CHAPTER 14

FREEDOM OF EXPRESSION

ChapterScope

The First Amendment provides, in part, that "Congress shall make no law … abridging the freedom of speech, or of the press. … " These rights (plus the accompanying "freedom of association") are often grouped together as "freedom of expression." Here are the key concepts relating to freedom of expression:

- **Content-based vs. content-neutral:** Courts distinguish between ***"content-based"*** and ***"content-neutral"*** regulations on expression.
  - **Content-based:** If the government action is ***"content-based,"*** the action will be generally subjected to ***strict scrutiny***, and the action will usually be struck down.
  - **Content-neutral:** On the other hand, if the government action is ***"content-neutral,"*** the government's action is subjected to a much easier-to-satisfy test, and will usually be upheld.
  - **Classifying:** A governmental action that burdens expression is "content-based" if the government is ***aiming*** at the ***"communicative impact"*** of the expression. By contrast, if the government is aiming at something other than the communicative impact, the action is "content-neutral," even if it has the ***effect*** of burdening expression.
- **Analysis of content-based government action:** Where a government action impairing expression is "content-based," here's how courts analyze it:
  - **Unprotected category:** If the speech falls into certain pre-defined ***unprotected*** categories, then the government can more or less completely ban the expression.
    - **Listing:** The main "unprotected" categories are: (1) obscenity; (2) fraudulent misrepresentation; (3) defamation; (4) advocacy of imminent lawless behavior; and (5) "fighting words."
  - **Protected category:** All expression not falling into one of these five categories is ***protected***. If expression falls within the protected category, then any government ban or restriction on it based on its content is ***presumed to be unconstitutional***. The Court subjects any such regulation to ***strict scrutiny*** — the regulation will be sustained *only* if it (1) serves a ***compelling governmental objective***; and (2) is ***"necessary,"*** i.e., drawn as ***narrowly as possible*** to achieve that objective. Very few content-based restrictions on protected-category expression can survive that scrutiny.
- **Analysis of content-neutral regulations:** If the government restriction is ***content-neutral***, here is how the Court analyzes it:
  - **Three-part test:** The government must satisfy a ***three-part test*** before the regulation will be sustained, if the regulation substantially impairs expression:
    - **Significant governmental interest:** First, the regulation must serve a ***significant governmental interest***;

- **Narrowly tailored:** Second, the regulation must be ***narrowly tailored*** to serve that governmental interest; and
- **Alternative channels:** Finally, the state must ***"leave open alternative channels"*** for communicating the information.

- **The public forum:** Speech that takes place in a ***"public forum"*** is often harder for government to regulate.
  - **Content-based:** If a regulation is ***content-based***, it makes no difference whether the expression is in a public forum: strict scrutiny will be given in any event.
  - **Neutral "time, place and manner":** But if a regulation is ***content-neutral,*** then the fact that the speech does or does not take place in a public forum makes a difference. Usually, we're talking about ***"time, place and manner"*** restrictions here.
    - **Non-public forum:** When expression takes place in a ***non-public forum***, the regulation merely has to be ***rationally related*** to some ***legitimate*** governmental objective, as long as equally effective alternative channels are available.
    - **Public forum:** But where the expression takes place in a ***public forum***, the regulation has to be ***narrowly drawn*** to achieve a ***significant*** governmental interest (roughly ***intermediate-level*** review). It is still necessary (but not sufficient) that the government leaves alternative channels available.
  - **What are public forums:** "True" public forums are: (1) streets; (2) sidewalks; and (3) parks. Also, places in which a public government ***meeting*** takes place are probably true public forums.
    - **Designated-public:** There are also ***"designated-public"*** forums. These are locations where the government has decided to open the place to particular open-expression purposes. The rules are essentially those for true public forums, except that government may at any time decide to close the forum.
    - **Non-public forums:** Other public places are "non-public forums." Here, government regulation merely has to be rationally related to some legitimate governmental objective, as long as alternative channels are left open. (*Examples:* Airport terminals, jails, military bases, courthouses, schools used after hours, and governmental office buildings.)
- **Defamation:** The First Amendment places limits on the extent to which a plaintiff may recover tort damages for ***defamation***.
  - **Plaintiff as public official or public figure:** Where P is a ***public official*** or ***public figure***, he may only win a defamation suit against D for a statement relating to P's official conduct if P can prove that D's statement was made with either "***knowledge*** that it was false" or ***"reckless disregard"*** of whether it was true or false.
- **Obscenity:** Expression that is ***"obscene"*** is simply ***unprotected*** by the First Amendment. (But the mere ***private possession*** of obscene material by an adult may ***not*** be made criminal.)
- **Commercial speech:** Speech that is ***"commercial"*** gets First Amendment protection. But this protection is more limited than protection given to non-commercial speech:

- ? **Truthful speech:** Content-based restrictions on truthful commercial speech get only mid-level review: the government must be: (1) ***directly advancing*** (2) a ***substantial*** governmental interest (3) in a way that is ***reasonably tailored*** to achieve the government's objective. (This compares with strict scrutiny of content-based restrictions on non-commercial speech.)
- ? **False, deceptive or illegal:** False or deceptive commercial speech, or speech proposing an ***illegal transaction***, may be forbidden by the government.

? **Freedom of association:** First Amendment case law recognizes the concept of ***"freedom of association."*** If an individual has a First Amendment right to engage in a particular expressive activity, then a ***group*** has a "freedom of association" right to engage in that same activity as a group.

I. GENERAL THEMES

A. Text of First Amendment: The First Amendment provides that "Congress shall make no law … abridging the ***freedom of speech***, or of ***the press***; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

1. Related rights: There are thus several distinct rights which may be grouped under the category "freedom of expression": freedom of ***speech***, of the ***press***, of ***assembly***, and of ***petition***. Additionally, there is a well-recognized "freedom of association" which, although it is not specifically mentioned, is derived from individuals' rights of speech and assembly.

B. Two broad classes: When government "abridges" freedom of speech, its reasons for doing so can be placed into two broad classes. The first is that the government is restricting the speech ***because of its content***, that is, because of the ***ideas or information contained in it***, or because of its general subject matter. The second reason for abridgment has nothing to do with the content of the speech; rather, the government seeks to avoid ***some evil unconnected with the speech's content***, but the government's regulation has the ***incidental by-product*** of interfering with particular communications.

1. Two tracks: The Supreme Court has implicitly recognized that the dangers posed by governmental action taken for the first reason are different (and generally more severe) than those posed by regulation carried out for the second reason. Therefore, the Supreme Court's rules for determining whether the government has violated the First Amendment differ depending on whether the governmental control falls within the first class or the second.

a. Track one (communicative impact): Where the government's conduct falls within the first class, which Tribe summarizes as governmental actions "aimed at ***communicative impact***," he has labeled the appropriate analysis ***"track one"*** analysis. (Tribe, p. 791).

b. Track two (noncommunicative impact): Where the government's conduct falls within the second class (which Tribe describes as government actions "aimed at ***noncommunicative impact*** but nonetheless having ***adverse effects on communicative opportunity"***), he calls the relevant analysis ***"track two."*** Tribe, p. 792.

c. We adopt terms: For ease of labeling, we will follow the same "track one" and "track two" terminology.

2. Some examples: Following are some examples of governmental actions punishing or restricting speech, and the track into which each falls:

Example 1 (track one): The state forbids pharmacists to advertise the prices of prescription drugs, because it is afraid that the public will buy drugs at the lowest available price and will therefore receive low-quality goods and service. This case falls within "track ***one***," since the speech is being regulated because of the government's fears about consumers' reaction to the speech's ***content***. See *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976) (invalidating the restriction, as discussed *infra*, p. 565).

Example 2 (track one): The state forbids "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person [by] offensive conduct." D is convicted under the statute for wearing a jacket bearing the words "Fuck The Draft" in a corridor of the county courthouse. The case should be analyzed under "track ***one***," since the asserted offensiveness caused by D results ***solely from the content*** of his communication. (To see this, observe that bystanders who ***could not read English*** would ***not*** have been offended.) See *Cohen v. California*, 403 U.S. 15 (1971) (reversing D's conviction, as discussed *infra*, p. 519).

Example 3 (track one): Under Maryland tort law, if a speaker (D) intentionally makes outrageous statements attacking another person (P), P may be able to recover against D for intentional infliction of emotional distress (IIED). In a federal-court diversity case based on Maryland tort law, a jury grants P (the father of a Marine killed in Iraq) a civil judgment for IIED against the Ds, who are members of a church that thinks God punishes the U.S. military for tolerating homosexuality. The IIED consists of the Ds having carried, during and nearby the Marine's funeral, picket signs attributing the Marine's death to God's desire to punish the military for not rooting out homosexuality.

Maryland's constitutional authority to allow such a recovery under its substantive tort law, notwithstanding the Ds' First Amendment right to speak out on matters of public interest, is to be analyzed under "track ***one***." That's because the "outrageousness" of the Ds' messages on the picket signs results solely from the content of those messages. (If the Ds' statements on the picket signs addressed to P constituted pleasant rather than nasty messages, the statements wouldn't be "outrageous" — so giving the jury power to impose liability for IIED is a content-based rather than content-neutral regulation.) See *Snyder v. Phelps*, 131 S.Ct. 1207 (2011), *infra*, p. 520 (reversing the verdict against the picketers as a violation of their First Amendmen right not to have their statements on public affairs be regulated on content-based grounds).

Example 4 (track two): A city prohibits the use of sound trucks which emit "loud and raucous noises" while operating on the streets. The ordinance should be analyzed under "track ***two***," since the harm which the government seeks to prevent is ***independent of the content*** of the messages being amplified — even a listener who ***could not understand English*** would be a victim of the harm. See *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding such a ban, as discussed *infra*, p. 512).

Example 5 (track two): A city forbids distribution of leaflets, because it wishes to prevent littering. The case should be analyzed under "track ***two***," since the harm sought to be avoided exists regardless of what information is contained on the leaflets. (In fact, even ***blank*** leaflets could end up being litter.) See *Schneider v. State*, 308 U.S. 147 (1939), striking the ban (on the grounds that the First Amendment requires a less restrictive alternative, such as only punishing actual littering; the case is discussed *infra*, p. 506).

C. Analysis of "track one" cases ("content-based" regulation): If a case falls within "track ***one***" — that is, the government is trying to restrict expression based on its ***communicative impact*** — courts generally ***"strictly scrutinize"*** the regulation. Here's a more specific catalog of the rules that apply to such "content based" restrictions:

1. **Unprotected vs. protected categories:** There are certain categories of expression (e.g., defamation) that the Supreme Court has long identified as being essentially ***"unprotected"*** for First Amendment purposes. (See p. 486 for a list of these categories.) But most expression does ***not*** fall within these special unprotected categories. Since the rules for when and how government may restrict expression on account of its content vary based on this distinction, it's important to keep track of the two types of categories; therefore, we'll use the phrases ***"unprotected categories"*** and ***"protected category"*** to refer to the two types.

2. **Speech in the main "protected category":** For speech in the broad ***"protected category,"*** such as everyday speech on ***core political issues,*** it is simply ***not open to the government to argue that the speech is harmful*** because of its content, and that it should be suppressed or punished.

   a. **Strict scrutiny required:** So when government tries to regulate such protected-category speech on account of the speech's contents, the Supreme Court will ***strictly scrutinize*** the regulation: the government bears the burden of showing "that its regulation is necessary to ***serve a compelling state interest*** and that it is ***narrowly drawn*** to achieve that end." *Widmar v. Vincent*, 454 U.S. 263 (1981).

   b. **Comparable to strict scrutiny elsewhere:** The techniques of strict scrutiny in this area are therefore comparable to those used in the due process (*supra*, p. 173) and equal protection (*supra*, p. 263) contexts.

   c. **Marketplace of ideas:** The rule requiring strict scrutiny of content-based restrictions on speech falling within the ordinary "protected category" reflects the view, implicit in the First Amendment, that ***it is not the government's place to suppress ideas because they are "wrong."*** Rather, as Justice Holmes put it in his dissent in *Abrams v. U.S.*, 250 U.S. 616 (1919) (discussed more extensively *infra*, p. 491), there is to be ***"free trade in ideas,"*** and truth will become accepted through "the ***competition of the market."***

   Example: Consider Example 1, *supra*, p. 478, in which the state prohibited pharmacists from advertising their prices for prescription drugs. The state contended that barring this information would be in the public interest, since a contrary policy would lead people to be interested only in price, and therefore to receive low-quality goods or services.

   The Court conceded the plausibility of the state's claim. But it held that the weighing of the state's interest in protecting its citizens versus the value of free-flowing

information was ***not the Court's or the Virginia legislature's to make.*** "It is precisely this kind of choice between the dangers of suppressing information, and the dangers of its misuse if it is freely available, ***that the First Amendment makes for us.***" *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976) (discussed more extensively *infra*, p. 565).

d. Consequences if regulation is of "protected category" speech: Here are some of the consequences that flow from the fact that the Court uses strict scrutiny to review content-based restrictions of ***"protected category"*** speech:

i. Effect of more speech: Any time ***more speech*** could eliminate the evil feared by the state, the Court will conclude that the regulation is ***not "necessary"*** to prevent that evil (no matter how serious the evil is). This is simply an application of the general principle, previously noted, that whenever possible, "harmful" speech must be fought by more expression, not by government-imposed silence.

ii. Other speakers' opportunities irrelevant: The government may not claim that the content of the expression has been adequately articulated by ***other speakers***, and that proponents of ***different viewpoints*** on the issue should be given a chance to speak instead.

iii. Other times and places irrelevant: The government may not claim that the speaker can make his point just as well in ***some other place***, at ***some other time***, or in ***some other manner.*** Once the government is seen to be objecting to a message based on its content, ***not even a "trifling" or "minor" interference with expression will be tolerated by the courts***.

e. "Viewpoint based" restrictions, generally: The most obvious type of scenario in which a restriction will be found to be "content-based" (and thus subjected to strict scrutiny) is one in which government has singled out a certain ***"message"*** or ***"viewpoint,"*** and imposes ***restrictions on that message or viewpoint on account of its communicative content.*** We'll refer to such restrictions as being ***"viewpoint based."***

i. Time, place and manner restrictions that are viewpoint based: Government rarely attempts to prohibit specific messages ***entirely***; rather, when government imposes "viewpoint based" restrictions, it typically does so by ***limiting the time, place or manner*** in which the message can be delivered. But even modest time, place and manner restrictions will ***trigger strict scrutiny*** if the restriction is "viewpoint based," i.e., if it applies only to certain messages or viewpoints.[1]

ii. Illustration: A good example of a classic "viewpoint based" time, place and manner restriction came in ***Boos v. Barry***, 485 U.S. 312 (1988). There, a Washington D.C. statute that prohibited the display of certain messages on ***signs near foreign embassies*** was strictly scrutinized (and struck down), even though people

1. As we'll see at greater length *infra*, p. 507, time, place and manner restrictions will be subject instead to the less-rigorous "mid-level" standard of review if the court is satisfied that the restriction is ***truly content-neutral*** rather than content-based. But where a time, place and manner restriction is found to single out particular viewpoints for greater restrictions (i.e., the regulatory scheme is found to be content- or viewpoint-based), strict scrutiny applies even if people who want to express the discriminated-against message are left with many alternative places, times or methods for delivering it.

who wanted to deliver that sort of message were left with lots of alternative venues in which to do so.

(1) Facts of *Boos*: The statute in *Boos* prohibited the display of any ***sign within 500 feet of a foreign embassy*** if that sign tended to bring that foreign government into ***"public odium"*** or ***"public disrepute."*** The statute was obviously "viewpoint based" — that is, only certain messages (those bringing the foreign government into "public odium" or "public disrepute") were prohibited from being delivered near embassies.

(2) Strict scrutiny applied: Since the statute was viewpoint based, the Court subjected it to ***strict scrutiny:*** the statute could survive only if the restriction was found "necessary" to serve a "compelling" state interest. And if a less speech-restrictive statute would have achieved the compelling interest as well or even almost as well, the statute wasn't "necessary" to achieve the goal.

(3) Result: The Court concluded that the D.C. statute ***failed*** this nearly-impossible-to-satisfy standard. Even if the District's interest in preserving the dignity of foreign diplomats was "compelling" — something the Court did not decide — more ***narrowly-drawn measures*** (e.g., a ban on ***harassing foreign officials***) would have furthered that interest adequately.

f. Bans on discussing "either side" of issues are "viewpoint based": Most of the "track one" statutes we've looked at so far have singled out ***particular messages*** for disfavor, based on the content of the message. For instance, Example 1 on p. 478 singled out a particular type of message-content for restrictive treatment — pharmacists' advertisements of the prices of prescription drugs.

But for purposes of applying the principle that "viewpoint based" restrictions must be strictly scrutinized, a statute will *also* be held to be viewpoint based even if the statute singles out a ***whole category*** of speech, ***not just a particular "point of view,"*** for negative treatment based on the speech's message content. Thus a regulation that restricts people from making arguments about a contested issue, regardless of which ***side*** of the issue the speaker supports, will nonetheless be held to be viewpoint based (and therefore content based) — the fact that the restriction is ***"even handed"*** won't be enough to insulate it from strict scrutiny.

i. Restriction on "hate speech" or "offensive" speech (*Matal v. Tam*): So for instance, suppose that government limits messages for the theoretically-admirable purpose of ***protecting whole groups of people*** from being emotionally damaged by ***"hate speech"*** or ***"offensive speech."*** Even though the restriction applies to protect ***all*** groups equally, that fact won't prevent the courts from treating the restriction as "viewpoint based" and thus ***triggering strict scrutiny.***

A 2017 case involving the federal government's unsuccessful attempt to ban ***derogatory terms*** from being used as ***registered trademarks*** furnishes a vivid illustration of this principle. See ***Matal v. Tam***, 137 S.Ct. 1744 (2017).

(1) The statute in *Matal*: *Matal* involved a federal statute that denied federal trademark registration for any trademark "which may ***disparage*** ... ***persons***, living or dead, ***institutions***, ***beliefs***, or national symbols, or bring them into ***contempt, or disrepute***." (This is the so-called "disparagement clause.")

(2) The rock group named "The Slants": The Ps were a rock group called "The Slants," who sought trademark registration for that name. "Slants" is (the Supreme Court found) a "derogatory term for persons of Asian descent." The members of the band were Asian-Americans who believed that by taking this slur as the name of their group they could help "reclaim" the term and "drain its denigrating force." The U.S. Patent and Trademark Office (PTO) denied the registration application on account of the disparagement clause. The Ps claimed that the PTO's denial of registration for this reason violated their free speech rights.

(3) Supreme Court agrees with the Ps: The Supreme Court ***agreed*** with the Ps that the denial infringed their right of free speech. All eight justices who participated[2] agreed that the disparagement clause constituted ***unconstitutional "viewpoint discrimination."***

(4) The plurality: Writing for a four-justice plurality, Justice Alito concluded that even though the disparagement clause ***"evenhandedly*** prohibits disparagement of *all* groups" (e.g., trademarks that "damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue"), the clause was "viewpoint discrimination," because ***"[g]iving offense is a viewpoint."***

(5) The concurrence: Justice Kennedy, writing for himself and three other justices who did not sign the plurality opinion, agreed with the plurality that the disparagement clause ***constituted viewpoint discrimination.*** The disparagement clause "reflects the government's ***disapproval of ... messages it finds offensive,"*** making the clause ***"the essence of viewpoint discrimination."***

ii. Restriction on "scandalous" or "immoral" trademark: Similarly, if government restricts speech on the grounds that it is ***"scandalous"*** or ***"immoral,"*** that restriction, too, will be viewed as a ***viewpoint-based regulation*** that must be strictly scrutinized.

A 2019 case illustrates this principle. That case, ***Iancu v. Brunetti***, 139 S.Ct. 2294 (2019), was similar to *Matal v. Tam, supra*, in that both cases invalidated the federal trademark statute's ban on the registration of a category of trademarks.

(1) The statute in *Iancu*: *Iancu* involved a federal statutory provision denying trademark registration for any trademark that comprises ***"immoral[] or scandalous matter."***

(2) The mark P sought to register, "FUCT": P sought a registration for the trademark "FUCT," which he had been using on his clothing line. The Patent and Trademark Office (PTO) refused the registration, on the grounds that the mark was "extremely offensive" and thus "immoral or scandalous." P asserted that the ban on registration of immoral-or-scandalous trademarks constituted viewpoint-based regulation, which P said triggered – and could not survive – strict scrutiny.

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2. Justice Gorsuch did not participate, because he joined the Court after oral argument.

(3) Court agrees with P: The Court ***agreed with P***, and ***struck down*** the "immoral or scandalous" provision. The majority opinion by Justice Kagan consulted the dictionary definitions of "immoral" and "scandalous," and found that both terms had ***meanings tied to concepts of morality.*** Therefore, Kagan said, the statute "distinguishes between two ***opposed sets of ideas***: those ***aligned with conventional moral standards*** and those ***hostile*** to them."

The statute's use of "immoral and scandalous" therefore constituted, on its face, viewpoint bias, triggering strict scrutiny. And the provision could not survive that scrutiny.

3. **Distinctions based on viewpoint versus ones based on "topic":** Probably the greatest danger of content-based restrictions on speech is that government will ***favor certain messages over others,*** and will thereby ***censor private expression.*** That's why the Supreme Court has long interpreted the First Amendment as requiring strict scrutiny of such restrictions. All of the examples we've considered so far of content-based restrictions are ones in which it's clear that the government was singling out speech ***based on the particular viewpoint or message it contained.*** But there's *another* type of content-based regulation, one that does not single out particular viewpoints. This consists of restrictions based on what can loosely be called the speech's ***"topic"*** or ***"subject matter."*** And this type of regulation, too, will be subjected to ***strict scrutiny***, and probably struck down as a a First Amendment violation.

   a. **Combined rules on modes and topics:** Such "topic-specific" restrictions virtually never occur in the form of a government ban on *all* discussion of a topic. Instead, they usually occur as a more limited restriction, on only the use of a particular ***medium or mode of expression*** to discuss a ***particular topic.***

   b. **Signage regulation, generally:** A common way government might try to regulate a combination of a particular mode of expression and a particular topic — without any apparent intent to favor particular messages — is by a local government's regulation of ***signage***. Most cities tightly regulate how and when ***signs may be posted by private citizens*** — these regulations typically require private signs to be no more than some stated ***maximum size***, be posted for no more than a ***certain duration***, be limited to a certain ***number*** or to certain ***places***, etc.

      i. **Regulation applies similarly to all signs:** If a regulation applies the same way to *all* signs — regardless of the "type" of sign or the sign's "subject matter" — the regulation will be presumed to be content-neutral (i.e., to fall within "track two"), and will ***not*** be subject to strict scrutiny.

      ii. **Regulations apply differently depending on subject matter:** But frequently, even where a city doesn't intend to disfavor any particular message, the city divides signs into ***multiple categories***, and treats certain categories as meriting fewer restrictions than others, perhaps for reasons as innocuous as preventing "visual litter." As we'll see in the discussion of *Reed v. Gilbert* immediately below, such category-based regulation schemes will be ***strictly scrutinized***, and likely to be ***struck down*** as violations of the First Amendment.

   c. **Signage regulation struck down in *Reed v. Gilbert*:** A unanimous 2015 decision, ***Reed v. Town of Gilbert,*** 135 S.Ct. 2218 (2015), shows that as soon as government tries to impose any sort of differential regulation of ***signage*** based on even the broad-

est categorizing of the signs' subject matter, the regulation will be found to be content-based, will be ***strictly scrutinized***, and will in all probability be ***struck down***.

i. Ordinance in *Reed*: *Reed* involved the signage ordinance of the Town of Gilbert, Arizona. The Town required a permit before the posting of any sign that was not classified as "exempt" under the ordinance. Of the various categories of exempt signs, the two most relevant to the case were:

[1] ***"Ideological Signs,"*** a catch-all category of signs used for noncommercial purposes that did not fall into any other, more specific, category. Apparently this category included ***political speech*** that was ***not*** related to any current ***election campaign.*** Ideological Signs were treated quite ***favorably***, in that they could be up to 20 square feet in area, could be placed in all zoning districts, and were not subject to limits on how long they could remain posted.

[2] ***"Temporary Directional Signs,"*** which included, most relevantly, signs giving the particulars of ***events to be held by non-profit groups***, such as the time and place for church services. These signs were treated much less favorably than Ideological Signs — they could be no larger than 6 square feet; could number no more than four on a single property at once; and had to be put up no more than 12 hours before the event and taken down within an hour afterwards.

ii. The conflict: The plaintiffs were the Good News Community Church and its pastor. Because the Church was cash-strapped, it wanted to publicize its services cheaply; posting signs around town was the main way it chose. The Church and the pastor sued the Town, arguing that the ordinance violated their rights of free speech by allowing them to keep their signs up for a far shorter time each week than if the sign had been an "Ideological" one.

iii. Court strikes the statute in opinion by Thomas: All nine Justices agreed with the plaintiffs that the statute ***violated the plaintiffs' First Amendment rights.*** For our present discussion of content-neutrality, what's most significant is that all nine Justices agreed that the ordinance was ***content-based,*** even though it did ***not*** appear to be motivated by a desire to ***suppress any particular message.*** Therefore, all Justices agreed, it had to be ***strictly scrutinized***, and invalidated. We'll focus on Justice Thomas' opinion, in which he announced the result and gave a rationale that five other Justices supported.

(1) Strict scrutiny is triggered: The ordinance was clearly content-based, due to its ***on-its-face classification based on subject matter and purpose.*** Therefore, Thomas said, the Court was required to ***subject it to strict scrutiny.*** Thus the Town bore the burden of demonstrating that the Code's differentiation between Temporary Directional Signs and other types of signs, such as Ideological Signs, "***furthers a compelling interest and is narrowly tailored to that end."***

(2) Easy to strike down: In Thomas' view (which on this point was shared by all Justices), the Town had ***not*** come even remotely close to satisfying this very difficult burden. The Town had cited only two governmental interests in support of the distinction: preserving the town's ***aesthetic appeal***, and ***main-***

taining traffic safety. Even if these were compelling interests (which Thomas assumed but did not decide), the distinctions used in the code were "hopelessly ***underinclusive."***

For instance, the Town "cannot claim that placing strict limits on temporary directional signs is ***necessary to beautify*** the Town while at the same time ***allowing unlimited numbers of other types of signs that create the same problem."***

iv. Concurrence only in result: But three members of the Court disagreed with parts of Thomas' reasoning, and therefore concurred only in the result. Justice Kagan (joined by Ginsburg and Breyer) agreed with Thomas that the Court does, and should continue to, apply strict scrutiny to facially content-based regulations of speech "when there is any ***'realistic possibility that official suppression of ideas is afoot.' "*** And she agreed that, because there is such a possibility of suppression when the regulation on its face differentiates "on the ***basis of viewpoint,"*** or restricts "discussion of an ***entire topic"*** in public debate, strict scrutiny is needed in *those* instances. But, she said, in cases where hidden official suppression of ideas ***is "not realistically possible,"*** the Court should perhaps ***"relax our guard*** so that ***'entirely reasonable' laws*** imperiled by strict scrutiny can ***survive***."

(1) Examples: Kagan agreed that the present statute was not one of those cases where hidden official suppression was "not realistically possible"; that's why she concurred in the result. But Kagan gave several examples of categories of signs that, under the majority's standard, could not be given any preference without being struck down, but that she thought might be constitutionally permissible. For instance, according to the majority's analysis a town could not give preference for signs informing passersby ***"where George Washington slept,"*** unless the town could show a compelling interest in doing so. Kagan predicted that courts across the U.S. would now have to invalidate the "entirely reasonable" sign restrictions of ***thousands of towns.*** "

d. Rule on distinctions between various "topics" or "subjects": So to summarize, cases like *Reed v. Gilbert*, *supra*, mean that the requirement of content-neutrality effectively bars the government not only from (1) showing favoritism as between differing ***points of view*** (or "messages") on a particular subject, but also from (2) placing a ***particular topic or subject-matter*** off-limits (or subjecting it to time-place-and-manner restrictions) while not so limiting discussion of other issues or subjects. The case in the following example demonstrates restriction (2) in a context *not* involving signage.

Example: The New York Public Service Commission, using its power to regulate utilities, orders the utilities not to discuss, as part of their monthly billing materials, the ***desirability of nuclear power.***

Held, this order violates the utilities' right of free speech. "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an ***entire topic***." *Consolidated Edison v. Public Serv. Commission*, 447 U.S. 530 (1980).

4. Content-based regulation of speech falling into an unprotected category: The cases we've just reviewed in Pars. 2 and 3 above — e.g., *Boos*, *Matal,* and *Reed v. Gilbert* — are ones in which the speech that was subjected to content-based restrictions did *not* fall within any category recognized by the Supreme Court as a predefined ***"unprotected category."*** Now, let's look at ***what the unprotected categories are,*** as well as the rules for evaluating content-based restrictions on speech that *does* fall within one of these categories.

a. List of categories: Here is a list of these unprotected categories, as the Supreme Court has recognized them:

[1] ***"Incitement."*** This category includes advocacy of ***imminent lawless behavior*** (p. 495), as well as the utterance of ***"fighting words,"*** i.e., words that are likely to precipitate an immediate physical conflict (p. 516);

[2] ***Obscenity*** (p. 559);

[3] ***Misleading or deceptive speech (i.e., fraud)*** (p. 571);

[4] Speech ***integral to criminal conduct*** (p. 571), such as speech that is part of a ***conspiracy*** to commit a crime or speech ***proposing an illegal transaction***; and

[5] ***Defamation*** (p. 552).

i. Few if any new additions: The unprotected status of the five above categories has existed for decades, though the precise contours of some of the categories have varied a bit. But over the last few decades, the Supreme Court ***has refused to add any new entries*** to this unprotected-categories list.

(1) Animal-crush videos: For example, the Court has refused to add to the list of unprotected-categories the class of ***"depictions of animal cruelty."*** See *U.S. v. Stevens*, 130 S.Ct. 1577 (2010).

(2) No "false statements" category: Similarly, the Court has declined to establish an unprotected category consisting of ***"factually-false statements."*** See *U.S. v. Alvarez,* 132 S.Ct. 2537 (2012), *infra*, p. 558.

b. Court's change of approach in 1992: What are the rules for when government may engage in content-based regulation of speech that falls within one of these unprotected categories? Until about 1992, such speech could be regulated in a content-based way as long as the regulation satisfied the very lenient ***"mere rationality"*** review standard, not strict scrutiny. But since a 1992 decision, a majority of the Court seems to have ***abandoned*** this distinction between the protected-categories situation and the unprotected-categories situation: in ***either*** case, ***viewpoint based restrictions will now be strictly scrutinized.*** See *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (discussed further *infra*, p. 523).

i. Significance of categories: Since viewpoint based restrictions are now strictly scrutinized even where the restricted speech falls within an unprotected category, what significance remains to the fact that particular speech does or does not fall within an unprotected category? The main consequences of the unprotected/protected distinction now are probably that:

[1] Government may ***completely proscribe*** materials falling in an unprotected cat-

egory (so long as government acts in a content-neutral manner within the category); by contrast, government obviously may not enact such a total ban on materials not falling within an unprotected category; and

[2] ***Time/place/manner*** restrictions on speech in public forums will be ***presumptively valid*** when applied to unprotected categories, but will be subjected to careful "mid-level" review (see *infra*, p. 507) in the case of protected categories.

5. Blurry line between content-based and content-neutral: The dividing line between content-based and content-neutral regulation can sometimes be ***blurry***, with the Court deeply split about which side of the line a particular regulation falls.

a. Speech outside of abortion clinics (*McCullen* case): A recurring scenario in which the justices have differed about whether the regulation is content-neutral is that of attempts to regulate conduct on public property ***outside of abortion clinics.*** Suppose a state creates a ***buffer zone*** on the street and sidewalk near a clinic entrance, from which all persons without clinic-related business are excluded ***without reference to what message***, if any, they want to deliver. Assume further that when the state enacts the buffer zone, the legislature has only one goal in mind: preventing violence and intimidation by ***anti-abortion protesters*** against women visiting the clinic. Does the fact that the zone on its face excludes *everyone, regardless of message,* who has no business at the clinic, prevent the regulation from being content-based? In a 2014 case, ***McCullen v. Coakley***, 134 S.Ct. 2518 (2014) (also discussed *infra*, p. 515), the Supreme Court split 5-4 on this issue, with the bare majority concluding that the state had ***succeeded in acting in a content-neutral way.***

i. Statute in *McCullen*: *McCullen* involved a Massachusetts law that excluded all persons from standing on streets and sidewalks in an area 35 feet around the entrance to any abortion clinic, except those with clinic-related business.

ii. Held not to be content-based: The plaintiffs who challenged the statute contented that it was in fact a ***content-based restriction of speech***, because, as they (correctly) pointed out, "virtually all speech affected by the [statute] is speech concerning abortion." But Chief Justice Roberts, writing on this point for a majority of the Court, ***disagreed*** with the plaintiffs' conclusion.

(1) Reasoning: Roberts conceded that the statute, by creating buffer zones only around abortion clinics, had the ***"inevitable effect"*** of restricting abortion-related speech more than speech on other subjects. But this fact wasn't enough to make the act content-based: ***"A facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics."***

iii. Dissent: But four members of the Court ***disagreed*** with Robert's conclusion that the statute was content-neutral. A concurrence by Justice Scalia (joined by Kennedy and Thomas) argued that the statute was obviously content-based: "[It] blinks reality to say [that] a blanket prohibition on the use of streets and sidewalks where ***speech on only one politically controversial topic is likely to occur*** — and where that speech can ***most effectively be communicated*** — is not content-based." Scalia went on, "Would the Court exempt from strict scrutiny a law banning

access to the streets and sidewalks surrounding the site of the Republican National Convention? Or those used annually to commemorate the 1965 Selma-to-Montgomery civil rights marches? ... Surely not."

D. Analysis of "track two" cases ("non-content-based" regulation): Let us turn now to the analysis of a case which belongs on "track ***two***," that is, one in which the government's interest in regulation ***does not relate to the communicative impact of the expression.*** Regulations of the ***"time, place and manner"*** of speech (assuming that they do not mask discrimination based on the communicative content of the speech) fall within "track two." The abortion-protest case discussed on p. 487 above, *McCullen*, is an example (according to a majority of the Court) of such a content-neutral regulation.

1. General principles: Analysis on "track two" depends on whether or not the expression takes place in a ***"public forum."*** (This term includes traditional public places like streets and parks, and is further defined *infra*, p. 532.)

a. Public forum: Where the expression takes place in a public forum, the regulation must not only be ***content-neutral*** (which it must be no matter what the forum, unless the expression falls within an "unprotected category" as discussed above), but it must also ***not close adequate alternative channels*** for communications, and it must be ***narrowly-tailored*** to serve a ***significant governmental interest.*** This is effectively a "middle level of review," halfway between mere-rationality and strict scrutiny.

i. "Convenience" not enough: An important aspect of this mid-level review is that regulations that impair the use for expressive purposes of such public forums may ***not*** be justified merely by the government's ***convenience*** (e.g., a ban on handbills to prevent littering).

b. Private places: Where the expression takes place in a location that is ***not*** a public forum, it's much easier for the government to regulate the expression:

i. Insubstantial restraint: If the impairment of expression caused by the regulation is ***not substantial***, the state must merely show that its regulation is ***rational*** (assuming, as always, that the restraint is content-neutral).

ii. Substantial: If the impairment of expression *is* "substantial," the state must show that its own interest is even more substantial. But in contrast to the public-forum situation, the state can prove that a restraint on expression in a non-public-forum is not substantial by showing that there are ***alternate channels*** by which the speaker can reach the same audience with the same message. Tribe, p. 982.

E. Regulation of "pure conduct": So far, we have assumed that "expression" is somehow being regulated by the government. But how do we decide whether what is being regulated ***is in fact "expression"***? The fact that what is being regulated is "conduct" rather than "pure speech" is not dispositive — a long line of Supreme Court cases holds that "expressive conduct" receives First Amendment protection just as "pure speech" does. (For instance, marching down the street in a protest is in a sense "conduct," but it is also clearly "expression." See the discussion of this conduct/speech distinction *infra*, p. 509.) But some conduct may contain such a ***small*** component of expression that it is found to be ***not protected by the First Amendment at all***.

1. Supreme Court's test: The Supreme Court has articulated a two-part test for determining whether conduct possesses sufficient ***"communicative elements"*** to trigger the First

Amendment protection: it must be the case that ***both***: (1) an "intent to convey a ***particularized message*** was present"; and (2) "the likelihood was great that the message would be ***understood*** by those who viewed it." *Spence v. Washington*, 418 U.S. 405 (1974).

> **Example:** A court might hold that panhandling on the street has so little expressive content that it gets no First Amendment protection at all. The court might reason that the express or implied statement "Please give me money" (or even "Please give me money because I'm poor") does not really convey any communicative element that would be so understood by the people to whom it is addressed. (The Supreme Court has never decided whether panhandling gets any First Amendment protection.)

II. ADVOCACY OF ILLEGAL CONDUCT

A. Introduction: If any kind of speech can lay claim to special constitutional protection, it is probably speech of a *political* nature. Our entire system of representative government operates on the assumption that political and social change will come about peacefully, through public discussion, rather than through violence.

1. **Dangerous speech:** Yet, certain types of political speech may seem to most of us to pose a threat to the very system of representative democracy which freedom of speech is supposed to ensure. For instance, speech calling for immediate assassination of the President, or the institution of a military coup, seems dangerous to tolerate. However, once the government is permitted to prevent or punish some types of political speech, there arises the threat that those in power may also ***stifle legitimate dissent.***

2. **Advocacy of illegal conduct:** Since early 20th century, when the Supreme Court first began its serious grappling with the limits of valid political speech, the Court has generally tried to distinguish between, on the one hand, general ***political dissent*** and advocacy of ***abstract theories*** (which may not be punished), and on the other hand, ***incitement*** of ***particular illegal acts*** (which constitutes an "unprotected category," and may therefore be punished). But the Court has vacillated dramatically during this period in drawing the line between these two types of speech. Most commentators agree that the current standard, articulated in 1969 in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (discussed *infra*, p. 495) gives substantially greater protection to political speech than the various tests in force before it.

B. The "clear and present danger" test: For most of the 20th century prior to *Brandenburg*, the dividing line between legal advocacy and illegal incitement of criminal acts was drawn by use of the ***"clear and present danger"*** test. Under this test, speech could be punished as an attempt to commit an illegal act if the speech created a "clear and present danger" that the illegal act ***would come about*** (even if it never in fact occurred).

1. ***Schenck:*** The test was first articulated by Justice Holmes (speaking for a unanimous Court) in ***Schenck v. U.S.,*** 249 U.S. 47 (1919). The case arose in a wartime context, and involved the degree to which citizens had a constitutional right to oppose the First World War.

   a. **Facts:** In the 1917 Espionage Act, Congress made it a crime, *inter alia*, to "willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States," or to "willfully obstruct the recruiting or enlistment service" of the U.S. The defendants were not charged with violating the

Act, but rather, with ***conspiring*** to violate it. The defendants had sent two draftees a document opposing the draft, calling it "despotism," and urging the draftees, "[d]o not submit to intimidation." But the document ***did not explicitly advocate illegal resistance*** to the draft; it merely advocated ***peaceful measures,*** such as petitioning for repeal of the Conscription Act.

b. Holding: Nonetheless, the Court unanimously found that the defendants ***could constitutionally be convicted*** of conspiracy to violate the statute. Whether or not a given utterance is protected by the First Amendment depends, Holmes wrote, on the circumstances; the defendants' document might have been constitutionally protected, for instance, in time of peace. The issue was "whether the words used are used in such circumstances and are of such a nature as to create a ***clear and present danger*** that they will ***bring about the substantive evils*** that Congress has a right to prevent." Whether the defendants' conduct in fact posed a "clear and present danger" was a factual issue, the jury's disposition of which the Court refused to disturb.

c. Crying "fire" in theater: In his *Schenck* opinion, Holmes illustrated his assertion that not all speech was constitutionally privileged by posing the now-famous example of ***falsely crying "fire!" in a crowded theater.***

i. Criticism: However, the nature of crying "fire!" in a crowded theater seems dramatically different from the speech in *Schenck*; for one thing, the false cry of "fire" is clearly understood by its listeners to be a statement of ***fact,*** not an exhortation or expression of opinion as the *Schenck* document obviously was. Also, if one believes that the best way to combat false speech is by combatting it in the "marketplace of ideas" (a view espoused by Holmes himself in *Abrams v. U.S.*, *infra*, p. 491), the two situations are clearly different: there is not time to argue with the cry of "fire!", but probably ample time to argue about the merits of conscription.

2. *Frohwerk* and *Debs:* Very shortly after *Schenck*, Justice Holmes wrote two more opinions, for a unanimous Court, upholding Espionage Act convictions against First Amendment arguments.

a. *Frohwerk:* One of these, *Frohwerk v. U.S.*, 249 U.S. 204 (1919), involved writers of editorials criticizing the draft in a German-language newspaper. Holmes' opinion seemed to ***shift the burden of proof to the defendants*** — because of the lack of clarity of the record on appeal, it was "impossible to say that it might not have been found" that the publication might have been enough to "kindle a flame" of draft resistance.

b. *Debs:* The other case, ***Debs v. U.S.***, 249 U.S. 211 (1919) is perhaps even more disturbing to those who believe that general opposition to government policies, unaccompanied by explicit advocacy of illegal acts, ought to be protected by the First Amendment. The defendant in *Debs* was the well-known socialist and presidential candidate Eugene V. Debs, who made a speech opposing the First World War. Debs' conviction of obstructing military recruitment was upheld by the Court.

i. Weak standard: Although Holmes purported to be applying the "clear and present danger" standard, he phrased it as merely requiring that the words have as their ***"natural tendency and reasonably probable effect"*** the obstruction of recruitment. As in *Schenck*, the Court refused to reject the jury's finding that Debs' speech met this test.

ii. **Criticism of *Debs:*** The "clear and present danger" standard which the *Debs* opinion purported to apply gave very little protection to Debs. There was, for instance, no evidence that any obstruction of recruitment actually occurred as a result of the speech. Holmes did not acknowledge that there was a difference between mailing anti-draft leaflets ***directly*** to draftees (as in *Schenck*) and addressing a general audience. Debs' conviction was "somewhat as though George McGovern had been sent to prison for his criticism of the war [in Vietnam]." 40 U. CHI. L. REV. 237 (quoted in L,K&C, p. 653, n.a.).

3. **Holmes' dissent in *Abrams:*** It was not until ***Abrams v. U.S.,*** 250 U.S. 616 (1919) that application of the "clear and present danger" standard was sufficient to produce even so much as a dissent against a conviction for anti-war speech. In that case, Justice Holmes' dissent (joined by Justice Brandeis) finally placed some First Amendment "bite" into the standard; *Abrams* is one of his best-known dissents.

   a. **Facts:** The defendants in *Abrams*, American socialists of Russian-Jewish birth, were convicted of violating a newly-added section of the Espionage Act, which prohibited the urging of any curtailment of war production with intent to hinder the United States' prosecution of the War. The defendants had published two pro-Bolshevik leaflets, which attacked the United States' production and supplying of arms that might be used against Russia (against whom the U.S. had not declared war); neither leaflet was pro-German, and in fact one was violently against German militarism. The leaflets urged workers not to make bullets which would be used not only against Germans but Russians as well.

   b. **Majority view:** The key factual issue in the case was whether the defendants had the requisite intent to interfere with the war effort ***against Germany***. The majority conceded that the defendants' *primary* purpose may have been only to aid the Russian Revolution. But "[m]en must be held to have intended … the effects which their acts were ***likely to produce***." Curtailment of production to protect Russians could not have been accomplished except by also impairing the war effort against Germany, the majority believed, so that the intent requirement was satisfied. (The majority also went out of its way to emphasize, repeatedly, that the defendants were self-proclaimed "anarchists.")

   c. **Holmes' dissent:** Much of Holmes' dissent was on the fairly pedestrian issue of intent. Unlike the majority, he believed that an actor does not "intend" a consequence "unless that consequence is the aim of the deed." By this standard, the defendants simply had no intent to interfere with the war effort against Germany, however likely that possible outcome may have seemed to them.

      i. **Value of free speech:** But Holmes' dissent is best known for its more general words about the value of free speech. He articulated what could be called the "marketplace of ideas" theory: he urged ***"free trade in ideas,"*** and argued that "[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market. … " The importance of allowing ideas to compete with each other, he argued, was so great that even opinions which we "loathe and believe to be fraught with death" should not be suppressed, "unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

4. **Criticism of "clear and present danger" doctrine:** Holmes' "clear and present danger" doctrine has been criticized on a number of grounds.
   a. **Not very protective:** First, at least as it was applied in early cases, the doctrine obviously did not give very much protection to freedom of speech, since the defendants in *Schenck, Frohwerk, Debs*, and *Abrams* were all convicted, without a showing that the words of any of them actually brought about a substantive evil.
   b. **Opinion about threat:** Second, the test, since it relies upon the fact-finder's opinion about the immediacy of a specific threat (e.g., obstruction of military recruitment), makes political speech particularly vulnerable to the mass hysteria which tends to strike in times of national crisis. For instance, the test gave the least protection to speech during the First World War and during the McCarthy anti-Communist scare, as discussed below.
   c. **Ineffectiveness rewarded:** Finally, the test seems to say that any kind of speech is permissible ***as long as it is ineffective***, making the test a very peculiar way of carrying out the First Amendment notion of political change through peaceful speech rather than through violent action.

C. **The Learned Hand test:** Because of these weaknesses in the "clear and present danger" test, Judge Learned Hand, one of the greatest federal district and appeals court judges in our history, articulated a different test, one focusing ***solely on the words spoken, not on the surrounding circumstances***. Hand's test was put forth in *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), a pre-*Schenck* decision.
   1. **Terms of test:** Hand believed that words could be punished if they "counsel or advise others to ***violate*** the law as it stands," but not if they are merely ***critical*** of the law.
      a. **Application:** The speech at issue in *Masses* consisted of anti-war cartoons and text which criticized the War and the draft, and which expressed great sympathy for draft resisters. Yet for Hand, this was still only ***abstract advocacy*** of the anti-war position, not a direct call to violate the law. Consequently, he found the materials beyond Congress' power to prohibit or punish.
   2. **Significance:** The main significance of Hand's test is that it makes the ***likely effects*** of the speech ***completely irrelevant***. Even if it were shown that the materials in fact caused many readers to resist the draft illegally, the publication would still be beyond Congress' reach. By the same token, if the publication *did* constitute a ***direct call*** to violate the law, it would be punishable ***even if it was utterly ineffectual***.
   3. **Fate of Hand test:** Hand's test was immediately rejected; not even the federal court of appeals in *Masses* itself was willing to affirm it. Instead, the "clear and present danger" test prevailed for the next 50 years. But the Hand approach has ultimately had its day; *Brandenburg v. Ohio (infra*, p. 495) incorporates the main aspects of that test, though it adds aspects of "clear and present danger" as well.

D. **Statutes directly proscribing speech:** In the cases considered thus far, the legislature proscribed ***acts***, not speech; speech became relevant only because the prosecution claimed that the speech constituted an attempt, or conspiracy, to bring about the forbidden act. Later, however, legislatures began enacting statutes which ***directly forbade*** certain types of speech. A major debate erupted on the Court about whether the "clear and present danger" test applies to prosecutions under such statutes as well.

1. **Test not applied:** The argument was won, at least temporarily, by those who claimed that the "clear and present danger" test had ***no application*** in this instance, and that the legislature's ***own conclusion*** that certain types of speech were ***intrinsically dangerous*** was to be respected.

2. ***Gitlow:*** Thus in ***Gitlow v. New York***, 268 U.S. 652 (1925), the Court construed the New York "criminal anarchy" statute, which banned advocating (orally or in writing) the overthrow of a government by assassination or other violent means. The defendant, a socialist, was involved in the publication of a "Left-wing Manifesto," which advocated establishment of a dictatorship of the proletariat through mass strikes and other "revolutionary mass action."

   a. **Majority view:** There was no showing at trial that the publication had posed any present danger of governmental overthrow or other substantive evil. Nonetheless, the majority ***upheld*** the defendant's conviction.

      i. **Rationale:** The "clear and present danger" test of *Schenck* was only to be applied "in those cases where the statute merely prohibits certain ***acts*** involving the danger of substantive evil, ***without any reference to language*** itself. … " Here, by contrast, the legislature had ***already*** determined that ***certain types of language*** (advocacy of violent overthrow of the government) posed a risk that substantive evils would result. It was not open to the Court to dispute the legislature's judgment and to conclude that, in a particular case, utterances coming within the statute were not dangerous.

      ii. **No immediacy requirement:** Furthermore, there was no requirement that the legislature proscribe only speech advocating ***definite*** or ***immediate*** action. Thus the defense that the Manifesto called only for action at some indefinite time in the future was unavailing.

   b. **Dissent:** A dissent by Justice Holmes (joined by Justice Brandeis) argued that the "clear and present danger" test ***should*** be applied on these facts. Under this test, he argued there should be no conviction because the Manifesto "had ***no chance*** of starting a ***present conflagration***." But Holmes did not respond directly to the majority's argument that the test should not be applied where the legislature has directly forbidden certain types of speech.

3. ***Whitney:*** The legislature's right to ban a certain type of speech, regardless of the substantive dangers posed by it, was presented again in ***Whitney v. California***, 274 U.S. 357 (1927).

   a. **Facts:** The California Criminal Syndicalism Act forbade the knowing membership in any organization advocating the use of force or violence to effect political change. Miss Whitney, who did not deny being a member of the Communist Labor Party, was convicted even though she did not agree with the Party's advocacy of violent means of change, and had in fact voted for a more temperate plank.

   b. **Holding:** But a majority of the Court upheld the conviction, believing that the legislature's conclusion that mere knowing membership in an organization advocating criminal syndicalism was substantively dangerous, "must be given great weight."

   c. **Brandeis' dissent:** Justice Brandeis' concurrence in *Whitney* (joined by Holmes) is one of his most eloquent on free speech.

i. **The value of free speech:** Brandeis' concurrence is most remembered for its general discussion of the value of free speech. An orderly society ***cannot be maintained merely through fear and enforced silence***, for "fear breeds repression … repression breeds hate … [and] hate menaces stable government." On the contrary, "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies. … ***[T]he fitting remedy for evil counsels is good ones.***" This might be thought of as the ***"safety valve"*** theory of free speech (in contrast to the view that human expression is an end in itself, not merely a means to maintenance of order).

ii. **Emergency:** For Brandeis, it followed that anytime bad ideas could be combatted by good ones, this combat, rather than suppression of the bad ideas, must be allowed to take place. Only where "the incidence of the evil apprehended is so ***imminent*** that it may befall ***before there is opportunity for full discussion***" may speech be prohibited or punished. Furthermore, even if the danger is imminent, it may not be suppressed unless it is ***"relatively serious"***; for instance, advocacy of the right of pedestrians to cross unfenced vacant lands could not be prohibited, even if there were imminent danger that such advocacy would lead to trespass.

iii. **Concurrence:** However, Brandeis' opinion was cast as a concurrence, not a dissent, because in Brandeis' opinion the defendant had not raised the appropriate constitutional claims at the trial level.

d. Overruled: *Whitney* was explicitly overruled in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), discussed extensively *infra*, p. 495.

E. Threat of communism and the Smith Act: During and immediately following the Second World War, fears of an international communist threat became even more pronounced. One response was the passage by Congress in 1940 of the Smith Act, which was similar to the New York Criminal Anarchy Statute upheld in *Gitlow (supra*, p. 493).

