THE "LAW OF THE FIRST AMENDMENT" REVISITED

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I. INTRODUCTION

Some twenty-plus years ago, I undertook an exploration of what I called "The Law of the First Amendment."[1] My purpose in doing so was to "analyze the First Amendment as it appears to judges and lawyers in the context of actual litigation and to explicate the meaning of the "Law of the First Amendment."[2] I did so from the perspective of a constitutional law professor who had litigated a number of First Amendment cases over the years.[3]

> My litigation experience ha[d] carried over into my teaching of the First Amendment and ha[d] led me to conclude that lawyers and academic commentators tend to approach the First Amendment with fundamentally different perspectives. This

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1. Robert A. Sedler, *The First Amendment in Litigation: The "Law of the First Amendment,"* 48 WASH. & LEE L. REV. 457 (1991).

2. *See id.* at 457.

3. The results in earlier cases were mixed. Some cases resulted in reported opinions. *See* Hetrick v. Martin, 480 F.2d 705 (6th Cir. 1973); Preston v. Cowan, 69 F. Supp. 14 (W.D. Ky. 1973); Honey v. Goodman, 432 F.2d 333 (6th Cir. 1970); Black Unity League of Ky. v. Miller, 394 U.S. 100 (1969) (per curiam); O'Leary v. Commonwealth, 441 S.W.2d 150 (Ky. Ct. App. 1969), *appeal dismissed*, 396 U.S. 40 (1969); McSurely v. Ratliff, 282 F. Supp. 848 (E.D. Ky. 1967). The cases litigated in the late 1980s and 1990s generally resulted in success. Many of those resulted in reported opinions. *See* Planned Parenthood Affiliates of Mich. v. Miller, 21 F. Supp. 2d 740 (E.D. Mich. 1998); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177 (6th Cir. 1995); G&V Lounge v. Mich. Liquor Control Comm'n, 23 F.3d 1071 (6th Cir. 1994); Lueth v. St. Clair Cnty. Cmty. Coll., 732 F. Supp. 1410 (E.D. Mich. 1990); Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989). I no longer engage in active constitutional litigation and instead limit my involvement to a consulting role.

> difference in perspective is much more than a difference between "doctrine" and "theory" or a difference between "what the Constitution means" and "what the Constitution should mean." It goes to the difference between how an academic commentator may approach the First Amendment for purposes of academic commentary and how litigating lawyers and judges, including the Justices of the Supreme Court, do in fact analyze a First Amendment issue in the context of actual litigation.
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> The academic commentator is subject to no constraints whatsoever in establishing the analytical framework for academic commentary. The academic commentator is free to posit a grand theory about the meaning of the First Amendment and to analyze the Supreme Court's First Amendment decisions with reference to the commentator's grand theory. Or in a more modest enterprise, the academic commentator may develop a thesis about the meaning of the First Amendment with respect to a particular kind of expression and try to support the thesis by invoking a number of conceptual, doctrinal, and policy considerations.
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> In actual First Amendment litigation, however, both grand theory and theses about the meaning of the First Amendment with respect to a particular kind of expression are [usually] irrelevant. Rather, in actual litigation, the analytical framework for the resolution of the First Amendment issue is what I [have] call[ed] the "*Law of the First Amendment.*"[4]

"The 'Law of the First Amendment' is th[e] body of concepts, principles, specific doctrines," and precedents in particular areas of First Amendment activity[5] that has emerged "from the collectivity of the Supreme Court's decisions" in First Amendment cases over a long period of time.[6] In my earlier article, I endeavored to explain the "structure of the 'Law of the First Amendment,' [to] discuss its essential components, and to demonstrate how the 'Law of the First Amendment' controls the

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4. Sedler, *supra* note 1, at 457-58.

5. In the original article, I referred to the body of precedents in particular areas of First Amendment activity as "balancing/subsidiary doctrine." *Id.* at 458.

6. *Id.*

results in actual First Amendment litigation, or at least sets the parameters for the resolution of the First Amendment question at issue."[7]

In scholarly discussions regarding the First Amendment, it has long been "commonplace to lament the failure of the Supreme Court to develop any general theory of the First Amendment."[8] Rather, it is said

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7. *Id.* For the author's discussion and application of the "Law of the First Amendment" to determine the constitutionality of governmental regulation of First Amendment activity involving the use of private property, see Robert A. Sedler, *The Rehnquist Court and the First Amendment: Property and Speech*, 21 WASH. U. J.L. & POL'Y 123, 138-39 (2006).

8. Sedler, *supra* note 1, at 458. *See, e.g.*, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 16 (1970). "The outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases," and its failure to do so "has had a most unfortunate effect upon the work of the lower Federal and State Courts, upon the performance of government officials, and upon the understanding of the public." *Id.* Professor Emerson said that the Supreme Court had the responsibility of "building a comprehensible structure of doctrine and practice that is meaningful to all and meets the needs of a free society." *Id.* at 15-16. Professor Emerson went on to formulate a general theory of the First Amendment, distinguishing between "expression," which would receive full protection, and "action," which the government could regulate, so long as the regulation did not impair "expression." *Id.* In a contemporary review of the book, which I called a "master work of scholarly excellence," I questioned whether the "expression-action" formulation would be effective in practice. Robert A. Sedler, Review, *The First Amendment in Theory and Practice*, 80 YALE L.J. 1070, 1070, 1076 (1970). I questioned, in particular, whether this formulation would protect fully the dissent and social change function of the First Amendment. *Id.* at 1080. Writing at a time of a movement for sweeping social change and strong opposition to the Vietnam War, I feared—incorrectly, as it turned out—that the courts would be resistant to First Amendment claims in this context. *Id.* at 1072. I also incorrectly feared that courts would often find the particular form of protest activity to constitute "action" rather than "expression." *Id.* Instead, I proposed a formulation of "full protection with limited exceptions." *Id.* at 1086-87.

Writing some years later in the context of urging substantial protection for commercial speech, Professor Steven Shiffrin, referring to Emerson's book as "surely the best book on the first amendment written in this century," said that "Emerson's attempt to formulate a general theory of the first amendment, however, has not been successful." Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1283 (1983). Professor Shiffrin went on to argue against any general theory of the First Amendment. *Id.* He stated as follows:

> Scholar after scholar has set out to produce a different but more successful *general* theory. All of these attempts, in my judgment, have been thwarted by the complexity of social reality. Speech interacts with the rest of our reality in too many complicated ways to allow the hope or the expectation that a single vision or a single theory could explain, or dictate helpful conclusions in, the vast terrain of speech regulation. In trying to move toward general theory, scholars have too often built abstractions without sufficient regard for the diverse contexts in which speech regulation exists. I do not mean to imply that

that the Court "has sought to develop principles on a case-by-case basis and has produced a complex and conflicting body of constitutional precedent."[9]

> However, while the Supreme Court's First Amendment decisions in their collectivity may seem complex and confusing when viewed from an academic perspective because of the absence of a unifying general theory, the "Law of the First Amendment" that has emerged from these decisions is neither complex nor conflicting. The "Law of the First Amendment" also has resulted

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> our attempts in the past twenty years to move toward a general theory of the first amendment have been unproductive. I do suggest, however, that in the next twenty years we would be better off if we had more appreciation for the advantages of thinking small. It is time to move *away from* a general theory of the First Amendment.

Id. (citation omitted). *See also* Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 U.C.L.A. L. REV. 1615 (1987). Farber and Frickey challenged a number of "general theories" about the meaning of the First Amendment. *Id.* at 1617-18. They concluded that, "[r]ather than thinking of free speech as one level in a hierarchy of values, it may be better to think of it as part of a web of mutually reinforcing values," so that First Amendment issues should be resolved by the exercise of "judicial practical reason." *Id.* at 1640, 1652-53.

General theories continue to abound. *See, e.g.*, Joshua P. Davis & Joshua D. Rosenberg, *The Inherent Structure of Free Speech Law*, 19 WM. & MARY BILL RTS. J. 131 (2010). Davis and Rosenberg "provide a framework that distills free speech law down to three [propositions]." *Id.* at 131.

> [F]irst, the Constitution constrains government if it regulates private speech, but not if government speaks, sponsors speech or restricts expression in managing an internal governmental function; second, government regulation is subject to the Free Speech Clause only if it targets communication; and third, government regulation targeting communication is constitutional if it survives a constrained cost-benefit analysis.

Id.

I do not favor any general theory of the First Amendment, and I am pleased to see that the Supreme Court has made no effort whatsoever to promulgate one. *See* Sedler, *supra* note 1, at 458 ("[W]hile the Supreme Court's First Amendment decisions in their collectivity may seem complex and confusing when viewed from an academic perspective because of the absence of a unifying general theory, the 'Law of the First Amendment' . . . has resulted in a very high degree of constitutional protection for freedom of expression in this nation."). Instead, as I have demonstrated earlier and will continue to demonstrate in the present writing, the Court has resolved First Amendment questions by the application of the "Law of the First Amendment." *Id.* at 484.

9. JESSE H. CHOPER, RICHARD H. FALLON, JR., YALE KAMISAR & STEVEN H. SHIFFMAN, CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 641 (11th ed. 2011).

> in a very high degree of constitutional protection for freedom of expression in this Nation.[10]

In the present writing, I propose to revisit the "Law of the First Amendment" in light of the Supreme Court's post-1991 decisions in First Amendment cases. In this revisit, I will demonstrate that nothing has changed in the intervening years and that the structure of the "Law of the

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10. Sedler, *supra* note 1, at 458. It is now recognized that, with the possible exception of freedom from racial discrimination, freedom of expression is "the strongest protection afforded to any individual right in our constitutional system, and, in practice, a First Amendment challenge is the one that is most likely to be successful." *Id.* at 458 n.3. To take a few classic examples, "while a public school board or university can refuse to renew the contract of a nontenured teacher on seemingly 'arbitrary' grounds, it cannot do so on the ground that the teacher has engaged in activity that is protected by the First Amendment, such as criticizing American foreign policy." *Id. See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972). Similarly, government "regulation of economic activity, which is virtually immune from constitutional challenge under the due process or equal protection clause, becomes subject to serious constitutional challenge and possible invalidation when the regulation reaches advertising, because advertising is speech for First Amendment purposes and brings into play the commercial speech doctrine." Sedler, *supra* note 1, at 458 n.3. *See, e.g.*, Williams v. Lee Optical, 348 U.S. 483 (1955); Ry. Express Agency, Inc. v. New York, 336 U.S. 106 (1947). *See also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) (holding that a ban on promotional advertising by a regulated public utility, purportedly designed to advance the government's interest in energy conservation, violates the First Amendment).

More significantly perhaps, it is also fair to say that the constitutional protection afforded to freedom of expression in the United States is seemingly unparalleled in other constitutional systems and that, in the United States, as a constitutional matter, the value of freedom of expression generally prevails over other democratic values. *See* Sedler, *supra* note 1, at 462-63. For example, while article 19 of the International Covenant on Civil and Political Rights generally protects freedom of expression, article 20 requires that "any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" to be prohibited by law. U.N. Office of the Comm'r for Human Rights, General Comment No. 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (Art. 20) (July 29, 1983), *available at* http://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo11.pdf.unhchr.ch/tbs/doc.nsf/0/60dcfa23f32d3feac12563ed00491355?Opendocument. War propaganda and "hate speech" are, in most circumstances, protected by the First Amendment, so when the United States Senate ratified the International Covenant on Civil and Political Rights, the resolution of ratification contained a reservation to the effect that, "Art. 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States." U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 CONG. REC. S4781-01 (daily ed., Apr. 2, 1992), *available at* http://www1.umn.edu/humanrts/usdocs/civilres.html. As to the unparalleled protection of freedom of expression in the United States, see generally Robert A. Sedler, *Essay on Freedom of Speech: The United States Versus the Rest of the World*, 2006 MICH. ST. L. REV. 377 (2006).

First Amendment" is exactly the same as it was when I first explored it over twenty years ago.[11] I will incorporate all of the post-1991 cases into the principles, specific doctrines, and precedents in particular areas of First Amendment activity that I developed in my original analysis of the "Law of the First Amendment."[12] In addition, I will expand on the precedents in particular areas of First Amendment activity to include areas of First Amendment activity that were not discussed in the original article.[13]

I will begin by making some general observations about First Amendment analysis, including a bit of First Amendment theory reflected in the Supreme Court's First Amendment decisions.[14] In so doing, I will point out that in its post-1991 decisions, the Court has increased the protection afforded to First Amendment rights and has resisted attempts to diminish that protection.[15] I will then review all the components of the "Law of the First Amendment," adding the Court's post-1991 decisions to its pre-1991 decisions.[16] I will conclude this revisit with a strong justification for the high degree of constitutional protection for freedom of expression in the United States that is provided under the "Law of the First Amendment."[17]

II. GENERAL OBSERVATIONS ABOUT FIRST AMENDMENT ANALYSIS

A. Freedom of Expression for First Amendment Purposes

The first step in understanding First Amendment analysis is to recognize that not all activity, which somehow involves speech or writing, constitutes freedom of expression for First Amendment purposes.[18] First Amendment analysis, by which I mean an analysis under the "Law of the First Amendment," does not apply to certain categories of activity that involve speech or writing. These categories are

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11. *See* discussion *infra* Parts II, III.
12. *See* discussion *infra* Parts II, III.
13. *See* discussion *infra* Part III.E.
14. *See* discussion *infra* Part II.
15. *See* discussion *infra* Part II.
16. *See* discussion *infra* Part III.
17. *See* discussion *infra* Part IV.
18. *See* Brian B. Mahoney, *Constitutional Law—Speech Restriction, Governmental Interests, and an Ordinance's Constitutionality—Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002)*, 37 SUFFOLK U. L. REV. 569, 571 (2002).

(1) unlawful verbal acts, (2) obscenity, (3) child pornography, and (4) government speech.[19]

1. Unlawful Verbal Acts

The fact that certain crimes such as perjury, bribery, or illegal solicitation are carried out by means of words does not make them any less criminal, and the punishment of these crimes is in no way constrained by the First Amendment.[20] As the Supreme Court has stated: "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language."[21] In other words, conduct that the government may otherwise make unlawful does not cease to be unlawful merely because it is carried out by means of speech or writing.[22] We will use the term "unlawful verbal acts" to refer to such conduct.

In addition to crimes such as perjury, bribery, and illegal solicitation, unlawful verbal acts include acts of discrimination that are carried out by means of speech or writing, such as a newspaper carrying sex-designated "help-wanted" advertisements[23] or an employer sexually harassing an employee by threatening to discharge her if she does not submit to his

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19. *See infra* pp. 1009-17.

20. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

21. *Id.* In the recent case of *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), the Court held that the federal law making it a crime to "knowingly provid[e] material support or resources to a 'foreign terrorist organization,'" 18 USC § 2339B, prohibited a group from providing educational programs and political advocacy services designed to persuade such an organization to pursue its aims through peaceful means, and that such a prohibition did not violate the group's First Amendment rights.

22. *Giboney*, 336 U.S. at 498.

23. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973). A newspaper's carrying of sex-designated help-wanted advertisements amounts to an act of sex discrimination and so is not protected by the First Amendment. *Id.* at 388-89, 391. Likewise, an advertisement for an illegal activity is not protected expression for First Amendment purposes. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563-64 (1980). In addition, the state may maintain fraud actions against fundraisers hired by charitable organizations that make false or misleading representations designed to deceive donors about how their donations will be used. Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 606 (2003). *See also* Wisconsin v. Mitchell, 508 U.S. 476, 479 (1993) (holding that the First Amendment does not preclude a state from imposing additional punishment for an assault that was racially motivated, where the basis for the imposition of additional punishment is not the actor's beliefs, but the actor's discriminatory conduct taken pursuant to those beliefs, the expression of which may be taken as evidence of the actor's racial motivation).

sexual advances.[24] Again, what is being prohibited here is an act of discrimination, and it is irrelevant for constitutional purposes how the act of discrimination is being carried out.[25] The Court has also held that "'fighting words" addressed by one person to another are not protected by the First Amendment, because they are "likely to provoke the average person to retaliation and thereby cause a breach of the peace."[26] Another example of an unlawful verbal act is the classic "false cry of fire in a crowded theater."[27] The false cry of fire in a crowded theater is not protected expression for First Amendment purposes because the speaker is not trying to convey an idea.[28] Instead, the speaker is trying to induce panic as an automatic response to the false cry of fire, and the government may constitutionally prohibit a person from trying to induce panic in this manner.[29]

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24. *See, e.g.*, Kaufman v. Allied Signal, Inc., 970 F.2d 178 (6th Cir. 1992).

25. *See Giboney*, 336 U.S. at 502.

26. Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942). "Fighting words" for these purposes appear to be limited to one-to-one insults uttered in such circumstances as to amount to an invitation to a fight. *Id.* at 571-72. The Court has resisted any effort to expand the notion of "fighting words" to include highly offensive speech designed to cause emotional distress to the recipient. *Id.* at 572. It has also held that the content neutrality principle applies to any governmental prohibition of "fighting words" and so has held unconstitutional a law that prohibited only "fighting words" that expressed a message of racial hatred. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). The Court has not, since *Chaplinsky*, held a law constitutional on the ground that it only prohibited "fighting words."

Closely related to "fighting words" is a "true threat" in which the speaker uses words or symbols making clear the speaker's intention to cause harm to another person. *See* Virginia v. Black, 538 U.S. 343, 343 (2003) (citing Watts v. United States, 394 U.S. 705 (1969)). In *Black*, the Court held that the state could constitutionally prohibit the burning of a cross "with the intent to intimidate a person or group." *Id.* The Court's conclusion that the state could prohibit cross-burning with intent to intimidate as a "true threat" was based in part on "cross burning's long and pernicious history as a signal of impending violence." *Id.* at 344. The Court, however, also held that the First Amendment precluded the state from making cross-burning prima facie evidence of intent to discriminate, because this provision could result in a conviction for cross-burning without proof of intent to discriminate. *Id.* at 364. This result could have a chilling effect on cross-burning without the intent to discriminate, which is constitutionally protected. *Id.* at 366-67.

27. Schenck v. United States, 249 U.S. 47, 52 (1919).

28. Brandenburg v. Ohio, 395 U.S. 444, 456 (1969). *See also* Hustler Magazine v. Falwell, 485 U.S. 46, 50-51 (1988).

29. *Brandenburg*, 395 U.S. at 456. Contrast the situation in which there is in fact a fire in a multistoried building, and someone says: "Ignore the 'In case of fire, take the stairs' signs. Let's take the elevator, or we'll all be burned to death." Here, the speaker is expressing an idea. The speaker is invoking the listener's cognition and is trying to persuade the listener to take certain action. The idea that the speaker is expressing may be an unsound idea, but, unlike the "false cry of fire in a crowded theater," it is an idea and not an unlawful verbal act. Thus, it involves freedom of expression for First Amendment

However, the concept of unprotected "verbal act" may be applied only to activity that is otherwise unlawful and does not involve the expression of an idea or the discussion of matters of public interest.[30] The government may not avoid the constraints of the First Amendment simply by making the expression of a particular idea or the discussion of particular matters of public interest "unlawful" because of the purported harm that such expression or discussion is deemed to cause to individuals or to the public at large.[31] For example, material contained in a book or newspaper article may injure a person's reputation or privacy, or may cause a person to suffer emotional distress, and the government may seek to redress that injury by the imposition of tort liability, such as in an action for defamation, invasion of privacy, or the intentional infliction of emotional distress.[32] But the injury that the government seeks to redress by the imposition of tort liability has resulted from the expression of an idea or the discussion of matters of public interest.[33] This being so, the concept of unlawful "verbal act" cannot be invoked to take the purportedly harmful expression out of the protection of the First Amendment, and the government's imposition of tort liability for the harm caused by the expression must be justified under the "Law of the First Amendment."[34]

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purposes, and any governmental effort to sanction it must be justified under the "Law of the First Amendment." It may be assumed that the government can justify the sanction on the ground that the expression creates an imminent danger of immediate and serious harm, akin to that created by advocacy of unlawful action "likely to incite or produce imminent lawless action." *See id.*

30. Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1315 (2005).

31. *Id.* at 1310-11.

32. *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46, 46-47.

33. *See id.* at 50.

34. Robert A. Sedler, *The Settled Nature of American Constitutional Law*, 48 WAYNE L. REV. 173, 287 (2002). *See, e.g.*, *Hustler Magazine*, 485 U.S. at 46 (explaining that the First Amendment precludes a state from imposing liability for emotional distress suffered by a public figure who was the subject of an offensive parody). See discussion *infra* notes 252-58, on the *New York Times* rule, which imposes significant First Amendment limitations on the ability of the state to impose liability for defamation, invasion of privacy, and the infliction of emotional distress. Under the *New York Times* rule, when a public official or public figure is involved, the state may only impose liability for false statements of fact that were knowingly false or made with reckless disregard for truth or falsity. *See* Volokh, *supra* note 30, at 1277. Volokh emphasizes that the notion of what I refer to as an unlawful verbal act must be limited to what are clearly "unprotected categories and must not trench on what is otherwise protected speech by labeling it as 'conduct.'" *Id.* at 1310-11.

2. Obscenity

Pornography, in the sense of the depiction or description of sexual activity in books, magazines, motion pictures, television, on the Internet, and the like, is fully protected by the First Amendment, and the government cannot prohibit pornographic expression on the ground that it is considered to be "immoral" or "degrading to women."[35] However, the Supreme Court has carved out an "obscenity" exception to the constitutional protection otherwise afforded to pornographic expression.[36] In an unusual "historical context" interpretation of the First Amendment, the Court has held that the Framers of the First Amendment did not intend to include obscenity within its protections, because they considered obscenity to be "utterly without redeeming social importance."[37] Obscenity for these purposes is very narrowly defined,[38] and the constitutional test for "obscenity" makes it clear that serious books, motion pictures, and other works describing and depicting sexual activity, even in a very graphic way, are fully protected by the First Amendment.[39]

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35. *See, e.g.*, Sable Commc'ns v. FCC, 492 U.S. 115, 115-16 (1989) (holding unconstitutional a prohibition on indecent commercial telephone messages); Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (explaining an ordinance's definition of "pornography" as simply the "graphic sexually explicit subordination of women").

36. Roth v. United States, 354 U.S. 476, 483 (1957).

37. *Id.* at 484.

38. A work is "obscene" for First Amendment purposes only if, taken as a whole: (1) the dominant theme of the work appeals to a "prurient" interest in sex; (2) it is patently offensive to contemporary community standards relating to the description or depiction of sexual activity; and (3) it lacks serious literary, artistic, political, or scientific value. Miller v. California, 413 U.S. 15, 24 (1973). "Obscenity" is thus limited to "hard core" books, motion pictures, and videocassettes that contain nothing more than graphic description or depiction of sexual activity without any real story line and that are typically purveyed in "adult bookstores" and other "adult establishments." *Id.* at 36. "Anti-obscenity" laws must very precisely define the sexual activity that cannot be described or depicted, and any law that fails to do so or that goes beyond the Court's definition of "obscenity" in *Miller* will be found to be void on its face for overbreadth. *Id.* at 41. *See infra* notes 145-53 and accompanying text. "Obscenity" is limited to depictions of sexual conduct. *Miller*, 413 U.S. at 24. The Court rejected the state's efforts to liken violence to obscenity and found a state law prohibiting the sale or rental of violent video games to minors violative of the First Amendment. Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729, 2734 (2011). The Court observed, "Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of 'sexual conduct.'" *Id. See also* Geoffrey R. Stone, *Sex, Violence and the First Amendment*, 74 U. CHI. L. REV. 1857, 1857-58 (2007).

