutional right to possess child pornography even in the privacy of one's own home.[15]

In 1996, Congress enacted the Child Pornography Protection Act (CPPA), which defined "child pornography" to include visual depictions that *appear* to be of a minor, even if no minor is actually used. The Supreme Court, however, declared the CPPA unconstitutional to the extent that it prohibited pictures that are produced without actual minors.[16] Pornography that uses actual children may be banned because laws against it target "[t]he production of the work, not its content"; the CPPA, by contrast, targeted the content, not the production.[17] The government "may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'"[18] In 2003, Congress responded by enacting Title V of the PROTECT Act, P.L. 108-21, which prohibits any "digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct." It also prohibits "a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that ... depicts a minor engaging in sexually explicit conduct," and is obscene or lacks serious literary, artistic, political, or scientific value.

Fighting Words and True Threats

So-called "fighting words" also lay beyond the pale of First Amendment protection.[19] The "fighting words" doctrine began in *Chaplinsky v. New Hampshire*, where the Court held that fighting words, by their very utterance, inflict injury or tend to incite an immediate breach of the

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[10] Stanley v. Georgia, 394 U.S. 557, 568 (1969).

[11] United States v. Reidel, 402 U.S. 351 (1971).

[12] United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973).

[13] CRS Report 98-670, *Obscenity, Child Pornography, and Indecency: Brief Background and Recent Developments*, by Kathleen Ann Ruane.

[14] New York v. Ferber, 458 U.S. 747, 764 (1982). The definition of "sexually explicit conduct" in the federal child pornography statute includes "lascivious exhibition of the genitals or pubic area of any person [under 18], and "is not limited to nude exhibitions or exhibitions in which the outlines of those areas [are] discernible through clothing." 18 U.S.C. §§ 2256(2)(A)(v), 2252 note.

[15] Osborne v. Ohio, 495 U.S. 103 (1990).

[16] Ashcroft v. Free Speech Coalition, 435 U.S. 234 (2002).

[17] *Id.* at 249; see also, *id.* at 242.

[18] *Id.* at 253.

[19] A subset of laws that prohibit "fighting words" are laws that prohibit speech expressed with the intent to threaten. The Supreme Court has found that true threats may be punished without offending the constitution. *See* Virginia v. Black, 538 U.S. 343, 363 (2003)(finding that cross-burning is a particularly virulent form of intimidation that may be punished as a "true threat").

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peace and may be punished consistent with the First Amendment.[20] In *Chaplinsky*, the Court upheld a statute which prohibited a person from addressing "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place," calling "him by any offensive or derisive name," or making "any noise or exclamation in his presence and hearing with the intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."[21] The state court construed the statute as forbidding only those expressions that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark [was] addressed."[22] Given the limited scope of application, the Supreme Court held that the statute at issue did not proscribe protected expression.[23]

This category of proscribable speech requires the threat of an immediate breach of peace in order to be punishable. In *Cohen v. California*, the Supreme Court held that words on a t-shirt that contained an expletive were not directed at a person in particular and could not be said to incite an immediate breach of the peace.[24] For that reason, profane words that are not accompanied by any evidence of violence or public disturbance are not "fighting words."[25] The Court went on to describe the value of expression in communicating emotion.[26] In the Court's view, certain words, including expletives, which could in other contexts be construed as fighting words, may be indispensable in effectively communicating emotion, a form of expression protected by the First Amendment.[27] Particular words, such as certain expletives, in and of themselves, likely could not be universally defined as "fighting words."

In *Brandenburg v. Ohio*, the Supreme Court struck down an Ohio statute that criminalized advocating violent means to bring about social and economic change.[28] The Court found that the statute failed to distinguish between advocacy, which is protected by the First Amendment, and incitements to "imminent lawless action," which are not protected.[29] These cases illustrate that "fighting words" require an immediate risk of a breach of peace in order to be proscribable. What speech is proscribable, therefore, appears highly dependent upon the context in which it arises.[30]

Relatedly, Justice Holmes, in one of his most famous opinions, wrote:

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[20] *Chaplinsky*, 315 U.S. at 572.

[21] *Id.* at 569.

[22] *Id.* at 572.

[23] *Id.*

[24] 403 U.S. 15, 20 (1971).

[25] *Id.*

[26] *Id.* at 26.

[27] *Id.*

[28] 395 U.S. 444, 446 (1969)(*per curiam*).

[29] *Id.* at 448.

[30] *See* Odem v. Mississippi, 881 So.2d 940, 948 (Miss. Ct. App. 2004)(finding that complaints and shouts of profanity from the defendant rose to the level of "fighting words" where the officer to whom he spoke did not initiate the conversation nor did the officer have the opportunity to walk away); *see also* Washington v. King, 145 P.3d 1224 (Wash. Ct. App. 2006)(noting that "it is context that makes a threat "true" or serious), Commonwealth v. Pike, 756 N.E.2d 1157, 1158-60 (Mass. App. Ct. 2001)(upholding the conviction of a woman for violation of her neighbor's civil rights where she posted signs in her yard accusing homosexuals of molesting young children and yelled insulting names as well as invitations to a physical fight because the words and conduct constituted "fighting words").

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> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.... The question in every case is whether the words used ... create a clear and present danger.[31]

In its current formulation of this principle, the Supreme Court held that "advocacy of the use of force or of law violation" is protected unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[32] Similarly, the Court held that a statute prohibiting threats against the life of the President could be applied only against speech that constitutes a "true threat," and not against mere "political hyperbole."[33]

Protected Speech

All other types of speech are protected by the First Amendment. In general, the government may not prohibit the citizenry from engaging in speech. However, that does not mean that speech may not be subjected to regulation. The following subsections address different ways in which the government constitutionally may place burdens upon speech that is protected, to varying degrees, by the First Amendment.

Content-Based Restrictions

In cases of content-based restrictions of speech other than fighting words or true threats, the Supreme Court applies "strict scrutiny," which means that it will uphold a content-based restriction only if it is necessary "to promote a compelling interest," and is "the least restrictive means to further the articulated interest."[34] Rigorous analysis is required because the government, generally, is not constitutionally allowed to favor one type of content or idea by suppressing or otherwise burdening another type of content or idea.[35]

Thus, it is unconstitutional for a state to proscribe a newspaper from publishing the name of a rape victim, lawfully obtained.[36] By contrast, "[n]o one would question but that a government

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[31] Schenck v. United States, 249 U.S. 47, 52 (1919).

[32] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). *See also*, Stewart v. McCoy, 537 U.S. 993 (2002) (Justice Stevens' statement accompanying denial of certiorari).

[33] Watts v. United States, 394 U.S. 705, 708 (1969). *See also*, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Planned Parenthood v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (*en banc*), *cert. denied,* 539 U.S. 958 (2003) (the "Nuremberg Files" case); Virginia v. Black, 538 U.S. 343, 360 (2003) ("Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.").

[34] Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115, 126 (1989). The Court does not apply strict scrutiny to another type of content-based restrictions—restrictions on commercial speech, which is discussed below.

[35] Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995):

> Discrimination against speech because of its message is presumed to be unconstitutional. . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. *Id*. at 828-29.

[36] 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 (continued...)

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might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."[37] The government, therefore, may restrict speech based upon its content, but only when the restriction satisfies the highest level of scrutiny the Court can apply.

Prior Restraint

There are two ways in which the government may attempt to restrict speech. The more common way is to make a particular category of speech, such as obscenity or defamation, subject to criminal prosecution or civil suit, and then, if someone engages in the proscribed category of speech, to hold a trial and impose sanctions if appropriate. The second way is by prior restraint, which may occur in two ways. First, a statute may require that a person submit the speech that he wishes to disseminate—a movie, for example—to a governmental body for a license to disseminate it—for example, to show the movie. Second, a court may issue a temporary restraining order or an injunction against engaging in particular speech—publishing the Pentagon Papers, for example.

With respect to both these types of prior restraint, the Supreme Court has written that "[a]ny system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity."[38] Prior restraints, it has held,

> are the most serious and the least tolerable infringement on First Amendment rights.... A prior restraint ... by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time. The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events.[39]

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."[40] 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, on temporary restraining orders and preliminary

(...continued)

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 material did not participate in the interception, and the communication concerns a public issue.

[37] Near v. Minnesota, 283 U.S. 697, 716 (1931).

[38] Freedman v. Maryland, 380 U.S. 51, 57, 58 (1965) ("a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards"); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (injunction sought by United States against publication of the Pentagon Papers denied).

[39] Nebraska Press Association v. Stuart, 427 U.S. 539, 559 (1976) (striking down a court order restraining the publication or broadcast of accounts of confessions or admissions made by the defendant at a criminal trial). Injunctions that are designed to restrict merely the time, place, or manner of a particular expression are subject to a less stringent application of First Amendment principles; see, "Time, Place, and Manner Restrictions," below.

[40] 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").

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injunctions pending final judgment, not on permanent injunctions after a final judgment is made that the restricted speech is not protected by the First Amendment.[41]

In the case of a statute that imposes prior restraint, "a prescreening arrangement can pass constitutional muster if it includes adequate procedural safeguards."[42] These procedural safeguards, the Court wrote, include that "the burden of proving that the [speech] is unprotected expression must rest on the censor," and "that the censor will, within a specified brief period, either issue a license or go to court to restrain [speech]."[43] In the case of time, place, or manner restrictions (and presumably other forms of speech that do not receive full First Amendment protection), lesser procedural safeguards are adequate.[44]

Prior restraints are permitted in some circumstances. The Supreme Court has written, in dictum, "that traditional prior restraint doctrine may not apply to [commercial speech],"[45] and the Court has not ruled whether it does. "The vast majority of [federal] circuits ... do not apply the doctrine of prior restraint to commercial speech."[46] "Some circuits [however] have explicitly indicated that the requirement of procedural safeguards in the context of a prior restraint indeed applies to commercial speech."[47]

Furthermore, "*only* content-based injunctions are subject to prior restraint analysis."[48] 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.[49]

Forum Doctrine

One of the first analyses in which a court will engage when examining a law that burdens protected speech is the forum analysis. The analysis is important because speech may be more easily regulated depending upon where it takes place. For example, speech that cannot be restricted in a public park may be proscribable entirely if it occurs on a military base.