1. The *Dennis* case: The most important Smith Act case was ***Dennis v. U.S.***, 341 U.S. 494 (1951), in which the Court purported to apply the "clear and present danger" standard, but did so in a manner that gave dramatically ***less First Amendment protection*** to political speech than Holmes or Brandeis would presumably have wanted.

a. Facts: The defendants were convicted under the Smith Act of conspiring to advocate the overthrow of the United States Government, and of conspiring to reorganize the U.S. Communist Party, which the prosecution claimed was a group that advocated such overthrow.

b. Majority upholds: A majority of the Court ***upheld*** the conviction. The opinion, by Justice Vinson, purported to be applying the "clear and present danger" test. However, the majority refused to interpret the test as requiring that there have been a clear and present danger of an ***actual attempt*** to overthrow the government; the Holmes test "cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited."

i. **Adoption of Hand balancing test:** Instead, the majority applied a test which had been formulated by Learned Hand, writing for the appeals court below: the test was "whether the ***gravity*** of the 'evil', ***discounted by its improbability,*** justifies such invasion of free speech as is necessary to avoid the danger." (Hand thus

abandoned his *Masses* test, and instead tried to reshape the Holmes test.) Here, the evil (violent overthrow of the government) was so great that even a ***small, non-imminent***, chance of success justified curtailing the speech.

c. Significance of *Dennis:* *Dennis* represents "the temporary eclipse of the Holmes-Brandeis formulation of the clear and present danger test." Tribe, p. 846. Once the evil's ***seriousness*** became a ***substitute*** for its ***immediacy,*** speech could be restricted ***no matter how remote its anticipated consequences***.

F. The modern standard: Today, the Supreme Court generally gives ***greater protection to free speech***, at least in the political area, than it has given in previous eras.

1. *Brandenburg:* The present status of freedom of political speech is best expressed in ***Brandenburg v. Ohio***, 395 U.S. 444 (1969), a case in which the Court combined the most speech-protective aspects of ***both*** the ***"clear and present danger"*** test and the ***"advocacy/incitement"*** distinction.

a. Facts: Defendant was a leader of an Ohio Ku Klux Klan group. He was charged with violating Ohio's Criminal Syndicalism Statute, which (like that of California, sustained in *Whitney v. California, supra*, p. 493) forbade the advocacy of crime or violence as a means of accomplishing industrial or political reform.

b. Holding: The Court (in a unanimous *per curiam* opinion) ***struck down*** the Ohio statute, without considering whether the defendant's actual speech could have been properly proscribed.

i. New test: In so doing, the Court articulated new requirements which a statute proscribing speech must meet. Speech advocating the use of force or crime can be proscribed only where two conditions are satisfied:

[1] the advocacy is ***"directed to inciting or producing imminent lawless action"; and***

[2] the advocacy is also ***"likely to incite or produce such action."***

2. Significance of new test: The two-part *Brandenburg* standard is usually viewed as combining aspects of both the Holmes and Hand tests, in a way that gives "double protection" to speech.

a. Holmes aspect: The Holmes "clear and present danger" legacy is reflected in the requirement that the speech be "***likely*** to incite or produce" ***imminent*** unlawful action. Thus the concern with immediate, likely, consequences remains.

b. Hand aspect: But *Brandenburg* also reflects Hand's insistence that what should be restricted is only direct advocacy of ***action***, not mere advocacy of ***abstract doctrine***. This distinction is imposed by the requirement that the speech be ***"directed"*** (i.e., ***intended***) to ***"inciting*** or ***producing***" an unlawful response.

c. Consequence: Apparently, therefore, no speech that would have been protected by ***either*** the Holmes or Hand tests may be prohibited under *Brandenburg.*

d. Application to Ohio statute: The significance of the *Brandenburg* test is illustrated by the way the Court applied it to the Ohio statute at issue there. The Ohio act punished all advocacy of the "duty, necessity or propriety of crime [or] violence … as a means of accomplishing industrial or political reform. … " This language was suffi-

ciently broad that it forbade advocacy of the ***abstract doctrine*** of violent political change, as well as incitement to imminent unlawful action. Therefore, it was held unconstitutional, even though some applications of it might have been constitutional (an illustration of the "overbreadth" doctrine, discussed below).

3. **Severity of harm:** The *Brandenburg* test does not explicitly take into account the ***severity*** of the harm which is threatened. Reading *Brandenburg* literally, a speaker who advocated use of nuclear weapons for terrorist purposes, but only after a one-year moratorium, could not be punished (since the harm would not be "imminent"). Conversely, one who incited his listeners to jaywalk immediately could be punished. Tribe (p. 849, n. 59) advocates taking into account seriousness, at least on the less-serious side of the spectrum.

4. ***Whitney* overruled:** *Brandenburg* explicitly overruled *Whitney v. California, see supra*, p. 493, which had upheld a Criminal Syndicalism statute nearly identical to that struck down in *Brandenburg.*

5. **Other modern cases:** Other cases decided in the late 60's or later present additional illustrations of the twin modern requirements of: (1) ***incitement*** (as distinguished from abstract advocacy); and (2) harm that is ***imminent*** (as distinguished from remote).

   a. ***Bond:*** The Court held that the Georgia House of Representatives' exclusion of Julian Bond from membership violated his First Amendment rights, in *Bond v. Floyd*, 385 U.S. 116 (1966). Bond, an opponent of the war in Vietnam, had joined a statement of "sympathy with, and support [of] the men in this country who are unwilling to respond to a military draft." The Georgia House reasoned that Bond could not truthfully swear to "support the Constitution of this State and of the United States." But the Court held that Bond could not be penalized for his statement, since it did not constitute a call for unlawful draft resistance, but was merely a ***general, abstract***, declaration of opposition to the war.

   b. ***Watts:*** A black anti-war activist, in a speech, said "[i]f they ever make me carry a rifle, the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers." He was convicted under a law making it a crime intentionally to threaten to kill the President. In *Watts v. U.S.*, 394 U.S. 705 (1969), the Court reversed the conviction, on the grounds that the circumstances showed that the speaker did not intend to make a ***"true threat"*** but rather, to state his ***political opposition*** to the President (albeit in a "very crude, offensive" way). The Court relied especially on the fact that the "threat" was conditional, and that the audience responded by laughter.

   c. ***Hess:*** *Bond, Watts* and *Brandenburg* were all decided during the Warren era. But the post-Warren Court has also applied the *Brandenburg* standard. One instance is *Hess v. Indiana*, 414 U.S. 105 (1973), growing out of a campus anti-war demonstration in which demonstrators blocked a street until they were moved off it by the police. Defendant then said "We'll take the fucking street later [or again]." (The record was ambiguous as to the precise word used.) The Court found this to be protected speech, rather than an unprotected incitement to illegal action. Construed least favorably to the defendant, the statement was "nothing more than advocacy of illegal action at ***some indefinite future time***"; only words intended to produce (and also likely to produce) ***imminent*** disorder could be punished.

6. **Mere membership not enough (*Scales*):** Are there some organizations that are so subversive that ***mere knowing membership*** in them can be forbidden? The answer so far has

been ***"no"*** — membership in a group can be punished only if the member is an ***active*** (not passive) member who ***specifically intends to further the organization's illegal ends.*** *Scales v. U.S.*, 367 U.S. 203 (1961).

a. "Active support" is enough: On the other hand, a post-9/11 decision shows that although government may not be entitled to make "mere membership" in an organization illegal, the state *can* constitutionally prohibit virtually any kind of ***active support*** of an illegal organization, even support that is intended to further the organization's ***legal*** aims. See ***Holder v. Humanitarian Law Project***, 130 S.Ct. 2705 (2010), in which the Court upheld a federal statute making it a crime to provide ***"material support"*** to a designated foreign terrorist organization, and defining "material support" in an exceptionally broad way.

i. What the statute forbids: The statute in question in *Holder* let the U.S. Secretary of State designate an entity as a ***"foreign terrorist organization."*** Once an organization had been designated in that way, it was then a federal crime to give the organization "material support or resources." "Material support" was defined to include not just financial support, but also a number of intangible services such as "***training***" and the giving of ***"expert advice or assistance."***

ii. The plaintiffs: Two of the organizations put on the terrorist list were the Kurdistan Workers' Party (which had the aim of establishing an independent Kurdish state in southeast Turkey) and the Liberation Tigers of Tamil Eelam (which aimed to created an independent Tamil state in Sri Lanka). The plaintiffs were various American citizens and organizations that wanted to train members of these groups in how to use international law to resolve their disputes peacefully, and also wanted to engage in political advocacy on their behalf. The plaintiffs claimed that the statute was inconsistent with *Scales* — they argued that it effectively made mere membership in the organization illegal, even if the member wanted to pursue only the organization's lawful aims.

iii. Statute upheld: By a 6-3 vote, the Court ***upheld*** the statute against First Amendment attack. In an opinion by Chief Justice Roberts, the Court said that *Scales* was irrelevant, because that case did not deal with the issue of whether the giving of material support to an organization could constitutionally be forbidden. The statute here did not criminalize "mere membership" (as the one in *Scales* had done), but instead criminalized the giving of "material support" to the organization. There was no constitutional difficulty, Roberts said, with prohibiting material support of an illegal organization (at least a foreign one), even if the supporter did not have a specific intent to further the organization's illegal aims.

(1) Freeing up of resources: Roberts argued that even support of a terrorist organization's ***legitimate*** aims could be ***harmful***. For instance, such support ***"frees up other resources within the organization*** that may be put to violent ends." And that support "helps ***lend legitimacy*** to foreign terrorist groups — legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds — all of which facilitate more terrorist attacks."

(2) Statute is limited: But, Roberts asserted, the statute applied only to material support that was ***"coordinated with or under the direction of"*** the designated terrorist organization, not "***independent*** advocacy that might be viewed as

promoting the group's legitimacy." So *Holder* does not answer the question of whether Congress could make it a crime to engage in truly independent advocacy on behalf of a terrorist organization.

iv. **Dissent:** Three justices (Breyer, joined by Ginsburg and Sotomayor) dissented in *Holder*. They argued that the statute should be strictly scrutinized, because it authorized the criminal prosecution of those who engage in the communication and advocacy of political ideas. The dissenters were especially troubled by the majority's argument that the forbidden support "helps lend legitimacy" to terrorist groups; the dissenters believed that there was "no natural stopping place" once this argument was accepted — "speech, association and related activities on behalf of a group will often, perhaps always, help to legitimate that group."

b. **"Incitement" law today:** *Holder* suggests that today, as we are actively waging the war on terror, the Supreme Court will be ***quicker to uphold government restrictions on subversive or terrorist organizations*** than it was in the relatively liberal 1960s era in which *Brandenburg* and *Scales* were decided. True, *Brandenburg* and *Scales* technically remain the law: mere advocacy of even violent political change cannot be forbidden unless the speaker is calling for imminent lawless action, and mere membership in even the most dangerous organization cannot be flatly prohibited. But *Holder* means that any support beyond pure advocacy or membership — even ***"training"*** of an organization's personnel, or "***advocacy***" that is coordinated with the organization — ***may be criminalized***, and that's true even if the support is intended to further only the organization's *legal* objectives.

i. **Less free-speech protective:** That's a less free-speech-protective approach than pre-9/11 cases seemed to allow. See Bollinger (quoted at SST&K, p. 1066, n. 5), presciently saying in 2002 that "the fact that the last 30 years since *Brandenburg* have been remarkably peaceful and prosperous means that the understandings we now have about the meaning of free speech have not really been tested ... [J]ust about every time the country has felt ***seriously threatened*** the First Amendment has ***retreated***."

III. OVERBREADTH AND VAGUENESS

A. Overbreadth: Because of the especially great importance of freedom of expression in our constitutional scheme, the Supreme Court has developed several techniques of statutory analysis to make sure that that freedom gets the extra protection it requires. One of these techniques is the use of the doctrine of ***"overbreadth."***

1. **Definition:** A statute is overbroad if, in addition to proscribing activities which may constitutionally be forbidden, it ***also*** sweeps within its coverage speech or conduct which is ***protected by the guarantees of free speech or free association***. See *Thornhill v. Alabama*, 310 U.S. 88 (1940).

2. **Significance:** There are two respects in which the doctrine of statutory overbreadth changes the usual rules of constitutional litigation:

a. **Standing:** First, a litigant who is attempting to have a statute ruled unconstitutional must normally show that it is unconstitutional ***in its application to him.*** For instance, in a First Amendment case that does not involve overbreadth, the challenger to a stat-

ute must show that his own speech or conduct was protected by the First Amendment. But the overbreadth doctrine permits the challenger to prevail if he can show that the statute, applied according to its terms, would violate the First Amendment rights of persons not now before the Court. Thus overbreadth can be viewed as an ***exception to the usual requirements of "standing"*** (see *infra*, p. 731), by which a person is not normally permitted to assert the constitutional rights of others, only his own. Or to put it in terms of the usually-employed set of labels, most constitutional attacks are required to be ***"as applied"*** attacks (the plaintiff is saying that the statute is unconstitutional "as applied" to her, i.e., the statute violates ***her own rights***), whereas an overbreadth attack is a ***"facial"*** attack, i.e., an attack ***"on the face"*** of the statute, saying that it's invalid ***no matter to whom it's applied***.

i. **Statute's application to challenger:** In fact, where overbreadth analysis is applied, the Court simply ***assumes*** that a more narrowly-drawn statute *could* constitutionally proscribe the challenger's own conduct. Ordinarily, the Court never even decides this question explicitly; by deciding to apply overbreadth analysis, it is able to decide instead the usually ***easier*** question of whether the statute by its terms covers hypothetical constitutionally-protected conduct by third parties.

b. Statute found void on its face: Secondly, in the usual situation, where a court finds a statute to be unconstitutional it will simply ***excise*** the statute's unconstitutional applications, ***leaving the statute in force*** as to those situations where its application would be constitutional. But where overbreadth is applied, the statute is ***completely struck down***. That is, the statute is found to be ***void "on its face."*** Until a different statute is enacted (a more limited one, applying only where it may constitutionally do so), or until another court with authority construes the statute more narrowly (in a way that forbids only constitutionally-proscribable speech or conduct), the statute is simply unenforceable against ***anyone.***

3. Rationales: There are two main rationales for using the overbreadth doctrine in First Amendment cases:

a. "Chilling effect" on speech: First, the mere existence of an overly broad statute (that is, a statute which by its terms forbids some protected speech) is likely to have a ***"chilling effect"*** on free speech. Some people whose speech the statute could ***not*** constitutionally reach (and who thus would presumably prevail in court if they spoke and then litigated the statute's application to them) might simply be ***intimidated*** into ***not exercising their right to speak.***

i. **Explanation:** As Justice Marshall put it in a dissent to *Arnett v. Kennedy*, 416 U.S. 134 (1974), an overbroad statute "hangs over [people's] heads like a Sword of Damocles. … That this Court will ultimately vindicate [a person] if his speech is constitutionally protected is of little consequence — for the value of a sword of Damocles is that it hangs — not that it drops." He added that the focus of the overbreadth doctrine "is not on the individual actor before the court but on others who may forgo protected activity rather than run afoul of the statute's proscriptions."

b. Selective enforcement: Secondly, an overly-broad statute is highly vulnerable to ***selective enforcement*** by the authorities, i.e., enforcement that discriminates against certain classes of people or certain points of view. The problem of selective enforcement exists in any statute. But the risk is greater in the case of an overbroad one, since

the statute gives officials, by hypothesis, not only the opportunity to treat people differently (a problem with any statute, since it is always possible to prosecute only one of two people who may constitutionally be prosecuted), but also the chance to ***violate the constitutional rights*** of one person without violating those of another.

Example: Assume that a town ordinance proscribes "all demonstrations, involving 100 or more persons, held in public streets." This ordinance by its terms applies both to activity which may constitutionally be proscribed (e.g., demonstrations that include violence or a substantial breach of the peace) as well as to those which may ***not*** be constitutionally prohibited (peaceful demonstrations, conducted at an appropriate time, without causing major interference with traffic).

Within the class of activities to which the statute may ***not*** constitutionally be applied, there is an open invitation to the police to allow their own views about acceptable content to color their decision. For instance, they may "look charitably at a post game victory celebration in the streets of a college town [but] not feel the same way about an antiwar demonstration." See 43 CHI. L. REV. 38 (quoted in L,K&C, p. 733). Therefore, the statute will be found to be overbroad, and thus void "on its face"; that is, it may not be applied even to activity which ***could*** constitutionally be proscribed by a more narrowly-drawn statute (e.g., demonstrations that include violence to bystanders).

4. **Doctrine cut back — "substantial" overbreadth now required:** However, the modern Court has significantly ***curtailed*** the use of overbreadth analysis in First Amendment cases. It has done so principally by requiring that the overbreadth be ***"substantial,"*** compared with the legitimate applications of the statute. This requirement was first set forth in ***Broadrick v. Oklahoma***, 413 U.S. 601 (1973), a case which remains the best statement of the modern Court's view on overbreadth.

   a. **Facts:** §818 of Oklahoma's Merit System Act prohibited civil servants from engaging in certain political activities, including taking part in the management or affairs of any political party or campaign, and soliciting for campaign contributions. Broadrick, who had campaigned for a superior and had solicited money for him, challenged §818 on overbreadth (as well as vagueness) grounds. He pointed out that §818 had been construed as applying to such political expression as the wearing of political buttons and the displaying of bumper stickers, which (he asserted) were constitutionally-protected free speech activities. Therefore, he contended, the section must be struck down, regardless of whether his own activity could have been constitutionally proscribed by a more narrowly-drawn statute.

   b. **Holding:** By a 5-4 vote, the Court ***rejected*** Broadrick's claims, spending most of its time on the overbreadth one.

   c. **Speech vs. conduct:** The opinion distinguished between statutes primarily regulating conduct and those directly governing speech. In situations involving the latter, the Court did not modify the overbreadth rule. But in the case of statutes ***governing conduct***, where the conduct happens to have an expressive content, the "strong medicine" of complete invalidation of the statute should not invariably be applied. Instead, the majority believed, for facial invalidation to be appropriate, "the overbreadth of a statute must not only be real, but ***substantial*** as well, judged in relation to the statute's plainly legitimate sweep." Where the overbreadth is not substantial, unconstitutional

applications should be rooted out one at a time, by analysis of the particular fact situations in which successive litigants find themselves.

d. Application: The Oklahoma statue, under this analysis, ***did not call for overbreadth treatment***. The statute was primarily directed at ***conduct*** (taking part in a political campaign), not at pure speech. The statute was ***not "substantially overbroad,"*** since in the majority's judgment, it applied to a "substantial spectrum of conduct" that could constitutionally be subjected to state regulation.

i. Some protected applications: The Court conceded that the statute by its terms could be applied to the wearing of political buttons or the use of bumper stickers, and that these might be constitutionally-protected expressions. But such potential unconstitutional applications of the statute were ***not numerous enough compared with the body of permissible applications***, so there was no "substantial overbreadth."

ii. Applied to litigant: Since Broadrick's own conduct was clearly regulable rather than protected, the statute was upheld as applied to him.

e. Makes hard cases easy: The overbreadth doctrine, even with its requirement of "substantial" overbreadth, often has the effect of ***making "hard" cases into "easy" ones***. That is, a case that would be a difficult one if it had to be decided on its own facts often becomes easy once the statute can be taken literally and applied to a substantial number of other hypothetical situations, as to which it would clearly be unconstitutional. See Sullivan & Gunther, p. 1346.

B. Vagueness: The doctrine of ***"vagueness"*** is similar, but not identical, to that of overbreadth. A statute will be held void for vagueness if the conduct forbidden by it is so ***unclearly defined*** that persons "of common intelligence must necessarily ***guess at its meaning*** and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385 (1926).

1. Constitutional basis: Theoretically, the proscription against vagueness stems from the Due Process Clause's requirement that people be given ***fair notice*** of what conduct is prohibited. But many void-for-vagueness holdings stem more from violations of other constitutional provisions, particularly the First Amendment. In the First Amendment area, an unduly vague statute has the same ***"chilling"*** effect on speech or association as does an overbroad one: a person does not know whether or not his conduct will ultimately be held to be constitutionally protected, so he declines to exercise his right of speech or association.

2. Curbing discretion: The other main function of the vagueness doctrine is to ***curb the discretion*** afforded to law enforcement officers or administrative officials. Observe that this danger, too, is also a danger posed by an overbroad statute (*supra*, p. 499).

3. Distinguished from overbreadth: Yet vagueness and overbreadth are quite distinguishable doctrines. Their differences can be illustrated by the following example:

Example: Statute I prohibits anyone from "publicly display[ing] a red flag [as] a sign, symbol or emblem of opposition to organized government." Statute II prohibits anyone from "publicly displaying a red flag for any purpose whatsoever."

Statute I is unconstitutionally ***vague***, because there is no way to tell whether it is meant to apply to peaceful displays of opposition to the political party currently in

office, or to other constitutionally-protected expressions of political opposition. (See *Stromberg v. California*, 238 U.S. 359 (1931), so holding.)

Statute II is unconstitutionally overbroad. It is obviously not "vague," since its meaning is perfectly clear. But since by its terms it appears to apply to constitutionally-protected conduct, and since there is no "bright line" rule to separate out the constitutional from unconstitutional applications, neither a member of the public nor a court has an easy way to articulate what the statute may constitutionally cover.

Note: These two statutes show that vagueness and overbreadth are both, in part, attempts to deal with the same problem. Both statutes leave the user uncertain about which applications of the statute may ***constitutionally*** be imposed. The main difference is that in the overbreadth situation, the vagueness is "latent"; for this reason, overbreadth has been called "really a special case of the problem of vagueness." See Freund, *The Supreme Court of the United States* (quoted in L,K&C, p. 732).

Quiz Yourself on

FREEDOM OF EXPRESSION — GENERAL THEMES; ADVOCACY OF ILLEGAL CONDUCT; OVERBREADTH AND VAGUENESS

71. Darwin and 10 others were all members of the basketball team of State U, a public university. The Chancellor of State U had recently suspended Xavier, one of the members of the team, from both the team and the school for alleged cheating in an exam. At 10:00 a.m. on a Tuesday morning, Darwin and his 10 teammates stood in front of the University administration building, which contained the Chancellor's office. They carried signs saying, "Reinstate Xavier"; they also chanted and sang. The Chancellor happened to be away from the office that day (unbeknownst to Darwin and his friends), and nobody in the building was considering Xavier's case at the time.

A statute of the state in which State U is located provides as follows:

> "No group of 10 or more persons shall demonstrate on the sidewalk or other public way in front of a state or local government office building during business hours, unless the demonstration is related to matters currently under consideration by government officials working in the building. Violation of this provision shall be punishable as a misdemeanor."

Darwin has been charged with violating this section. He wishes to defend on the grounds that the section violates his First Amendment freedom of expression.

(a) What is the best argument he can make as to why his First Amendment rights would be violated by a conviction? _____

(b) May Darwin constitutionally be convicted of violating the provision? _____

72. The city of Munford has enacted the following ordinance: "No person shall attempt to give to passersby on any sidewalk or public thoroughfare any handbill during a Restricted Time Period. 'Restricted Time Period' shall mean the hours between 8:00 and 9:30 a.m. and the hours between 4:30 and 6:00 p.m., Monday through Friday. 'Handbill' is defined to include any piece of printed literature, four pages or less, dealing with a single topic." The purpose of the definition is to cover advertising circulars and brochures, but not to cover newspapers and magazines. The ordinance was enacted in response to two fears: (1) that during the busy rush hour, people were handing out so many handbills that the flow of pedestrian traffic

was frequently impaired; and (2) that an extraordinary amount of litter was being generated when people who had handbills thrust into their hands dropped them on the sidewalk. Kermit, a political candidate who was giving out brochures in support of his own candidacy, was charged with violating the statute. Kermit now argues that a conviction would violate his First Amendment rights. Should the Court agree? _____

73. Picketers picket on the public street adjacent to the house of CEO, the head of a company that makes drones used in an unpopular foreign war. The signs they carry contain intentionally hurtful messages (e.g., "CEO is a cowardly murderer"). The state common law of intentional infliction of emotional distress (IIED) allows recovery for any "outrageous and intentionally offensive" language carried on a picket sign near the plaintiff's house. In a suit brought by CEO against the picketers, a jury imposes a $100,000 civil judgment in favor of CEO. May the judgment be constitutionally imposed? _____

74. Leonard, a resident of a state that bordered Mexico, believed that the federal government should vastly increase the physical barriers to illegal immigration from Mexico. One day he went to a park that was frequented by people on both sides of the immigration issue. Before a moderately interested audience of about 20 people, all of whom had come to the park for other purposes, Leonard began to make a speech. He said, "If the federal government doesn't start doing a whole lot more to keep out illegal immigrants, we'll have to make 'em do it. Let's start by building up an arsenal of automatics and machine guns. Eventually, we'll have guerilla cells throughout the Southwest to make the federal government's life such a hell they'll build the kind of huge border fence we need." A few of the listeners applauded, one asked a question, but no one took any other action in apparent response to Leonard's speech. Immediately after his speech, Leonard was arrested by the police for violating §123 of a state statute. That statute provided that it is a felony to "advocate insurrection against the state or federal government or any local subdivision thereof." Leonard now defends on the grounds that a conviction would violate his First Amendment rights. May Leonard constitutionally be convicted of violating the statute? _____

75. Robert was a tenured teacher in a public high school, in the state of Cartesia. He was also a member of NAMBLA, the National Association of Man Boy Love Affairs. NAMBLA's charter says that it is dedicated to the furtherance of social and sexual interaction between men and boys. Cartesia makes it a crime for an adult male to have sexual relations with a boy under the age of 17. Robert knows the aims of NAMBLA, and supports those aims; in fact, he himself has in the recent past had sexual relations with a boy. School officials, worried about recent publicity concerning teachers who belong to NAMBLA, asked Robert and all other teachers at the school to sign an affidavit stating that "I am not now nor have I ever been a member of NAMBLA." (The affidavit said nothing else.) School officials announced that if a teacher did not sign the affidavit, they would consider that refusal to sign presumptive evidence of unfitness to be a teacher. Robert has so far refused to sign the affidavit. He wishes to challenge the constitutionality of the school's insistence that he sign.

(a) What is the strongest argument Robert can make as to why the affidavit requirement is unconstitutional? _____

(b) Will Robert's attack on the requirement's constitutionality succeed? _____

76. Becky, a young woman, walked topless on the boardwalk of Straitsville. She was arrested for violating a town ordinance that banned "lewd or lascivious public conduct." The statute contains no other relevant language, and there is no legislative history. For purposes of this question, assume that it would be possible to draft a statute in such a way that it could constitutionally proscribe appearing topless in public. Instead, concern yourself only with whether Becky may be convicted for violating *this* statute.

(a) What is Becky's strongest argument as to why she cannot constitutionally be convicted of violating the statute? _____

(b) Will Becky's argument succeed? _____

Answers

71. (a) That the section is a content-based regulation on speech, and is thus invalid unless necessary to achieve a compelling state interest.

(b) No. Government may impose reasonable regulations on the "time, place and manner" of speech that takes place on public forums. However, government's right to do this is contingent on its behaving in a ***content-neutral*** way. If government chooses to allow some messages and not allow others based on the content of the speech, then the restriction will be strictly scrutinized, and will be struck down unless it is: (1) necessary to achieve a compelling objective; and (2) narrowly drawn to achieve that objective. See, e.g., *Widmar v. Vincent*.

Here, government allows messages that pertain to matters under discussion inside the office building, but not messages pertaining to other matters. The government might defend on the grounds that it has not objected to the content of the messages, but has merely allowed some whole "categories" of speech while not allowing other whole categories. However, even distinctions among topics or categories is typically found to be content-based. See, e.g., *Consolidated Edison v. Public Serv. Comm.* (state may not prevent utilities from discussing the issue of nuclear power's desirability, because "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.") In any event, the speech here is taking place in a public forum, so the court will be especially reluctant to allow such a broad interference with it.

72. Yes. First, we need to analyze whether the restriction is ***content-based.*** A regulation can be found to be content-based even though it does ***not*** appear to ***favor any point of view*** over another. Thus in addition to regulations that favor certain messages or points of view, content-based regulations are defined so as to also include regulations that (a) ***place a particular topic or subject matter off-limits***, or (b) ***require discussions of some topics or subject-categories*** to meet ***more stringent time-place-and-manner restrictions*** than other topics or subject categories. [*Reed v. Town of Gilbert* (2015)] [483-485] A court would almost certainly say that the restriction here falls within category (b), since publications are treated differently depending on whether they discuss only a single subject or multiple subjects. Therefore, the court will almost surely classify the restriction here as content-based.

When government engages in content-based regulation of expression, the restriction will be ***strictly scrutinized***, and will be struck down unless it is: (1) necessary to achieve a compelling objective; and (2) narrowly drawn to achieve that objective. It's very unlikely that the regulation here can survive that strict scrutiny. Even if the two objectives cited by the town (avoiding impairment of traffic flow during rush hour, and avoiding litter) are "compelling," the ***means*** chosen by the town (a ***complete ban*** on the distribution of short single-topic hand-bills during rush hour) is deeply ***"underinclusive."*** That is, the town has chosen *not* to restrict the distribution of free magazines and newspapers in the same places and time slots, even though that distribution poses essentially the same dangers. A dramatically underinclusive regulation will rarely be found to satisfy the very tight "means-end fit" requirement imposed by strict scrutiny. See, e.g., *Reed v. Gilbert, supra*, striking down a town's tighter regulation of some types of signs than others, after the Court found that the regulation showed a fatal under-inclusiveness similar to the one here.

73. No. It would be a violation of the picketers' First Amendment rights for them to be held liable under this

statute, because such liability would effectively allow for content-based regulation of the picketers' speech, and cannot survive strict scrutiny. The case is comparable to *Snyder v. Phelps*, where picketers located on a public street who carried signs that intentionally offended the family of a soldier killed in Iraq were found to be shielded on First Amendment grounds from state-court liability for IIED.

74. No. The government may forbid a person from advocating illegal conduct, such as insurrection or overthrow of the government. However, under *Brandenburg v. Ohio*, speech advocating such illegality may only be proscribed if two conditions are satisfied: (1) the advocacy is directed to inciting or producing ***imminent*** lawless action; and (2) the advocacy is ***likely*** to incite or produce such action. Here, neither of these requirements seems to be met. Leonard is not calling for ***imminent*** illegality — he says "let's start … ," but he does not indicate that action should take place immediately. Furthermore, although his statement about having guerilla cells could probably be interpreted as a call for illegality, his statement about "building up an arsenal" is not necessarily a call for illegality, since there are many legal ways to buy guns, even automatics and machine guns. Even if the court decides that Leonard was attempting to incite imminent lawless action, it is pretty clear that there was very little risk that his speech was ***likely*** to produce that effect, since he had only a small crowd in front of him, they were in the park for other reasons, and they did not in fact respond with immediate illegal actions.

75. (a) That it is overbroad. A statute or regulation is overbroad if, in addition to proscribing activities which may constitutionally be forbidden, it also sweeps within its coverage future conduct which is protected by the guarantees of free speech or free association.

(b) Yes, probably. The government is clearly entitled to insist that Robert not commit crimes, and that he not advocate that others imminently commit crimes. However, the government may ***not*** make mere membership in an organization, without more, a crime, and it may not deprive a person of a government job or benefit for being merely a member or for refusing to say that he is not a member. Here, the affidavit merely requires Robert to say that he has not been a member; since Robert would be entitled to be a mere member of NAMBLA, so long as he did not agree with its aim of advocating imminent commission of the crime of man-boy love, the affidavit requirement would punish some membership that is constitutional. Robert's own membership here is ***not*** constitutionally protected, since he in fact knows of NAMBLA's stated aims and supports those (illegal) aims. But under the overbreadth doctrine, Robert is permitted to say, in effect, "The affidavit requirement would be unconstitutional if applied to (hypothetical) other people who merely belong to NAMBLA without supporting its criminal aims, so it should be struck down as facially invalid."

Under the requirement of ***"substantial*** overbreadth," the overbreadth doctrine would not be applied unless the invalid applications of the requirement are substantial compared to the legitimate applications. Here, however, this requirement of substantial overbreadth is probably satisfied, since quite a number of people are likely to belong to NAMBLA just to get information about the law and politics surrounding this question rather than to advocate or practice illegal man-boy sex. Therefore, Robert's overbreadth attack will probably succeed.

76. (a) That the statute is unconstitutionally vague.

(b) Yes, probably. A statute will be held void for vagueness if the conduct forbidden by it is so unclearly defined that a person of ordinary intelligence would not know what is forbidden.

Here, the statute uses the words "lewd or lascivious," but furnishes no further information about what type of conduct is being forbidden. A reasonable observer would probably be in doubt as to whether it is necessarily lewd for a woman to appear topless. Because of the ordinance's lack of specificity, undue dis-

cretion is given to local law enforcement officials, who depending on how they felt about Becky or toplessness generally could decide to look the other way rather than making an arrest. Therefore, while the city might be entitled to ban women from appearing topless in public if the ordinance specifically applied to toplessness, the formulation here is probably unconstitutionally vague.

IV. REGULATION OF CONTEXT — "TIME, PLACE AND MANNER"

A. Context regulations generally: Recall that the state is somewhat more free to regulate expression when it does so for reasons independent of the speech's communicative content (a "track two" situation) than where the regulation is motivated by the expression's content (the "track one" case). Or, to put it another way, the state is substantially freer when it acts in a ***content-neutral*** manner. This section discusses various factual settings in which the state has claimed (not always successfully) that it is merely regulating the ***"time, place and manner"*** of speech and is therefore entitled to "track two" analysis.

1. Rules for "track two" cases: In general, the Court has applied a ***balancing test*** to determine whether the government's interest in content-neutral regulation of speech-related conduct outweighs the speaker's (or his listeners') interest in a particular form of communicative activity. But in performing this balancing test, the Court in effect places a "thumb on the scale" on the side of free expression, to reflect the exceptional importance of such expression.

2. Disproportionate impact: In performing the balancing test, the court will take into account the extent to which the regulation "falls ***unevenly upon various groups*** in … society." Tribe, p. 980. For instance, the poor cannot generally afford television spots or full-page newspaper announcements; they must use cheaper means such as demonstrations, leafletting and door-to-door canvassing. Therefore, regulations which inhibit these economical forms of expression will be especially closely scrutinized because of their unequal impact.

3. Public forum: Speech in a ***"public forum"*** (defined *infra*, p. 532) may not be restricted, even in a content-neutral way, unless the restriction is a ***narrow one*** which is ***necessary*** to serve a ***significant governmental interest***. Tribe, p. 982. Thus citizens have in essence a ***"guaranteed access"*** to streets, parks and other public forums. See *Hague v. CIO*, 307 U.S. 496 (1939): "The privilege [to] use the streets and parks for communication of views on national questions may be regulated in the interest of all; [but] it must not, in the guise of regulation, be abridged or denied."

a. Mere inconvenience: This "guaranteed access" to public forums is implemented by several rules not applicable to non-public-forum situations. In a public forum context, ***mere inconvenience*** to the government will ***not suffice*** to outweigh the interest in public expression. Also, the government must use the ***least restrictive means*** of achieving its legitimate content-neutral objectives.

Example: Ordinances in several cities completely forbid distribution of leaflets. The cities claim that the bans are necessary to prevent littering.

Held, the flat bans violate the First Amendment. The objective of keeping the streets clean is insufficiently substantial to justify preventing a person with a right to be on a public street from giving literature to one who wants to receive it. Also, the

state's objective can be met by means which place less of a burden on the freedom of expression (e.g., punishing only those who actually litter). *Schneider v. State*, 308 U.S. 147 (1939).

b. Alternative places or times: Similarly, where a public forum is involved, the fact that the same message may be expressed by the speaker at a ***different place*** or time, or in a different manner, will not by itself suffice to validate a content-neutral restriction on the expression.

4. Non-public forum: By contrast, where the expression does ***not*** take place in a "public forum," the analysis depends on whether the regulation constitutes a ***substantial interference*** with communication. Here, the existence of alternatives is relevant — the availability of a different time, place, or manner for expressing the same message is likely to mean that the regulation's interference with speech is not substantial. If there is no substantial interference with expression, the state must merely show a ***rational justification*** for the regulation (assuming that it is content-neutral). Tribe, p. 982.

5. General rule for "time, place and manner" rules: Where a regulation is claimed to be a valid ***"time, place and manner"*** regulation, the Court now applies the following ***three-part test,*** which is essentially a ***"mid-level" of review.*** The regulation will not be valid unless it satisfies ***all*** of these these three requirements:

? It must be "justified without reference to the content of the regulated speech"; that is, it must be ***content-neutral*** (thus avoiding "track one" analysis);

? It must be ***"narrowly tailored"*** to serve a ***"significant*** governmental interest." (The requirement that the regulation be "narrowly tailored" to serve the interest means that it must be the case that the interest cannot be equally well-served by a means that is substantively less intrusive of First Amendment interests. See *Clark v. Community For Creative Non-Violence*, 468 U.S. 288 (1984));

? It must "***leave open alternative channels*** for communication of the information." *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981).

Note: The above test does not explicitly distinguish between speech which takes place in public forums and that which does not. However, the ***second*** and ***third*** of the above requirements are ***interpreted more stringently in the public forum situation***. As noted, "mere governmental convenience" (e.g., prevention of littering) is not treated as a "significant governmental interest" where a public forum is involved, and the availability of other public forums or other times for using the one at issue is not deemed to constitute "alternative channels."

a. Mid-level standard: As noted, this 3-part standard for time, place and manner regulations essentially amounts to a ***middle level of review:*** it will ***not*** almost-inevitably lead to an ***invalidation*** of the regulation (as ***strict scrutiny*** does), but at the same time it's a ***meaningful obstacle*** for the regulation (unlike "mere-rationality" review, used for things like reviewing most social-welfare and economic regulation). The mid-level standard also ***shifts the burden of proof to the government*** to defend the regulation, instead of placing it on the speaker to show why the regulation violates the speaker's First Amendment rights.

B. Requirement that means be "narrowly tailored" to the objective: As we noted above (*supra*, p. 544), any regulation of "time, place and manner" must not only serve a significant government interest, but must be ***"narrowly tailored"*** to achieving that interest. In fact, the issue of whether the regulation is sufficiently narrowly tailored tends to be the main battlefield on which litigants fight over the validity of time, place and manner regulations.[3]

1. Meaning of "narrowly tailored": What does it *mean* for a law regulating expression to be "narrowly tailored" to the achievement of a state interest? The answer is that the law ***must not "burden substantially more speech than is necessary*** to further the government's legitimate interests." *McCullen v. Coakley*, 573 U.S. __ (2014) (discussed in more detail *infra*, p. 515). So it's not fatal that the law forbids ***a bit more speech*** than would be strictly necessary to achieve the state's interest, but it can't be the case that the law blocks "***substantially"*** more speech than is necessary.

2. Restriction often fails: Time, place and manner restrictions are often found to ***fail*** this "narrowly tailored" prong of mid-level review. That's because government, while acting to combat a clearly-significant evil by content-neutral means, often through imprecise drafting ends up ***silencing substantially more speech*** than is really needed.

3. Use of social-networking sites by registered sex offenders: A good example of a time, place and manner law that the Court has struck down as being substantially more speech-restrictive than needed was the statute struck down in ***Packingham v. North Carolina***, 582 U.S. __ (2017). There, all eight justices who participated[4] agreed that a North Carolina law making it a felony for a ***registered sex offender*** to use a ***"commercial social networking Web site"*** was ***not narrowly tailored*** to the admittedly-important state interest in ***preventing sexual abuse of minors.***

a. The statute: The statute defined the concept of a "commercial social networking Web site" quite broadly. The Supreme Court found that such highly popular sites as ***Facebook, LinkedIn*** and ***Twitter*** would all fit within this definition, and would thus be off-limits to any registered sex offender.

i. P's conviction: P, as a 21-year-old college student, had sex with a 13-year-old-girl and was convicted of statutory rape. Eight years later, he logged into Facebook and posted a single message celebrating getting a traffic ticket dismissed. By virtue of this post alone, P was convicted of felony violation of the statute. He argued that the statute violated his freedom of expression, because it was not sufficiently narrowly-tailored to meet the state's goal of preventing sexual abuse of minors.

b. U.S. Supreme Court strikes the statute: The Supreme Court agreed with P: the statute was not sufficiently narrowly tailored to pass mid-level review. The majority opinion was by Justice Kennedy, who was joined by four other justices.

i. Mid-level scrutiny applied: Kennedy assumed, without deciding, that the statute was content-neutral and thus subject to intermediate scrutiny. Therefore, he noted, the law could survive only if it was ***"narrowly tailored*** to serve a ***significant*** gov-

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3. That's because there are many governmental interests that qualify as "significant," so the majority of interests asserted by government in support of any given time, place and manner regulation will satisfy the "significant interest" prong of middle-level review.

4. Justice Gorsuch did not participate, since he joined the Court after the case was argued.

ernment interest." And it would be found narrowly tailored only if it ***did not "burden substantially more speech than is necessary to further the government's legitimate interests"*** (quoting *McCullen v. Coakley*, discussed *infra*, p. 515).

ii. **Speech greatly burdened:** The bulk of Kennedy's opinion was devoted to estimating ***how extensively the statute burdened the speech*** of registered sex offenders like P. Kennedy found the burdens to be ***extreme:*** "the statute here enacts a prohibition ***unprecedented in the scope*** of ***First Amendment speech it burdens***."

(1) **Nature of Internet:** Kennedy commented on the ***First Amendment significance of the Internet generally.*** "Cyberspace," he said, today encompasses ***"the most important places (in a spacial sense) for the exchange of views[.]"***

(2) **Reach of social-media sites:** Furthermore, Kennedy said, users of what he called ***"Internet social networking services"*** — the type of services covered by the statute, like Facebook, LinkedIn or Twitter — "employ these websites to ***engage in a wide array*** of protected First Amendment activity on ***topics 'as diverse as human thought.' "***

(3) **Broad impact on expression:** Therefore, Kennedy said, the statute had a ***devastating impact on sex offenders:*** "North Carolina with one broad stroke ***bars access*** to what for many are the ***principal sources*** for ***knowing current events, checking ads for employment, speaking and listening in the modern public square,*** and otherwise ***exploring the vast realms of human thought and knowledge."***

iii. **Broader than necessary to achieve the desired benefit:** Kennedy then turned to the ***"benefit" side*** of the narrow-tailoring analysis. North Carolina asserted that its law fulfilled a "preventative purpose of ***keeping convicted sex offenders away from vulnerable victims."*** Kennedy concluded that the state had ***not met*** its "burden to show that ***this sweeping law is necessary or legitimate to serve that purpose."***

(1) **Narrower laws might survive:** But Kennedy indicated that a ***more narrowly-drawn prohibition,*** covering just *some* types of Internet access by registered sex offenders, might be narrowly-tailored enough to ***survive*** intermediate-level review. For instance, he said, the First Amendment probably permits a state to "prohibit a sex offender from engaging in conduct that ***often presages a sexual crime***, like ***contacting a minor*** or ***using a website to gather information about a minor***."

4. **State need not pick least-restrictive alternative:** Although a content-neutral regulation of "time, place and manner" must be ***"narrowly tailored"*** to serve an important governmental interest, the requirement of narrow tailoring does ***not*** mean that the state must choose the ***least-restrictive*** or least-intrusive means of achieving its objective. Instead, the state must merely avoid choosing means that are ***"substantially broader*** than necessary to achieve the government's interest." *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). In other words, the fact that an alternative method would have interfered somewhat less with expression while still fulfilling the government's objectives, is irrelevant — all that is required is that the means-end fit be ***fairly close***, not perfect.

Example: To cut down on complaints by citizens that rock concerts in the city's parks are too loud, New York City imposes a requirement that rock performers use only city-provided sound equipment and sound technicians.

Held, this requirement is a valid "time, place and manner" restriction. It's true that the city might have found a less-restrictive means of solving the loudness problem (e.g., by monitoring the performances and punishing performers who exceeded predefined sound limits). But the availability of less-restrictive means of regulating volume is irrelevant: since the means chosen by the city were not "*substantially* broader than necessary" to keep sound low, the requirement that the means be "narrowly tailored" to serve the government's interest is satisfied. *Ward v. Rock Against Racism, supra.*

C. "Leave open alternative channels" requirement: The third and final requirement for a "time, place and manner" regulation is that it "***leave open alternative channels*** for communication of the information." See *supra*, p. 507. Usually, a regulation that satisfies the other requirements (content-neutral, and narrowly tailored to serve a significant governmental interest) will also satisfy this final requirement. But occasionally, the requirement does turn out to make a difference. It is especially likely to do so where the government tries to foreclose an ***entire medium*** or ***method*** of communication, and the method is so easy-to-use or inexpensive that other channels simply are not substitutes.

1. **Use by individuals:** In general, the more a particular method is likely to be used by ***individuals*** who are trying to disseminate core political messages without spending a lot of money, the more likely the method is to be found so vital that its prohibition fails to leave open "alternative channels." Thus complete bans on ***handbills*** (see *supra*, p. 506) or on the display of ***homemade signs*** are likely to be struck down as not leaving open alternative channels.

   Example: The City of Ladue, Missouri generally prohibits "signs," and defines that term broadly. All residential signs are prohibited except for "identification signs" and "for sale" signs. P places an 8.5 x 11 inch sign in the second story window of her home, stating "For Peace in the Gulf." The city asserts that P's sign must come down, and defends its ordinance on the grounds that it is merely a "time, place and manner" regulation whose purpose is to minimize the visual clutter associated with signs.

   Held, for P. By forbidding residents from displaying virtually any "sign" on their property, the city "has almost completely foreclosed a venerable means of communication that is both unique and important." The city has not "[left] open ample alternative channels for communication. … Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute." Therefore, even though the city's ordinance may be content-neutral, and even assuming that the ordinance is narrowly tailored to serve a significant governmental interest, it unconstitutionally infringes P's free speech. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

D. Licensing: One way in which governments often attempt to regulate speech or expressive conduct is through ***licensing*** or ***permit*** requirements, by which official permission is required ***in advance*** of a public address, march, solicitation campaign, or other expressive activity.

1. **Multiple techniques:** The Court has used a number of techniques to ensure that such requirements will not stifle the freedom of expression:

   a. **Content-neutrality:** The government must apply the permit requirement in a ***content-neutral*** manner. If, for instance, a permit is required before any parade, the officials charged with granting or denying permit requests ***may not take into account the ideas or politics being espoused*** by the paraders. (Only if the content of the expression places it within an "unprotected category," such as "advocacy of imminent illegal activity," may this content be taken into account.)

      i. **Consequence:** Thus if the government wishes to have its advance-permit requirement sustained in a particular fact situation, it will almost certainly have to show either that the case belongs on "track two" rather than "track one," or that the speech's content falls into an unprotected category.

      ii. **Fee based on content of speech:** For example, the government almost certainly cannot charge a ***different fee*** for the license or permit, based on the content of the speech. In fact, the government may not vary the fee according to the ***costs of security*** that the government will bear in connection with the expression, because such costs will inevitably depend on the content of the speaker's message, and the hostility generated by that message. Cf. *Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992).

   b. **Excessive administrative discretion:** The grounds upon which a permit may be denied must be set forth ***specifically***, and ***narrowly***, in the ordinance. If the official charged with granting or denying permit applications is given ***too much discretion***, the ordinance will be voided for overbreadth, vagueness, or both (see *supra*, p. 498).

      Example: A municipal ordinance forbids the distribution anywhere within the town of "literature of any kind," unless a permit has first been obtained from the City Manager. D is convicted of violating the ordinance for distributing religious literature published by the Jehovah's Witnesses.

      Held, the ordinance is an unconstitutional violation of freedom of speech. It gives a censor's power to the City Manager, since his right to deny a permit is not tied to the avoidance of littering or disorderly conduct, or to regulation of time and place. Because the ordinance is void on its face (for what would today be called overbreadth), D was not required to seek the permit and then challenge its denial in court; she was free to disregard the permit requirement and to challenge the ordinance after her arrest. *Lovell v. Griffin*, 303 U.S. 444 (1938).

2. **Prior restraint:** One of the reasons the courts look with particular disfavor on permit requirements is that these amount to ***prior restraint*** on the freedom of speech. That is, in contrast to statutes which merely ***punish*** certain types of expressive conduct ***after*** they have occurred, the permit requirement, if enforced, prevents the expression from ever taking place at all.

   a. **Restraint of press:** The Court's hostility to prior restraints on free expression is even more noteworthy in the case of the ***press***. See, e.g., *Near v. Minnesota*, discussed *infra*, p. 628.

3. **General right of regulation:** However, if the statute or ordinance *does* adequately constrain administrative discretion, does require content-neutrality, and does have an adequate

means-end fit, it will be upheld if it is a ***reasonable means of ensuring that public order is maintained.***

Example: The Ds (Jehovah's Witnesses) are charged with holding a parade on public streets, in violation of a state statute that requires a permit before any "parade or procession" is held on a public street. The statute sets forth elaborate procedural requirements for the hearing of such permit requests. The Ds claim that the advance-permit requirement abridged their First Amendment rights.

Held, ordinance sustained (and the Ds' conviction affirmed), because: (1) the statute required ***content-neutrality*** in the issuance of permits; and (2) the Ds would, if they had applied for a permit, have had an unqualified right to a permit so long as their proposed parade was to be at a time and place where it would not unduly disturb public use of the streets. The government's interest in not having overlapping parades, and in having advance notice so as to be able to ensure proper policing, furnished adequate justification for the permit requirement. *Cox v. New Hampshire*, 312 U.S. 569 (1941).

E. Intrusive speakers vs. right to be left alone: One way in which the state has sometimes justified content-neutral regulations on expressive activity is by claiming that the would-be audience has an interest in ***not being forced to listen*** to the speaker's message. The Court has not been completely unsympathetic to this "right to be left alone." But it has generally held that it is ***up to the unwilling listener*** (or viewer) to ***avoid the undesired expression***, and that the state may not issue a blanket proclamation shielding both the willing and unwilling from the expression.

1. Loudspeakers: Thus the Court has carefully scrutinized restrictions on ***loudspeakers*** and ***soundtrucks***. Where such restrictions give ***uncontrolled discretion*** to local officials, they will be struck down (just like other types of overbroad or vague permit schemes, discussed above).

a. "Loud and raucous noises" prohibitable: But if administrative discretion is sufficiently restricted, and the statute is not overbroad or vague, regulation of amplification devices will be permitted, as a valid regulation of the "time, place and manner" of expression.

i. Loudspeakers: For instance, in *Kovacs v. Cooper*, 336 U.S. 77 (1949), the Court ***upheld*** a ban on all amplification devices operated in public places which emit ***"loud and raucous noises."*** The municipality's interest in avoiding distractions to traffic, and in protecting the "quiet and tranquility" of its inhabitants, was sufficient to justify the regulation, despite the "preferred position of freedom of speech." (It is not clear whether the logic of the majority opinion in *Kovacs* would allow a city to ban ***all*** public amplification devices, since it is not clear whether all such devices make "loud and raucous noises.")

ii. Regulating sound equipment: Similarly, the Court held that New York City could require that any musician performing in a public forum (the bandshell in Central Park) use city-provided sound-amplification equipment and sound technicians. The city had a significant governmental interest in protecting citizens from unduly loud sounds, and the regulation was not substantially broader than necessary to achieve that interest. *Ward v. Rock Against Racism* (other aspects of which are discussed *supra*, p. 509).

2. **The captive audience:** Whenever speech is directed towards a ***captive audience***, that is, one which ***cannot easily avoid exposure*** to the speech, this is a factor which the Court will weigh in favor of ***allowing restriction*** on that form of expression. A number of cases show how the presence of a captive audience is a factor making the Court more willing than usual to allow restrictions on expression:

   a. **Print advertising on city buses:** For instance, in *Lehman v. Shaker Heights*, 418 U.S. 298 (1974), the Court upheld restrictions on some but not all types of print advertising on city-owned buses. The Court held that the fact that commercial advertising was accepted did not give political candidates a right to have *their* advertising accepted; the majority relied in part upon the city's interest in limiting access so as to reduce "the risk of imposing upon the captive audience."

   b. **Picketing in front of residence:** Similarly, the Court has held that a municipality may ban all ***picketing*** in front of a ***particular residence***, in order to protect the inhabitants of that house from hearing or seeing unwanted messages. *Frisby v. Schultz*, 487 U.S. 474 (1988), also discussed *infra*, p. 534.

   c. **Women visiting abortion clinics:** Finally, ***women*** who are ***visiting abortion clinics*** or other health-care offices can get some protection from unwanted expression. See, e.g., *Hill v. Colorado*, 530 U.S. 703 (2000) (*held*, a state may create a 100-foot ***"buffer zone"*** around the entrance to any health-care facility, in which no one may make an unwanted approach to within eight feet of another person in order to counsel that person, pass out a leaflet, or picket).

   d. **No general rule:** But don't think that the Court has adopted a broad rule that the public has an absolute ***"right to be left alone,"*** even in special contexts like the entrances to abortion clinics. For instance, the Court has struck down, post-*Hill*, a statute that completely prohibited unauthorized persons from being present in a 35-foot buffer zone around abortion-clinic entrances. See *McCullen v. Coakley*, *infra*, p. 515. So even in the abortion context, it is clear that citizens in public places must tolerate some unwanted messages — government may prevent ***"harassment,"*** but it ***may not forbid or restrict the delivery of all or some messages in advance*** even if government correctly believes that most of the recipients would find the messages unwelcome.