39. Nudity, of course, is not synonymous with obscenity, and the fact that performers appear in the nude on stage or in motion pictures does not deprive the performance of

Since the First Amendment does not protect obscenity, the government may constitutionally prohibit the dissemination of obscenity to persons wishing to receive it[40] and may obtain an injunction against such dissemination.[41] However, in order to prevent a chilling effect on the dissemination of constitutionally protected pornography resulting from the government's efforts to suppress constitutionally unprotected obscenity, the First Amendment requires that the government establish procedures that will minimize this possible chilling effect and ensure that there will be no actual suppression of constitutionally protected pornography.[42] The most significant constitutionally required procedure is that there can be no advance prohibition of the dissemination of a work alleged to be obscene until there has been a judicial determination of obscenity in an adversary proceeding initiated by the government.[43]

3. Child Pornography

Child pornography refers to the participation of children in the depiction of sexual activity, such as in photographs, movies, videos, or on the Internet.[44] As the government can conclude that the participation of children in the depiction of sexual activity causes serious harm to the children forced to participate in that activity, the government's interest in preventing such harm "constitutes a government[al] objective of surpassing importance."[45] For this reason, the Court has held that child pornography does not constitute freedom of expression for First

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First Amendment protection. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565 (1991). Nude dancing, even of the striptease variety, also involves freedom of expression for First Amendment purposes, since it conveys the idea of sexuality. *Id.* at 566. However, the Court has upheld a ban on totally nude dancing in "adult entertainment" establishments on the ground that the state may find that there are harmful "secondary effects" associated with totally nude dancing in this kind of establishment, such as a higher incidence of sexual assault and prostitution. *Id.* at 582.

40. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973). The government may not, however, make it a criminal offense for an individual to read or view "obscenity" in the privacy of the individual's home. Stanley v. Georgia, 394 U.S. 557, 568 (1969).

41. *See, e.g.*, Kingsley Books, Inc. v. Brown, 354 U.S. 436, 437 (1957). In practice, there is relatively little enforcement of anti-obscenity laws. *See supra* note 38. *See infra* note 177 and accompanying text. The focus instead has been on the containment of the "commercial sex" industry, including regulation of the location of "adult entertainment" establishments and the activity conducted at such establishments. *See supra* note 39. *See infra* note 177 and accompanying text.

42. Freedman v. Maryland, 380 U.S. 51, 61 (1965).

43. *See id.* at 58.

44. 18 U.S.C.A. § 2256 (West 2008).

45. New York v. Ferber, 458 U.S. 747, 757 (1982).

Amendment purposes and that the government may prohibit the dissemination of all child pornography without regard to whether the work itself is legally obscene.[46] However, because the unprotected nature of child pornography is based on the harm it causes to children, the government may not constitutionally prohibit the depiction of children engaging in sexual activity that does not involve actual children, such as the use of adults who look like children or virtual child pornography involving the use of computer-generated images of children engaging in sexual activity.[47]

4. Government Speech

The First Amendment does not apply to the government's own speech.[48] When the government chooses to speak, it may convey only the message that the government wants to convey, and in no respect is conveyance of that message subject to the "Law of the First Amendment."[49] Thus, the government may use its funds or public property to convey its message.[50] For example, since the display of donated monuments in a city-owned park is a form of government speech, a city could choose to accept a monument donated by one group and reject a monument donated by another group.[51] So too, the First Amendment permits the government to impose conditions on the recipients of government funds or benefits that are related to the advancement of governmental policy objectives.[52] Thus, because federal law prohibits the use of federal funds to subsidize abortions, the government may require that recipients of federal funds for family planning purposes not provide counseling concerning the use of abortion as a means of family planning nor make referrals to abortion providers.[53] The government may also set advisory guidelines relating to the content

46. *Id.* at 761.

47. *See* Ashcroft v. Free Speech Coal. 535 U.S. 234, 256 (2002). However, offers to provide or requests to obtain child pornography are types of unlawful verbal acts and are categorically excluded from First Amendment protection even if the material is not actually child pornography. United States v. Williams, 553 U.S. 285, 299 (2008). The depiction of the children must be sexual in nature. Massachusetts v. Oakes, 491 U.S. 576, 582-83 (1989). The depiction of ordinary nudity of children, such as a photograph of small children taking a bath or a topless teenager on a beach, does not constitute child pornography and is protected under the First Amendment. *See id.* at 585.

48. Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009).

49. *Id.*

50. *Id.* at 467-68.

51. *Id.* at 464.

52. Rust v. Sullivan, 500 U.S. 173, 177-78 (1991).

53. *Id.*

of artistic programs that the government is funding, such as a guideline that the funding agency take into account "general standards of decency and respect for the diverse beliefs and values of the American public."[54] And, most recently, the Court has held that a public university's policy requiring officially recognized student groups to open their membership and leadership positions to all students, including those who do not share the groups' core beliefs about religion and sexual orientation, does not violate the groups' First Amendment rights.[55]

Related to the proposition that the First Amendment does not apply to the government's own speech is the proposition that generally the public has no First Amendment right of access to information possessed by the government.[56] Thus, as a constitutional matter, the government may refuse to release information within its control and may deny access to certain governmental facilities.[57] The Court has held, however, that the

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54. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572 (1998). In *United States v. American Library Association*, 539 U.S. 194 (2003), the Court upheld on its face a provision of the Children's Internet Protection Act (CIPA), requiring public libraries receiving federal assistance to install software filters to block obscene or pornographic images and to prevent minors from obtaining access to material that is harmful to them. 20 U.S.C.A. § 9101 (West 2000). The law permitted disabling the filters for "other lawful purposes," and the filter programs at issue permitted disabling during use by an adult. *Am. Library Ass'n*, 539 U.S. at 201.

55. Christian Legal Soc'y Chapter of the Univ. of Cal. Hastings Coll. of Law v. Martinez, 130 S. Ct. 2971, 2978 (2010). For an interesting discussion of the different capacities in which the government speaks and the view that in some circumstances, government speech may impair private speech rights or violate assumptions underlying the First Amendment itself, see Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377 (2001). The Court's decisions, however, have not drawn a distinction between different categories of government speech and have given the government broad leeway to convey whatever message the government wants to convey. *Id.* at 1431.

56. *See* Houchins v. KQED, Inc., 438 U.S. 1, 9-12 (1978). As the media has no greater First Amendment rights than those enjoyed by the public at large, the media likewise cannot claim a constitutional right of access to government-controlled information. *Id.* at 11.

57. *Id.* at 15-16. The cases establishing this proposition have involved unsuccessful efforts by the media to obtain face-to-face interviews with prison inmates and to challenge restrictions on media access to prisons. *See id.* at 15; Pell v. Procunier, 417 U.S. 817, 819 (1974). In the context of holding that the media had no First Amendment right to face-to-face interviews with prison inmates or to challenge restrictions on media access to prisons, the Court emphasized that the media or "working press" does not have greater First Amendment rights than the public at large. *Houchins*, 438 U.S. at 11. This being so, members of the media do not have a First Amendment privilege to refuse to testify in a legal proceeding or to avoid disclosure of confidential sources. Branzburg v. Hayes, 408 U.S. 665, 708 (1972). In reaction to this holding, many states, but not Congress, have enacted "shield" laws, enabling members of the media in some circumstances to refuse to disclose confidential sources. *See generally State-by-State*

public does have a First Amendment right of access to criminal trials and to all stages of the criminal process.[58]

B. A Bit of First Amendment Theory: The Marketplace of Ideas

To the extent that the Supreme Court has developed any theory about the meaning of the First Amendment, it is that the First Amendment operates within the framework of a *marketplace of ideas*.[59] Under this theory, the primary function of the First Amendment is to ensure that all ideas enter the marketplace of ideas and compete with one another, seeking to win acceptance by the public as a whole.[60] This means that, under the First Amendment, there can be no such thing as a false idea, that the government cannot keep what it considers to be false ideas out of the marketplace, and that if someone engages in what many of us would consider "bad" speech, such as the espousal of racism[61] or genocide,[62] then the remedy must be "more speech, not enforced silence."[63]

Guide to the Reporter's Privilege for Student Media, STUDENT PRESS LAW CENTER (2010), http://www.splc.org/knowyourrights/legalresearch.asp?id=60. The government may also obtain a search warrant to search a newsroom under the same conditions as it may obtain a warrant to conduct any other search. Zurcher v. Stanford Daily, 436 U.S. 547, 552-53 (1978). In reaction to the Court's holding that there is no constitutional right of access to governmentally-controlled information, in 1976, Congress enacted the Freedom of Information Act (FOIA), which provides, subject to nine very specific exemptions, very broad access to information within the control of the executive branch of the federal government. 5 U.S.C.A. § 552 (West 1995). The underlying premise of the Act is that all records of federal agencies and all information within their control must be available to the public unless specifically exempt from disclosure. *See, e.g.*, Taylor v. Sturgell, 553 U.S. 880 (2008); Dep't of Air Force v. Rose, 425 U.S. 352 (1976). A companion law, the Government in the Sunshine Act of 1976, requires most government agencies to open their meetings to the public, subject to exemptions that parallel most of the FOIA exemptions. 5 U.S.C.A. § 552b (West 1995). Most states have also adopted freedom of information and "open meetings" acts with similar provisions. *See, e.g.*, MICH. COMP. LAWS ANN. § 15.261 (West 2012).

58. *See* Press-Enter. Co. v. Superior Court, 478 U.S. 1 (1986); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

59. Lamont v. Postmaster Gen. of U.S., 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

60. *Id.* (Brennan, J., concurring).

61. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

62. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

63. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). As Justice Lewis Powell stated, "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-340 (1974). Similarly, Justice Anthony Kennedy stated more recently:

Justice Oliver Wendell Holmes first developed the theory of the marketplace of ideas in his classic dissent in *Abrams v. United States*,[64] a World War I case in which the Court majority upheld the conviction of protestors for distributing leaflets expressing opposition to the war.[65] Justice Holmes stated:

> The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth. The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.

United States v. Alvarez, 132 S. Ct. 2537, 2549 (2012) (plurality opinion) (citation omitted). In this case, the Court held 6-3 that the Stolen Valor Act, making it a crime to falsely claim receipt of military decorations or medals, violated the First Amendment. *Id.* at 2543 (citing 18 U.S.C.A. § 704 (West 2012)). There is no doubt that the underlying assumption of the marketplace of ideas theory is that in the final analysis, people are capable of making rational judgments about which ideas are "false" and which ideas are not "true," or at least not clearly "false." Lyrissa Barnett Lidsky, *Nobody's Fool: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 901 (2010). In an interesting article applying behavioral economics to the underlying assumption of the "rational audience," Professor Lyrissa Barnett Lidsky maintains that the "rationality ideal" is "inevitably flawed" and that "[b]ehavioral economics helps illuminate areas in which human beings tend to make cognitive mistakes." *Id.* at 849. Lidsky then concludes that the rational audience assumption should not be discarded from First Amendment doctrine, because "[a] presumption of audience irrationality would justify increased government regulation of the speech marketplace, which presents far more dangers of mischief than increased regulation of economic markets." *Id.* She states as follows:

> If we the people are incapable of rationally choosing our collective fates, then democracy is doomed to failure . . . . The rational audience ideal reflects a justifiable distrust of overtly paternalistic intervention by government in the realm of speech and expression. In light of the government's already powerful potential to drown out other speakers in the marketplace of ideas, it is useful to preserve the rational audience assumption as an additional check on government's abuse of that power.

Id. at 850.

64. 250 U.S. 616 (1919).

65. *Id.* at 624-31 (Holmes, J., dissenting). The defendants were convicted under the Espionage Act, 40 Stat. 553, for conspiring to "utter, print, write and publish . . . disloyal, scurrilous and abusive language about the form of government of the United States," "language intended to bring the form of government of the United States into contempt, scorn, contumely and dispute," "language intended to incite, provoke and encourage resistance to the United States in said war," and language "to urge, incite and advocate curtailment of production of things and products . . . necessary and essential to the prosecution of the war." *Id.* at 616-17 (internal quotation marks omitted).

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[66]

In a more recent emanation, the theory of the marketplace of ideas was very effectively set forth by Justice John Marshall Harlan, writing for the Court in *Cohen v. California.*[67] Justice Harlan stated:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[68]

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66. *Id.* at 630 (Holmes, J., dissenting).

67. 403 U.S. 15 (1971). In that case, the Court held that the First Amendment protected the right to protest against the Vietnam War by the use of an "unseemly expletive," here, wearing a jacket in public with the message, "Fuck the Draft." *Id.* at 16, 23, 26. For a discussion of Justice Harlan's evolving views on the meaning of the First Amendment, as reflected in the *Cohen* opinion, and praise for his "commitment to the protection of first amendment values and his rejection, at least by the end of his tenure on the Court, of ad hoc balancing as a general approach to first amendment issues," see Daniel A. Farber & John E. Nowak, *Justice Harlan and the First Amendment*, 2 CONST. COMMENT. 425, 453-54 (1985).

68. *Cohen,* 403 U.S. at 24.

In a number of other cases, the Court has also referred to the marketplace of ideas, thus firmly establishing the theory of the marketplace of ideas in First Amendment analysis.[69]

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69. *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2550 (2012) (citing *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)); N.Y. State Bd. of Elections v. Torres, 552 U.S. 196, 208 (2008) (holding that a state election law providing for the selection of judicial candidates did not violate the First Amendment, which "creates an open marketplace where ideas . . . may compete without government interference") (citing *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995) (invalidating a ban on anonymous campaign literature because "having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry"). In *Alvarez*, the Court invalidated the Stolen Valor Act, which made it a crime to falsely claim receipt of military decorations or medals. *Alvarez*, 132 S. Ct. at 2551-52 (citing 18 U.S.C.A. § 704(b)(c) (West 2012)). The plurality opinion of Justice Kennedy stated, "The theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'" *Id.* at 2550 (quoting *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)).

In *Alvarez*, the Court held unconstitutional a law that prohibited a false statement of fact rather than a law that prohibited the expression of an idea. *Id.* at 2552-53. The theory of the marketplace of ideas clearly has also resulted in First Amendment protection for a large number of false statements of fact. *Id.* at 2544-47. To this extent, in our constitutional system, we rely on the ability of the public to determine the truth of facts as well as the truth of ideas. *See* Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 907-912 (2010). In this article, Professor Schauer discusses what he calls the "widespread public acceptance of factual falsity" and concludes that "[f]ar more than First Amendment freedoms have created a society in which truth seems to matter so little, and far more than First Amendment freedoms will be necessary to do anything about it." *Id.* at 919. Professor Rodney A. Smolla has suggested that it is possible to conceptualize the history of the American free speech debate as a contest between two alternative approaches to free speech regulation: one that seeks to identify and proscribe inherently dangerous speech, *see, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (defining "fighting words" as "[w]ords which by their very utterance tend to inflict injury"), and one that is based on the premise that "all speech is presumptively free speech, and that it is to remain unshackled by government unless the government comes forward with compelling justifications for its abridgments," as reflected in the marketplace of ideas theory. Rodney A. Smolla, *Words Which by Their Very Utterance Inflict Injury: The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 357 (2009). He then says that there has been a "paradigm shift taking place over the last several decades" and that today the marketplace theory is the dominant one, concluding, "The overall effect of this shifting paradigm is to broaden protection of freedom of speech, at the expense of other societal and individual interests." *Id.* at 359-60.

It has been contended that "digital technologies [have] alter[ed] the social conditions of speech and therefore should change the focus of free speech theory" from a concern with protecting the democratic process to a larger concern with protecting and promoting a democratic culture "in which individuals have a fair opportunity to participate in the forms of meaning-making that constitute themselves as individuals." Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 1 (2004). At this point in

The theory of the marketplace of ideas is the foundation of the most important First Amendment principle, that of content neutrality.[70] As we will see, under this principle, the government may not proscribe any expression because of its content, and an otherwise valid regulation violates the First Amendment if it differentiates between types of expression because of content.[71] This means, as I have stated, that under the First Amendment, there can be no such thing as a "bad idea," that all ideas, "good and bad," must be able to compete in the marketplace of ideas, and that the remedy for what most of us would consider "bad speech" is necessarily "more speech, not enforced silence."[72] It is the content neutrality principle, derived from the theory of the marketplace of ideas that, as a constitutional matter, sets the United States apart from most other democratic nations, where "bad ideas," such as genocide and racism, are not constitutionally protected and are proscribed by international human rights norms.[73]

Operationally, the theory of the marketplace of ideas means only that all ideas are entitled to enter the marketplace and to compete with other ideas.[74] There is a built-in inequality in this theory, as it does not permit the government to regulate the marketplace to ensure that every idea can compete fairly with every other idea. Things being what they are, the media and wealth interests obviously will have much bigger "stalls in the marketplace" than the lone blogger or groups with limited resources. However, the history of the First Amendment has been one of dissident groups seeking access to the marketplace of ideas, so that they can express their ideas with whatever resources they may have.[75] Therefore, the marketplace of ideas is designed to ensure access, not equality of access, and governmental efforts to regulate the marketplace in order to

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time, there is no indication that the Supreme Court is doing anything other than applying the "Law of the First Amendment" to determine the constitutionality of governmental regulation of the Internet. *See infra* notes 386-89 and accompanying text.

70. *Alvarez*, 132 S. Ct. at 2537.

71. *Id.*

72. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974).

73. *See generally* Sedler, *supra* note 10. *See also* Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1529-41 (2003), for a critical view of the content neutrality principle and the resulting protection of hate speech in the United States as distinguished from other western democracies.

74. Lamont v. Postmaster-General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

75. *See* discussion *infra* notes 77-84 and accompanying text.

bring about equal competition in the marketplace are violative of the First Amendment.[76]

C. A Look Back: The History of the First Amendment and Its Function in the American Constitutional System

The development of the First Amendment as the constitutional basis of the protection of freedom of expression is generally considered to have begun with First Amendment challenges to espionage and sedition prosecutions during World War I and the "red scare" that followed, as indicated by cases such as *Schenck v. United States*,[77] *Abrams v. United States*,[78] *Gittlow v. New York*,[79] and *Whitney v. California*.[80] These challenges were generally unsuccessful. While the First Amendment was recognized doctrinally as a basis for challenging these laws, the Court applied the "clear and present danger" test and came down on the side of upholding the challenged law or governmental action at issue.[81] In the 1930s, the Court began to sustain First Amendment challenges under this test, in effect protecting the oppositional speech of the socialists, communists, anarchists, and similar groups, which consisted of criticism of the government in Marxist terms and discussion of abstract Marxist doctrine, including violent overthrow of the government.[82] By the 1950s, the "clear and present danger" test had been firmly established as the doctrinal basis for determining the First Amendment protection afforded to advocacy of illegal action and other expression directed toward dissent and social change efforts.[83] The Court had also invoked the "clear and

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76. It is for this reason that campaign finance regulations attempting to equalize the funds available to candidates who are receiving public funds and candidates who are self-financing their campaigns violate the First Amendment. *See* Davis v. FEC, 554 U.S 724, 744 (2008); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2829 (2011).

77. 249 U.S. 47 (1919).

78. 250 U.S. 616 (1919).

79. 268 U.S. 652 (1925).

80. 274 U.S. 357 (1927).

81. *See, e.g.*, *Whitney*, 274 U.S. at 374 (Brandeis, J., concurring) ("It is said to be the function of the legislature to determine whether at a particular time and under the particular circumstances the formation of, or assembly with, a society organized to advocate criminal syndicalism constitutes a clear and present danger of substantive evil; and that by enacting the law here in question the Legislature of California determined that question in the affirmative.").

82. *See, e.g.*, Herndon v. Lowry, 301 U.S. 242, 263-64 (1937); De Jonge v. Oregon, 299 U.S. 353, 365 (1937).

83. There was some regression on this issue during the Cold War period, when the Court interpreted the "clear and present danger" test rather loosely in order to sustain the constitutionality of laws directed against the Communist Party, which was widely

present danger" test to strike down efforts by judges to punish "contempt of court by publication."[84]

More significantly, beginning in the 1930s and continuing thereafter, the Court invoked the First Amendment in a number of contexts to strike down laws and governmental actions affecting freedom of expression.[85] These cases became the genesis for a number of First Amendment doctrines currently in effect. In the area of prior restraint and the licensing of expression, there was *Near v. Minnesota*,[86] striking down an injunction against the publication of a "scandalous, or defamatory publication," as well as *Lovell v. City of Griffin*[87] and *Staub v. City of Baxley*,[88] invalidating standardless laws licensing expression. Bans on the distribution of literature and other forms of expression in the public streets and parks were held unconstitutional in cases such as *Hague v. Committee for Industrial Organizations*[89] and *Schneider v. Irvington*.[90] In *Martin v. Struthers*,[91] the Court held unconstitutional an absolute ban on knocking on doors or ringing doorbells in order to deliver handbills. In *Terminiello v. Chicago*,[92] the Court held that the First Amendment protected speech that "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." In *West Virginia State Board of Education v. Barnette*,[93] the Court held that the First Amendment protected the right to refrain from speaking

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believed to be controlled by the Soviet Union and a part of an international conspiracy directed toward bringing about violent revolution in the United States. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 517 (1951). However, in a series of decisions beginning with *Yates v. United States*, 354 U.S. 298, 303 (1957), and culminating in *Brandenburg v. Ohio*, 395 U.S. 444, 444-45 (1969), the Court began a process that effectively overruled *Dennis* and that, by a combination of statutory interpretation and constitutional holdings, rendered nugatory virtually all of the anticommunist legislation enacted during the Cold War period. Under the reformulated "clear and present danger" test, advocacy of illegal action is constitutionally protected until it becomes "likely to incite or produce imminent lawless action," which effectively protects virtually any expression directed toward dissent and social change effort. *See, e.g.*, Communist Party v. Whitcomb, 414 U.S. 441, 448 (1974); Hess v. Indiana, 414 U.S. 105, 108 (1973). *See infra* notes 249-51 and accompanying text.

84. *See, e.g.*, Pennekamp v. Florida, 328 U.S. 331, 350 (1946) (Frankfurter, J., concurring); Bridges v. California, 314 U.S. 252, 278 (1941).

85. *See infra* notes 86-93 and accompanying text.

86. 283 U.S. 697 (1931).

87. 303 U.S. 444 (1938).

88. 355 U.S. 313 (1958).

89. 307 U.S. 496 (1939).

90. 308 U.S. 147 (1939).

91. 319 U.S. 141, 149 (1943).

92. 337 U.S. 1, 4 (1949).

93. 319 U.S. 624 (1943).

and to avoid being forced to express an idea with which a person disagrees, concluding that a public school could not constitutionally expel a Jehovah's Witness child for failing to salute the American flag. During this time, the Court developed what has come to be known as the overbreadth or "void on its face" doctrine, under which a law regulating or applying to acts of expression can be challenged on its face on the ground that the terms of the law are so broad or vague that the law could be applied to constitutionally protected acts of expression.[94] In addition, this was the time when the Court first extended constitutional protection to sexual expression by holding that all descriptions and depictions of sexual activity, even in very graphic ways, were protected by the First Amendment, except for a very-narrowly defined category of obscenity.[95] The Court also held that the state could not limit sexual expression for adults to that which would be suitable for children.[96]

In the 1960s, the Court applied the First Amendment in case after case to strike down state officials' efforts to repress the civil rights movement in the South by prosecuting protestors[97] and searching the membership rolls of civil rights organizations.[98] This was also the context in which the Court promulgated the *New York Times* rule, which mandates that no recovery is available for false statements about public officials or public figures unless the plaintiff can prove that the statement was knowingly false or was made with "reckless disregard of whether it was false or not."[99] In another series of cases in the 1960s, the Court invoked the First Amendment to curtail the power of legislative investigating committees to inquire into people's beliefs and associations.[100] In another line of cases, the Court used the First

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94. *See, e.g.*, Burstyn v. Wilson, 343 U.S. 495 (1952) (addressing the use of a film licensing statute banning "sacrilegious" motion pictures); Thornhill v. Alabama, 310 U.S. 88 (1940) (addressing an absolute ban on peaceful picketing); Stromberg v. California, 283 U.S. 359 (1931) (addressing the display of a flag in opposition to organized government). In such a case, there is no concern with whether or not the activity of the party subject to the law is itself constitutionally protected. *See, e.g.*, *Burstyn*, at 504-06.

95. Roth v. United States, 354 U.S. 476, 484-85, 487-88 (1957).

96. *See* Butler v. Michigan, 352 U.S. 380, 383-84 (1957).

97. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969); Brown v. Louisiana, 383 U.S. 131, 133, 141 (1966); Cox v. Louisiana, 379 U.S. 559, 574 (1965); Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

98. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 431 (1963); Shelton v. Tucker, 364 U.S. 479, 480-81, 490 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

99. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). See *infra* note 252 and accompanying text for further discussion of the *New York Times* rule.