The Supreme Court has identified different types of fora. Some public spaces, such as streets and parks, are known as "traditional public forums," which means that they generally are open to all people to express themselves by speech-making, demonstrating, or leafleting, and the like. The government may exclude speakers from traditional public forums "only when the exclusion is

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

[42] Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 571 n.13 (1980).

[43] *Freedman*, 380 U.S. at 58, 59.

[44] Thomas v. Chicago Park District, 534 U.S. 316, 322-323 (2002).

[45] *Central Hudson*, 447 U.S. at 571 n.13.

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

[47] New York Magazine v. Metropolitan Transportation Authority, 136 F.3d 123, 131 (2d Cir. 1998), *cert. denied*, 525 U.S. 824 (1998); citing as examples, 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).

[48] 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*" (italics in original)). For the test regarding content-neutral injunctions, see the section on "Time, Place, and Manner Restrictions," below.

[49] *Bosley*, *supra* footnote 46, at 930; Lemley and Volokh, *supra* footnote 41 (arguing that intellectual property should have the same First Amendment protection from preliminary injunctions as other speech).

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necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."[50] Likewise, in traditional public forums, the government may limit speech on the basis of its content only if it shows "that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[51] Thus, in traditional public forums, the exclusion of speakers or of speech based on its content is constitutional only if it satisfies what the Court calls "strict scrutiny."

In traditional public forums, the government may regulate speech as to its time, place, and manner of expression, so that, for example, two demonstrations do not occur at the same time and place. The Supreme Court will uphold "regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[52] A "significant" government interest, which is required for a time, place, or manner restriction to be constitutional, may be less vital than a "compelling" government interest, which is required for a content-based exclusion of speech from a traditional public forum to be constitutional.

A second category of public forum is the designated public forum, which "consists of public property which the State has opened for use by the public as a place for expressive activity."[53] Such a forum "may be created for a limited purpose such as use by certain groups" (e.g., student groups) or for the discussion of certain subjects (e.g., school board business),[54] but, within the framework of such legitimate limitations, "a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."[55] Thus, "[g]overnment restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum."[56]

A third category of forum is "[p]ublic property which is not by tradition or designation a forum for public communication.... "[57] The Supreme Court has held that "the First Amendment does not guarantee access to property simply because it is owned and controlled by the government.... [T]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[58] Thus, although public streets and parks are traditional public forums, a sidewalk in front of a post office, which belongs to the post office, is not a traditional nor a dedicated public forum, and the government may prohibit solicitation on such a sidewalk, on the ground that "solicitation is inherently disruptive of the Postal Service's business."[59] A Court plurality found this speech restriction reasonable,[60] and, "[i]n such a forum, a government entity may impose restrictions on speech that are reasonable and viewpoint-

[50] Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 800 (1985).

[51] Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983).

[52] *Id*.

[53] *Id*.

[54] *Id*. at 46 n.7.

[55] *Id*. at 46.

[56] Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 1132 (2009).

[57] *Perry Education Assn*., 460 U.S. at 46.

[58] United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129-130 (1981).

[59] United States v. Kokinda, 497 U.S. 720, 732 (1990).

[60] *Id*. at 727 ("regulation of speech activity where the Government has not dedicated its property to First Amendment activity is examined only for reasonableness").

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neutral."[61] Such restrictions, in other words, need not meet strict scrutiny. Also falling into the category of nonpublic forums are military bases,[62] prisons,[63] and school mail systems.[64]

Non-Content-Based Restrictions

If the government limits speech, but its purpose in doing so is not based on the content of the speech, then the limitation on speech may still violate the First Amendment, but it is less likely than a content-based restriction to do so. This is because the Supreme Court applies less than "strict scrutiny" to non-content-based restrictions. With respect to non-content-based restrictions, the Court requires that the governmental interest be "significant" or "substantial" or "important," but not necessarily, as with content-based restrictions, "compelling." And, in the case of non-content-based restrictions, the Court requires that the restriction be narrowly tailored, but not, as with content-based restrictions, that it be the least restrictive means to advance the governmental interest.

Two types of speech restrictions that receive this "intermediate" scrutiny are (1) time, place, or manner restrictions, and (2) incidental restrictions, which are restrictions aimed at conduct other than speech, but that incidentally restrict speech. This report includes separate sections on these two types of restrictions. In addition, restrictions on commercial speech, though content-based, are subject to similar intermediate scrutiny; this report also includes a separate section on commercial speech. Finally, bans on nude dancing and zoning restrictions on pornographic theaters and bookstores, although discriminating on the basis of the content of speech, receive intermediate scrutiny because, according to the Supreme Court, they are aimed at combating "secondary effects," such as crime, and not at the content of speech.

Time, Place, and Manner Restrictions

Even speech that enjoys the most extensive First Amendment protection may be subject to "regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[65] In the case in which this language appears, the Supreme Court allowed a city ordinance that banned picketing "before or about" any residence to be enforced to prevent picketing outside the residence of a doctor who performed abortions, even though the picketing occurred on a public street. The Court noted that "[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech."[66]

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[61] Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 1132 (2009).

[62] Greer v. Spock, 424 U.S. 828 (1976). See also, United States v. Apel, No. 12-1038, slip op. (2014) (holding that commanding military officers have broad statutory authority to exclude civilians from the grounds of a military base, including roads that are generally open to the public).

[63] Adderley v. Florida, 385 U.S. 39 (1966) (holding that a sheriff could lawfully remove protesters from a county jail, because the property was closed to the public and the removal of the protesters served a security purpose).

[64] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

[65] Frisby v. Schultz, 487 U.S. 474, 481 (1988).

[66] *Id.* at 487.

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Thus, the Court, while acknowledging that music, as a form of expression and communication, is protected under the First Amendment, upheld volume restrictions placed on outdoor music in order to prevent intrusion on those in the area.[67] Other significant governmental interests, besides protection of captive audiences, may justify content-neutral time, place, and manner restrictions. For example, in order to prevent crime and maintain property values, a city may place zoning restrictions on "adult" theaters and bookstores.[68] And, in order to maintain the orderly movements of crowds at a state fair, a state may limit the distribution of literature to assigned locations.[69]

However, a time, place, and manner restriction will not be upheld in the absence of sufficient justification or if it is not narrowly tailored. Thus, the Court held unconstitutional a total restriction on displaying flags or banners on public sidewalks surrounding the Supreme Court.[70] A lack of sufficiently narrow tailoring was also the reason the court struck down a statutory buffer zone prohibiting speech near abortion clinics in Massachusetts, which will be discussed further below.[71] Lastly, a time, place, and manner restriction will not be upheld if it fails to "leave open ample alternative channels for communication." Accordingly, the Court held unconstitutional an ordinance that prohibited the display of signs from residences, because "[d]isplaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else."[72]

When a court issues an injunction that restricts the time, place, or manner of a particular form of expression, because prior restraint occurs, "a somewhat more stringent application of general First Amendment principles" is required than is required in the case of a generally applicable statute or ordinance that restricts the time, place, or manner of speech.[73] Instead of asking whether the restrictions are "narrowly tailored to serve a significant governmental interest," a court must ask "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."[74] Applying this standard, the Supreme Court, in *Madsen v. Women's Health Center, Inc.*, upheld a state court injunction that had ordered the establishment of a 36-foot buffer zone on a public street outside a particular health clinic that performed abortions. The Court in this case also upheld an injunction against noise during particular hours, but found that a "broad prohibition on all 'images observable' burdens speech more than necessary to achieve the purpose of limiting threats to clinic patients or their families."[75] It also

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

[68] Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976); Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986). Although singling out "adult" material might appear to be a content-based distinction, the Court in *Renton* said that regulations of speech are content-neutral if they "are *justified* without reference to the content of the regulated speech." 475 U.S. at 48 (emphasis in original). Zoning restrictions are justified as measures to "prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views." *Id.*

[69] Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

[70] United States v. Grace, 461 U.S. 171 (1983).

[71] McCullen v. Coakley, No. 12-1168, slip op. (2014), available at http://www2.bloomberglaw.com/public/desktop/document/McCullen_v_Coakley_No_121168_US_June_26_2014_Court_Opinion.

[72] City of Ladue v. Gilleo, 512 U.S. 43 (1994).

[73] Madsen v. Women's Health Center, Inc., 512 U.S. 753, 765 (1994). In this case, the Court held that the challenged injunction was content-neutral, even though it was directed at abortion protesters, because its purpose was to protect patients, not to interfere with the protesters' message.

[74] *Id.* This is not "prior restraint analysis," which courts apply to content-based injunctions; *see*, "Content-Based Restrictions," *supra*.

[75] *Id.* at 773.

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struck down a prohibition on all uninvited approaches of persons seeking the services of the clinic, and a prohibition against picketing within 300 feet of the residences of clinic staff. The Court distinguished the 300-foot restriction from the ordinance it had previously upheld that banned picketing "before or about" any residence.

In *Schenck v. Pro-Choice Network of Western New York*, the Court applied *Madsen* to another injunction that placed restrictions on demonstrating outside an abortion clinic.[76] 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." 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." The Court cited "public safety and order" 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" 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." 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."

In *Hill v. Colorado*, the Court upheld a Colorado statute that makes it unlawful, within 100 feet of the entrance to any health care facility, to "knowingly approach" within 8 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."[77] This decision is significant because it upheld a statute that applies to everyone, and not, as in *Madsen* and *Schenck*, an injunction directed at a particular situation. 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."[78] The restrictions are content-neutral because they regulate only the places where some speech may occur, and because they apply equally to all demonstrators, regardless of viewpoint. Although the restrictions do not apply to all speech, the "kind of cursory examination" that might be required to distinguish casual conversation from protest, education, or counseling is not "problematic."[79] The law is "narrowly tailored" to achieve the state's interests. The eight-foot restriction does not significantly impair the ability to convey messages by signs, and ordinarily allows speakers to come within a normal conversational distance of their targets. Because the statute allows the speaker to remain in one place, persons who wish to hand out leaflets may position themselves beside entrances near the path of oncoming pedestrians, and consequently are not deprived of the opportunity to get the attention of persons entering a clinic.