F. **Canvassing and soliciting:** The interest in being left alone also plays a role in the case law on ***canvassers and solicitors***. Here, too, however, this interest has been merely one factor in the balancing of society's interest in regulating the form of expression against the speaker's interest in unrestrained communication.

   1. **Significance of place:** The ***place*** in which the canvassing or solicitation occurs is important; the Court has granted greater weight to the rights of canvassers and solicitors in ***public places*** than at ***private residences*** (though even as to the latter, access may not be completely cut off by a blanket ban).

   2. **Mailboxes:** The Court's concern with the sanctity of the home has led it to be sympathetic to legislative acts which restrict access to ***home mailboxes.***

      a. **Homeowner's right to block receipt:** Thus a congressional provision allowing a homeowner who has received what he (in his sole judgment) believes to be "erotically arousing or sexually provocative" material to obtain a post office order requiring the mailer to remove the homeowner's name from its mailing lists, was upheld in *Rowan*

v. Post Office Dept., 397 U.S. 728 (1970). The Court found that "[t]he right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." Whatever rules might apply outside the home, "[a] mailer's right to communicate ***must stop at the mailbox*** of an unreceptive addressee."

b. Not public forum: The mailer's "right of access" to home mailboxes was further undermined when the Court upheld a federal statute which prohibited depositing ***unstamped materials in home mailboxes,*** in *U.S. Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114 (1981). There, several civic groups argued that they had a constitutional right to deliver messages to local residents by placing unstamped pamphlets and notices in such mailboxes. But the Court held that ***home mailboxes do not constitute a "public forum,"*** even though they are in effect controlled by the government; therefore, any reasonable, content-neutral, regulation of their use was permissible.

3. Personal visits at home: Those who wish to solicit or canvass by making ***personal visits*** to homes have received substantial First Amendment protection from the Court, notwithstanding the homeowner's interest in being left alone. In general, the Court has taken the view that ***it is up to homeowner himself to indicate his desire to be left alone*** (in which event the state may enforce that desire); the state may not simply ***assume*** that all homeowners wish to be undisturbed.

Example: An ordinance prohibits anyone from distributing handbills to residents by either ringing their doorbell or otherwise calling them to the door. (Nor is there any way to get a permit that would allow this.) The town defends this prohibition on privacy grounds. *Held*, this flat ban on canvassing is unconstitutional, because less restrictive alternatives are available (e.g., letting a homeowner post a no-soliciting sign, and then making it an offense for anyone to ring the bell of such a person). *Martin v. Struthers*, 319 U.S. 141 (1943).

4. Heightened scrutiny: Even where an ordinance regulating canvassing is written in a way that does not give officials undue discretion, it will not pass constitutional muster if it: (1) directly and substantially impairs protected First Amendment expression; and (2) is not substantially related to achievement of a ***"strong, subordinating interest."*** This two-part test was applied to invalidate an ordinance barring door-to-door or in-the-street solicitation by charitable organizations that do not use at least 75% of their receipts for "charitable purposes" (defined to exclude overhead and solicitation expenses). *Schaumburg v. Citizens For Better Environment*, 444 U.S. 620 (1980).

5. Solicitation in public places: Where canvassing or solicitation occurs in ***public places***, essentially the same constitutional standards apply as in the door-to-door situation. That is, the regulation must be content-neutral, and authorities may not be given excessive discretion in determining who may solicit, or in what manner. Reasonable "time, place and manner" regulations which satisfy both of these requirements will be upheld, so long as they serve a ***significant governmental interest*** and ***leave open ample alternative channels*** for communicating the same information.

a. Less judicial tolerance: But since the "governmental interest" and "alternative channel" factors inevitably involve a kind of balancing, the Court has been ***less tolerant*** of regulations on solicitation done in public forums than in the door-to-door situation (where the governmental interest in having citizens be left alone is stronger).

G. Protest and persuasion on public property outside of abortion clinics: The interest in being left alone frequently arises in the context of ***abortion clinics***. Opponents of legalized abortion frequently seek to ***picket*** on public streets and sidewalks around the entrance to such clinics, and from there attempt to ***persuade*** women approaching the clinic entrance that they should reconsider getting abortions. In general, the Supreme Court has been quite ***protective of the free-speech rights of abortion protesters*** in this public-forum scenario, in the face of government regulations that claim to protect the interest of clinic patrons to be free of unwanted communications.

1. Summary: The Court has not denied government *all* tools to prevent harassment and unwanted communications outside abortion clinics. For instance, the Court has held that government may ensure that the entrance is ***not physically blocked***, and that no patron is ***harassed***. But the Court has ***struck down*** government attempts to establish sizable ***"buffer zones"*** around clinic entrances, within which no sort of speech is permitted. And the Court has done this even where it is convinced that government is attempting to act in a content-neutral way (by proscribing *all* speech, regardless of the viewpoint expressed, in the buffer zone).

2. *McCullen* case: The most important case illustrating the Court's protection of the expressive rights of abortion opponents on public property is a 2014 decision, ***McCullen v. Coakley***, 134 S.Ct. 2518 (2014), involving a Massachusetts attempt to create a buffer zone around abortion clinics.

a. Facts: A 2007 Massachusetts statute made it a crime for any person knowingly to ***stand*** on a "public or sidewalk" ***within 35 feet*** of an entrance or doorway to any place (other than a hospital) at which abortions are performed. The Ps in *McCullen* were abortion opponents who wished to "approach and talk to women outside such facilities," in the hopes of dissuading them from having abortions. The statute meant that the Ps could not make such an approach to any woman within 35 feet of a clinic entrance, even if the woman being approached gave no indication that she would find the approach unwelcome.

i. Broader than prior law: Massachusetts enacted the 2007 statute after a more narrowly-drafted 2000 statute (imposing an 18-foot buffer) had failed to curtail what the state characterized as a history of harassment and violence outside abortion clinics in the state.

b. Unanimously struck down: The Supreme Court ***unanimously struck down*** the newer statute as a violation of the abortion opponents' free-speech rights. In an opinion by Chief Justice Roberts, the Court found that ***even though the statute was content-neutral,***[5] the statute ***forbade more speech than necessary,*** and therefore violated the Court's rules on content-neutral time-place-and-manner regulation.

i. Statement of level of review: Roberts began by stating the familiar rule that ***mid-level review*** is to be given to content-neutral time-place-and-manner regulations substantially affecting traditional public fora like streets and sidewalks, which have a "special position" in terms of First Amendment protection. He continued, "[G]overnment's ability to restrict speech in such locations is ***'very limited.'*** "

5. As was discussed *supra*, p. 487, four members of the Court disagreed with Roberts' finding of content-neutrality.

Even if the government regulation is content-neutral, it must be ***"narrowly tailored to serve a significant governmental interest."*** And for a time-place-or-manner regulation to qualify as narrowly tailored, it must ***not "burden substantially more speech than is necessary to further the government's legitimate interests."***

ii. **Buffer zones aren't narrowly tailored:** It was clear to Roberts (and indeed, to *every* member of the Court) that the Massachusetts statute ***wasn't sufficiently narrowly tailored*** — that it burdened substantially more speech than necessary to achieve the various interests cited by the state. These interests included "ensuring ***public safety*** outside abortion clinics, preventing ***harassment and intimidation*** of patients and clinic staff, and combating deliberate ***obstruction*** of clinic entrances." But, Roberts said, the state had numerous ***other means available to it*** to accomplish these objectives.

(1) **Other methods available:** For instance, the statute itself already had a provision making it a separate offense to ***block another person from entering or exiting*** an abortion clinic. And if more protection was needed, the legislature was free to follow federal law and make it a crime to intimidate or interfere with anyone to prevent them from obtaining "reproductive health services."

H. The hostile audience and "fighting words": One of the "unprotected categories" of speech consists of so-called ***"fighting words,"*** that is, words which are likely to make the person to whom they are addressed ***commit an act of violence*** (probably against the speaker). "Fighting words" receive no First Amendment protection, because, like other unprotected categories (e.g., defamation, obscenity, etc.) they are not normally part of any "dialogue" or "exposition of ideas." But the Supreme Court today keeps this exclusion within tightly circumscribed bounds.

1. ***Chaplinsky:*** The "fighting words" doctrine originated in ***Chaplinsky v. New Hampshire***, 315 U.S. 568 (1942).

a. Facts: The defendant in *Chaplinsky* was a Jehovah's Witness who called the city marshall a "goddamned racketeer" and "a damned fascist," and then got into a fight with him on the sidewalk. He was convicted under a broadly-worded statute, which provided that "no person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place … " But the New Hampshire Supreme Court had interpreted the statute to bar only "words ***likely to cause an average addressee to fight."***

b. Conviction upheld: The conviction was ***upheld***. The Supreme Court believed that the defendant's words were indeed ones which would ***likely provoke the average person to retaliate***. It then held that among the classes of speech which are not protected by the First Amendment are "fighting words," which the Court defined as "those which by their very utterance ***inflict injury*** or ***tend to incite an immediate breach of the peace***." Such words are "***no essential part of any exposition of ideas***, and are of such ***slight social value as a step to truth*** that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

c. Two branches: Observe that this *Chaplinsky* formulation defines "fighting words" quite broadly — in addition to words which are likely to incite an immediate fight, words are also included which "inflict injury." Here, we are concerned only with words likely to provoke a fight or other breach of the peace.

2. **Limitations on doctrine:** The Court realized, soon after *Chaplinsky*, that giving a broad scope to the "fighting words" doctrine would lead to the swallowing up of important First Amendment protections. Therefore, the Court has ***limited*** the "fighting words" doctrine in a number of ways.

   a. **"Stirring to anger" not enough:** To constitute "fighting words," it is not enough that the speaker's words ***make the listeners angry; incitement to violence*** (whether or not the violence actually ensues) is required. For instance, in *Terminiello v. Chicago*, 337 U.S. 1 (1949), D made a race-baiting speech, which attracted an angry crowd; the speaker then denounced the crowd as "snakes" and "slimy scum." The Supreme Court reversed D's conviction under a breach-of-the-peace statute which the trial court had interpreted to include speech which "stirs the public to ***anger*** [or] ***invites dispute***," as well as speech which creates a disturbance.

      i. **Rationale:** The Supreme Court reasoned that speech which "stirs the audience to anger" or "invites dispute" is ***protected*** under the First Amendment and that, in fact, ***the most valuable expression may well be that which, because it is provocative and challenging, produces these emotions***. Therefore, the statute (as interpreted by the trial judge) was ***overbroad*** on its face; D's conviction had to be reversed, regardless of whether ***his actual words*** could have been made criminal under a more narrowly-drawn statute covering only words likely to incite violence.

   b. **Crowd-control required:** Wherever the police have the physical ability to ***control the angry crowd*** as a means of preventing threatened violence, they ***must do so*** in preference to arresting the speaker for using "fighting words." For instance, in *Cox v. Louisiana*, 379 U.S. 536 (1965), 2,000 civil rights demonstrators picketed a courthouse; about 75 policemen separated the demonstrators from 100-300 whites gathered on the other side of the street. The Court, in reversing the breach of peace conviction of the demonstration's leader, rejected the state's claim that the conviction was justified because "violence was about to erupt" — the Court relied in part on the fact that the police could have "handled the crowd."

      i. **"Heckler's veto":** Observe that a contrary rule, allowing the police to silence a speaker whenever the audience threatens violence, would legitimate what has been called the ***"heckler's veto."*** That is, members of the audience would gain the right to silence any speaker with whose ideas they did not agree.

   c. **Mere dislike of speaker's identity not sufficient:** If it is the ***mere identity*** or lawful acts of the speaker or demonstrator, ***not his threatening words or actions***, which lead the police to believe that violence is imminent, the "fighting words" doctrine may ***not*** be applied.

      i. **Civil rights sit-ins:** For instance, in several breach-of-peace cases involving civil rights sit-ins of segregated facilities, the state was able to justify its fear of imminent violence only by asserting that the ***mere fact that blacks were using segregated facilities*** made whites likely to attack them. Even if this anticipation of whites' response was accurate, it was constitutionally irrelevant, since the blacks' use of these facilities was not evidence of any crime. See *Garner v. Louisiana*, 368 U.S. 157 (1961). See also Tribe, p. 854.

3. **Doctrine sometimes applicable:** But these *are* occasional situations in which none of these exceptions or limitations applies, and the "fighting words" doctrine is applicable. These will be those situations in which "imminent spectator violence cannot be satisfactorily prevented or curbed by means of crowd control techniques, and … the speech itself is the apparent cause of the impending disorder." Tribe p. 855.

   a. ***Feiner:*** The last true "fighting words" conviction sustained by the Court was in ***Feiner v. New York***, 340 U.S. 315 (1951).

      i. **Facts:** D, a left-wing college student, made a street-corner speech in which he called President Truman a "bum" and the American Legion a "Nazi Gestapo," and said that blacks should "rise up in arms and fight for [legal rights]." One member of the racially-mixed crowd said that if the police did not get that "son of a bitch" off the stand he would do it himself. D refused to heed requests from the police to stop speaking, and was then arrested for disorderly conduct.

      ii. **Conviction upheld:** A majority of the Court believed that D's conduct constituted ***incitement to riot***, and that his arrest was motivated by the police's legitimate desire to prevent a fight, not by disagreement with the content of D's message. The Court conceded that "the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker," but implied that the crowd response here went beyond that. Therefore, the Court ***upheld*** D's conviction.

      iii. **Black's dissent:** But Justice Black dissented, disagreeing with the majority's view of both the facts and the law. As a factual matter, he did not agree that violence was imminent; he believed that D had in reality been arrested and convicted for the unpopularity of his views, not the tendency of his speech to induce violence. He also believed, as a legal principle, that the police must, before interfering with a lawful speaker, make "***all reasonable efforts to protect him … even to the extent of arresting the man who threatened to interfere***." (Black believed that the majority's opinion implied that there was no such requirement.)

      iv. ***Feiner* to be read narrowly:** However, the present Court would probably construe *Feiner* quite ***narrowly***, and it is not at all clear that the case would be decided the same way if it arose today. In particular, the Court is probably less inclined to accept the police's self-justifying rationales for their action ("We didn't think we could control the crowd.") See Tribe, p. 855.

4. **Relation to "clear and present danger":** The problem of "fighting words" is similar to, and in some ways a subset of, the problem of advocacy of illegal conduct (*supra*, p. 489). Just as under *Brandenburg, supra*, p. 495, only speech which is intended to advocate ***imminent*** lawless action, and which is in fact ***likely*** to result in such action, may be punished, so only those words which are likely to result in violence that cannot be prevented in any other way (e.g., by controlling the crowd) will be preventable or punishable under the "fighting words" doctrine.

   a. **Perhaps no longer valid:** This requirement of imminent unpreventable violence is so strict that many commentators doubt that the fighting words doctrine has much real practical value today. For instance, it is probably the case that there are no words which by themselves are "automatically" fighting words — each utterance has to be evaluated ***in context*** to determine whether there were actual listeners who were likely

to resort to violence. This, coupled with the fact that no regulation has been upheld under the fighting words exception since *Feiner* in 1951, may render the doctrine largely irrelevant.

I. Offensive words and the sensitive audience: A related issue is whether the government may prevent or punish words which listeners will find ***offensive***, even though these words are not likely to lead to actual violence. In general, the Court has ***not*** allowed government to suppress speech or expressive conduct on the grounds that others would find it "offensive," at least where matters of ***public interest*** rather than purely private interests are at stake.

1. Foul language: Most of the cases involving "offensive language" have focused upon ***profanity***. Generally, the Court has held that statements ***may not be punished merely because they are profane*** and are therefore offensive to their listeners. These cases, even though they involve "four-letter-words" with a sexual connotation, must be sharply distinguished from speech that is "obscene"; here, we deal with statements whose tone is ***not erotic***, so that the law of obscenity is irrelevant.

a. ***Cohen v. California:*** The most important case involving the state's right to ban offensive language of the profane sort is ***Cohen v. California***, 403 U.S. 15 (1971). The case stands basically for the proposition that ***profane, offensive language is nonetheless First Amendment speech***, and may not be suppressed under the guise of regulating the "manner" of speech.

i. Facts: Cohen wore a jacket bearing the legend "Fuck the Draft" in a corridor of the Los Angeles County Courthouse, where women and children were present. He was convicted of violating a statute prohibiting the intentional "disturb[ing] the peace or quiet of any … person [by] offensive conduct."

ii. Conviction reversed: The Court, in a classic opinion by Justice Harlan, ***reversed the conviction*** on First Amendment grounds. In so doing, Harlan rejected a number of arguments advanced by the state.

iii. Not obscene: Harlan found that the legend on the jacket was ***not obscene***. An expression is obscene only if it is "in some significant way, erotic." No erotic "psychic stimulation" could reasonably have been expected to result when anybody read the jacket.

iv. Not "captive audience": The state claimed that *Cohen's* message had been "thrust upon unwilling or unsuspecting viewers," and that the state had the power to protect such ***"captive audiences"*** from offensive language. But Harlan's opinion took a narrow view of what constitutes a true "captive audience." Those in the courthouse could have "avoid[ed] further bombardment of their senses simply by ***averting their eyes***."

v. Right to purge offensive language: Lastly, Harlan rejected the state's most general claim, that it had the right to ban certain expletives in order to "maintain what [officials] regard as a ***suitable level of discourse*** within the body politic." He stressed that the First Amendment's general function is to ***"remove governmental restraints for the arena of public discussion."*** Only where speech falls within relatively narrow pre-established categories may government regulate its form or content; none of these exceptions was applicable here. But Harlan also found more

specific reasons for finding that the state could not ban expressions like Cohen's from public discourse:

(1) No stopping point: First, there was no principled way to distinguish "fuck" from other words. Yet the state clearly did not have the right to "cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." The preferable constitutional result was simply to ***leave matters of "taste and style" to the individual***, especially since "[o]ne man's vulgarity is another's lyric."

(2) Emotional content: Secondly, this was not simply a situation in which Cohen chose vulgar words to express an idea that could have been equally well expressed by more polite language. The language chosen by Cohen, like much expression, conveyed not only an intellectual idea, but also ***"otherwise inexpressible emotions."*** The Constitution protects this ***"emotive function"*** of speech just as much as the cognitive content of expression.

(3) Smokescreen for censorship: Finally, governments might often ban particular words as a ***smokescreen*** for banning the ***expression of unpopular views***. "One [cannot] forbid particular words without also running a substantial risk of suppressing ideas in the process."

2. Emotionally hurtful speech: A second important category of speech that is entitled to full First Amendment protection even though offensive is speech that is ***emotionally hurtful*** to the listener. No matter how much psychic pain the speech inflicts — indeed, is *intended* to inflict — on the listener, the speech gets ***full First Amendment protection***, as long as

[1] The speech is on a matter of ***public*** (not purely private) ***interest***; and

[2] The pain comes from the ***content*** of the message (i.e., the attempted state regulation is "content-based" as discussed *supra*, p. 477).

A 2011 case striking down a state's right to allow recovery for speech that under state law constituted ***intentional infliction of emotional distress*** (IIED) is the leading illustration of this principle. That case, which upheld the First Amendment right of picketers to use hateful speech to attack the character of a dead soldier at his funeral, is ***Snyder v. Phelps***, 131 S.Ct. 1207 (2011).

a. Facts: The speakers in *Snyder* were members of a small church, the Westboro Baptish Church of Topeka, Kansas, founded in 1955 by Fred Phelps and still run by him and his family in the 2000s, when the events in the suit took place. The church members' core belief was that God hates homosexuality and hates (and punishes) the U.S. military for tolerating homosexuality.

i. Protest strategy: The church members' main First Amendment activity has long been to picket military funerals. *Snyder* grew out of one such picketing session, in which the church members carried hateful signs on public land adjacent to the Maryland funeral of a Marine Lance Colonel killed in Iraq, Matthew Snyder. Matthew's father, Albert Snyder, saw the signs on a TV broadcast after the funeral and became severely distressed at their content. He brought a federal-court diversity action based on substantive Maryland law for the tort of IIED. He ultimately

obtained a civil judgment for $4 million in combined compensatory and punitive damages against the church members. The issue was whether that — or indeed any — civil judgment could be enforced without violating the church members' First Amendment rights. (The Supreme Court's answer turned out to be a very clear "no," as we'll see.)

(1) Hateful signs: The picketers at the Snyder funeral carried signs with messages like "God Hates the USA/Thank God for 9/11," "God hates fags," and "Thank God for Dead Soldiers." The picketers' message was apparently that Matthew and other soldiers had been killed in combat because God wanted to punish the United States for tolerating homosexuality. Some viewers seem to have assumed that the picketers were saying that Matthew was himself gay; in any event, Matthew was not in fact gay.

(2) On public property: A key aspect of the case was that the protest took place entirely on a small plot of ***public land adjacent*** to a public street. Picketing took place 1,000 feet from the church where the funeral was held; none of the church members ever entered the church or the cemetary, or in any way interfered with the funeral.

b. The Ds win: In an opinion by Chief Justice Roberts that seven members of the Court (all but Alito) joined, the Court held that allowing Matthew's father Albert to recover any damages at all would be a ***violation*** of the Ds' First Amendment right to ***speak freely on a matter of public interest.***

i. The test: Roberts began by saying that whether the First Amendment prohibited holding the church members liable for their speech "turns largely on whether the speech is of ***public*** or ***private*** concern." Speech on matters of "***public*** concern" is "at the ***heart*** of the First Amendment's protection" and "occupies the ***highest rung*** of the hierarchy of First Amendment values [making it] entitled to special protection." By contrast, if the speech involved solely a "***purely private*** matter," it would ***"not implicate the same constitutional concerns"*** because there would be "no potential ***interference with a meaningful dialogue of ideas."***

ii. Public concern: Roberts then quickly concluded that the speech here was indeed on a matter of ***public*** concern. Speech involves a matter of public concern when it either (1) "can be fairly considered as relating to ***any matter of political, social, or other concerns to the community,***" or (2) "is a subject of ***legitimate news interest.***" The fact that the statement is "inappropriate or controversial" is ***irrelevant*** to the question of whether it involves a matter of public concern. The messages on the picket signs here "may fall short of refined social or political commentary" but those messages were clearly designed to ***speak on a broad public issue***, and indeed, to reach as broad a public audience as possible.

iii. Content-based rather than content-neutral: Roberts was also in no doubt about whether the governmental regulation here (namely, the availability of a ***tort recovery*** under state law) was of the forbidden ***content-based*** variety rather than an easier-to-justify ***content-neutral*** "time, place and manner" regulation. Maryland *could* indeed have imposed some content-neutral time, place and manner regulation, such as prohibiting picketing within a specified short distance of a funeral service or procession.

(1) **Content-based jury deliberations:** But that isn't what happened here: the substantive tort law of Maryland gave the jury the right to allow recovery for ***"outrageousness,"*** a concept that has an ***"inherent subjectiveness about it"*** that would make the jury ***"unlikely to be neutral with respect to the content of the speech."***

c. Alito dissent: The sole member of the Court to believe that the First Amendment did not bar Albert Snyder from recovering was Justice Alito, who dissented. He believed that notwithstanding the First Amendment, any speaker ***may not "intentionally inflict[] severe emotional injury on private persons*** at a time of intense emotional sensitivity by launching ***vicious verbal attacks*** that make no contribution to public debate."

d. Nazi-Skokie dispute: Before *Snyder*, the leading case showing that speech may not be banned merely because it is emotionally hurtful was a federal Court of Appeals case involving plans by an American Nazi group to demonstrate in front of the Skokie, Illinois Village Hall. Skokie is a predominantly-Jewish community, and about 5,000 of its residents were survivors of the concentration camps. When the village learned of the Nazis' demonstration plans, it passed an ordinance to ban the demonstration.

i. **March could not be banned:** But the Seventh Circuit explicitly ***rejected*** the argument that the village had the right to prevent a substantive evil, the "infliction of psychic trauma on resident Holocaust survivors." *Collins v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

(1) **Rationale:** The court in *Collins* agreed that the demonstration might be shocking to the village's residents. But any shock effect would be due to the ***content of the ideas expressed***, and "public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."

3. Strict scrutiny to be used: If the state *does* want to regulate speech on the grounds of its offensive content, the courts will use ***strict scrutiny*** to review the regulation, and the regulation will ***virtually never survive that strict scrutiny.***

a. *Snyder v. Phelps*: *Snyder v. Phelps, supra*, illustrates this — once the Supreme Court determined there that allowing a recovery for intentional infliction of emotional distress constituted a form of content-based regulation of speech related to a public issue, the reversal was virtually automatic.

b. Offensive trademarks (*Matal*): A 2017 case involving ***federal trademarks*** similarly illustrates that government attempts to silence offensive speech will be ***strictly scrutinized,*** and almost always struck down. In *Matal v. Tam,* 137 S.Ct. 1744 (2017) (also discussed *supra*, p. 481 and *infra*, p. 569), the federal trademark registration statute contained a "disparagement clause," under which the Patent and Trademark Office (PTO) was told to disallow the registration of any trademark that "may ***disparage ... or bring ... into contempt"*** any "persons, living or dead, institutions, beliefs, or national symbols[.]" Under PTO regulations, a mark would be denied registration if the PTO examiner found that it was "disparaging to a substantial composite of the referenced group."

i. **Rationale:** All eight Justices who participated in *Matal* agreed that denying registration to any trademark that would be "offensive to a substantial percentage of

the members of any group" ***constituted viewpoint discrimination.*** And all agreed that the viewpoint discrimination here violated the Ps' freedom of expression.

J. Regulation of "hate speech": As we just saw, government may generally not prevent or punish words on the grounds that listeners will find them hurtful or otherwise offensive. Groups interested in eliminating discrimination against ***minorities*** have argued that an exception should be made for ***"hate speech"*** directed against racial minorities, women, homosexuals, and other traditionally disfavored groups. State legislatures have generally agreed — all but four states have some form of "hate crime" law criminalizing bias-motivated speech or acts.

However, if government ***singles out bias-motivated speech***, criminalizing it while not criminalizing other types of angry speech, the government can properly be accused of acting in a forbidden ***content-based*** rather than content-neutral way. In a series of three cases since 1992, the Supreme Court has tried to lay out some rules for when government may single out hate speech and punish it specially. Two of the three cases have involved ***cross burning***, a particular form of hate speech that has a long history of expressing racial hatred (and, often, of preceding racial violence).

1. Three rules: These three cases stand for the following main propositions, which represent a general rule about what the state may not ban, and three exceptions to that major rule:

? **General ban:** A ban on speech or conduct intended or likely to incite anger or violence based solely on ***particular listed topics or motives*** — such as race, color, religion or gender hatred — is ***impermissibly content-based.*** That's true even if all the speech/conduct banned falls within an ***"unprotected"*** category such as, here, ***"fighting words."*** (See *R.A.V.*, *infra*.)

? **Worst examples:** However, a state ***may*** impose a content-based ban on ***particular instances*** of unprotected speech if the ban forbids ***only the very worst examples*** illustrating ***the very reason the particular class of speech is unprotected.*** (Thus the state may choose to criminalize just the very most dangerous "fighting words," the very most obscene obscene images, etc.) (*R.A.V.*)

? **Penalty-enhancement statutes:** Also, a state may identify particular generally-applicable criminal proscriptions, and may then choose to punish ***more severely*** those criminal acts that happen to be motivated by hate than those not motivated by hate. This is called the ***"penalty enhancement"*** approach. For instance, from within the overall class of acts that constitute criminal vandalism or arson, the state may punish vandalism or arson more seriously if it's motivated by bias against particular groups. (*Wisconsin v. Mitchell*, *infra*, p. 526.)

? **All intimidating acts:** Finally, a state may select a particular type of expressive act (e.g., cross-burning), and punish ***all instances*** where that act is done with a purpose of ***intimidating or threatening*** someone, even though the state doesn't punish other types of intimidating or threatening acts. (*Virginia v. Black*, *infra*, p. 526.)

2. The general principle of *R.A.V. v. St. Paul*: The first of this trio of Supreme Court cases on hate-speech was ***R.A.V. v. City of St. Paul***, 505 U.S. 377 (1992). The case involved a ***cross-burning***, but seems applicable to anti-hate-speech laws in general.

a. Facts: In *R.A.V.*, D and several other teenagers allegedly burned a homemade cross inside the fenced yard of a black family that lived across the street from D; the incident took place in the middle of the night. D was prosecuted under the St. Paul "Bias-Motivated Crime Ordinance," which provided that "whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of ***race, color, creed, religion or gender*** commits disorderly conduct and shall be guilty of a misdemeanor." D contended that the ordinance violated the First Amendment in two respects: (1) it was substantially overbroad; and (2) it was impermissibly content-based.

b. Court agrees: The Court unanimously agreed that the ordinance, on its face, violated the First Amendment. However, the Court was bitterly split, 5-4, on the proper rationale.

c. Opinion of the Court: Justice Scalia, joined by four other Justices (Rehnquist, Kennedy, Souter and Thomas), wrote the opinion for the Court. Scalia concluded that the law was ***impermissibly content-based***, because "it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."

i. Only applicable to "fighting words": The Minnesota Supreme Court, in construing the ordinance, had concluded that it was intended to apply only to ***"fighting words"*** (see *supra*, p. 516), not to bias speech that would not threaten an immediate breach of the peace. Scalia believed that he had no choice but to accept the Minnesota court's construction of the statute.

ii. No content-based regulation of unprotected categories: The Supreme Court had previously held, as noted (see *supra*, p. 516) that fighting words are an "unprotected category" under the First Amendment. But Scalia's opinion asserted that ***even when government is regulating a supposedly "unprotected" category, it may not do so in a content-based manner***.

(1) Examples: Scalia gave two examples of what he considered to be impermissibly content-based regulations of "unprotected" categories: The government may proscribe libel, but it may not make the further content discrimination of proscribing ***only*** libel critical of the government. Similarly, a city council may not enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government.

iii. Ordinance unconstitutional: By Scalia's standard, the St. Paul ordinance was clearly ***unconstitutional***, even though applicable only to generally-unprotected "fighting words." The ordinance was certainly content-based, because it applied only to fighting words that insult or provoke violence "on the basis of ***race, color, creed, religion or gender***" — abusive language, no matter how vicious or severe, was permitted under the ordinance unless it was addressed to one of the ***"specified disfavored topics"***; fighting words used to express hostility based on political affiliation, union membership or homosexuality, for instance, were not covered by the ordinance.

(1) Viewpoint based: In fact, Scalia said, the ordinance was not only content-based but "***viewpoint*** based." That is, where two opposing sides had a confrontation concerning a matter of race or religion, one side could use fighting words while the other could not. "One could hold up a sign saying, for example, that all 'anti-catholic bigots' are misbegotten; but not that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.' " St. Paul has no authority, Scalia asserted, "to license one side of a debate to fight free-style, while requiring the other to follow Marquis of Queensbury Rules."

iv. Remedy: Proponents of the ordinance argued that even if it was content-based, it could survive the strict scrutiny given to content-based regulations because it was necessary to serve a compelling state interest. Scalia conceded that the state had a compelling interest in safeguarding the rights of traditionally-disfavored groups, including their right to live in peace where they wish. But he argued that the ordinance was not ***"necessary"*** to achieve this state interest, because there were ***"adequate content-neutral alternatives."*** In particular, St. Paul could enact an ordinance prohibiting *all* fighting words, not merely fighting words motivated by racial, religious or other specifically-enumerated biases. To Scalia, burning a cross in someone's front yard is "reprehensible," but St. Paul had "sufficient means at its disposal to prevent such behaviour without adding the First Amendment to the fire."

d. Concurrence: The main concurrence in *R.A.V.* (by Justice White, joined by Blackmun, O'Connor and, in most respects, Stevens) read more like a dissent.

i. Unprotected categories: Justice White believed that where a category is "unprotected," the states are ***not*** prevented from regulating it on the basis of content. "It is inconsistent to hold that the government may proscribe an ***entire category*** of speech because the content of that speech is evil … but that the government may not treat a ***subset of that category differently*** without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection."

(1) Overbreadth: But White nonetheless agreed with the result in the case. White believed that the case should instead have been decided on ***overbreadth*** grounds. He interpreted the Minnesota court to have ruled that the ordinance prohibited expression that "by its very utterance" causes "anger, alarm or resentment." By this interpretation, the ordinance reached not only words tending to incite an immediate breach of the peace (words which may constitutionally be proscribed), but also words and expressive conduct that cause ***only*** hurt feelings, offense, or resentment (words and conduct which may not be constitutionally proscribed). Since the ordinance reached both protected and unprotected speech, it was ***overbroad***, and thus invalid.

3. Enhancement-of-penalty statutes: The Court's approach in *R.A.V.* invalidates many anti-hate crime statutes that, like St. Paul's, define certain activities as a ***new, separate, crime***.

a. Enhancement-of-penalty statutes may be valid: But *R.A.V.* does ***not invalidate*** statutes that approach the hate-speech problem in a quite different way: these statutes pun-

ish ***existing crimes*** like vandalism and arson ***more seriously*** if the prosecution shows that the crime was motivated in part by one of the listed types of bias. The Court found such a ***"penalty enhancement"*** statute to be ***valid***, in ***Wisconsin v. Mitchell***, 508 U.S. 476 (1993). This unanimous decision seems to validate all of the dozens of state and local hate-crime laws of the "penalty enhancement" variety throughout the country.

b. Facts: In *Wisconsin v. Mitchell*, D, a black teenager, was convicted of aggravated battery, a crime that in Wisconsin ordinarily carries a maximum sentence of two years in prison. However, there was strong evidence that D had selected his victim, V, based on race; for instance, he pointed to V, told his friends, "There goes a white boy; go get him," then led them in a severe beating of V. Under Wisconsin's statute, the ***maximum sentence*** for aggravated battery was ***increased*** to seven years because of D's race-based selection of a victim.

c. Statute upheld: The Court unanimously held that this penalty-enhancement scheme did not violate D's First Amendment rights, and thus ***upheld*** the statute.

i. Defendant's argument: D argued in *Mitchell* that since the only reason for the enhanced sentence was his discriminatory motive for selecting his victim, the statute punished his beliefs. Therefore, he argued, the penalty-enhancement statute was no more constitutionally acceptable than the ban on certain "fighting words" struck down in *R.A.V.*

ii. Speech/ conduct distinction: But the Court rejected this argument. In doing so, the Court relied heavily on the distinction between speech and conduct. The ordinance struck down in *R.A.V.* was explicitly directed at expression, whereas the penalty-enhancement statute here was aimed at ***conduct***, and this conduct was completely unprotected by the First Amendment. (That is, there is no constitutional protection for the act of battery, whatever the actor's motive.)

iii. Analogy to anti-discrimination laws: The Court also observed that many other statutes punish a defendant based on his motive for acting. For instance, federal Title VII makes it unlawful for an employer to discriminate against an employee "because of such individual's race, color, religion, sex, … ," yet that statute has always been found to conform with the First Amendment.

4. Ban on all acts intended to intimidate: Finally, in the most recent cutting back on the general rule of *R.A.V.*, the Court has held that ***all instances*** of a certain type of expressive act — such as cross-burning — may be prohibited if done for the purpose of ***intimidation or threat***, even if other intimidating acts with expressive content are not prohibited. ***Virginia v. Black***, 538 U.S. 343 (2003).

a. Statute: The statute at issue in *Black* made a crime to burn a cross in a public place or on the property of another, if done "with the intent of ***intimidating any person or group of persons.***" The statute also added a clause (we'll refer to it here as the "prima facie" clause) saying that "Any such burning of a cross shall be ***prima facie evidence*** of an intent to intimidate[.]"

b. Main provision upheld: The Court's opinion in *Black* was fragmented — there was no opinion that spoke for a majority on all points. But there were separate majorities for two propositions: (1) that government may ***single out cross burning*** as a particularly virulent form of intimidation, and may thus ***ban all cross burnings done with***

intent to intimidate even while not banning other expressive acts intended to intimidate; and (2) that the statute here was ***unconstitutional*** (though no majority agreed about why).

i. Government may single out cross-burning: As to proposition (1), a majority of the Court in *Black* agreed that "[i]nstead of prohibiting all intimidating messages, Virginia may choose to ***regulate this subset of intimidating messages*** in light of cross burning's long and pernicious history as a ***signal of impending violence.***"

c. Significance: *Black* is significant mainly for the proposition that a properly-constructed statute may ***ban a particular type of intimidating expression*** — such as cross burning — while ***declining to ban other types of intimidating expressions***.

K. All speech not necessarily created equal (the disfavoring of indecent speech): Implicit in *Cohen v. California*, *supra*, p. 519, is the principle that all constitutionally-protected expression is ***created equal*** in the eyes of the First Amendment, so that the government ***may not prefer certain ideas or subject matter to others.*** But a number of cases suggest that certain types of expression, while not directly suppressible on the grounds of their content, are viewed as inherently ***less valuable*** and may therefore be ***regulated more extensively*** than speech closer to the "core" of First Amendment values, such as political speech. This less-favored of speech seems to include mainly speech that is "***indecent***."[6] This is sometimes referred to as the ***"two-tier"*** theory of First Amendment protection.[7]

Example: New York criminalizes the distribution of non-obscene materials showing ***children engaged in sexual conduct.*** The ban covers such sexually-explicit materials even if they are not obscene (e.g., materials that have serious literary value, a factor that automatically prevents them from meeting the formal definition of "obscene"; see *infra*, p. 561).

Held, the ban does not violate the First Amendment. Materials showing children engaged in sexual conduct, even if the materials are not "obscene," have an "exceedingly modest, if not *de minimis,"* First Amendment value. The state has a countervailing, compellingly strong interest in stopping sexual exploitation of child actors. Therefore, the First Amendment does not demand that the state allow distribution of such materials. *New York v. Ferber*, 458 U.S. 747 (1982) (discussed further *infra*, p. 563.)

1. Consequences of being "lesser-valued" speech: So in what way may lesser-valued speech such as indecent speech be more extensively regulated than high-value speech? Sometimes, the low-value speech may be completely banned; more commonly, its "secondary effects" can be regulated.

2. Complete ban: Occasionally, as in the indecent-speech-involving-minors area at issue in *Ferber*, *supra*, the Court has allowed government to ***completely ban*** the speech despite its

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6. *Commercial* speech also seems to be somewhat less-favored. See *infra*, p. 565.

7. Don't confuse this "two-tier" theory with the "two track" analysis on p. 477 *supra*. "Two-tier" refers to the Court's distinction based on the "value" of the speech. "Two track" refers to two ways of analyzing restrictions on speech, one track for content-based regulations and the other for content-neutral "time, place and manner" regulations.

slight First Amendment value.

3. The "secondary effects" doctrine: But a more important practical difference between high-value and low-valued speech is that the ***"secondary effects"*** doctrine seems to apply to this lesser-valued speech.

a. Nature of doctrine: Under the secondary effects doctrine, if the court is satisfied that the government was merely trying to eliminate the undesirable ***non-content-related consequences*** of an expressive activity — things like increased crime or declining property values — the regulation will be found to be ***content-neutral*** and will be given only relatively un-strict "track two" review.

i. Regulation passes review: Furthermore, in cases qualifying for the secondary effects doctrine, the Court seems very willing to find that the measure ***passes*** that track two review. That is, the Court typically accepts that the government is indeed pursuing an important interest, and that the regulatory means being chosen appropriately further that interest while leaving open adequate alternative channels for communication.

b. *Erie v. Pap's* expands the doctrine to allow a complete ban: For instance, a 2000 case holds that the secondary effects of lower-valued speech may entitle government to ***completely ban*** the disfavored expressive conduct (not merely limit the speech to a certain geographical area). The case is ***Erie v. Pap's A.M.***, 529 U.S. 277 (2000).

i. Facts: *Pap's* was a ***"nude dancing"*** case. The city of Erie, Pa. passed an ordinance that required live dancers to wear at least "pasties" and a "G-string." (Neither the city nor anyone else claimed that nude dancing was obscene and therefore constitutionally unprotected.) The city said that it was attacking not the expressive content of nude live entertainment, but rather its secondary effects, such as violence, sexual harassment, public intoxication, prostitution, and the spread of sexually transmitted diseases. The ban applied throughout the city, not just in a delimited area (as a prior Supreme Court case had approved). A nightclub that presented live nude dancers attacked the ordinance.

ii. Plurality: The Court ***upheld*** the ordinance. However, there was no majority opinion on the underlying constitutional issues. A four-Justice plurality (opinion by O'Connor, joined by Rehnquist, Kennedy and Breyer) found that the secondary effects doctrine applied, so that the ordinance should be judged by the more-forgiving track two analysis for ***content-neutral*** time, place and manner regulations.

(1) Bad motivation irrelevant: In fact, to the plurality it didn't even matter that the city may have been ***motivated in part*** by a desire to ***suppress particular expression***. According to the plurality, as long as *one* of the purposes of the regulation was to combat secondary effects, it didn't matter that government also had the motive of suppressing speech.

(2) Passes track two analysis: The plurality then found it easy to conclude that the ordinance satisfied the track two "time, place and manner" standard.

iii. Additional votes: Justices Scalia and Thomas concurred. They believed that because the ordinance was a "general law regulating conduct and not specifically directed at expression," the ordinance was ***not subject to First Amendment scru-***

tiny at all. Therefore, they agreed that the ordinance easily passed constitutional muster.

iv. **6 votes for using secondary effects analysis:** So *Erie v. Pap's* demonstrated that there were at least six votes on the Court for holding that even an ***absolute government ban*** on a particular form of expressive conduct motivated by a desire to combat the conduct's ***secondary effects*** is to be viewed as ***content-neutral***, and may be upheld if the ban is a reasonably effective means of combating those effects.

v. **Limited to indecency or other less-favored speech:** So far, the secondary effects doctrine has not been applied outside of the ***indecency*** context. Thus as far as we know, government can't attack what it says are the bad secondary effects of protected speech other than indecency (e.g., ***core political speech***) except by surviving strict scrutiny.

L. Regulation of indecency in media: A number of cases have dealt with ***indecency in the media.*** A brief summary of the Court's holdings is that the government has substantial latitude in regulating indecent expression on the ***public airwaves,*** but much less latitude when it tries to carry out such regulation in media that are more one-on-one, such as ***phone systems,*** modern individually-addressable ***cable TV systems,*** and ***computer networks*** such as the ***Internet.***

1. **Public airwaves:** The government has the power to regulate non-obscene "indecent" material broadcast over the ***public airwaves*** (standard broadcast ***radio and TV***).

2. **Regulation of indecency on phone, cable and computer systems:** But when government tries to limit indecency in ***other media*** that are not as intrusive and widely-disseminated, the limits will be ***strictly scrutinized.*** These cases have involved ***phone networks*** ("dial-a-porn"), ***cable TV*** systems, and the ***Internet***.

   a. **Cable programming:** For instance, if government tries to perform content-based regulation of indecent speech on ***cable TV systems***, the court will use ***strict scrutiny***.

      i. **Less restriction permissible:** Therefore, much less regulation of indecency will be tolerated in the cable TV area than in the over-the-air broadcast area, because of cable's technological ability to ***block access on a household-by-household basis.*** Since content-based restrictions will be strictly scrutinized, any reasonably-effective less-restrictive alternative must be used. Therefore, government, instead of curtailing transmission of indecent material to *all* households, must instead give cable operators the right to offer blocking to ***just those households that want it.***

   b. **Indecency on the Internet:** What about ***"cyberspace,"*** and in particular the ***Internet***? Is the Internet more like over-the-air broadcasting (as to which the Court has traditionally allowed substantial government regulation), or is it more like books and newspapers (which receive the greatest First Amendment freedom)? The Supreme Court has answered this question by saying that the Internet ***more closely resembles books and newspapers,*** and is therefore deserving of the ***utmost freedom from content regulation***. The Court did so in two major opinions concerning Congress' efforts to restrict the access of ***minors*** to ***indecent content*** over the Internet.

      i. ***Reno v. ACLU*:** The first of the two cases was ***Reno v. American Civil Liberties Union***, 521 U.S. 844 (1997). The plaintiffs attacked two provisions of the federal Communications Decency Act (CDA). The first provision made it a crime to use a "telecommunications device" to transmit any communication which is "obscene

or ***indecent***," while "***knowing that the recipient*** of the communication is under 18 years of age." The second made it a crime to "use any interactive computer service" to "display in a manner ***available to a person under 18***," any communication that uses ***"patently offensive"*** language or images. (For easy reference, we'll call the first provision the "knowing transmission" provision and the second the "make available" provision.) Both provisions were directed mainly at the Internet.

(1) Unanimously struck down: All nine Justices agreed that at least parts of the CDA were ***unconstitutional***. The Court's opinion was by Justice Stevens, who found the CDA to be both overly vague and overbroad.

(2) Less risk of intrusion: Stevens concluded that the burden on government to justify content regulation of the Internet was much greater than for such regulation of over-the-air broadcasting. Over-the-air broadcasting merited regulation in part because there was no way to adequately ***protect the listener from unexpected messages.*** By contrast, the risk that a computer user would ***stumble upon*** indecent material by accident was ***"remote,"*** because "a series of affirmative steps is required to access specific material." So cases allowing tight regulation of indecency in the over-the-air context (like *FCC v. Pacifica*, *infra*, p. 640) furnished no support for a finding that the CDA was constitutional.

(3) Statute found overbroad: Stevens concluded that the statute was ***overbroad***, because it restricted the free-speech rights of *adults*. "In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that ***adults have a constitutional right to receive*** and to address to one another." For instance, if one member of a 100-person chat group was a minor, the entire group would be foreclosed from discussing an "indecent" topic, even though the 99 adults clearly had a right to discuss that topic.

(4) Fails strict scrutiny: This suppression of protected adult speech had to survive ***strict scrutiny***, Stevens said. Therefore, the government had to show that there was ***no less restrictive alternative*** that would accomplish the same ends. The government had failed to carry this burden, he concluded. For instance, the government might have just imposed the less-restrictive alternative that indecent material be "tagged" so that user-installed filters could block it.

ii. Replacement statute is also found invalid: After *Reno*, Congress tried to fix the CDA's constitutional problems by enacting a replacement statute, the ***Child Online Protection Act (COPA)***. But in ***Ashcroft v. American Civil Liberties Union***, 542 U.S. 656 (2004), the Court found that COPA, too, was very likely a violation of the First Amendment. (Because of the preliminary-injunction posture of the case, the Court did not definitively decide the statute's constitutionality.)

(1) Terms of statute: COPA made it a crime to put on to the Web content that was "harmful to minors." Material was deemed "harmful to minors" if it was either obscene or was designed to appeal to minors' prurient interests in a "patently offensive" way that lacked serious literary or other value to such minors. (Minors were defined as persons under 17.) Web operators were

given an affirmative defense if they screened minors from access by some ***age-verification mechanism***, such as by requiring a credit card or by "any other reasonable measures that are feasible under available technology." So basically, COPA said that anyone who wanted to operate a commercial Web site containing material that might be harmful to minors had to impose a mechanism for checking that only adults used the site.

(2) Lower court issues injunction: A federal district court issued a preliminary injunction against COPA, on the grounds that it, like the CDA before it, violated the First Amendment rights of adults.

(3) Supreme Court agrees with injunction: By a 5-4 vote, the Supreme Court held that the lower-court had ***not abused its discretion in entering the injunction.*** Justice Kennedy's opinion for the majority began by repeating *Reno*'s holding that if a statute suppresses a large amount of speech that adults have a constitutional right to receive, the government must bear the burden of showing that there are ***no less-restrictive alternatives*** that would be at least as effective.

(4) Filtering not shown to be less effective: Kennedy concluded that the government had not borne this burden of proof here. In particular, he focused on ***"blocking and filtering software"*** that could voluntarily be installed by users on their own computers. Such filtering software would clearly be less restrictive than the age-verification scheme required by COPA; for instance, an adult with children could simply turn off the filter when the adult wanted to use the computer. Therefore, the injunction should be permitted to stand while the case was tried on the merits, and the statute would be found valid only if the government could show (as seemed very unlikely) that the statute was in fact the ***least-restrictive available means of effectively blocking minors*** from accessing indecent Internet material.

(5) Dissent: The four dissenters, led by Justice Breyer, believed that COPA did indeed satisfy the least-restrictive-alternative requirement. They believed that COPA blocked very little content that was not in fact obscene (and thus forbiddable even to adults).

iii. Significance: Here are some of the things that *Reno v. ACLU* and *Ashcroft v. ACLU* seem to establish:

(1) Broad protection for Internet: The Internet, and publicly-available computer networks in general, deserve the same ***very broad First Amendment protection as books and newspapers,*** not the lesser protection given to scarce over-the-air broadcast media. (*Reno*.) This means that any "time, place and manner" restriction on the Internet will have to be very closely linked to the achievement of an important governmental interest.

(2) Protection of rights of adults: When government tries to protect minors from non-obscene material, government must make great efforts to see to it that the ***rights of adults*** to access material that they have a constitutional right to access are not inadvertently hampered. *Reno*. (So a ban on putting non-

obscene "indecent" material in any place where minors might see it infringes the rights of adults, since adults have a right to see the material and the ban will dissuade people from making the material broadly available.)

(3) No-restrictive available alternatives: Indeed, if government *is* going to make it harder for adults to access material that they have a First Amendment right to see — even if "harder" means imposing a hurdle as relatively small as requiring the user to prove that she is in fact an adult — government must bear the burden of proving that there are ***no less-restrictive available alternatives.*** For example, if Congress wants to impose an age-verification requirement, Congress would have to prove that this device is less restrictive, or more effective, than filtering software voluntarily installed by private (adult) users, clearly a hard-to-make showing. (*Ashcroft*.)

M. The public forum: We turn now to a detailed discussion of the ***public forum*** as a factor in determining whether governmental regulation that purports to be merely of the "time, place and manner" of expression nonetheless violates the First Amendment.

1. Recap of rules: To recapitulate briefly how the status of a place as a public or non-public forum fits into the constitutional analysis, here is a summary of the relevant rules:

a. Content-based regulation: If the regulation occurs because the government objects to the ***communicative impact*** of the expression (i.e., the government is not being content-neutral), it ***does not make a difference*** whether the expression takes place in a public forum or not; in either event, the governmental regulation is presumptively invalid, unless the expression falls in a pre-defined "unprotected category" (or, apparently now, if it falls within a class of speech that has "lesser social value," such as the "offensive" or "indecent" speech in *American Mini Theatres* and *Pacifica* or the child pornography in *Ferber).*

b. Content-neutral regulation in a public forum: But assuming the regulation is ***content-neutral,*** then if the speech occurs in a ***public forum***, it (and conduct related to it) can only be regulated in ***narrow ways*** which the government shows to be ***necessary*** to serve ***significant governmental interests***. Tribe, p. 982. The availability of ***alternative channels*** for the communication will ***not*** by itself be enough to make the regulation valid.

i. Designated public forum: Some government-owned property is viewed as a ***"designated public forum."*** This happens where government makes the decision to open non-public-forum property to broad expressive uses. (*Example:* Government decides to let any student group use its classrooms for any expressive activity.) The same rules (given in (b) above) apply to designated public forums as to true public forums, but government can at any time ***change its mind*** and remove the designation, making the site or use a non-public forum. (For more about designed public forums, including how they are defined, see p. 535 *infra*.)

c. Content-neutral regulation in a non-public forum: Where the speech does ***not*** occur in a public (or designated public) forum, the state's right to regulate it in a content-neutral manner depends on whether the regulation's interference with expression is ***"substantial"*** or not.

i. **Substantial interference:** If the interference *is* substantial, the same rule applies as in the public-forum situation: the regulation must be narrowly drawn, and necessary to serve some significant government interest.

ii. **Insubstantial interference:** But if the interference is ***not substantial***, the government must only show a ***rational justification*** for its regulatory scheme. Tribe, p. 982. The government's scheme may allow access to some speakers and some subject matters while excluding others, "so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are ***viewpoint neutral***." *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788 (1985).

iii. **Alternative channels:** One significant difference between expression occurring in a public (including designated public) forum and that occurring in a non-public forum is that in the latter situation, the ***availability of equally effective alternative channels*** is ***sufficient to make the interference "insubstantial"*** (so that the "rational relation" test is all that has to be met). Tribe, p. 982.