100. *See, e.g.*, DeGregory v. Attorney Gen., 383 U.S. 825, 829-30 (1966); Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 557-58 (1963).

Amendment to protect academic freedom by invalidating the widespread use of loyalty oaths designed to enforce political conformity on university campuses and in public schools.[101] In addition, in 1969, the Court held that the First Amendment protected advocacy of unlawful action up to the point at which it is directed toward inciting imminent unlawful action and is likely to incite or produce such action.[102]

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101. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 592, 603-04 (1967); Baggett v. Bullitt, 377 U.S. 360, 361, 366 (1964); Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 279, 287-88 (1961).

102. *See* Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969). During the late 1960s, the Court rendered a series of decisions upholding the First Amendment claims of Vietnam War protestors. Without deciding whether a ban on flag desecration itself violated the First Amendment, the Court reversed convictions for flag desecration on other First Amendment grounds. *See* Spence v. Washington, 418 U.S. 405, 415 (1974) (holding that placing peace symbol with removable tape over flag was protected speech because it did not impair physical integrity of flag); Smith v. Goguen, 415 U.S. 566, 568, 573 (1974) (finding a prohibition of contemptuous treatment of flag reached expressive conduct and so was void on its face for overbreadth); Street v. New York, 394 U.S. 576, 590-91, 594 (1969) (reversing conviction where instruction to jury would permit conviction for uttering critical words rather than for burning the flag). In *Cohen v. California*, 403 U.S. 15, 23, 26 (1971), the Court held that the constitutional protection of offensive speech precluded a conviction for the public display of a jacket containing an "unseemly expletive" ("fuck the draft"). The only case in which the Court upheld a conviction for protesting against the Vietnam War was *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), in which the Court applied the symbolic speech doctrine to uphold a conviction for burning a draft card in violation of federal law. *See infra* p. 1057 and notes 280-85 and accompanying text.

In *United States v. Spock*, 416 F.2d 165, 168 (1st Cir. 1969), the court set aside four convictions for a conspiracy to counsel draftees to refuse induction into the armed services. The case arose out of the circulation of a document entitled "A Call to Resist Illegitimate Authority," along with a "cover letter requesting signatures and support." *Id.* Dr. Benjamin Spock, the famous "baby doctor" who had authored a widely-used book on infant care, Rev. William Sloane Coffin, Jr., the Chaplain at Yale University, and two lesser known persons signed the letter. *Id. See* Marc D. Charney, *Rev. William Sloane Coffin Dies at 81; Fought for Civil Rights and Against the Way*, N.Y. TIMES, Apr. 13, 2006, http://www.nytimes.com/2006/04/13/us/13coffin.html?pagewanted=all8_r=0. *See also* Eric Pace, *Benjamin Spock, World's Pediatrician, Dies at 94*, N.Y. TIMES, Mar. 17, 1998, http://www.nytimes.com/learning/general/onthisday/bday/0502.html. Following circulation of the letter, two of the defendants participated in a draft card submission and burning in Boston. *Spock*, 416 F.2d at 168. Afterward, the "four defendants attended a demonstration in Washington, in the course of which an unsuccessful attempt was made to present" the draft cards to the Attorney General. *Id.* The First Circuit held that because First Amendment activity was involved, the government had to show that the defendants had the specific intent to engage in a conspiracy to counsel registrants to refuse induction. *Id.* at 172-73. The court held that the evidence was insufficient to show specific intent on the part of Spock and another defendant. *Id.* at 177-79, 183. In addition, the court held that while the evidence was sufficient to show intent with respect to Coffin and the fourth defendant, the court reversed their convictions, finding that the lower court erred when it directed the jury to make specific findings rather than to return a general verdict. *Id.*

The strong protection of freedom of expression by the Supreme Court continued through the 1970s and 1980s.[103] The Court held that there was no "national security" exception to the First Amendment, and thus the government could not obtain an injunction against the publication of "secret" governmental documents allegedly harmful to national security.[104] The Court upheld the right of an opponent of the Vietnam War to make a public protest by the use of an "unseemly expletive."[105] Going further, the Court held that the First Amendment protected the right to burn the American flag as a means of protesting against the government and governmental action.[106] Looking to the history of the First Amendment and to the results of the cases that the Supreme Court decided prior to 1991 when I wrote the original article, I could confidently say that "the 'Law of the First Amendment' also has resulted in a very high degree of constitutional protection for freedom of expression in this nation."[107]

In its post-1991 decisions, the Court has continued to afford strong protection to First Amendment rights and has resisted any attempts to diminish that protection. It has held that the government may not try to advance "good" ideas, such as equality, by prohibiting the expression of "bad" ideas, such as those that promote inequality.[108] It has strongly

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The defendants were not retried. Following the decision in *Spock*, the federal government did not initiate any more conspiracy cases. The extensive protest against the Vietnam War and the military draft continued unabated throughout the Nation, and it is reasonable to believe that this extensive protest contributed to the decision of the President to end American involvement in the Vietnam War in early 1973 and the decision of Congress to repeal the draft in 1972. The antiwar protest during the Vietnam War is a classic example of the dissent and social change function of the First Amendment, and the Court extended constitutional protection to that protest at that time.

103. *See infra* note 104 and accompanying text. *See also* discussion *infra* pp.1053-55.

104. *See* N.Y. Times Co. v. United States (The Pentagon Papers Case), 403 U.S. 713, 714 (1971) (plurality opinion). *See also id.* at 741-42 (Marshall, J., concurring).

105. *See Cohen*, 403 U.S. at 23, 26.

106. *See* United States v. Eichman, 496 U.S. 310, 319 (1990); Texas v. Johnson, 491 U.S. 397, 406, 420 (1989).

107. Sedler, *supra* note 1, at 458.

108. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 386, 391 (1992). In that case, the Court held that a law prohibiting only "fighting words" that expressed a message of "racial hatred," but permitting "fighting words" that expressed a message of "racial tolerance," violated the First Amendment. *Id.* The effect of *R.A.V.* was to confirm the result in lower court cases, such as *Doe v. University of Michigan*, 721 F. Supp. 852, 856, 864 (E.D. Mich. 1989), which the author litigated and which struck down a university policy prohibiting speech that created an "intimidating, hostile, or demeaning environment" for racial minorities, women, gay and lesbian persons, and other "protected groups." *See also* Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1184 (6th Cir. 1995); Robert A. Sedler, *The Unconstitutionality of Campus Bans on "Racist Speech:" The View from Without and Within*, 53 U. PITT. L. REV. 631, 646 (1992).

reaffirmed the right to protest, holding in a recent decision that there is a right to demonstrate in the vicinity of a military funeral and to contend that the death of American soldiers is divine punishment for America's tolerance of homosexuality.[109] The Court has refused to take any category of supposed "bad" speech out of the protection of the First Amendment, striking down a federal law prohibiting the depiction of acts of animal cruelty committed against living animals[110] and a state law prohibiting the sale of "violent video games" to minors.[111] In addition, the Court has extended the constitutional protections afforded to commercial speech.[112] Most significantly, the Court has held that the First Amendment protects the right to make independent expenditures on behalf of political candidates and political issues.[113] Thus, the Court has held unconstitutional a federal law prohibiting corporations and labor unions from using their general funds to make independent expenditures on behalf of political candidates,[114] another federal law imposing a limitation on independent expenditures by political parties,[115] and a number of other federal and state laws regulating campaign financing and political activity.[116]

It is indisputably clear today that constitutional doctrine and precedent are strongly on the side of protecting freedom of expression in all its manifestations.[117] Therefore, I can say now, as I did in the original

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109. Snyder v. Phelps, 131 S. Ct. 1207, 1216-19 (2011).

110. United States v. Stevens, 130 S. Ct. 1577, 1585, 1592 (2010).

111. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2740-42 (2011).

112. *See infra* Part III.D.5 and accompanying text.

113. *See* Buckley v. Valeo, 424 U.S. 1, 39-51 (1976); FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985).

114. *See* Citizens United v. FEC, 558 U.S. 310, 365 (2010).

115. Colo. Republican Fed. Campaign Comm. v. FEC (*Colorado Republican I*), 518 U.S. 604, 608 (1996).

116. *See infra* notes 350-55 and accompanying text.

117. In its last three terms, the Court has held violative of the First Amendment a wide range of laws. *See* United States v. Alvarez, 132 S. Ct. 2537, 2547-48 (2012) (finding a content-based restriction in the federal Stolen Valor Act, 18 U.S.C.A. §704 (West 2006-2012), which made it a crime to falsely claim receipt of military decorations or medals); Snyder v. Phelps, 131 S. Ct. 1207, 1220-21 (2011) (allowing anti-gay picketing at a funeral); Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2742 (2011) (allowing children to play violent video games); *Citizens United,* 558 U.S. at 365 (finding independent corporate expenditures to be political speech); Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2661-72 (2011) (invalidating law prohibiting pharmaceutical marketing); Ariz. Free Enter. Club v. Bennett, 131 S. Ct. 2806, 2820-25 (2011) (addressing a state campaign regulation in which candidates who accepted public financing for foregoing private contributions would receive additional public financing to match the amount that their opponents, in conjunction with independent supporters, spent beyond the public financing cap.); United States v. Stevens, 130 S. Ct. 1577, 1592 (2010) (invalidating law prohibiting depictions of animal cruelty).

article, that the protection afforded to freedom of expression is perhaps the strongest protection afforded to any individual right in our constitutional system.[118] It is also fair to say that the constitutional protection afforded to freedom of expression in the United States is seemingly unparalleled in other constitutional systems and that in the United States, as a constitutional matter, the "value of freedom of expression generally prevails over other democratic values."[119] As I will now demonstrate, the strong constitutional protection afforded to freedom of expression is reflected in and is the result of the development of the "Law of the First Amendment."

III. THE "LAW OF THE FIRST AMENDMENT"

A. The Meaning and Operation of the "Law of the First Amendment"

The "Law of the First Amendment" consists in large part of the chilling effect concept as well as principles and specific doctrines that the Court has developed over the years through the process of resolving First Amendment cases. The principles and specific doctrines are supplemented by the Court's precedents in particular areas of First Amendment activity, but more often than not, the result in a First Amendment case is determined by the Court's application of the appropriate principle or specific doctrine. To put it another way, the precedents in a particular area of First Amendment activity become determinative only when the case cannot be resolved by application of a principle or specific doctrine.[120] In the context of actual First

118. *See* Sedler, *supra* note 1, at 458 n.3.

119. *See* Sedler, *supra* note 10, at 383.

120. As a practical matter, in any First Amendment case, as in any other constitutional case, lawyers and judges will begin their analysis of the First Amendment issue by looking to the applicable precedents. In many cases, the applicable precedents will involve the Court's application of the principles and doctrines. In a case involving the regulation of advertising, for example, the applicable doctrine is the commercial speech doctrine, and the relevant precedents involve the Court's application of that doctrine. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562-63 (1980). Therefore, when we refer to the precedents in particular areas of First Amendment activity, we are referring to precedents that did not involve, at least directly, the Court's application of principles or doctrines. To illustrate, some cases involve restrictions on expression relating to the administration of justice. If the restriction takes the form of an injunction against expression, such as the issuance of an injunction against the media prohibiting the publication of facts connected with a criminal prosecution in order to prevent "prejudicial publicity" against the accused, the prior restraint doctrine applies, and under that doctrine, the restriction will generally be held unconstitutional. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 556-58 (1976); Okla. Publ'g Co. v. Dist. Court, 430 U.S. 308, 310 (1977). So too, where a law imposes an absolute ban on

Amendment litigation, First Amendment analysis is very much a matter of identification and application. In many cases, once the Court identifies and applies the appropriate principle or specific doctrine, the parameters for the resolution of the constitutional question at issue have been established and the result is often fairly clear.[121]

The matter of identification and application of the appropriate principle or specific doctrine is illustrated most clearly by a case such as *Boos v. Barry*.[122] In *Boos*, a challenge was brought against a provision of the District of Columbia Code, which prohibited the "display of any sign within 500 feet of a foreign embassy" that tends to bring the foreign government into "public odium" or "public disrepute."[123] Another challenged provision, as construed, prohibited the "congregation of three or more persons within 500 feet of a foreign embassy" "when the police reasonably believe that a threat to the security or peace of the embassy is present."[124] Although both provisions regulate expression within 500 feet of a foreign embassy, they differ in their terms, and it is this difference that triggers different components of the "Law of the First Amendment."[125]

The "display clause" proscribes speech because of its content: it prohibits displays that are critical of the foreign government, but not displays that are favorable to the foreign government.[126] This being so, the display clause triggers the First Amendment principle of content neutrality—here, that aspect of the principle which precludes the government from differentiating between types of expression based on the particular viewpoint that is being expressed.[127] Because the display clause violated this aspect of the principle of content neutrality—to which the Court has never recognized any exceptions—it was held unconstitutional.[128]

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witnesses disclosing their testimony before a grand jury after the grand jury's term has concluded, the absolute ban brings into play the narrow specificity principle. *See* Butterworth v. Smith, 494 U.S. 624, 633-36 (1990). On the other hand, where the law in question imposes only a post-publication sanction and is more specific in its prohibitions, neither the prior restraint doctrine nor the narrow specificity principle is applicable. This being so, the case will be decided with reference to the precedents applicable to restrictions on expression relating to the administration of justice. *See infra* Part III.E.1.

121. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321-22 (1988) (identifying and applying the principle of context neutrality).

122. *Id.*

123. *Id.* at 315-16.

124. *Id.* at 315-16, 330.

125. *Id.* at 317-21, 329-32.

126. *Id.* at 318-19.

127. *Boos*, 485 U.S. at 318-21.

128. *Id.* at 318-321, 329.

The "congregation clause," however, is content neutral. It comes into play not because of the particular viewpoint expressed, but because of the threat the particular congregation of persons is deemed to pose to the security or peace of the embassy.[129] This being so, this provision triggers the public forum doctrine, which permits the government to impose a reasonable and content neutral time, place, and manner regulation on access to a public forum, such as the public streets.[130] Under this doctrine, the only question to be decided is whether the particular regulation is "reasonable,"[131] and here, the Court held that the regulation was reasonable on its face.[132]

This case illustrates that in actual First Amendment litigation, the operation of the "Law of the First Amendment" effectively supplants the analytical significance of the Court's articulated standard of review.[133] In most First Amendment cases, the articulated standard of review is "heightened scrutiny," which requires that the restriction be justified by a compelling governmental interest and narrowly drawn to serve that interest.[134] In some cases, such as those involving access to governmental property for purposes of expression or commercial speech, the articulated standard of review is "intermediate scrutiny," which indicates that there is a greater likelihood that the Court will uphold the challenged regulation.[135]

However, in practice, the Court does not apply the articulated standard of review in the same analytical way in a First Amendment case as it does, for example, in a due process or equal protection case. Rather, the Court applies the appropriate principle, specific doctrine, or precedent in the particular area of First Amendment activity to the facts of the case, and the Court's application of the appropriate component of the "Law of the First Amendment" often controls the result, or at least sets the parameters for resolving the First Amendment question at issue. When the Court is applying heightened scrutiny, as it does in most First

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129. *Id.* at 329-333.

130. *Id.* at 318, 321.

131. See *infra* Part III.D.7 and accompanying text for a discussion of the factors that determine "reasonableness."

132. *Boos,* 485 U.S. at 331. Note that the regulation could be found to be unconstitutional as applied in a particular case.

133. *See id.* at 321-29 ("Our cases indicate that as a content-based restriction on political speech in a public forum, § 22-115 must be subjected to the most exacting scrutiny.").

134. *See, e.g.*, Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2664 (2011); Brown v. Enter. Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011).

135. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980).

Amendment cases, any consideration of the "compelling" nature of the asserted governmental interest or the narrowness of the restriction takes place only in the context of the Court's application of the appropriate component of the "Law of the First Amendment."[136] Similarly, when the Court is dealing with a matter to which intermediate scrutiny applies, such as access to public property for purposes of expression, the Court simply invokes and applies the public forum doctrine.[137] In practice then, the articulated standard of review has limited analytical significance, and the Court's analysis proceeds with reference to the components of the "Law of the First Amendment." It is only in those relatively few cases when none of the components of the "Law of the First Amendment" appear to be applicable that the result will depend on the Court's application of the articulated standard of review.[138] We will now turn to the components of the "Law of the First Amendment."

B. The Chilling Effect Concept

The chilling effect concept is a fundamental and pervasive concept in the "Law of the First Amendment." Precisely because the "Law of the First Amendment" developed initially in response to governmental repression of dissent and the expression of unpopular ideas,[139] the Court has always been concerned with a chilling effect on expression that could result from laws and governmental action regulating or applying to acts of expression.[140] As we will see, the chilling effect concept has been the basis of the overbreadth doctrine and the *New York Times* rule.[141] Moreover, the possibility of a serious chilling effect on expression is an analytical basis for invalidating any regulation of expression.[142] It is for

136. *See, e.g.*, *Boos*, 485 U.S. at 321-29 (recognizing that a compelling "dignity interest" might exist, but finding the law unconstitutional for lack of content-neutrality).

137. *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 790-91 (1994).

138. For an example of such a case, see *Eldred v. Ashcroft*, 537 U.S. 186 (2003), in which the Court held that the First Amendment did not prohibit Congress from extending the term of new and existing copyrights to seventy years and rejected what the Court called a "plea for imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards." The Court had previously held that the "fair use" provision of the federal copyright act, 17 U.S.C.A. § 107, properly accommodated the relevant First Amendment interests. Harper & Row v. Nation Enters., 471 U.S. 539 (1985).

139. *See supra* Part II.C and accompanying text.

140. *See, e.g.*, Baird v. State Bar of Ariz., 401 U.S. 1, 6 (1971).

141. *See infra* note 225 and accompanying text. *See also* discussion *infra* p. 1052.

142. *See, e.g.*, Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 243, 254-58 (1974) (invalidating state law requiring newspaper to give right of reply to political candidate that it attacked in print because it could have a chilling effect on political commentary);

this reason that the chilling effect concept is pervasive throughout First Amendment litigation, and a concern for a possible chilling effect may strongly influence the Court's decision in a particular First Amendment case.

C. First Amendment Principles: Content Neutrality, Narrow Specificity, the Protection of Offensive Speech, and the Right to Remain Silent

First Amendment principles are independently significant, so that their application may determine the result in a particular case. They also may be incorporated into specific doctrines, and when they are, they tend to be a very important part of that doctrine. I have identified four principles, which I will now discuss in more detail.[143]

1. The Content Neutrality Principle

> [T]he most important First Amendment principle in terms of its applicability in [actual] litigation is the principle of content neutrality. Under this principle, the government may not proscribe any expression because of its *content*, and an otherwise valid regulation [will] violate[] the First Amendment if it [discriminates] between [different] types of expression based on

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Lamont v. Postmaster-Gen., 381 U.S. 301, 305 (1965) (invalidating federal law permitting mail delivery of "communist political propaganda" if addressee specifically requested delivery in writing because of possible chilling effect on willingness of identified recipients to receive "communist political propaganda"). In *Virginia v. Black*, 538 U.S. 343, 347 (2003), the Court held that the state could constitutionally prohibit as a "true threat" the burning of a cross "with the intent to intimidate" a person or group. The Court also held that the First Amendment precluded the state from making cross-burning "prima facie evidence of intent to intimidate." *Id.* at 347-48. The Court reasoned that this provision could result in a conviction for cross-burning without proof of intent to intimidate, and so it could have a chilling effect on cross-burning without the intent to intimidate, which is constitutionally protected. *Id.* at 364-67. *See also* Robert A. Sedler, *Self-Censorship and the First Amendment*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13, 24-43 (2011) (discussing the chilling effect concept in relation to the *New York Times* rule and overbreadth doctrine, the concept to which the author refers as "self-censorship bad"). *See also* discussion *infra* Part III.D.1 (chilling effect in relation to overbreadth doctrine); discussion *infra* Part III.D.4 (chilling effect in relation to *New York Times* rule).

143. In the earlier article, I discussed the principle of heightened protection against interference with expression in the academic context. *See* Sedler, *supra* note 1, at 471-73. The principle was applicable to challenge the loyalty oaths of the 1950s and 1960s, the campus restrictions on student speech in the 1960s and 1970s, and the campus speech codes of the 1980s and 1990s. *Id.* With the demise of those kinds of restrictions on freedom of expression on university campuses, this principle is unimportant today.

> content. Analytically, there are two aspects to the principle of content neutrality: viewpoint neutrality and category neutrality. Under the viewpoint neutrality aspect of the principle, [to which the Supreme Court has recognized no exceptions,] the government cannot regulate expression in such a way as to favor one viewpoint over another [viewpoint].[144]

Thus, as discussed earlier, a law prohibiting the display of any sign in front of a foreign embassy that "tends to bring the foreign government into 'public odium' or 'public disrepute'" violates the First Amendment, since it "only prohibits displays that are critical of the foreign government [and] not displays that are favorable to [it]."[145] So does a "federal law that allow[s] the wearing of [American] military uniforms in a portrayal only if that portrayal [does] not 'tend to discredit the military.'"[146] The viewpoint neutrality aspect of the principle formed the basis of the Court's invalidation of state and federal laws prohibiting the burning of the American flag.[147] Since the laws "authorized burning as a proper means of disposing of a torn or soiled flag, [] the thrust of the ban was directed toward the 'content of the message' conveyed by the burning," and so the laws were unconstitutional.[148] The Court has also invalidated, as a content-based restriction on political speech, a judicial conduct rule that prohibited candidates for judicial office from announcing their views on "disputed legal or political issues."[149] In another case, the Court held that a regulation of the federal agency funding for local legal assistance programs that prohibited those programs from engaging in representations involving efforts to amend or challenge the validity of existing welfare laws was impermissible viewpoint discrimination and therefore unconstitutional.[150] Moreover, because the government cannot discriminate against religious speech, so long as providing a particular benefit (such as access to public facilities) to a religious group would not violate the Establishment Clause,[151] the government is required by the content neutrality principle to provide the

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144. *Id.* at 466.

145. *Id.* at 459. *See* Boos v. Barry, 485 U.S. 312, 316-16, 318-19 (1988).

146. Sedler, *supra* note 1, at 467 (quoting Schacht v. United States, 398 U.S. 58, 59-60 (1970)).

147. *Id.* at 468 (citing Texas v. Johnson, 491 U.S. 397, 416-18 (1989)).

148. *Id.* at 467-68 (citing *Johnson*, 491 U.S. at 412). *See also* United States v. Eichman, 496 U.S. 310, 317 (1990).

149. Republican Party of Minn. v. White, 536 U.S. 765, 768 (2002).

150. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 536 (2001).

151. U.S. CONST. amend I.

benefit to that group.[152] The strength of the content neutrality principle is demonstrated by the fact, as discussed previously, that even though "fighting words" are not entitled to First Amendment protection, the government cannot only prohibit "fighting words" that express a message of "racial hatred" and permit "fighting words" that express a message of racial tolerance.[153]

The concern with preventing viewpoint discrimination is embodied in the public forum doctrine, the variant of the prior restraint doctrine dealing with the licensing of expression, and the symbolic speech doctrine.[154] Under the public forum doctrine, any regulation of expression in a public forum must take the form of a content neutral time, place, and manner regulation.[155] Similarly, when the government

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152. In all of the numerous cases presenting this issue, the Court held that providing the particular benefit to the religious group would not violate the Establishment Clause. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 135 (2001) (holding that a school district that allowed after-school use of its facilities for "instruction in education, learning, or the arts" and "social, civic, recreational, and entertainment uses pertaining to the community welfare" could not deny access to a private Christian organization that wanted to use the facilities for religious activities for children); Capital Square Review Advisory Bd. v. Pinette, 515 U.S. 753, 757 (1995) (addressing a group's desire to erect a Christmas display of a cross in a plaza in front of a state capitol that had been dedicated as a public forum); Rosenberger v. Univ. of Va., 515 U.S. 819, 822-29 (1995) (holding that a public university that paid printing costs of student organizations could not refuse to pay printing costs of a religiously-oriented student publication); Good News Club v. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 386 (1993) (holding that a school district that permitted after-hours use of school facilities for "social, civic and recreational purposes" by private organizations could not prohibit such use of school facilities by a private organization for the showing of a "[f]amily oriented movie—from a Christian perspective"); Widmar v. Vincent, 454 U.S. 263, 264-65 (1981) (addressing a public university student group's wish to use a designated public forum for religious worship and discussion). *See also* Bd. of Educ. v. Mergens, 496 U.S. 226, 231 (1990) (upholding a federal law prohibiting school districts receiving federal funds from discriminating against religious groups in regard to access to school facilities). For the same reason, when a public university grants official recognition to student groups, it cannot refuse recognition to a group because of its political views. *See* Healy v. James, 408 U.S. 169, 170 (1972). In addition, a public university must grant official recognition to gay and lesbian groups. *See, e.g.*, Gay Student Servs. v. Tex. A & M Univ., 737 F.2d 1317, 1319 (5th Cir. 1984).

153. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 379 (1992). In the same vein, although the First Amendment does not protect against obscenity, the government cannot prohibit only that obscenity that depicts inequality in a sexual relationship, such as a "civil rights anti-pornography" law that defined proscribed pornography as the "graphic sexually explicit subordination of women." Am. Bookseller Ass'n, Inc. v. Hudnut, 771 F.2d 323, 331-32 (7th Cir. 1985).

154. *See* Sedler, *supra* note 1, at 473-80.

155. *See infra* Part III.D.7 and accompanying text. Under the public forum doctrine, the government may regulate access to a non-public forum on the basis of "reasonable"

requires a license to engage in acts of expression, the licensing law on its face must not only be content neutral, but it must contain narrow, objective, and definite standards that control the discretion of the licensing official.[156] An essential element of the symbolic speech doctrine, which applies to governmental regulation of expression that combines "speech" and "non-speech" elements, is that the regulation must be unrelated to the suppression of free expression and so cannot regulate expression because of its content.[157]

Under the category neutrality aspect of the principle, to which the Court has recognized only limited exceptions, the "government generally cannot regulate in such a way as to [discriminate] between [different] categories of expression . . . and an otherwise valid regulation will be found to violate the First Amendment" if it discriminates on this basis.[158] Thus, a "ban on picketing within 150 feet of a school building while the school was in session," which could otherwise stand as a reasonable time, place, and manner regulation of expression, was unconstitutional because it contained an exception for picketing in connection with a labor dispute.[159] There are numerous other examples of laws invalidated under the category neutrality aspect of the content neutrality principle; these include a law prohibiting drive-in movie theaters from showing films containing nudity when the screen was visible from the highway, since the law singled out one kind of film for differential treatment based on its content.[160] In a similar vein, the Supreme Court invalidated a law imposing "blocking" restrictions only on cable channels that were primarily transmitting sexually oriented programming.[161] They also include a law that discriminated between expression and other activities by requiring that proceeds from a book written by a criminal about the crime be used to compensate crime victims and not requiring compensation from the criminal's other assets.[162] In addition, under the category neutrality of the content neutrality principle, the state may not

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regulations. To be "reasonable," the regulation necessarily must be content neutral. *See infra* Part III.D.7.

156. *See infra* notes 315-18 and accompanying text.

157. For this reason, laws prohibiting the burning of the American flag, which the Court held violated the content neutrality principle, could not be upheld as a permissible regulation of symbolic speech. *See supra* notes 147-48 and accompanying text.

158. Sedler, *supra* note 1, at 468.

159. *Id.* (citing Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972)). *See also* Carey v. Brown, 447 U.S. 455, 457-59 (1980) (invalidating a non-category neutral statute on equal protection grounds).

160. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 209-12 (1975).

161. United States v. Playboy Entm't Grp., 529 U.S. 803, 806-19 (2000).

162. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 108 (1992).

impose selective taxation against the press by imposing a tax on general interest magazines, but not on religious, professional, trade, and sports journals.[163] Along the same lines, the state may not impose selective taxation by imposing a gross receipts tax only on publications with weekly circulations above 20,000.[164] Further, the state may not impose selective taxation by imposing a special use tax on the cost of paper and ink consumed in the production of publications, with an annual exemption for the first $100,000 worth of paper and ink, so that only 16 of the state's 374 paid circulation papers are liable for the tax, and one paper is responsible for two-thirds of the revenue raised by the tax.[165]

> The Court has recognized two limited exceptions to the requirement of category neutrality in government regulation, both involving the regulation of particular "lower-level" speech. First, to deal with the secondary consequences resulting from the concentration of businesses purveying sexually explicit materials, a [government] can enact zoning regulations requiring such businesses to spread out.[166] Second, because commercial speech receives less constitutional protection than noncommercial speech, [the Court has held that] a billboard regulation does not violate the First Amendment when it exempts some commercial billboards from the regulation, although it does violate the First Amendment when it exempts some noncommercial billboards from the regulation.[167]

With these limited exceptions, the Court has held unconstitutional all laws that it has found to be content-based, and it has not distinguished between what I have called "viewpoint neutrality" and "category neutrality."[168] I have made the distinction only for the purpose of

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163. *See* Ark. Writers Project v. Ragland, 481 U.S. 221, 223 (1987).

164. *See* Grosjean v. Am. Press Co., 297 U.S. 233, 240 (1936).

165. *See* Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 577-81 (1983).

166. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 43 (1986). *See also* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 52 (1976). The Court in *Young* emphasized that while the regulation was on the basis of the category of speech involved, the regulation was "unaffected by whatever social, political, or philosophical message a film may be intended to communicate." *Id.* at 70.

167. Sedler, *supra* note 1, at 469-70. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 493, 515 (1981). As we will see later, because the government may reserve public property that is not a "public forum" for its intended purposes, communicative or otherwise, it may impose category-type access restrictions to such property if appropriate to the purpose for which the property is being used. Sedler, *supra* note 1, at 473-80.

168. Sedler, *supra* note 1, at 466.

showing that there are two aspects to the content neutrality principle and that the Court has allowed limited exceptions to the category aspect of the principle.[169] In the context of actual litigation, all that matters is that the challenged law contains content-based restrictions.[170] When the law does contain content-based restrictions, the content neutrality principle applies, and it is very likely that the law will be invalidated.[171]

In a very recent application of the content neutrality principle, the Court held unconstitutional a Vermont law that prohibited pharmacies from selling or disclosing pharmacy records that revealed the prescribing practices of individual doctors and that prohibited the use of this information for marketing by pharmaceutical manufacturers.[172] The Court found that "[o]n its face, the law enact[ed] content- and speaker-based restriction[s]."[173] The Court reasoned that this kind of information could be used by those who wished to engage in certain "educational communications," such as academic organizations, for "use in countering the messages of brand-name pharmaceutical manufacturers and in promoting the prescription of generic drugs."[174] The Court applied "heightened scrutiny" to the regulation and concluded that the state could not justify prohibiting the use of this information for marketing purposes while permitting its use for educational purposes.[175]

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169. *Id.* at 468-70.

170. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (explaining that "content-based regulations are presumptively invalid").

171. *See id.*

172. Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2659 (2011).

173. *Id.* at 2656.

174. *Id.* at 2663.

175. *Id.* at 2656-57. The state argued that a lesser standard of scrutiny should apply here because the speech at issue was commercial speech. *Id.* at 2664. The Court found that it was not necessary to decide whether the speech constituted commercial speech within the meaning of the commercial speech doctrine, because even if it did, under the commercial speech doctrine, the state could not have a substantial interest in suppressing a disfavored message. *Id.* at 2668. In *Alvarez*, four Justices applied the content neutrality principle to hold unconstitutional the Stolen Valor Act, 18 U.S.C.A. § 704(b)-(c) (West 2006), which made it a "crime to falsely claim receipt of military decorations or medals." United States v. Alvarez, 132 S. Ct. 2537, 2539 (2012). The plurality opinion by Justice Kennedy, joined by Chief Justice Roberts, Justice Ginsburg, and Justice Sotomayor, found that false statements were entitled to constitutional protection and that the law violated content neutrality by singling out only one category of false statements for prohibition. *Id.* at 2547-48. Justices Breyer and Kagan did not base their conclusion on the content neutrality analysis of the plurality opinion, but instead invoked the narrow specificity principle to find that the government could advance "its legitimate objectives in less restrictive ways" than by an absolute prohibition on false statements about receipt of military medals or decorations. *Id.* at 2554-55 (Breyer, J., concurring). The result was a 6-3 decision, holding the law unconstitutional. *Id.* at 2537. See Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious*

The principle of content neutrality is a very powerful principle.[176] As the Court has stated, "It is rare that a regulation restricting speech because of its content will ever be permissible."[177] In the context of

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Relationship, 53 UCLA L. REV. 1107, 1118-19 (2006), for an interesting discussion of First Amendment protection to deceptive speech, including the observation that the content neutrality principle limits the government's power to prohibit deceptive speech.

176. As discussed, the theory of the marketplace of ideas is the foundation for the content neutrality principle. *See supra* Part II.B. The content neutrality principle implements the theory of the marketplace of ideas by ensuring that, under the First Amendment, there can be no such thing as a "false idea" and that all ideas, "good" and "bad," must be able to compete in the marketplace of ideas. *See supra* note 72 and accompanying text. It is the content neutrality principle that, as a constitutional matter, sets the United States apart from most other democratic nations, where "bad" ideas, such as genocide and racism, are not constitutionally protected and are proscribed by international human rights norms. *See* Sedler, *supra* note 10. See also Rosenfeld, *supra* note 73, at 1566-67, for a critical view of the content neutrality principle and the resulting protection of "hate speech," setting the United States apart from other western democracies. The author contends as follows:

> As hate speech can now almost instantaneously spread throughout the world, and as nations become increasingly socially, ethnically, religiously and culturally diverse, the need for regulation becomes ever more urgent. In view of these important changes the state can no longer justify commitment to neutrality, but must embrace pluralism, guarantee autonomy and dignity, and strive for maintenance of a minimum of mutual respect. Commitment to these values requires states to conduct an active struggle against hate speech, while at the same time avoiding the pitfalls bound to be encountered in the pursuit of that struggle. It would of course be preferable if hate could be defeated by reason. But since unfortunately that has failed all too often, there seems no alternative but to combat hate speech through regulation in order to secure a minimum of civility in the public arena.

Id.

Under the content neutrality principle, however, we are committed to rely on reason rather than regulation, even at the cost of a lack of a "minimum of civility in the public arena." *Id.* at 1567.

177. *Brown*, 131 S. Ct. at 2738 (quoting United States v. Playboy Entm't Grp., 529 U.S. 803, 818 (2000)). The content neutrality principle has been subject to repeated academic criticism, primarily on the ground that it precludes the state from regulating speech that violates the rights of other persons to personal security, privacy, reputation, and equality. *See, e.g.*, Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 672 (2002). The content neutrality principle has also been criticized for failing to balance the harm caused to freedom of speech by the particular regulation against the government's valid interest in imposing the regulation. *See* Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression,* 81 NOTRE DAME L. REV. 1347, 1363 (2006). Moreover, of course, it results in the protection of "hate speech," which is not protected in other democratic nations. *See* Rosenfeld, *supra* note 73. If the Court has taken any notice of this academic criticism, it has not so indicated in its decisions applying the content neutrality principle to invalidate the law or regulation at issue.

actual First Amendment litigation, the lawyer challenging a law or governmental action will endeavor to show that the law or governmental action is content-based.[178] If it is, the content neutrality principle applies, and the law or governmental action is unlikely to stand.[179]

2. The Narrow Specificity Principle

The narrow specificity principle reflects the heightened scrutiny that the Court gives to any regulation of expression and a concern that the regulation will not go beyond what is clearly necessary to advance the asserted governmental interest.[180] As the Supreme Court has stated, "Because First Amendment freedoms need breathing space to survive, government may regulate in this area only with narrow specificity."[181] This being so, any regulation of expression is always subject to challenge on the ground that it sweeps more broadly than is necessary to advance the legitimate governmental interests at stake.[182] Under the principle of narrow specificity, absolute prohibitions on expressive activity will frequently be found to be unconstitutional, since the asserted governmental interest could be advanced by narrower means than an absolute prohibition.[183] As we will see, the narrow specificity principle is

178. Conversely, the lawyer defending the law will try to demonstrate that it is content-neutral so that it is more likely to be upheld. In *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), the Court upheld the constitutionality of a public university's use of a mandatory student activity fee to provide grants to student organizations, because the criteria for awarding the grants was content-neutral. However, another provision of the policy provided for a student referendum on funding for a particular student organization, and the Court indicated that this provision might violate content neutrality. *Id.* at 221. The record was not clear on this issue, and the case was remanded. *Id.*

179. *See, e.g., R.A.V.*, 505 U.S. at 382 (stating that "[c]ontent-based regulations are presumptively invalid").

180. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) (stating the principle that a regulation must be narrowly drawn) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

181. NAACP v. Button, 371 U.S. 415, 433 (1963).

182. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 480 (1960) (invalidating a requirement that public school teachers list all of the organizations to which they had belonged or had contributed money during the preceding five years).

183. *See* Butterworth v. Smith, 494 U.S. 624, 626 (1990) (holding unconstitutional an absolute ban on witnesses' disclosure of testimony given before a grand jury, even after the grand jury's term has been completed); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 598 (1982) (holding unconstitutional a statute requiring exclusion of the press and public during the testimony of a minor victim of a sex offense); Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 62 (1981) (holding unconstitutional a prohibition of all live entertainment in a city's small commercial zone); Martin v. City of Struthers, 319 U.S. 141, 149 (1943) (holding unconstitutional an absolute ban on knocking on doors or

incorporated into the commercial speech doctrine, which includes a requirement that the regulation not be more extensive than is necessary to advance the asserted important governmental interest.[184] In light of the narrow specificity principle, in First Amendment litigation, the party challenging the regulation will frequently try to demonstrate that a narrower regulation would advance the asserted governmental interest, while the party defending the regulation will try to demonstrate that the regulation was drawn as narrowly as possible to advance that interest.[185]

3. The Protection of Offensive Speech

Under this principle, the government cannot prohibit the expression of an idea on the ground that the idea itself or the manner in which the idea is expressed is highly offensive to many people.[186] Thus, any time the government tries to justify a restriction on the ground of offensiveness, the justification is necessarily improper. A public university, for example, cannot constitutionally justify a ban on racist speech on the ground that it expresses a highly offensive idea or that it is very offensive to the victim groups,[187] nor can a city with a large Jewish

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ringing doorbells of residents in order to deliver handbills); Schneider v. New Jersey, 308 U.S. 147, 164-65 (1939) (holding unconstitutional an absolute ban on the distribution of leaflets in public streets or other public places); Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 168-69 (2002) (holding unconstitutional a municipal ordinance prohibiting persons from engaging in any door-to-door advocacy unless they obtained a permit prior to doing so and displayed the permit on demand). In *United States v. Alvarez*, Justices Breyer and Kagan did not base their conclusion on the content neutrality analysis of the Kennedy plurality opinion but invoked the narrow specificity principle to find that the government could advance its legitimate objectives in less restrictive ways than an absolute prohibition on false statements about receipt of military medals or decorations. 132 S. Ct. 2542, 2554-56 (2012).

184. *See infra* Part III.D.5. We will see that this is frequently a basis for invalidating the challenged regulation of commercial speech. *See infra* Part III.D.5.

185. *See, e.g.*, *Button*, 371 U.S. at 432-33.

186. As the Supreme Court has stated: "If 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." Texas v. Johnson, 491 U.S. 397, 397, 414 (1989). In that case, in which the Court held unconstitutional a state law prohibiting the burning of the American flag, the Court noted that there was no exception to this principle "even where our flag has been involved." *See also* Cohen v. California, 403 U.S. 15, 24 (1971) (applying this principle to the public display of a jacket containing the "unseemly expletive," "fuck the draft").

187. *See, e.g.*, Doe v. Univ. of Mich., 721 F. Supp. 852, 853 (E.D. Mich. 1989). *See also* Sedler, *supra* note 108.

> population, including many Holocaust survivors, ban a march by self-styled "Nazis" with Nazi uniforms and swastikas.[188]

In the same vein, the government cannot restrict expression on the ground that its offensiveness toward the audience to which it is directed creates a danger of violent reaction against the speaker from the hostile audience.[189] In such circumstances, the police have a constitutionally imposed duty to protect the speaker from the hostile audience.[190] The principle of protection of offensive speech also applies to commercial speech.[191] Thus, the government cannot prohibit product advertising, such as an advertisement for contraceptives, on the ground that such advertising would be offensive to many persons.[192]

The principle of protection of offensive speech means that in American society, we must tolerate a lot of speech that is highly offensive to many individuals and groups.[193] This is a price that the First Amendment requires American society to pay. In doing so, all ideas and expressions are able to enter the marketplace of ideas and compete in the search for truth, no matter how offensive the expression of those ideas may be.[194]

4. The Right to Refrain from Speaking

The Court has held that the First Amendment protects the right to "refrain from speaking."[195] There are two aspects to the First Amendment "right to refrain from speaking." First, the First Amendment generally prohibits the government from requiring disclosure of a person's beliefs or associations.[196] The cases establishing this proposition arose out of governmental efforts to suppress "subversion" during the Cold War period and efforts in some southern states to harass organizations involved in the civil rights movement of the 1960s.[197] Thus, a governmental body investigating "subversion" could not require

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188. Sedler, *supra* note 1, at 471 (citing Collin v. Smith, 578 F.2d 1197, 1198 (7th Cir. 1978)).

189. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229, 242 (1963); Terminiello v. City of Chicago, 337 U.S. 1, 2 (1949).

190. *See, e.g.*, *Edwards*, 372 U.S. at 242; *Terminiello*, 337 U.S. at 2.

191. *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64-65 (1983).

192. *Id.*

193. *See Doe*, 721 F. Supp. at 864.

194. *See id.*

195. *See* Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 32-33 (1986).

196. *See* DeGregory v. Attorney of N.H., 383 U.S. 825, 829 (1966).

197. *See generally id.*

witnesses to testify as to their past membership in allegedly "subversive" organizations[198] or require a civil rights organization to turn over its membership list to the investigating committee.[199] A school board could not require teachers to list all the organizations to which they belonged or had contributed money for the preceding five years.[200] During the Cold War period, a number of states required teachers and governmental employees to take loyalty oaths, through which they were required to swear that they did not belong to any "subversive" organizations and that they were "loyal" to the United States. The Supreme Court held that all the loyalty oath requirements violated the First Amendment,[201] except for an affirmative oath to support the constitutional system of government.[202]

During this time, the Court dealt with inquiries into the political beliefs and organizational memberships of applicants for admission to the bar, which had become a staple of state-required "character and fitness" investigations.[203] The Court held that the First Amendment precluded the state from inquiring into the applicants' political beliefs and organizational memberships under the guise of determining "character and fitness," except for an inquiry into an applicant's knowing membership in an illegal organization with intent to further the organization's illegal purpose.[204]

The Court has also held that the First Amendment does not prevent the government from requiring political contributors to report their contributions to or expenditures on behalf of a candidate or requiring campaign committees to disclose a list of their contributors.[205] However, the Court held that a state law requiring political parties to report the names of their campaign contributors and recipients of campaign disbursements could not constitutionally be applied to a minor political party when the party showed a "reasonable probability" that such disclosure would subject the contributors to "threats, harassment, or reprisals from either government officials or private parties."[206] In a recent case, the Court found that such a danger would not necessarily exist from the public disclosure of petitions supporting a referendum on a

198. *Id.* at 826.

199. *See* Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 540 (1963).

200. *See* Shelton v. Tucker, 364 U.S. 479, 480 (1960).

201. *See, e.g.*, Keyshian v. Univ. of N.Y., 385 U.S. 589, 591 (1967).

202. *See* Cole v. Richardson, 405 U.S. 676, 677 (1972).

203. *See* Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 156 (1971); Baird v. State Bar of Ariz., 401 U.S. 1, 2 (1971).

204. *See Wadmond*, 401 U.S. at 156; *Baird*, 401 U.S. at 2.

205. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 6 (1976).

206. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 93 (1982) (quoting *Buckley*, 424 U.S. at 74).

state constitutional provision with the names and addresses of its signers, and so upheld on its face a state law imposing such a requirement.[207]

Second, the "right to refrain from speaking" includes the right not to be associated with particular ideas.[208] This means that the government cannot force a person to express an idea with which that person disagrees, which prohibits the government from compelling public school children to participate in a salute to the American flag[209] or compelling a person to display an automobile license plate containing an ideological message with which that person disagrees.[210] The "right to refrain from speaking" protects the ability of sponsors of a parade to exclude from the parade groups expressing ideas with which the sponsors disagree.[211] For the same reason, the Court has held unconstitutional a directive of a state regulatory agency that required a public utility to include in its billing envelopes messages from a group that opposed the utility's position on utility rates.[212]

The Court has also held that the right not to be associated with particular ideas is violated when a labor union uses fees imposed by law on non-union members of the bargaining unit to advance ideological purposes unrelated to the union's function as the workers' collective bargaining representative.[213] The same is true when the state requires all

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207. *See* Doe v. Reed, 130 S. Ct. 2811, 2815 (2010).

208. *See* Robert A. Sedler, *The First Amendment Right to Silence* 7 (Wayne St. Univ. Law Sch. Legal Studies Research Paper Series, Research Paper No. 07-39, Nov. 9, 2007), http://ssrn.com/abstract=1031505.

209. *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 625 (1943).

210. *See* Wooley v. Maynard, 430 U.S. 705, 706 (1977). In *Wooley*, the owner of the vehicle was a Jehovah's Witness who covered up the portion of the state-issued automobile license plate containing the state's motto, "Live Free or Die," which he contended was inconsistent with the Jehovah's Witnesses' beliefs in "eternal life." *Id.* at 709.

211. *See, e.g.*, Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 559 (1995). In *Hurley*, the Court held unconstitutional the application of a state public accommodations law that would have required a veterans group sponsoring a parade to permit a gay, lesbian, and bisexual group to march in the parade. *Id.* at 560-66.

212. *Compare* Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 4 (1986), *with* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 77 (1980). In *Robins*, under state law, a privately owned shopping center was compelled to allow expressive activities to take place in the central courtyard of the shopping center, such as the solicitation of signatures on a petition. *Robins*, 447 U.S. at 77. The shopping center contended that the requirement violated its right not to be associated with particular ideas, but the Court disagreed. *Id.* The Court found that there was no danger that the public would associate the shopping center with the expressive activity taking place in the courtyard, so the requirement did not violate the shopping center's right not to be associated with particular ideas. *Id.* at 101.

213. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 211 (1977). The non-union members of the bargaining unit can be charged, of course, for expenses related to the role

lawyers to pay dues to the state bar association under what is called an "integrated bar" arrangement; objecting lawyers are entitled to a pro rata refund of that portion of the compulsory dues that are used by the bar association for ideological purposes.[214]

The "right to refrain from speaking"[215] arose in two cases involving governmentally authorized assessments for generic advertising imposed on members of an association of agricultural producers.[216] In one case, the Court held that the assessment did not violate the "right to refrain from speaking," because the generic advertisements did not promote any particular message, but merely urged consumers to buy the agricultural products.[217] But in another case, the Court held that a mushroom marketing scheme, under which a federally established Mushroom Council could "impose mandatory assessments [on] handlers of fresh mushrooms for generic advertising to promote mushroom sales," violated the "right to refrain from speaking."[218] Here, the Court concluded that the assessment was not germane to the association's purposes independent of the speech itself and compelled support only for speech, thereby violating "the right to refrain from speaking."[219]

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of the union as a collective bargaining representative. This includes the costs associated with activities of state and national union affiliates, including strike preparations (even though strikes were illegal under state law), but not lobbying expenses. *See* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 511 (1990). The non-union members may also be charged for national litigation expenses so long as the subject matter of the litigation is of a kind that would be chargeable if the litigation were local and other locals were reasonably expected to contribute to the costs of the litigation. *Id.* at 522. The First Amendment requires that procedures used by the union to collect fees from non-members must ensure that the non-members have an opportunity to object to and challenge the fees imposed on them. Specifically, the union must provide an "adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." Chicago Teachers Union Local No. 1 v. Hudson, 475 U.S. 292, 310 (1986). The Court has recently held that when a union proposed a special assessment to use for political purposes, the union was required to send out a notice to all non-union members of the bargaining unit, giving them an opportunity to object to the special assessment and providing a full refund of the assessment to the objecting non-union members. Knox v. Serv. Emps. Int'l Union, 132 S. Ct. 2277, 2284 (2012).