The constitutionality of buffer zone statutes was recently brought into question again in 2014 when the Supreme Court struck down a Massachusetts statute that banned all speech within 35 feet of the entrance to abortion clinics.[80] The case was captioned *McCullen v. Coakley*. The Court

[76] 519 U.S. 357 (1997).

[77] 530 U.S. 703, 707 (2000).

[78] *Id*. at 714.

[79] *Id.* at 722.

[80] McCullen v. Coakley, No. 12-1168, slip op. (2014), available at http://www2.bloomberglaw.com/public/desktop/document/McCullen_v_Coakley_No_121168_US_June_26_2014_Court_Opinion.

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did not overrule *Hill v. Colorado*, but did appear to narrow the circumstances to which buffer zones may be applied. Justice Roberts began the majority opinion in *McCullen* with a paean to speech on public sidewalks that 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."[81] Because speech on public sidewalks is so integral to public discussion, the law, though it did not reference speech specifically, was subject to First Amendment scrutiny. Though the content-neutrality of the statute was challenged, ultimately, the majority held that the law was content neutral because it was justified regardless of the content of the speech restricted and was aimed at addressing legitimate government concerns separate and apart from the suppression of speech. Namely, the law sought to protect public safety and access to clinic facilities and did not, on its face, single out speech on a certain topic for greater restriction. The Court acknowledged that because the law applied only to abortion clinics, the law had the "inevitable effect" of restricting speech about abortion more than other types of speech. However, "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics."

The majority struck down the law, nonetheless, finding that the law was not narrowly tailored enough to withstand even the lower standard of scrutiny. The Court began this portion of the decision by discussing the plight of the petitioners in this case. Massachusetts's law is in place, ostensibly, to protect public safety, a legitimate concern. The plaintiffs, however, apparently did not pose a threat to public safety in the opinion of the Court. The plaintiffs sought to peacefully and quietly counsel women who may be seeking abortions. Of this, the Court notes, "Petitioners are not protestors. They seek not merely to express their opposition to abortion, but to inform women of various alternatives and provide help in pursuing them."[82] The petitioners argued that the buffer zones inhibited their communication of this message because they often could not tell, until a woman was inside a buffer zone, whether she was a woman they would wish to counsel. This fact led them to be reduced to shouting or yelling to women to attempt to gain their attention, a tactic, the Court noted, that is at odds with their intended message. In other words, the distance the plaintiffs were required to stand away from the clinic entrance changed their message in what the Court believed was a substantial way, and Massachusetts had not offered sufficient evidence to support its argument that the buffer zone was the only way that the commonwealth's goals could be achieved.

In the wake of this decision, what is clear is that generally applicable laws creating buffer zones that apply to all speech and activities in public fora with the intention of protecting public safety will be considered to be content neutral, and reviewed under the less restrictive time, place, and manner standard. However, it appears that, when reviewing whether the law is narrowly tailored to achieve the government's interests, the Court will be less inclined to accept the government's contention that the burden on otherwise protected speech created by buffer zones is necessary to preserve public safety without more evidence that the threat to public safety is ongoing and a permanent statutory prohibition remains necessary. Instead, the Court appeared to indicate that a more tailored approach to particular circumstances would be preferable. As a result, there may be a return to the use of injunctions to institute temporary buffer zones when circumstances require, instead of statutes banning speech regardless of whether a need to regulate speech in a particular location has ever been demonstrated. The Court also appeared to be sensitive to the fact that the design of the buffer zone in this case had the effect of changing the message of the plaintiffs in

[81] *Id.*

[82] *Id.*

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McCullen by requiring them to shout in order to get the attention of those to whom they wished to speak. States instituting buffer zones in the future might be advised to take this into account when crafting buffer zone distances.

Incidental Restrictions

Some laws are not designed to limit freedom of expression, but nevertheless can have that effect. For example, when a National Park Service regulation prohibiting camping in certain parks was applied to prohibit demonstrators who were attempting to call attention to the plight of the homeless from sleeping in certain Washington, DC, parks, it had the effect of limiting the demonstrators' freedom of expression. Nevertheless, the Court found that application of the regulation did not violate the First Amendment because the regulation was content-neutral and was narrowly focused on a substantial governmental interest in maintaining parks "in an attractive and intact condition."[83]

The Supreme Court has said that an incidental restriction on speech is constitutional if it is not "greater than necessary to further a substantial governmental interest."[84] However, the Court has made clear that an incidental restriction, unlike a content-based restriction, "need not be the least restrictive or least intrusive means" of furthering a governmental interest. Rather, the restriction must be "narrowly tailored," and "the requirement of narrow tailoring is satisfied 'so long as the ... regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation.'"[85]

The Court has noted that the standard for determining the constitutionality of an incidental restriction "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions."[86] Thus, the restriction on camping may be viewed as a restriction on conduct that only incidentally affects speech, or, if one views sleeping in connection with a demonstration as expressive conduct, then the restriction may be viewed as a time, place, and manner restriction on expressive conduct. In either case, as long as the restriction is content-neutral, the same standard for assessing its constitutionality will apply.

In 1991, the Supreme Court held that the First Amendment does not prevent the government from requiring that dancers wear "pasties" and a "G-string" when they dance (non-obscenely) in "adult" entertainment establishments. Indiana sought to enforce a state statute prohibiting public nudity against two such establishments, which asserted First Amendment protection. The Court found that the statute proscribed public nudity across the board, not nude dancing as such, and therefore imposed only an incidental restriction on expression.[87] In 2000, the Supreme Court

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

[84] San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 537 (1987). This is known as the "*O'Brien* test," which was first formulated in the case United States v. O'Brien, 391 U.S. 367, 382 (1968)..

[85] *Ward*, 491 U.S. at 798-799. This case makes clear that, although both "strict scrutiny" and the *O'Brien* test for incidental restrictions require "narrow tailoring," "the same degree of tailoring is not required" under the two; under the *O'Brien* test, "least-restrictive-alternative analysis is wholly out of place." *Id.* at 798-799 n.6. It is also out of place in applying the *Central Hudson* commercial speech test.

[86] *Clark*, 468 U.S. at 298. And, "the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context." United States v. Edge Broadcasting Co., 509 U.S. 418, 430 (1993).

[87] Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

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again upheld the application of a statute prohibiting public nudity in an "adult" entertainment establishment. It found that the statute was intended "to combat harmful secondary effects," such as "prostitution and other criminal activity."[88]

In a 1994 case, the Supreme Court apparently put more teeth into the test for incidental restrictions by remanding the case for further proceedings rather than deferring to Congress's judgment as to the necessity for the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992.[89] To justify an incidental restriction of speech, the Court wrote, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[90] The Court added that

> [its] obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with our own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.[91]

Commercial Speech

"The Constitution ... affords a lesser protection to commercial speech than to other constitutionally guaranteed expression."[92] Commercial speech is "speech that *proposes* a commercial transaction."[93] The most typical example of commercial speech is an advertisement. However, other speech related to commercial transactions may be regulated as commercial speech, too. For example, the disclosures required for the public sale of securities are commercial speech and regulated as such. However, speech itself does not become commercial speech simply because it is sold. That books and films are published and sold for profit does not make them commercial speech; that is, it does not "prevent them from being a form of expression whose liberty is safeguarded [to the maximum extent] by the First Amendment."[94] Important to each attempt by the government to regulate speech due to its commercial character, therefore, is the question of whether the speech is, in fact, commercial in the constitutional sense.

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[88] Erie v. Pap's A.M., 529 U.S. 277 (2000).

[89] Turner Broadcasting System, Inc. v. Federal Communications Commission, 512 U.S. 622 (1994), discussed under "Radio and Television," below. David Cole describes *Turner* as "effectively giving bite to the *O'Brien* standard." He writes that, "if the Court had applied the *O'Brien* standard the way it applied that standard in *O'Brien*, it should have upheld the 'must carry' rule. The *O'Brien* standard is extremely deferential." *The Perils of Pragmatism*, LEGAL TIMES, July 25, 1994, at S27, S30.

[90] *Id.* at 664.

[91] *Id.* at 666.

[92] *Edge Broadcasting Co.*, 509 U.S. at 418.

[93] Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 482 (1989) (emphasis in original). In *Nike, Inc. v. Kasky*, 45 P.3d 243 (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 certioriari, 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 case.

[94] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-502 (1952).

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Commercial speech may be banned if it is false or misleading, or if it advertises an illegal product or service. Even if it fits in none of these categories, the government may regulate it more than it may regulate fully protected speech. In addition, the government may generally require disclosures to be included in commercial speech; see the section on "Compelled Speech," below.