2. **Necessary for significant state interest:** In applying the rule that content-neutral regulations of speech in public forums must be narrow ones that are necessary to serve significant governmental interests, the Court has held that ***mere administrative convenience does not suffice*** as a governmental interest. Recall, for instance, that a city's interest in keeping its streets clean was held not to constitute a sufficient justification for a ban on distribution of handbills, in *Schneider v. State*, 308 U.S. 147 (1939) (*supra*, p. 506).

a. **Safety:** But a need to ***control crowds*** to prevent ***physical danger*** from say, demonstrators or their audience, *will* suffice, provided that the Court is convinced that the crowd-control justification is not really a smokescreen for censorship (non-content-neutrality), and provided that there is no problem of vagueness or overbreadth (so that administrative discretion is held within acceptable limits).

b. **No right to make communication-free zones:** On the other hand, government's interest in preventing people from being ***bothered*** by hearing possibly-unwelcome messages will generally ***not*** justify government in ***putting certain public forums completely off-limits to expression.*** Government may forbid *harassment*, and may forbid one person from continuing a discussion with another if the latter indicates that she does not want the conversation to continue. But government generally may not act ***prophylactically***, by ***forbidding in advance all communication in a certain public place*** merely because government fears that much of the communication will be unwelcomed by the intended recipient.

i. **Conversations outside abortion clinics:** The issue of government's right to put certain public fora off-limits for communication arises most often in the case of ***abortion clinics***. Opponents of abortion frequently attempt to station themselves on public property near the entrances to clinics, so that the opponents can from there either engage in protest (e.g., by holding signs opposing abortion), or attempt to persuade prospective clients of the clinic that they should reconsider their plans.

(1) **First Amendment right upheld:** In general, the Supreme Court has ***protected*** the rights of abortion opponents to protest and communicate on public property near the entrance to abortion clinics. For more about regulation of speech near abortion clinics, see the discussion of *McCullen v. Coakley*, 134 S.Ct. 2518 (2014) *supra*, p. 515.

c. Access to public and private places: The need to allow ***access*** to ***public and private buildings*** will clearly justify some regulation of demonstrators. For instance, at least where less-intrusive measures have not worked, a judge may enjoin protesters or picketers from ***blocking access*** to the place that they are picketing.

d. Traffic flow: Even the need to keep streets ***free for ordinary traffic*** may justify ***limited*** regulation of marchers or demonstrators (e.g., a requirement that they use a street that is not a main thoroughfare).

3. Private places: Even where expression takes place in a ***private*** place, content-neutral regulations may be found to so impair the freedom of expression that the First Amendment has been violated. This will be true where the channel of communication being impaired ***has no adequate substitutes.***

Example: The City of San Diego bans all billboards containing non-commercial messages, apart from a few narrowly-defined exceptions. The City raises the defense (among others) that the ordinance is a reasonable "time, place and manner" restriction.

Held, the ban is not a valid "time, place and manner" restriction; such restrictions, to be valid, must not only be content-neutral, but must also serve a significant governmental interest and ***"leave open ample alternative channels for communication of the information."*** Here, the parties stipulated that many advertisers rely on outdoor advertising because other forms of advertising are "insufficient, inappropriate and prohibitively expensive." Thus these other forms of advertising do not represent adequate alternative channels. *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981).

a. Other locations: In private-forum situations, there is no general rule to predict when alternative channels will be found to be "adequate." One rule of thumb that seems to have emerged, however, is that a different ***location*** (as distinguished from a different medium) is much more likely to be an adequate substitute when it is in the ***same city*** as the location which has been placed under restriction, than where this alternative location is in a neighboring city.

4. "True" or "traditional" public forums: Let us now consider in more detail the various types of forums. First, and easiest to analyze are ***"true" public forums,*** sometimes referred to as ***"traditional"*** public forums. These are forums that by custom, rather than by any explicit government decision or designation, are completely public.

The clearest examples of a completely public forum, recognized as such since the 1930's, are ***streets, sidewalks and parks***. See *Hague v. C.I.O.*, 307 U.S. 496 (1939) ("Use of the streets in public places [for assembly and debate of public questions] has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.") Even a ***quiet street*** in a ***residential neighborhood*** is a true public forum. See *Frisby v. Schultz*, *supra*, p. 534, so holding (but concluding that the state nonetheless was entitled to ban all picketing on a residential street in front of a particular house).

a. Rules: Remember the ***rules*** applicable to true public forums:

? any ***content-based*** regulation will be ***strictly scrutinized*** (regulation must be necessary to achieve a compelling governmental interest) and rarely sustained; and

? any ***content-neutral*** "time, place and manner" regulation must be ***narrowly drawn*** to serve ***significant governmental interests***, while leaving open adequate ***alterna-***

tive channels for the communication.

5. **Designated public forums:** An additional class consists of what are called ***"designated*** public forums." These are public facilities as to which the government ***has made the decision to open the place up to a broad range of expressive activities.*** (As we explain below, these are treated essentially the ***same way as true public forums***.)

   a. **Municipal theater:** For instance, a ***municipal theater*** that is held open as a place where ***any group*** may put on productions becomes a designated public forum, and certain groups or productions may not be excluded merely because a different theater is available. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (city theater may not exclude production of "Hair," even though some other, privately-owned theater in the city was available).

   b. **School classrooms:** The same would be likely to be true of ***school classrooms***, if the school district has decided to let practically *any* community group or school group use the premises ***after hours.*** Such a decision makes the classrooms (at least after hours) a designated public forum, at which point the government can't allow or disallow particular groups to use the rooms based on agreement/disagreement with the group's message.

   c. **Social-media Internet websites:** It now seems that ***major portions of the Internet*** will be treated by the Supreme Court as constituting a designated public forum (or maybe even a "true" public forum). In ***Packingham v. North Carolina*** (discussed more extensively *supra*, p. 508), the Court held that mid-level scrutiny must be given to content-neutral restrictions on ***"commercial social networking Web sites,"*** such as the North Carolina statute at issue there.

      i. **Status of "cyberspace":** In support of that conclusion, Justice Kennedy's majority opinion said that ***"a street or a park is a quintessential forum*** for the exercise of First Amendment rights"; he then observed that "While in the past there may have been difficulty in identifying the ***most important places*** (in a spatial sense) for the exchange of views, today the answer is clear. It is ***cyberspace*** — the ***'vast democratic forums of the Internet'*** in general."

      ii. **"Internet social networking services":** Kennedy then focused his analysis on "Internet social networking services" — the types of sites covered by the statute at issue. Kennedy found that this category included sites like Facebook, LinkedIn and Twitter, and said that "social media users employ these websites to engage in a ***wide array of protected First Amendment activity*** on topics ***'as diverse as human thought.'*** " Therefore, he said, the state's decision to place these social media websites off-limits to certain users (registered sex offenders) had to undergo mid-level review, which it could not survive.

      iii. **Significance:** So it sounds as though a majority of the Court that decided *Packingham* believes that social media websites on the Internet — and perhaps other types of websites as well — are now such important avenues for First Amendment expression that even content-neutral time, place and manner restrictions on a person's access to such sites are to be analyzed by the same mid-level-review standard as are restrictions on expression occurring in true public forums like public streets and parks or in designated public forums (see Par. (d) below).

iv. **Internet websites as private property:** Observe that the major Internet social-media websites like Facebook are ***privately-owned***, not government-owned. And until recently, virtually all of the Court's public-forum decisions involved publicly-owned property, like streets and parks. But *Packingham* seems to mean that the fact that a particular place for expression is privately owned does ***not*** prevent that place from being ***treated as a designated public forum*** when the source of the restriction on expression is the government rather than the private owner.

(1) **Restriction by owner of site:** Assuming that social-media websites are now to be analyzed similarly to public streets and parks, what happens if restrictions on expression there are ***imposed by the website's private owners*** — should such restrictions be limited by the First Amendment? The answer seems to be ***"no,"*** though the Supreme Court has never squarely faced the issue.

Example: Suppose that according to Facebook's own (i.e., not government-mandated) "terms of service," no person who is registered as a sex offender under the law of his state of residence may post on Facebook. Suppose further that Facebook learns that P is such an offender, and cancels his user ID under the terms of service. Can P argue that First Amendment principles (or perhaps common-law "public policy" principles inspired by the First Amendment) prevent Facebook from imposing this restriction on him given that government wouldn't be allowed to do so?

It seems clear that P will ***lose*** with this argument. The fact that the restriction comes from a private person (the site owner) who is not acting at any government's request will itself suffice to deprive P of a First Amendment claim. And it's unlikely that the courts will recognize any sort of federal or state "common-law right to free expression" "inspired" by First Amendment concerns.[8]

d. Rules: Once a place becomes a designated public forum, the ***same rules apply as apply to true public forums:*** (1) content-based regulation will be strictly scrutinized; and (2) content-neutral "time, place and manner" regulation must be narrowly drawn to serve significant governmental interests, while leaving open adequate alternative channels for the communication.

i. **Government may change its mind:** The only difference between a true public forum and a designated public forum is that with a designated forum, government may at any time ***change its mind***, and ***remove the designation*** — at that point the forum becomes a non-public forum (see immediately below), which may be subjected to much greater "time, place and manner" regulation.

6. Non-public forums: A final category consists of those public facilities which are used for purposes ***not particularly linked to expression***. Such a facility is usually referred to as a ***"non-public forum"*** (or sometimes, a ***"limited public forum"***). Of the three categories

8. For an analogous situation, consider speech restrictions imposed by the private owners of *shopping centers*, discussed *infra*, p. 541. The Court now holds that such shopping centers are ***not*** the equivalent of public forums; therefore, the private owner of such a center may restrict speech there without thereby violating the speaker's First Amendment rights.

of public areas, this group offers the ***least*** constitutionally-protected access for First Amendment expression. The government regulation of expression in a non-public forum must merely be:

[1] ***reasonable*** in light of the ***purpose served*** by the forum; and

[2] ***viewpoint neutral***.

See, e.g., *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).

a. Reasonableness: The requirement of ***"reasonableness"*** has relatively little bite here, as in the due process and equal protection areas. Government may limit speech in the non-public forum even if ***less restrictive alternatives are readily available***, and even if the restriction chosen is not the ***"most reasonable."***

Example: The public authority that operates the three major New York City airports bans all repetitive solicitation of money within the terminals, and all distribution of literature.

Held, because airport terminals are not public forums, the regulation of expression within them must merely be reasonable. The ban on face-to-face solicitation of money is reasonable, because "passengers who wish to avoid the solicitor may have to alter their path, slowing both themselves and those around them [with the result that] the normal flow of traffic is impeded." Also, face-to-face solicitation presents risks of duress and fraud. (But, a different majority of the Court holds, the sale and distribution of literature may ***not*** be banned; at least one member of the Court believes that such regulation is not even "reasonable.") *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, *supra*.

b. Viewpoint neutrality: But the requirement of ***viewpoint neutrality*** has a real impact in these non-public-forum cases. The government can restrict speech across the board in these forums, but it can't restrict speech by ***preferring some messages or perspectives over others.***

i. Can't bar religious viewpoint, even if it involves worship: The most dramatic example of the requirement of viewpoint-neutrality for non-public forums is that when a government allows use of ***public facilities*** by various (even though not all) community groups, ***religious groups*** must be given ***equal access***.

(1) Funding of student activities: For instance, where a public university funds a broad range of ***student publications***, it may not exclude publications on the grounds that they are religiously-oriented. See *Rosenberger v. Univ. of Virginia*, discussed *infra*, p. 538.

ii. Candidate forums on government-owned TV: Similarly, government must be viewpoint-neutral when it organizes a debate or forum for ***competing political candidates***. See *Arkansas Educational Television Comm'n v. Forbes*, 523 S. Ct. 666 (1998), holding that a state-owned TV station which held a candidates' forum was not entitled to choose which candidates to invite based upon the candidate's political views (but also holding that the station did not violate this principle).

iii. Even spending must be viewpoint-neutral: The requirement of viewpoint-neutrality is so strict that it applies even to activities that are ***funded by the govern-***

ment. Thus government may ***not*** choose to ***fund some third-party activities and not others, based on the viewpoints expressed***.

Example: The University of Virginia (a public university) funds certain student publications, by paying for their printing costs. The University disqualifies from this funding any publication that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." P is the publisher of *Wide Awake*, a student newspaper that gives a "Christian perspective" on the University. P argues that the University's refusal to fund *Wide Awake* violates his free-speech rights. The University concedes that its policy puts a whole subject — religion discussed from a proselytizing perspective — off limits, but claims that its policy is viewpoint-neutral. (For instance, the university points out that those opposing the practice of religion are equally excluded.)

Held, for P (by a 5-4 vote). The regulation here was *not* viewpoint-neutral. "The University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints." Nor does the fact that the University is spending money make any difference: If the University were disseminating only its own messages, it would not have to fund opposing viewpoints. But once it chooses to fund some ***third-party viewpoints*** (i.e., some student-run publications), it may not choose which ones to fund based on the viewpoint of the speaker. (Also, requiring the University to fund publications like P's does not violate the Establishment Clause. See *infra*, p. 663.) *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995).

(1) Can ban discrimination by others: But when government gives a subsidy to certain organizations, it *may* require as a condition of the subsidy that the organizations themselves ***not discriminate against certain viewpoints.*** When government pursues such an ***"all-comers"*** policy, the Court has held, government is not engaging in forbidden viewpoint based discrimination. See *Christian Legal Society Chapter v. Martinez*, 130 S.Ct. 2971 (2010), a 5-4 decision set out in the following Example.

Example: The University of California's Hastings College of Law gives official recognition and some funding only to those organizations ("Registered Student Organizations," or RSOs) that comply with the school's nondiscrimination rules (the "all-comers" policy). The all-comers policy requires any RSO to accept all students who apply, and also forbids RSOs from discriminating on the basis of various specified criteria, one of which is sexual orientation. P (the Christian Legal Society) refuses to accept any student who engages in "unrepentant homosexual conduct," or who holds religious convictions different from those contained in a "Statement of Faith" the Society has adopted. Hastings refuses to grant P the RSO status because of these limits on who may join. P claims that the all-comers policy violates the First Amendment requirement that when government restricts access to limited public forums (i.e., nonpublic forums) the restriction must be both reasonable and viewpoint neutral.

Held, for Hastings: the all-comers policy is constitutional. The policy is viewpoint neutral: "[It is] hard to imagine a more viewpoint-neutral policy than one requiring all student groups to accept all comers." The requirement

that student groups accept all applicants is " 'justified without reference to the content [or viewpoint] of the regulated speech.' " (Also, the all-comers requirement is *reasonable* for several reasons, including that Hastings could reasonably conclude that (1) an equal-access policy promotes the educational experience, and (2) in light of the fact that RSOs get school funding, no Hastings student should be forced to fund a group that would reject her as a member.)

(The four dissenters argue that the policy is not in fact viewpoint neutral because it "single[s] out one category of expressive associations for disfavored treatment: groups formed to express a religious message. Only religious groups [are] required to admit students who [do] not share their views.") *Christian Legal Society Chapter v. Martinez*, *supra*.

c. "Subject neutrality" not required: The requirement of neutrality in non-public forum cases is merely one of "***viewpoint*** neutrality," ***not "subject neutrality."*** Thus "[a] speaker may be excluded from a non-public forum if he wishes to address a ***topic*** not encompassed within the purpose of the forum … or if he is not a member of the class of speakers for whose special benefit the forum was created. … [But] the government violates the First Amendment when it denies access to a speaker solely to suppress the ***point of view*** he espouses on an otherwise includable subject." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985).

Example: The federal government says that non-profits may solicit from federal employees in the workforce by using a particular fundraising mechanism administered by the federal government. However, no agency that seeks to influence the outcome of elections or the determination of public policy through politics, lobbying or litigation, may participate. *Held*, the government may exclude litigation and advocacy organizations, assuming that it is acting in a viewpoint-neutral way. *Cornelius*, *supra*.

d. Particular types of places that are non-public forums: The Court is increasingly quick to find that particular publicly-owned places are ***non-public forums***. The test is whether the government has intended to create ***"general access for a class of speakers"*** (in which case the forum is true public or designated public) or, instead, "***selected access for individual speakers***" (in which case the forum is probably non-public). *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998). In most cases where the issue has been discussed by the Court, a non-public forum has been found.

i. Airport terminals: An ***airport terminal*** is a non-public forum. ***Int'l Soc. for Krishna Consciousness v. Lee***, 505 U.S. 672 (1992).

(1) Rationale: Six members of the Court in *Krishna* believed that an airport terminal was a non-public forum. The majority opinion, by Chief Justice Rehnquist, asserted that public forums have two principal characteristics: they have *traditionally* been used for purposes of assembly and expression, and they have as a "*principal purpose* … the *free exchange of ideas."* Airports do not satisfy either of these tests: only recently have they been made available for speech activity, and their principal purpose is to facilitate travel and make a regulated profit, not to facilitate free expression.

ii. **Other transportation hubs:** What about ***subways, bus stations, railroad stations,*** and other publicly-owned and operated parts of transportation systems? The rationale of the majority's opinion in the *Krishna* case suggests that these, too, will be found to be non-public forums — they have not traditionally been used for purposes of free expression (with the possible exception of big-city subways), and their principal purpose is transportation, not expression.

iii. **Jails:** Another good example of a non-public forum is the ***jailhouse***. Jailhouses serve the limited function of housing prisoners, and nearly any type of expressive conduct, whether by prisoners or members of the public, is likely to be seen as incompatible with this basic purpose.

iv. **Military bases:** Similarly, ***military bases*** may be placed off-limits to political speakers. In *Greer v. Spock*, 424 U.S. 828 (1976), a majority of the Court so held, reasoning that the purpose of a military base is to "train soldiers, not to provide a public forum." The policy against political campaign appearances was also justified by the "American constitutional tradition of a politically neutral military under civilian control."

v. **Use of school facilities by student groups:** Where facilities and funding are made available by a public school system to ***student groups*** (not to all members of the public generally), this usage will be classified as falling within the non-public-forum category. See *Christian Legal Society Chapter v. Martinez*, 130 S.Ct. 2971 (2010), *supra*, p. 538 (Court uses the phrase "limited public forum," but it's clear the Court means the same thing as "non-public forum.")

vi. **School mail system:** A ***school system's*** internal ***mail*** system, including teachers' mailboxes, has been held to fall into this non-public-forum category. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). The fact that the official teachers' union, as well as a number of other outside organizations (e.g., YMCA and Cub Scouts) were permitted to use the mail system was not enough to convert the system into a public forum. Therefore, the school district's rule that no "school employee organization" except the official union could use the system was valid.

vii. **Governmental workplace:** A ***governmental workplace*** will apparently be treated as a non-public forum. In *Cornelius v. NAACP Legal Defense and Educational Fund*, *supra*, p. 539, the Court held that a charitable campaign held at federal workplaces fell into the non-public forum category.

viii. **Candidates' debates or fora:** When government organizes a ***forum or debate for political candidates,*** this will often be a non-public forum. For instance, in a case in which a state-owned TV station organized a televised debate to which the two leading candidates for a congressional seat were invited, the court found that the forum was a nonpublic one, because the debate "did not have an open-microphone format," i.e., the station did not make its debate "generally available to candidates" for that seat. Therefore, the station was within its rights not to invite plaintiff, a minor candidate (so long as the station made its decision based upon an objective determination of the plaintiff's lack of strength rather than upon lack of enthusiasm for his views). *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998).

ix. **Internet connections in libraries:** ***Internet connections at public libraries*** appear not to constitute public forums. Therefore, the government may require libraries receiving federal funding to install anti-pornography filters on any computer connected to the Internet. See *U.S. v. Amer. Library Ass'n.*, 539 U.S. 194 (2003) (4-justice plurality holds that "a public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak." A fifth Justice, Breyer, in concurring, says he agrees with this determination.)

x. **Buses:** ***Buses*** that are part of a municipally-owned transit system also appear to fall within the category of non-public-forum facilities. See *Lehman v. Shaker Heights*, 418 U.S. 298 (1974), where a plurality reached this conclusion.

xi. **Utility poles:** ***Utility poles*** owned by the government are not a public forum, so that a city may prevent the posting of signs on them, in order to reduce "visual blight." See *Los Angeles v. Taxpayers For Vincent*, 466 U.S. 789 (1984).

N. Right of access to private places: In most of the First Amendment cases which we have examined so far, the speaker sought to use ***public property*** to deliver his message. In a few of the other cases above, he sought to use his own property, or that of a willing owner (e.g., billboard advertisers in *Metromedia v. San Diego, supra*, p. 534). We turn now to the rights of a speaker to use ***private property, against the owner's will***, for expressive purposes. In this group of cases, speakers have in effect argued that there should be recognized certain ***"private forums,"*** to which the government should guarantee speakers access, just as it guarantees access to public forums like streets and parks.

1. **Rationale:** The main argument in support of recognizing a guaranteed right of access to certain private forums is that a contrary view would ***close off many important channels of communication***. The mere fact that government itself has not closed down these channels is of small consolation, "[f]or if no one will rent an unpopular speaker a hall or print the speaker's views, it may be of little use that the government has not gone out of its way to muzzle the speech." Tribe, p. 998.

2. **Shopping centers:** The main type of "private forums" to which speakers have asserted a guaranteed right of access is ***shopping centers***.

   a. **Initial success by claimants:** Speakers asserting a right to access to privately-owned shopping centers were, initially, partly ***successful*** — the Court held that a center's owner could not constitutionally be permitted to use state trespass law to bar peaceful union picketing of a store in the center.

   b. **Change of law:** But the Court eventually changed its mind, and concluded that the First Amendment does ***not*** guarantee any speaker a right of access to a privately-owned shopping center, even if the speech relates to the center's (or its tenants') operations. *Hudgens v. NLRB*, 424 U.S. 507 (1976).

   c. **Present rule:** So neither labor picketers, anti-war activists ***nor any other citizens have a First Amendment right to express themselves in shopping centers over the property owner's objection***.

   d. **Access guaranteed by state constitution:** Although there is no right of access to a shopping center under the First Amendment to the federal constitution, at least one

state, California, has interpreted ***its own constitution*** as guaranteeing such a right. In *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court held that this interpretation of the California State Constitution did not violate a shopping center owner's federal right of free speech, nor his right not to have his property taken without just compensation.

V. SYMBOLIC EXPRESSION

A. Problem generally: Just as expression may consist of speech accompanied by conduct (e.g., a protest march), so expression may sometimes consist solely of ***non-verbal actions***. The Supreme Court has for a long time been willing to recognize that certain non-verbal conduct is protected by the First Amendment (e.g., *Stromberg v. California*, 283 U.S. 359 (1931), striking a statute prohibiting display of a red flag as a symbol of opposition to organized government). Yet the Court has been wary of giving generalized First Amendment protection to any act which is an attempt to convey a message; this reluctance stems principally from the fear that granting such protection would legitimatize actions like political assassinations, Patty Hearst-type bank robberies, pouring blood on draft records, and other violent actions. See Tribe, p. 601.

1. Two-track analysis: The Court's recent cases on symbolic expression seem to have implicitly followed the "two-track" method of analysis (*supra*, p. 477). That is, where the Court believes that certain symbolic expression is prohibited because the government objects to the ***communicative content*** of the expression (what we're calling "track one"), the Court applies ***strict scrutiny***. Conversely, where the Court believes that the government's interest in regulating the conduct has nothing to do with the conduct's expressive content ("track two"), a more-easily-satisfied balancing test is applied, in which the interest being pursued by the state may well be found to outweigh the individual's interest in using that particular mode of expression.

2. Draft card burning: The Court's choice of "track two" rather than "track one" analysis seems to have been dispositive in the well-known case involving a conviction for ***draft card burning, U.S. v. O'Brien***, 391 U.S. 367 (1968).

a. Facts: O'Brien and several others burned their draft cards in public, as part of a protest against the war in Vietnam. They were convicted of violating an amendment to the draft laws making it a crime to "knowingly destroy [or] mutilate" a draft card.

b. Court finds right to regulate: O'Brien contended that the burning was "symbolic speech" protected by the First Amendment. But the Court held that even if this were true, conduct combining "speech" and "non-speech" elements could be regulated if four requirements were met:

[1] the regulation was within the constitutional power of the government;

[2] it furthered an ***"important or substantial governmental interest"***;

[3] that interest was ***"unrelated to the suppression*** of free expression"; and

[4] the ***"incidental restriction"*** on First Amendment freedoms was ***"no greater than is essential*** to the furtherance" of the governmental interest.

The *O'Brien* Court found that all of these requirements were satisfied.

Note: This four-part test continues to be the one used by the Court for analyzing "time, place and manner" regulations. Therefore, it's worth memorizing.

i. **"Track two" analysis:** The four-part test turns out to be indistinguishable from what we've been calling "track two" analysis (see *supra*, p. 488). The requirement that the governmental interest be "unrelated to the suppression of free expression" is a somewhat clumsy and conclusory way of saying that the harm which the regulation seeks to avoid must not stem from the ***communicative content*** of the conduct; this is the key finding of "content neutrality" that places a case on "track two" rather than "track one." Requirement (4) is equivalent to the "track two" requirement that content-neutral regulations of conduct in public forums must not close alternative channels for communication.

c. **Content-neutrality:** The Court in *O'Brien* identified several governmental interests served by the prohibition on draft-card destruction, interests the Court said were all ***"limited to the non-communicative aspect*** of O'Brien's conduct." For instance, the government had an interest in making sure that all draft-age males had in their possession a document indicating their availability for induction in an emergency. This and the other governmental interests were "important and substantial," and could not have been achieved with any less impact on O'Brien's freedom of expression. Therefore, his conviction did not violate the First Amendment, the Court concluded.

d. **Relevance of motive:** O'Brien argued that Congress' ***"purpose"*** or ***"motive"*** in enacting the statute was the improper one of suppressing dissent. But the Court rejected this argument, concluding that ***congressional "purpose" was simply irrelevant to a statute's constitutionality, so long as there was a legitimate governmental interest which could support the statute*** (whether or not Congress actually relied on it).

i. **Still a rule:** It apparently remains the case that in First Amendment cases, the existence of a legitimate non-content-based government interest can save a statute that burdens expressive conduct, even if one of the government's motives is to suppress or oppose the message being communicated.[9]

3. **Protest in schools:** The Court's initial judgment about whether or not the government's regulation of symbolic expression is targeted at the expression's communicative impact will usually be dispositive. This was true in *Cohen*, and also true in another Vietnam-War-protest case, ***Tinker v. Des Moines School District***, 393 U.S. 503 (1969). In *Tinker*, several high school and junior high school students were suspended for wearing black armbands as a symbol of opposition to the War; a rule forbidding the wearing of such armbands had been adopted by school officials two days before, in anticipation of the protest.

a. **Free expression right upheld:** The Court held that the prohibition on armbands ***violated*** the students' First Amendment rights. What was being suppressed was not "actu-

9. Notice, though, that the same "motive irrelevant" rule doesn't apply to at least some constitutional rules *outside* the First Amendment area. For instance, the legislature's motivation is often relevant in *equal protection* cases; see, e.g., *Washington v. Davis*, 426 U.S. 229 (1976), *supra*, p. 258, holding that the absence or presence of government intent to commit racial discrimination is relevant in equal protection cases.

ally or potentially disruptive conduct," but rather, something that was nearly "pure speech."

i. **Wish to avoid controversy:** The authorities seem to have acted out of a wish to ***avoid controversy*** which might stem from the students' silent expression of opinion about the War. But this fear was not a valid reason for banning the expression: "Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."

ii. **Other symbols not barred:** The lack of content-neutrality in the school officials' conduct was also shown by the fact that they did not prohibit the wearing of ***all*** political or other controversial symbols; buttons for national political campaigns, and even the Nazi iron cross symbol, were permitted.

b. **"Track one" analysis:** Thus the *Tinker* Court seems to have applied conventional "track one" analysis, under which any regulation of expression which is done because of the communicative impact of the expression will be strictly scrutinized, and allowed only if necessary to serve a compelling governmental interest.

i. **Possibility of "track two":** But, the Court indicated, had the students' act "materially and substantially interfere[d] with the requirements of ***appropriate discipline*** in the operation of the school," the officials would have been justified in preventing it. If the officials had been able to show that they acted for this reason, this presumably would have been the equivalent of showing that they were content-neutral, and would thus have entitled them to the less stringent review of "track two."

c. **Regulation of hair and clothing:** The Court in *Tinker* explicitly declined to deal with the constitutionality of school regulations dealing with ***hair length, clothing type***, and other aspects of ***personal appearance*** which arguably have an expressive content. Nor has the Court ever been willing to confront this issue after *Tinker.*

i. **Lower courts:** Most lower courts have held that such aspects of personal appearance are not sufficiently communicative as to be entitled to full First Amendment protection. However, particular regulations have sometimes been struck down on the grounds that they infringe the personal liberty protected by the ***Fourteenth*** Amendment. See Tribe, p. 1386. .

4. **Sleeping in park:** The low level of scrutiny given to content-neutral regulations that affect symbolic expression was again demonstrated in ***Clark v. Community For Creative Non-Violence***, 468 U.S. 288 (1984). There, the Court held that a National Parks Service ***ban on sleeping in public parks*** did ***not*** violate the First Amendment rights of demonstrators who wished to sleep in tents in two Washington D.C. national parks in order to dramatize the plight of the homeless. (The Court assumed, without deciding, that sleeping in connection with the demonstration constituted symbolic expression.)

a. **Application of test:** The Court found that the regulation was valid under the four tests of *U.S. v. O'Brien, supra*, p. 542. Most significantly, the Court found a substantial governmental interest in "maintaining the parks in the heart of our capital in an attractive and intact condition," and concluded that the ban on sleeping furthered this interest by limiting the extent and duration of demonstrations like the one involved here.

B. Flag desecration: One context in which the right of symbolic speech is important is the area of ***flag desecration***: nearly all states (as well as the federal government) make it a crime to mutilate or otherwise desecrate an American flag. Most such statutes seem to have been enacted for the purpose of preserving the flag as a symbol of ***national unity***, or some similar rationale. If such a statute, either on its face or as applied, applies to some flag-related conduct but not others based on the actor's ***message***, the Court will presumably apply strict scrutiny, and will therefore probably strike the statute.

1. *Texas v. Johnson:* This is what happened in ***Texas v. Johnson***, 491 U.S. 397 (1989), the first of the Court's two highly controversial decisions on flag burning.

a. Statute: The Texas statute at issue in *Johnson* made it a crime to "intentionally or knowingly desecrate … a state or national flag." "Desecrate" was defined to mean "deface, damage, or otherwise physically mistreat in a way that the actor knows will ***seriously offend*** one or more persons ***likely to observe*** or discover his action."

b. Facts: Johnson, the defendant, participated in a political demonstration outside the 1984 Republican National Convention in Dallas. At the end of the demonstration, he unfurled an American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted, "America, the red, white, and blue, we spit on you." Johnson was charged with violating the desecration statute; at his trial, several witnesses testified that they had been seriously offended by the flag burning, and he was convicted.

c. Holding: By a 5-4 vote, the Court held that the Texas statute violated the First Amendment as applied to Johnson's acts. The majority opinion was written by Justice Brennan.

i. "Track one" analysis: The key to the result reached by the majority was that the Court applied what we have called "track one" analysis. That is, the majority determined that the prosecution of Johnson was ***"directly related to expression."*** In reaching this conclusion, the Court reviewed the two objectives that Texas asserted it was pursuing: (1) preventing breaches of the peace; and (2) preserving the flag as a symbol of nationhood and national unity. As to objective (1), the majority simply disbelieved that preventing breaches of the peace was what had motivated Texas on these facts (since no disturbance of the peace either actually occurred or was threatened by this particular flag burning). As to objective (2), the need to protect the flag as a symbol of national unity would only be implicated if the defendant's conduct had a contrary message associated with it, so this objective was "directly related to expression" and thus called for track one scrutiny. The content-based nature of the statute was illustrated by the fact that particular conduct was covered only if an observer's likely reaction would be to be "seriously offended" — the offense could only flow from the message accompanying the act. (For instance, if D had burned the flag as a means of respectfully disposing of it because it was dirty or torn, he would not have offended anyone, and he would not have been convicted under the statute.)

ii. Strict scrutiny applied: Since Johnson was prosecuted only because of the content of the particular message he was conveying, the Court applied strict scrutiny to the statute. "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." Here, Texas's objective — preserving the flag as a symbol of national unity — may have been worthy, even "compelling." But the means chosen by Texas to serve that objective were not necessary ones. First, the majority didn't believe that the nation's belief in the cherished significance of the flag would be undermined by acts of mutilation; indeed, these acts might produce the opposite result. Second, the government could combat such acts by acts of its own, such as giving the remains of the flag a respectful burial (as one witness to Johnson's burning did).

d. Dissent: Four members of the Court bitterly dissented. The principal dissent was by Justice Rehnquist (joined by White and O'Connor). The dissenters thought that a state could prohibit the burning of a flag without violating the First Amendment prohibition on suppression of ideas. "The flag is not simply another 'idea' or 'point of view' competing for recognition in the market place of ideas." Also, the dissenters thought that flag burning is so inherently inflammatory that it inevitably threatens a breach of the peace, and thus could be analogized to "fighting words" and deprived of First Amendment protection entirely. In a separate dissent, Justice Stevens thought that the flag, even though it is in a sense an intangible asset, could be protected from desecration just as, say, the Lincoln Memorial could be protected from having a political message spray-painted upon it.

2. The federal statute: The problem with the Texas statute in *Texas v. Johnson* seemed to be the statute's proscription of flag burning that would "seriously offend" observers — this reference to "offensiveness" made it clear that only flag burning intended to convey a particular message (disrespect) was proscribed by the statute. Therefore, immediately after the *Johnson* decision, the U.S. Congress tried to enact a ***federal*** flag burning statute that would ban all or most flag burning without being content-based and thus unconstitutional. This federal statute, the Flag Protection Act of 1989, punished anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States. … " However, even though the statute avoided any reference to conduct that would "offend" an observer, the Supreme Court, by a 5-4 vote, found that this statute, too, was a violation of the First Amendment. ***U.S. v. Eichman***, 496 U.S. 310 (1990).

a. Rationale: The five-justice majority in *Eichman* found that despite the more careful wording, this statute, like the one in *Johnson*, was content-based. "Although the [Act] contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the government's asserted ***interest*** is 'related to the suppression of free expression' … and concerned with the content of such expression." The majority noted that the government was asserting its interest in preserving the flag as a ***symbol for certain national ideals***; this goal was intimately related to the content of the burner's message (so that, for instance, a person's secret burning of the flag in his basement would not threaten this symbolic meaning of the flag). Since Congress was attempting to "suppress … expression out of concern for its likely communicative impact," the statute had to be strictly scrutinized. It failed that scrutiny. (Interestingly, Justice Scalia was part of the five-member majority voting to strike down the statute, a surprise given his generally conservative views.)

3. Significance: As a result of *Johnson* and *Eichman*, there is probably no way for government (whether state or federal) to "wipe out flag burning." Even if the statute uses the

most content-neutral language (e.g., "No one may burn a flag under any circumstances"), the statute will presumably be struck down so long as the Court believes that it was ***motivated*** by a desire to preserve the symbolic value of the flag. Therefore, a constitutional amendment is probably the only way to prevent such acts.

Quiz Yourself on
"TIME, PLACE AND MANNER" RESTRICTIONS; SYMBOLIC EXPRESSION

77. Centerville is a small town. Its two biggest streets are Broadway and Main. After several recent parades and demonstrations that badly snarled traffic, Centerville's City Council enacted an ordinance that forbade all parades from taking place on either Broadway or Main. The ordinance did not forbid parades on the other, smaller streets in town. There is no evidence that the ordinance was motivated by hostility to particular types of parades, and the ban has been enforced even-handedly as to all parades. Citizens Against Corruption, a group wishing to protest what it believed was corruption in the mayor's office, paraded in an organized way down Broadway, and its leaders were arrested. The city has asserted that its ban on parades is a valid "time, place and manner" regulation.

(a) What standard should the court use in evaluating the ordinance as applied here? _____

(b) Should the court uphold the ordinance, and convict the marchers, under the test you specified in (a)? _____

78. An ordinance in the town of Harmony provides that "no demonstration or parade involving more than 20 persons shall take place on the town's streets, parks or other city-owned property without the prior issuance of a permit." The permit is free, and is to be granted by the mayor's office, "if the mayor concludes, acting in a reasonable manner, that the proposed activity would not be detrimental to the overall community, taking into account the "time, place and manner" of the activity." Firebrand, the head of a local group of anarchists, wished to conduct a demonstration in the park, at which he planned to urge his followers to immediately attempt a "sit in" of the mayor's office. The mayor, without knowing the precise purpose of the demonstration and knowing only that it was to be a demonstration against the local government, refused to issue the permit. In announcing the refusal, the mayor stated that "there has been too much demonstration, and not enough cooperation, around here recently." Firebrand then brought suit for an injunction against continued application of the permit requirement, and for a declaratory judgment that the permit requirement as drafted was unconstitutional. Should the court find the ordinance unconstitutional on its face? _____

79. Same facts as prior question. Now, however, assume that Firebrand ignored the ordinance, did not ask for a permit, and held a demonstration involving 30 people in a city park. He was arrested and charged with violating the ordinance. He now wishes to defend on the grounds that the ordinance is overbroad and thus facially invalid. Assuming that the ordinance is indeed overbroad, should the court acquit Firebrand? _____

80. The town of Lawton had a very carefully worded permit requirement. For any demonstration or parade involving more than 30 people, a permit was required, application for which must be made at least one hour prior to the close of business on the day before the proposed activity. Under the terms of the ordinance, the police commissioner was required to issue the permit, subject only to the rule that if in the commissioner's reasonable judgment, a breach of peace would be likely to occur which could not be controlled with the manpower available to the Lawton Police Department, the permit could be denied until

such later date as proper police protection could be arranged (by borrowing from other police departments, if necessary).

Rouser, a radical, applied late on Friday afternoon to make a speech on Saturday. Because past speeches by Rouser had led to skirmishes, and because the commissioner believed that under weekend police schedules only three officers would be available (a number which the Commissioner believed would not be sufficient if problems should occur), the Commissioner turned down the request for a permit, and suggested that Rouser wait until the following Saturday. A local Justice of the Peace Court was open Friday night, and the Justice would have had jurisdiction to issue an injunction against the permit requirement. However, Rouser did not seek an injunction. Instead, Rouser gave his speech anyway, and no violence occurred. Rouser was charged with violating the permit requirement. He is now defending on the grounds that he was wrongfully denied the permit, because there was not in fact a serious threat of a breach of the peace, and that even if there was one, the presence of three officers would have been sufficient.

Assuming that the court agrees with Rouser's factual contentions about the danger of breach of the peace, should Rouser be acquitted? _____

81. The city of Blue Bell has enacted an ordinance providing as follows: no "canvasser or solicitor" may ring the doorbell of a private home, or knock on the door of a private home, where her purpose is to distribute handbills or to solicit an order for goods, services or charitable contributions. The ban does not prevent a person from simply sticking advertising material under the door or into the mail slot, so long as there is no bell-ringing or door-knocking. The purpose of the ordinance is to avoid disturbing residents (including those who work nights and sleep days), and also to prevent crime (e.g., people who want to see into the residence to "case the joint" for a later burglary).

Delrina, a Jehovah's Witness, was charged with violating the statute in that she rang doorbells so that she could personally hand inhabitants the literature requesting donations to the Jehovah's Witness organization. She has defended on the grounds that the ordinance represents an unconstitutional infringement of her right to free expression. May Delrina be convicted? _____

82. The city of Crooklyn had two substantial ethnic populations that were frequently at odds with each other, Middle-eastern Moslems and Orthodox Jews. After complying with a city requirement calling for a permit before the making of a public address, Mohammed, a self-proclaimed Islamic Fundamentalist, gave a speech in a park in Crooklyn. There were approximately 100 Islamic followers in the audience, as well as a group of about 30 Orthodox Jews. The Jews carried signs opposing Mohammed. Mohammed then made various anti-Semetic inflammatory statements, such as "Jews are corrupt" and "Jews control the U.S. government." He also addressed the Jews in the audience, saying, "You Jews in the audience today, you're not fit to kiss the dung-stained shoes of my poorest follower." At no time did Mohammed urge his audience to attack any of the Jewish onlookers or to otherwise commit immediate illegal acts.

Some of the Jews in the audience began to shake their fists and yell back at Mohammed; five of them then began to move towards the podium with upraised fists. There were 15 police officers at the scene to prevent disturbances, most of them ringed around the podium. They immediately arrested Mohammed and charged him with violating an ordinance prohibiting anyone from inciting a riot or causing a breach of the peace. Mohammed has defended on the grounds that his arrest violated his freedom of expression.

(a) What doctrine can the prosecution point to as justifying the arrest? _____

(b) Do First Amendment principles prevent Mohammed's conviction? _____

83. The Women's Health Alliance is a clinic that principally performs abortions. Abortion protesters decided to demonstrate outside the clinic. The protesters waved signs containing messages such as "Abortion Equals Murder." Whenever the protesters saw a woman leaving the clinic, they shouted, "Baby Killer," at her. The protesters remained at least 20 feet away from the front door of the clinic, and they did not block anyone's access to or from the clinic. All protesting took place on public property. A local ordinance forbids "the making of any public statement or the showing of any sign where the speaker knows the statement or sign is likely to be offensive to the person to whom it is addressed." May a protester who has waved the sign and shouted the epithet described above be convicted of violating the statute? _____

84. State U, a public university, recently added the following provision to its Student Code: "No student or faculty member shall address to any other student or faculty member any verbal slur, invective, insult or epithet based on the addressee's race, ethnicity, gender, handicap or sexual orientation." The penalty for a first offense is suspension, and for the second offense is expulsion. Desmond, a white student at the university, addressed the following remark to Vera, a black student, "You nigger, go back to Africa where you belong." State U has commenced disciplinary proceedings against Desmond. You are the university's general counsel. The president has asked you the following question: "May the university constitutionally suspend Desmond for making this remark?" If your answer is "no," please describe the types of changes that might be made in the Code to alleviate the problem. _____

85. The state of Morality makes it a crime to post any "indecent" photo on a computer system located in the state, if the computer is connected by means of a physical wire or a telephone line to any other computer. "Indecent" is defined to include "any photo of a naked man or woman that would be offensive when measured by local community standards." The legislature means for its prohibition to apply even to pictures that would not be "obscene," including photos having significant artistic value. The legislature's purpose is to prevent minors from seeing indecent material. *Playpen* magazine puts a photo of a naked woman (which is not obscene under U.S. Supreme Court rulings) on its dial-in computer, located in Morality. Peter, a 16-year-old, dials in and retrieves the photo. A local prosecutor in Morality prosecutes the owner of *Playpen*, Hugh, and shows that Hugh had ordered that the photo be placed on the system. May Hugh constitutionally be convicted? _____

86. The Grand Union Station is a large train station owned and run by a public agency, the Tri-State Transit Authority. The Authority has enacted a "policy statement," prominently posted on the walls of the Station, which says, in part, that "no person or organization shall solicit for funds within this Station." Hussan, a member of the Hari Krishna religious sect, approached numerous passengers in the Station one day, asking each one, "Would you like to contribute to my religious organization?" Authority police stopped him and politely but forcibly removed him from the station for violating the no-solicitation policy. The police appear to enforce the no-solicitation rule uniformly, i.e., they stop everyone from soliciting, regardless of whether the solicitation is religiously-oriented, regardless of whether it appears to be "begging" or on behalf of an organized charity, etc.

(a) Is the Station a "public forum" for purposes of First Amendment analysis? _____

(b) Was the police's treatment of Hussan constitutional? _____

Answers

77. (a) The ban must be: (1) content-neutral; (2) narrowly tailored to serve a significant governmental interest; and (3) leave open alternative channels for communication of the information.

(b) No, probably. The facts indicate to us that the ban is content-neutral both in terms of the purposes for which it was enacted and the way in which it is applied. However, it seems not to be "***narrowly tailored*** to serve a ***significant*** governmental interest." Since the proposed speech would take place in the most traditional of all public forums — the streets — mere convenience, such as avoiding traffic obstructions, probably does not qualify as a "significant governmental interest." Also, there are more narrowly-tailored restrictions that could be used, such as an advance permit requirement which would give the police time to detour traffic and thereby reduce disruption. Finally, the requirement that alternative channels be left open is strictly construed in a public-forum context; the fact that there may be other public places (e.g., smaller streets) where the same expression is allowed will not generally be enough to qualify as an adequate alternative channel.

78. Yes. An advance permit requirement will be upheld if it is content-neutral, adequately constrains administrative discretion, and is a reasonable means of insuring that public order is maintained. However, in order to avoid giving the official charged with granting or denying permit applications too much ***discretion***, the grounds upon which a permit may be denied must be set forth ***specifically*** and ***narrowly*** in the ordinance. Here, the standard given for granting or denying a permit — that the proposed activities "not be detrimental to the overall community" — gives the mayor virtually uncontrolled discretion, and acts as an invitation to him to behave in a content-based way. This excessive discretion makes the statute overbroad and vague. Therefore, even though Firebrand's own proposed conduct might be capable of being prohibited by an appropriately-drawn ordinance, the ordinance here must be struck down as invalid on its face.

79. Yes. If a permit that is required prior to the exercise of First Amendment rights is unconstitutional ***on its face***, the speaker is ***not required*** to apply for a permit. He may decline to apply, then speak, and avoid conviction on the grounds of the permit requirement's unconstitutionality. See, e.g., *Lovell v. Griffin*. Because a statute that is overbroad is facially invalid, this rule applies to overbreadth claims. Therefore, Firebrand may assert overbreadth even though he failed to ever apply for a permit.

80. No. Where a permit requirement is not facially invalid (e.g., not unduly vague or overbroad), and the speaker's claim is merely that he has been wrongfully denied a permit, the speaker ***must seek judicial relief*** before speaking. That is, for an "as applied" as opposed to "facial" challenge to a permit requirement, one who ignores the denial of the permit loses the right to object to the permit scheme's unconstitutionality. There is an exception where the applicant shows that he could not have obtained prompt judicial review of the administrative denial of the permit; however, the facts here tell us that Rouser could have obtained judicial review prior to the time for the speech, if he had wanted to do so.

81. No. As with any "time, place and manner" restriction, the ordinance will be valid only if it is content-neutral, is narrowly tailored to serve a significant governmental interest, and leaves open alternative channels for communicating the information. Here, probably the requirement of content-neutrality is satisfied (unless there is evidence that, say, Jehovah's Witnesses were a special target of the ordinance). The government probably has a significant government interest in preventing homeowners from being disturbed at home when they do not want to be. However, it is doubtful that the ordinance is "narrowly tailored," since there are less restrictive alternatives (e.g., permitting a homeowner to indicate on his door that he does not wish to be disturbed by solicitors) — when the city makes a blanket assumption that ***no*** homeowner wishes to receive a solicitor, this is probably not a sufficiently narrowly tailored approach. Furthermore, it is doubtful whether alternative channels have been left open, since for many types of organizations, door-to-door and face-to-face is the only affordable means, given the large expense associated with, say, newspaper and TV advertising. Upon facts similar to these, the Court struck down a blanket ban. See *Watchtower Bible and Tract Soc. v. Stratton* (ban on solicitation without prior permit is

unconstitutional).

82. (a) The "fighting words" doctrine.

(b) Yes, probably. Among the classes of speech which are not protected by the First Amendment are "fighting words," which the Court has defined as "those which by their very utterance … tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*. However, there are several exceptions and clarifications to the "fighting words" doctrine, which make it seldom applicable. One of those exceptions is that if the police have the physical ability to ***control the angry crowd*** as a means of preventing threatened violence, they ***must do so*** in preference to arresting the speaker for using "fighting words." *Cox v. Louisiana*. Here, it seems probable that the 15 police officers could have either arrested or at least restrained those Jews who were moving forward towards the podium, and probably any other hostile Jew in the audience. At the very least, the police needed to make some effort to do this, rather than immediately arrest the speaker.

83. No. In general, government may not forbid speech merely because it would be ***"offensive"*** to the listener. For example, language cannot be forbidden merely because it is profane. *Cohen v. California* (D cannot be punished for wearing a jacket bearing the legend "Fuck the Draft"). Here, the statute is phrased specifically to reach only "offensive" conduct, so it runs afoul of this principle. Furthermore, the statute is probably unconstitutionally vague, since a reasonable reader of it would not know exactly what types of language would be forbidden.

84. No. The problem is that the ban here is ***content-based***. That is, it proscribes only certain types of speech, based on the content or message of that speech. Thus insults based on race, ethnicity and three other attributes are banned, but insults based on other attributes are not (e.g., the addressee's politics, intelligence, short or tall stature, etc.). Even if the university interprets the ban so as to bar only "fighting words," this will not be enough to save the statute, because *R.A.V. v. City of St. Paul* (striking down an anti-cross-burning statute) establishes that government may not ban some fighting words but not others, based on the words' precise message. The best way for State U to solve the problem is to amend its code so as to ban "all slurs, invectives, insults or epithets that would have the likely effect of either inducing the listener to respond with violence, or which would be likely to create in the listener an apprehension of imminent physical harm." Such a formulation would essentially ban all fighting words, plus all words that would constitute an assault; these two categories may clearly be constitutionally proscribed, as long as the proscription occurs in a content-neutral way. (Of course, this re-write would fail to prohibit a lot of hate speech, so it would not be a perfect solution, but at least it would be content-neutral.)

85. No. The Supreme Court has held that computer networks are more like newspapers than like broadcast TV, and that content-based restrictions on what is placed on such networks must therefore be strictly scrutinized. See *Reno v. ACLU*. Applying strict scrutiny, the measure is clearly unconstitutional, since it's content-based (only materials with an "indecent" message are proscribed), and it's not narrowly tailored towards the (admittedly "compelling") objective of keeping indecent materials away from minors — for instance, the state could give parents free filtering software that would block access to these materials by minors. See *Ashcroft v. ACLU.* Furthermore, the statute is overbroad: it applies to viewing by adults (who have a right to see the photo), as well as to viewing by minors (who probably don't have a First Amendment right to see such a photo, though this is not completely clear). Since the rights of adults are being curtailed in a content-based way, the statute will surely fail strict scrutiny. *Reno v. ACLU*.

86. (a) No. The Supreme Court has held that airport terminals are not "public forums," even though they are public places. *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*. Assuming that train stations are analyzed

the same way as are airport terminals — which seems virtually certain — the terminal here falls into the category of "non-public forum." Non-public forums are public facilities that are used for purposes that are not especially linked to expression; thus the terminal here is primarily linked to transportation, and has never historically been viewed as a center for expression.

(b) Yes. A non-public forum offers the ***least*** constitutionally-protected access for First Amendment expression. Government regulation of expression in a non-public forum must merely be: (1) ***reasonable*** in light of the ***purpose*** served by the forum; and (2) ***viewpoint neutral***. See *Krishna v. Lee*, *supra*. The Court in *Krishna* held that these tests were met by a ban on funds solicitation in airport terminals; presumably the same analysis would apply to the fund solicitation in the train station here. The ban on face-to-face solicitation of money was found to be reasonable in *Krishna* because such solicitation might slow pedestrian traffic within the terminal, interfering with its transportation-related function. (But a ***total ban*** on ***literature distribution*** was found not to be even "reasonable" in *Krishna*.)

VI. DEFAMATION, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, AND THE BANNING OF "FALSE SPEECH"

A. Regulation of defamatory and other false speech: Recall that there are certain pre-defined categories of speech that receive no, or virtually no, First Amendment protection. (See *supra*, p. 489). These include such categories as obscenity, "fighting words," and commercial fraud. We concentrate here on one of those unprotected categories, ***"defamation,"*** i.e., the making of ***false statements*** that are ***damaging to reputation***. We also consider ***intentional infliction of emotional distress*** (*infra*, p. 556) as well as the more general problem of whether government may forbid speech on the grounds that it is ***factually false*** (see *infra*, p. 557).