214. *See* Keller v. State Bar of Cal., 496 U.S. 1, 4 (1990).

215. *Wooley*, 430 U.S. at 714.

216. U.S. Dep't of Agric. v. United Foods, Inc., 533 U.S. 405, 408 (2001); Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457 (1997).

217. *Glickman*, 521 U.S. at 471-72.

218. *United Foods, Inc.*, 533 U.S. at 408-09, 415-16.

219. *Id.* at 415-16. In *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006), the Court upheld the constitutionality of a federal law that provided that if any part of a university denied military recruiters access equal to that afforded to other recruiters (as a number of law schools were doing in order to protest a rule barring openly

D. Specific First Amendment Doctrines

A number of specific First Amendment doctrines have emerged from the Supreme Court's decisions in First Amendment cases, reflecting the Court's efforts to balance the interest in freedom of expression against other societal interests.[220] Some of these doctrines, such as the overbreadth doctrine, are applicable to any regulation of expression, while others are designed to deal with the regulation of particular kinds of expression.[221] Whenever a specific doctrine is applicable to a challenged regulation of expression, the application of that doctrine determines the constitutionality of the regulation.[222] We will now discuss a number of these specific doctrines.

1. The Overbreadth Doctrine

The source of the overbreadth doctrine, sometimes referred to as the "void on its face" doctrine, is the chilling effect concept.[223]

> To prevent a chilling effect on expression resulting from the existence and threatened enforcement of overbroad and vague laws regulating or applicable to acts of expression, such laws may be challenged on their face for substantial overbreadth or

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gay and lesbian persons from serving in the military, the so-called "don't ask, don't tell" rule), the entire university would be deprived of federal funds. The Court held that the law did not require the university to support the policy and that the university was free to oppose the policy, so long as the university did not deny access to military recruiters. *Id.* at 58-60. *See also* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 220-21 (2000) (holding that the "right to refrain from speaking" was not violated by a university's use of a mandatory student activity fee to provide grants to student organizations on the basis of viewpoint-neutral criteria). The right to refrain from speaking is a part of what I have called the "First Amendment Right of Silence." *See* Sedler, *supra* note 208, at 7. The right to silence also includes the right to speak anonymously without disclosing one's identity and the right to avoid unwanted communications. *Id.* Another aspect of the right to silence and the right to refrain from speaking is the media's editorial discretion. Sedler, *supra* note 142, at 24. A "media organization may decide that it is in the public interest . . . to refuse to disclose particular information . . . in its possession . . . . When [a media organization] chooses to exercise [this] editorial discretion[,] . . . it has concluded that in the circumstances presented, other values, such as a concern for an individual's privacy" (reflected in the decision of some media to refuse to disclose the identity of rape victims), or a concern for national security, outweigh the public's interest in obtaining that information. *Id.*

220. Sedler, *supra* note 1, at 460.

221. *Id.* at 458-59.

222. *See id.*

223. Sedler, *supra* note 34, at 292-93.

> vagueness without regard to whether the activity of the party challenging the law is itself constitutionally protected.[224]

The overbreadth doctrine is very important in practice, not only because it permits a law to be invalidated on its face without regard to whether the activity of the party challenging the law is itself constitutionally protected,[225] but because the constitutional analysis does not go beyond the terms of the law itself.[226] Moreover, once a law is held void on its face for overbreadth, the law literally ceases to exist: it cannot be enforced against any person in any circumstance.[227] In applying the overbreadth doctrine, a court must look to the terms of the law and must determine whether the law includes, or reasonably could be interpreted to include, a substantial amount of protected expression.[228] The more sweeping the terms of the law, the more likely it is to include within its prohibitions protected expression, and the more likely it is to be found void on its face for overbreadth.[229]

Applying the overbreadth doctrine, "the Court has struck down, for example, a law imposing an absolute ban on peaceful picketing,[230] a law making it unlawful for a person to 'in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty,'"[231] a law making it unlawful to "advocate crime or methods of terrorism,"[232] and "a law forbidding the use of 'opprobrious words or abusive language tending to cause a breach of the peace.'"[233] The Court has also struck down "a law

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224. *Id.* at 292.

225. The overbreadth doctrine is sometimes explained as an exception to the rule against third party standing. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 611-612 (1973). I have maintained that it is more properly explained in substantive terms. A party has a substantive First Amendment right, grounded in a concern for preventing a chilling effect on expression, not to be subject to sanction under a law that is "void on its face" for overbreadth. *See* Robert A. Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach,* 70 CAL. L. REV. 1308, 1326-27 (1982). Where a party is not subject to sanction under a challenged law, the party cannot assert an overbreadth challenge on the ground that the law violates the First Amendment rights of third parties. *See* L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 38-41 (1999) (holding that a party who wanted to obtain governmental information for purposes not authorized by statute could not assert facial challenge to statutory requirements).

226. *Broadrick*, 413 U.S. at 611-12.

227. *See id.* at 613.

228. *See* United States v. Stevens, 559 U.S. 460, 130 S. Ct. 1577, 1587 (2010).

229. Sedler, *supra* note 34, at 292.

230. *Id.* (citing Thornhill v. Alabama, 310 U.S. 88, 91 (1940)).

231. *Id.* (citing City of Houston v. Hill, 482 U.S. 451 (1987)).

232. Brandenburg v. Ohio, 395 U.S. 444, 445 (1969).

233. Sedler, *supra* note 34, at 292 (citing Gooding v. Wilson, 405 U.S. 518, 518-19 (1972)).

forbidding individuals to 'assemble on the sidewalk and conduct themselves in a manner annoying to persons passing by,'[234] a federal law banning 'indecent' interstate commercial telephone messages,"[235] and recently, a federal law criminalizing the commercial creation, sale, or possession of certain depictions of animal cruelty.[236]

The one qualification of the overbreadth doctrine is that it will not be applied to invalidate a law unless there is a showing of substantial overbreadth. The overbreadth must be "real and substantial in relation to the law's plainly legitimate sweep." [237] In other words, where the regulatory provisions of the law are clearly constitutional, the law will not be invalidated on its face merely because it is possible to hypothesize some possible unconstitutional applications.[238] With this qualification, the overbreadth doctrine is very important in practice because it can be invoked to challenge on its face a law regulating or applying to acts of expression.

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234. Coates v. City of Cincinnati, 402 U.S. 611, 611-13, 616 (1971).

235. Sedler, *supra* note 34, at 292 (citing Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 117 (1989)).

236. *Stevens*, 130 S. Ct. at 1592.

237. Sedler, *supra* note 108, at 653 n.94 (citing City of Houston v. Hill, 482 U.S. 451,460-65 (1987)).

238. *Stevens*, 130 S. Ct. at 1587 (stating that to survive an overbreadth challenge, one must establish that no circumstances exist under which the statute would be valid). The Court first pronounced the substantial overbreadth qualification in *Broadrick*, 413 U.S. at 601. That case involved a challenge to a state law prohibiting partisan political activity on the part of state civil service employees. *Id.* The Court upheld the law on the ground that partisan political activity on the part of state civil service employees could interfere with the impartial and efficient operation of the civil service. *Id.* at 616. The Court emphasized that the ban on such activity did not interfere with the ability of civil service employees to express political views outside the context of a partisan political campaign. *Id.* at 616-17. The civil employees challenging the law, who had engaged in soliciting contributions from their subordinates, argued that the law could be interpreted as applying to activities such as wearing campaign buttons or placing campaign signs on the bumpers of their automobiles. *Id.* at 609-10. The Court said that if the law ever was applied to such activities, it could be challenged as unconstitutional as applied, but this possible overbreadth was not substantial in relation to the law's plainly legitimate sweep. *Id.* at 618. *See also* Virginia v. Hicks, 539 U.S. 113, 115, 124 (2003). In *Hicks*, the Court upheld a municipal law which forbade the public from using streets adjacent to a municipal housing development for low-income residents in an effort to combat rampant crime and drug dealing there. *Id.* at 124. The Court rejected an overbreadth challenge to the law despite the possibility that it could be applied to bar a person seeking to come to the housing development for expressive purposes. *Id.* at 123-24. Similarly, in *Los Angeles Police Department v. United Reporting Publishing Co.*, 528 U.S. 32, 34, 38 (1999), the Court held that a facial challenge could not be made to a state law requiring that a person requesting an addressee's address declare that the request was "made for one of five prescribed purposes" and that the address would "not be used directly or indirectly to sell a product or service."

2. The Prior Restraint Doctrine

Any effort by the government to obtain an injunction or otherwise to impose an advance prohibition against expression brings into play the prior restraint doctrine. Since a prior restraint directly interferes with the ability of the public to receive the information, it creates a "freezing effect" on expression. Thus, a prior restraint is presumptively unconstitutional and requires a very heavy burden of justification on the part of the government.[239] Applying the prior restraint doctrine, the Supreme Court has held that the United States government could not obtain an injunction against the publication of the "Pentagon Papers," a series of secret governmental documents detailing the events that led up to American military involvement in Vietnam,

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239. In the "classic" prior restraint case, *Near v. Minnesota*, 283 U.S. 697, 701, 706, 722-23 (1931), the Court applied the prior restraint doctrine to hold violative of the First Amendment a state law providing for the abatement as a nuisance of a "malicious, scandalous and defamatory newspaper" and a resulting injunction against a newspaper enjoining it from publishing or circulating "any publication whatsoever which is a malicious, scandalous or defamatory newspaper." Many years later, the Court again applied the prior restraint doctrine to hold unconstitutional another state public nuisance law authorizing injunctions against the "habitual use of the . . . premises for commercial exhibition of obscene material." Vance v. Univ. Amusement Co., 445 U.S. 308, 317, 321 (1980). *See also* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61-63, 69-71 (1963) (holding unconstitutional as an "informal" prior restraint a state's use of a governmental commission that would identify "objectionable" books, notify the distributor of the commission's duty to recommend obscenity prosecutions to the Attorney General, and distribute the commission's list of "objectionable" books to the local police departments, which usually visited the distributor to determine what action had been taken).

The prior restraint doctrine does not preclude the issuance of an injunction against illegal activity carried out by means of language, such as a newspaper's engaging in an action of discrimination by running sex-based "help wanted" ads. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 380-81, 389 (1973). Likewise, an adult bookstore may not be used as a place for prostitution. *See* Arcara v. Cloud Books, Inc., 478 U.S. 697, 707 (1986). *See also* Kingsley Books, Inc. v. Brown, 354 U.S. 436, 438-39, 445 (1957) (upholding an injunction against a publication that the court determined to be obscene in an adversary proceeding).

The prior restraint doctrine precludes the issuance of an *ex parte* injunction against any activity involving expression, such as a planned demonstration, and it does not matter whether the injunction could have been justified following such a hearing. Carroll v. President & Comm'n of Princess Anne, 393 U.S. 175, 184-85 (1968). However, once an injunction against expression has been issued, whether or not in violation of the First Amendment, the party subject to the injunction must take action to have the injunction set aside on appeal and cannot violate the injunction. Walker v. City of Birmingham, 388 U.S. 307, 317-18 (1967). The First Amendment does not require the invalidity of the injunction to provide a defense to a contempt proceeding for its violation. *Id.* at 318 n.11.

> which had been illegally disclosed to the press by disaffected governmental officials.[240] The Court has also held that under the prior restraint doctrine, injunctions against the media prohibiting the publication of facts connected with criminal prosecutions, and issued for the purpose of preventing "prejudicial publicity" against the accused, are generally unconstitutional.[241]
>
> Any system of governmental licensing of expression analytically involves a prior restraint, and the Court has dealt with governmental licensing of expression by imposing specific requirements on any form of licensing. As a general proposition, any law licensing expression must be content[-]neutral and must contain narrow, objective, and definite standards control the discretion of the licensing official. If the law fails to contain such standards, it is invalidated on its face, and a party subject to the law is not required to apply for a license as a condition to challenging its constitutionality.[242]

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240. N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971). There, the Court refused to recognize a so-called "national security" exception to the prior restraint doctrine, and, in that particular case, the United States could not sustain the heavy burden of justification required under the doctrine. *Id.* The heavy burden of justification might be sustained in a case where the government seeks an injunction against a publication that would disclose the names of Central Intelligence Agency agents engaged in covert activities in foreign countries. *C.f.* Haig v. Agee, 453 U.S. 280, 280 (1981) (upholding a First Amendment challenge to the revocation of the passport of an American citizen and former Central Intelligence Agency employee who had announced his intention to "expose CIA officers and drive them out of the countries where they [were] operating").

241. Sedler, *supra* note 34, at 293. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 541, 570 (1976).

242. Sedler, *supra* note 34, at 293-94. *See* Hynes v. Mayor of Oradell, 425 U.S. 610, 620-23 (1976); Staub v. City of Baxley, 355 U.S. 313, 322-24 (1958); Lovell v. City of Griffin, 303 U.S. 444, 450-52 (1938). However, if the licensing law is valid on its face, the party seeking the license must apply for a license before being able to challenge the constitutionality of the law as applied to deny the license in the particular case. Poulos v. New Hampshire, 345 U.S. 395, 408-14 (1953). *See also* Watchtower Bible & Tract Soc'y v. Vill. of Stratton, 536 U.S. 150, 154-56 (2002). In *Watchtower Bible*, the Court held unconstitutional a municipal law that required individuals to obtain a permit prior to engaging in door-to-door advocacy and to display on demand the permit containing the individual's name. *Id.* The Court found that the law was not narrowly tailored to advancing the asserted interests of "protecting [the] privacy [of the residents] and preventing fraud and crime." *Id.* at 168-69.

The licensing of expression involving access to public property, such as that reflected in parade permit laws, will be discussed subsequently. *See* discussion *infra* Part III.D.7. As discussed below, the constitutional requirements for such licensing laws are the same as those for laws licensing expression generally. *See* Se. Promotions, Ltd. v.

The First Amendment also imposes procedural requirements on governmental efforts to enjoin the publication of unprotected speech, such as obscenity, and on the operation of licensing systems.[243] These requirements are designed to ensure that an injunction will not be issued against protected expression and that expression will not be delayed or "chilled" due to a licensing requirement. Therefore, if a state seeks to enjoin the publication of a work or the distribution of a film on the ground that it is "obscene," the state must initiate a judicial proceeding during which the alleged "obscenity" of the work or film will be expeditiously determined. It is only after the judicial determination of the "obscenity" of the work or film in an adversarial proceeding that an injunction can be issued against its publication or distribution.[244] Likewise, laws requiring the licensing of charitable solicitors must provide that if the license is not issued within a specified (brief) period of time, the government will initiate a judicial proceeding to seek a determination that the applicant does not meet the constitutionally permissible licensing criteria.[245]

3. The Clear and Present Danger Doctrine

As discussed previously, the primary context in which the "Law of the First Amendment" developed for many years was in response to governmental repression of dissent and the expression of unpopular ideas.[246] The Supreme Court very early promulgated the "clear and present danger" test as the basis for determining when the government

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Conrad, 420 U.S. 546, 559-60 (1975) (holding that when the government establishes standards for access to a particular public forum, it must follow the *Freedman* procedures) (citing Freedman v. Maryland, 380 U.S. 51, 58 (1965)).

243. *See, e.g., Freedman*, 380 U.S. at 58.

244. *See id.*; *Kingsley Books,* 354 U.S at 436, 442. The *Freedman* procedures were held to apply to postal refusals to deliver and customs seizures. *See* Blount v. Rizzi, 400 U.S. 410, 417 (1971); United States v. Thirty-Seven Photographs, 402 U.S. 363, 374-75 (1971). Laws dealing with the licensing of adult entertainment businesses must require the government to decide whether to issue a license "within a reasonable period of time" and must provide for expeditious judicial review of a refusal to issue a license, but the law may require that the applicant institute the proceeding for judicial review. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 228-30 (1990). In *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 781-82 (2004), the Court held that the state's ordinary judicial review procedures would suffice to assure prompt judicial access and a prompt judicial decision, as long as the state courts remained sensitive to the need to prevent First Amendment harms. The Court upheld the facial validity of an adult entertainment licensing law that provided that the final licensing decision could be appealed to a state court pursuant to the state's civil procedure rules. *Id.* at 776, 784.

245. Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 802 (1988).

246. *See supra* notes 77-96 and accompanying text.

could constitutionally prohibit advocacy of unlawful action, such as the violent overthrow of the government.[247] While the Court's application of this test was not always consistent, especially during the early Cold War period when the Court applied the test rather loosely to sustain the constitutionality of laws directed against the Communist Party,[248] the Court many years ago reformulated the test to provide strong constitutional protection for advocacy of unlawful action. Under the current formulation of the "clear and present danger" test, advocacy of unlawful action is constitutionally protected "except where such advocacy is directed toward inciting imminent lawless action and is likely to incite or produce such action."[249] This formulation effectively protects virtually any expression directed toward dissent and social change efforts despite the government's claim that the expression advocates unlawful action.[250] The Court has also long applied the "clear and present danger" test to efforts by judges to punish individual or media criticism as contempt of court and has found all such efforts to be unconstitutional.[251]

4. The New York Times *Rule*

The *New York Times* rule, promulgated in *New York Times Co. v. Sullivan*,[252] is derived from the "chilling effect" concept, and imposes stringent requirements in defamation and other personal tort actions brought by public officials and public figures. In order to avoid a "chilling effect" on the discussion of issues of public interest, the *New York Times* rule mandates there can be no recovery for false statements of fact about public officials or public figures, unless the plaintiff can prove with "convincing clarity" that the statement was knowingly false or was made with "reckless disregard" for its truth or falsity.[253] The *New*

247. *See supra* notes 81-84 and accompanying text.

248. *See supra* notes 77-83.

249. *Brandenburg*, 395 U.S. at 447. Because the challenged state "Criminal Syndicalism Act," which traced back to the "red scare" period of the 1920s, made it unlawful to advocate crime or methods of terrorism, it was void on its face for overbreadth. *See id.* at 444-45, 447-49.

250. *See, e.g.*, Hess v. Indiana, 414 U.S. 105, 106, 108 (1973) (finding that threats of violence made by university students during an anti-war demonstration did not reach the point of being "likely to incite or produce [imminent lawless] action").

251. Sedler, *supra* note 34, at 294-95. The Court has said that the criticism must be of such a nature as to present an extremely high danger of an actual obstruction of the administration of justice; it has never found this rigorous test satisfied. *See, e.g.*, Wood v. Georgia, 370 U.S. 375, 386-88 (1962); Pennekamp v. Florida, 328 U.S. 331, 336 (1946).

252. 376 U.S. 254, 268-73, 279-80 (1964).

253. *Id.* at 279-80, 285-86.

York Times rule also applies to actions for invasion of privacy and for the infliction of emotional distress.[254] Moreover, the rule imposes certain limitations on defamation actions brought by private figure plaintiffs against newspapers when the newspaper has "publishe[d] speech of public concern."[255] In such a case, the plaintiff must prove the falsity of the statements at issue,[256] and there can be no award of punitive damages unless the test of "knowing falsity or reckless disregard for truth" has been satisfied.[257] In an extension of the *New York Times* rule, the Court has held that the federal wiretap law, prohibiting the illegal interception of telephone communications, could not constitutionally be applied to impose liability against a newspaper for broadcasting an illegally intercepted communication concerning a matter of public concern, notwithstanding that the newspaper had reason to know that the communication had been illegally intercepted.[258]

It may be assumed that most media organizations have established internal procedures to ensure that they will not disseminate any information that could be shown to be "knowingly false" or made with "reckless disregard" for its truth or falsity. As a practical matter, the *New York Times* rule has served to insulate media organizations from liability for defamation and has reflected the Court's determination that the public interest in the widespread dissemination of information about matters of public concern outweighs the resulting harm to individual reputational and privacy interests.

5. The Commercial Speech Doctrine

For constitutional purposes, commercial speech refers to speech involving the exchange of goods or services for a profit, such as product

254. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988); Time, Inc. v. Hill, 385 U.S. 374, 386-88 (1967).

255. *See* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 775-76 (1986).

256. *Id.* at 776.

257. Sedler, *supra* note 34, at 296. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 377 (1974) (White, J., dissenting). In *Rosenbloom v. Metromedia*, 403 U.S. 29, 42-45 (1971), a three-justice plurality would have fully extended the *New York Times* rule to any defamatory statement involving matters of public interest. To a large extent, this objective is achieved by the holding in *Gertz*. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 751-52, 757-61, 763 (1985), a highly fragmented Court held that when the defamatory statements did not involve a matter of public concern, such as a false report to subscribers of a credit reporting agency concerning a contractor's bankruptcy, the *New York Times* rule did not apply, and the state court could award actual and punitive damages without a showing of "knowing falsehood or reckless disregard for the truth."

258. Bartnicki v. Vopper, 532 U.S. 514, 517-18 (2001).

advertising, which is distinct from speech involving the production or exchange of ideas.[259] The Court has promulgated the commercial speech doctrine to determine the constitutional permissibility of governmental regulation of commercial speech.[260] The application of the commercial speech doctrine, referred to as the *Central Hudson* test, requires a four-part analysis.[261] First, the commercial speech "must concern lawful activity and [must] not be misleading."[262] Assuming that the commercial speech in question meets this requirement, courts must evaluate three factors to determine the constitutionality of the particular commercial speech regulation: (1) the governmental interest asserted to justify the regulation must be substantial; (2) the regulation must directly advance

259. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561-64 (1980).

260. *See id.* at 566.

261. *Id.*

262. *Id.* An advertisement for illegal activity constitutes an unprotected "verbal act." *See supra* note 21 and accompanying text. Under this element of the commercial speech doctrine, the First Amendment does not preclude governmental regulation of false or misleading advertising. *Cent. Hudson*, 447 U.S. at 563-64. The justification for this restriction is that the truth of an advertisement is more readily verifiable than the truth of non-commercial speech. Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976). In any event, the advertiser must advertise the product and so will not be "chilled" by this restriction. *Id.* For the same reason, when an advertisement is false or misleading, the government may require the advertiser to retract the false or misleading information and make disclaimers in future advertisements. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985). This is one example of the Court's oft-repeated statement that commercial speech receives less constitutional protection than non-commercial speech. *See, e.g.*, *Cent. Hudson*, 447 U.S. at 562-63. Under this component of the commercial speech doctrine, the government may impose disclosure requirements that are reasonably related to the government's interest in preventing deception of consumers. *See Zauderer*, 471 U.S. at 652 (requiring advertising lawyers operating on a contingent-fee basis—under which the lawyer receives no fee unless the suit is successful—to disclose in the advertisement that the client would be liable for court costs if the suit were unsuccessful); Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1330 (2010) (requiring that "debt relief agencies," which include lawyers who provide advice with respect to "debt relief," disclose in any advertisement directed to the general public that they "are a debt relief agency [that] help[s] people file for bankruptcy under the Bankruptcy Code" and that the debt relief agency "provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt"). It may be noted that requirements that advertisers retract false or misleading information and that they make disclaimers or disclosures advance the public information function of the First Amendment by providing additional and relevant information to consumers. *Id.* at 1339-40.

the asserted governmental interest; and (3) the regulation may not be more extensive than is necessary to serve that interest.[263]

Applying the commercial speech doctrine, the Court has invalidated a number of restrictions on commercial speech, such as bans on advertising by lawyers and other professionals,[264] bans on promotional advertising by regulated public utilities,[265] bans on advertising contraceptives,[266] bans on placing "for sale" signs on the lawns of private homes,[267] bans on displaying the alcoholic content of beverages on product label,[268] bans on advertising the retail price of alcoholic

263. *Cent. Hudson*, 447 U.S. at 564-66. The "no more extensive than is necessary" element incorporates, to an extent, the narrow specificity principle into the commercial speech doctrine. *Id.* at 570.