The Supreme Court has prescribed the four-prong *Central Hudson* test to determine whether a governmental regulation of commercial speech is constitutional. This test asks initially (1) whether the commercial speech at issue is protected by the First Amendment (that is, whether it concerns a lawful activity and is not misleading) and (2) whether the asserted governmental interest in restricting it is substantial. "If both inquiries yield positive answers," then to be constitutional the restriction must (3) "directly advance[ ] the governmental interest asserted," and (4) be "not more extensive than is necessary to serve that interest."[95]

The Supreme Court has held that, in applying the third prong of the *Central Hudson* test, the courts should consider whether the regulation, in its general application, directly advances the governmental interest asserted. If it does, then it need not advance the governmental interest as applied to the particular person or entity challenging it.[96] Its application to the particular person or entity challenging it is relevant in applying the fourth *Central Hudson* factor, although this factor too is to be viewed in terms of "the relation it bears to the overall problem the government seeks to correct."[97] The fourth prong is not to be interpreted "strictly" to require the legislature to use the "least restrictive means" available to accomplish its purpose. Instead, the Court has held, legislation regulating commercial speech satisfies the fourth prong if there is a reasonable "fit" between the legislature's ends and the means chosen to accomplish those ends.[98]

Despite the more lenient standard of review applied to the regulation of commercial speech, the Court often strikes down commercial speech regulations that burden too much speech, particularly if the speech is neither false nor misleading.[99] In *44 Liquormart, Inc. v. Rhode Island*, the Court struck down a state statute that prohibited disclosure of retail prices in advertisements for alcoholic beverages.[100] In the process, the Court made clear that a total prohibition on "the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process" will be subject to a stricter review by the courts than a regulation designed "to protect consumers from misleading, deceptive, or aggressive sales practices."[101] The Court added, "The First Amendment directs us to be especially skeptical of

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[95] Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. at 566 (1980).

[96] See, *Edge Broadcasting*, 509 U.S. at 427.

[97] *Id.* at 430.

[98] *Fox*, 492 U.S. at 480.

[99] *See* Cincinatti v. Discovery Network, Inc., 507 U.S. 510 (1993) (striking down a Cincinatti regulation that banned newsracks on public property if they distributed commercial publications); Edenfield v. Fane, 507 U.S. 761 (1993) (striking down a Florida law banning solicitation by certified public accountants); *Edge Broadcasting*, 509 U.S. at 418 (upholding federal statutes that prohibit the broadcast of lottery advertising by a broadcaster licensed to a State that does not allow lotteries, while allowing such broadcasting by a broadcaster licensed to a State that sponsors a lottery); Ibanez v. Florida Board of Accountancy, 512 U.S. 136 (1994) (holding that the Florida Board of accountancy could not prohibit a Certified Public Accountant from stating that she was a certified public accountant in her advertisements); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (striking down 27 U.S.C. § 205(e), which prohibited beer labels from displaying alcohol content unless state law required the disclosure, because the regulatory scheme was irrational); Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995)(upholding a rule that prohibited personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster).

[100] *Id.*

[101] *Id.* at 501. The nine Justices were unanimous in striking down the law, which prohibited advertising the price of (continued...)

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regulations that seek to keep people in the dark for what the government perceives to be their own good."[102]

The Court has also demonstrated a willingness to strike down commercial speech regulations where the government's chosen methods of achieving a legitimate goal are too burdensome on the speakers. In *Lorillard Tobacco Co. v. Reilly*, the Supreme Court applied the *Central Hudson* test to strike down most of the Massachusetts attorney general's regulations governing the advertising and sale of cigarettes, smokeless tobacco, and cigars.[103] The Court struck down the outdoor advertising regulations under the fourth prong of the *Central Hudson* test, finding that the prohibition of any advertising within 1,000 feet of schools or playgrounds "prohibit[ed] advertising in a substantial portion of the major metropolitan areas of Massachusetts,"[104] and that such a burden on speech did not constitute a reasonable fit between the means and ends of the regulatory scheme. "Similarly, a ban on all signs of any size seems ill suited to target the problem of highly visible billboards, as opposed to smaller signs."[105]

In a case that further elucidates the application of the fourth prong of the *Central Hudson* test and reemphasizes the Court's reluctances to uphold restrictions on the communication of truthful information, even in the commercial context, *Thompson v. Western States Medical Center*,[106] the Court struck down Section 503A of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 353a, which "exempts 'compounded drugs' from the Food and Drug Administration's standard drug approval requirements as long as the providers of those drugs abide by several restrictions, including that they refrain from advertising or promoting particular compounded drugs."[107] "Drug compounding," the Court explained, "is a process by which a pharmacist or doctor combines, mixes, or alters ingredients to create a medication tailored to the needs of an individual patient."[108] The Court found that the speech restriction in this case served "important" governmental interests, but that, "[e]ven assuming" that it directly advances these interests, it failed the fourth prong of the *Central Hudson* test.[109] In considering the fourth prong, the Court wrote that "the Government has failed to demonstrate that the speech restrictions are 'not more extensive than is necessary to serve'" the governmental interests, as "[s]everal non-speech-related means [of serving those interests] might be possible here."[110] "If the First Amendment means anything," the Court added, "it means that regulating speech must be a last—not first—resort. Yet

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alcoholic beverages, but only parts of Justice Stevens' opinion for the Court were joined by a majority of justices. The quotations above, for example, are from Part IV of the Court's opinion, which was joined by only Justices Kennedy and Ginsburg besides Justice Stevens.

[102] *Id.* at 503.

[103] 533 U.S. 525 (2001).

[104] *Id.* at 562.

[105] *Id.* at 563. The Court also found "that the point-of-sale advertising regulations fail both the third and fourth steps of the Central Hudson analysis." The prohibition on advertising "placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of" any school or playground did not advance the goal of preventing minors from using tobacco products because "[n]ot all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings." *Id*. at 566.

[106] 535 U.S. 357 (2002).

[107] *Id.* at 360.

[108] *Id.* at 360-361.

[109] *Id.* at 369, 371.

[110] *Id.* at 371, 372.

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here it seems to have been the first strategy the Government thought to try."[111] The Court noted that it had "rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information."[112]

Lastly, in its *Thompson* opinion, the Court noted that "several Members of the Court have expressed doubts about the Central Hudson analysis and whether it should apply in particular cases." These Justices believe that the test does not provide adequate protection to commercial speech, but the Court has found it unnecessary to consider whether to abandon the test, because it has been striking down the statutes in question. It is possible, given recent developments, that the Court is now moving towards a higher degree of protection for at least some truthful commercial speech.

In *Sorrell v. IMS Health*,[113] the Court, for the first time since the *Central Hudson* decision was issued, did not apply the *Central Hudson* standard to a commercial speech regulation. Instead, the Court applied what it termed to be "heightened judicial scrutiny" to a Vermont statute that prohibited the sale of certain data for the purposes of using that data to market drugs to doctors and other medical professionals. The data could be freely sold for academic research or for any other reason not related to the commercial use of the data. The Court held that the Vermont statute should be subject to "heightened judicial scrutiny," because it placed both content- and speaker-based restrictions on speech.[114] The Court seemed particularly concerned with what it believed to be Vermont's attempt to favor its own message by disadvantaging the speech of a particular group (in this case, pharmaceutical marketers). The "First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'"[115] Burdens on commercial speech are not excepted from this rule, according to the Court. Often citizens may have more of an interest in hearing truthful commercial speech than even highly valued political dialogue. "That reality has great relevance in the fields of medicine and public health, where information can save lives."[116]

Fundamentally, the Court seemed to be particularly concerned that the government, in this case, had burdened a message simply because the government did not approve of the message, and found it to be too effective. The government also left unburdened the speech of speakers with whom the government agreed or whose message the government supported. "This the State cannot do," even when regulating commercial speech.[117] It remains to be seen whether *Sorrell* signals a shift in the Court towards greater protections for commercial speech and away from the *Central Hudson* test.

[111] *Id.* at 373.

[112] *Id.* at 374.

[113] No. 10-779 131 S.Ct. 2653 (2011).

[114] *Id*. at 2663-2664.

[115] *Id*. (citing *Ward*, 491 U.S. at 791).

[116] *Id*.

[117] *Id*.

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Compelled Speech

On occasion, the government attempts to compel speech rather than to restrict it. For example, in *Riley v. National Federation of the Blind of North Carolina, Inc.*, a North Carolina statute required professional fundraisers for charities to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations.[118] The Supreme Court held this unconstitutional, stating:

> There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees "freedom of speech," a term necessarily comprising the decision of both what to say and what *not* to say.[119]

Nonetheless, disclosures in the noncommericial context may also be permissible in some circumstances. In *Meese v. Keene*, the Court upheld a compelled disclosure requirement in the Foreign Agents Registration Act of 1938.[120] It requires 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.

On the subject of compelled disclosure, the Court wrote:

> 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.[121]

One might infer from this that compelled disclosure, in a noncommercial context, gives rise to no serious First Amendment issue, and nothing in the Court's opinion would seem to refute this inference. Thus, it seems impossible to reconcile this opinion with the Court's holding a year later in *Riley* (which did not mention *Meese v. Keene*) that there is no difference of constitutional significance between compelled speech and compelled silence.

In *Meese v. Keene*, the Court did not mention earlier cases in which it had struck down laws compelling speech. In *Wooley v. Maynard*, the Court struck down a New Hampshire statute requiring motorists to leave visible on their license plates the motto "Live Free or Die."[122] In *West Virginia State Board of Education v. Barnette*, the Court held that a state may not require children to pledge allegiance to the United States.[123] In *Miami Herald Publishing Co. v. Tornillo*, the Court

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[118] 487 U.S. 781 (1988). In *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 605 (2003), the Supreme Court held that a fundraiser who 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. "So long as the emphasis is on what the fundraisers misleadingly convey, and not on percentage limitations on solicitors' fees *per se*, such [fraud] actions need not impermissibly chill protected speech." *Id.* at 619.

[119] *Riley*, 487 U.S. at 796-797 (emphasis in original).

[120] 481 U.S. 465 (1987).

[121] *Id.* at 480.

[122] 430 U.S. 705 (1977).

[123] 319 U.S. 624 (1943).