B. Initially no protection: Initially, the Supreme Court took the view that any language treated as ***defamatory*** under state law was not entitled to First Amendment protection. For instance, in *Chaplinsky (supra*, p. 516), the Court included libelous statements in the list of categories which are "no essential part of any exposition of ideas," and as to which there is therefore no First Amendment protection.

C. *New York Times v. Sullivan:* But the Court eventually concluded that the First Amendment protections for speech and the press place at least ***some limits on the rules states may establish for defamation actions***. This limiting process occurred initially in ***New York Times Co. v. Sullivan***, 376 U.S. 254 (1964), where the Court concluded that the First Amendment requires that a defense for ***"honest error"*** be allowed in the case of false statements made about ***public officials*** relating to their ***official conduct.***

1. Facts: Plaintiff in *New York Times* was a public official one of whose duties was supervising the Montgomery, Alabama Police Department. He alleged that the *Times* had libeled him by printing an advertisement that stated that the Montgomery police had attempted to terrorize Martin Luther King and his followers. (Plaintiff was not even named in the advertisement; but under Alabama libel law, criticism of the department of which he was in charge was deemed to reflect on his reputation.)

a. Truth as affirmative defense: The libel law of Alabama, like that of most states at the time, provided for ***strict liability***. That is, a publisher could not avoid liability by showing that he reasonably believed his statement to be true, if it was in fact false.

Furthermore, although "truth" was an available defense under Alabama law, it was an ***affirmative defense*** as to which the defendant bore the burden of proof. Therefore, although the factual errors in the *Times* ad were minor (e.g., that Dr. King had been arrested seven times, rather than the actual four times), and even though there was no showing that the *Times* ought to have known that the ad prepared by others contained falsehoods, the paper was nonetheless subjected to a $500,000 libel judgment. The net result was that familiar rules of libel gave Alabama's "white establishment" a formidable weapon with which to punish the *Times*, and any other proponents of civil rights. See Tribe, p. 863.

2. **Libel judgment reversed:** A unanimous Supreme Court ***reversed*** the damage award. In so doing, the Court for the first time established that ***state defamation rules are limited by First Amendment principles.***

   a. **Robust debate:** The Court viewed this case as one involving ***criticism of government policy***, not merely factual statements about an individual. Debate on public issues must be "uninhibited, robust, and wide open," and may often include "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Requiring critics of official conduct to guarantee the truth of all their factual assertions would lead to ***self-censorship***, rather than free debate.

      i. **Sedition Act:** The Court found that the effect of Alabama's libel rules was similar to that of the original federal Sedition Act of 1798. The Sedition Act made it a crime to publish any "false scandalous and malicious writings" against the federal government with intent to bring it into "contempt or disrepute." Although the Act expired before the Supreme Court determined its constitutionality, the view that the Act violated the First Amendment had "carried the day in the court of history," according to the *New York Times* Court. So, here, criticism of government public officials could not be curtailed, without violating the First Amendment.

3. **Formal rule:** The Court was not content merely to strike the libel judgment as a disguised ban on criticizing the government. Instead, it articulated a formal rule, so that future speakers would not have to worry about liability for libel in similar circumstances: the First Amendment prohibits a ***public official*** from recovering damages for a defamatory falsehood ***relating to his official conduct*** unless he proves that the statement was made with ***"actual malice"*** — that is, ***"with knowledge that it was false*** or with ***reckless disregard of whether it was false or not."*** The case thus establishes a ***"constitutional privilege for good faith critics of government officials."*** Tribe, pp. 864-65.

   a. **Knowing or reckless falsity:** *New York Times* requires the public official to prove that the defendant ***knew*** his statement was false, or ***recklessly disregarded*** whether it was true or not. It is ***not*** enough for the official to show that a ***"reasonably prudent man"*** would not have published the statement, or would have investigated further before publishing. Rather, there must be evidence to permit the conclusion that "the defendant ***in fact entertained serious doubts*** as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727 (1968). Thus at least with respect to statements published about public officials relating to their duties (and also statements about "public figures," see *infra*), ***"ignorance is bliss."*** Tribe, pp. 870-71.

D. Extension to "public figures": The *New York Times* "actual knowledge or reckless disregard of the truth" test was extended to include ***"public figures"*** in *Curtis Pub. Co. v. Butts* and

Associated Press v. Walker, both reported at 388 U.S. 130 (1967). In these cases both the University of Georgia football coach and a prominent retired Army General were held to be public figures.

1. **"Public figure" narrowly defined:** However, the Court has read the "public figure" category ***narrowly*** in cases since *Butts* and *Walker.* The Court has recognized three classes of public figures: (1) those who have ***"general fame*** and notoriety in the community," who are public figures for ***all*** purposes; (2) those who have "voluntarily ***injected themselves*** into a ***public controversy*** in order to influence the resolution of the issues involved," who are public figures ***only*** with respect to ***that controversy***; and (3) ***"involuntary*** public figures," who are directly ***affected*** by the actions of public officials, such as a ***defendant in a criminal case*** (who would be an involuntary public figure with respect to news items concerning that case). See *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974) (discussed extensively *infra*).
2. **Meaning of "voluntarily injected":** The Court will not be quick to conclude that a person has "voluntarily injected" himself into a controversy (required for category (2) above). For instance, in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), *Time* incorrectly reported that one of the grounds for Ms. Firestone's divorce was adultery. The Court found that she was not a "public figure," even though she had held some press conferences during the divorce trial, and even though the trial itself had been widely reported in the Miami newspapers. (Nor did Ms. Firestone's extensive activities before the trial as a prominent member of Palm Beach society make her a public figure.)
3. **"Involuntary" class narrow:** Similarly, category (3), that of "involuntary public figures," has also been narrowly construed by the Court; such involuntary figures will be relatively rare.

E. Private figures: The *New York Times* standard does ***not*** apply to suits by ***private figures***. That is, where the plaintiff is neither a public official nor a public figure, there is ***no constitutional requirement*** that he prove that the defendant ***knew his statement to be false or recklessly disregarded the truth. Gertz v. Robert Welch, Inc.,*** 418 U.S. 323 (1974).

1. **Facts:** The plaintiff, Gertz, was a locally well-known lawyer who represented the family of a youth who was killed by a policeman. Defendant, publisher of a John Birch Society magazine, falsely attacked Gertz as having helped "frame" the policeman and as being a communist.
2. **Negligence standard permitted:** The Supreme Court held, 5-4, that in libel actions brought by ***private figures***, the First Amendment ***does not forbid use of a simple negligence standard***. The states are free to decide whether they wish to establish negligence, recklessness or knowing falsity as the standard (but they ***may not impose strict liability).***
   a. **Reasoning:** The majority reasoned that private individuals are both more vulnerable, as well as more deserving of recovery for defamation, than public figures. They are more ***vulnerable*** because public figures generally have "significantly greater access" to the media, and can use that access to counteract false statements. They are ***deserving*** of extensive protection against defamation, because public figures have generally "voluntarily exposed themselves to increased risk of injury from defamatory falsehoods," unlike private persons.

3. **Punitive damages not allowed:** The majority also held that, if a private figure shows only negligence on the part of the defendant, rather than recklessness or knowing falsity, he ***may not recover presumed or punitive damages***. ("Presumed" damages are ones awarded where there is no proof of actual harm, but the jury believes that damage would ordinarily result from a defamatory communication like the one in issue.) The Court imposed this limitation because the state's interest in giving broader protection to private figures only justified awarding "compensation for ***actual*** injury."

4. **Who is private figure:** In holding that Gertz himself was a private figure, the Court implicitly took a narrow view of the term "public figure." Gertz was a well-known lawyer locally, and had agreed to take a case which he knew would attract substantial publicity. Nonetheless, Gertz had not achieved "general fame or notoriety in the community" (so that he was not public figure for all purposes); similarly, he was not a public figure for the limited purposes of this case, because he had played only a "minimal role" in it.

5. **Dissents:** The four dissenters differed significantly among themselves in reasoning. For instance, Justice Brennan continued to believe (as he had in *Rosenbloom v. Metromedia*, Inc., 403 U.S. 29) that the *New York Times* standard should be applied to private-person libel actions arising out of events of "public or general interest." But Justice White argued the quite opposite position that the *Gertz* majority should not even have stripped the states of their right to apply ***strict liability*** in suits brought by private persons.

6. **Proof of falsity:** As noted, one aspect of *Gertz* is that the states may not impose strict liability, even in cases brought by private figures. This aspect of *Gertz* was broadened in the later case of *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767 (1986), where the Court held that the private figure suing a media defendant must bear the burden of proving not only "fault," but also the ***falsity*** of the defendant's statement. That is, *Gertz* has been held to replace the common-law rule ***presuming*** falsity. (This holding applies only where the suit involves a matter of "public interest"; the presumption of falsity is probably constitutional where there is no matter of public concern, in light of *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., infra*, p. 556.)

F. Non-media defendants: Both *New York Times* and *Gertz* involved ***media*** defendants, and in those cases the Court relied heavily on freedom-of-the-press considerations, especially the need to prevent media self-censorship. It is not clear whether the public-figure standard of *New York Times* and the private-figure standard of *Gertz* also apply where the ***defendant*** is a ***private person*** or other ***non-media defendant.***

1. **Possibility of different standard:** Thus it is possible that such defendants might be liable ***without*** a showing of reckless disregard or knowledge of falsity when they defame a public official or public figure. Similarly, they might even be ***strictly liable*** where they defame a ***private*** figure.

   a. **Unlikely:** However, no Supreme Court case after *Gertz* has made a constitutional distinction between media and non-media defendants, and it's ***unlikely*** the Court will do so in the future. That's especially true now that the rise of the Internet has dramatically blurred the distinction between media and non-media speakers. (For instance, if the Court were to hold non-media defendants to a stricter standard in defamation cases, should an amateur blogger who blogs once a week be deemed a "media" speaker or a "non-media" one?)

G. Statements of no "public interest": If the communication does ***not involve any matter of "public interest,"*** special constitutional rules apply. These were laid down in ***Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,*** 472 U.S. 749 (1985).

1. **Facts:** D was a credit reporting agency which falsely reported to several subscribers that P, a small corporation, was insolvent. The issue in the case was whether presumed and punitive damages could be awarded without a showing of reckless disregard for the truth or actual knowledge of falsity.

2. **Result:** Although no opinion commanded a majority of the Court, the divided Court affirmed an award of both types of damages. Three Justices thought that presumed and punitive damages could be awarded even without a showing of reckless disregard for the truth or knowledge of falsity if the statements did not involve any issue of "public interest"; two more Justices thought that *Gertz* was entirely wrongly decided (and thus that presumed and punitive damages should be allowed to all private plaintiffs, regardless of whether an issue of public interest was involved).

3. **Consequences:** Thus *Dun & Bradstreet* seems to put a majority of the Court behind two constitutional principles:

   a. **Presumed and punitive damages:** First, where a private plaintiff sues concerning statements that involve no issue of public interest, he can recover ***presumed and punitive damages without*** a showing that the defendant recklessly disregarded the truth or knew of the falsity of his statement. This is the actual result of *Dun & Bradstreet.*

   b. **Strict liability:** Secondly, *Dun & Bradstreet* probably means that where a private figure sues on a statement relating only to matters of private concern, ***he is not constitutionally required to show even ordinary negligence*** in order to recover. (At least one member of the Court that decided *Dun & Bradstreet*, Justice White, concurring, stated that he believed this result to follow from *Dun & Bradstreet*.)

H. Statements of opinion: The Supreme Court has refused to give special First Amendment protection for statements of ***"opinion."*** So some statements, even though they express opinions, may be the subject of defamation actions. But only when a statement contains or implies a statement of ***provably false fact*** may the suit proceed. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

1. **Holding:** In *Milkovich*, the Supreme Court held that statements of opinion ***get no special First Amendment protection***. However, the majority opinion in *Milkovich* makes it clear that the Court's prior First Amendment rulings will ensure that statements of ***pure*** opinion are not found to be defamatory. The Court observed that these prior cases require any libel plaintiff to prove: (1) that the statement is "***false***"; and (2) that the statement can be reasonably interpreted as stating ***"actual facts"*** about an individual. A pure statement of opinion (e.g., "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin.") would not be actionable, because it: (1) is not provably false; and (2) cannot reasonably be interpreted as stating actual facts about the plaintiff.

I. Intentional infliction of emotional distress: The *New York Times* standard also applies to actions for ***intentional infliction of emotional distress (IIED).*** That is, a public figure or public official may recover against the publisher who causes such distress only if he can prove that the publication contained a false statement of fact published either with knowledge that

the statement was false or with reckless disregard as to whether it was true or not. The Supreme Court so held in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

1. **Facts:** The facts of *Hustler* vividly illustrate this extension of *New York Times* to suits for emotional distress. Hustler Magazine published a parody of an advertisement for Campari Liqueur, which portrayed P (the Reverend Jerry Falwell) as a drunken hypocrite who had sex with his mother. The ad contained a legend at the bottom, "Ad parody, not to be taken seriously." A jury found that the parody could not reasonably be understood as describing actual facts about Falwell; the jury therefore rejected his libel claim, but gave him an award for intentional infliction of emotional distress.

2. **Holding:** All eight members of the Court who heard the case agreed that Falwell could ***not*** receive such an award consistent with the First Amendment. The Court observed that "even when a speaker or writer is motivated by hatred or ill-will, his expression [is] protected by the First Amendment." The Court noted that political parody and satire is an important element of political speech, and believed that there is no way to distinguish such "core" political speech from the kind of satire involved here. The "outrageousness" of the speech here did not furnish an acceptable distinction, because that term is inevitably highly subjective.

3. **Remains good law:** *Hustler* remains good law in a general sense, as we know from a 2011 case: actions for IIED can violate the First Amendment if they make it too easy for the plaintiff to establish liability. *Snyder v. Phelps*, 131 S.Ct. 1207 (2011), *supra*, p. 520, involved a suit against a private-figure defendant, but on a matter of public interest. So it raised a somewhat different issue than *Hustler* (where the defendant was a public figure, requiring the plaintiff to show actual malice). But *Snyder*, like *Hustler* before it, establishes that as a general principle suits for IIED will violate a civil defendant's First Amendment right to content-neutrality unless the plaintiff can show that the state law of IIED, when it allows the content of the defendant's message to trigger liability, can survive strict scrutiny (a standard that a state's common law of IIED will rarely meet).

J. False statements of fact outside the defamation context: Successful actions for defamation necessarily involve a factually-false statement. And as we've just seen, despite cases like *New York Times v. Sullivan*, the First Amendment does not generally prevent governments from forbidding defamatory (and thus factually false) speech. The treatment of defamation raises a more general question: can government ***categorically forbid factually-false statements***, even ones that are *not* defamatory? Could a state, for instance, ***make it a crime to "tell a lie"?***

1. **Content-based regulation:** Keep in mind that a ban on making false statements would be a form of ***content-based regulation***: if there are two statements made in exactly the same context, punishing the "false" one and not the "true" one would require government to regulate based on the message being delivered.

2. **Can't generally forbid false statements:** Given the extreme scrutiny given to content-based regulation of speech, it's not surprising that the brief answer to the question, "Can government generally forbid lying?" is ***"no."*** Except for a few narrow ***pre-defined subcategories*** (defamation, fraud, and perjury, for instance), as to which there is a long-standing consensus that the type of false speech in question is especially likely to cause severe harm, government ***may not forbid statements merely on the grounds that they are factually false.***

3. **Can't criminalize lying about military medals (*U.S. v. Alvarez*):** The principle that government may not ban factually-false speech not falling into the few pre-defined specially-harmful categories was demonstrated in ***U.S. v. Alvarez,*** 132 S.Ct. 2537 (2012). The Court held by a 6-3 vote that Congress' decision to make it a crime for a person to falsely state that he had won certain ***military medals*** violated the First Amendment.

   a. **The Stolen Valor Act:** In the federal ***"Stolen Valor Act"*** of 2005, Congress made it a crime for any person to falsely state, even orally, that he had been "awarded any decoration or medal authorized by Congress for the Armed Forces of the United States." Alvarez falsely claimed, in a public meeting, that he had been awarded the Congressional Medal of Honor 20 years before.

   b. **6 votes against the Act:** Six members of the Court ***agreed with Alvarez*** that the Act violated the First Amendment. No opinion commanded a majority, because the six justices were not in agreement about how stringent a test should be used to evaluate the law.

   c. **Plurality:** A four-Justice plurality opinion (written by Justice Kennedy, and joined by Roberts, Ginsburg and Sotomayor) applied "exacting scrutiny" — essentially, ***strict scrutiny*** — to the statute, and concluded that the statute could not survive that scrutiny.

      i. **"No First Amendment value" argument rejected:** The government argued that false statements "have ***no First Amendment value*** in themselves," and are therefore not entitled to constitutional protection. But the plurality ***rejected*** this "categorical" assertion. True, certain categories of false statement could be restricted — categories like defamatory statements, perjury, and fraudulent statements intended to extract some material benefit from another (e.g., fraudulent commercial speech). But outside of these few pre-defined categories where there was inevitably some special harm caused by the falsehood, the Court had ***never held that false statements are without constitutional protection***, and the plurality wasn't willing to do so now.

      ii. **Strict scrutiny applied:** In fact, the plurality held, even though the Act barred only false statements, the Act needed to be subjected to "the ***most exacting scrutiny."*** The plurality conceded that the government's interest in ensuring that the public's general perception of military awards not be diluted by false claims was a compelling interest. But no matter how compelling the government's interest, the statute could survive only if the particular restriction imposed was ***"actually necessary"*** to achieve that interest.

         (1) Alternatives available: The plurality concluded that the government had not made this showing of "actual necessity." In particular, the government had not shown why ***"counterspeech"*** would not suffice. For instance, in the case of false claims concerning the Congressional Medal of Honor (the most-heavily-punished type of violation under the Act, and the one with which Alvarez had been charged), the government could combat the lying problem by creating an ***online database*** that would list Medal of Honor winners, making it "easy to verify and expose false claims."

d. Two additional votes: Justice Breyer (joined by Kagan) agreed with the plurality that the Act was unconstitutional, making 6 votes for that proposition. But Breyer applied ***"intermediate scrutiny"*** rather than the plurality's strict scrutiny. Even under this easier-to-satisfy standard, however, the statute could not survive, because the government had not shown that a "more finely tailored statute" could not adequately address the harms. For instance, the statute might be rewritten to require that the false statement "caused specific harm" or was "material."

e. Dissent: Three Justices dissented, contending that the statute was constitutional. Justice Alito (joined by Scalia and Thomas) pointed out that the statute was narrowly drafted, and reached only "knowingly false statements about ***hard facts directly within a speaker's personal knowledge."*** Also, he said, the statute was "strictly ***viewpoint neutral***" — it reached *all* false statements about medals, whether the statements disparaged or commended the military or the system of military honors.

i. Harmful: On the other hand, Alito said, the lies forbidden by the statute "inflict substantial harm," because they "***debase the distinctive honor***" of military awards, by making them ***seem more common*** than they really are. This debasement harms military morale.

ii. No First Amendment protection: The dissent asserted that "false statements of fact ***merit no First Amendment protection in their own right."*** Alito conceded that in many areas (e.g., defamation suits brought by public figures), government needs to "extend a measure of strategic protection" even to false statements, in order to ensure sufficient ***"breathing space"*** for protected speech, so that protected (and truthful) speech is not ***"chilled."***

(1) Act is narrow: But, Alito said, the Stolen Valor Act was not one of those situations requiring that some false statements be tolerated in order to avoid a chilling of protected speech. The Act presented ***"no risk at all that valuable speech will be suppressed,"*** leading Alito to conclude that the Act was fully constitutional.

VII. OBSCENITY

A. Generally unprotected: Obscenity, like defamation and "fighting words," was listed in *Chaplinsky (supra*, p. 516) as being a type of speech ***unprotected by the First Amendment***. But again, as with defamation, the states are no longer completely free to define obscenity however they wish, and to then punish the distribution or sale of the material so defined.

1. Attempt to define: Instead, the Supreme Court has attempted to lay down specific guidelines for what materials may, compatibly with the First Amendment, be punished as "obscene." However, none of these attempts to define "obscenity" has turned out to be specific enough to give legislatures and lower courts reliable guidance about what materials are covered. Therefore, the Supreme Court has remained very much in the business of deciding, case by case, whether given materials meet the Court's definition.

2. *Roth:* The first case which required the Court to face directly the issue of whether obscene materials are protected by the First Amendment was ***Roth v. U.S.***, 354 U.S. 476 (1957). In *Roth* (in an opinion by Justice Brennan), the Court confirmed what its dictum in

Chaplinsky had suggested — that "obscenity is not within the area of constitutionally protected speech or press." But the Court also held that First Amendment concerns ***limit the acceptable definition of "obscenity."***

a. Definition of "obscene": The Court formulated its own definition of "obscenity": ***"whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."*** The Court purported to be repeating the definition of obscenity laid down in certain prior lower-court cases. However, the definition seems to have been intended as a ***minimal constitutional standard***; that is, the state could not, consistent with the First Amendment, ban a given item as obscene unless it satisfied this *Roth* definition.

b. Meaning of "prurient": The Court defined "prurient" as "material having a tendency to excite lustful thoughts." (But in a much later case, the Court interpreted this definition of "prurient" to *exclude* materials which, although they "excite lustful thoughts," provoke "only normal, healthy sexual desires." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985). However, the *Brockett* Court did not define its phrase "normal, healthy sexual desires.")

c. Redeeming social value: Of primary importance to the *Roth* Court was distinguishing between obscenity and "the portrayal of sex … in ***art, literature and scientific works***." The latter must be given full constitutional protection. It is not clear from the Court's opinion whether, apart from the definition cited above, there is an ***additional*** requirement for obscenity that the work not constitute art, literature, or other category having social value. But the Court did say that "all ideas having even the ***slightest redeeming social importance"*** are to be protected (and, implicitly, are to be judged not obscene).

i. Ambiguity: If a work had some serious social value (e.g., of a literary nature), but its dominant theme was nonetheless one which "excites lustful thoughts" and is therefore "prurient," it is simply not clear whether the material could be obscene under *Roth*. (In any event, the presence of a small amount of "redeeming social importance" is ***no longer sufficient*** to prevent a work from being obscene, under *Miller v. California*, the presently-applicable test, discussed *infra*, p. 561.)

3. Post-*Roth* cases: In a long string of post-*Roth* cases, the Court was forced to decide whether particular materials were obscene under the *Roth* definition. In many instances, no majority of the Court could agree on a single rationale, though of course there was always either a majority of the Court believing that the materials were obscene or a majority believing that they were not. From *Roth* until 1973, in fact, no majority of the Court ever agreed on a definition of obscenity.

a. Stewart's remark: Perhaps the most candid, and certainly the most famous, comment made during the post-*Roth* period on the difficulties of defining "obscenity," was that of Justice Stewart. Concurring in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), he conceded that he might never be able intelligibly to describe "hard core pornography," which he believed to be the only type of material bannable under *Roth*. However, he observed, ***"I know it when I see it***, and the motion picture involved in this case is not that."

B. ***Miller:*** Finally, in ***Miller v. California***, 413 U.S. 15 (1973), five Justices agreed on a ***new definition*** of "obscenity," one which was built upon the *Roth* definition but which also resolved some additional issues.

1. ***Miller's* definition:** *Miller* laid out the following three-part test (all parts of which must be met) for identifying material which may be banned as obscene:

a. the *"**average person***, applying ***contemporary community standards"*** would find that "the work, ***taken as a whole***, appeals to the ***prurient*** interest" (citing *Roth*);

b. the work "depicts or describes, in a ***patently offensive way, sexual*** conduct specifically defined by the applicable state law" and

c. the work, taken as a whole, ***lacks "serious literary, artistic, political, or scientific value."***

2. Changes: This definition changes or clarifies prior law in two major respects:

a. "Community" standards: The *Miller* majority explicitly ***rejected*** the argument that what appeals to the "prurient interest" or is "patently offensive" should be determined by reference to a ***national standard***. What counts are the standards of the ***local community*** where the prosecution is taking place. Thus "the people of Maine or Mississippi [need not] accept the public depiction of conduct found tolerable in Las Vegas, or in New York City."

b. Limited to "hard core" sex: *Miller* also establishes that the states may ban as obscene only depictions or descriptions of ***"hard core"*** sexual conduct. Since the states must ***be specific*** about what sexual conduct is being banned (in order to satisfy the First Amendment need for "fair notice" of what is forbidden, and in order to avoid a chilling effect on expression), the Court provided several examples of materials which could be banned:

i. Ultimate sexual acts: "Patently offensive representations or descriptions of ***ultimate sex acts***, normal or perverted, actual or ***simulated"***;

ii. Other: "Patently offensive representations or descriptions of ***masturbation, excretory functions***, and ***lewd exhibition*** of the ***genitals***."

Note: Later Court cases show that mere *nudity*, by itself, is *not obscene*, and indeed gets some First Amendment protection. See, e.g., *Erie v. Pap's A.M.*, *supra*, p 528.[10]

3. Dissents: Four Justices dissented in *Miller*. The reasoning of three of them was more fully expressed in their dissent to a companion case decided the same day, *Paris Adult Theatre I v. Slaton*, discussed *infra*.

4. Some limits on right to define terms: Notwithstanding *Miller's* "community standards" approach, the Court will impose some limits on the right of the local community to apply its own interpretation of the meaning of terms like "patently offensive" or "prurient interest." For instance, the Court has made it clear that the definition of "prurient interest" (part of the definition of obscenity in *Miller*, and in *Roth, supra*, p. 559) ***may not include*** a concept of lust that encompasses "only normal, healthy sexual desires." *Brockett v. Spokane*

10. However, 7 members of the Court held in *Pap's* that totally nude dancing, though not obscene, could nonetheless be prohibited as part of a content-neutral attempt to combat nude dancing's "secondary effects." See *supra*, p. 528.

Arcades, Inc., 472 U.S. 491 (1985). That is, the community is not free to say, in effect, that material that excites "normal, healthy sexual desires," and that does not incite sexual responses above and beyond these normal ones, is "prurient" or "offensive."

C. Private possession by adults: The mere ***private possession*** of obscene material by an adult ***may not be made criminal. Stanley v. Georgia***, 394 U.S. 557 (1969).

1. Rationale: In reaching this conclusion, the Supreme Court relied both on the weakness of the state's interest in controlling private possession of obscenity, and on the strength of the individual's interest in not being forbidden such private usage. The state's interest was only the weak one of "protect[ing] the individual's mind from the effects of obscenity." The individual's interest was directly contrary, and much stronger: that of ***not having his thoughts controlled***. "If the First Amendment means anything, it means that a State has ***no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."***

a. Two interests: Thus the *Stanley* rule relied on two distinct interests held by individuals: the First Amendment interest in having free access to ideas, and a distinct ***privacy*** interest in not having what one does in one's own home made the subject of government scrutiny.

2. Possession of child pornography: There is one important exception to *Stanley's* rule that private possession of obscene material by an adult may not be made criminal: the states may criminalize even private possession of ***child pornography***. See *Osborne v. Ohio*, discussed *infra*, p. 563.

3. No right to supply consenting adults: Since *Stanley* recognized a right held by consenting adults to possess and use obscenity in their homes, it would not have been illogical for the Court also to conclude that there was a right to ***supply*** obscene materials to such adults. But the Court has refused to extend the rationale of *Stanley* in this manner.

a. Mailing of obscene material: For instance, government may make it a crime to ***mail*** obscene materials to consenting adults. *U.S. v. Reidel*, 402 U.S. 351 (1971). *Reidel* concluded that the focus on *Stanley* had been on "freedom of mind and thought and on the privacy of one's home" (the privacy strand of *Stanley*), and that *Stanley* did not recognize any First Amendment right to acquire obscene materials from commercial suppliers.

b. Adult movie theaters: Similarly, the holding of *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973), that there is no right to ***show obscene movies to consenting adults***, represents an unwillingness to carry the rationale of *Stanley* beyond its immediate facts.

D. Protection of children: The Court has developed special doctrines to give the states additional authority to protect ***children*** from pornography. Two sorts of dangers are involved: (1) that children may ***read, view or listen*** to pornography; and (2) that children may be induced to ***take part in sexual conduct*** in order to be ***filmed*** for pornographic pictures and movies.

1. Protection of children as audience: A state may prohibit the distribution of sexually explicit materials to children, even though those materials would not be obscene if distributed to an adult.

a. Can't impair access of adults: But if the state wants to keep materials that are sexually explicit (but not obscene) out of the hands of minors, it must do so in a way that

does ***not substantially impair*** the access of ***adults*** to those materials. That is, the state must ***narrowly tailor*** its regulations so that the materials are forbidden ***only*** to minors.

2. **Children as photographic subjects:** A state may also ban the distribution of materials ***showing children engaged in sexual conduct, even though the material is not legally obscene***. In reaching this conclusion, the Court in ***New York v. Ferber***, 458 U.S. 747 (1982) relied on the state's "compelling," surpassingly important, interest in ***preventing the sexual exploitation and abuse of children*** who are photographed for production of such materials.

   a. **Private possession may also be banned:** The state's interest in preventing the sexual exploitation and abuse of children is so strong that even the ***private possession*** of sexually explicit nude pictures of children may be prohibited. In the post-*Ferber* case of *Osborne v. Ohio*, 495 U.S. 103 (1990), the Court upheld a statute criminalizing most private possession of nude pictures of children. Even though *Stanley v. Georgia* (*supra*, p. 562) had held that adults have a First Amendment right to privately possess pornography, the *Osborne* Court held that materials showing children are different: the state's interest in preventing the pornographic exploitation of children is much stronger than the interest in protecting the minds of adults, so any First Amendment interest in possessing nude pictures of children is outweighed by this anti-child-exploitation interest. And this is true even if the materials are ***not "obscene,"*** merely ***"indecent."***

3. **Virtual child pornography:** On the other hand, government may ***not*** ban non-obscene ***"virtual child pornography,"*** by forbidding either ***computer-generated images*** that appear to be of children having sex, or explicit images of ***young-looking adults posing as minors***. In *Ashcroft v. Free Speech Coalition*, 535 U.S. 564 (2002), the Court rejected the federal government's argument that barring such virtual images was necessary to restrain the market for actual child pornography, and therefore necessary to protect children.

4. **Protection against non-obscene violence:** Government's extensive power to protect children by banning them from access to non-obscene materials applies only where the materials involve ***sexual content***, not where the materials involve ***violent conduct*** without any direct sexual connection.

   a. **Violent video games:** Thus in a 2011 case, *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729 (2011), the Court struck down a California law that prohibited the sale or rental of ***"violent video games"*** to minors. The Court reasoned that ***"video games qualify for First Amendment protection,"*** in the same way as ***books, plays and movies*** do, and the obscenity exception to the First Amendment does not apply to violent games any more than it does to violent books, if there is no direct depiction of sexual conduct.

E. Protection of animals, and the "animal crush video" issue: Just as the state has an interest in avoiding the harm to children that inevitably occurs during the filming of child pornography (as in *N.Y. v. Ferber*, *supra,* p. 563), animal-rights activists have claimed that government ought to be able to prevent the harm to ***animals*** that inevitably occurs during the making of videos depicting animal cruelty. But a 2010 case, *U.S. v. Stevens*, 130 S.Ct. 1577 (2010), demonstrates that any attempt by government to prevent such harm will have to be ***narrowly constructed*** to avoid First Amendment problems.

1. **Facts of *Stevens*:** *Stevens* involved a federal statute that made it a crime to create, sell or possess any depiction of "animal cruelty," if done for "commercial gain" and in violation

of any federal or state law existing in the place where the video was created, sold or possessed. The statute gave an exemption for a depiction that has "serious religious, political, scientific, educational, journalistic, historical or artistic value." The legislative history of the statute showed that it was designed to eliminate the market for ***"crush videos,"*** videos depicting the intentional torture and killing of small animals, often by showing women slowly crushing the animals to death with their bare feet or high-heeled shoes.

a. The defendant: But in *Stevens*, D was convicted not for selling a crush video, but for selling videos of ***dogfights*** involving pitbulls. D argued that the statute was an unconstitutional infringement of his First Amendment rights.

2. D wins: By an 8-1 vote, the Supreme Court ***agreed*** with D, on overbreadth grounds. There might well be portrayals of animal cruelty that government *could* constitutionally ban in order to avoid harm to animals. But the statute here criminalized a far ***greater range of content*** than could be prohibited consistently with the First Amendment. For instance, the statute covered depictions in which a living animal was "wounded or killed," even if no cruelty was involved. It was true that the statute applied only where the conduct depicted was against the law of the state where the video was made, possessed, or sold. But the statute by its terms would apply to, say, the depiction of hunting done by a particular method that was legal in the place where it happened, but illegal in the place where the resulting video was possessed or sold. Therefore, ***a substantial number of the possible applications of the statute*** were unconstitutional. That made the statute ***void on its face*** under the doctrine of ***substantial overbreadth*** (*supra*, pp. 500-501).

F. Other issues: Here are a few other substantive rules regarding obscenity laws:

1. Book without pictures: A book without pictures, in which sexual acts are ***verbally described***, may nonetheless be obscene under the *Miller* test.

2. Community standards: In *Miller*, the Court held that the "community standards" by reference to which terms like "patently offensive" should be defined did not have to be national. In *Jenkins v. Georgia*, and its companion case, *Hamling v. United States*, both reported at 418 U.S. 87 (1974), the Court ***rejected*** the argument that the standards should have to be at least ***statewide***. Thus an obscenity case can be tried in a small, conservative rural town, and the ***standards of that town*** may be made the relevant ones (though the judge is not ***precluded*** from allowing evidence of standards in other communities).

a. Venue for federal suits: Permitting local community standards to control becomes especially significant in view of state and federal prosecutors' ability to pick as the venue for trial ***any town through which the allegedly obscene materials have passed***. The federal statute prohibiting the mailing of obscene matter, for instance, has been held to allow venue ***anywhere along the route that the mailed material travels***, not just the point of mailing or receipt.

i. Consequence: Thus a publisher or distributor who wishes to sell his materials nationally must face the possibility that any small town anywhere in the country through which a mail train or truck carrying one copy of the materials passes may be selected by federal prosecutors as the venue for a criminal trial. That place's local standards for determining what is "patently offensive," "prurient," etc. will then control.

3. **Scienter:** The seller of an obscene work may not be convicted unless the prosecution proves *scienter*, that is, knowledge by the defendant of the ***contents*** of the materials. *Smith v. California*, 361 U.S. 147 (1959). (But there is no requirement that the prosecution prove that the defendant knew, as a conclusion of law, that the materials were obscene. Thus "ignorance of the law is no excuse" in obscenity prosecutions, any more than it is in most other contexts. See *Hamling v. U.S.*, 418 U.S. 87 (1974).)

VIII. COMMERCIAL SPEECH

A. Overview: Like libel, obscenity and a few other types of speech, most kinds of ***"commercial speech"*** were traditionally viewed as being an "unprotected category" totally outside the scope of the First Amendment. But just as the Court in recent decades has held that the states do not have an unlimited right to ban or regulate speech merely by labeling it "libelous" or "obscene," so the Court has now given substantial First Amendment protection to speech which can be described as "commercial."

1. **Extensive change:** In fact, in some senses this change towards more extensive First Amendment protection has been even greater in the commercial-speech area than in the areas of defamation and obscenity: in the latter two areas, the Court has simply limited governments' ability to define these areas as broadly as they wish. Once speech falls within the allowable definition of "libel" or "obscenity," it is completely without First Amendment protection. But most types of commercial speech, by contrast (all types except those that are misleading or that propose illegal transactions), are now ***entitled to some First Amendment protection***. However, this protection is generally not as extensive as that reserved for speech nearer the "core" of First Amendment values, especially "political" speech.

B. The *Virginia Pharmacy* revolution: Since a 1976 case, the Court has held that ***even "purely commercial" speech is entitled to First Amendment protection. Virginia Pharmacy Bd. v. Virginia Consumer Council***, 425 U.S. 748 (1976).

1. **Facts:** *Virginia Pharmacy* involved a state statute making it "unprofessional conduct" for a pharmacist to ***advertise prescription drug prices.***

2. **Statute stricken:** This ban was held by the Court to violate the First Amendment. The Court conceded that this case involved speech that was ***purely*** commercial, and that the only "idea" expressed was "I will sell you the ***X*** prescription drug at the ***Y*** price." Nonetheless, the Court held, such wholly commercial speech was protected by the First Amendment.

   a. **Informational value:** In reaching this conclusion, the Court relied on society's strong interest in "the ***free flow of commercial information***." Here, for instance, consumers, especially poor ones, had a compelling interest in who was charging how much for what drug.

   b. **Weak state interest:** The countervailing state interest in suppressing price advertising was that of maintaining "a high degree of professionalism on the part of licensed pharmacists," an interest implicated by the possibility that advertising might lead to aggressive price competition, which might in turn lead to shoddy services. But this interest amounted to saying that consumers would be best protected ***if kept in igno-***

rance. And, the Court concluded, the First Amendment ***flatly forbids the state from deciding that ignorance is preferable to the free flow of truthful information***.

3. **Exceptions:** However, the Court hinted that although purely commercial speech is entitled to First Amendment protection, that protection might be ***less extensive*** than for other types of speech. ***False or misleading*** advertising could clearly be prohibited (whereas such statements when made about public figures cannot be, unless there is actual malice — see *New York Times v. Sullivan, supra*, p. 552). Similarly, ***broader regulation of "time, place and manner"*** might be justified, and the strong ***presumption against prior restraints*** might not apply.

4. **Audience's right to information:** Apart from the fact that it recognizes purely commercial speech as being entitled to First Amendment protection, *Virginia Pharmacy* is of interest because it demonstrates the Court's recognition of a First Amendment right to ***receive*** information. Prior First Amendment cases had almost all involved the right to ***express*** oneself, that is, to be a ***disseminator*** rather than a recipient of information.

   a. **Third-party rights:** By contrast, the successful plaintiffs in *Virginia Pharmacy* were in fact consumers (the recipients of the information), not pharmacists (the disseminators of the information). It is not yet completely clear whether disseminators of information may assert the third-party rights of their audiences in First Amendment cases, though it seems probable that they may. This would be an exception to the usual rules of standing (discussed *infra*, p. 731), which normally permit a litigant to assert only that his ***own*** rights have been violated.

5. **No right to ban "For Sale" signs:** The rationale of *Virginia Pharmacy*, especially the principle that dissemination of even purely commercial information may not be barred because that information would be "harmful," was later applied in *Linmark Associates, Inc., v. Willingboro*, 431 U.S. 85 (1977). There, the Court unanimously held that a racially-integrated town's prohibition on ***real estate "For Sale" and "Sold" signs*** violated the First Amendment, despite the town's interest in stemming "white flight."

   a. **Suppression of truthful information:** The fatal flaw of the *Linmark* ordinance was that it, like the ban in *Virginia Pharmacy*, was an attempt to protect the public (residents of the town) by ***keeping them in ignorance***. The town's claim that the information about sales might cause residents to act "irrationally" would, if accepted, permit "every locality in the country [to] suppress any facts that reflect poorly on the locality."

6. **"Track one":** *Virginia Pharmacy* and *Linmark* can be viewed as classic "track one" cases (see *supra*, p. 477). That is, in those cases the government tried to suppress information based on the chance that the ***communicative impact*** of the message might cause harm. Such "track one" abridgements will be allowed only where they either fall into pre-defined "unprotected categories" or survive strict scrutiny; the point of *Virginia Pharmacy*, of course, is that "commercial speech" is no longer such an unprotected category.

   a. **Later case:** But the later case of *Central Hudson Gas, infra*, p. 568, indicates that such content-based restrictions may be upheld if they are a ***narrow and direct means*** of pursuing ***substantial governmental interests***, essentially a type of "***intermediate***" scrutiny.

C. Regulation of lawyers: First Amendment protection for commercial speech has also been conferred by the Court in several cases involving regulation of the way in which ***lawyers*** acquire clients.

1. Newspaper advertising in general: The first of these cases established that states ***may not ban all newspaper advertising of legal services***. In ***Bates v. State Bar of Arizona***, 433 U.S. 350 (1977), the Court upheld by a 5-4 vote the right of a "legal clinic" to offer in newspaper advertisements certain routine services at "very reasonable fees."

2. In-person solicitation: The majority in *Bates* explicitly excluded considerations of whether lawyers could be barred from ***in-person solicitation*** of clients. But in a pair of 1978 cases, the Court held that some (though not all) types of in-person solicitation of clients may be banned. The two cases were at absolute opposite ends of the spectrum in terms of the acceptability of the lawyer's conduct. Therefore, it is hard to know where the line will be drawn between solicitation that may constitutionally be prohibited and that which may not.

a. Pecuniary gain: *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) represented the most prohibitable kind of solicitation, classic ***"ambulance chasing."*** There, the Court held that a state may forbid ***in-person solicitation*** for ***pecuniary gain***. So a state may forbid the kind of conduct at issue in *Ohralik*, in which the lawyer solicited accident victims in person, to induce them to let him represent them for a contingent fee.

b. Right of association: The other case, *In re Primus*, 436 U.S. 412 (1978), represented the kind of solicitation that is least objectionable and most worthy of protection.

i. Facts: Primus, a South Carolina lawyer who did occasional work without pay for the ACLU, wrote a letter to a woman who had allegedly been illegally sterilized as a condition to her further receipt of Medicaid benefits; the letter offered the ACLU's free services in filing a lawsuit on her behalf. Primus, like Ohralik, was disciplined for violating anti-solicitation rules.

ii. Punishment reversed: But the Supreme Court held that Primus ***could not constitutionally be punished*** for what she did. Her letter, and the ACLU litigation itself, were attempts to further her ***political and ideological goals***. Therefore, her conduct implicated her interest in ***free "political expression"*** as well as ***freedom of association***, both core First Amendment values. (This was the same sort of associational activity that the Court had earlier protected in *NAACP v. Button, infra*, p. 600.) These First Amendment interests were sufficiently strong that the state could ***not*** use ***prophylactic measures*** because of the mere potential for overreaching, fraud or other abuse; instead, Primus could only be disciplined if there was a showing that her solicitation had ***in fact*** led to one of these harms.

c. Some in-person solicitation allowed: A much more recent case suggests that some types of ***in-person solicitation*** by professionals will be ***allowed***, and that it was the unusually ***vulnerable and susceptible condition*** of the prospective clients in *Ohralik* that made the difference there. See *Edenfield v. Fane*, 507 U.S. 761 (1993), striking down Florida's ban on direct, in-person uninvited solicitation of business owners by Certified Public Accountants.

D. Commercial speech doctrine curtailed (*Central Hudson Gas*): *Virginia Pharmacy* seemed to hold that the states may not suppress even "purely commercial" speech, so long as the speech was not false or misleading and did not propose an illegal transaction. But later cases show that *Virginia Pharmacy* cannot be read this broadly: while purely commercial speech is entitled to *some* First Amendment protection, it ***does not receive the full range*** of that Amendment's protection. See ***Central Hudson Gas v. Public Service Commission***, 447 U.S. 557 (1980).

1. The *Central Hudson* case: In *Central Hudson*, the Court laid down a formal ***four-part test*** to determine whether a given regulation of commercial speech violates the First Amendment. This test indicates that, even apart from the states' right to prevent misleading speech or speech that proposes illegal transactions, the government has ***significantly more power to regulate commercial speech*** than might have been supposed from a simple reading of *Virginia Pharmacy*.

a. Facts: In *Central Hudson Gas*, the New York State Public Service Commission (PSC) banned all "promotional advertising" by electric utilities. The stated purpose of the ban was to conserve energy; "promotional advertising" was defined as advertising intended to stimulate the purchase of utility services (so that all other types of advertising by utilities, including "institutional" ads, were permitted).

b. Four-part test: Before analyzing the ban, the Court reviewed prior commercial speech cases, and derived for the first time a ***four-part test*** for determining whether a given regulation abridges the First Amendment.

[1] Protected speech: First, courts must determine whether the commercial speech is protected ***at all*** by the First Amendment. All commercial speech receives at least partial protection except for: (1) speech that is ***misleading*** or ***fraudulent***; and (2) speech that ***concerns unlawful activity***. (The contours of these two exceptions are discussed further, *infra*, p. 571.) Speech that falls into one of these exceptions raises no First Amendment issues at all, and may thus be fully regulated by the government.

[2] Substantial government interest: Second, the court must ask whether the ***governmental interest*** asserted in support of the regulation is ***"substantial."*** If not, the regulation will be struck down without further inquiry. If the interest is substantial, the government must still meet the final two parts of the test.

[3] Interest "directly advanced": Third, the court will decide whether the regulation ***"directly advances"*** the governmental interest evaluated in part (ii) of the test. If it does not, the regulation will be struck down. If it does, it will still have to meet the fourth part of the test.

[4] Means-end fit: Finally, the court will ask whether the regulation is ***"not more extensive than is necessary"*** to serve the government interest. If it *is* more extensive than necessary, the regulation will be struck down. (But a post-*Central Hudson Gas* case has watered down this "not more extensive than is necessary" test. Today, all that is required of the fit between the means and the end is that the means be ***"reasonably tailored"*** to serve the governmental objective, so that some looseness in the means-end fit will be tolerated where what is regulated is commercial speech. See *Edenfield v. Fane*, discussed further, *infra*, p. 572.)

c. Application to facts: The Court in *Central Hudson* then applied its test to the facts there.

i. Protected speech: Utilities' promotional advertising was clearly speech ***protected*** by the First Amendment, satisfying part (i). The Court rejected the argument that advertising by a monopolist has no value; for one thing, even a monopolistic electric utility faces competition from alternative energy sources.

ii. State interests: The state asserted two interests in support of its ban: conservation of energy and maintenance of a fair and efficient rate structure (which, the state contended, would have been impaired by an increase in usage, because of the peculiarities of the rate structure). The Court agreed that each of these interests was ***substantial***.

iii. Direct link: The Court found that there was a ***direct link*** between the ban and one (but not the other) of the asserted state interests, that of energy conservation. (The link between promotional advertising and inequitable rates was, by contrast, too speculative to satisfy the "direct link" requirement.)

iv. Least-restrictive alternative: With respect to the ban as a way of promoting energy conservation, part (iv) was ***not satisfied***; the ban was ***more extensive than needed*** to further that interest. For instance, it prevented a utility from promoting the use of electricity even for those applications where it was a more efficient power source than that currently being used.

d. Rehnquist dissent: Justice Rehnquist was the sole dissenter in *Central Hudson*. He thought that the majority's four-part test did not give the government enough power to regulate commercial speech, and that the test gave commercial speech falling within the First Amendment protection that was "virtually indistinguishable" from that given to non-commercial speech. Rehnquist believed that the regulation here was more an economic regulation than a restraint on "free speech." Therefore, he would have given it "virtually complete deference," in contrast to what he viewed as the majority's resurrection of the discredited doctrine of *Lochner v. New York* (see *supra*, p. 167).

2. Viewpoint discrimination under the *Central Hudson* test: In *Central Hudson* itself, the Court did not expressly address whether the regulation there — banning promotional advertising by electric utilities — was "viewpoint based." So *Central Hudson* doesn't say squarely whether that case's more-forgiving ***"mid-level"*** standard of review applies even when government is ***selecting one particular viewpoint to restrict especially thoroughly*** (as opposed to the strict-and-usually-fatal review applied to viewpoint based restrictions on *non*-commercial speech, as discussed *supra*, p. 479).

a. No definitive answer: No Supreme Court case decided post-*Central-Hudson* (i.e., post-1980) has ever squarely addressed this issue. But probably the answer will turn out to be that in the case of a viewpoint-based restriction, strict scrutiny, not just mid-level review, is the appropriate standard even though the case involves "just" commercial speech.

i. Hard for government to win: But even if it should turn out that for a majority, mere mid-level review of viewpoint-based regulation of commercial speech *is* the applicable standard, government will usually find it quite ***difficult*** to convince the

court that government's choice to discriminate based on viewpoint is ***sufficiently narrowly tailored*** to the achievement of a substantial government interest.

E. Advertising of lawful but harmful products: Advertising of unlawful products may clearly be prohibited under *Central Hudson Gas*. But what about the advertising of products or services that are ***lawful***, but believed by the legislature to be ***harmful***? Examples include ***cigarettes***, ***liquor***, and ***gambling***.

1. Regular commercial-speech rules apply: The Court's relatively pro-free-speech approach towards regulation of commercial speech generally — applying fairly-tough ***mid-level review*** to such regulations (see *supra*, p. 572) — seems to ***apply the same way to "vice" products*** as to products or services not generally considered harmful. This tough attitude towards speech regulation in this area is shown by the Court's ***rejection*** of several arguments commonly made in favor of regulation of arguably harmful products:

a. Right to ban product irrelevant: The fact that the state could have ***banned the sale of the product completely*** probably does ***not*** confer on the state the right to ban or tightly regulate ***commercial speech about the product.*** That's so because the Court seems to agree that banning speech about certain conduct may often be ***more intrusive*** than banning the conduct itself.

i. Rationale: Thus in *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (also discussed immediately *infra*), the Court unanimously held that a state statute forbidding the ***advertising of liquor prices*** violated the First Amendment, even though the state would have had the freedom to ***ban all liquor sales.*** Justice Stevens, speaking for a plurality in *44 Liquormart*, said, "We think it quite clear that ***banning speech*** may sometimes prove ***far more intrusive*** than banning conduct. ... [A] local ordinance banning bicycle lessons may curtail freedom far more than one that prohibits bicycle riding within city limits. ... The text of the First Amendment ... presumes that ***attempts to regulate speech*** are ***more dangerous than attempts to regulate conduct***." Based on recent cases, it's likely that a majority of the present Court would agree that a legislature's right to ban the sale of a product does not confer a right to issue content-based regulations seeking to sell the product.

b. "Consume less" objective will fail: If the government's sole justification for limiting advertising of the legal-but-assertedly-harmful product is that the limitation will cause people to ***consume less*** of the item, it will be extremely ***difficult*** for the limitation to pass muster. First, the government will have to show that the limit "***significantly***" reduces consumption, and this will generally be quite hard to do. Second, the government will have to show that no means are available that are significantly ***less intrusive***; since the government will almost always be free to ***increase taxes*** on the item, or to ***regulate how and where it can be sold***, or to conduct an educational campaign showing its dangers, it's again unlikely that the government will succeed in making the required showing that materially less restrictive alternatives don't exist.

Example: Rhode Island prohibits all advertising of liquor prices, except for price tags displayed with the merchandise and not visible from the street. The state defends the prohibition on the grounds that price advertising will lead to lower prices, and lower prices will lead to increased consumption, a result at odds with the state's interest in "temperance."