264. *See Va. State Bd. of Pharmacy*, 425 U.S. at 749 (invalidating a ban on pharmacists' advertisement of prices of prescription drugs); Bates v. State Bar of Ariz., 433 U.S. 350, 354-55 (1977) (invalidating an absolute ban on lawyer advertising); Edenfield v. Fane, 507 U.S. 761, 761 (1993) (invalidating a ban on certified public accountants' direct, in-person solicitation of prospective business clients). The state may, however, prohibit lawyers from engaging in direct, in-person solicitation of prospective clients for remunerative employment, although not for the purpose of litigating "public interest" issues without any compensation to the lawyer. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 454-55 (1978); *In re* Primus, 436 U.S. 412, 412-13 (1978). The justification for the ban on a lawyer's in-person solicitation of prospective clients for remunerative employment is that it is necessary as a "prophylactic rule" because of the inherent danger of overreaching in direct solicitation by lawyers. *Ohralik*, 436 U.S. at 467. This danger is considered absent when a lawyer is soliciting clients to litigate "public interest" issues, usually on behalf of a "public interest" organization, or when a certified public accountant is soliciting business clients for accounting services. *See, e.g.*, *In re* Primus, 436 U.S. at 421; *Edenfeld*, 507 U.S. at 775-777. The state must generally permit targeted direct mail solicitation of clients for remunerative employment. *See* Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 466-67 (1988). However, the state may prohibit targeted direct-mail solicitations by personal injury lawyers to accident victims and their relatives for thirty days following an accident. Fla. Bar v. Went-for-It, Inc., 515 U.S. 618, 618 (1995). With that exception, states may not otherwise prohibit lawyer advertising containing truthful information. *See* Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 136-37 (1994) (invalidating a board's reprimand of a lawyer for referencing her credentials as a certified public accountant and certified financial planner in advertising); Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 91 (1990) (allowing an attorney to advertise a certification as a specialist received from a national organization). The state may not prohibit newspaper advertisements advising persons of a pending class action and soliciting their participation in the class action. *Zauderer*, 471 U.S. at 626-27.

265. *Cent. Hudson*, 447 U.S. at 561.

266. Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 61. The government's attempt to justify the ban on the ground that such advertising would be offensive to many persons conflicted with the principle of the protection of offensive speech. *Id.* at 73.

267. Linmark Assocs. Inc. v. Willingboro Twp., 431 U.S. 85, 86, 98 (1977).

268. Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995).

beverages,[269] location prohibitions and point-of-sale restrictions on tobacco advertising directed at children,[270] and a provision of a federal regulation that exempted certain drugs from standard Federal Drug Administration approval requirements, on condition that the providers refrain from advertising or promoting these drugs.[271]

However, in some cases, the Court—emphasizing that commercial speech does not receive as much protection as non-commercial speech—has upheld challenged regulations under the *Central Hudson* test.[272] These have included a ban on commercial billboards to advance

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269. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996). In *Liquormart*, the Court clarified that the Twenty-First Amendment, which gives states plenary authority over the manufacture and sale of alcoholic beverages, did not qualify the First Amendment. *Id.* Thus, the state regulation of speech-connected alcoholic beverages could be challenged as violative of the First Amendment. *Id.*

270. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 565-66 (2001). The state law prohibited any outdoor advertising of tobacco products that was directed toward or visible in any location within a "1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school." *Id.* at 534-35 (quoting 940 MASS. CODE REGS § 21.04(5)(a)(2001)). The law also regulated advertising in retail stores selling tobacco and located within a 1,000-foot radius of playgrounds and schools by requiring that point-of-sale advertising be placed at least five feet above the floor. *Id.* at 535. The Court held that the Federal Cigarette Labeling and Advertising Act preempted the law with respect to cigarette advertising and then considered whether the law violated the First Amendment as applied to the advertising of cigars and smokeless tobacco. *Id.* at 550-51 (citing 15 U.S.C.A. § 1334 (West 2000)). Applying the commercial speech doctrine, a Court majority held that the prohibition of outdoor advertising was more restrictive than necessary to advance the state's interest in preventing underage tobacco use, and that the regulation of on-site advertising did not directly advance the asserted interest in preventing underage tobacco use, as it was "more extensive than necessary" to advance this interest. *Id.* at 561-67.

271. Thompson v. W. States Med. Ctr., 535 U.S. 357, 360, 376-77 (2002). Again, the Court found that the regulation was "more extensive than necessary" to advance the state's asserted interest in preventing large-scale manufacturing of drugs that had been exempted from the standard drug approval requirements. *See id.* at 368, 370-72 (quoting *Robin*, 514 U.S. at 491). In Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2659 (2011), after holding that a Vermont law prohibiting pharmacies from selling or disclosing pharmacy records that revealed the prescribing practices of individual doctors was unconstitutional under the content neutrality principle, the Court addressed the state's argument that a lesser standard of scrutiny should apply because the speech at issue was commercial speech. The Court found it unnecessary to decide this question, because even if it was commercial speech, under the commercial speech doctrine, the state could not have a substantial interest in suppressing a disfavored message. *Id.* at 2668. Justices Breyer, Ginsburg, and Kagan dissented on the ground that any effect on expression was "inextricably related to a lawful governmental effort to regulate a commercial enterprise" and that the regulation could be upheld under the commercial speech doctrine. *Id.* at 2673-84.

272. *See infra* notes 277-78 and accompanying text.

governmental interests in aesthetics and traffic safety[273] and a public university's ban on sales presentations in student residences.[274] The Court has also held that, at least in some circumstances, the government may limit advertising of the availability of activities that are illegal in some states.[275] It has also been assumed that the First Amendment does not prevent the government from requiring that commercial advertising contain additional information, such as the "cigarette smoking is harmful to your health" warning that the federal government requires on all cigarette advertising.[276]

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273. *Compare* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 503 (1981) (recognizing an exception to the category neutrality aspect of the content neutrality principle and holding that the government could exempt some commercial billboards from the regulation, but not some non-commercial billboards from the regulation), *with* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 410-11 (1993) (holding that a city could not exclude newsracks containing advertising and promotional materials on public sidewalks if it permitted newsracks containing newspapers, as there was no valid basis for distinguishing between newsracks in terms of the content of the material contained in the newsrack).

274. *See* Bd. of Trustees v. Fox, 492 U.S. 469, 472, 480-81, 85-86 (1989).

275. *See* FCC v. Edge Broad. Co., 509 U.S. 418, 436 (1993) (upholding a federal law prohibiting the broadcasting of lottery advertisements in states where lotteries were illegal). A large number of states have state-sponsored lotteries, but some do not, and the effect of the law in *Edge Broadcasting Company* was to prohibit advertising of such lotteries in a neighboring state where lotteries were illegal. *Id.* However, in *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173, 180-81 (1999), the Court held that the law was unconstitutional as applied to prohibit the broadcasting of advertisements for casino gambling in states where casino gambling was legal, notwithstanding that the broadcast signals could, under certain conditions, be heard in neighboring states where casino gambling was illegal. One of the justifications the government asserted for the ban was to discourage public participation in casino gambling in order to minimize the social ills that have been historically associated with this activity. *Id.* at 181-82. The Court found, however, that the ban did not "substantially advance" that interest because of the inconsistencies and exceptions contained in the law, including an exception for advertising by gambling casinos operated by Indian tribes in accordance with a detailed federal regulatory scheme. *Id.* at 189-90. The Court also found that the regulation was "more extensive than necessary to serve the [asserted] interest." *Id.* at 188-89 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 557 (1980)). In *Posadas de P.R. Ass'n v. Tourism Co. of P.R.*, 478 U.S. 328, 345-46 (1986), the Court in a 5-4 decision held that Puerto Rico could prohibit casino gambling under a "greater includes the lesser" analysis: since Puerto Rico could constitutionally prohibit casino gambling, it could also prohibit advertising about casino gambling. In *Liquormart*, the Court stated that "*Posadas* erroneously performed a First Amendment analysis," and *Posadas* is effectively overruled. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 509-10 (1977).

276. *See* Federal Cigarette Labeling & Advertising Act, 15 U.S.C.A. §§ 1331-1341 (West 2012). Again, this requirement provides additional information to consumers and so advances the public information function of the First Amendment by providing

The commercial speech doctrine is very important in practice, and one may expect cases involving the application of the commercial speech doctrine to continue to come before the Court. Business entities have used the doctrine with considerable success to challenge restrictions on advertising and regulatory laws that reach commercial speech.[277] In addition, while the Court has emphasized that commercial speech does not receive as much protection as non-commercial speech, it has nonetheless invalidated a number of restrictions under the commercial speech doctrine.[278] This result will encourage business entities to continue to try to use the commercial speech doctrine to challenge governmental regulation of their activities.[279]

6. The Symbolic Speech Doctrine

> The constitutionality of governmental regulation of activity that combines speech and non-speech elements [is evaluated] under the symbolic speech doctrine. Under this doctrine, a sufficiently important governmental interest in regulating the non-speech elements of the activity may justify incidental restrictions on expression.[280] In order to be sustained, the challenged regulation must satisfy four requirements: (1) the

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information to smokers about the harmful effect of cigarette smoking. *See* Sedler, *supra* note 34, at 297.

277. *See* Thompson v. W. States Med. Ctr., 535 U.S. 357, 360 (2002).

278. *See, e.g.*, Rubin v. Coors Brewing Co., 514 U.S. 476, 481-83 (1995).

279. Older cases decided before the Court that have promulgated the commercial speech doctrine have upheld certain bans on commercial speech, such as bans on advertising on the sides of delivery vehicles. *See* Ry. Express Agency Inc. v. New York, 336 U.S. 106, 107-08, 111 (1949). Bans on the distribution of advertising leaflets in the public streets were also upheld. *See* Valentine v. Chrestensen, 316 U.S. 52, 54-55 (1942). In addition, while bans on door-to-door solicitation using non-commercial speech were held unconstitutional, bans on door-to-door commercial solicitation were assumed to be unconstitutional. *See* Martin v. City of Struthers, 319 U.S. 141, 149 (1943). Today, the constitutionality of such restrictions on commercial speech would be evaluated under the commercial speech doctrine, and they would not be as readily upheld. For different views as to the extent and bases of First Amendment protection for commercial speech, *compare* Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67 (2007), *with* Charles Fischette, *A New Architecture of Commercial Speech Law*, 31 HARV. J.L. & PUB. POL'Y 663 (2008). See also Shiffrin, *supra* note 8, for a comprehensive discussion of First Amendment methodology and commercial speech.

280. The symbolic speech doctrine was first promulgated in *United States v. O'Brien*, 391 U.S. 367, 376-77, 383 (1968). See Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1059 (2009), for a submission that the historic context of the First Amendment—originalism—demonstrates that the Framers intended symbolic expression to be the equivalent of verbal expression.

> regulation must be within the constitutional power of the government; (2) the regulation must further a substantial governmental interest; (3) the governmental interest must be unrelated to the suppression of free expression;[281] and (4) the "incidental" restriction on expression must be no greater than is essential to the furtherance of that interest.[282]

Applying the symbolic speech doctrine, the Court has upheld a Congressional ban on the destruction of 'draft registration' cards, which men subject to the military draft were required to carry in their possession,[283] but has held that a public high school could not constitutionally prohibit "a student from wearing a black armband to school to protest the Vietnam War."[284] "Although many cases may involve 'symbolic speech' in the sense that the activity at issue combines 'speech' and 'non-speech' elements," relatively few cases and no recent ones have seen the Court actually invoke the symbolic speech doctrine to resolve the constitutional issue presented in the particular case.[285] It may be that, in practice, the Court is likely to invoke the symbolic speech doctrine only when the government specifically asserts an interest in regulating the "non-speech" element of the activity, as it did with respect to the destruction of "draft registration" cards.

7. The Public Forum Doctrine

The public forum doctrine determines the constitutional permissibility of governmental regulation of "expression that takes place on, or seeks access to, public property."[286] Precisely because public property is involved, the government may, consistent with the First Amendment, impose some restrictions on the expression that takes place on public property that would not be permissible in other contexts, and it

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281. This requirement incorporates the viewpoint neutrality aspect of the content neutrality principle into the symbolic speech doctrine. In the flag burning cases, *United States v. Eichman* and *Texas v. Johnson*, the Court found that the ban was directed to the content of the message conveyed by the burning. United States v. Eichman, 496 U.S. 310, 311 (1990); Texas v. Johnson, 491 U.S. 397, 412 (1989). Thus, the ban violated the content neutrality principle and likewise failed the third requirement of the symbolic speech doctrine. *See supra* notes 147, 157 and accompanying text.

282. Sedler, *supra* note 34, at 300. This requirement incorporates the narrow specificity principle. *See* discussion *supra* Part III.C.2.

283. *O'Brien*, 391 U.S. at 386.

284. Sedler, *supra* note 34, at 300; Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 504, 514 (1969).

285. Sedler, *supra* note 34, at 300.

286. *Id.* at 316.

may sometimes deny or limit access to public property for expressive purposes.

> The public forum doctrine and the doctrine of reasonable time, place and manner regulation interact with each other to determine the constitutional permissibility of governmental regulation of expression that takes place on, or seeks access to, public property.
>
> Under the public forum doctrine, the permissible scope of regulation or restriction of expression that takes place on, or seeks access to, public property depends on whether or not the public property in question constitutes a public forum. If the public property constitutes a public forum, there must be universal access to that property for purposes of expression by all persons and groups, subject only to reasonable time, place and manner regulations. . . . [Universal access is not required] [w]ith respect to public property that is not a public forum, [and] the permissibility of any restriction on access to or use of such property for expressive purposes is determined under a general "reasonableness" test. The government may "reserve the [property] for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's views."[287] This means that the government may constitutionally impose category-type restrictions on such access [to public property that does not constitute a public forum] so long as the particular category-type restriction is reasonably related to the purpose for which the property is being used.[288]

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287. Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 46 (1983) (citing U.S. Postal Serv. v. Greensburgh Civic Ass'n, 453 U.S. 114, 133 n.7 (1981)).

288. Sedler, *supra* note 34, at 316. In *Perry*, the Court held that a school district could limit access to the interschool mail system to the exclusive bargaining representative of its teachers. 460 U.S. at 50-51, 55. To this extent, the category neutrality aspect of the content neutrality principle does not apply unreservedly to access to public property that does not constitute a public forum. *See id.* at 48-49. However, the category neutrality aspect of the principle does apply to invalidate a category-type restriction that is not reasonably related to the purpose for which the property is being used. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 99 (1972). In *Mosley*, a municipal law prohibited picketing within 150 feet of a school building while the school was in session. *Id.* at 92. Such a restriction would be upheld as a reasonable time, place, and manner regulation, even as applied to the sidewalk adjoining the school, a public forum, as a reasonable restriction on access to the school grounds, which are not a public forum. *See id.* at 98-99.

> The public streets and parks are traditional public forums, which "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."[289] Any other public property may be designated as a public forum by the government's opening it up for use by the public as a place for expressive activity.[290] Where the public property in question is either a traditional or designated public forum, the government cannot deny access to or prohibit expression on the property, but can only impose reasonable and content neutral regulations with respect to the time, place, and manner in which expression occurs on the property.[291] In order for a particular regulation to be sustained as a reasonable time, place[,] and manner regulation, it must (1)

But the law here contained an exception for "the peaceful picketing of any school involved in a labor dispute." *Id.* at 93. This category distinction was not related to the purpose for which the property in question was being used, since picketing in connection with a labor dispute would disrupt the functioning of the school in the same manner as any other picketing. *Id.* at 100. Thus, the law violated the category neutrality aspect of the content neutrality principle and was unconstitutional. *Id.* The viewpoint neutrality aspect of the content neutrality principle applies fully to the non-public forum as well as to the public forum, so any viewpoint-based restriction would be unconstitutional. *See Perry*, 460 U.S. at 45-46. *See also Mosley*, 408 U.S. at 99. This is the meaning of the "[no] effort to suppress expression merely because public officials oppose the speaker's view" language in *Perry*. 460 U.S. at 46.

289. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

290. The government may designate a public forum for a limited purpose, such as for use by certain groups. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 267 (1981) (designating facilities of a state university available for use by student groups); City of Madison Joint Sch. Dist. No. 8 v. Wisc. Emp't Relations Comm'n, 429 U.S. 167, 174-76 (1976) (opening school board meetings to the public).

291. As the regulation must be content-neutral, a public university's attempt to exclude a student group wishing to use the facilities for religious worship and discussion was held unconstitutional in *Widmar*. 454 U.S. at 267. In *Madison*, the school board could not constitutionally deny a non-union teacher the opportunity to speak on pending labor negotiations at a school board meeting. 429 U.S. at 174-76. *See also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 386-92 (1993) (holding that when a school district permitted after-hours use of school facilities for "social, civic, [and] recreational purposes" by private organizations, it could not prohibit a private organization seeking to show a religious film).

serve a significant governmental interest,[292] and (2) leave open ample alternative channels for communication.[293]

> The application of the reasonable time, place[,] and manner regulation doctrine may be illustrated by . . . [considering a case] where the Court upheld a regulation requiring that the sale or distribution of merchandise, including written materials, at a state fair take place only from a booth on the fairground, and not on the fairground itself.[294] Any person or group wishing to sell merchandise or materials could rent a booth on a first-come, first-served basis with the rental charge based on the size and location of the booth.[295] [In upholding the rule,] [t]he Court emphasized the state's interest in maintaining crowd movement within the relatively small area of the fairground, and noted that a fairground presented crowd control problems that were absent on a city street. The Court also emphasized that the rule did not prohibit any expression on the fairground other than that involving sale or distribution. Thus, the Court concluded the rule served a significant governmental interest while leaving open ample alternative channels of communication.[296]

> The Court has been disposed to uphold most restrictions on expression in the public forum on the ground that [the particular restriction can be brought within the ambit of the reasonable time, place, and manner regulation doctrine]. . . .[297] The Court has upheld as a reasonable time, place and manner regulation a law prohibiting the congregation of persons within 500 feet of a foreign embassy "when the police reasonably believe that such congregation poses a threat to the security or peace of the

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292. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). *See* Schneider v. New Jersey, 308 U.S. 147, 160-62 (1939) (holding that a city's interest in preventing littering was not of sufficient importance to justify a ban on distributing leaflets on public streets).

293. Sedler, *supra* note 34, at 317. *See Clark*, 468 U.S. at 293. *See also* Schneider v. Town of Irvington, 308 U.S. 147, 163 (1939).

294. Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 646-56 (1981).

295. *Id.* at 644.

296. Sedler, *supra* note 34, at 317-18. *See Heffron*, 452 U.S. at 644. If the state had tried to advance the interest in maintaining crowd control by prohibiting any crowd mingling not involving sale or distribution, or had not provided the booths on a first-come, first-served basis and at a reasonable cost, the rule would not have been found "reasonable" and so would have been constitutionally invalid. *Id.* at 647-48.

297. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 331 (1988).

embassy,"[298] a law prohibiting voter solicitation and the display or distribution of campaign materials within 100 feet of the voting place,[299] [a ban on "focused picketing" in front of a person's home,[300]] a rule of the federal park service prohibiting overnight sleeping in a small public park near the White House, as applied to prohibit "tenting" in connection with a demonstration intended to call attention to the plight of the homeless,[301] an "anti-noise" regulation prohibiting the making of "any noise or diversion on school grounds while school is in session which tends to disturb the peace or good order of such school session," as applied to a public sidewalk adjacent to the school,[302] and a municipal noise regulation requiring that musical performances in a band shell in a public park make use of the sound system and sound technician provided by the city.[303] However, the Court has held unconstitutional[,] [as an unreasonable restriction,] a law prohibiting all displays and leafleting on a sidewalk in front of the Supreme Court building.[304]

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298. *Id.*

299. Burson v. Freeman, 504 U.S. 191, 193-211 (1992).

300. Frisby v. Schultz, 487 U.S. 474, 476-88 (1988). In that case, in response to picketing by anti-abortion protestors in front of the home of a physician who performed abortions, a city enacted a law that prohibited "'engag[ing] in picketing before or about the residence or dwelling of any individual.'" *Id.* at 477. The Court gave the law a narrowing construction, so as to limit it to "focused picketing" directed at a particular residence. *Id.* at 482-83. As narrowed, the law did not reach walking through residential neighborhoods or "even walking a route in front of an entire block of houses." *Id.* Thus, the law would advance the asserted interest in promoting residential privacy without substantially interfering with the ability of the protestors to convey their message to the general public and even to the target of their protest. *Id.* at 484-87. Thus, the law was valid as a reasonable time, place, and manner regulation. *Id.* at 476-88. In *Madsen v. Women's Health Center*, the Court held unconstitutional an injunction creating a 300-foot buffer zone around the homes of those who worked in an abortion clinic. 512 U.S. 753, 773-76 (1994). The Court noted that the zone around the residence was much larger than the zone approved in *Frisby* and that a "limitation on the time, duration of picketing, and number of pickets outside a smaller zone" would advance the asserted interest in protecting the privacy of the patients and physicians. *Id.* at 775.

301. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 289-98 (1984).

302. Grayned v. City of Rockford, 408 U.S. 104, 107-08 (1972).

303. Ward v. Rock Against Racism, 491 U.S. 781, 783-90 (1989).

304. Sedler, *supra* note 34, at 318-19. *Compare* United States v. Grace, 461 U.S. 171 (1983), *with* Cox v. Louisiana, 379 U.S. 559, 560-64 (1964) (upholding a ban on picketing in or near a courthouse "with the intent of interfering with, obstructing or impeding the administration of justice"). While the reasonable time, place, and manner doctrine has developed primarily to determine the constitutionality of regulations governing access to a public forum, it is potentially applicable in other contexts. *See, e.g.*,

In a number of cases, the Court has dealt with the constitutionality of restrictions on picketing and demonstrations in front of anti-abortion clinics.[305] In these cases, the Court has tried to balance the right of abortion opponents to express their strong opposition to abortion and dissuade women approaching the clinics from having an abortion against the privacy rights of the women and the operational rights of the clinics.[306] The Court has found that certain restrictions satisfy the requirement of a reasonable time, place, and manner restriction while others do not. Specifically, the Court held unconstitutional an injunction prohibiting anti-abortion protestors from attempting to counsel women entering abortion clinics who indicated that they did not wish to be counseled.[307] Yet in the same case, the Court upheld "fixed buffer zones" around clinic entrances and driveways to ensure access.[308] In another case, the Court again upheld a provision of an injunction establishing a buffer zone around an abortion clinic, but held unconstitutional those provisions prohibiting anti-abortion protestors from making uninvited approaches and displaying "observable images of aborted fetuses and the like."[309] In *Hill v. Colorado,*[310] the Court finally upheld a state law prohibiting anti-abortion protestors within one hundred feet of the abortion clinic from coming within eight feet of a person going to the clinic, without that person's consent, in an effort to dissuade her from having an abortion.[311]

There is no First Amendment requirement that the government permit concerted expression in the form of demonstrations or parades to take place in a public forum, such as the public streets or parks.[312] However, if the government chooses to permit concerted expression to take place in a public forum, as, for example, by opening up the public streets for parades, the First Amendment comes into play and imposes significant limits on how the government can regulate access to a public

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Nev. Comm'n on Ethics v. Corrigan, 131 S. Ct. 2343, 2346-47 (2011) (upholding as a reasonable time, place, and manner restriction a state ethics law requiring public officials to recuse themselves from voting on, or advocating the passage or failure of, a matter in which the official had a conflict of interest).

305. *See infra* notes 307-11.

306. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 714-15 (2000).

307. Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 377-80 (1997).

308. *Id.* at 380-85.

309. Madsen v. Women's Health Ctr., 512 U.S. 753, 768-70, 773-76 (1994).

310. 530 U.S. 703.

311. *Id.* at 707-14.

312. *See, e.g.*, Thomas v. Chicago Park Dist., 534 U.S. 316, 318-23 (2002).

forum for purposes of concerted expression.[313] Most fundamental in this regard is the principle of content neutrality. The government cannot distinguish between different kinds of concerted expression based on the content of that expression.[314] If, for example, the government sponsors or allows a private group to hold a parade celebrating a national holiday, it has thereby opened up the public streets for concerted expression, and it must allow other groups to use the public streets for other parades or demonstrations, such as one to protest government policy.