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struck down a Florida statute that required newspapers to grant political candidates equal space to reply to the newspapers' criticism and attacks on their record.[124]

In *McIntyre v. Ohio Elections Commission*, the Court, applying strict scrutiny, struck down a compelled disclosure requirement by holding unconstitutional a state statute that prohibited the distribution of anonymous campaign literature. "The State," the Court wrote, "may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented."[125]

In *Hurley v. Irish-American Gay Group of Boston*, the Court held that Massachusetts could not require private citizens who organize a parade to include among the marchers a group imparting a message—in this case support for gay rights—that the organizers do not wish to convey. Massachusetts had attempted to apply its statute prohibiting discrimination on the basis of sexual orientation in any place of public accommodations, but the Court held that parades are a form of expression, and the state's "[d]isapproval of a private speaker's statement does not legitimatize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others."[126]

Each of these cases, *Meese v. Keene* notwithstanding, indicates that the Court may be nearly as reluctant to allow the government to require speech as it is to allow the government to prohibit it. However, recently, the Court took a different view. In *Citizens United v. FEC*,[127] the Court upheld requirements for disclosure of funding sources for electioneering communications in the Bipartisan Campaign Reform Act using language very similar to that it used in *Meese v. Keene*. The Court found that, while the disclosure requirements may place some burden on speakers, they "do not prevent anyone from speaking" and "impose no ceiling on campaign-related activities." The Court acknowledged that the requirements might be unconstitutional if there was a reasonable probability that the speaker might suffer threats or harm as a result of the speech, but found that the requirements only would be unconstitutional as applied in those cases. It seems, therefore, that generally applicable disclosure requirements may be permissible in the eyes of the Court, so long as they are factual, do not prevent any speech, do not require the communication of a message with which a private speaker does not agree, and are not aimed at suppressing particular categories of speakers.

Commercial Disclosure Requirements

In the commercial speech context, by contrast, the Supreme Court held, in *Zauderer v. Office of Disciplinary Counsel*, 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

[124] 418 U.S. 241 (1974). In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), the Court 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. While a plurality opinion adhered to by four Justices relied heavily on *Tornillo*, there was not a Court majority consensus as to rationale.

[125] 514 U.S. 334, 357 (1995).

[126] 515 U.S. 557, 581 (1995).

[127] 130 S. Ct. 876 (2010).

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> 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.[128]

In *Zauderer*, the Supreme Court upheld an Ohio requirement that advertisements by lawyers that mention contingent-fee rates disclose whether percentages are computed before or after deduction of court costs and expenses. It stands for the principle that the government may require commercial speakers to provide additional factual information along with their commercial messages, as long as the disclosure requirement is reasonably related to the government's interest. According to a number of Circuit Courts of Appeal, the *Zauderer* standard may apply to disclosure requirements imposed for reasons beyond the prevention of consumer deception.[129]

Check-off Programs

Another type of compelled commercial speech occurs when the government requires industry participants to contribute money that will support advertising campaigns for the industry, often called "check-off" programs. In *Glickman v. Wileman Brothers & Elliott, Inc.*, the Supreme Court upheld the constitutionality of marketing orders promulgated by the Secretary of Agriculture that imposed assessments on fruit growers to cover the cost of generic advertising of fruits.[130] The First Amendment, the Court held, does not 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.[131]

However, in *United States v. United Foods, Inc.*, the Court struck down a federal statute that mandated assessments on handlers of fresh mushrooms to fund advertising for the product.[132] The Court did not apply the *Central Hudson* commercial speech test, but rather found "that the mandated support is contrary to First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity."[133] It distinguished *Glickman* on the ground that "[i]n *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing authority. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme."[134]

In *Johanns v. Livestock Marketing Association*, the Supreme Court upheld a federal statute that directed the Secretary of Agriculture to use funds raised by an assessment on cattle sales and importation to promote the marketing and consumption of beef and beef products.[135] The Court

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[128] 471 U.S. 626, 651, 652 n.14 (1985) (emphasis in original).

[129] American Meat Institute v. Dep't of Ag., No. 13-5281 (D.C. Cir. 2014); N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 133 (2d Cir. 2009); Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 310 (1st Cir. 2005) (Torruella, J.).

[130] 521 U.S. 457 (1997).

[131] *Id.*, 521 U.S. at 471, 472. The Court found that the marketing orders did not raise a First Amendment issue, but "simply a question of economic policy for Congress and the Executive to resolve." The *Central Hudson* test (see "Commercial Speech," above), therefore, was inapplicable. *Id.* at 474.

[132] 533 U.S. 405 (2001).

[133] *Id.* at 413.

[134] *Id.* at 411.

[135] 544 U.S. 550 (2005).

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found that, unlike in *Glickman* and *United Foods*, where "the speech was, or was presumed to be, that of an entity other than the government itself," in *Johanns* the promotional campaign constituted the government's own speech and therefore was "exempt from First Amendment scrutiny."[136] It did not matter "whether the funds for the promotions are raised by general taxes or through targeted assessment."[137] As for the plaintiffs' contention "that crediting the advertising to 'America's Beef Producers'" attributes the speech to them, the Court found that, because the statute does not *require* such attribution, it does not violate the First Amendment, but the plaintiffs' contention might form the basis for challenging the manner in which the statute is applied.[138] Therefore, it seems that "check-off" programs and marketing orders will likely be upheld as constitutional so long as the advertising campaign constitutes the government's own speech.

Defamation

Defamation (libel is written defamation; slander is oral defamation) is the intentional communication of a falsehood about a person, to someone other than that person, that injures the person's reputation. The injured person may sue and recover damages under state law, unless state law makes the defamation privileged (for example, a statement made in a judicial, legislative, executive, or administrative proceeding is ordinarily privileged). Being required to pay damages for a defamatory statement restricts one's freedom of speech; defamation, therefore, constitutes an exception to the First Amendment.

The Supreme Court, however, has granted limited First Amendment protection to defamation. The Court has held that public officials and public figures may not recover damages for defamation unless they prove, with "convincing clarity," that the defamatory 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."[139]

The Court has also held that a private figure who sues a media defendant for defamation may not recover without some showing of fault, although not necessarily of actual malice (unless the relevant state law requires it). However, if a defamatory falsehood involves a matter of public concern, then even a private figure must show actual malice in order to recover presumed damages (i.e., not actual financial damages) or punitive damages.[140]

Speech Harmful to Children

Speech that is otherwise fully protected by the First Amendment may be restricted in order to protect children. This is because the Court has "recognized that there is a compelling interest in protecting the physical and psychological well-being of minors."[141] However, any restriction must

[136] *Id*. at 559, 553.

[137] *Id*. at 562.

[138] *Id*. at 564-566.

[139] New York Times v. Sullivan, 376 U.S. 254, 279-280 (1964); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[140] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[141] Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989). A federal district court noted that, in cases that involve a restriction of minors' access to sexually explicit material, "the Supreme Court's jurisprudence does not require empirical evidence. Only some minimal amount of evidence is required.... " Playboy Entertainment Group, (continued...)

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be accomplished "'by narrowly drawn regulations without unnecessarily interfering with First Amendment freedoms.' It is not enough to show that the government's ends are compelling; the means must be carefully tailored to achieved those ends."[142]

Thus, the government may prohibit the sale to minors of material that it deems "harmful to minors" ("so called 'girlie' magazines"), whether or not they are not obscene as to adults.[143] It may prohibit the broadcast of "indecent" language on radio and television during hours when children are likely to be in the audience, but it may not ban it around the clock unless it is obscene.[144] Federal law currently bans indecent broadcasts between 6 a.m. and 10 p.m.[145] Similarly, Congress may not ban dial-a-porn, but it may (as it does at 47 U.S.C. § 223) prohibit it from being made available to minors or to persons who have not previously requested it in writing.[146]

The government's ability to restrict speech in order to protect children is not unlimited, however. In *Reno v. American Civil Liberties Union*, the Supreme Court declared unconstitutional two provisions of the Communications Decency Act (CDA) that prohibited indecent communications to minors on the Internet.[147] The Court held that the CDA's "burden on adult speech is unaccep-

(...continued)

Inc. v. U.S., 30 F. Supp. 2d 702, 716 (D. Del. 1998); *aff'd*, 529 U.S. 803 (2000). By contrast, in cases not involving access of minors to sexually explicit material, the Supreme Court generally requires that the government, to justify a restriction even on speech with less than full First Amendment protection, "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." Turner Broadcasting System v. FCC, 512 U.S. 622, 664 (1994) (incidental restriction on speech). See also, Edenfield v. Fane, 507 U.S. 761, 770-771 (1993) (restriction on commercial speech); Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 392 (2000) (restriction on campaign contributions).

[142] *Id.* In the case of content-based regulations, narrow tailoring requires that the regulation be "the least restrictive means to further the articulated interest."

[143] Ginsberg v. New York, 390 U.S. 629, 631 (1968). The Supreme Court held that this standard does not extend to violent speech. Brown v. Ent. Merch. Ass'n, 131 S. Ct. 2729 (2011).

[144] Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978); Action for Children's Television v. Federal Communications Commission, 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996). The Supreme Court has stated that, to be indecent, a broadcast need not have prurient appeal; "the normal definition of 'indecent' refers merely to nonconformance with accepted standards of morality," *Pacifica*, 438 U.S. at 740. The FCC holds that the concept "is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." *Id.* at 732. The FCC applied this definition in a case in which the singer Bono said at the Golden Globe Awards that his award was "f[***]ing brilliant." In another case involving "fleeting expletives," however, the U.S. Court of Appeals for the Second Circuit held "that the FCC's new policy regarding 'fleeting expletives' is arbitrary and capricious under the Administrative Procedure Act." Fox Television Stations, Inc. v. Federal Communications Commission, 489 F.3d 444 (2d Cir. 2007). The Supreme Court, however, reversed the Second Circuit's decision, finding that the FCC's explanation of its decision was adequate; it left open the question whether censorship of fleeting expletives violates the First Amendment. Federal Communications Commission v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009).

Similarly, the FCC fined broadcast stations for broadcasting Janet Jackson's exposure of her breast for nine-sixteenth of a second during a Super Bowl halftime show, but a federal court of appeals overturned the fine on non-constitutional grounds. CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008). For additional information, including an analysis of whether prohibiting the broadcast of "fleeting expletives" would violate the First Amendment, see CRS Report RL32222, *Regulation of Broadcast Indecency: Background and Legal Analysis*, by Kathleen Ann Ruane.

[145] *See*, "Speech on Radio and Television."

[146] Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115 (1989); Dial Information Services v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992).