Held, the prohibition violates the First Amendment. First, the three-part test of *Central Hudson Gas supra*, p. 572) requires that any regulation of commercial speech ***"directly advance"*** the state's interest. This "directly advance" requirement means that the regulation must "significantly," not just slightly, advance the state's goal. Here, there is no evidence that prohibiting price advertising ***significantly*** curtails alcohol consumption. Second, *Central Hudson Gas* also requires that a regulation of commercial speech be ***"no more extensive than necessary."*** The ban fails this requirement, too, since the state could have limited alcohol consumption by less restrictive means, such as increased taxation, limits on per capita purchases, or educational campaigns.[11] *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996).

c. Protect minors: Finally, if the government's principal justification is to prevent ***minors*** from gaining access to, or being enticed by, the "vice" product, government will have to ***tailor its methods very tightly*** so that there is no undue interference with the rights of ***adults*** to obtain or learn about the product.

i. Tobacco regulation: As the Court said in a case striking down Massachusetts' restrictions on the advertising of smokeless tobacco and cigars, "no matter how laudable the state's interest in preventing minors' access to tobacco products, the state may not regulate advertising in a way that interferes materially with the legitimate rights of the tobacco industry, and its ***adult customers***, to exchange truthful information." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

F. Current status: The ***current status*** of the protection given to "commercial speech" may be ***summarized*** as follows:

1. Misleading or deceptive statements: Commercial speech that is ***misleading*** or ***deceptive***, or that ***proposes an illegal transaction***, is ***not*** entitled to ***any*** First Amendment protection at all. That is, misleading or deceptive speech is deemed to fall within an "unprotected category" of speech (see *supra*, p. 486), and commercial speech falling within an unprotected category gets no First Amendment protection at all.

a. Potential to mislead: Even speech which merely has a ***potential*** to mislead may be regulated. But if information may be presented in ***either*** a misleading or a non-misleading way, the state must attempt to prohibit ***only*** the misleading method (i.e., it must use the ***least-restrictive alternative***). *In re R.M.J.*, 455 U.S. 191 (1982).

b. Integral to criminal conduct: Speech that is ***integral to criminal conduct*** is not protected.

i. Proposing an illegal transaction: So, for instance, speech that ***proposes an illegal transaction*** doesn't receive any First Amendment protection. See, e.g., *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376 (1973), upholding an order forbidding newspapers from publishing sex-designated help-wanted col-

11. The two arguments discussed here — that the measure failed because there was no evidence that it significantly diminished alcoholic consumption, and because less restrictive means would have sufficed — were joined only by a plurality of the Court. But all 9 members of the Court agreed with the result, that Rhode Island's ban violated the First Amendment.

umns. The Court reasoned that such columns act as an aid to illegal sex discrimination in employment.

ii. **Conspiracy:** Similarly, speech that is part of a ***conspiracy*** to commit a crime ("We hereby agree to rob the First National Bank") may be punished, because such speech is unprotected.

2. Three-part test: If the commercial speech *is* covered by the First Amendment (i.e., the speech does not fall within an "unprotected category"), then — even if the regulation is ***content neutral*** — the restriction will be upheld only if the state shows that it:

[1] ***directly advances*** ...

[2] a ***substantial governmental interest*** ...

[3] in a way that is ***reasonably tailored*** to achieve that objective.

(These are essentially the last three prongs of *Central Hudson Gas*.) This is basically ***"mid-level"*** (or ***"intermediate-level"***) review.

a. Content based: And if the regulation is *not* content neutral, the regulation must survive strict scrutiny, even though what's being regulation is commercial speech.

3. "Reasonably tailored means": Part (3) of the *Central Hudson Gas* test requires that the content-neutral regulation of commercial speech be "no more restrictive than necessary" to achieve the government's objective. But several post-*Central Hudson Gas* cases show that the Court is ***not*** taking the phrase "no more restrictive than necessary" ***literally***, as if it meant "least restrictive possible alternative." Instead, all that is required of the means-end fit is that the means be ***"tailored in a reasonable manner"*** to serve the government objective, i.e., that the means advance the objective in a ***"direct and material way."*** *Edenfield v. Fane*, 507 U.S. 761 (1993).

a. Looseness of means-end fit: The fact that there may be ***some other means*** that would serve the government interest as well, while restricting the commercial speech less, will ***not be fatal***. In other words, some degree of ***looseness in the means-end fit*** will be ***tolerated*** when what is being regulated is commercial speech. See *Board of Trustees of SUNY v. Fox*, 492 U.S. 469 (1989).

b. Can still have "bite": But the not-so-demanding means-end test still has considerable ***"bite"***: If the Court is convinced that there is some alternative method of achieving the same end as well or almost as well, with ***significantly less interference*** with protected speech, the Court will not hesitate to ***strike down*** the restriction. Indeed, the Court will generally place upon the government the burden of ***showing*** that ***proposed less-restrictive alternatives would not adequately fulfill*** the governmental objective being sought. See *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002).

c. Internal consistency required: An important factor in whether the means will be found not to be uncessarily restrictive is whether the means selected by the government are ***internally consistent*** — where the means are not self-consistent, the Court is likely to find that the scheme is too irrational to advance the stated objective sufficiently.

Example: A federal statute prohibits beer manufacturers from listing their beverage's alcohol content on the label. The federal government defends the ban on the grounds

that it's needed to prevent brewers from engaging in "strength wars," in which each maker increases its beer's alcohol content and then tries to lure drinkers by advertising the high content.

Held, the statute violates the brewers' free speech rights. The federal government does not prohibit alcohol strength listings in advertising, only on labels. Similarly, the government doesn't ban such listings for the labels of wines and spirits, only beer. These inconsistencies make the scheme so irrational that it does not "directly and materially advance" the objective of preventing strength wars. *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

d. Some chance of success: A second factor in determining whether the means are reasonably tailored to the government objective is whether the means have a ***reasonable probability of achieving the objective*** at least some of the time. The means-end fit will be too loose if it "provides only ***ineffective or remote support*** for the government's purpose" (*Edenfield*, *supra*), or if there is ***"little chance"*** that the restriction will advance the state's goal (*Greater New Orleans Broadcasting Assoc.*, 527 U.S. 173 (1999).

Example: Massachusetts regulates indoor advertising for smokeless tobacco and cigars in a number of ways. One restriction is that advertising for such products cannot be placed lower than five feet above the floor of any retail establishment located within 1,000 feet of any school or playground. The purpose of the regulation is to make tobacco products less appealing to minors, by limiting minors' exposure to advertising about the products.

Held, the restriction is unconstitutional. The five-foot rule "does not seem to advance" the state's goal. "Not all children are less than five feet tall, and those who are certainly have the ability to look up and take in their surroundings." Therefore, the height restriction "does not constitute a reasonable fit" with the state's goal. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (also discussed *infra*, p. 571).

e. Fear of bad public decisions not sufficient: Government's fear that if the commercial information is divulged to the public, the public will make ***"bad decisions"*** is not a legitimate state objective. "Fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech." *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653 (2011).

G. Constitutionally-protected products: The use of some products is so tightly tied in with the ***exercise of constitutional rights*** that sale of the product could ***not*** constitutionally be banned; therefore, advertising of these products may also not be banned or heavily regulated. For instance, since there is a constitutional right to use ***contraceptives***, a ban on the advertising of contraceptives would not be any more constitutional than would a ban on the sale of them. Indeed, the Court held this to be the case, in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983).

Quiz Yourself on

DEFAMATION, OBSCENITY AND COMMERCIAL SPEECH

87. Joe was the owner of "Joe's Jewelry," a jewelry store that was the only such store in the town of Liberty. Since Liberty was a small town, most people knew who Joe was, but they didn't know much about his

personal life, and he had never been involved in politics. One day, the local newspaper, the *Liberty Post*, reported that Joe had shot Tim, a shopper in the store, based on Joe's mistaken belief that Tim was attempting to rob the store. In fact, Tim was shot in Joe's store, but by Pete, Joe's employee, who Joe then immediately fired. (Tim was not in fact trying to shoplift, and Pete simply made a bad mistake.) Joe has brought a libel action against the *Post*. The state's policy is to allow a libel recovery whenever such a recovery would be allowed at common law and would not be forbidden by the U.S. Constitution. At the end of the case, the judge charged the jury that Joe could recover against the *Post* if the jury found that the *Post* had been negligent, but not if it found that the *Post* had made a non-negligent error as to the underlying facts. Does this charge correctly reflect the relevant constitutional principles? _____

88. After Emilio failed to pay numerous traffic tickets, the police came to his house to arrest him on a bench warrant. While they were standing inside the foyer of his house making the arrest, they saw copies of two unusual publications. One was *Kiddie World*, which contained pictures of nude adolescents; the adolescents were suggestively posed, but were not engaged in real or simulated sexual activities. The second publication was *Barnyard Illustrated*, which consisted exclusively of pictures of men and women having real or simulated sex with a variety of barnyard animals, including sheep and goats. A state ordinance forbids the sale or possession of "any pictorial material containing sexually explicit photographs that are obscene under prevailing constitutional standards." Assume that Emilio can be shown to have known the contents of both of these magazines.

(a) Can Emilio be convicted for violating the ordinance as to *Kiddie World*? _____

(b) Can Emilio be convicted for violating the ordinance as to *Barnyard Illustrated*? _____

89. Congress has concluded that the nicotine used in cigarettes is "highly addictive." Congress has also concluded that cigarette advertising causes many minors (who under federal and state laws can't legally buy the product) to take up smoking. Therefore, Congress has now banned all print advertising for cigarettes. Together with a prior ban on broadcast advertising for cigarettes, this means that billboards and handbills are now the only allowable means of advertising cigarettes. The cigarette industry asserts that this near total ban violates its right of free expression.

(a) What is the test that the Court will use in evaluating the constitutionality of the ban? _____

(b) Is the statute constitutional? _____

Answers

87. Yes, probably. The first question is whether Joe is a ***"public figure."*** If he is a public figure, he may not be permitted to recover unless he shows "actual malice" on the part of the *Post*, i.e., that either the *Post* had knowledge that its statement about who did the shooting was false, or that the *Post* acted with "reckless disregard" of whether the statement was false or not. So if Joe is a public figure, then the judge's instruction is wrong. Joe might be held to be an "involuntary public figure" because of his involvement in this matter of obvious public interest; however, since he is not a criminal defendant, and since the Court has construed the "involuntary public figure" category narrowly, probably Joe does not fall into this category. Joe is certainly not a generally famous person (even locally), nor one who has voluntarily injected himself into a public controversy, so he probably doesn't fit into either of the other public figure categories recognized by the Court.

If Joe is in fact a "private figure," then the judge's charge is correct. Under *Gertz v. Robert Welch,* where P is neither a public official nor a public figure, there is no constitutional requirement that he prove that the defendant knew his statement to be false or recklessly disregarded the truth. (On the other hand, the state would not be permitted to grant Joe a recovery based on strict liability; the First Amendment requires that the *Post* be proven to be at least negligent, even in a suit brought by a private figure.)

88. (a) Yes. On these facts, Kiddie World is probably not, strictly speaking, "obscene" under Supreme Court definitions. The reason is that mere nudity, without any attempt to portray sexual activity, is not considered "obscene." However, the state's interest in preventing the sexual exploitation and abuse of children is so strong that states may prohibit the sale, and even the private possession, of sexually explicit nude pictures of children, even though these are not strictly speaking "obscene." *Osborne v. Ohio*.

(b) No. The material here is almost certainly "obscene." Under *Miller v. California*, material is obscene if it depicts "patently offensive representations or descriptions of ultimate sex acts, normal or perverted. … " It must be the case that the average person, applying contemporary community standards, would find that the work taken as a whole appeals to the prurient interest, and that the work taken as a whole lacks serious literary, artistic, political or scientific value. These tests all seem to be satisfied by the material here. However, the mere ***private possession*** of obscene material by an adult may not be made criminal. *Stanley v. Georgia*. Therefore, even though the state might be able to punish the person who sold the magazine to Emilio, it may not punish Emilio for knowingly possessing the material in his house. (As noted in part (a), possession of material showing sexually explicit photos of children does not come within the purview of *Stanley*.)

89. (a) In theory, the four-part test of *Central Hudson Gas v. Public Service Comm.*, as modified by later cases. First, the Court will determine whether the commercial speech is protected at all by the First Amendment; commercial speech receives at least partial protection so long as it is not "misleading" and does not propose unlawful activity. Next, the Court asks whether the governmental interest in support of the regulation is ***"substantial."*** Third, the Court decides whether the regulation ***"directly advances"*** the governmental interest being sought. Finally, the Court asks whether the restriction is ***"not more extensive than is necessary"*** to serve the governmental objective. (But some post-*Central Hudson* cases suggest that when a ban on advertising is premised on the idea that less advertising of a harmful product will lead to less consumption, the Court may apply ***strict scrutiny***, not the mid-level standard of *Central Hudson Gas*. So the *Central Hudson Gas* test might not be applied here.)

(b) Unclear, but the statute would probably be struck down. Even if the not-so-hard-to-satisfy *Central Hudson Gas* test were applied, the restriction would probably not survive. General cigarette advertising is not "misleading" and does not propose unlawful activity (since Congress has not outlawed the sale of cigarettes), so the speech gets some First Amendment protection. It's true that the government's interest in preventing additional people (especially minors) from becoming "addicted" certainly seems to be "substantial." It's also true that a ban on all print advertising certainly seems to "directly advance" the objective of preventing the creation of new smokers, given the power of advertising. However, *44 Liquormart* says that the anti-consumption impact of the regulation must be "significant," and it's not clear that the impact here would qualify. Furthermore, it's not clear whether the ban is "not more extensive than is necessary" to serve this interest, since there are some less-restrictive methods (e.g., a broader anti-smoking campaign, or higher taxes) that haven't been tried yet.

It may be that the fact that the users that Congress is principally targeting are ***minors***, who under state and federal law can't be legal purchasers of the product, may lead the Court to give more deference to the restriction here than it did to the no-liquor-price-ads restriction struck down in *44 Liquormart.* But in

Lorillard Tobacco Co. v. Reilly, the Court struck down several state regulations against smokeless tobacco advertising where the regulations were designed to protect minors (e.g., a ban on outdoor advertising, and a rule that advertising within a retail store had to be at least five feet above the floor). In *Lorillard*, the Court said that regardless of the importance of protecting minors, "the state may not regulate advertising in a way that interferes materially with the legitimate rights of the tobacco industry, and its ***adult customers***, to exchange truthful information." So protection of minors probably won't be enough to save the statute here from being found to flunk the *Central Hudson Gas* requirements that the government regulation (1) *significantly* reduce the use of the harmful substance; and (2) be "*not more extensive than necessary*" to serve the state interest.

IX. REGULATION IN THE CONTEXT OF POLITICAL CAMPAIGNS

A. Money in political campaigns, generally: In the modern political campaign, speech and the expenditure of money seem inevitably to go hand in hand. Whether money is spent by a private citizen who is contributing to a candidate, by a political action committee which runs advertisements backing or opposing certain candidates, or by a candidate himself, campaign spending has a strong expression component. Yet if corruption and the appearance of corruption are to be curbed, and if the cynical view that the richest candidate generally wins is to be proved wrong, some sorts of limits on campaign spending are probably necessary.

1. General principles: In a series of cases beginning in 1976, the Supreme Court has attempted to work out a line dividing those types of election spending which the states or the federal government may prohibit from those which are constitutionally-protected. While this line is a somewhat blurry one, several basic principles have emerged:

? ***Contributions*** made by individuals or groups to individual candidates, to Political Action Committees (***PAC***'s) or to political parties, may be ***limited in dollar amount***, so long as the limits are not so low as to substantially interfere with candidates' and parties' ability to ***run a competitive election campaign.***

? On the other hand, ***independent expenditures by individuals***, as well as by ***corporations and unions,*** may ***not*** be limited at all.

? Similarly, expenditures by ***candidates from their own funds*** may ***not*** be limited at all.

? Congress may not treat ***corporations*** and unions ***less favorably than individuals*** (e.g., by preventing corporations from paying for independent election-time ads out of their own treasuries).

B. *Buckley v. Valeo:* The seminal case on the First Amendment implications of campaign-finance regulation is ***Buckley v. Valeo***, 424 U.S. 1 (1976), in which the Supreme Court upheld some but not all provisions of the Federal Election Campaign Act of 1971 (FECA), as amended in 1974 (shortly after Watergate).

1. Statutory provisions: Of the several provisions of the Act whose constitutionality the Court reviewed in *Buckley*, two are of concern to us here: (1) the Act's limitation on ***individual political contributions*** to $1,000 to any single candidate per election (with a corollary $25,000 limit on ***aggregate*** contributions by any one individual in any year); and (2) its limitations on ***expenditures***, including a $1,000-per-year limit on ***independent*** expen-

ditures by individuals and groups on behalf of a "clearly identified" candidate, various limits on expenditures ***by a candidate*** from personal or family funds, and various limits on ***total*** campaign spending.

2. **Result:** In brief, the Court's *per curiam* decision ***sustained*** the contribution limits, but found ***unconstitutional*** the limits on independent expenditures by individuals, on expenditures by a candidate from personal or family funds, and on aggregate campaign spending.

3. **Contribution limits upheld:** The Court applied what it called its "closest scrutiny" to the ***contribution*** limits. But despite the close scrutiny, the Court ***upheld*** the limits, on the following analysis:

   a. **Marginal restriction:** Although these limits placed some quantity restriction on political expression, the restriction was only ***"marginal."*** Since a dollar contribution does not communicate the "underlying basis" for the contributor's support of the candidate, the amount of "communication" being done by the contributor ***does not increase*** as the size of the contribution increases — whatever expression takes place when a contribution is made derives from the "undifferentiated, symbolic act of contributing," whose symbolism is largely independent of dollar amount.

   b. **Strong governmental interest:** On the other side of the scale, the governmental interest supporting the limits was a powerful one, that of limiting the ***actuality and appearance of corruption*** resulting from large individual contributions, which are sometimes made to secure a political *quid pro quo* from the candidate. ***No less restrictive alternative*** would have been adequate; for instance, anti-bribery and disclosure laws could not deal fully with the need to root out all apparent as well as actual opportunity for corruption.

   c. **Aggregate limits struck down:** The contribution limits at issue in *Buckley* included not only a limit of $1000 to any single candidate per election, but also a $25,000 limit on ***aggregate contributions*** by an individual to ***all*** federal candidates in any one year. The Court in *Buckley* ***sustained this aggregate limit***, just as it sustained the limit on contributions to a single candidate. But whereas the ***per-candidate*** limit on individual expenditures remains constitutional as of this writing (late 2014), the ***aggregate limit was struck down*** in 2014 as a violation of the free-speech rights of individual contributors. That holding, in *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014), is discussed *infra*, p. 580.

4. **Expenditures by individuals:** In contrast to its ruling upholding contribution limits, the Court in *Buckley* ***struck down*** the limitations on ***expenditures*** by ***individuals acting independently*** from candidates. The Court concluded these independent-expenditure limits imposed "***direct and substantial restraints*** on the quantity of political speech," and unconstitutionally limited political expression "at the core … of First Amendment freedoms." For instance, the restrictions would have made it impossible for an individual or association legally to take out a single quarter-page advertisement backing a particular candidate in a big-city newspaper.

   a. **State interest insufficient:** When viewed with the requisite "exacting scrutiny," the governmental interest in combating corruption, asserted in support of the limits on expenditures by individuals, was ***inadequate***.

i. **Wouldn't eliminate *quid pro quos*:** First, not all apparent or actual *quid pro quo* deals would be eliminated, since the limits applied only to expenditures "advocating the election or defeat" of a "clearly identified candidate," so that ads could still be run supporting the candidate's ***views*** (as part of a *quid pro quo*), without expressly advocating his election.

ii. **Complete independence reduces danger:** Secondly, the expenditure limits only applied where the expenditures were made ***totally independently*** of the candidate and his campaign; spending which was controlled by or coordinated with the campaign was treated as a contribution. Where such complete independence existed, a carefully-orchestrated *quid pro quo* was less likely, the Court concluded, making the need for the contribution limits less pressing.

5. **Spending of candidate's own money:** The Court in *Buckley* also struck down limits on the amount that a ***candidate*** could spend from his ***own personal or family funds***. The interest in preventing actual or apparent corruption did not apply to this situation, since obviously a candidate would not bribe himself. And the interest in ***equalizing the resources*** of competing candidates was not well served by the spending limit, since a candidate who spent less of his own money than his opponent could nonetheless outspend the latter by raising more money from outside sources. Therefore, no state interest was sufficient to outweigh the candidate's own "First Amendment right to engage in the discussion of public issues and vigorously and tirelessly advocate his own election. …"

   a. **Still valid:** This principle that the amount a candidate may spend from his own resources may not be capped remains intact — and indeed has been expanded — in the Roberts court. See the discussion on p. 586 of *Citizens United*, where the Court held that even ***corporations and unions***, not just individuals, must be permitted to ***spend uncapped amounts*** of their own funds to buy advertising for or against a candidate, as long as the corporation or union acts independently of the candidate.

6. **Limits on total campaign spending:** Finally, the Court struck down limits on what a candidate could ***spend from all sources combined***. Candidates have a First Amendment right to spend as much as they wish to promote their own political views, and the governmental interest in curbing the skyrocketing costs of political campaigns is not sufficient to outweigh that right, the Court held. (But Congress may create a scheme for ***publicly funding*** elections, in which case the candidate *may* be required to choose between respecting an aggregate spending limit and losing the public subsidy.)

7. **Other opinions:** Only three Justices joined the Court's *Buckley* opinion in its entirety. Five others concurred only in part, and one did not participate.

   a. **Burger's concurrence:** Justice Burger dissented from the plurality's upholding of the contribution limits. In his view, contributions, no less than expenditures, were ways of communicating. Contributions were simply a way of "pooling" money, and were thus associational activities comparable to, say, volunteer work; therefore, freedom of ***association*** as well as freedom of speech required that these not be restricted unless there was no less-restrictive satisfactory alternative. In Burger's view, anti-bribery laws and disclosure requirements could solve the corruption problems inherent in large contributions just as they could in the expenditure context.

   b. **White's concurrence:** Justice White, like Justice Burger, saw no principled distinction between expenditures and contributions. But in sharp contrast to Justice Burger's

view, White believed that ***both*** the contribution and expenditure limits were ***valid***. He disagreed with the plurality's equation of money with speech. Also, he would have deferred much more completely to Congress' superior knowledge of what motivates politicians, and to its conclusion that expenditure limits on both private citizens and candidates are needed to accomplish the goals of preventing bribery and corruption and equalizing "access to the political area."

8. ***Buckley*** **remains valid (*Randall v. Sorrell*):** A 2006 decision involving Vermont's campaign-finance reform statute shows that ***Buckley's general approach remains valid*** in the Roberts Court. That case, *Randall v. Sorrell*, 548 U.S. 230 (2006), held that:

? limits on ***candidate expenditures*** remain flatly ***unconstitutional***, as *Buckley* had held them to be; and

? limits on ***contributions*** will often be constitutional (as the ones in *Buckley* had been held to be), but the particular Vermont limitations at issue were so low (e.g., $400 per election cycle for gubernatorial candidates) that they ***interfered with candidates' ability run a competitive election***, and thus ***violated*** the First Amendment.

Note: Although as *Randall* illustrates limits on the amount that one individual may contribute to a *single* candidate remain constitutional (provided the limit is not so low that it interferes with candidates' ability to run competitive campaigns), limits on the ***aggregate*** amount that an individual can contribute to ***all candidates collectively*** are ***no longer valid***. That is, the aggregate-contribution limits approved in *Buckley*, and then tacitly re-approved in *Randall*, were later overturned, in the 2014 case of *McCutcheon v. FEC*, discussed *infra*, p. 580.

9. Attempts to level the candidate playing field: In the decades after *Buckley*'s ruling that limits on a candidate's expenditure of her own personal funds violated her First Amendment rights, both Congress and many states have sought to find other ways to ***reduce the advantages held by wealthy candidates willing to spend their own funds***. Essentially, legislatures have devised arrangements under which, if a wealthy candidate spends a large amount of his own or well-heeled contributors' funds, the opposing non-wealthy candidate gets to ***"level the playing field"*** by either ***qualifying for public financing***, or being able to ***receive larger private donations*** than would otherwise be allowed.

But in a pair of decisions, one from 2008 and the other from 2011, the Court by a 5-4 vote has ***struck down two of these "level the playing field" structures,*** one created by Congress and the other by Arizona. In both cases, the majority's theory was that the ***wealthy candidate's*** right to ***spend on her campaign*** was being ***substantially and unconstitutionally burdened*** by having that spending trigger extra campaign money for the non-wealthy opponent.

a. Millionaire's Amendment: The first of the cases involved a federal statute, the so-called ***"Millionaire's Amendment,"*** passed by Congress in 2002. This amendment said that when a candidate for the House of Representatives spent more than $350,000 of his own funds, the candidate's ***adversary*** could receive individual contributions at ***three times the usual rate*** (i.e., subject to a per-donor limit of $6,900 rather than the usual $2,300). The idea was to "even the playing field," so that the millionaire candidate wouldn't have an unfair advantage from his ability to self-fund without limit. But

in ***Davis v. F.E.C.***, 128 S.Ct. 2759 (2008), the Court by a 5-4 vote found that the Millionaire's Amendment ***violated the First Amendment rights of wealthy candidates.***

i. **Burden on speech:** The majority agreed with the plaintiff (a wealthy candidate) that the amendment required candidates to "choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fund-raising limitations." Therefore, the amendment imposed a ***"substantial burden"*** on the exercise of the First Amendment right to use personal funds for campaign speech, triggering strict scrutiny. And the amendment could not withstand that strict scrutiny.

b. **Right to public funding:** The second case involved an Arizona statute that created a ***voluntary public financing system*** to fund the primary and general campaigns of candidates for state office. Candidates could agree to limit their own spending to $500, and thereby receive public funds. The key innovation was that during the course of the campaign, if a candidate who did not take the public option then spent more than a certain amount of her own money (or raised more than a certain amount from contributors), the publicly-funded candidate would ***get additional equalizing or matching funds.*** In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806 (2011), a five-Justice majority found that this violated the First Amendment rights of the privately financed candidate, because it ***"substantially burdens protected political speech without serving a compelling state interest."***

i. **Rationale:** The majority relied on the rationale of the decision in the *"*Millionaire's Amendment" case (*Davis v. FEC*, *supra*). Since "each personal dollar spent by the privately financed candidate results in an award of almost one additional dollar to his opponent," the structure "forces the privately financed candidate to ***'shoulder a special and potentially significant burden'*** when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy."

ii. **Dissent:** The four dissenters, in an opinion by Justice Kagan, believed that the matching-funds mechanism here was perfectly proper. Far from substantially burdening speech, the program ***"creates more speech*** and thereby ***broadens public debate."***

C. **Limits on aggregate contributions by an individual (*McCutcheon*):** You'll recall that in *Buckley v. Valeo*, the Supreme Court upheld not only limits on the amount that an individual can contribute to a single candidate, but also limits on the ***aggregate*** amount that an individual can contribute to ***all*** candidates during an election cycle. Thus a federal law providing that no individual could contribute more than $25,000 in any year to all candidates for federal office was found in *Buckley* to be constitutional on the same basis as the limit on per-candidate contributions: that such limits are needed to ***combat the actuality and appearance of corruption***, including the reality or appearance that the candidate is implicitly promising favorable action in return for a large contribution (a "*quid pro quo*").

But although the limit on the amount an individual may contribute to a *single* candidate has so far *survived* the Roberts Court's hostility to campaign-finance laws, ***the aggregate-contribution limit has not survived.*** In ***McCutcheon v. FEC***, 134 S.Ct. 1434 (2014), the Court held by a 5-4 vote that limits on the amounts that an individual may contribute in a year to ***all federal candidates***, and, separately, to ***all political committees***, ***violate the free-speech rights of individual***s who want to make bigger aggregate contributions.

1. **Regulations at issue in *McCutcheon*:** *McCutcheon* involved the contribution limits for the 2013-14 federal election cycle. During this cycle, federal campaign restrictions prohibited an individual from contributing more than $48,600 to all federal candidates, and from giving more than $74,600 to all non-candidate-controlled political committees. These ***"aggregate"*** restrictions were on top of "base" restrictions limiting how much an individual could contribute to any *one* candidate ($5,200, counting both the primary and general elections) or to any one political committee ($5,000).

2. **Plaintiffs:** The two plaintiffs — a donor and a political party — challenged these aggregate limits as a violation of their First Amendment rights.

3. **Struck down by 5-4 vote:** The Supreme Court, in a 5-4 victory for the conservative bloc of the Court, ***struck down the aggregate limits as violations on the free speech rights of contributors.*** The main opinion was a plurality opinion by Chief Justice Roberts (joined by Justices Scalia, Kennedy and Alito); the fifth vote came from Justice Thomas, who concurred in the result.

   a. **Relation between base and aggregate limits:** Roberts conceded that the Court had long held that the *base* limits — the maximum contribution by one donor to one candidate — serve the permissible objective of combating corruption and the appearance of it. (The plaintiffs in *McCutcheon* did not challenge the base limits.) The question was whether the *aggregate* limits, too, could be found to serve the anti-corruption objective. The federal government, defending the aggregate limits, argued that the answer was yes; for one thing, the government said, the aggregate limits would make it harder for donors and political parties to ***circumvent the base limits.***

   b. **Only corruption-prevention an allowable objective:** But Roberts rejected this "circumvention" defense of the aggregate limits. He noted that over the past 40 years since *Buckley*, the Court had recognized only *one* legitimate governmental interest supporting restrictions on campaign finances: "***preventing corruption*** or the ***appearance of corruption***."

      i. **Narrow view of corruption:** Furthermore, Roberts said, the Court had decided that there was only ***one*** type of activity that would qualify as "corruption" of the sort that could be fought by finance regulation: **"*'quid pro quo' corruption or its appearance.*** That Latin phrase captures the notion of a ***direct exchange of an official act for money."***

   c. **No impact on *quid-pro-quo* problem:** Under this narrow view by which only measures that target *quid pro quo* corruption could survive, the aggregate limits were ***fatally flawed,*** Roberts said. The government had argued that the aggregate limits helped in the fight against corruption by making it harder for contributors to evade the base limits. But Roberts concluded that the aggregate limits "do ***little, if anything, to address [the circumvention] concern***, while ***seriously restricting participation*** in the democratic process." That was enough to make the limits invalid under the First Amendment.

   d. **Thomas adds fifth vote:** The fifth vote to uphold the aggregate limits came from Justice Thomas, who concurred in the judgment. Thomas would have gone even further than the plurality — he would have ***overruled*** *Buckley*'s core distinction between limits on *contributions* (which *Buckley* decided did not need to be strictly scrutinized) and limits on *expenditures* (which *Buckley* and later cases have strictly scrutinized).

Thomas believed that limits on both contributions and expenditures should be strictly scrutinized. He left little doubt that if the base limits upheld by *Buckley* (and never overturned since) were subjected to such scrutiny, they too, like the aggregate limits, should and would be struck down.

4. **Dissent:** Justice Breyer dissented in *McCutcheon*, in an opinion joined by Justices Ginsburg, Sotomayor and Kagan.

   a. **Evisceration:** Breyer believed that the outcome in *McCutcheon*, when taken together with that in *Citizens United* (see *infra*, p. 586) striking down limits on corporations' independent expenditures, ***"eviscerates our Nation's campaign finance laws***, leaving a remnant incapable of dealing with the ***grave problems of democratic legitimacy*** that those laws were intended to resolve."

5. **Significance:** So as the result of *McCutcheon*, a donor may now donate the maximum per-candidate amount (currently $5,200 per election cycle) directly to ***as many federal candidates as the donor wishes.*** And the same is true of political committees: the donor may give the $5,000 (current) limit to as many political committees as he or she desires. Thus, even apart from the unlimited "independent expenditures" that a wealthy donor might make to urge the election of particular candidates, the donor could give, for instance, an aggregate of nearly $2.8 million to all Republican House and Senate candidates ($5,200 x 535 candidates) in a single election cycle, as well as an even larger amount to a collection of political committees not under the control of any individual candidate.

D. "Soft money" and pre-election "issue ads" (*McConnell, Wisconsin Right to Life* and *Citizens United*): The federal campaign finance reform measures approved by the Court in *Buckley* turned out not to be tremendously effective over the several decades that followed. Sophisticated and wealthy donors and advocacy organizations — and the national political parties — bypassed these measures by various devices, most notably the institutions of ***"soft money"*** and ***"issue ads."*** Finally, Congress responded by enacting the Bipartisan Campaign Reform Act of 2002 ("BCRA"), popularly known as the ***McCain-Feingold Act*** after its chief Senate sponsors. In an important trio of decisions, the Court first approved the key measures of the BCRA, but then (after a switch in Court personnel) reversed itself by striking one of the two key measures.

The three cases are: ***McConnell v. Federal Election Comm.***, 540 U.S. 93 (2003) (approving both key measures, mostly by a 5-4 vote); ***Federal Election Commission v. Wisconsin Right to Life***, 127 S.ct. 449 (2007) (dramatically narrowing the scope of the ban on election-time issue ads, also by a 5-4 vote); and ***Citizens United v. Federal Election Commission***, 130 S.Ct. 876 (2010) (stripping nearly all the rest of the BCRA's regulation of such issue ads, by holding, again by a 5-4 vote, that ***corporations and unions can't be treated worse than individuals***). *Citizens United*, in particular, is the most important campaign-finance decisions by the Court since *Buckley*.

1. **Twin targets of the BCRA:** The BCRA addressed the two practices that Congress believed were the most egregious ways in which wealthy donors and special-interest groups were corrupting and distorting the federal election process:

   a. **Soft money:** First was the giving of ***"soft money"*** donations. Political contributions whose amounts were regulated by the FECA (the act upheld in *Buckley*) were and are known as ***"hard money"*** donations. But the FECA as interpreted by the Federal Election Commission treated certain donations and expenditures as not falling within this

regulated, hard-money classification; these unregulated sums are what is known as soft money. For instance, donors could contribute ***unlimited soft-money sums to the Democratic and Republican national parties*** (or special committees run by those parties), and the parties could then ***re-spend the money*** however they wanted as long as the funds were not used to expressly advocate the election or defeat of a particular candidate. Such large soft-money donations could be given by wealthy individuals, corporations, labor unions, and anyone else, as long as the funds were used in this no-advocacy-of-election-or-defeat-of-a-specific-candidate manner.

i. **Get-out-the-vote and other uses of soft money:** So, for instance, the national political parties could raise large sums from wealthy donors, then spend those sums on activities like ***get-out-the-vote drives*** (directed at voters expected to vote for the party putting on the drive), and ***generic party advertising*** (e.g., "Vote for the Democratic ticket this November 2nd.")

b. **Issue ads:** The second practice that was upsetting Congress was the use of ***special-issue broadcast ads*** by groups like ***corporations*** and ***labor unions***. If a corporation or union wanted to buy an ad expressly advocating the election or defeat of a particular candidate, that ad had to be paid for with hard (and thus tightly-regulated) dollars, and lots of information about the sponsor of the ad had to be disclosed. But if the sponsor avoided the "magic words" — i.e., words expressly advocating a particular candidate's election or defeat — then the ad could be funded by ***unlimited sums furnished by the corporation or union***, and with no disclosure of the sponsors' identity. These ads are generically known as ***"issue ads"*** (and ones attacking rather than supporting a particular candidate are known as ***"attack ads"***).Thus a Republican-leaning advocacy group might purchase ads attacking Democratic Congressman Joe Smith's voting record on Social Security, and then conclude, "Call Joe Smith and tell him to stop weakening Social Security." These attack ads were in fact often ***more effective*** than direct "vote for [or against] Jane Doe" ads.

2. **Congress attacks the twin evils:** So by enacting the BCRA, Congress tried to curb the abuses associated with both unregulated soft money and with issue ads purchased by that unregulated money. In doing so, Congress believed that it was acting to reduce not only corruption but the ***appearance*** of corruption, stemming from wealthy donors' apparent attempt to purchase access to office holders. The heart of the BCRA consisted of Titles I and II.

   a. **Title I on soft money:** Title I of the BCRA was Congress' attempt to plug the soft-money loophole. The main provision in Title I ***prohibited the national political parties and their committees from soliciting, receiving or spending any soft money.*** As the *McConnell* majority later summarized this provision, Title I "takes national parties out of the soft-money business."

   b. **Title II on issue ads:** Title II mainly ***prohibited corporations*** and ***labor unions*** from using their general funds for ***broadcast advertisements naming specific candidates for federal office near election time.***

      i. **Electioneering Communications:** Title II defined a new category called ***"Electioneering Communications,"*** which consisted of ***TV and radio ads***, broadcast within 60 days before a general election or 30 days before a primary, and referring to an ***identified candidate*** for federal office.

ii. **Ban on ads:** Title II then said that ***corporations and labor unions may not use their general funds to pay for Electioneering Communications,*** and must instead pay for these with money from their Political Action Committees (see *supra*, p. 576).

iii. **Significance:** Since PAC's are ***subject to contribution limits*** and other types of regulation (e.g., the requirement that the names of individual donors be ***publicly disclosed***), Title II significantly restricted the ways in which ***corporations*** (including ***non-profit advocacy corporations*** like the ACLU and the NRA) could pay for and carry out their own election-time broadcast advertising.

3. **The twin evils meet different fates:** Both Title I on soft money and Title II on issue ads were promptly attacked in multiple litigations. As we'll see below, as of mid-2010, Title I's ***soft-money*** restrictions have ***survived*** constitutional scrutiny, but Title II's restrictions on ***corporations' and unions' right to pay for issue ads*** have been completely ***overruled*** as First Amendment violations. We consider the attacks on each title independently, first Title I (in Paragraph 4) and then Title II (in Paragraph 5).

4. **Title I (soft-money ban) survives:** The ban on ***soft-money donations*** imposed by Title I of the BCRA has, at least for now, survived First Amendment attack. That happened in *McConnell*, *supra*, the 2003 case that was the first, and least successful, of the trio of First Amendment attacks on the BCRA.

   a. **Attacked by odd grouping:** In *McConnell*, a consortium of non-profit groups attacked the constitutionality of the BCRA, including such unlikely allies as the American Civil Liberties Union and the National Rifle Association. (They attacked both Title I and Title II; here, we cover the Title I attack, with the Title II attack postponed to p. 585 below).

   b. **Court upholds Title I in *McConnell*:** The *McConnell* Court ***upheld the constitutionality of Title I***, as part of a decision ***upholding nearly all of the BCRA***.[12] The majority opinion on Title I was jointly authored by Justices Stevens and O'Connor (joined by Souter, Ginsburg and Breyer). Most of the case was decided on a 5-4 vote.

      i. **Rationale:** The majority wrote that soft money had enabled candidates and parties to ***circumvent*** FECA's limits. The majority agreed with the congressional drafters of Title I that there was ample evidence to support the conclusion that large soft-money contributions to the national political parties had had a ***corrupting influence***, or at the very least had given rise to the ***appearance*** of corruption. There was "no meaningful distinction between the national party committees and the public officials who control them." There was evidence that "candidates and donors alike [have] exploited the soft-money loophole, the former to increase their prospects of election and the latter to ***create debt on the part of officeholders***, with the national parties serving as ***willing intermediaries***[.]" Therefore, it was not a violation of donors' First Amendment rights for Congress to regulate donations so as to curb the reality or appearance of that corruption.

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12. The one part of the Act that was struck down was a ban on contributions by ***minors*** — Congress was worried that rich parents would funnel, through their minor children, contributions in excess of the hard-money limits. But the Court said that there was no evidence that such evasions were occurring.

c. Dissents in *McConnell*: Four justices — Kennedy, Scalia, Thomas and Rehnquist — ***dissented*** from the majority's wholesale upholding of Title I in *McConnell*.

i. Scalia's dissent: Justice Scalia's dissent said that the majority had "smiled with favor upon a law that cuts to the heart of what the First Amendment is meant to protect: the right to ***criticize the government***." In particular, he thought the law improperly allowed Congress to ***insulate its own incumbent members against criticism*** by political parties and corporations. The BCRA might be "evenhanded" in the sense that it similarly prohibited criticism of those running *against* incumbents. But "this is an area in which ***evenhandedness is not fairness***. [If] incumbents and challengers are limited to the same quantity of electioneering, ***incumbents are favored."***

d. Present status: Title I's ban on soft-money donations ***remains in force***. Nothing in the revolutionary case of *Citizens United* (*infra*, pp. 586-587), giving corporations and unions the same independent-campaign-spending rights as individuals, directly invalidates the soft-money ban upheld in *McConnell*.

i. Vulnerable: However, notice that Title I treats the ***national political parties less favorably*** than all other non-candidate election players, since outside groups (e.g., Political Action Committees) may receive unlimited donations to use for electioneering, whereas the national political parties may not. The same logic that led the Court in *Citizens United* to say that Congress couldn't radically disfavor one type of player (corporations) as to issue ads, arguably applies the same way to prevent Congress from disfavoring one type of player (national political parties) as to political fund-raising. Therefore, Title I may not survive in a post-*Citizens United* world.

5. Title II (issue-ad ban) struck down: Recall (p. 583 *supra*) that Title II of the BCRA banned ***issue ads***, i.e., pre-election ads mentioning a candidate, paid for by corporations or unions. That ban, unlike Title I's ban on soft-money, has ***not survived*** in the Supreme Court.

a. Title II initially upheld: In *McConnell*, *supra*, a majority of the Court thought that Title II, like Title I, was ***constitutional***. Those attacking Title II argued that under *Buckley*, speakers had an absolute First Amendment right to engage in "issue advocacy" (as opposed to express advocacy of the election or defeat of a particular candidate). But the majority disagreed: corporate-paid broadcast ads near the time of an election, mentioning specific candidates, were just as clearly intended to influence the election as were the type of express-advocacy ads regulated under *Buckley*. Therefore, it did not violate the First Amendment for these issue ads to be regulated in the same way.

b. Reversal of Court's view on Title II: But beginning four years after *McConnell*, and following a change in the Court's membership, the Court ***reversed itself*** as to Title II's ban on issue ads near election time. In a pair of cases, *FEC v. Wisconsin Right to Life* (2007) and *Citizens United v. FEC* (2010), Justice O'Connor's replacement by Justice Alito produced a ***switch*** to 5-4 the other way, with the ultimate result that ***even corporations and labor unions may run whatever issue ads they want during political campaigns***, as long as they ***operate independently*** of the candidate.

c. Narrowed in *Wisconsin Right to Life*: First, in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), the Court dramatically narrowed the scope of the ban on issue ads.

d. Ban overturned (*Citizens United*): Then, in the much more important ***Citizens United v. FEC***, 130 S.Ct. 876 (2010), by the same 5-4 alignment as in *Wisconsin Right to Life*, the Court explicitly ***overruled*** the part of *McConnell* that had upheld Title II. *Citizens United* establishes that ***corporations have a full measure of First Amendment protection in the area of politics***, and that Congress may not prohibit them from using their ***general funds to run campaign advertising***, as long as the corporation ***acts independently*** of the candidate.

i. Facts: Citizens United, a non-profit organization that was the plaintiff, made a documentary presenting an unflattering portrait of then-presidential candidate Hillary Clinton. Citizens United wanted to pay for a cable TV video-on-demand presentation of the movie shortly before the 2008 Democratic presidential primary. Regulations of the Federal Election Commission prohibited Citizens from paying for this broadcast with its unrestricted funds, on the theory that this would be a forbidden corporate-paid "electioneering communication." Citizen United sued the FEC for a ruling that its free speech rights had been violated.

ii. Plaintiff wins: By a 5-4 vote, Citizens United ***prevailed***. In a very broad opinion by Justice Kennedy, the majority held that Title II's ban on corporate issue ads violated corporations' free speech rights.

(1) *Austin* and *McConnell* overruled: In reaching this conclusion, Kennedy's opinion squarely overruled the Title II holding of *McConnell* (*supra*, p. 585). The opinion rejected the rationale that corporate campaign speech could be limited because of its distorting effects. To Kennedy, this rationale would ***reach too far***: "If the ***anti-distortion rationale*** were to be accepted ... it would permit government to ***ban political speech*** simply because the speaker is an association that has taken on the corporate form." Nor did Kennedy believe that independent corporate campaign expenditures could be banned in order to ***prevent corruption*** or the appearance of corruption; an anti-corruption rationale justified limits on contributions to *candidates*, he said, but there was no evidence that independent corporate expenditures that were ***not coordinated*** with a candidate fostered corruption or the appearance of corruption.

(2) Censorship: Kennedy concluded that banning corporations from making independent expenditures to broadcast political messages ***amounted to censorship***: "When government seeks to use its full power, including the criminal law, to ***command where a person may get his or her information*** or ***what trusted source he or she may not hear***, it ***uses censorship to control thought.*** ... The Government ***may not suppress political speech*** on the basis of the ***speaker's corporate identity.***"

iii. Dissent: Justice Stevens (joined by Justices Ginsburg, Breyer and Sotomayor) ***dissented*** from the key holding in *Citizens United*, that Title II's ban on corporate-funded issue ads violated corporations' free speech rights.

(1) Rationale: Stevens believed that Congress was entitled to ***distinguish between corporate and human speakers.*** Lawmakers have a "compelling con-

stitutional basis" to guard against the ***potentially-damaging effects of corporate spending*** in local and national elections, he said, a basis reflected in the the special limitations that Congress had imposed on corporate campaign spending ever since a 1907 law. The majority's rule "threatens to ***undermine the integrity of elected institutions*** across the Nation."

(2) Antidistortion and anticorruption: Stevens argued that regulation of corporate electioneering expenditures was a necessary means of avoiding corporations' ***unfair influence in the electoral process***. Unregulated corporate expenditures would be likely to ***drown out non-corporate voices***, and to "generate the impression that corporations dominate our democracy." The majority's approach was premised on the idea that "there is no such thing as too much speech." This might be true "if individuals ... had ***infinite free time*** to listen to and contemplate every last bit of speech uttered by anyone, anywhere[.]" But, he continued, "[i]n the real world, we have seen, corporate domination of the airwaves prior to an election may ***decrease the average listener's exposure to relevant viewpoints***[.]"

iv. Unions: *Citizens United* dealt directly only with speech by corporations, not by other types of entities such as ***labor unions*** (who were also forbidden by Title II to run issue ads). But the rationale of the case is broad — the majority says that for First Amendment purposes, the particular form of legal organization doesn't matter. Therefore, *Citizens United* strongly implies that independent campaign spending by labor unions ***cannot be barred or heavily regulated — or treated much differently*** — than such spending by individuals.

v. Significance: *Citizens United* essentially ***removes all dollar limits on corporations' and labor unions' direct campaign spending.*** As long as the corporation or union acts "***independently***" of the candidate that it is supporting, and discloses to the world that that is what it is doing, is ***no limit to how much the entity can spend*** to advocate the election or defeat of a particular candidate, right up until election day.

6. Prognosis: So here is where federal regulation of ***soft money*** and ***issue ads*** seems to stand after *McConnell* and *Citizens United*:

? Title I's ban on ***soft money contributions to the national political parties*** remains ***constitutional.*** There is no indication that a majority of today's post-*Citizens-Unitied* Court disagrees with *McConnell*'s conclusion that Congress can constitutionally fight the appearance of corruption by tightly regulating the making of ***cash contributions to candidates or parties.***

? Title II's ban on ***"electioneering communications"*** is ***defunct*** — all types of speakers, including ***corporations and unions***, can spend ***apparently-limitless sums*** from their general treasuries to advocate for or against particular candidates, as long as the spending is "***independent***," i.e., not coordinated with the candidate.

? Consequently, corporations, unions and ***non-party special-interest groups*** (e.g., party-independent Political Action Committees, or ***"PAC's"***) all have the opportunity to exert ***more influence*** on elections than before these two decision, because of their

ability to spend limitless sums on political ads. Conversely, the ***national political parties*** have probably ***lost influence*** relative to these other kinds of groups, since the political parties' fundraising abilities are restricted and the independent entities' fundraising and fund-spending abilities are not.

? The core distinction dating back to *Buckley* — between ***contributions*** to candidates, and ***independent spending*** to help elect a candidate — ***remains in effect***. Contributions can be heavily regulated (because they give the appearance of corruption), whereas independent expenditures cannot (because they're less likely to feed corruption or the appearance of it). This distinction continues to be much criticized, but there's no sign the present Court is ready to abandon it.

E. Campaign spending by political parties: Campaign spending by ***political parties*** on behalf of congressional candidates ***may not be limited***, as long as the party is working ***"independently"*** of the candidate rather than in "coordination" with her. This was the result of the pre-*McConnell* case of *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996) ("*Colorado Republican I*").

1. **Limited by BCRA:** But the BCRA (*supra*, p. 582) means that such spending by political parties is limited, because the parties are now restricted to ***raising only tightly-regulated hard-money donations*** from which to make even such candidate-independent expenditures.

2. **Limits on coordinated spending are constitutional:** Furthermore, it is ***constitutional*** for Congress to limit campaign spending by parties that *is* ***coordinated*** with the candidate. The court so concluded in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado Republican II"*).

F. How low can limits be set: We know from *Buckley* that government can set a dollar limit on campaign contributions, and we also know from that case that a $1,000 limit (in 1976 dollars) per-contributor/per-candidate is valid. But may the limits constitutionally be ***set even lower***? As the result of a 2000 case, *Nixon v. Shrink Missouri Government PAC*, 523 U.S. 666 (2000), we know that the answer is ***yes***: as long as the limitation is not so radical as to ***"render contributions pointless,"*** it will be ***sustained*** even though it buys far less campaign speech than $1,000 did in 1976. (So, for instance, a limit of $1,075 in donations for statewide offices was upheld in *Shrink Missouri*.)

1. **Applies to states:** *Shrink Missouri* means that the ***states*** may limit campaign contributions for state elections, just as *Buckley* and *McConnell* said that Congress may do for federal elections.

2. **Some limits are too low:** In only one case has the Court concluded that contribution limits were ***unconstitutionally low.*** In *Randall v. Sorrell*, *supra*, p. 579, the Court concluded that Vermont's limits — for instance, a $400 limit on what an individual or party could contribute to a candidate for governor during a two-year election cycle — were so low as to "disproportionately burden" the First Amendment rights of candidates, parties and volunteers. Only in a truly extraordinary case — where the limits are so low that they prevent challengers from making an effective campaign against incumbents, for instance — will the Court find that the limits are unconstitutionally low. (No majority of the Roberts Court has been able to agree on a standard for determining when contribution limits are "too low.")

G. Corporate and judicial expression during campaigns: We turn now to two special issues involving regulation of campaign speech:

[1] to what extent may political expression be regulated on account of the fact that the speaker is a ***business*** or ***corporation***?; and

[2] in places where ***judges*** must run for electoral office, what restrictions may be placed upon the candidates' ***campaign speech*** and their efforts to ***raise campaign funds***?

The Supreme Court has issued one decision on the first issue, and two on the second. The decision in the corporate case went in favor of the corporate speaker. In the two judicial-election cases, the earlier decision was in favor of the judicial speech claim, while the later one upheld a much narrower regulation on judges' campaign-finance efforts.

1. Corporate political expression: On the issue of campaign-related speech by ***businesses*** and ***corporations***, the Court has held that political expression may not be denied First Amendment protection merely because its source is a ***corporation*** rather than an individual. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) the Court, by a 5-4 vote, struck down a Massachusetts ban on ***corporate political advocacy***. The decision relied on the ***public's right to know***, rather than on the corporation's right to speak.

a. Reaffirmed in *Citizens United*: *Citizens United* (*supra*, p. 586) makes it clear that *Bellotti* is still good law. The majority in *Citizens* cited *Bellotti* for the proposition that "First Amendment protection extends to corporations." After *Citizens United*, it is clear that independent political expression by a ***business or corporation*** cannot be ***treated any less favorably*** than such expression by an ***individual***.

2. Campaign speech in judicial elections: In 39 states, at least some judges are ***popularly elected*** rather than appointed. In these states, there is a risk that candidates for judgeships will, in order to get elected, say things or do things that may conflict with a judge's ethical obligations once elected.

For instance, the candidate may ***announce how she would rule*** on a controversial issue likely to come before her court, in which case the due process rights of the litigants might be impaired. Or, in order to defray the costs of running a campaign, the candidate may ***solicit funds*** in a way that creates a risk that contributors (who may include potential litigants as well as lawyers) will ***expect and perhaps receive favorable treatment*** if the candidate wins office, raising an obvious appearance of ***corruption***.

a. Split decisions: The Supreme Court's two decisions on regulations limiting the campaign speech and financial activities of judicial candidates are, as noted, ***split***. A 2002 case struck down a state law that barred judicial candidates from expressing their opinions about legal issues that may come before the court, but a 2015 case upheld a much narrower regulation that blocked judicial candidates from personally soliciting campaign contributions. We'll look at each decision in turn.

b. Ban on discussion of "legal or political issues" (*White* case): In the earlier case, the Court gave broad First Amendment protection to speech by judicial candidates, comparable to protection long given to candidates for legislative or executive office. The case was ***Republican Party of Minn. v. White***, 536 U.S. 765 (2002). There, the Court struck down a Minnesota rule that a candidate for judicial office shall not ***"announce his or her views on disputed legal or political issues."***

i. **Purpose of the rule:** Drafters of the rule reasoned that when a candidate publicly makes known her views on issues that may come before her court, the ***due process rights*** of later litigants are likely to be abridged.

ii. **Struck down:** By a 5-4 vote, the Court struck down Minnesota's rule, on the theory that it violated the ***First Amendment rights of judicial candidates.*** The opinion, by Justice Scalia, conceded that opposition to judicial elections "may be well taken." But, he said, "the First Amendment does not permit [opponents of judicial elections] to achieve [their] goal by leaving the principle of elections in place while ***preventing candidates from discussing what the elections are about."***

iii. **Dissent:** The four dissenters contended that the Minnesota rule was a reasonable way for Minnesota to pursue its legitimate goal of maintaining judicial impartiality.

c. **Ban on direct solicitation of contributions (*Williams-Yulee* case):** In the more recent case, again by a 5-4 vote, the Court ***upheld*** a Florida rule that prohibited judicial candidates from ***personally soliciting campaign contributions.*** See ***Williams-Yulee v. Florida Bar***, 135 S.Ct. 1656 (2015).

i. **Canon of Ethics:** Florida adopted a whole set of Canons of Judicial Conduct. One of them, Canon 7C(1), was based on a similar provision from the American Bar Association's Model Dode of Judicial Conduct. 7C(1) provided that a candidate running for an elective judgeship:

> ***shall not personally solicit campaign funds***, or solicit attorneys for publicly stated support, but ***may establish committees*** of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. ***Such committees are not prohibited from soliciting campaign contributions*** and public support from any person or corporation authorized by law.