Any parade permit law, therefore, must be content-neutral and must satisfy the requirements of a reasonable time, place, and manner regulation.[315] The Court has emphasized that such a law must not give the governmental officials enforcing it any discretion to deny the permit based on the content of the expression, and so

> it must contain "narrow, objective, and definite standards" controlling the discretion of the licensing official.[316] If the [parade permit] law fails to contain such standards, it is invalidated "on its face," and a party seeking to hold a parade is not required to apply for a permit in order to challenge the law's constitutionality.[317] The government may impose a reasonable licensing fee to cover the costs of the licensing system, but it may not charge "controversial" speakers for the costs of police protection.[318]

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313. *See, e.g.*, Gregory v. City of Chicago, 394 U.S. 111, 111-13 (1969) (overturning disorderly conduct convictions of peaceful protesters who refused to curtail a lawful street demonstration when onlookers became disorderly).

314. *See* discussion *supra* Part III.C.1.

315. Forsyth Cnty., Ga. v. Nationalist Movement, 505 U.S. 123, 130 (1992).

316. See City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 755-59, 776 (1988), in which the Court applied this principle to invalidate a municipal permit law regulating the placement of newsracks on public property. It was irrelevant in this regard that the city could ban newsracks on public property, because the city had established a procedure for allowing some newsracks on public property. *Id.*

317. *See, e.g.*, *id.* at 757-60; Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969). As the above discussion indicates, the constitutional requirements for licensing expression that involves access to public property are the same as the requirements for licensing expression generally. *See supra* note 242 and accompanying text. *See also Thomas*, 534 U.S. at 318-24 (upholding a municipal parade permit law requiring individuals to obtain a permit before conducting large scale events in public parks, because the law contained neutral standards, required applications to be processed within fourteen days, required an explanation for denial, and provided for administrative and judicial review).

318. Sedler, *supra* note 34, at 320 (citing *Forsyth Cnty.*, 505 U.S. at 130-37). The First Amendment requires that the government protect the rights of controversial speakers

In practice, most public property has not been designated as a public forum, so that except for the traditional public forums of the public streets and parks,[319] most public property constitutes a non-public forum for purposes of the public forum doctrine.

> This means, as stated previously, that the constitutional permissibility of any restrictions on access to, or use of, such public property for expressive purposes is determined under a general "reasonableness" test, which recognizes the government's entitlement to "reserve the property for its intended purposes, communicative or otherwise." Thus, the government may impose category-type restrictions on access to the non-public forum, so long as they are reasonably related to the purpose for which the property is being used.[320] Applying this standard, the Court has held that a school district may limit access to the interschool mail system to the exclusive bargaining representative of its teachers,[321] that the military may exclude all partisan political activity from military bases,[322] and that the federal government may exclude legal defense and political advocacy groups from a charity drive aimed at federal employees and conducted in a federal workplace during working hours under governmental regulation[,][323] [and that a state-owned public television network may limit a television debate

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against interference from a hostile crowd. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229, 235-38 (1963).

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

320. *Id.* at 46.

321. *Id.* at 44-47.

322. Greer v. Spock, 424 U.S. 828, 838 (1976).

> The reasonableness of this category-type restriction relates to the fact that the United States has had a long tradition of a politically-neutral military establishment. This being so, the military could properly exclude partisan political activity from the base, although it allowed other activity, such as charitable solicitation, to take place there. Note again, however, that the government must maintain strict viewpoint neutrality regarding access to the non-public forum. If, for example, the military allowed the President to speak on a military base during a political campaign, it could not refuse to allow a speech by a candidate of the opposite party.

Sedler, *supra* note 34, at 320 n.704.

323. Sedler, *supra* note 34, at 320-21 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 799-802 (1985) (finding the exclusion reasonable because it advanced governmental interests in avoiding the appearance of political favoritism, avoiding controversy, and maximizing support of agencies that provide direct aid to the poor)).

among candidates for a Congressional seat to the two major party candidates and exclude an independent candidate with little popular support.][324]

In addition to imposing category-type restrictions on access to certain kinds of public property, the government, in an effort to "reserve the property for its intended purposes," may prohibit any expressive activity that is "basically incompatible with the normal activity of a particular place at a particular time."[325] Under this test, except for permissible category-type restrictions on access, the government may not declare the non-public forum "off-limits" for expression, but may only impose reasonable restrictions related to preventing interference with the "normal activity of a particular place at a particular time." For example, the government could prohibit making a speech in the reading room of a public library, but it could not prohibit a silent vigil where persons sat on the floor of the reading room to protest the library's policies.[326] Likewise, the government can prohibit a demonstration on the grounds of a school while the school is in session, but not after the school day has ended.[327] The Court has also held that the government may prohibit the posting of signs on public property[,] such as utility poles and lamp posts, in order to prevent "visual clutter,"[328] that the United States Postal Service may prohibit the deposit of unstamped materials in a

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324. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 669, 676, 682-83 (1998) (finding the decision to exclude an independent candidate reasonable and a viewpoint-neutral exercise of journalistic discretion consistent with the First Amendment "where the decision resulted from lack of viability of the third party candidate").

325. *See* Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

326. *See* Brown v. Louisiana, 383 U.S. 131, 139-43 (1966) (reversing convictions of breaching the peace arising from a silent "sit-in" at a public library to protest its policy of racial segregation). In *United States v. American Library Association, Inc.*, 539 U.S. 194, 205-06 (2003), the Court specifically held that a public library was not a designated public forum. The plurality opinion emphasized that the acquisition of Internet terminals did not make the library a public forum, stating that to create a public forum, "the government must make an affirmative choice to open up its property for use as a public forum." *Id.* at 206. A Court majority in that case upheld on its face a provision of the Children's Internet Protection Act (CIPA), requiring public libraries receiving federal assistance to install software filters to block obscene or child pornographic images and to "prevent minors from obtaining access to material that is harmful to them." *Id.* at 199 (citing 20 U.S.C.A. § 9134(f)(1) (West 2010)). The law permitted disabling the filters for "other lawful purposes," and the filter programs at issue permitted disabling during use by an adult. *Id.* at 201 (citing 20 U.S.C.A. § 9134(f)(3) (West 2006)).

327. *See Grayned*, 408 U.S. 116-21.

328. City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 808-09 (1984).

Postal Service-approved letter box,[329] and that the military may generally prohibit protest activity at military bases.[330]

As a practical matter, where the non-public forum is "physically open," such as an airport terminal, the Court's "reasonableness" test application does not differ significantly from its application of the reasonable time, place, and manner regulation doctrine.[331] Therefore, despite the Court's finding that airport terminals are not public forums, it has held invalid an absolute ban on "all First Amendment activities" at a terminal.[332] The Court has also held unconstitutional a ban on distributing literature in an airport terminal, while upholding a ban on the solicitation and receipt of funds in the terminal.[333]

We see from our discussion of the public forum doctrine that there has been a great deal of litigation over governmental regulation of expression that takes place on or seeks access to public property. While the First Amendment applies to determine the constitutionality of such

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329. U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 116, 119-32 (1981). The ban on depositing unstamped "mailable matter" in Postal Service-approved letterboxes aimed to ensure that only pre-paid postage material was deposited in letterboxes.

330. Sedler, *supra* note 34, at 321-22 (citing United States v. Albertini, 472 U.S. 675, 677-85 (1985)).

331. *See, e.g.*, Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987).

332. *See id.* at 570-77.

333. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680-85 (1992). "[F]our Justices took the position that the interior area of an airport terminal was a public forum for purposes of the public forum doctrine." Sedler, *supra* note 34, at 322 n.715 (citing *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 709-16 (Souter, J., concurring in part, dissenting in part)). In addition, these four justices stated that neither the ban on distribution nor the ban on "solicitation and receipt of funds" could be sustained as a reasonable time, place, and manner regulation. *Id.* A fifth justice, "whose vote provided a majority on all the issues in the case, took the position that the interior area of an airport terminal did not constitute a public forum." *Id.* (citing *Int'l Soc'y for Krishna Consciousness,* 505 U.S. at 685 (O'Connor, J., concurring)). Applying the general "reasonableness" test, they concluded that the ban on distribution was not reasonable, but that the ban on "solicitation and receipt of funds" was reasonable and so could be upheld. *Id.* (citing *Int'l Soc'y for Krishna Consciousness,* 505 U.S. at 685). In light of current security regulations under which only ticketed passengers can go to the gates, an airport terminal provides only a limited opportunity for First Amendment activity. *Id.* See also United States v. Kokinda, 497 U.S. 720 (1990), in which the Court upheld the Postal Service's ban of solicitation on postal premises as applied to a sidewalk near the entrance of a postal building. Four justices took the position that the postal sidewalk was not a public forum and that the ban on solicitation could be sustained under the general "reasonableness" test. *Id.* at 725. A fifth justice took the position that the postal sidewalk was a public forum, but concluded that the ban on solicitation there could be sustained as a reasonable time, place, and manner regulation. Sedler, *supra* note 34, at 737-39.

regulation, it is here, more so than in any other area, that the governmental regulation at issue is more likely to be upheld against a First Amendment challenge. We have seen that at least some regulations of access to a public forum, assuming that they are content-neutral, have been upheld as a reasonable time, place, and manner regulations. When it comes to a non-public forum, which is most public property, a general reasonableness test applies, under which the government may "reserve the property for its intended purposes, communicative or otherwise," and so may even impose some category restrictions.[334] Nonetheless, any governmental regulation of "expression that takes place on or seeks access to public property" comes within the scope of First Amendment protection, and the public forum doctrine determines whether the particular regulation of expression will be upheld.[335]

E. Precedents in Particular Areas of First Amendment Activity

When the result in a First Amendment case is not controlled by the application of a principle or specific doctrine, it is most likely controlled by the application of a particular First Amendment Court precedent. As a practical matter, in any First Amendment case, as in any other constitutional case, lawyers and judges, including Supreme Court Justices, will begin their analysis by looking to the applicable precedents in the particular area of First Amendment activity. In many cases, the applicable precedents will involve the Court's applications of the First Amendment principles and doctrines.[336] Therefore, when we refer to the precedents in particular areas of First Amendment activity, we are referring analytically to precedents that did not involve, at least directly, the Court's application of principles and doctrines. Nonetheless, in our discussion of the precedents in particular areas of First Amendment activity, in an effort to review these precedents as they appear to lawyers and judges, we will include some cases in which the result, at least in part, depended on the Court's application of principles and doctrines. We will now review the Court's precedents in the more important areas of First Amendment activity.

334. City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 815 (1984).

335. Sedler, *supra* note 34, at 322.

336. *See* Sedler, *supra* note 1, at 461 (labeling this derivative approach as "applying 'subsidiary doctrine'" and listing areas of law where this approach is common).

1. Restrictions on Expression Relating to the Administration of Justice

The Court has generally rejected governmental efforts to justify restrictions on freedom of expression on the ground that they are necessary to promote the fair and efficient administration of justice or to protect the privacy interests of persons involved in legal proceedings. The Court has sometimes invoked the narrow specificity principle to find that the particular challenged restriction is broader than necessary to advance the asserted "fairness and efficiency" or "protection of privacy" interest. Other times, it has found the asserted governmental interest insufficient to justify the restriction on expression in the circumstances presented. In any event, the Court has held unconstitutional the following restrictions on expression relating to the administration of justice: an absolute ban on witnesses' disclosing their testimony before a grand jury after the grand jury's term has been completed;[337] a state law prohibiting the publishing or broadcasting of the name of a sexual offense victim, as applied to a newspaper that obtained the name from an inadvertently released police report;[338] a law prohibiting newspapers from publishing the name of a youth charged as a juvenile offender, as applied to information that the newspaper lawfully obtained from private sources;[339] a law prohibiting the publication of information in confidential legal proceedings, as applied to a non-participant who had lawfully obtained the information;[340] a law imposing liability for public dissemination of the name of a rape victim when the name had been obtained from public court documents;[341] and an order prohibiting the press from publishing the name or picture of an eleven-year-old boy accused of murder, when the reporter had been lawfully present at a public court hearing and had photographed the boy en route from the courthouse.[342] A court, however, can prohibit lawyers and parties from making public statements about pending legal proceedings when the statements could create a "substantial likelihood of material prejudice" in the case.[343]

337. *See* Butterworth v. Smith, 494 U.S. 624, 626 (1990).
338. *See* Fla. Star v. B.J.F., 491 U.S. 524, 526 (1989).
339. *See* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 98-104 (1979).
340. *See* Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 831-34 (1978).
341. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 471-76 (1975).
342. *See* Okla. Publ'g Co. v. Dist. Court, 430 U.S. 308, 308-12 (1977).
343. Sedler, *supra* note 34, at 301-02 (citing Gentile v. State Bar of Nev., 501 U.S. 1030, 1075-76 (1991)).

2. Campaign Financing Regulation

In the leading case of *Buckley v. Valeo*,[344] the Court held that money is speech, such that the expenditure of funds in support of political candidates and public issues involves freedom of expression for First Amendment purposes. This being so, the First Amendment imposes significant constraints on governmental campaign financing regulation.[345] However, beginning with *Buckley*, the Court has drawn a sharp distinction between restrictions on contributions and restrictions on expenditures.[346] The Court has generally upheld as constitutional restrictions on contributions to political candidates on the ground that unregulated contributions can lead to political corruption and that contributions do not involve "direct speech" by the contributor.[347] Thus, in *Buckley*, the Court upheld all the limitations on campaign contributions to a candidate for federal office contained in the Federal Election Campaign Act of 1971.[348] The Court has also held that limitations on candidate contributions are constitutional, even though those limitations were lower in current dollar value than those upheld in *Buckley*.[349] The only time that the Court found a limitation on contributions unconstitutional was when the state-imposed limitation was slightly more than 1/20th of the limitation on contributions to candidates for federal office that was upheld in *Buckley*, and that was the lowest per election limit in the nation.[350]

However, it has been a very different story when it comes to limitations on expenditures by candidates or their supporters. In *Buckley*, the Court held unconstitutional all limitations on individual and

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344. 424 U.S. 1, 14-20 (1976).

345. *See id. See also* discussion *infra* pp. 1069-73.

346. *See Buckley*, 424 U.S. at 20.

347. *Id.* at 20-21.

> A limitation [on] the amount of money a person may give to a candidate or campaign organization . . . involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Id.

348. *Id.* at 34-38 (upholding contribution amendments to Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1974), including a $1000 limitation on contributions to a candidate).

349. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 395-97 (2000).

350. Randall v. Sorrell, 548 U.S. 230, 248-53 (2006).

candidate expenditures.[351] These included a $1000 per year limitation on an individual expenditure in support of a candidate, limitations on personal expenditures by candidates on their own behalf, and limitations on overall campaign expenditures by candidates seeking election to federal office.[352] With respect to limiting expenditures by candidates, the Court specifically rejected the government's asserted justification of "equalizing the financial resources of candidates" seeking election to federal office.[353]

In the same vein, the Court has held unconstitutional the so-called "Millionaires' Amendment" under which Congress increased the contribution limits for a non-self-financing candidate whose self-financing opponent had achieved a specified advantage in spending by virtue of the opponent's personal funds.[354] In addition, the Court recently struck down a state campaign financing scheme under which candidates who accepted public financing in exchange for foregoing private contributions were given additional public funds matching virtually dollar for dollar the amounts that their opponents and independent supporters spent beyond the public financing cap.[355]

The Court has also held unconstitutional a limitation on independent expenditures made by political parties,[356] but it has held that it is constitutionally permissible to limit the expenditures of a political party that were coordinated with the campaign of the party's candidate.[357]

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351. *Buckley*, 424 U.S. at 51-58.

352. *Id.*

353. *Id.* at 54, 56. In rejecting this justification, the Court stated as follows:

> The interest in equalizing the financial resources of candidates competing for federal office is no more convincing a justification for restricting the scope of federal election campaigns. Given the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support. There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate. Moreover, the equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.

Id. (internal citations omitted).

354. *See* Davis v. FEC, 554 U.S. 724, 736-44 (2010) (invalidating 2 U.S.C.A. § 441a-1 (West 2002)).

355. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2813-18 (2011).

356. Colo. Republican Fed. Campaign Comm. V. FEC (*Colorado Republican I*), 518 U.S. 604, 608-18 (1996).

357. FEC v. Colo. Republican Fed. Campaign Comm. (*Colorado Republican II*), 533 U.S. 431, 437 (2001).

In 2002, Congress enacted the Bipartisan Campaign Reform Act of 2002 (BCRA),[358] which amended and supplemented the federal campaign financing law that had been in effect for the preceding thirty years.[359] Among other provisions, the BCRA prohibits corporations and labor unions from making expenditures for any "electioneering communication" within sixty days before a general election or thirty days before a primary election;[360] imposes limitations on so-called "soft money" contributions by corporations and labor unions to political parties;[361] prohibits all contributions by persons under the age of eighteen; requires disclosures by persons who expend more than $10,000 in any year for "electioneering communications";[362] limits the source and amount of disbursements that are "coordinated" with a federal candidate or a national, state, or local party committee; and severely restricts any national, state, or local political party committee from soliciting, receiving, or transferring "soft money" funds that are not subject to federal regulation but are subject to state regulation. When the constitutionality of BCRA came before the Supreme Court in *McConnell v. Federal Election Commission*,[363] the Court was sharply divided on the different constitutional issues presented by the law, but a Court majority held that all the provisions, except for the ban on contributions by persons under eighteen years of age, did not violate the First Amendment.[364] The recurring theme in the different opinions upholding the constitutionality of these provisions was that the governmental interest in preventing actual or apparent corruption of federal candidates was sufficiently important to justify limits on political contributions—and efforts to circumvent those limits—and limits on independent expenditures by corporations and labor unions from corporate and union funds.[365]

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358. Pub. L. No. 107-155, 116 Stat. 81 (2002).

359. 2 U.S.C.A. §§ 431-42 (West 2012) (enacted Feb. 7, 1972).

360. 2 U.S.C.A. § 441b (West 2010), *invalidated by* Citizens United v. FEC, 558 U.S. 310 (2010).

361. 2 U.S.C.A. § 441(i) (West 2010), *invalidated by Citizens United*, 558 U.S. 310.

362. 2 U.S.C.A. § 434(f) (West 2010).

363. 540 U.S. 93, 114 (2003), *overruled by Citizens United*, 558 U.S. 310.

364. *Id.*

365. *Id.* at 120-22, 142-56, 167-69, 182, 196. The ban on independent expenditures by corporations and unions from corporate and union funds was of long standing and was upheld against First Amendment challenge in *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 655 (1990). However, in *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 491-500 (2007) (Scalia, J., concurring), three justices argued to overrule the part of the *McConnell* decision upholding the ban. Two others held that the ban only applied to "electioneering communications" that were "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at

However, in the later and highly controversial case of *Citizens United v. Federal Election Commission*,[366] a sharply divided Court held that the First Amendment protected the right of corporations and labor unions to use corporate and union funds to make expenditures on behalf of political candidates. This being so, the Court overruled that part of the *McConnell* decision, upholding the ban on using corporate and union funds for any "electioneering communication" within sixty days before a general election or thirty days before a primary election.[367] The effect of this part of *Citizens United* is that corporations or unions can use their general funds without restraint to make independent expenditures on behalf of political candidates.[368] In *Citizens United*, the Court specifically upheld the disclosure and disclaimer and the non-coordination provisions of the BCRA as applied to corporations and labor unions, and it did not question the constitutionality of the bans on the use of general funds to make direct contributions to candidates and political parties.[369] Therefore, under the present state of the law, the government can prohibit corporations and labor unions from using their general funds to make direct contributions on behalf of candidates and political parties, but it cannot prohibit them from using their general funds to make independent expenditures on behalf of candidates and political parties.

470-76. The Court had previously held that it was unconstitutional to prohibit a non-profit corporation from expending its general funds in connection with an election for public office, FEC v. Mass. Citizens for Life, 479 U.S. 238, 241 (1986), and to bar a corporation from expending corporate funds to influence a voter referendum on a proposed progressive income tax on corporations. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 767-69 (1978).

366. 558 U.S. 310, 365-66 (2010).

367. *Id.* It also specifically overruled *Austin*, 494 U.S. 652.

368. It will no longer be necessary for corporations and labor unions to solicit persons to contribute to corporate or union-sponsored political action committees. In *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012), the Court, in a *per curiam* opinion, applied *Citizens United* to summarily reverse a decision of the Montana Supreme Court that upheld a state law prohibiting corporations from making expenditures in support of a political candidate or political party. Dissenting from that action, Justice Breyer, in an opinion joined by Justices Ginsburg, Sotomayor, and Kagan, contended that the Court should grant certiorari to reconsider *Citizens United* in light of the Montana Supreme Court's finding that independent expenditures by corporations in Montana did in fact lead to corruption or the appearance of corruption in Montana. But the dissenting justices did not see a "significant possibility of reconsideration" in light of the Court's *per curiam* disposition of the case, so they voted instead to deny the petition for certiorari. *Id.* at 2492 (Breyer, J., dissenting).

369. *Citizens United*, 558 U.S. at 366-72. In *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 149 (2003), the Court upheld the constitutionality of the ban on using corporate funds for political contributions, even as applied to contributions by a non-profit advocacy corporation.

The government, however, can apply disclosure and disclaimer and non-coordination requirements to those expenditures.

A number of states allow their citizens to enact laws directly through initiatives placed on the election ballot.[370] To get an initiative proposal on the ballot, the proponents must gather a specified number of signatures of registered voters,[371] and they often pay persons to circulate the petitions and obtain signatures. State efforts to prohibit or restrict the use of paid circulators have been held to violate the First Amendment.[372]

3. Governmental Broadcast, Cable, and Internet Regulation

> Governmental regulation of broadcasting in the United States has traditionally taken place in connection with the allocation of radio and television frequencies by the Federal Communications Commission. The Supreme Court has held that such regulation can proceed on [the assumption] of ["]public ownership of the airwaves,["] and that the Federal Communications Commission can require that broadcasters operate "in the public interest." This being so, the Court has upheld against First Amendment challenge the Federal Communication Commission's now-repealed "fairness doctrine," which required that broadcasters provide for a balanced presentation of viewpoints, allocate a reasonable percentage of broadcast time for the discussion of public issues, and in certain circumstances allow other persons to have access to broadcasting facilities in order to respond to positions taken by the broadcasters.[373] The Court has also held that Congress

370. *See State-by-State List of Initiative and Referendum Provisions*, INITIATIVE & REFERENDUM INST., http://www.iandrinstitute.org/statewide_i%26r.htm (last visited Mar. 30, 2013).

371. *See id.*

372. *See* Meyer v. Grant, 486 U.S. 414, 415-16 (1988) (invalidating a Colorado law making it a felony to compensate petition circulators); Buckley v. Am. Law Found., 525 U.S. 182, 186-87 (1999) (invalidating requirements that ballot initiative circulators be registered voters, "that they wear an identification badge bearing the circulator's name," and that initiative proponents "report the names and addresses of all paid circulators and the amount paid to each circulator").

373. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 391-96 (1969). "The government's imposition of such a requirement on newspapers would be unconstitutional because of the chilling effect it could have on the newspapers' discussion of public issues." Sedler, *supra* note 34, at 308 n.639 (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1969)). While the imposition of this requirement could have the same chilling effect on the discussion of public issues by broadcasters, the Court has found that this possible chilling effect was justified because of the "public interest" considerations that followed

> may constitutionally provide that candidates for federal office have a legally enforceable right to purchase a reasonable amount of broadcast time.[374] Finally, the Federal Communications Commission may impose certain limited restrictions on programming that might be [objectionable] to children during the time of the day when children are likely to be viewing or listening.[375] Nonetheless, the First Amendment does apply to governmental regulation of broadcasting, and certain broadcasting regulations may be found to violate the First Amendment, such as a complete ban on editorializing by public broadcasting stations that receive grants from the federal government.[376]

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from the allocation of scarce radio and television frequencies to the broadcasters. *See Red Lion*, 395 U.S. at 400-01. In repealing the "fairness doctrine" in 1987, the Federal Communications Commission took the position that there had been a marked increase in the availability of information services to the public since *Red Lion*—most particularly, the advent of cable television—and that enforcement of the "fairness doctrine" was no longer in the public interest. *See* Sedler, *supra* note 34, at 309 n.639 (citing Gen. Fairness Obligations of Broad. Licensees, 102 F.C.C.2d 142, 221, 246-47 (1985); Syracuse Peace Council, 2 FCC Rcd. 5043, 5056-57 (1987)).