[147] 521 U.S. 844 (1997).

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table if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." "[T]he governmental interest in protecting children from harmful materials ... does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not 'reduc[e] the adult population ... to ... only what is fit for children.'"[148]

The Court distinguished the Internet from radio and television 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."

In 1998, Congress enacted the Child Online Protection Act (COPA), P.L. 105-277, title XIV, to replace the CDA. COPA differs from the CDA in two main respects: (1) it prohibits communication to minors only of "material that is harmful to minors," rather than material that is indecent, and (2) it applies only to communications for commercial purposes on publicly accessible websites. COPA has not taken effect, because a constitutional challenge was brought and the district court, finding a likelihood that the plaintiffs would prevail, issued a preliminary injunction against enforcement of the statute, pending a trial on the merits. The Third Circuit affirmed, but, in 2002, in *Ashcroft v. American Civil Liberties Union*, the Supreme Court held that COPA's use of community standards to define "material that is harmful to minors" does not by itself render the statute unconstitutional. The Supreme Court, however, did not remove the preliminary injunction against enforcement of the statute, and remanded the case to the Third Circuit to consider whether it is unconstitutional nonetheless. In 2003, the Third Circuit again found the plaintiffs likely to prevail and affirmed the preliminary injunction. In 2004, the Supreme Court affirmed the preliminary injunction because it found that the government had failed to show that filtering prohibited material would not be as effective in accomplishing Congress's goals. It remanded the case for trial, however, and did not foreclose the district court from concluding otherwise.[149] In 2007, the district court found COPA unconstitutional and issued a permanent injunction against its enforcement; in 2008, the U.S. Court of appeals affirmed, finding that COPA "does not employ the least restrictive alternative to advance the Government's compelling interest" and is also vague and overbroad.[150] In 2009, the Supreme Court declined to review the case.

Children's First Amendment Rights

In a case upholding high school students' right to wear black arm bands to protest the war in Vietnam, the Supreme Court held that public school students do not "shed their constitutional

[148] *Id.* at 874-875.

[149] American Civil Liberties Association v. Reno, 31 F. Supp. 2d 473 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3d Cir. 2000), *vacated and remanded sub nom.* Ashcroft v. American Civil Liberties Union, 535 U.S. 564 (2002), *aff'd on remand*, 322 F.3d 240 (3d Cir. 2003), *aff'd and remanded*, 542 U.S. 656 (2004). *See also*, footnote 8 of this report.

[150] 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, 198 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009).

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rights to freedom of speech or expression at the schoolhouse gate."[151] They do, however, shed them to some extent. The Supreme Court has upheld the suspension of a student for using a sexual metaphor in a speech nominating another student for a student office.[152] It has upheld censorship of a student newspaper produced as part of the school curriculum.[153] (Lower courts have indicated that non-school-sponsored student writings may not be censored.)[154]

A plurality of the Justices found that a school board must be permitted "to establish and apply their curriculum in such a way as to transmit community values," but that it may not remove school library books in order to deny access to ideas with which it disagrees for political or religious reasons.[155] The Supreme Court has also held that Congress may not prohibit people 17 or younger from making contributions to political candidates and contributions or donations to political parties.[156] Most recently, in *Morse v. Frederick*, the Court held that a school could punish a pupil for displaying a banner that read, "BONG HiTS 4 JESUS," because these words could reasonably be interpreted as "promoting illegal drug use."[157] The Court indicated that it might have reached a different result if the banner had addressed the issue of "the criminalization of drug use or possession."[158] 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.'"[159] As *Morse v. Frederick* was a 5-to-4 decision, Justices Alito's and Kennedy's votes were necessary for a majority and therefore should be read as limiting the majority opinion with respect to future cases.

Outside of the context of public schools, children have greater First Amendment rights. For example, in *Brown v. Entertainment Merchants Assn*., the Supreme Court struck down a California statute banning the sale of certain violent video games to persons under the age of 18.[160] In this case, the Court applied strict scrutiny to strike down a law designed to protect children. First, citing explicitly violent literature and children's stories, the Court disagreed that explicit violence was equivalent to explicit sexual content, and declined to find that children needed to be protected from it in a similar fashion. Then, applying strict scrutiny to the law, the Court found that California had not presented sufficient evidence of the harm to children caused by the games and struck down the regulation on that basis. This case suggests that outside the context of access to sexual content and public school, children may have First Amendment rights nearly coextensive with adults.

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[151] Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969).

[152] Bethel School District No. 463 v. Fraser, 478 U.S. 675 (1986).

[153] Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

[154] E.g., Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988); Romano v. Harrington, 725 F. Supp. 687 (E.D. N.Y. 1989).

[155] Board of Education, Island Trees School District v. Pico, 457 U.S. 853, 864 (1982). The Court noted that "nothing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the libraries of their schools." *Id*. at 871.

[156] McConnell v. Federal Election Commission, 540 U.S. 93, 231-232 (2003).

[157] 127 S. Ct. 2618, 2624 (2007).

[158] *Id*. at 2625.

[159] *Id*. at 2636.

[160] 131 S. Ct. 2729 (2011).

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Speech on Radio and Television

Speech on radio and television is treated differently depending on the method of delivery of the content. Broadcast radio and television content may be regulated more extensively than cable, satellite, or online radio or television content. Recent Supreme Court opinions have hinted that this discrepancy in treatment of broadcast content may change in the near future, if the right case presents itself to the Court.

Broadcast Radio and Television

Radio and television broadcasting has more limited First Amendment protection than other media. In *Red Lion Broadcasting Co. v. Federal Communications Commission*, the Supreme Court invoked what has become known as the "scarcity rationale" to justify this discrimination:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.[161]

The Court made this statement in upholding the constitutionality of the Federal Communication Commission's (FCC's) "fairness doctrine," which required broadcast media licensees to provide coverage of controversial issues of interest to the community and to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues. The Fairness Doctrine has since been repealed by the FCC.[162]

Following *Red Lion*, in *Federal Communications Commission v. Pacifica Foundation*, the Court upheld the power of the FCC "to regulate a radio broadcast that is indecent but not obscene."[163] The Court cited two distinctions between broadcasting and other media: "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans ... confront[ing] the citizen, not only in public, but also in the privacy of the home," and "[s]econd, broadcasting is uniquely accessible to children."[164]

The Court may be poised to limit, or even overrule these decisions allowing the government to regulate more tightly the speech of broadcasters. The FCC's indecency policy has come under fire over the past decade.[165] The most recent legal challenges to the rule involved the agency's decision to pursue enforcement actions against broadcasters that aired fleeting expletives or fleeting indecent images. The court challenge to the policy, captioned *FCC v. Fox Television*, reached the Supreme Court twice, and twice the policy was struck down, but the Court did not do so on First Amendment grounds in either case.[166] The second time the challenge reached the

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[161] 395 U.S. 367, 388 (1969).

[162] 76 Fed. Reg. 55817-818 (2011).

[163] 438 U.S. 726, 729 (1978).

[164] *Id.* at 748-749. In *Action for Children's Television v. Federal Communications Commission* (ACT III), 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996), the court of appeals, in upholding a ban on indecent broadcasts from 6 a.m. to 10 p.m., wrote: "While we apply strict scrutiny to regulations of this kind regardless of the medium affected by them, our assessment of whether section 16(a) survives that scrutiny must necessarily take into account the unique context of the broadcast media." See, "Speech Harmful to Children," *supra*.

[165] CRS Report RL32222, *Regulation of Broadcast Indecency: Background and Legal Analysis*, by Kathleen Ann Ruane

[166] Federal Communications Commission v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009); FCC v. Fox (continued...)

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highest court, Justice Ginsburg filed a concurring opinion that was joined by Justice Thomas.[167] In her concurrence, Justice Ginsburg made clear that she believes that *FCC v. Pacifica*[168] was wrongly decided, and that she believes the case should be reconsidered. This concurrence may prove significant in a future case, should the Supreme Court have the occasion to consider the constitutionality of broadcast indecency regulations while Justice Ginsburg and Justice Thomas remain on the Court. If the Court does overrule *Pacifica* and *Red Lion*, it is possible that it will become more difficult for the government to impose restrictions on speech over the broadcast airwaves.

Cable, Satellite, and Online Radio and Television

Speech on cable systems and online video and radio delivery systems is fully protected speech the regulation of which is subject to strict scrutiny. The Court began to draw a distinction between these content delivery systems and broadcast systems in *Turner Broadcasting System, Inc. v. Federal Communications Commission*. In that case, the Court held that "application of the more relaxed standard of scrutiny adopted in *Red Lion* and other broadcast cases is inapt when determining the First Amendment validity of cable regulation."[169] Despite finding that speech over cable systems was entitled to greater First Amendment protection, the Court did not apply strict scrutiny to the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992, which require cable television systems to devote a portion of their channels to the transmission of local broadcast television stations. The Court found the requirements to be content-neutral in application and subject only to the test for incidental restrictions on speech.[170]

In *United States v. Playboy Entertainment Group, Inc.*, the Supreme Court did apply strict scrutiny to a content-based speech restriction on cable television.[171] The Court struck down a federal statute 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. The statute required cable operators, on channels primarily dedicated to sexually oriented programming, either to fully scramble 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 apparently assumed that the government had a compelling interest in protecting children from sexually oriented signal bleed, but found that Congress had not used the least restrictive means to do so. 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

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Television, Inc. 132 S.Ct. 2307 (2012).

[167] *FCC v. Fox*, 132 S.Ct. at 2321 (Ginsburg, J., concurring).

[168] 428 U.S. 726 (1978).

[169] *Turner*, 512 U.S. at 639.

[170] *Id.* at 667-668. Attempting to apply this test, however, the Court found "genuine issues of material fact still to be resolved" as to whether "broadcast television is in jeopardy" and as to "the actual effects of must-carry on the speech of cable operators and cable programmers." It therefore remanded the case for further proceedings. On remand, the lower court upheld the must-carry rules, and the Supreme Court affirmed, finding "that the must-carry provisions further important governmental interests; and ... do not burden substantially more speech than necessary to further those interests." Turner Broadcasting System, Inc. v. Federal Communications Commission, 520 U.S. 180, 185 (1997).