So under the Canon, the candidate herself could not "personally solicit" campaign contributions, but a campaign committee run by others *could* solicit campaign contributions on behalf of the candidate.

ii. **Canon is attacked:** P (Ms. Yulee, a lawyer) wrote, signed and mailed a letter to local voters in which she announced her candidacy for a county court judgeship, and asked for small contributions (from $25 to $500) to be made payable to her campaign. The Florida bar then filed a complaint against her for violating Canon 7C(1)'s ban on personal solicitation of campaign funds. She defended by asserting that she had a First Amendment right to solicit campaign funds.

iii. **Majority upholds the Canon:** Five members of the Court, in an opinion by Justice Roberts, held that this relatively narrow restriction on candidates' speech did ***not*** violate their First Amendment rights.

(1) **Strict scrutiny applied:** Roberts first decided that because the solicitation-of-contributions ban restricted P's speech based on its content, the restriction would have to ***survive strict scrutiny.*** That is, it would pass constitutional muster "only if the restriction is ***narrowly tailored to serve a compelling interest."***[13]

(2) A compelling interest: But Roberts wrote that this was one of the ***"rare cases*** in which a speech restriction ***withstands*** strict scrutiny." First, the state's interest in "protecting the ***integrity*** of the judiciary" and "maintaining the public's ***confidence in an impartial judiciary,"*** taken together, constituted "a state interest of the highest order," and thus a "compelling" interest. In fact, he said, the state's interest in maintaining public confidence in the integrity is even more important in the case of *judicial* elections than in the context of *legislative* and *executive* elections: "Politicians are expected to be appropriately ***responsive to the preferences of their supporters,"*** whereas "In deciding cases, a judge is ***not to follow the preferences of his supporters***, or ***provide any special consideration to his campaign donors."***

(3) "Raises a red flag": Roberts then turned to the issue of whether the ban here was sufficiently ***narrowly tailored*** to achieve this compelling objective regarding integrity. P argued that the ban was fatally underinclusive, in that Canon 7C(1) "allows a judge's ***campaign committee*** to solicit money, which arguably reduces public confidence in the integrity of the judiciary just as much as a judge's personal solicitation." And Roberts conceded that a law's underinclusivity ***"raises a red flag"*** in First Amendment strict scrutiny cases (in part by "rais[ing] 'doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint'.")

(4) Narrowly tailored: But, Roberts said, "the First Amendment ***imposes no freestanding 'underinclusiveness limitation'***." A state "need not ***address all aspects of a problem in one fell swoop,"*** and the ban here "aims squarely at the conduct ***most likely to undermine public confidence*** in the integrity of the judiciary: ***personal requests for money by judges and judicial candidates."*** So the ban was indeed narrowly tailored to achieve the compelling state interest in judicial integrity, thereby surviving strict scrutiny.

X. SOME SPECIAL CONTEXTS

A. Scope: We now examine several particular contexts in which special First Amendment problems have arisen. Generally, these special problems arise because the First Amendment comes into conflict with unusually strong "public policy" interests, for instance, the interest in running an effective public-school system, or in the smooth administration of justice.

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13. Only two of the four Justices who agreed with the result reached by Roberts — that the Canon was constitutional — agreed with him that strict scrutiny was the appropriate standard. The other two (Ginsburg and Breyer, both concurring only in the result) would have applied a less rigorous standard (though they didn't say what it was), making five Justices to hold the ban constitutional. But the four dissenters (Scalia, Kennedy, Alito and Thomas) all believed that strict scrutiny was required, and that the ban could *not* survive that strict scrutiny. So one majority of the Court — Roberts plus the four dissenters — believed that strict scrutiny was the appropriate standard, but a different majority (Roberts, plus two others who joined his reasoning, and another two who concurred only in result) believed that the ban could survive whatever scrutiny that particular Justice thought was the right standard. (But only one Justice, Roberts, simultaneously thought *both* that the standard to use was strict scrutiny and that the statute could survive.)

B. Schools: The conflict between First Amendment values and society's substantial interest in pursuing other important values can be seen clearly in the ***public school*** context. On the one hand, the public school system is the community's principal means for transmitting knowledge and values from one generation to the next; this process unavoidably involves teaching students how, and sometimes what, to think. See 96 HARV. L. REV. 151. Yet students and teachers have First Amendment rights, which they do not completely surrender when they enter the school.

1. **Reluctance to intervene:** The Supreme Court has generally been reluctant to intervene in school authorities' handling of school operations. The Court will not intervene in those operations unless "basic constitutional values" are "directly and sharply implicate[d]." *Epperson v. Arkansas*, 393 U.S. 97 (1968).

2. **Illustrations of interference:** But the Court has, nonetheless, occasionally held that school authorities have violated the First Amendment or other constitutional rights of students or teachers. For instance, the Court has held that the state ***may not forbid*** the ***teaching of foreign languages***; see *Meyer v. Nebraska*, 262 U.S. 390 (1923) (decided on substantive due process grounds; see *supra*, p. 174). Similarly, the Court has held that school children ***cannot be required to salute the flag; West Virginia Bd. of Ed. v. Barnette***, 319 U.S. 624 (1943). And recall that a student's right to wear an armband and to protest symbolically against the Vietnam War was not permitted to be suppressed by school authorities, at least where this was done to suppress a particular point of view; *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (*supra*, p. 543).

   a. **Permissible purposes:** However, school authorities may act to preserve ***discipline***, the ***rights of other students***, and the ***educational function of the school***. For instance, the Court in *Tinker* indicated that the armband display could have been prohibited if there had been a showing that it did or would substantially interfere with school work or discipline.

3. **Choice of materials to be taught:** Perhaps the most difficult First Amendment issue in the school context is the extent to which that Amendment restricts educators' choices of ***curriculum*** and ***teaching materials***. Educators must of course be given the right to determine what is to be taught in the public schools. Yet there is a potential conflict between this right and the First Amendment principle that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. … " *West Virginia Bd. of Ed. v. Barnette, supra.*

   a. **School libraries:** The only Supreme Court case to deal directly with this conflict did so in a limited context, the right of school authorities to ***remove books from a school library***. In ***Board of Education v. Pico***, 457 U.S. 853 (1982), a plurality of the Court held that such a removal must not be carried out in a ***"narrowly partisan or political manner,"*** or for the purpose of denying students access to ***ideas with which the authorities disagree.***

      i. **Facts:** The school board in *Pico* ordered nine books to be removed from its high school and junior high school libraries, including Richard Wright's *Black Boy* and Eldridge Cleaver's *Soul on Ice*. The books were all on a list published by a conservative parents' group and were labelled by the board as "anti-American, anti-Christian, anti-Semitic, and just plain filthy."

ii. **Holding:** Because of the procedural posture, the Supreme Court did not directly decide whether the school board had violated the Constitution in ordering the removal of the books. The plurality did, however, articulate what it saw as the appropriate constitutional standard: a school board has wide authority in determining what books to remove from a library, but it may not remove books for the purpose of ***denying access to ideas for political or partisan reasons***. As an extreme example, the plurality noted that a Democratic school board could not, motivated by party affiliation, order the removal of all books written by Republicans.

b. Curriculum and textbooks: It is hard to know what standard the Court will apply to the issue of school authorities' discretion to select the ***curriculum*** and ***required textbooks***. Although, as noted, the Court will probably recognize greater discretion here than in the library-book-removal situation of *Pico*, it is not clear that this discretion will be much broader. Something like *Pico*'s ban on "narrow partisan or political motives" will probably be applied in this situation as well. For instance, it is doubtful that a majority of the Court would uphold a school board's rule that no teacher may express in class the opinion that the war in Vietnam was morally and legally wrong.

i. **Teacher's own expression of views:** At the same time, ***individual teachers*** may probably take actions which a school board would not be permitted to take on a system-wide basis. For instance, a teacher may certainly constitutionally express to his students a view about the morality or legality of the Vietnam War, whether or not the school system may formulate an "official" view on the same subject; this distinction is appropriate because an individual teacher's views do not represent an "official" or "orthodox" position in the same way that a system-wide position does.

4. Speech by students: What about ***speech by students?*** Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), discussed more extensively, *supra*, p. 543. Thus in *Tinker*, the Court held that the First Amendment rights of several high school and junior high school students were abridged when they were suspended for wearing black armbands in school as a symbol of opposition to the Vietnam War.

However, the Supreme Court has recognized some important ***limits*** on *Tinker*. Two of the more important are that school authorities are free to limit student speech when:

[1] the limit is needed to ***maintain school discipline*** and fulfill the school's ***educational mission***; or

[2] the speech ***advocates illegality***, at least in the special case of ***drug use***.

We'll examine each of these exceptions in more detail, in Pars. (a) and (b) below. Then, in Par. (c), we'll discuss speech that occurs off-campus.

a. Maintenance of discipline and the school's mission: Notwithstanding *Tinker*, school authorities have a strong and valid interest in ***maintaining school discipline and in carrying out their educational mission.*** Pursuit of these goals will sometimes entitle the authorities to regulate speech in a way that would not be permissible outside the school context. The cases of *Bethel School District No. 403 v. Fraser* and *Hazelwood School District v. Kuhlmeier* illustrate this principle.

i. Speech at a school assembly (*Bethel*): In *Bethel School District No. 403 v. Fraser,* 478 U.S. 675 (1986), a high school student addressing a high school assembly gave a speech that school authorities found to be lewd. The speech, made in support of a candidate for a student government office, contained an elaborate sexual metaphor (e.g., "Jeff Kuhlman is a man who takes his point and pounds it in. … He doesn't attack things in spurts — he drives hard, pushing and pushing until finally — he succeeds."). School authorities suspended the speaker and removed him from the list of candidates for commencement speaker.

(1) Disciplinary action upheld: The Court ***upheld*** the disciplinary actions over the student's claim that they violated his freedom of expression. "The undoubted freedom to advocate unpopular and controversial issues in schools and classrooms must be balanced against society's countervailing interest in ***teaching students the boundaries of socially appropriate behavior."*** When balanced in this way, the school's interest in prohibiting "vulgar and lewd speech" outweighed whatever First Amendment interests the student might have had, especially since the penalties were ***"unrelated to any political viewpoint," i.e., they were content-neutral.***

ii. Student newspaper (*Hazelwood*): Similarly, school officials may exercise editorial control over the contents of ***student newspapers*** if they do so in a way that is ***reasonably related to legitimate pedagogical concerns. Hazelwood School District v. Kuhlmeier***, 484 U.S. 260 (1988).

(1) Facts: Thus in *Hazelwood*, the Court upheld a school principal's decision to remove two articles from the student newspaper: (1) a story describing three students' experience with pregnancy; and (2) a story discussing the impact of divorce on students at the school. The principal believed that the first story might indirectly identify the students (even though their names weren't used), and that its references to sexual activity and birth control were inappropriate for some of the younger students at the school. He believed that the second article, which in the draft the principal saw identified a student who blamed her father for her parents' divorce, unfairly denied the father the chance to respond.

(2) Holding: A majority of the Court held that where a school a ***sponsors an activity***, in such a way that students and others may reasonably perceive the activity as ***bearing the school's imprimatur***, the school's right to restrict student speech is much greater than in the *Tinker* situation (*supra*, p. 543). In *Tinker*, the students who wore armbands were not in any school-sponsored activity; they merely happened to be on school property, but did not forfeit their right of free speech. But expression that occurs during the course of a school-sponsored publication, theatrical production, or other school-sponsored activity may be subject to school authorities' control "so long as [the authorities'] actions are ***reasonably related to legitimate pedagogical concerns.***"

(3) Application: Applying this "reasonable relation" test, a majority found that the school principal acted reasonably: based on the facts as the principal then knew them, suppression of the articles was reasonably related to the school

objectives of protecting privacy, shielding younger students from inappropriate subject matter, and teaching journalistic fairness.

b. Advocacy of illegal drug use: Both of the above cases (*Bethel* and *Hazelwood*) were ones in which either school discipline or the school's pedagogic mission was at stake, so it seemed relatively painless for the Supreme Court to carve out an exception from *Tinker* to justify the regulation of student speech. Where the student speech does *not* place discipline or the school's pedagogic mission in danger, the Court has been less likely to approve regulation. Thus in the core scenario typified by *Tinker* — student engages in political or social expression in a way that cannot plausibly be thought to pose discipline or pedagogic problems – *Tinker* remains the law, and restraints on student expression will be strictly scrutinized. But the Court has carved out one special ***exception*** to this general rule: speech ***advocating the use of illegal drugs*** may be restricted. That was the holding of ***Morse v. Frederick***, 551 U.S. 393 (2007).

i. Facts: In *Morse*, students at a public high school were permitted to leave school to observe the carrying of the Olympic Torch; the excursion was treated as a school trip. One of the students, Frederick, while watching the Torch procession, unfurled a banner that said "BONG HiTS 4 JESUS." (No one seems confident of what the banner was supposed to mean, though it seemed to express the owner's view that marijuana use was a good thing.) The principal demanded that Frederick take down the banner, because she thought it encouraged illegal drug use in violation of school policy; she also suspended him from school.

ii. Action upheld: The Court held that the confiscation of the banner and suspension of Frederick ***did not violate*** his First Amendment rights. The Court concluded that "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed ***as promoting illegal drug use."*** That was true even though the speech here could not reasonably be viewed as a threat to the school's discipline or mission. The Court reasoned that schools have "an important, perhaps compelling" interest in deterring drug use by schoolchildren.

c. Off-campus speech: So far, all the student-speech cases we've discussed involved speech that occurred either ***on campus*** (e.g., *Tinker* itself, where the students wore the anti-war armband at the school) or during the course of a ***school-sponsored off-campus activity*** (e.g., *Morse v. Frederick*, where the student displaying the "Bong Hits" banner did so during a school trip). But how much speech-regulation may the school impose when the speech in question ***takes place off-campus,*** and the student is ***not speaking as part of a school-sponsored event?*** As a result of an important 2021 case, ***Mahanoy Area School District v. B.L.***, 141 S.Ct. 2038 (2021), we can make several general statements about a school's power to regulate such off-campus speech:

[1] The fact that the speech occurs off-campus and not as part of a school event ***does not completely prevent*** the school from ***regulating*** the content or manner of the speech; but ...

[2] The school's authority to regulate is ***generally much weaker*** than it is where the speech occurs on-campus or as part of a school-sponsored off-campus activity; and ...

[3] Unless the speech falls within a few special categories (e.g., harassment, fighting

words, obscenity, or significant disruption of school activities), the speech receives ***at least as much constitutional protection*** as if it had occurred ***on-campus*** or during the course of a school-sponsored off-campus activity.

i. Facts of *Mahanoy*: *Mahanoy* concerned speech by B.L.,[14] a student at Mahanoy Area High School, a public school in a small town in Pennsylvania. B.L. tried out for the varsity cheerleading squad at the end of her freshman year, but was rejected and instead offered a spot on the junior varsity. When she got this news, she and a friend went to a local convenience store on a Saturday, from which B.L. used her smartphone to post two photos on Snapchat, a social media application. Snapchat allowed her to send these photos so that they could be viewed by her Snapchat "friends" (of which she had about 250), but would vanish after 24 hours.

(1) Content of the photos: One of the photos showed B.L. and her friend with their middle fingers raised. The caption read: "Fuck school fuck softball fuck cheer fuck everything."

(2) The images spread: Before the Snapshot photos vanished, one of B.L.'s "friends," a member of the cheerleading squad, took screenshots of them, and showed them to her mother, who was a cheerleading coach. The images spread, and several cheerleaders, appearing "visibly upset" about the photos, asked the cheerleading coaches about them; one discussion occurred during an algebra class taught by one of the coaches.

(3) School's response: The cheerleading coaches, together with the principal, decided that because the posts used profanity in connection with a school extracurricular activity, the posts violated team and school rules. B.L. apologized, but the coaches nonetheless ***suspended her from the junior varsity cheerleading squad*** for the upcoming year.

ii. The suit and the lower-courts' rulings: B.L. and her parents sued the school district in federal court, claiming that the suspension violated B.L.'s First Amendment right of free speech. Both the district court and a 3-judge panel of the Third Circuit on appeal ***held in B.L.'s favor***, reasoning that the posts were protected under *Tinker* (*supra*, p. 543).

iii. Supreme Court finds for B.L.: The Supreme Court, by an 8-1 vote, agreed that the suspension ***violated B.L.'s right of free speech.*** The Court's opinion was written by Justice Breyer.

(1) Cites the *Tinker* decision: Breyer began by repeating what *Tinker v. Des Moines* (*supra*, p. 543) said about the First Amendment rights of students: students ***"do not 'shed their constitutional rights to freedom of speech or expression,'*** even 'at the school house gate.' " But, he noted, *Tinker* recognized that schools have a ***special interest*** in regulating speech that ***"materially disrupts classwork*** or involves ***substantial disorder or invasion of the rights*** of others."

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14. Because B.L. was a minor when the case began, the Supreme Court's opinion refers to her only by her initials.

(2) Rejects lower court's "off campus" rationale: Breyer then turned to the question of whether public schools had the same ***"special interest"*** in regulating student speech if the speech took place ***off-campus***. For Breyer, the answer was a ***qualified "yes"***: "[W]e do ***not believe*** the special characteristics that give schools additional license to regulate student speech ***always disappear*** when a school regulates speech that takes place off campus."

(3) List of scenarios: Breyer gave examples of scenarios in which the school's "regulatory interests" would ***remain significant*** even though the speech took place off-campus. These included situations involving:

- "serious or severe ***bullying or harassment*** targeting ***particular individuals"***;
- "***threats*** aimed at ***teachers or other students***";
- the "***failure to follow rules*** concerning ***lessons***, the ***writing of papers***, the ***use of computers***, or participation in other ***online school activities***";
- "breaches of ***school security devices***, including ***material maintained within school computers***."

(4) No "broad, highly general" rule: When the Court granted *certiorari* in *Mahanoy*, observers hoped that it would articulate a *general* rule about whether and how schools could regulate off-campus speech. But Breyer's opinion ***declined*** to do that.

(5) Features of off-campus speech: However, Breyer *was* willing to mention ***three features of off-campus speech*** that, he said, "***diminish the strength*** of the unique educational characteristics that might call for [giving the school] special First Amendment leeway." Here were the three features:

- First, in relation to off-campus speech, "a school . . . ***will rarely stand in loco parentis,"*** because "off-campus speech will normally ***fall within the zone of parental,*** rather than school-related, ***responsibility***."
- Second, "from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, ***include all the speech a student utters during the full 24-hour day."*** Consequently, "courts must be ***more skeptical*** of a school's efforts to regulate off-campus speech, for doing so ***may mean the student cannot engage in that kind of speech at all."*** He continued, "When it comes to ***political or religious speech*** that occurs outside school or a school program or activity, the school will have a ***heavy burden to justify intervention."***
- Finally, Breyer said, "the school itself has an interest in ***protecting a student's unpopular expression,*** especially when the expression takes place off campus." He continued, "America's public schools are the ***nurseries of democracy,***" and must ***"protect[] unpopular ideas***, for popular ideas have

less need for protection."

Breyer said that the Court would "leave for future cases" the job of deciding "where, when, and how these features mean the speaker's off-campus location will make the critical difference[.]" But the present case provided one example of how the features would be applied.

(6) "Pure speech" protected by First Amendment: Before applying the three factors making the off-campus location of B.L.'s speech significant, Breyer described how her speech fit within broad freedom-of-expression principles. Her speech consisted of ***"criticism of the rules of a community*** of which B.L. forms a part." The post was therefore "the kind of ***pure speech*** to which, were she an adult, the First Amendment would ***provide strong protection***."

(7) Application of law to facts — factors helping B.L.: It was then time for Breyer to apply the three factors to the particular facts of the case; the issue was whether the school's interest in regulating student speech was strong enough to overcome the fact that the speech here occurred off-campus. Breyer began by listing the ways in which B.L.'s off-campus location — together with the factors that limited the impact of the speech — cut ***in favor of B.L.***:

? The speech occurred ***"outside of school hours."*** (It took place on a Saturday.)

? The speech came from a ***"location outside the school"*** (the convenience store).

? The speech ***did not identify the school.***

? The speech ***did not "target any member of the school community*** with ***vulgar or abusive language***."

? The speech was ***transmitted "through a personal cell phone"*** (i.e., ***not*** through a device ***owned by the school***).

? The speech was directed "to an audience consisting of [B.L.'s] ***private circle of Snapchat friends.***"

In sum, Breyer said, although B.L.'s speech "risk[ed] transmission to the school itself," the above attributes of that speech ***"diminish[ed]" the school's interest*** in punishing B.L., according to the three broad features Breyer had previously articulated (summarized in Sub-par. (5) above).

(8) Application of law to facts – factors helping the school: Breyer then listed the factors that ***cut in favor of the school district's interest*** in regulating (and in this case, punishing) B.L. for her speech. Breyer broke the district's interests into three broad categories, and concluded that as to each category, the district's interest was ***weaker*** than the district claimed. Here were the categories:

[1] **"Teaching good manners":** First, the district claimed an interest "in ***teaching good manners*** and consequently in ***punishing the use of vulgar language*** aimed at part of the school community." But this interest was

"weakened considerably" by the fact that B.L. spoke ***"outside the school on her own time,"*** which meant that the school was not "stand[ing] in *loco parentis*."

Apart from the district's lack-of-*in-loco-parentis* status, the district's interest in "teaching good manners" was also weakened by the fact that the school presented ***"no evidence of any general effort*** to ***prevent students from using vulgarity outside the classroom.***"

[2] **"Preventing disruption":** Next, the school argued that it was "trying to ***prevent disruption*** … within the bounds of a school-sponsored ***extracurricular activity***." But Breyer concluded that the school had not produced any evidence of a ***"substantial disruption"*** of a school activity. The school had merely shown that discussion of B.L.'s post had taken "at most 5 to 10 minutes of an Algebra class for 'just a couple of days'," and that some members of the cheerleading team were "upset." But under *Tinker*, the school must show that "its action was caused by ***something more than a mere desire to avoid the discomfort and unpleasantness*** that always accompany an unpopular viewpoint"; the disturbance here did not meet this "demanding standard."

[3] "**Team morale":** Finally, the school claimed that it acted out of a ***"concern for team morale."*** But Breyer said that there was no evidence of any ***"serious decline"*** in team morale.

(9) Summary: In sum, Breyer concluded, B.L.'s post presented a situation in which the various interests that the school was pursuing when it punished that speech were ***so weak*** — especially in light of the off-campus nature of the post — that the school's action ***violated*** B.L.'s First Amendment rights. The school may have viewed B.L.'s post as "unworthy of … robust First Amendment protections[.]" But, Breyer concluded, ***"sometimes it is necessary to protect the superfluous in order to preserve the necessary."***

iv. Dissent: Only Justice Thomas refused to join Breyer's opinion. In a dissent, Thomas argued that at the time the First Amendment was made applicable to the states via the Fourteenth Amendment, it was "well settled" that schools could ***"discipline students for off-campus speech or conduct*** that had a ***proximate tendency to harm the school environment."*** The majority had failed to supply any "good constitutional reason" to depart from this "historical rule," he said.

C. Furnishing of legal services by lay groups: As part of their interest in regulating the ***legal profession***, states have a strong interest in preventing any conduct which interferes with the relationship between a client and his attorney. One concern which many states have had is that people or organizations might ***stir up litigation*** in which they have no direct pecuniary interest, and might then exercise control over the handling of the law suit, control which should normally be solely in the hands of the lawyer and client. Most states would, for instance, prohibit the creation of a for-profit corporation whose purpose is to advertise to personal-injury victims the availability of contingent-fee representation, and to receive a commission, or "forwarding fee" from the lawyer to whom the corporation assigns a case; even under the modern

Court's relaxed view of lawyer advertising, such prohibitions would almost certainly be upheld.

1. **Rights and political expression:** However, these valid state interests may sometimes conflict with the interests of an organization in ***furthering political goals*** or obtaining economic benefits for its members, by notifying individuals of their legal rights, referring them to lawyers, or paying their legal bills. In general, where a ***lay organization*** (i.e., one not composed solely of lawyers) is able to make a respectable claim that it is engaged in ***associational activities*** when it gives such advice, referrals or funding, these freedom-of-association rights will ***prevail*** over the state interest in regulating the attorney-client relationship.

2. ***NAACP v. Button:*** The classic case demonstrating the strength of such associational interests is ***NAACP v. Button***, 371 U.S. 415 (1963), in which the Supreme Court upheld the NAACP's right to refer to lawyers individuals who were willing to become plaintiffs in public school desegregation cases, and to pay these plaintiffs' litigation expenses.

   a. **Facts:** In *Button*, Virginia made it a crime for any organization to employ or compensate any attorney "in connection with any judicial proceeding in which [the organization] has no pecuniary right or liability." The state also forbade any organization to "control" or "exploit" the lawyer-client relationship, or to "intervene between client and lawyer." The Virginia NAACP brought about school desegregation cases by encouraging parents to become plaintiffs, by referring them to non-NAACP-staff lawyers, and by paying all litigation expenses. The Virginia courts held that these activities violated both the anti-control and anti-compensation rules.

   b. **Activities held protected:** But the Supreme Court held that the NAACP's activities were "modes of ***expression*** and ***association*** protected by the First and Fourteenth Amendments," and ***could not be prohibited*** under the state's power to regulate the legal profession. The Court reasoned that the litigation promoted by the NAACP was not a "technique of resolving private differences," but was rather a means for achieving equal treatment for blacks, and was thus a ***"form of political expression."***

3. ***Primus:*** *Button* has been extended, to allow an ***individual lawyer*** to solicit clients as part of her *pro bono* work on behalf of the ACLU. See *In re Primus*, 436 U.S. 412 (1978) (discussed more extensively *supra*, p. 567).

D. Government as speaker or as funder of speech: So far, nearly everything we have said in this chapter concerns the role of government as the regulator of speech by non-government actors. But sometimes, ***government itself wishes to speak***. And sometimes, government wishes to give ***financial support*** to certain speech by others. In these two contexts — government as speaker, and government as funder of speech — government seems to have at least somewhat greater ability to prefer one viewpoint over another than it does when it merely regulates. However, the law governing these two special contexts is far from settled.

1. **Government as speaker:** When government wishes to ***be a speaker itself***, it is pretty clear that government may ***say essentially what it wants***, and is not subject to any real rule of viewpoint neutrality. As the Court noted in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (discussed more fully *infra*, p. 603), "The Free Speech Clause restricts government regulation of private speech; ***it does not regulate government speech.***"

a. No obligation to fund opposing viewpoints: Furthermore, when government — acting as a speaker — uses its own funds to deliver a particular message, government is ***not thereby obligated to also fund other points of view*** on the same topic.

Example: "When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to ***encourage competing lines of political philosophy*** such as communism and fascism." *Rust v. Sullivan*, 500 U.S. 173 (1991) (also discussed *infra*, pp. 625-625).

2. Government as funder of third-party speech: But a much tougher question arises when government ***funds speech by third parties***, who are essentially expressing their own beliefs rather than the government's. Here, may government be non-viewpoint-neutral, by funding only those viewpoints of which it approves? The answer is heavily dependent on the details of the government funding.

a. Use of agents to deliver government's message: Government ***may*** use content-based criteria when government is selecting third parties who will serve as the ***government's agents*** in ***spreading the government's own message***. As the Court said in *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995), "we have permitted the government to ***regulate the content of what is or is not expressed*** when it is the speaker or when it ***enlists private entities to convey its own message.***"

Example: The federal government funds certain family-planning "projects" (essentially, clinics) that are operated by private parties. The program's regulations say that while a person (e.g., a doctor) is working in such a clinic, that person may not discuss the possibility of an abortion with a pregnant clinic patient.

Held, this limitation of private speech does not violate the First Amendment. *Rust v. Sullivan*, 500 U.S. 173 (1991). As the Court later summarized this aspect of *Rust* (in *Rosenburger, supra*), "the government did not create a program to encourage private speech but instead ***used private speakers*** to ***transmit specific information pertaining to its own program***. We recognized that when the government appropriates public funds to ***promote a particular policy*** of its own it is ***entitled to say what it wishes***."

b. No forbidding of some topics or messages for disfavor: On the other hand, if government decides to ***fund*** (or allow on public property) ***some expressions of private citizens' own views,*** government must generally ***behave not only in a content-neutral but also a subject-neutral way.*** That is, government cannot (1) decide that it's going to subsidize or facilitate private messages on various topics, but then (2) decline to fund (or exclude from the discussion) a few ***disfavored topics or messages***.[15]

i. Religion: For example, government cannot decide to fund a broad range of expressive activities and then exclude expressive activities that are ***mainly religious.***

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15. Note that here, we're not talking about the situation in which government selects agents to disseminate what the public will realize is government's *own* message (a topic we discussed *supra*); we're talking about the situation in which government gives funding to private speakers (or gives them access to public property, even non-public-forum public property, see Par. 6(b) *supra*, p. 537), and in effect decrees, "Say whatever you want, but you can't use this funding to deliver Message X or to speak on Subject X."

Example: Recall the facts of *Rosenberger* (*supra,* p. 538): The University of Virginia (a public university) funds certain student publications, by paying for their printing costs. The University disqualifies from this funding any primarily-religious publication.

Held, this exclusion violates the free speech rights of student religious organizations. If the University were disseminating only its own messages, it would not have to fund opposing viewpoints. But once it chooses to fund some ***third-party viewpoints*** (i.e., some student-run publications), it may not choose which ones to fund based on the viewpoint of the speaker. *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995).

c. Unconstitutional conditions: Similarly, if government decides to award public funding for a privately-run program, the doctrine of ***"unconstitutional conditions"*** may prevent government from conditioning the funding on the recipient's agreement to give up its right to speak on certain topics, or requiring the recipient to deliver certain messages. The doctrine of unconstitutional conditions, especially as applied to free speech, is a quite confused area of the law, which we discuss in its own section *infra*, p. 623.

d. Government as patron of excellence: Suppose that government acts a ***"patron"*** by giving subsidies to a ***select number*** of speakers. In this context, it appears that the Court will ***not*** require government to remain rigidly viewpoint-neutral. In this type of "reward for excellence" situation, the government cannot be expected to fund every speaker, so it is entitled to some degree of discretion in what speakers, and messages, it wishes to fund.

Example: The National Endowment for the Arts gives various grants to artists of unusual merit. Congress requires the NEA, in deciding which artists should receive grants, to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." The Ps (various artists) bring a facial challenge to this requirement that the standards be taken into account, arguing that it's inconsistent with *Rosenberger*'s holding that when a public university funds student publications, it cannot exclude those with religious content.

Held, the artists lose. *Rosenberger* is ***inapplicable***, and that NEA statute is ***constitutional*** on its face: "[Any] content-based considerations that may be taken into account in the grant-making process are a consequence of the ***nature of arts funding***. ... The 'very assumption' of the NEA is that grants will be awarded according to the 'artistic worth of competing applications,' and ***absolute neutrality is simply 'inconceivable.'***" (But the "decency" requirement here is very general, and the Ps aren't claiming that it's being used to discriminate against the Ps' particular viewpoints. "If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case.") *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

3. The boundary between government-as-speaker and government-as-facilitator-or-funder-of-private-speech: As we've just seen, government can behave in a non-content-neutral way when it is the ***speaker***, but generally ***not*** when it is the ***funder or facilitator of private citizens' speech.*** But the boundary line between government speech and government-facilitated private speech can sometimes be blurry.

a. Monuments and plaques (*Pleasant Grove v. Summum)*: One scenario in which it may be unclear whether the speech is by the government occurs when a message is ***inscribed*** on a piece of tangible property — a ***monument or a plaque***, for example — by a private citizen who then ***donates*** the property to government and asks that it be permanently ***displayed***. If government accepts and permanently displays the item, is government a speaker (making it free to reject other messages) or a facilitator of private-party speech (making it obliged to accept similar property expressing other views)?

As the result of a 2009 case, where government accepts and permanently displays the monument or plaque, government is likely to be found to be ***acting as a speaker***, and thus is free to ***reject other similar donations*** of tangible items bearing messages that government does not agree with. See ***Pleasant Grove City v. Summum***, 555 U.S. 460 (2009).

i. Facts: Prior to the litigation, Pleasant Grove, Utah, had permanently placed in a local park 11 displays and monuments donated by private groups. One of these was a Ten Commandments monument donated in 1971. Members of the Summum religion then asked the city to accept and display in the same park a monument showing the "Seven Aphorisms," which Summum adherents believe were brought down from Mt. Sinai by Moses before he brought down the Ten Commandments. The proposed Summum monument was similar in size and nature to the Ten Commandments one.

ii. The Ps' argument: The Summum members argued that when Pleasant Grove accepted and displayed the Ten Commandments and other monuments, the effect was to turn the park into a public forum, thereby requiring the city to accept other kinds of monuments and displays on a content-neutral basis.

iii. Held to be government speech: But the Supreme Court held unanimously that the monument display was ***government speech***, which therefore did not have to be content-neutral. Justice Alito's opinion said, "Although a park is a traditional public forum for ***speeches and other transitory expressive acts***, display of a ***permanent monument in a public park*** is not a form of expression to which forum analysis applies. Instead, the placement of a permanent monument in a public park is best viewed as a ***form of government speech*** and is therefore ***not subject to scrutiny under the Free Speech Clause***." So the city was permitted to reject the monument from the Summum congregants.

b. Specialty license plates: Another context in which reasonable people can differ about whether government is the speaker involves ***state-issued specialty license plates***, which allow vehicle owners to pay the state extra to display certain pre-approved ***slogans or images.*** In the one Supreme Court case on the subject so far, the Court held by a 5-4 vote that the message on the plate was a ***form of government speech***, thereby entitling the state to ***reject messages it found offensive.*** See ***Walker v. Tex. Div., Sons of Confederate Veterans, Inc.***, 135 S.Ct. 2239 (2015).

i. Facts: The Texas Department of Motor Vehicles Board gave organizations and individuals the chance to design a particular "specialty" license plate, by proposing a plate design containing a slogan, image or (most commonly) both. If the

Board accepted a proposed design, vehicle owners could pay extra to use the specialty plate.

(1) Proposed plate: The Texas Division of the Sons of Confederate Veterans ("SCV") proposed a specialty design displaying the ***Confederate battle flag.***

(2) Rejected by Board: The Board ***rejected*** the proposed design, saying that public comments had shown that "many members of the general public find the design offensive ... [and] associate the confederate flag with organizations ***advocating expressions of hate*** directed toward people or groups [in a way] that is demeaning to those people or groups."

(3) Positions of the parties: SCV sued the Board, arguing that its rejection of the proposed plate ***constituted viewpoint based regulation*** in violation of SCV's First Amendment rights. The Board defended on the theory that the plate and its contents constituted ***speech by the government,*** a conclusion that if accepted would give the government wide latitude to reject messages it found offensive.

ii. State wins by 5-4: By a 5-4 vote, the Court found ***in favor of the Board*** — the specialty plates ***constituted government speech***, entitling the government to reject messages it found offensive. The majority opinion, by Justice Breyer, reasoned that the factors relied on by the Court in *Pleasant Grove City v. Summum, supra,* showed that the plates here should be viewed as government speech just as the monuments displayed by government in *Summum* had been found to be government speech.

(1) Rationale: Breyer's opinion pointed to several factors — taken from the analysis in *Summum* — that he said caused the plates here to constitute government speech:

? First, the ***"history of license plates"*** shows that when the plates contain more than state names and vehicle identification numbers, the plates ***"long have communicated messages from the States."***

? Second, Texas license plates are "often ***closely identified in the public mind with the state."***

? Finally, Texas ***"maintains direct control"*** over the messages on its specialty plates, and carefully ***reserves the right to approve each specialty plate design***, thereby allowing the state "to ***choose how to present itself*** and its constituency."

Taken together, these factors convinced the majority that the specialty plates here "are similar enough to the monuments in *Summum* to call for the same result" (that the plates, like the monuments, ***were government speech***).

iii. Dissenters: Four justices dissented, in an opinion by Alito (joined by Roberts, Scalia and Kennedy).[16] Alito concluded that (1) the license plates were not government speech; and (2) SCV's core contention was correct: in enacting the specialty plate program, the state had ***created a limited public forum***, and once it did so, it ***could not discriminate based on viewpoint.***

(1) Alito's thought experiment: As to conclusion (1), Alito proposed a thought experiment: "Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. You would see ... an impressive array of specialty plates [with] more than 350 varieties. ... You might see plates bearing the name of a high school, a fraternity or sorority, the Masons, the Knights of Columbus ... a favorite soft drink, a favorite burger restaurant, and a favorite NASCAR driver." He then asked, rhetorically, "As you sat there watching these plates speed by, ***would you really think*** that the sentiments reflected in these specialty plates are the ***views of the State of Texas*** and not those of the owners of the cars?"

(2) "Pure viewpoint discrimination": As to conclusion (2), Alito noted that the Board had rejected the plate design "because it concluded that many Texans would find the flag simply ***offensive***." This was, he said, ***"pure viewpoint discrimination."*** And the Court's precedents, he said, made it clear that the government cannot practice viewpoint discrimination when it furnishes a limited public forum.

XI. THE FREEDOM OF ASSOCIATION, THE RIGHT NOT TO SPEAK OR ASSOCIATE, AND THE DENIAL OF PUBLIC JOBS OR BENEFITS

A. Freedom of association generally: The First Amendment does not explicitly mention the freedom of ***association***. But in numerous cases, the Supreme Court has held that that freedom derives by ***implication*** from the explicitly-stated right of speech, press, assembly and petition.

1. Limited scope: However, the freedom of association has not been broadly construed by the Court. For instance, the Court has never held that any activity which an individual may lawfully do by himself, he is constitutionally entitled to do in concert with others. Rather, all that has been recognized is "a right to join with others to pursue goals ***independently protected*** by the First Amendment." Tribe, p. 1013. These goals include ***political advocacy***, the pursuit of ***unionization in the workplace, literary expression*** and ***religious worship***, among others.

a. No general right of "social association": Since there is a special freedom of association only where the goals being pursued are independently protected by the First Amendment, there is no special freedom to engage in ***"social association."*** That is, a group of people do not have any specially-protected First Amendment right to gather together for social purposes such as dancing, partying, watching a sporting event, etc. These events are not primarily expressive events, so there is no special First Amendment right to ***gather*** for purposes of engaging in these events.

2. Strict scrutiny: Government is not absolutely forbidden to impair the freedom of association, just as it is not absolutely forbidden to interfere with freedom of speech. However, before the government may significantly interfere with protected associational activity,

16. Notice that Thomas, who customarily votes with the conservative bloc on the Court, joined the four-member liberal bloc on this case. Since he did not write a concurrence, it's not clear why he parted company with the conservatives this time.

two showings must be made: (1) that the governmental interest being pursued is a ***compelling*** one; and (2) that that interest cannot be achieved by means ***less restrictive*** of the freedom of association. In other words, ***strict scrutiny*** is normally applied. See *NAACP v. Alabama*, 357 U.S. 449 (1958) (discussed further *infra*, p. 616), holding that "[s]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."

a. Anti-discrimination measures: One governmental interest that is often found to be compelling — as well as not achievable without restrictions on First Amendment freedoms — is the interest in ***preventing discrimination*** based on race, sex, or other suspect criterion. For instance, the Supreme Court has held that Minnesota could constitutionally require the Jaycees to admit women members, even though there might be some impairment of existing members' freedom of association or freedom of speech. ***Roberts v. United States Jaycees***, 468 U.S. 609 (1984).

i. Rationale: Minnesota's desire to eliminate discrimination in "places of ***public accommodation***" (found as a factual matter to include quasi-commercial organizations like the Jaycees) was a compelling interest which the state was achieving through the least restrictive available means.

ii. California Rotary case: Similarly, the Court has held that California was constitutionally empowered to force Rotary Clubs in that state to admit women, because "the relationship between Rotary Club members is not the kind of intimate or private relation that warrants constitutional protection." *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

B. Right not to associate, generally: The Court has also recognized, in effect, a right ***not*** to associate. That is, an individual has a general First Amendment right ***not to be compelled by the government to associate with, or support, the speech or expressive activities of persons or groups of which the individual does not approve.***

1. Contexts where the right applies: There are several major contexts in which this "right not to associate" comes into play. Here's a preview of most of the ones we'll be examining:

a. Right not to give financial support: A person has a free-association right not to be ***compelled to give financial support*** to an organization whose message the person disagrees with. Most significantly, this means that government may not require a ***public employee*** to join, or even ***pay dues to, a union that represents the employee*** in collective bargaining. See Paragraph (C) below, p. 607.

b. Veto on unwanted participants and unwanted members: A group has a free-association right not be ***forced to accept a participant in an event*** if that person's participation would interfere with the group's expressive activities. See Paragraph (D) below, p. 609. Similarly, a group has a free-association right not to be forced to allow ***unwanted members*** into the group. See Paragraph (E) below, p. 610.

c. Right not to have membership in group be illegal: A person has a free-association right not to have the government ***criminalize membership in the group.*** See Paragraph (F) below, p. 611.

d. Right to public jobs and benefits: A person may have a free-association right not to have a ***public-sector job,*** or a ***license or benefit issued by the government,*** be denied because of the person's associational activities. See Paragraph (G) below, p. 611.

e. Right to refuse to disclose organizational affiliation: A person may have a freedom-of-association right not to be required to ***disclose her associational activities*** as a condition to receiving a government job or benefit. See Paragraph (H) below, p. 615.

C. Right to avoid compulsory financial support: An important aspect of the "right not to associate" is a person's right not to be compelled to ***give financial support to organizations or activities*** where the money will be used to ***disseminate messages with which the person disagrees.*** This right has played out most significantly in the context of laws ***forcing public employees to pay dues to a union*** that represents them. The Supreme Court has interpreted the right very broadly: as the result of the 5-4 decision in ***Janus v. AFSCME***, 138 S.Ct. 2448 (2018), government employees who choose not to join the union that represents them have a ***First Amendment right to refuse to contribute even one dollar towards the costs of collective bargaining.***

1. Payments toward cost of bargaining (*Janus*): Pre-*Janus* law had held that it was not a violation of non-union-members' free-association rights to force them to contribute towards the costs of the collective bargaining function. But *Janus* changed this, by holding that where a government worker exercises her (First Amendment) right to decline to join the union that represents her, she also has a First Amendment right ***not to be required to pay any fee at all, even a fee that would be used solely to help cover the costs of collective bargaining.***

a. How issue arose: *Janus* involved an Illinois ***"agency shop" provision,*** which as we'll see allowed public-employee unions to charge non-union members for the costs of collective bargaining.

i. Pre-*Janus* agency-fee statutes: Prior to *Janus*, states were free to require, or not require, non-union-member government employees to pay their share of the cost of the union's bargaining-related activities. Twenty-two states, including Illinois, enacted such statutes, making them "agency shop" states. The rest passed "right to work" statutes, which prohibited deduction of agency fees from non-members without their consent. That was the state of play when the Court decided *Janus*.

ii. Janus' attack on the statute: Janus, the plaintiff in the case, worked for the Illinois Department of Healthcare and Family Services as a child support specialist; he had declined to join the union that represented most Illinois public employees (the American Federation of State, County, and Municipal Employees, "AFSCME"). Under the Illinois agency-shop statute, the union was allowed to charge Janus an "agency fee" (by having the fee withheld from his wages) covering the union's direct costs of fulfilling its collective-bargaining obligation; the union set these at about 78% of full union dues. Janus asserted in the litigation that in view of Illinois' "fiscal crisis," he opposed certain positions the union had been taking in collective bargaining. Therefore, he said, the non-member agency fees charged to him were ***"coerced political speech"*** in violation of his First Amendment rights. This was exactly the argument that had been foreclosed by the decision in *Abood*.

b. Majority agrees with plaintiff's argument: By a 5-4 vote, the Court ***agreed with plaintiff Janus' argument.*** Justice Alito, joined by the other conservative-leaning Justices (Roberts, Kennedy, Thomas and Gorsuch), said that even though the agency fees in theory related only to the union's collective-bargaining activities, the compulsory-fee arrangement ***"violates the free speech rights of nonmembers*** by ***compelling them to subsidize private speech*** on matters of substantial public concern[.]" Therefore, the union could no longer have the agency fee deducted from a non-member's wages; only if the non-member affirmatively consented to pay would the union receive the fee.

i. "Exacting scrutiny" test is chosen: To reach this result, Alito had to select a ***standard*** to be used in determining whether the agency-fee statute violated the First Amendment rights of non-union-members. He selected a standard the Court had used in other compulsory-speech contexts, one using ***"exacting scrutiny."*** [17] Under "exacting" scrutiny, he said, the compelled subsidy must "serve a ***compelling state interest*** that cannot be achieved through ***means significantly less restrictive of associational freedoms."***

ii. Test is flunked: Alito then quickly determined that for several reasons, the Illinois statute could not satisfy the exacting-scrutiny standard. For example, he said, even if the statute promoted the state's interest in combating "free riding," combating free riding was ***not a "compelling"*** state interest.[18]

c. Dissent: The four liberal members of the court dissented in *Janus*. The principal dissent, by Justice Kagan (joined by Breyer, Ginsburg and Sotomayor) said that the majority "overthrows a decision entrenched in this nation's law — and in its economic life — for over 40 years." The Court's opinion, she said, "prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by ***weaponizing the First Amendment,*** in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."

d. Significance: So as the result of *Janus*, even when a government-employee workplace is represented by a union, each non-union-member's right to avoid subsidizing other persons' speech means that ***the union may not charge the non-member for any part of the cost of the union's bargaining activities.***

i. Impact on unions: The decision is a big financial blow to the activities of public-employee unions. In fact, it's a big blow to union power in the U.S. generally, since a much higher percentage of public-sector employees are represented by unions than is the case in the private sector.

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17. More precisely, Alito *applied* "exacting scrutiny" without deciding whether even this standard was sufficiently demanding. He cited a prior holding that, he said, "questioned whether [the exacting scrutiny] test ***provides sufficient protection*** for free speech rights"; he implied that ***true "strict scrutiny"*** might be required. But, he said, since the Illinois statute "cannot survive even under the more permissive [exacting scrutiny] standard," there was no need to "decide the issue of strict scrutiny."

18. Alito also suggested, without deciding, that the agency-dues provision here did not in fact combat free riding, at least when the provision was applied to Janus. He quoted, sympathetically, Janus' argument that "he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person ***shanghaied for an unwanted voyage."***

D. Veto on unwanted participants: The "right not to associate" extends well beyond the right not to have to give financial support to groups or causes of which one disapproves. Another important aspect of the right is that a group has a First Amendment right ***not to be forced to accept participants whose presence would interfere with the group's expressive activities.***

1. Parade: For instance, private parties who conduct a ***parade*** may exclude unwanted members — or at least unwanted messages — from the parade. Thus in ***Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston***, 515 U.S. 557 (1995), the Court held unanimously that Massachusetts could not require a private group that conducts a St. Patrick's Day parade in Boston to include gay and lesbian marchers marching under their own banner.

a. Expressive conduct: The "right not to associate" is closely related to the ***"right not to speak,"*** which the Court has also long recognized.[19] Thus in *Hurley*, the parade organizers were in fact willing to have gays and lesbians in the parade — the fight was about whether the gays should be allowed to march in their own unit ***under their own banner***. The Court found that a parade inevitably has expressive content, and that gays marching under a banner would be sending a message (presumably a message supporting gay rights and gay lifestyles) that the parade organizers had a right to refuse to endorse. "It boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control," the Court said in *Hurley*.

2. Must be perceived as group's own speech: But the right of a group not to be forced to accept co-participants of whose message the group disapproves applies ***only*** where the ***group's own "message" will be affected by the unwanted participation.*** This principle is demonstrated by ***Rumsfeld v. FAIR***, 547 U.S. 47 (2006), where the Court upheld the constitutionality of the "Solomon Amendment," under which Congress said that any university could receive certain federal funding only if all parts of the university, including its law school, gave the same on-campus access to military recruiters as to recruiters from other employers.

a. The claim: A group of law schools argued in *FAIR* that since the military discriminates against gays, the Amendment unconstitutionally forced the schools to ***support a message they abhorred***; the plaintiffs contended that by forcing the schools to serve as host for on-campus military recruiting, the Solomon Amendment infringed the schools' freedom not to associate with the military just as directly as the forced participation of gays in *Hurley* infringed the rights of the St. Patrick's Day parade organizers.

b. Argument rejected: But the Court in *FAIR* ***disagreed*** with the plaintiffs' assertion that the two cases were the same. The compelled-speech cases like *Hurley* turned on the fact that "the ***complaining speaker's own message was affected*** by the speech it was forced to accommodate." Thus in *Hurley* itself, the parade was expressive, and a law forcing the inclusion of an unwanted group altered the expressive content of the parade. In *FAIR*, by contrast, "[A]ccommodating the military's message ***does not affect the law schools' speech,*** because ***the schools are not speaking when they host interviews and recruiting receptions.*** Unlike a parade organizer's choice of parade

19. For more about the "right not to speak," see *infra*, p. 621.

contingents, a law school's decision to allow recruiters on campus ***is not inherently expressive*** ... Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies."

E. Right to exclude from membership in group: Just as the "right not to associate" means that a group may veto the participation of unwanted outsiders in the group's activities (see, e.g., *Hurley*, *supra*, p. 609), this right also means that an association has a First Amendment interest in ***not being forced to accept unwanted members***.

Examples: For instance, the rights of a Democratic club would probably be impaired if the government forced the club to admit registered Republicans as members. And the rights of NAACP members would be impaired if the organization were forced to admit, say, Nazi supremacists or Ku Klux Klanners.

1. Gays in the Boy Scouts: The most dramatic example of this "right to exclude from membership" branch of the right not to associate came in ***Boy Scouts of America v. Dale***, 530 U.S. 640 (2000), where the Court held that because opposition to homosexuality was part of the Scouts' "expressive message," the Scouts' freedom of association was violated by a state anti-discrimination law that barred the group from excluding gays as adult members.

a. Ouster upheld: By a 5-4 vote, the Court found for the Scouts. The majority, in an opinion by Justice Rehnquist, concluded that the Scouts had an "official position" that avowed homosexuals should not be Scout leaders, and that homosexual conduct was in the Scouts' view incompatible with the requirement that a Scout be "morally straight." Given this viewpoint, Rehnquist wrote, requiring that the Scouts keep Dale as an adult member would "at the very least, force the organization to ***send a message***, both to the youth members and the world, that the Boy Scouts ***accept homosexual conduct*** as a legitimate form of behavior." It didn't matter that the Scouts were not formed "for the purpose" of opposing homosexuality — as long as being forced to admit a practicing homosexual would ***impair the organization's message***, this was enough to trigger a strong First Amendment interest, one which the state's anti-discrimination interest could not overcome.

i. Strict scrutiny: Chief Justice Rehnquist didn't expressly say that he was using strict scrutiny. But he rejected the *O'Brien* content-neutral standard, which he characterized as an "intermediate standard of review," and he appears to have in fact used a variant of strict scrutiny.

b. Dissent: The four dissenters did not disagree with the general proposition that an organization cannot be forced to accept members whose presence would materially impair the group's message. But they disagreed about the application of this test here. As Justice Stevens' principal dissent put it, the Scouts had never — at least outside of various litigations — made a ***"clear, unequivocal statement"*** of opposition to homosexuality. And such a clear statement, in his view, was necessary before an organization could claim an infringement of its associational rights. All the Scouts had done was to "adopt[] an exclusionary membership policy" without any "shared goal of disapproving of homosexuality."