374. *Compare* CBS, Inc. v. FCC, 453 U.S. 367, 371-97 (1981), *with* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 97-132 (1973). There,

> the television network had refused to accept any public issue advertising. Parties seeking to purchase such advertising challenged the ban, and the Supreme Court held that there was no First Amendment requirement that the network accept such advertising." While the television network was not a state actor for constitutional purposes, the . . . [contention was] that the First Amendment imposed [the] obligation on the Federal Communications Commission to make the airwaves open for such advertising. The contrary contention was that for the Federal Communications Commission to make the networks accept such advertising would itself violate the networks' First Amendment rights.

Sedler, *supra* note 34, at 309 n.640. While the Court's decision did not rest on the latter ground, it was a consideration in the Court's determination "that the First Amendment did not impose the obligation on the Federal Communications Commission to require broadcasters to accept public issue advertising." Sedler, *supra* note 34, at 309 n.640 (citing *Democratic Nat'l Comm.*, 412 U.S. at 121-22).

375. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 748-51 (1978) (broadcaster's use of "seven dirty words"). In *Federal Communications Commission v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2315-20 (2012), the Court dealt with a ban on "fleeting expletives and momentary nudity." Without deciding whether the ban violated the First Amendment rights of the broadcasters, the Court held that the Commission failed to give the broadcasters fair notice that the "fleeting expletives and momentary nudity could be found" to be "actionably indecent," so that the Commission's standards as applied to those broadcasts were unconstitutionally vague, and its order was set aside. *Id.* at 2319-20.

376. Sedler, *supra* note 34, at 309-10. *Compare* FCC v. League of Women Voters, 468 U.S. 364, 366-73 (1984) *with* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666,

"The advent of cable television and its regulation by the federal government and local municipalities has given rise to a number of First Amendment questions that cannot be fitted neatly into the doctrine that the Court has developed to deal with broadcast regulation."[377] With conventional cablecasting, an operator obtains an effective monopoly by placing cable wires under or on municipally owned streets and utility poles,[378] and then "municipalities generally enter into a franchise agreement with a particular cable operator to serve the city[.] . . . These franchise agreements typically require the cable operator to reserve some channels for public, educational and governmental access" ("public access channels" or "pegs").[379]

"Congress was concerned about the monopolistic character of cablecasting in most municipalities" and imposed extensive regulations on the cable industry in the Cable Television and Consumer Protection and Competition Act of 1992,[380] and again in some provisions of the Telecommunications Act of 1996.[381] One of these regulations

> required cable operators to devote a portion of their channels to carrying the programs of local broadcasters.[382] A sharply divided Court upheld the constitutionality of these "must-carry" provisions.[383] [While] [f]ederal law generally prevents cable operators from exercising any editorial control over the content of leased-access or public-access channels[,] [in 1992] . . . Congress permitted cable operators to prohibit the broadcast of material that the cable operator "reasonably believes describes or

669, 676, 682-83 (1998) (holding that a state-owned public television broadcaster sponsoring a public debate could exclude from that debate an independent candidate having little public support).

377. *See* Sedler, *supra* note 34, at 310.

378. *See id.*

379. *Id.*

380. *Id.* (citing Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460).

381. 47 U.S.C.A. §§ 521-573 (West 2012).

382. *See* 47 U.S.C.A. §§ 522(a), 534-35 (West 2012).

383. Sedler, *supra* note 34, at 310 n.644 (citing Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 185, 195, 211-16 (1997) (plurality opinion) (finding it appropriate to defer to Congress where it had "drawn reasonable inferences based upon substantial evidence" and narrowly tailored the law to preserve the benefits of local broadcast television, promote widespread dissemination from multiple sources, and promote fair competition.)) "The dissenting Justices contended that the record in the case did not support the conclusion that cable television posed a significant threat to local broadcast markets or that the law was narrowly tailored to deal with anti-competitive conduct." *Turner*, 520 U.S. at 195. *See id.* at 230-33 (O'Connor, J., dissenting).

> depicts sexual or excretory activities or organs in a patently offensive manner" on leased-access and public-access channels.[384]
>
> The Act further provided that if the cable operator did not prohibit such material from being broadcast on leased access channels, the cable operator was required to provide a separate channel for the material, to scramble or otherwise block its presentation, and to permit viewing only upon written request of the subscriber. Congress also imposed these "segregate and block" requirements for channels primarily dedicated to sexual programming and required cable operators to honor a subscriber's request to block any undesired programs. The Court, again sharply divided, upheld against First Amendment challenge the provision giving cable operators the authority to prohibit the broadcast of [patently] offensive material, but held unconstitutional [all] segregate and block requirements.[385]

There is much concern in the United States today about protecting minors from harmful material on the Internet. In response to this concern, Congress enacted a law that prohibited the "transmission of obscene or indecent messages to any recipient under 18 years of age" and the "knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age."[386] The Court, this time with little dissent, invalidated both provisions as being too vague and overbroad to withstand First Amendment scrutiny.[387]

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384. 47 U.S.C.A. § 532(h) (West 2012).

385. Sedler, *supra* note 34, at 310 n.647 (citing Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 732-33 (1996)). The Court majority took the position that the "block and segregate" requirements did not "properly accommodate the speech restrictions they impose and the legitimate objective they seek to attain." *Id.* at 755.

386. Reno v. ACLU, 521 U.S. 844, 859 (1997) (citing Communications Decency Act of 1996, 47 U.S.C.A. § 223(a)(1)(B)(ii), (d)(1) (West 1996)).

387. *Id.* at 870-79. A major problem with this kind of legislation is that it could suppress the dissemination of sexually-oriented material to adults, as existing technology does not include any effective method for a sender to prevent minors from obtaining access to its internet communications without also denying access to adults. *See id. See also* Ashcroft v. ACLU, 542 U.S. 656, 666-67 (2004) (indicating that efforts to regulate the Internet dissemination of sexually-oriented materials to minors would probably violate the First Amendment, since filtering software could be used to block such material at the receiving end); United States v. Playboy Entm't Grp., 529 U.S. 803, 806-19 (2000) (invalidating "blocking" restrictions on cable channels that were primarily transmitting sexually-oriented programming, emphasizing that less restrictive means, such as the use of a technological solution that was available to parents who chose to

However, the Court has held that when Congress provides assistance to public libraries for internet access, it can impose as a condition a requirement that libraries install filtering software that blocks access to visual depictions that constitute "obscenity or pornography" and visual depictions that are "harmful to minors."[388] The law was held not to violate the First Amendment because it permitted the libraries to disable the filter at the request of an adult patron and to disable it for use by minors for "bona fide research or other lawful purposes."[389]

4. Government Employment and Contracting

The Supreme Court has held that the First Amendment applies to actions taken by the government in its capacity as employer and contractor.[390] The general principle in determining the First Amendment rights of government employees and contractors is that there must be a balance between the interest of the employee or contractor as a citizen in commenting upon matters of public concern and the interest of the government in promoting the efficiency of the public services it performs through its employees and contractors.[391] Applying this principle, the Court has held that the government violated the First Amendment rights of a teacher by terminating a teacher for sending a letter to a newspaper that was critical of the way that the school board had handled past proposals to raise new revenues for the schools;[392] by terminating a lower level employee who had expressed to another employee, in private conversation, the hope that the President would be assassinated;[393] and by terminating or preventing the renewal of a contractor's trash hauling contract with a county because of his criticism of the county board of commissioners.[394] On the other hand, when an employee took what the governmental employer considered to be inappropriate action to protest a personal office grievance, her discharge for doing so did not violate the employee's First Amendment rights.[395] The First Amendment also does

implement it, were available to protect minors from exposure to sexually-oriented materials).

388. United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 198-99 (2003).

389. *Id.*

390. *Id.* at 208-09.

391. Connick v. Myers, 461 U.S. 138, 140 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

392. *Pickering*, 391 U.S. at 574-75.

393. Rankin v. McPherson, 483 U.S. 378, 378, 379-81 (1987).

394. Bd. of Cnty. Comm'ns, Wabaunsee Cnty., Kan. v. Umbehr, 518 U.S. 668, 670-73 (1996).

395. Connick v. Myers, 461 U.S. 138, 140-41, 154 (1983). In this case, an assistant prosecutor objected to her transfer to another court and circulated a memorandum to

not protect statements made by public employees in the course of their official duties.[396]

The government does not violate the First Amendment rights of civil service employees by prohibiting them from engaging in partisan political activity.[397] The Court has held that the government could conclude that partisan political activity by civil service employees could interfere with the impartial and efficient operation of the civil service system.[398] The Court also emphasized that the ban on partisan political activity did not interfere with the ability of civil service employees to express political views outside of the context of a partisan political campaign.[399] The other side of the coin, so to speak, is that, even in the absence of a civil service, state and local governments cannot deny governmental employment on the basis of political party membership. This being so, the Court has held unconstitutional traditional "political patronage" practices under which the political party that wins an election would discharge all employees belonging to the opposite political party.[400] The result is that, under the First Amendment, non-

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other prosecutors raising questions about employee morale and the prosecutor's management of the office. *Id.* at 140-41. Since her speech concerned only a matter of private concern rather than a matter of public interest, the First Amendment did not protect her activity. *Id.* at 154. The government employer must perform a reasonable investigation to determine an employee's actual speech and must in good faith believe the facts on which it purports to act before it can discharge an employee for unprotected speech. Waters v. Churchill, 511 U.S. 661, 677 (1994). The requirement that the employee's speech must be a matter of public concern applied to a claim that the government violated the employee's rights under the petition clause of the First Amendment by retaliating against the employee for winning reinstatement in a union grievance proceeding. Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2491 (2011).

396. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006). In this case, a supervising prosecuting attorney wrote a disposition memorandum in which he recommended dismissal of a case on the ground that the affidavit in support of a search warrant contained false representations. *Id.* at 420. He contended that as a result of the memorandum, he was transferred to a less desirable work location and denied a promotion in retaliation. *Id.* at 415. The Court held that since he wrote the memorandum pursuant to his official duties as a supervising prosecuting attorney, he was not speaking as a citizen and so could not claim the protections of the First Amendment. *Id.* at 421. See Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and Section 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561 (2008), for a discussion of this case in relation to the precedents in this area of First Amendment activity.

397. *See* U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 578 (1973).

398. *Id.* at 565.

399. *Id.* at 575; Broadrick v. Oklahoma, 413 U.S. 601, 602 (1973). In *United States v. National Treasury Employees Union*, 513 U.S. 454, 457 (1995), the Court held that a broad ban on civil service employees below grade GS-16 receiving honoraria for making an appearance or speech or writing an article violated their First Amendment rights.

400 Elrod v. Burns, 427 U.S. 347, 350 (1976).

policymaking and non-confidential state and local government employees cannot be dismissed solely on the ground that they were not affiliated with or sponsored by the political party in power.[401] Hiring, promotion, transfer, and recall decisions in governmental employment cannot be made on this basis.[402] For the same reason, a city could not constitutionally deny governmental contracts to independent contractors who had supported the incumbent mayor's opponent in the last election.[403]

5. Expression in Special Environments

While the First Amendment clearly applies to expression that takes place in special environments, such as public schools, prisons, and military areas, the Court has recognized that the government has a legitimate interest in regulating expression in these environments precisely because of the special function that they are established to perform. Thus, the Court has been disposed to uphold restrictions on expression in the school environment that can be shown to be related to valid educational objectives, restrictions in the prison environment that can be shown to be related to prison discipline, and restrictions in the military environment that can be shown to be related to efficient military operation.

In the public school environment, the Court has held that a school may discipline a student for delivering a school assembly speech that contained sexual innuendos, emphasizing the broad authority of school officials to prohibit "inappropriate" student speech at a school assembly.[404] In a similar vein, the Court has held that a school may discipline a student for displaying a banner at a school-sponsored event that was "reasonably viewed as promoting illegal drug use."[405]

> The Court has also held that where the publication of a school newspaper was part of a regular course for which academic credit was given, the faculty advisor could exercise editorial control over the content of the student work that would be published in the newspaper.[406] However, the Court held that a public school could not, consistent with the First Amendment,

401. *Id.*
402. Rutan v. Republican Party of Ill., 497 U.S. 62, 71-72 (1990).
403. O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712, 722-23 (1996).
404. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).
405. Morse v. Frederick, 551 U.S. 393, 403, 404-418 (2007).
406. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988).

prohibit a student from wearing a black armband to school to protest the Vietnam War.[407]

In the prison context, the Court has held that the First Amendment permits the prison authorities to exercise extensive control over prisoner correspondence and over the publications that the prisoners may receive from the outside.[408] The test is whether the regulation is "reasonably related to legitimate penological interests," [and,] [a]pplying this test, the Court has held that [the] prison authorities may exclude incoming publications found to be "detrimental to security, good order, or discipline of the institution," [or that] "might facilitate criminal activity."[409] [The] prison authorities have less discretion to regulate outgoing correspondence, which does not pose the same kind of danger to prison security[,] [and] the Court has held unconstitutional prison regulations that prohibited outgoing correspondence that "unduly complained" of prison conditions or "expressed inflammatory . . . views or beliefs."[410] However, precisely because prisoners may communicate with the media by mail, they cannot claim a First Amendment right to face-to-face interviews with the media in prison.[411]

The First Amendment rights of persons in military service are subject to the exigencies of efficient military operation, and can be severely restricted while the persons are on base or in military uniform. The Court, for example, has upheld a military regulation prohibiting a serviceperson while on base, in uniform, or in a foreign country[] from soliciting signatures on a petition or distributing material on base without authorization from the

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407. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969). *See also* Bd. of Educ. v. Pico, 457 U.S. 853, 855 (1982) (indicating that the First Amendment may impose some limitations on the power of school authorities to remove "objectionable" books from a public school library).

408. *See* Turner v. Safley, 482 U.S. 78, 89 (1987).

409. Thornburgh v. Abbott, 490 U.S. 401, 404-05 (1989). "The Court has also upheld a regulation that, in effect, prohibited inmates from writing to non-relative inmates at other institutions." Sedler, *supra* note 34, at 312 n.653 (citing *Turner*, 482 U.S. 78 (1987)). In addition, the Court has upheld "a ban on the receipt of hardcover books (which could be used to smuggle in contraband) unless mailed directly from the publisher, a bookstore or a book club." *Id.* (citing Bell v. Wolfish, 441 U.S. 520 (1979)). Further, the Court has held that an inmate does not have a "First Amendment right to provide legal assistance to fellow inmates." *Id.* (citing Shaw v. Murphy, 532 U.S. 223 (2001)).

410. Procunier v. Martinez, 416 U.S. 396, 399 (1974).

411. Pell v. Procunier, 417 U.S. 817, 827-28 (1974).

post commander. Permission could be denied if the commander determined that the solicitation or distribution would result in a "clear danger to the loyalty, discipline or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission."[412] The Court has also held that the military may constitutionally punish as "conduct unbecoming [of] an officer" an officer's urging of black soldiers to refuse orders to serve in Vietnam.[413]

6. Freedom of Association

The freedom of association protected by the First Amendment focuses on the right of people to belong to groups and organizations and to engage in concerted organizational activity. As a general proposition, the government cannot impose sanctions on people because they belong to organizations, including organizations advocating illegal conduct.[414] Likewise, people generally cannot be denied or discriminated against with respect to governmental employment because of their membership in particular organizations.[415]

Because the First Amendment protects organizational membership, the government cannot, in the exercise of its regulatory power over

412. Brown v. Glines, 444 U.S. 348, 350 (1980).

413. Sedler, *supra* note 34, at 312-13 (citing Parker v. Levy, 417 U.S. 733, 738 (1974)).

414. In *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 233 (1957), the Court held that a state could not refuse to license a person as a lawyer because of the person's past membership in the Communist Party. And in *United States v. Robel*, 389 U.S. 258, 259 (1967), the Court held that the federal government could not deny employment in defense facilities to members of designated "communist action" groups, at least in the absence of a showing that the individual was a member of a "subversive" organization with knowledge of the organization's illegal purpose and a specific intent to further that illegal purpose. However, in the more recent case of *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2713 (2010), the Court held that a federal law making it a crime to "knowingly provide material support or resources to a 'foreign terrorist organization'" prohibited a group from providing educational programs designed to persuade such an organization to pursue its aims through peaceful means, and that such prohibition did not violate the group's freedom of association rights.

415. *See supra* notes 400-403 and accompanying text. Even in the absence of a civil service, state and local governments cannot deny governmental employment on the basis of political party membership, nor can they make hiring, promotion, transfer, and recall decision on this basis. Sedler, *supra* note 34, at 323 (citing Rutan v. Republican Party of Ill., 497 U.S. 62, 62 (1990)). The result has been to put an end to traditional "political patronage" practices and to ensure that "nonpolicymaking and nonconfidential state and local government employees cannot be dismissed solely on the ground that they were not affiliated with or sponsored by the political party in power." *Id.* (citing Elrod v. Burns, 427 U.S. 347 (1976); Branti v. Finkel, 445 U.S. 507 (1980)).

organizations, compel an organization to turn over its membership lists to the government.[416] Likewise, since organizations have a protected First Amendment right to engage in concerted organizational activity, an organization that sponsors a consumer boycott for the purpose of achieving political change cannot be held liable in damages for the economic losses suffered by businesses against which the boycott is directed.[417] The government cannot, in the guise of regulating the practice of law, prohibit an organization from soliciting parties to bring litigation to advance organizational objectives[418] or prohibit an organization from arranging for lawyers to represent the organization's members in private litigation.[419]

The First Amendment guarantee of freedom of association also restricts governmental efforts to regulate political party primary elections. Each party must be able to determine who will participate in the party's primary election, so if a party chooses to open the party primary to non-party members, the state cannot prevent it from doing so by requiring that only voters who have declared party membership can vote in the party primary.[420]

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416. NAACP v. Ala. *ex rel* Patterson, 357 U.S. 449, 451 (1958).

417. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 888 (1982). "In [*Claiborne*], a civil rights organization had organized a consumer boycott against local businesses for the purpose of forcing them to put pressure on the local governmental body to accede to the organization's demands." Selder, *supra* note 34, at 323 n.720.

418. NAACP v. Button, 371 U.S. 415, 418 (1963).

419. *See, e.g.*, United Transp. Union v. Mich. State Bar, 401 U.S. 576, 577 (1971).

420. Tashjian v. Republican Party of Conn., 479 U.S. 208, 210 (1986). Nor can the state prohibit a political party from endorsing candidates in a party primary. Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 216, 222-29 (1989). The state also violated a political party's First Amendment rights by requiring that the candidates of all parties run in a "blanket primary" in which voters were permitted to vote for any candidate despite the candidate's party affiliation, and the candidate of each party who received the highest number of votes was the party's nominee at the general election. Cal. Democratic Party v. Jones, 530 U.S. 567, 572-82 (2000). However, it is constitutional for the state to adopt a "blanket primary" system under which each candidate on the ballot must state a party preference or independent status, and the two candidates with the highest and second-highest vote totals advance to the general election regardless of their party preferences. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 452-53 (2008). This system, said the Court, does not choose a party's nominees, but simply enables the two highest vote-getters to advance to the general election. *Id.* at 453. The Court also found that there was "no basis to presume that a well-informed electorate [would] interpret a candidate's party-preference designation to mean that the candidate [was] the party's chosen nominee . . . or that the party associates with or approves of the candidate." *Id.* at 454. A number of other cases have upheld state laws protecting the right of political parties to control the nomination of the party's candidates over claims that these laws violate the associational rights of voters. These include state laws that prohibit "fusion" candidacies by which a candidate appears on the ballot as a candidate

> The First Amendment's guarantee of freedom of association cannot be asserted, however, by large private membership organizations and "private business clubs" to avoid the application of state anti-discrimination laws to their discriminatory membership practices that deny membership to racial minorities and women. The Court has held that because these organizations are large and are relatively unselective in their membership, a requirement that they admit racial minorities and women to membership will not impede the organizations' ability to carry out their organizational activity or "unduly burden" the associational interests of their members.[421] . . . [T]he only . . . limitation on the government's power to prohibit [discrimination] is that it cannot act in such a way that would destroy the structural integrity of the particular organization and prevent it from carrying out the purpose for which it was formed, such as by prohibiting an avowedly religious or ethnic organization from limiting its membership to persons of that religious or ethnic group.[422]

IV. A CONCLUDING NOTE

In this writing, we have revisited the "Law of the First Amendment."[423] The "Law of the First Amendment" consists of the chilling effect concept and the principles, doctrines, and precedents in different areas of First Amendment activity that have emerged from the collectivity of the Supreme Court's decisions in First Amendment cases over a long period of time. In the context of actual litigation, the "Law of the First Amendment" often controls the results, or at least sets the

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for more than one party, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 353 (1997); state laws that enable a political party to invite only its own registered members and voters registered as independents to vote in its primary, Clingman v. Beaver, 544 U.S. 581, 584 (2005); state laws that prohibit "write-in" voting in primary and general elections, Burdick v. Takushi, 504 U.S. 428, 430 (1992); and a state law authorizing a political party to nominate judicial candidates by party convention instead of by a primary election, N.Y. State Bd. of Elections v. Torres, 552 U.S. 196, 198 (2008).

421. N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 1-3 (1988); Roberts v. U.S. Jaycees, 468 U.S. 609, 626 (1984).

422. Sedler, *supra* note 34, at 322-24. In *Boy Scouts of America v. Dale*, 530 U.S. 640, 643 (2000), the Court held that the state could not apply its anti-discrimination law to require the Boy Scouts of America, a "[non]-profit organization engaged in instilling its system of values in young people," which included opposition to homosexuality, to accept homosexuals as members.

423. Sedler, *supra* note 1.

parameters for the resolution of the First Amendment question.[424] Our review of the Supreme Court's decisions in the twenty-plus years since the original article was written has demonstrated that nothing has changed in the intervening years and that the structure of the "Law of the First Amendment" is exactly the same as it was at the time of the original article.[425]

It also cannot be doubted that the "Law of the First Amendment" has resulted in a very high degree of constitutional protection for freedom of expression in this Nation. As I have said, "the constitutional protection afforded to freedom of expression in the United States is seemingly unparalleled in other constitutional systems, . . . and in the United States, as a constitutional matter, the value of freedom of expression generally prevails over other democratic values."[426]

In the view of a number of commentators, we give "too much" constitutional protection to freedom of speech in the United States, particularly when it comes to protecting "bad ideas," such as hate speech,[427] or when it enables corporations and labor unions to make unrestricted expenditures of corporate or union funds for political purposes.[428] At the same time, the expansive protection to freedom of speech under the First Amendment ensures that there will be robust debate and the widest dissemination of ideas. A few years back, I asked participants in a Humanities Colloquium to explore the difference between the constitutional protection of freedom of speech in the United States and the rest of the world in light of humanistic values.[429] Specifically, I asked them to consider "whether humanistic values could be relied on to justify the strong constitutional protection that we give to freedom of speech."[430] A consensus seemed to emerge, and the consensus was that in the United States, the strong constitutional protection for freedom of speech was itself an *American* humanistic value, a value that is a product of our own history and experience, and a value that is reflected in American culture.[431] It is a part of our culture that people are "free to speak their mind" and need not fear that they will

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424. *See supra* Part III.A.

425. *See supra* Part III.

426. *See* Sedler, *supra* note 10.

427. *See* Rosenfeld, *supra* note 73.

428. *See, e.g.*, Steven L. Winter, *Citizens Disunited*, 27 GA. ST. U. L. REV. 1133 (2011). This article is one of ten articles by law professors commenting on the *Citizens United* decision in *Symposium: An Intersection of Laws:* Citizens United v. FEC, 27 GA. ST. U. L. REV. 887 (2011).

429. *See supra* note 10.

430. *Id.* at 378.

431. *Id.*

be sanctioned for saying something that is offensive or unpopular. "Thus, in the United States, a concern for humanistic values would justify protecting 'bad ideas' and 'harmful speech.'"[432] In the United States, the government is not permitted to make decisions about what ideas may be expressed and what ideas may not be expressed. The constitutional guarantee of freedom of expression under the First Amendment then means freedom of expression in the fullest sense. For better or worse—and I believe it is for better—this is the American way.

432. *See* Sedler, *supra* note 10.