[171] 529 U.S. 803 (2000).

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cable operator, without charge, must fully scramble or fully block any channel to which a subscriber does not subscribe.

The Supreme Court has never decided whether the regulation of speech over satellite radio and television can be regulated similarly to broadcast radio and television, or if regulation of speech over the medium should be subject to strict scrutiny like speech over cable systems. The FCC does not currently regulate indecency over satellite television, reasoning that "because cable and satellite services are subscription-based, viewers of these services have greater control over the programming content that comes into their homes, whereas broadcast content traditionally has been available to any member of the public with a radio or television."[172] The FCC, therefore, equates its regulatory authority over satellite television and radio with its authority over cable, and refrains from regulating content delivered by both.

As noted above, in the section entitled "Speech Harmful to Children," the Supreme Court held, in *Reno v. ACLU*, that speech on the Internet is fully protected and that its regulation, generally, would be subject to strict scrutiny.[173]

Freedom of Speech and Government Funding

The Constitution grants Congress the power to subsidize some activities and speech without subsidizing all speech, or even all viewpoints on a particular topic. There is a certain amount of discrimination inherent in the choices Congress makes to provide funds or tax deductions to one organization's activities, but not to another. However, when the condition on the receipt of federal funds is an agreement to espouse, or to refrain from espousing, a particular point of view that is in line with the government's favored viewpoint, questions related to whether Congress is infringing upon the First Amendment freedoms of fund recipients may arise. While the principle that Congress may choose to subsidize whatever speech or behavior it may desire may seem simple enough, in practice, the case law has been described as complicated and contentious.[174] Nonetheless, some core principles may be distilled from the case history.

Congress may not coerce citizens to engage in or to refrain from certain speech through the tax code.[175] Congress may, however, choose not to provide a subsidy to a particular type of speech, though it chooses to provide subsidies to other types of speech. In the seminal case, *Regan v. Taxation with Representation*, a group known as Taxation with Representation (TWR) challenged Congress's denial of certain tax deductions to organizations that engage in substantial lobbying activities as a violation of the group's core First Amendment rights.[176] TWR argued that the federal government was unconstitutionally discriminating against a form of fully protected speech, in this case lobbying, based solely upon its content, while providing tax subsidies to

[172] FCC, Regulation of Obscenity, Indecency, and Profanity, http://www.fcc.gov/encyclopedia/regulation-obscenity-indecency-and-profanity.

[173] 521 U.S. 844 (1997).

[174] Alliance for Open Society v. United States Agency for International Development, 678 F.3d 127 (2d. Cir. 2011) *denying rehearing en banc* (J. Pooler, concurring) (citing Kathleen Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415, 1415-17 (1989)).

[175] Speiser v. Randall, 375 U.S. 513 (1958) (striking down a law that denied any and all tax deductions to persons who advocated the unlawful overthrow of the United States government).

[176] Regan v. Taxation with Representation, 461 U.S. 540 (1983).

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charitable donations, and that this discrimination violated the First Amendment.[177] The Supreme Court disagreed and found that the refusal to allow a tax deduction for lobbying activities was within Congress's power to tax and spend. In short, Congress was not discriminating against lobbying. It was merely choosing not to pay for lobbying activities. The Court pointed out that TWR was not prohibited from lobbying under the statute. It was merely prohibited from lobbying with funds it received pursuant to its 501(c)(3) structure. The Court noted that this would be a different case if Congress had discriminated against lobbying speech in such a way as to "aim at the suppression of dangerous ideas."[178] Finding no such circumstances in Congress's general refusal to subsidize lobbying activities, with a narrow exception for certain veterans organizations, the Court held that Congress did not have to provide a tax deduction in this circumstance.

The following year, in *FCC v. League of Women Voters*,[179] the Court examined whether Congress could constitutionally prohibit non-commercial broadcast stations that received federal funds through the Corporation for Public Broadcasting from engaging in editorializing. The Court found that Congress could not. Distinguishing this case from *TWR* where the organization remained free to engage in lobbying, the Court found that under this funding restriction non-commercial broadcasters were prohibited completely from editorializing if they received federal funds.[180] In fact, a non-commercial broadcaster that received only 1% of its funding from the federal government was subject to the editorializing prohibition and could not, for example, segregate its federal funds so as to prevent the use of those funds for editorializing activities, while using its private funds to editorialize. The Court conceded, however, that if Congress were to amend the statute at issue to prohibit the use of federal funds to support editorializing activities, but allow the broadcasters to engage in such speech with private funding, the statute would then be constitutional.[181]

Following *FCC v. League of Women Voters*, it appeared that Congress was entitled to subsidize the activities it supported, including speech activities, without being required to subsidize all activities. However, Congress was required to allow those who might benefit from congressional largesse the freedom to express their opinions outside the bounds of the congressional subsidy. Illustrating these principles, in *Rust v. Sullivan*,[182] grant recipients challenged the administration of Title X of the Public Health Service Act. Title X was intended to provide federal funding to subsidize health care for women prior to the conception of a child that included counseling, preconceptive care, education, general reproductive health care, and preventive family planning.[183] However, the regulations made clear that no federal money was to be spent to provide counseling for abortion, nor were any participants in the Title X program permitted to provide patients with a referral to an abortion provider, even when the patient may have requested

[177] Taxpayers who donated to 501(c)(3) organizations could deduct those donations from their taxes. 26 U.S.C. §501(c)(3). 501(c)(3) organizations were prohibited from engaging in substantial lobbying. Taxpayers who donated to 501(c)(4) organizations could not deduct those donations from their federal income taxes. 26 U.S.C. §501(c)(4). 501(c)(4) organizations were permitted to engage in lobbying activities. TWR had been operating with a dual structure wherein its lobbying activities were accomplished via contributions to a 501(c)(4) organization and its other activities were funded through a 501(c)(3).

[178] *Regan*, 461 U.S. at 550.

[179] 468 U.S. 364 (1984).

[180] *Id*. at 400.

[181] *Id*.

[182] 500 U.S. 173 (1991).

[183] 42 C.F.R. §59.2 (1989).

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such a referral, nor could employees advocate or lobby for abortion rights.[184] The Supreme Court upheld the program. The Court reasoned that Congress is entitled to subsidize the public policy message it chooses to fund without funding other opinions on the same topic. Congress was within its constitutional rights to control the message that it preferred to encourage family planning methods other than abortion with funding conditions. The Court wrote, "this is not a case of the Government suppressing a dangerous idea, but of a prohibition on a project grantee or its employees engaging in activity that was outside of the project's scope."[185] Congress was not denying a benefit based upon the grantees' support for abortion, but was instead preventing the use of federal funds for purposes outside the intended use of the program those funds were intended to support. Important for the Court's analysis in this case was the fact that the restrictions on speech only applied to the administration and employees of the Title X program itself.[186] The grantee, on the other hand, was free to receive funds for a variety of programs from a variety of sources and these other activities were not subject to the Title X speech restriction. As a result, Title X did not suffer from the same fatal flaw as the funding restriction in *FCC v. League of Women Voters*.

Following *Rust* came two significant cases wherein the law of unconstitutional conditions was further refined. First, in *Legal Services Corporation v. Vasquez*,[187] the Supreme Court struck down a restriction on the use of federal funds by lawyers employed by the Legal Services Corporation (LSC) to challenge existing welfare laws. In *Rust*, the government had used restrictions on the use of federal funds to subsidize and control the government's own message. In this case, however, the government was attempting to use restrictions on the use of federal funds to hinder private speech. In the Court's analysis, lawyers for the LSC were not speaking for the federal government or administering the federal government's message. They were representing the private views and interests of their clients. Because the LSC funded private expression, and not the message of the government, the Court found that Congress could not limit the types of cases that LSC attorneys could bring on behalf of their clients because such restrictions violated the First Amendment.[188]

The second case outlining some limits to Congress's ability to condition its spending was *Rosenberger v. Rector and Visitors of Univ. of Va*.[189] In this case, plaintiffs challenged a university regulation that provided funds to student publications, but refused to provide funding to student publications with religious affiliations. The Court found the university's restriction to be unconstitutional. Where the government creates a quasi-public forum, as it had in this case by making funds generally available to all university student publications, the government could not then discriminate against students seeking to use that forum on the basis of content.

Taken together these cases seem to indicate that where Congress has appropriated funds to support the government's own message, Congress has wide latitude to condition the receipt of those funds on the espousal of the government's approved message, unless that condition invidiously discriminates against the espousal of dangerous ideas. In conditioning the use of federal funds on making sure the funds are only used to support Congress's approved message,

[184] *Rust*, 500 U.S. at 180-181.

[185] *Id*. at 194.

[186] *Id*. at 196.

[187] 531 U.S. 533 (2001).

[188] *Id*. at 543.

[189] 515 U.S. 819 (1995).

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ample opportunity for the recipients of those funds to exercise their protected constitutional rights outside of the federal program in which they are participating must be preserved. However, where Congress has provided funds for private speech or created a public or quasi-public forum, the ability to restrict speech funded by that money on the basis of content is narrower.

In 2013, the Court again struck down a condition on the receipt of federal funds for violating the First Amendment. In 2003, Congress passed the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act (Leadership Act), 22 U.S.C. §§ 7601 *et seq*. Congress provided funds in the Leadership Act to private entities to assist in the fight against HIV/AIDS. Within the statute, Congress made clear that organizations would not be eligible to receive those funds unless they had adopted a policy explicitly opposing prostitution and sex trafficking.[190] This requirement meant that organizations that disagreed with that message or took no position regarding prostitution or trafficking had to adopt a policy denouncing prostitution and sex trafficking that applied to the entire organization in order to receive federal funds under the program. The Court pointed out the difference "between [permissible] conditions that define the federal program and those that reach outside" the program to restrict speech and behavior accomplished without federal funds. The Court noted that the line between the two is not always clear but it is crossed when the government seeks "to leverage funding to regulate speech outside the contours of the program itself."[191] Essentially, the Court found that the policy requirement forced funding recipients to adopt the government's view as their own on an issue of public concern. "By requiring recipients to profess a specific belief, the policy requirement goes beyond defining the limits of the federally funded program to defining the recipient," and that the government cannot do.[192]

Free Speech Rights of Government Employees and Government Contractors

Government Employees

In *Pickering v. Board of Education*, the Supreme Court made clear that the government has an interest in regulating the speech of its employees and may do so to a greater degree than it may restrict the speech of citizens generally,[193] but the First Amendment "protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern"[194] without fear of loss of government employment. In *Pickering*, the Supreme Court held it unconstitutional for a school board to fire a teacher for writing a letter to a local newspaper criticizing the administration of the school system. In keeping with the rule announced by the case, the Court did not hold that the teacher had the same right as a private citizen to write such a letter. Rather, because the teacher had spoken as a citizen on a matter of public concern, the Court balanced "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

[190] 22 U.S.C. § 7631(f).

[191] Agency for International Development v. Alliance for Open Society, Int'l., No. 12-10 slip op., at 12 (2013).

[192] *Id*. at 12.

[193] 391 U.S. 563, 568 (1968).

[194] Garcetti v. Ceballos, 547 U.S. 410, 417 (2006).

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performs through its employees."[195] In this case, the Court found that the open letter was not a direct criticism of the teacher's direct supervisors, which would have raised questions regarding the ability of the school to discipline an insubordinate employee. In this case, while the teacher did have an employment relationship with the school board, the relationship was not a close working relationship and therefore the teacher's speech was too tenuous in relation to the board to be considered within the scope of his employment or a threat to the proper functioning of the particular school that employed him.[196]

In *Arnett v. Kennedy*, the Supreme Court again balanced governmental interests and employee rights, and this time sustained the constitutionality of a federal statute that authorized removal or suspension without pay of an employee "for such cause as will promote the efficiency of the service," where the "cause" cited was an employee's speech.[197] The employee's speech in this case, however, consisted in falsely and publicly accusing the director of his agency of bribery. The Court interpreted the statute to proscribe: "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 as are necessary for the protection of the Government as employer."[198]

In *Connick v. Myers*, an assistant district attorney was fired for insubordination after she circulated a questionnaire among her peers soliciting views on matters relating to employee morale.[199] The Supreme Court upheld the firing, distinguishing *Pickering* on the ground that, in that case, unlike in this one, the fired employee had engaged in speech concerning matters of public concern:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but as an employee upon matters only of personal interest, absent the most unusual of circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[200]

In *Rankin v. McPherson*, the Court upheld the right of an employee to remark, after hearing of an attempt on President Reagan's life, "If they go for him again, I hope they get him."[201] The Court considered the fact that the statement dealt with a matter of public concern, did not amount to a threat to kill the President, did not interfere with the functioning of the workplace, and was made in a private conversation with another employee and therefore did not discredit the office. Furthermore, as the employee's duties were purely clerical and encompassed "no confidential, policymaking, or public contact role," her remark did not indicate that she was "unworthy of employment."[202]

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[195] *Id.*, quoting *Pickering*, 391 U.S. at 568.

[196] *Pickering*, 391 U.S. at 569-570.

[197] 416 U.S. 134, 140 (1974).

[198] *Id.* at 162.

[199] 461 U.S. 138 (1983).

[200] *Id.* at 146-147. Subsequently, in *Garcetti v. Ceballos*, 547 U.S. at 418, the Court 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." See *Connick*, 461 U.S. at 147.

[201] 483 U.S. 378, 380 (1987).

[202] *Id.* at 390-391.

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These Supreme Court cases indicate the relevant factors in determining whether a government employee's speech is protected by the First Amendment. It should be emphasized that the Court considers the time, place, and manner of expression.[203] Thus, if an employee made political speeches on work time, such that they interfered with his or others' job performance, he could likely be fired as "unworthy of employment." At the same time, he could not be fired for the particular political views he expressed, unless his holding of those views made him unfit for the job. Also, a governmental employer could not allow employees to make speeches in support of one political candidate on work time, but not allow employees to make speeches in support of that candidate's opponent. But a Secret Service agent assigned to guard the President would not have the same right as the clerical worker in *Rankin* to express the hope that the President would be assassinated.

In *Garcetti v. Ceballos*, the Court appeared to limit 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.[204] 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 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."[205] 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. Rather, the "controlling factor" was "that his expressions were made pursuant to his duties."[206] 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 he had in a letter to the editor of a newspaper. In these two instances, a court would apply *Pickering* balancing.

In 2014, the Court further clarified the distinction between the speech of an employee as a public citizen and speech of an employee during the course of employment. In *Lane v. Franks*, the Court found that the First Amendment protected the testimony of a public employee in a criminal trial where the employee was called to testify to crimes he had witnessed in the course of his employment.[207] Though the employee was called to the stand to speak about his employment, he was not called as a representative of his employer; therefore, he was speaking outside the scope of his employment, and criminal activity is a matter of public concern. The Court, therefore, applied the *Pickering* test, and found that "the employer's side of the Pickering scale [was] entirely empty." As a result, the employee's speech was entitled to First Amendment protection.

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[203] *See, e.g.*, Connick v. Myers, 461 U.S. at 152 ("Also relevant is the manner, time, and place in which the questionnaire was distributed.").

[204] *Garcetti*, 547 U.S. at 421.

[205] *Id*.

[206] *Garcetti*, 547 U.S. at 421.

[207] Lane v. Franks, No. 13-483, slip op., (2014) available at http://www2.bloomberglaw.com/public/desktop/document/Lane_v_Franks_No_13483_US_June_19_2014_Court_Opinion.

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Government Contractors

In *Board of County Commissioners v. Umbehr*, the Court held that "the First Amendment protects independent contractors from the termination of at-will government contracts in retaliation for their exercise of the freedom of speech."[208] The Court held that, in determining whether a particular termination violates the First Amendment, "the *Pickering* balancing test, adjusted to weigh the government's interests as contractor rather than as employer," should be used.[209] The Court did "not address the possibility of suits by bidders or applicants for new government contracts."[210]

In *Elrod v. Burns*[211] and *Branti v. Finkel*,[212] the Supreme Court held that "[g]overnment officials may not discharge public employees for refusing to support a political party or its candidates, unless political affiliation is a reasonably appropriate requirement for the job in question."[213] In *O'Hare Truck Service, Inc. v. Northlake*, the Court held "that the protections of *Elrod* and *Branti* extend to ... [a situation] where the government retaliates against a contractor, or a regular provider of services, for the exercise of rights of political association or the expression of political allegiance."[214]

Symbolic Speech

"The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word."[215] Thus wrote the Supreme Court when it held that a statute prohibiting flag desecration violated the First Amendment. Such a statute is not content-neutral if it is designed to protect "a perceived need to preserve the flag's status as a symbol of our Nation and certain national ideals."[216]

By contrast, the Court upheld a federal statute that made it a crime to burn a draft card, finding that the statute served "the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates," and imposed only an "appropriately narrow" incidental restriction of speech.[217] Even if Congress's purpose in enacting the statute had been to suppress freedom of speech, the Court would "not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[218]

In 1992, in *R.A.V. v. City of St. Paul*, the Supreme Court struck down an ordinance that prohibited the placing on public or private property of a symbol, such as "a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in

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[208] 518 U.S. 668, 670 (1996).

[209] *Id.* at 673.

[210] *Id.* at 685.

[211] 427 U.S. 347 (1976).

[212] 445 U.S. 507 (1980).

[213] O'Hare Truck Service, Inc. v. Northlake, 518 U.S. 712, 714 (1996).

[214] *Id.*

[215] Texas v. Johnson, 491 U.S. 397 (1989).

[216] United States v. Eichman, 496 U.S. 310 (1990).

[217] United States v. O'Brien, 391 U.S. 367, 382 (1968).

[218] *Id.* at 383.

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others, on the basis of race, color, creed, religion or gender."[219] Read literally, this ordinance would clearly violate the First Amendment, because, "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[220] In this case, however, the Minnesota Supreme Court had construed the ordinance to apply only to conduct that amounted to fighting words. Therefore, the question for the Supreme Court was whether the ordinance, construed to apply only to fighting words, was constitutional.

The Court held that it was not, because, although fighting words may be proscribed "*because of their constitutionally proscribable content*," they may not "be made the vehicles for content discrimination unrelated to their distinctively proscribable content."[221] Thus, the government may proscribe fighting words, but it may not make the further content discrimination of proscribing particular fighting words on the basis of hostility "towards the underlying message expressed."[222] In this case, the ordinance banned fighting words that insult "on the basis of race, color, creed, religion or gender," but not "for example, on the basis of political affiliation, union membership, or homosexuality.... The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[223]

In a subsequent case, the Supreme Court held that its opinion in *R.A.V.* did not mean that statutes that impose additional penalties for crimes that are motivated by racial hatred are unconstitutional. Such statutes imposed enhanced sentences not for bigoted thought, but for the commission of crimes that can inflict greater and individual and societal harm because of their bias-inspired motivation. A defendant's motive has always been a factor in sentencing, and even in defining crimes; "Title VII [of the Civil Rights Act of 1964], for example, makes it unlawful for an employer to discriminate against an employee '*because of* such individual's race, color, religion, sex, or national origin.'"[224]

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.[225] 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 burning 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."[226]

[219] 505 U.S. 377 (1992).

[220] Texas v. Johnson, 491 U.S. at 417.

[221] *R.A.V.*, 505 U.S. at 384-385 (emphasis in original).

[222] *Id.* at 386.

[223] *Id.* at 391.

[224] Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993) (emphasis added by the Court to its quotation of the statute).

[225] Virginia v. Black, 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.

[226] *Id.* at 363.

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