2. Compulsory membership won't necessarily interfere with expression: As *Boy Scouts* implies, the more ***central and unequivocal*** the organization's views on a particular matter, the ***greater the interference*** with associational rights will be if the organization is forced

to accept a member with opposing views. Therefore, if a particular point of view is ***not clearly articulated by the organization***, or ***not especially central*** to the organization's mission, compulsory membership by one with opposing views or conduct may ***cause so little harm*** that a countervailing governmental objective may outweigh the associational interest. And where that governmental interest is the possibly-compelling interest of reducing discrimination, the government is especially likely to prevail.

a. Illustration: This is what happened, for instance, in *Roberts v. United States Jaycees*, *supra*, p. 606: the originally all-male membership of the Jaycees had a First Amendment interest in not being required to accept women as members, but the organization's no-women stance was (the Court found) ***not very central*** to the organization's purposes. Consequently, this relatively weak interest was outweighed by the state's compelling interest in banning discrimination in places of public accommodation, an interest which could not be fully achieved by narrower measures.

F. Illegal membership: Government may not make it ***illegal*** to ***merely be*** a ***member of an association or group***. Membership in a group may only serve as an ***element*** of a criminal offense if the following ***additional requirements*** are satisfied:

[1] the group is ***actively engaged in unlawful activity***, or ***incites*** others to ***imminent lawless action*** (in such a way that the incitement is punishable as a "clear and present danger" under the modern *Brandenburg* test, *supra*, p. 495); and

[2] the individual member ***knows*** of the group's illegal activities, and has the ***specific intent*** of furthering the group's illegal goals.

This series of requirements evolved through the case law on subversive advocacy and the "clear and present danger" text, a subject treated in detail *supra*, p. 489.

G. Denial of public job or benefit: The freedom of association may be unconstitutionally abridged if a ***job in the public sector***, or a license or benefit issued by the government, is denied because of the applicant's associational activities. This possibility arises most commonly where a job or license is denied on the grounds of the applicant's membership in the ***Communist Party*** or other subversive group.

1. No ban based solely on membership: A public job or other public benefit ***may not be denied merely on the basis of the applicant's constitutionally-protected membership in a group or organization***.

2. Subversive group: Therefore, unless an individual's group activities could be made ***illegal***, those group activities cannot be grounds for denying him a job, license to practice law, or other public benefit.

a. Same test as for outright ban: Thus the test applied in the public-job-or-benefits context is the same as the two-part test used connection with the ***outright outlawing*** of subversive group activity (see *supra*, Par. (D)).

Example: A state statute provides for the discharge of any public employee who knowingly becomes a member of the Communist Party or of any party whose purposes include overthrow of the state government, if the employee has knowledge of this unlawful purpose. *Held*, the statute violates the First Amendment, because it does not also require that the employee have the "specific intent" to further the organization's illegal aims. *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

3. **Patronage hirings and dismissals:** The use of ***political patronage*** presents special free association problems: when a person or party who controls public-sector jobs gives those jobs out as a means of rewarding faithful party workers, applicants without political connections can plausibly claim that they have been discriminated against based on their political affiliation (or lack of one).

   a. **Rule for ordinary jobs:** In general, the Supreme Court has ***agreed*** with such claims, at least in the usual case where effective performance of the job does not depend on political affiliation. The rule is that in making ***hiring, promotion and dismissal*** decisions concerning such ordinary jobs, party affiliation may ***not*** be a factor. *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

      i. **Massive patronage rejected:** The facts of *Rutan*, *supra*, show the kind of patronage scheme that will ***not*** be allowed. Plaintiffs alleged that the Republican governor of Illinois prohibited any hiring, firing or promotions for any state office except on his "express permission," and that only those who had voted for or supported the Republican party in past years were favored. The Court held that these employment practices, if proven, violated the First Amendment free association rights of those not given special treatment.

   b. **Inherently political posts:** On the other hand, some government posts are by their nature so bound up with party affiliation — so ***inherently "political"*** — that the "wrong" party affiliation can get in the way of effective job performance. In that scenario, party affiliation ***may*** be considered in hiring and firing. For instance, "Democrats have no right to consideration on equal terms with Republicans when the newly elected Republican government of a state is choosing a speech writer or a high-level special assistant." Tribe, p. 1018.

      i. **"Effective performance" test:** The test is "whether the hiring authority can demonstrate that party affiliation is an ***appropriate requirement*** for the ***effective performance*** of the public office involved." *Branti v. Finkel*, 445 U.S. 507 (1980).

         (1) **Assistant public defender:** The one Supreme Court case deciding whether party affiliation was appropriately required for effective job performance is *Branti*, *supra*. There, the Court held that two Republican ***assistant public defenders*** could ***not*** be discharged on party-affiliation grounds when a Democrat was named to head the public defender's office. The majority reasoned that a rank-and-file public defender's ***effectiveness*** depends on how he handles his client's needs, not on any partisan political interests.

4. **Loyalty oaths:** Normally, denial of a job or license based on associational activities does not occur as the result of extensive investigation by the government. Rather, such denials have generally occurred where the applicant or employee is required to take an ***oath*** that he has not belonged to certain types of organizations, or engaged in other activities, and he is unwilling or unable to take such an oath.

   a. **Rule:** In general, the rule regarding such ***"loyalty oaths"*** is that one may not be required to state that one has not performed a certain act, or that one will not perform it in the future, unless actual ***performance*** of that act would be grounds for discharge. That is, the permissible scope of such oaths is co-extensive with the scope of grounds for ***non-hiring or discharge.*** See *Cole v. Richardson*, 405 U.S. 676 (1972).

i. **Illustration:** For instance, recall that a person may not be discharged for membership in an organization advocating overthrow of the government, unless she had *knowledge* of the organization's purpose and *specific intent* to further that purpose. Consequently, a person may also not be required to swear a blanket oath that she has never been a member of an organization advocating such overthrow — language referring to the affiant's knowledge of the illegal purposes, and to her specific intent to further them, must be inserted into the oath itself.

5. Speech critical of superiors: Thus far, we have examined the denial of public jobs and benefits for ***associational*** activities. Similar issues arise when the government attempts to deny a public job or benefit because of a person's ***speech***-related activities. For instance, under what circumstances may a government employee be fired for ***criticizing his superiors?***

a. **"Public concern" as key factor:** The key issue is whether the speech involves a matter of ***"public concern."*** Governmental attempts to fire or otherwise penalize its employees for speech on matters of "public concern" will be ***strictly scrutinized***, but speech on matters that are ***not*** within this category will receive substantially less protection. ***Connick v. Myers***, 461 U.S. 138 (1983).

i. **Public concern:** Where speech involves a matter of ***"public concern,"*** the Court held in *Connick*, the judiciary must carefully examine the justification given by the state for penalizing the speech, and must strike a ***balance*** between the free speech rights of the employee and the "interest of the State, as an employer, in promoting the efficiency of the public services it performs[.]"[20]

ii. **Matters not of "public concern":** By contrast, where the matters discussed by the employee are ***not*** ones of public concern, the court should give "a wide degree of ***deference*** to the ***employer's judgment."*** The employer's interest in, for instance, avoiding "the ***disruption of the office*** and the ***destruction of working relationships***" should be ***weighed heavily***.

Example: P is an assistant D.A. After learning that she has received an unwanted transfer to a new post within the D.A.'s office, she gives her coworkers a questionnaire soliciting their views on a number of matters concerning the office, including whether they have "confidence in" particular superiors, and whether they ever "feel pressured to work in political campaigns on behalf of office supported candidates." The D.A., upon learning of the questionnaire, views it as an act of insubordination, and fires P for both the questionnaire and for refusing to accept the transfer.

Held (5-4), P's firing is sustained. The D.A. reasonably believed that P's actions would "disrupt the office, undermine his authority and destroy close working relationships." Since the questionnaire as a whole touched only slightly on matters of "public concern," the D.A.'s judgment is entitled to great deference. (But if matters of public interest been been more plainly implicated in the questionnaire, less deference would be due the D.A.'s judg-

20. But there's a major exception to this rule of *Connick*: under *Garcetti v. Ceballos*, discussed *infra*, p. 614, if the speech occurs "pursuant to the employee's ***official duties***," it *doesn't* get this significant protection, even if it involves a matter of public concern.

ment, and a much stronger showing of danger to the efficiency of the office would be required to sustain the firing.) *Connick, supra*.

iii. Expansive reading to "public concern": The Court has sometimes given a surprisingly broad reading to the definition of "public concern," the key definition used by *Connick* for determining whether a public employer can fire an employee for speech-related reasons.

Example: P is a 19-year-old black clerical employee in the office of D (the County Constable). When P hears of John Hinckley's attempted assassination of President Reagan, P says (in the office) to a co-worker who happens to be her boyfriend, "If they go for him again, I hope they get him." The remark is overheard by another co-worker, who informs D about it; D fires P.

Held (by 5-4 vote), P's dismissal violated her First Amendment rights. P's comment was on a matter of "public concern," thus satisfying the first prong of the *Connick* test. Taken in the context in which it was made, the remark was essentially a commentary on the President's policies and the attempted assassination, both of which were matters of public concern. Since the statement touched on a matter of public concern, the dismissal could only be upheld if the State bore the burden of justifying the discharge on legitimate grounds. Any justification had to take into account the context in which the statement was made, including "time, place and manner." Here, P had no policy-making or law-enforcement responsibilities and her statement had no discernible impact on the functioning of the Constable's office, so the State failed to justify the dismissal. *Rankin v. McPherson*, 483 U.S. 378 (1987).

b. Need not have "property" interest: Observe that in the "speech critical of superiors" cases (*Connick*, for instance), the employee has a qualified right not to be fired for First Amendment activity even if she has no ***"property"*** interest in the job. This is very different from the rule in cases brought under the Due Process Clause (see *supra*, p. 222), under which the employee has no right to due process before being fired unless she is found to have had a property interest in the job.

c. Speech must not occur as part of job responsibilities: There's a very important exception to the *Connick* rule. In order for speech on matters of public concern to get the protection of *Connick*, the speech ***must not be made "pursuant to the employee's official duties."*** So speech on matters of public concern made in furtherance of the public employee's ***job functions*** receives ***less First Amendment protection*** than speech the employee makes as a "citizen" acting outside of his job. The Court announced this principle in ***Garcetti v. Ceballos***, 547 U.S. 410 (2006).

i. Facts: The plaintiff in *Garcetti* was a supervising lawyer in the L.A. County District Attorney's Office. P was called on to investigate whether an affidavit prepared by a deputy sheriff to obtain a search warrant was properly done. After his investigation, P wrote a memo to his supervisor concluding that the affidavit had been improperly done, and recommending dismissal of the criminal case premised upon it. This memo precipitated a chain of events at the end of which, P claimed, his superior retaliated against him for writing the memo. The D.A.'s office retorted that P's act of writing the memo was not entitled to First Amendment protection because the memo was created as part of P's job responsibilities.

ii. Court agrees: By a 5-4 vote, the Court agreed with the D.A.'s position: "[W]hen public employees make statements ***pursuant to their official duties,*** the employees are ***not speaking as citizens*** for First Amendment purposes, and ***the Constitution does not insulate their communications from employer discipline."*** Here, because P's investigation and the ensuing memorandum were part of his job responsibilities, the employer had the right to regulate the content and manner of P's speech.

(1) Rationale: The majority reasoned that "employers have heightened interests in ***controlling speech made by an employee in his or her professional capacity*** ... Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and ***promote the employer's mission.***"

iii. Dissent: The four dissenters conceded that the majority was correct to recognize a government employer's important interest in ensuring that employees who speak for it while doing their work have competence, honesty and good judgment. But the dissenters, led by Justice Souter, would nonetheless apply a *Connick*-style ***balancing*** when on-the-job speech implicates matters of public concern — they thought that the government's interest in job performance could sometimes be ***outweighed*** by the employee's interest in speaking (and the public's interest in hearing the speech) on matters of public concern. For Souter, such a balancing was appropriate, for instance, "when a public auditor speaks on his discovery of embezzlement of public funds, when a building inspector makes an obligatory report of an attempt to bribe him, or when a law enforcement officer expressly balks at his superior's order to violate constitutional rights he is sworn to protect."

6. Imposition of burdens: So far, we have talked about the award by the government of ***benefits*** (e.g., public-sector jobs). But a similar rule applies where the government metes out ***burdens***. That is, the government may not use as a basis for selecting which individuals are to be burdened the individuals' exercise of constitutionally-protected rights (or any other constitutionally-illicit criterion, e.g., race). This is true even if the government would otherwise have the right to place that burden upon the individuals in question. For instance, "there are First Amendment problems if only Democrats, or only critics of government, or only Socialists, are selected for ***income tax audit***." Gunther, 1985 Supp., p. 66. The same is true of any other government prosecution or penalty.

H. Compulsory disclosure (*Americans for Prosperity v. Bonta*): Sometimes, interference with associational freedoms will be alleged where the government requires a group, such as a charity or a political party, to ***disclose who its members or contributors are***. The group might be required to make the disclosure ***to the government*** (with or without government's promising to keep the contents ***secret***); or, the group might be required to make a ***public filing*** of the information. In either scenario, a 2021 case establishes that such a government-mandated disclosure requirement will be subjected to ***"exacting scrutiny,"*** essentially a form of ***intermediate-level review.***[21] This exacting-scrutiny standard requires that the type of disclosure being compelled must be at least ***"narrowly tailored*** to the government's asserted interest," though

21. See *supra*, pp. 320 and 572 for examples of intermediate-level review in other contexts.

not necessarily the "***least restrictive means*** of achieving that end." ***Americans for Prosperity Foundation v. Bonta***, 141 S.Ct. 2373 (July 1, 2021).

1. **Earlier case of *NAACP v. Alabama*:** Before we get to the *Americans for Prosperity* case, we need to review an earlier case, the first modern-era case in which the Supreme Court recognized that when government compels a group to disclose its members, this mandatory disclosure might violate the members' First Amendment freedom of association. That case was ***NAACP v. Alabama ex rel. Patterson***, 357 U.S. 449 (1958), a case arising from the Civil Rights struggle in the south.
   a. **Facts of *NAACP*:** Here's a brief summary of the facts of the *NAACP* case, as recounted in the majority's later opinion in *Americans for Prosperity*. The NAACP opened an Alabama office that supported desegregation in higher education and public transportation. NAACP members were then threatened with economic reprisals and violence. As part of the state's efforts to drive the organization out of the state, the Alabama Attorney General demanded that the group ***turn over its membership lists.***
   b. **Holding:** The Supreme Court held that such compulsory disclosure ***violated*** the group's members' freedom of association. As the *Americans for Prosperity* opinion summarized the holding in *NAACP*, "[b]ecause NAACP members faced a risk of reprisals if their affiliation with the organization became known — and because Alabama had demonstrated no offsetting interest 'sufficient to justify the deterrent effect' of disclosure, . . . the State's demand violated the First Amendment."
      i. **No standard of review announced:** The *NAACP* opinion did not specify ***what standard of review*** should be used for determining whether Alabama's disclosure scheme violated the plaintiff's' First Amendment rights. (At the time, in 1958, the Supreme Court had not yet even articulated either "strict scrutiny" or "intermediate review" as possible standards for reviewing First Amendment or other constitutional challenges.)
2. **Facts of *Americans for Prosperity*:** Returning now to the *Americans for Prosperity* case, California required any tax-exempt charity that solicited contributions in that state to file copies of the charity's "Form 990" with the state's Attorney General. The Form 990 is a form every charity is required to file annually with the federal Internal Revenue Service (IRS); the form requires the charity to list the names and addresses of any donor who contributed more than $5,000 in the relevant year. California was thus requiring every charity soliciting contributions in the state to tell the state the ***names and addresses of every major donor.*** The state promised to keep the information ***confidential***; however, prior to the suit, the Attorney General office had inadvertently posted at least 2,000 Form 990s to the Department's website, thus making their contents public.
   a. **The state's interest:** In California, one of the jobs of the Attorney General's office is to ***supervise charitable fundraising.*** The Attorney General defended the Form 990 disclosure requirement as a means of furthering the state's interest in ***preventing "charitable fraud and self-dealing."***
      i. **Efficiency argument:** Even had there been no automatic "up-front" disclosure scheme, the Attorney General would have been free to subpoena the Form 990 from any particular charity the A.G. wanted to investigate. But, the state said, collecting all Form 990s up-front ***improved the efficiency*** of the Office's regulatory efforts.

b. Two plaintiffs bring suit: The disclosure requirement was attacked in separate suits brought by two charities (the "Ps") associated with conservative causes. The Ps argued that by requiring them to file their Form 990s, the state was violating each charity's (and the charity's donors') First Amendment freedom of association. In part because of the inadvertent leaks of Form 990s mentioned above, the Ps argued, the disclosure scheme and related leakage risks made it ***harder for them to fund-raise***, by subjecting their donors to the risk of reprisals and harassment from the public.

i. Facial attack: An important aspect of the Ps' suit was the Ps' claim that the disclosure requirement was not only a violation of freedom-of-association "as applied" to each P and its donors, but was also ***invalid "on its face,"*** i.e., that it could not constitutionally be applied to *any* charity.[22]

3. The holding: By a 6-3 vote, the ***Ps prevailed*** in the Supreme Court. The Court (a) subjected the California disclosure scheme to ***"exacting scrutiny,"*** then (b) concluded that the scheme ***could not survive that scrutiny***, and (c) determined that the scheme was in fact ***invalid on its face.*** The Court's opinion was by Chief Justice Roberts.

a. Relevance of *NAACP*: Roberts began by explaining the importance of a group's interest in maintaining the ***privacy of its members' identities.*** He quoted from the *NAACP* opinion, *supra*: ***"privacy in group association*** may ... be indispensable to preservation of freedom of association, particularly where a group ***espouses dissident beliefs."***

b. "Exacting scrutiny" as the standard: Roberts then noted that after *NAACP*, the Court had concluded that the appropriate standard of review for compulsory-disclosure schemes is the ***"exacting scrutiny" standard.***

i. More about the "exacting scrutiny" standard: Under the exacting scrutiny standard, Roberts said, there must be "a ***substantial relation*** between the disclosure requirement and a ***sufficiently important governmental interest***." And, he continued, "To withstand this scrutiny, the strength of the governmental interest must ***reflect the seriousness of the actual burden*** on First Amendment rights."

ii. The means-end fit: Roberts then discussed ***how tight the means-end fit*** — the fit between the disclosures required by the government and the important governmental interest(s) being pursued — must be in order to satisfy the exacting-scrutiny standard. The government, he said, does ***not*** need to choose the ***"least restrictive means"*** of achieving the relevant interest. But, he continued, the means must be ***"narrowly tailored"*** to the achievement that asserted interest.

c. Applying the "important interest" requirement: Roberts then turned to ***applying*** the exacting-scrutiny standard to the actual California disclosure regime at issue. As to the "sufficiently important governmental interest" prong — i.e. the "end" being sought by government — Roberts quickly conceded that California's interest in "preventing wrongdoing by charitable organizations" was indeed ***"sufficiently important."***

d. Applying the "narrowly-tailored" requirement: Roberts then applied the other prong of exacting scrutiny — that the means chosen must be ***"narrowly tailored"*** to

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22. For the distinction between "as applied" challenges to the constitutionality of a government action and "facial" challenges, see *supra*, p. 499.

the governmental interest which that means promotes. As in most constitutional challenges triggering either intermediate-review or strict scrutiny, the ***"tightness of fit"*** between the end and the means was where the problem lay. Here, Roberts said, there was a ***"dramatic mismatch"*** between the A.G.'s interest in combating fraud and the broad disclosure regime he implemented.

i. **No instances:** For starters, the A.G. had not been able to point to even a ***"single, concrete instance"*** in which the collection of a Form 990 had done anything to "advance the Attorney General's investigative, regulatory or enforcement efforts."

ii. **Need for universal production:** Furthermore, Roberts said, even if the A.G. *had* actually relied on up-front collection in some cases, that modest reliance would fall "far short" of the means-end fit required by the exacting-scrutiny standard. This prong required the state to show that "universal production" was needed ***"in light of any less intrusive alternatives."***

(1) **Subpoenas as an alternative:** The A.G. had argued that alternative means of obtaining the Form 990s — such as ***subpoenas*** or ***letters announcing an audit*** — were less efficient than up-front collection. But, Roberts said, the record showed that the A.G. had never even ***"considered"*** these alternatives to universal up-front collection, weakening the A.G.'s claim that this was not a viable less-intrusive alternative.

(2) **"Administrative efficient not a sufficient goal:** Roberts concluded that the main interest that California was pursuing by its universal up-front disclosure regime was not investigating fraud but rather, achieving ***"ease of administration."*** However, he said, the highly burdensome up-front disclosure system was ***not narrowly-tailored*** towards achieving this relatively weak state interest in "mere administrative convenience."

e. **Scheme is "facially invalid":** Roberts then turned to the issue that may well prove to be the most far-reaching aspect of the decision: whether the disclosure regime was ***"invalid on its face."*** So far, we've seen how his majority opinion decided that the disclosure scheme here violated the freedom-of-association rights of the two particular plaintiff charities who brought the suit (making this at least a successful "as applied" challenge). But should the majority conclude that the scheme also violated the free-association rights of most or all charities ***not presently before the court?*** If so, the Court could find that the scheme was "facially invalid," i.e., that it could not constitutionally be enforced against ***any*** charity.

i. **The test:** Roberts noted that it's easier for the plaintiff to succeed with a "facial challenge" in First Amendment cases than in cases involving other parts of the Constitution. Outside of the First Amendment area, a plaintiff bringing a facial challenge has to show either that (a) "no set of circumstances exists under which the [law] would be valid"; or (b) the law lacks a "plainly legitimate sweep."[23] But where a challenge is based on the First Amendment, there is a separate, easier-to-satisfy standard for establishing that a law is facially invalid: "a law may be inval-

23. For more about facial challenges, see *supra*, p. 244.

idated as ***overbroad***[24] if a ***substantial number*** of its applications are unconstitutional, judged in relation to the statute's ***plainly legitimate sweep."***

ii. **Statute flunks the test:** Roberts said he had "no trouble" concluding that by this test, California's disclosure scheme ***was overbroad***: "The ***lack of tailoring*** to the State's ***investigative goals*** is categorical — ***present in every case*** — as is the ***weakness*** of the State's interest in ***administrative convenience***." It ***didn't matter*** that the plaintiffs had not shown that a substantial number of charities would be ***subjected to harassment and reprisals*** — if the statute had ***satisfied exacting scrutiny*** (by being narrowly tailored to the achievement of an important governmental interest), then it *would* have been appropriate for the Court to grant only as-applied treatment, rather than facial-invalidation.

But where, as here, a disclosure scheme does ***not*** survive exacting scrutiny, then ***even the theoretical risk of a chilling effect is enough*** to make the scheme facially invalid. "When it comes to the freedom of association, the protections of the First Amendment are ***triggered not only by actual restrictions*** on an individual's ability to join with others. ... The ***risk of a chilling effect on association is enough*** [for facial invalidity], '[b]ecause First Amendment freedoms ***need breathing space to survive.'"***

4. **The dissent:** Justice Sotomayor — joined by Breyer and Kagan — ***dissented*** in *Americans for Prosperity*.

   a. **Actual burden must be shown by Ps:** Sotomayor agreed with Roberts that publicizing individuals' associations with a particular group might chill the group's and its members' freedom of association by exposing them to harassment and reprisals. But in the Court's prior decisions, what had always mattered were the risks that ***"actually result[ed] from disclosure";*** only after the plaintiffs showed an ***actual burden*** had the Court then required means-end tailoring, and the level of that tailoring was proportional to that particular burden. But now, she said, the Court had abandoned that established approach, by "holding that narrow tailoring applies to disclosure requirements ***across the board,*** even if there is ***no evidence that they burden anyone at all."***

      i. **No need for exacting scrutiny:** Sotomayor sharply disagreed with this approach. The plaintiffs here had not produced *any* "evidence of tangible burdens" at all. Therefore, there was no need for the Court to perform any exacting scrutiny.

   b. **Tailor the level of scrutiny to the degree of burden:** Similarly, Sotomayor contended, in heightened-scrutiny cases the Court had always ***adjusted*** the required tightness of means-end fit in order to match the ***magnitude of the burden*** the government was placing on the group's freedom of association. Now, the majority was unwisely shifting from this "nuanced approach" to a ***"one size fits all"*** test — no matter whether the burdens the government was placing on associational rights were slight, heavy, or nonexistent, the Court was requiring that the disclosure regime ***always be narrowly tailored.*** This created a significant risk that disclosure requirements that should be constitutional would be struck down, Sotomayor said.

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24. When a law attacked on First Amendment grounds is found to be "overbroad," that overbreadth is a form of facial invalidity; consequently, the overbroad law may not be enforced against *anyone*, even persons who were not part of the plaintiff group when the suit against the statute was brought. See *supra*, p. 498.

c. Overbreadth: Finally, Sotomayor was especially critical of the majority's conclusion that the disclosure scheme was ***"facially invalid"*** — and thus could not be enforced against *any* charity — rather than merely invalid "as applied" to the two charities who had brought the suit. She conceded that facial attacks are (and should be) easier to win in the First Amendment area than in other contexts, because of the risk that imprecisely-drawn regulations will have a broad chilling effect on speech or association.

But even in the First Amendment area, she said, the Court had never allowed a facial attack to succeed unless the regulation was shown to be unconstitutional in a ***"substantial number of … applications*** … judged ***in relation to*** the statute's ***plainly legitimate sweep."*** Here, given the desire of many charitable donors to have their donations publicized, the plaintiffs had "fail[ed] to show that a substantial proportion of those affected would prefer anonymity, much less that they are objectively burdened by the loss of it."

d. "Marked with a bull's-eye": In sum, Sotomayor said, the Court had ***"mark[ed] reporting and disclosure requirements with a bull's-eye."***

5. Possible extensions to other disclosure regimes: The logic of *Americans for Prosperity* seems to render unconstitutional a ***wide variety of state and federal disclosure requirements,*** not just in the area of charitable donations but also in the domain of ***campaign finance.***

a. IRS charitable disclosure requirements: For instance, recall that the requirement struck down in *Americans for Prosperity* was that each non-profit file with the state the non-profit's IRS Form 990, listing each significant donor's identity and the amount they contributed. The Court's logic almost certainly ***applies equally*** to the ***filings required by the IRS itself***: the long-established requirement that non-profits file the Form 990 with the IRS seems now to be facially invalid (and thus unconstitutional) as to ***all nonprofits and their donors,*** even where there is no evidence that any donor's willingness to contribute to any charity has been ***actually chilled*** by that filing requirement. See Chemerinsky, *"Supreme Court Opens Door for Dark Money…,"* Sacramento Bee, Aug. 4, 2021.

b. Campaign-finance disclosure laws: Beyond the charitable-donation area, *Americans for Prosperity* also seems to cast into serious doubt every state and federal law requiring ***campaign-finance disclosure.*** As one observer writes, "Any ***candidate or political party*** can claim that having to reveal its donors will chill association," and the case makes it "clear that no proof of actual harm is required." Chemerinsky, *op. cit.* Therefore, unless the state or federal government can carry the hard-to-satisfy burden of showing that its disclosure requirement is "narrowly tailored" to the government's interest in, say, combating the buying of elections, the disclosure scheme will apparently be struck down as to ***all candidates and all donors.***

I. The bar membership cases: Cases on qualifications for ***admission to the bar*** are a kind of hybrid, raising problems both as to the grounds for denial of publicly-conferred benefits (the license to practice) as well as issues of the scope of required disclosure. Most of the bar cases have involved state qualification procedures designed to deal with ***subversive*** activities. Here's what seems to be the present state of affairs about bar-admission inquiries:

1. **No disqualification:** The state cannot ask the candidate a question whose ***sole function*** is to determine whether the candidate has been a knowing member of an organization which advocates forcible overthrow of the government. Thus ***knowing membership*** in such an organization, without more, ***can't be the basis*** for denying admission. *Baird v. State Bar of Arizona,* 401 U.S. 1 (1971).

2. **Screening device:** However, the state *can* use a ***two-part question***, where the first part acts merely as a ***screening device.*** Thus the state can ask the initial question, "Have you ever been a member of an organization which advocates forcible overthrow of the government, while knowing that that was the organization's aim?" Then, if the answer is "yes," the state can ask the follow-up question, "Do you ***support*** this aim?" An affirmative answer to this second question (or a refusal to answer it) can apparently then be grounds for denying bar admission. *Law Students Research Council v. Wadmond*, 401 U.S. 154 (1971).

J. The "right not to speak": In discussing the *Hurley* case, *supra*, p. 609, I noted that the "right not to associate" is closely related to the ***"right not to speak."*** Let's talk now in more detail about this right not to speak. The Court has long held that part of a person's freedom of expression is the ***right not to be forced*** by the government to ***express a message*** that the person does not wish to express.

1. **Pledge of allegiance:** In an early case, the Court held that a state law requiring all public school students to ***salute and pledge allegiance to the U.S. flag*** violates their freedom of expression. *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624 (1943). In *Barnette*, the Court noted that the pledge and salute "require[] ***affirmation of a belief and an attitude of mind***[.]" Were the Court to uphold the compulsory pledge and salute, "we [would be] required to say that a Bill of Rights which guards the individual's right to speak his own mind [leaves] it open to public authorities to ***compel him*** to ***utter what is not in his mind,"*** something the Court refused to do.

2. **"Live free or die" on license:** Similarly, the Court held that New Hampshire could not criminally punish vehicle owners who covered up the ***state motto "Live Free or Die"*** on their state-issued ***license plates,*** if the motto was at odds with the owner's moral or religious beliefs. See *Wooley v. Maynard*, 430 U.S. 705 (1977): "[W]here the State's interest is to ***disseminate an ideology,*** ... such interest cannot outweigh an individual's First Amendment right to ***avoid becoming the courier*** for such message."

3. **Required notices in "crisis pregnancy centers":** A business operator's "right not to speak" has even been extended to include the right not to be required to ***post government-drafted notices*** that deliver a disclosure message with whose content the operator disagrees. In a 2018 case, the Court held that California violated the free-speech rights of ***"crisis pregnancy centers"*** when the state passed a law requiring that such centers post a notice informing patients of the availability of public family-planning services ***including abortions***. The case was ***National Institute of Family and Life Advocates v. Becerra***, 138 S.Ct. 2316 (2018).

   a. **The statute:** California enacted the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act ("FACT" Act), which required clinics that primarily serve pregnant women to provide certain ***state-specified notices.*** Of greatest interest to us on the compelled-speech issue is the Act's requirement that licensed clinics post a notice (1) telling women that ***the state provides free or low-cost***

family-planning services, including abortions, and (2) supplying a phone number to call.

b. Attack on the statute: A group of "crisis pregnancy centers" — pro-life organizations that offer services to pregnant women, and that the state said "aim to discourage and prevent women from seeking abortions" — claimed that the notice requirement violated their free-speech rights by requiring them to deliver a state-sponsored message with which they disagreed. The plaintiffs sought a preliminary injunction against the notice requirement, which the lower courts denied.

c. Court agrees with plaintiffs: By a ***5-4 vote***, the Supreme Court ***agreed*** that the ***plaintiffs were likely to succeed*** on the merits of their free-speech claim, and therefore granted them an injunction against the notice requirement pending further proceedings in the lower court. The Court divided under familiar ideological lines, with the conservatives (including Justice Kennedy as the deciding fifth vote) upholding the free-speech claim, and the four liberals dissenting. The majority opinion was by Justice Thomas.

i. No special rule for "professional speech": The lower courts had held that the clinics were engaged in ***"professional speech,"*** and that the standard for reviewing government regulation of such speech should therefore be ***less stringent*** than for ordinary speech. But Thomas rejected this view: except in a few special circumstances not at issue here, the standards for reviewing government restrictions on speech, he said, are ***the same where the speech is "professional" as when it is not.***

ii. Strict scrutiny: Thomas wrote that the notice the licensed clinics were required to post was a ***"content-based regulation of speech."*** The state was requiring clinics to "provide a ***government-drafted script*** about the availability of state-sponsored services[.]" "By compelling individuals to ***speak a particular message,"*** Thomas said, the state ***"alter[s] the content of [their] speech[.]"*** Thomas suggested, though he did not explicitly hold, that in view of his finding that professional speech should not be any easier for government to regulate in a content-based way than other speech, the appropriate standard of review should be strict scrutiny.

iii. Can't survive even intermediate-level review: But Thomas saw no need to apply strict scrutiny here because, he said, the notice requirement "cannot survive ***even intermediate scrutiny."*** He didn't expressly recite what intermediate scrutiny would involve in this context, but he seemed to be saying that this level of view requires a showing that the means chosen by the state was ***closely drawn to achieve a substantial state interest.***

iv. Application of standard: The only interest the state had asserted here, Thomas said, was the interest in "providing low-income women with ***information about state-sponsored services[.]"*** And even if that was a substantial interest, the notice required here was ***"not sufficiently drawn*** to achieve" that interest, because the notice requirement was "wildly ***underinclusive***," in that it ***exempted many similar types of clinics*** from a similar requirement.

v. Remanded: The majority in *National Institute* did not conclusively find that the notice requirement was unconstitutional — the Court merely found that the plain-

tiffs would likely win on the merits, and therefore granted an injunction against enforcement of the notice while the case was fully litigated below.

d. Dissent: Justice Breyer (joined by Ginsburg, Sotomayor and Kagan) ***dissented***. He noted that the majority's rule applied heightened scrutiny to any government rule that compels an individual to "speak a particular message." But, he said, this rule would cast into doubt the constitutional validity of ***"virtually every disclosure law,"*** since nearly all disclosure laws require individuals 'to speak a particular message.'" The majority's view, if taken literally, "could radically change prior law, perhaps placing much ***securities law or consumer protection law at constitutional risk[.]"***

i. Bad consequences for regulation of professionals: Breyer noted that the majority opinion said it was willing to recognize an exception for laws that "require professionals to disclose factual, noncontroversial information in their 'commercial speech,'" but only in the narrow situation where the disclosure ***"relates to the services that [the regulated professionals] provide."*** But the majority's narrow exception meant that ***numerous disclosure requirements*** routinely imposed on the medical or legal professions — but not relating to the professionals' own services — would now have to be subjected to heightened scrutiny. For instance, statutes requiring hospitals to tell parents about ***child seat belts***, or to tell parents of newborns about diseases for which a ***vaccine is available***, would have to be closely scrutinized (and probably struck down) as content-based restrictions on the hospitals' right to reject compelled speech. Breyer believed that such disclosure laws should be upheld as falling within the Court's modern-era, post-*Lochner*[25] practice of treating "ordinary economic and social legislation" as "rais[ing] little constitutional concern."

XII. UNCONSTITUTIONAL CONDITIONS

A. Unconstitutional conditions generally: Government actions sometimes raise the problem of ***"unconstitutional conditions."*** The problem arises "when government attaches ***constitutionally troublesome 'strings'*** to ***government benefits***, such as housing, employment money, or licenses." S,S,S,T&K pp. 1608-09. Most often — but not always — the "string" is that the recipient of the government benefit must, in order to get the benefit, agree to ***waive her freedom of expression***.

1. Statement of doctrine: To deal with this problem, the Court sometimes invokes the doctrine of unconstitutional conditions in order to strike down the condition. When the doctrine applies, it holds that "government ***may not grant a benefit on the condition that the beneficiary surrender a constitutional right***, even if the government may ***withhold that benefit altogether***." 102 HARV. L. REV. 1415. The idea behind the doctrine is that what the government may not do ***directly***, it may not do ***indirectly*** either. *Id.*

Example: Suppose that the Republican-controlled legislature of a state passes a statute saying that no one may get or keep a job working for the state — no matter how low-level the position or what the requirements of the position are — unless the per-

25. See *supra*, p. 170, for a discussion of how the Court eventually rejected *Lochner v. N.Y.*'s close scrutiny of garden-variety social and economic legislature.

son signs a pledge not to criticize any elected Republican official during the employment.

The Supreme Court would undoubtedly invoke the doctrine of unconstitutional conditions to strike down this statute as a violation of state employees' freedom of expression. Every citizen has the right to criticize politicians, and letting the state condition all state employment on the waiver of this right amounts to letting the state do indirectly what it could not to directly.[26]

2. Guiding principles: The Court seems to apply the doctrine somewhat inconsistently. But following are three principles that seem to explain the outcome in most of the Court's unconstitutional-condition cases. (See S,S,S,T&K p. 1615.) We have already covered most of these principles in earlier parts of this chapter, especially in the discussion of government's rights as funder of speech, *supra*, p. 601.

[1] **Government uses agents to deliver government's own speech:** Government is ***permitted*** to say pretty much whatever it wants ***when the government is itself the speaker.*** (See *supra*, p. 601.) Furthermore, government is permitted to ***select agents*** to deliver the government's own message. (*Supra*, p. 601.) Therefore, government is free to ***pay agents*** to deliver the government's message, and to ***condition that payment*** on the agent's willingness to ***waive his otherwise-protected right*** to engage in speech that would contradict or garble the government message the agent is being paid to deliver.

Example: Congress provides funding for a public-education campaign called "Smoking Kills." The funding pays for lecturers to travel the country giving anti-smoking speeches. It's clear that Congress may insert into its contract with any lecturer a provision saying, "In any public lecture you are giving as part of the 'Smoking Kills' program, you shall make no statement inconsistent with the view that smoking is inherently hazardous."

By doing so, Congress has not attached an unconstitutional condition to its lecture contract; the nature and advertising of the program make it clear that any lecturer who is speaking under the auspices of the program is delivering the government's own message, so it is not unconstitutional for the government to insist on speakers who will faithfully deliver the message that the government has selected.

[2] **Limits on use of government's payments:** Government is also free to set up ***"subsidy programs,"*** under which government funds private groups to help them carry out some function. And when government does this, it is free to ***refuse*** to allow ***the subsidy dollars to be used for particular activities opposed by government***, including otherwise-constitutionally-protected activities like ***speaking*** on certain topics, ***performing abortions***, or lobbying legislators. (But this exception applies only when the restriction limits just the use of the actual ***dollars paid by the government***, not when the program restricts the grantee's freedom to engage in other activities being pri-

26. Notice that I've designed this hypothetical statute so that it applies even where the state has no legitimate interest in curbing the criticism. If such a law instead only applied, say, to high-ranking policy-making employees to prevent them from publicly criticizing their own superiors while performing the functions of the job, the unconstitutional-conditions doctrine wouldn't apply. In this situation, the Court would almost certainly hold that the government has an overriding interest in assuring that high-level employees don't impair their own performance or that of their superiors by on-the-job criticisms of superiors. See *Garcetti v. Ceballos*, *supra*, p. 614.

vately funded. As to this latter situation, see [3] below.)

Example: Recall the facts of *Rust v. Sullivan* (*supra*, p. 194): Congress has long provided federal grants to help private citizens operate family-planning clinics. Any program using these grants is known as a "Title X project." The Secretary of Health and Human Services then makes a new interpretation of the grant program, under which every Title X project is prohibited from "counselling [patients] concerning the use of abortion" or from "encourag[ing] or promot[ing] abortion." Grantees who have been receiving funds argue that this new condition violates their and their patients' freedom of speech, by stripping the grantees of the right to counsel a patient that she has a constitutionally-protected right to have an abortion in certain circumstances.

Held, the new interpretation is not an unconstitutional condition, and does not violate the First Amendment. "[T]he Government is not denying a benefit to anyone, but is instead simply insisting that ***public funds be spent*** for the purposes for which they were authorized." A critical distinction is between the "project" (the particular activity paid for by the grant funds, namely operating a family-planning clinic), and the "grantee" (the individuals or group that are running the project). The way the statute and interpretation are written, a Title X *grantee* can continue to engage in abortion advocacy or counselling; the grantee simply is required to conduct those activities "through programs that are *separate and independent from the project* that receives Title X funds."[27] *Rust v. Sullivan,* 500 U.S. 173 (1991).

[3] **No "leveraging" by government:** But although government may (as described in [2] above) put conditions on how the government funds will be used inside a government-subsidized privately-run program, government may not impose conditions that "seek to ***leverage funding*** to ***regulate speech outside the contours*** of the [government] ***program itself***."

Example 1: Congress gives funding to noncommercial TV and radio stations, but only on condition that they do not do any editorializing, even with private funds.

Held, the no-editorializing rule is an unconstitutional condition. Congress had the power to limit how subsidy dollars are spent. But here, Congress went beyond that power, by preventing all editorializing by even stations that didn't use federal funding for this purpose. For the no-editorializing condition to have been constiututional, Congress would have had to give a station a way to use private funds for editorializing as long as the station made sure not to use the federal grants for these editorializing purposes. *FCC v. League of Women Voters*, 468 U.S. 364 (1983).

Example 2: Congress gives large money grants to various nongovernmental organizations that are fighting HIV and AIDS. Congress says that no funds may be given to any group "that does not have a ***policy explicitly opposing prostitution[.]"*** (This is the "Policy Requirement.") The Ps are various non-profits that fear that if they obey the Policy Requirement and adopt an explicitly anti-prostitution message, their mission

27. Indeed, that's the way Planned Parenthood and other recipients of Title X funding operated after *Rust* — they set up federally-funded clinics to do non-abortion-related family planning such as distribution of contraceptives, and separately set up non-federally-funded abortion clinics.

will be adversely affected (e.g., they may find it harder to persuade prostitutes to promote condom usage).

Held (6-2),[28] for the Ps; the Policy Requirement is an unconstitutional condition. The Court's cases on unconstitutional conditions have distinguished between "conditions that define the limits of the government spending program, [i.e., that] specify the activities Congress wants to subsidize" (which are constitutional) and "conditions that seek to leverage funding to regulate speech outside the contours of the program itself" (which are unconstitutional). It may sometimes be hard to tell on which side of the line a particular condition falls. But here, the Policy Requirement falls on the unconstitutional side of the line. "By demanding that funding recipients adopt — as their own — the Government's view on an issue of public concern, the condition by its very nature affects 'protected conduct outside the scope of the federally funded program.'" *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321 (2013).

XIII. SPECIAL PROBLEMS CONCERNING THE MEDIA

A. Summary of issues: Certain First Amendment problems arise only where the First Amendment right is being asserted by a member of the ***media***, i.e., professional ***publishers*** and ***broadcasters***. The four issues which we address that pertain specially to the media are:

1. Does the press have a special role to play under the First Amendment, so that it has ***rights*** which an ***ordinary member of the public would not?***
2. Under what circumstances, if any, may the media be ***restrained*** from publishing or broadcasting material (as distinguished from being punished after such dissemination has already occurred)?
3. Does a journalist have any greater rights to ***resist governmental demands for information*** known to the journalist, than does an ordinary member of the public? and
4. Do the media have any First Amendment *right of access* to information ***within the government's possession*** or control?

B. Special role for the press: The First Amendment explicitly prohibits abridgment of the freedom "of the press," in addition to protecting the freedom "of speech." On its face, this language suggests that the organized press is entitled to somewhat greater First Amendment protection than are ordinary members of the public; otherwise, the explicit reference to the press would seem to be redundant.

1. **Not yet recognized:** However, in no case has a majority of the Court ever recognized the Press Clause of the First Amendment as having independent constitutional significance. Yet, neither has the Court ever squarely held that the Clause is redundant.
2. **Laws of general applicability:** The Court has heard a number of cases in which the press argued that it should receive an ***exemption*** from rules of general applicability. The Court has virtually always ***denied*** any special exemption for the press. For instance, if a state's generally applicable procedural rules allow a person to be forced to give ***testimony*** to a grand jury or petit jury, then the press must obey those rules like anyone else. See

28. Justice Kagan recused herself.

Branzburg v. Hayes, *infra*, p. 634. Similarly, the same rules apply to the issuance of ***search warrants*** to search a publisher's premises as apply to searches of a non-publisher. *Zurcher v. Stanford Daily*, *infra*, p. 636. And newspapers may be made to pay damages for violating contractual promises of ***confidentiality***, the same as any private citizen may be. See *Cohen v. Cowles Media Co.*, *infra*, p. 638.

a. Access right: There is one situation in which the press may have rights superior to those of the public at large. The press may have a right of ***access*** to newsworthy information within the government's control — such a right of access for the press, based on general free-expression principles, may have been recognized by the Court in the *Richmond Newspapers* case, *infra*, p. 638.

3. Government can't single out press: Regardless of whether the press has special rights, what is clear is that government may not ***single out*** the press for ***unfavorable*** treatment.

a. Taxation: This has been clearest in cases involving ***taxation***. The government may not impose a tax that applies to newspapers (or all media) but that is not generally applicable. Thus in ***Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue***, 460 U.S. 525 (1983), the Court held that a special Minnesota "use tax" applicable only to the cost of ***paper and ink*** consumed in the production of ***publications***, violated the First Amendment.

i. Rationale: The Court did not find any evidence that the Minnesota legislature had tried to censor or chill the press. But the tax was a special one, not part of the state's generally-applicable use tax. Therefore, the Court concluded, the state had "singled out the press for special treatment." Consequently, the tax had to be strictly scrutinized — it would be invalid unless "necessary to achieve an overriding governmental interest."

ii. "Chilling" effect: There was evidence that the particular tax here was not especially burdensome to the press (since it was at the same percentage rate as the general state sales and use taxes, and applied only to paper and ink, not to the total price of the newspaper). Nonetheless, because the state had singled out the press, the "***political constraints*** that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute." The ***mere threat*** of crippling taxes might well have a censorial effect, the Court argued.

iii. Strict scrutiny test failed: The statute was not able to withstand the strict scrutiny to which the Court subjected it. The state's interest in raising revenue might be a compelling one (the Court did not say); but the singling out of the press for a special tax was ***not a necessary means*** of achieving that objective. The state could, for instance, simply have made newspaper sales part of the ***general state sales tax*** already in force.

iv. Dissent: Justice Rehnquist, in dissent, argued that not all "differential treatment," but only that differential treatment which ***burdens*** the press, should be strictly scrutinized. Here, he calculated, the use tax was ***more favorable*** to the press than, say, a sales tax set at the same percentage, but applicable to the newspaper's gross revenues. Therefore, there was a "benefit" to the press, not a "burden."

b. Taxation based on content: Where a tax operates differently upon different members of the press depending on the ***content*** of a publication, it is even more likely to be found invalid. In the post-*Minneapolis Star* case of *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221 (1987), an Arkansas statute that taxed general interest magazines, but exempted newspapers and other special-interest publications, was invalidated by the Court. The fact that the tax did not discriminate among particular *views*, merely among subject areas, was not sufficient to save the statute.

i. Exemption that is denied to large category: On the other hand, where a generally-applicable tax is applied to most media as well as to non-media, and an exemption is given to a certain media segment, denial of the exemption to the rest of the media seems ***not*** to be unconstitutional. Thus if a state has a generally-applicable sales tax on goods and services, it may decide to cover cable TV services while continuing to exempt newspapers, magazines, and satellite broadcast services. *Leathers v. Medlock*, 499 U.S. 439 (1991). The idea seems to be that as long as it is not the case that a small segment of the media is singled out for negative treatment, the fact that some segment of the media *is* given an exemption is irrelevant.

C. Prior restraints: A key aim of the drafters of the First Amendment was to forbid any system of ***prior restraints***, similar to the English licensing scheme, by which nothing could be published without government or church approval. This aim remains a vital part of modern First Amendment doctrine, so that any governmental action which prevents expression from occurring (as distinguished from punishing it once it has occurred) is ***presumed to be constitutionally invalid***. This is all the more true where the prior restraint is directed against the organized press. See Tribe, p. 1041.

1. Procedural obstacles: The dangers of prior restraints also stem from the fact that procedural rules applied in American courts make such restraints more likely to ***"chill"*** the exercise of First Amendment rights than would a subsequent punishment. Where a person is sought to be punished *after* his speech-related conduct, he is completely free to raise the claim that the statute at issue is unconstitutional, either on its face or as applied to him. But where a person is enjoined *prior* to his expressive act, and yet goes ahead and does that act anyway, he will not be permitted to argue that either the underlying statute or the injunction was unconstitutional as applied to him (though he may argue that the statute was void on its face). See, e.g., *Walker v. City of Birmingham*, 388 U.S. 307 (1967). Thus an unconstitutionally-imposed prior restraint is likely to cow the defendant into forgoing his First Amendment rights, at least during the length of time it takes to conduct an appeal. See Tribe, pp. 1042-45.

2. Examples of prior restraints: There are two basic types of pre-publication restraints. One consists of governmental orders and court injunctions telling a particular person that he cannot engage in a certain type of communication. The other consists of a scheme requiring a ***license or permit*** before a particular type of expression may be engaged in. Movie-censorship schemes are illustrations of the latter category. All of the cases involving the organized press, with which we are concerned here, are of the governmental-order or court-injunction type.

3. *Near v. Minnesota:* The classic case articulating the heavy presumption against prior restraints is ***Near v. Minnesota***, 283 U.S. 697 (1931).

a. Facts: In *Near*, a state procedure for closing down as a public nuisance any "malicious, scandalous and defamatory newspaper" was used to permanently enjoin the publication of a newspaper which criticized local officials.

b. Holding: In striking the injunction as an unconstitutional infringement of free speech, the Court held that the primary aim of the First Amendment was to prevent pre-publication restraints. The proper remedy for false accusations against public officials was by a post-publication libel action, not by a pre-publication procedure which the Court found to be tantamount to censorship.

i. Exceptional cases: The prohibition on prior restraints, in the *Near* Court's view, was almost, but not quite, complete. There could be a few "exceptional cases" in which prior restraint would be permissible; the Court gave as illustrations actual obstruction of recruitment for the armed forces, and publication of "the sailing dates of transports or the number and location of troops."

ii. Burden of proof: One aspect of the Minnesota statute to which the Court took particular exception was that the ***burden of proof*** was placed ***upon the publisher*** to show his truthfulness or good faith, rather than on the party seeking the injunction to show falsity or malice. However, nothing in the *Near* opinion (or in subsequent case law) suggests that placing the burden of proof in these issues on the party seeking the injunction would validate such a generalized prior restraint scheme.

4. Pentagon Papers case: The only other case to reach the Court on the issue of prior restraint of political speech is the famous ***Pentagon Papers*** case, ***New York Times Co. v. U.S.***, 403 U.S. 713 (1971). This case establishes that the press has ***almost absolute immunity*** from pre-publication restraints. See Tribe, p. 1039.

a. Facts: *The New York Times* and *The Washington Post* began publishing portions of a secret Defense Department study (popularly known as the "Pentagon Papers") of U.S. policy in Vietnam. The government sought an injunction against the two papers to prevent further publication. The government conceded that the Papers discussed only historical events which transpired prior to 1968, but argued that publication would prolong the War by giving the enemy information useful to it and would embarrass our diplomatic efforts.

b. *Per curiam* opinion: The opinion of the Court was a brief *per curiam* one, which recited prior case law that there is a heavy presumption against the constitutionality of prior restraints, but which contained no other reasoning. By a 6-3 vote, the Court determined that the government was ***not entitled*** to the injunctions.

c. Nine separate opinions: ***Every member*** of the Court wrote a separate opinion, and no majority of the Court agreed on a precise rationale for the decision. The opinions fell into three broad categories: Justices Black and Douglas argued that there could ***never*** be a prior restraint on the press; Justices Brennan, White, Stewart and Marshall contended that there could be prior restraint in extraordinary circumstances, but that the present case did not qualify; and Justices Burger, Harlan, and Blackmun believed that prior restraint was appropriate here.

d. Absolutist view: Justices Black and Douglas appeared to be saying that ***ever*** to permit the publication of news to be enjoined would "make a shambles of the First Amendment."

i. Criticism: But as Professor Cox has pointed out, in 94 HARV. L. REV. 6, "Surely [Black and Douglas] would not have ruled during World War II that a newspaper had a constitutional right to publish for Nazi eyes the knowledge that, because of … cryptographic work … British authorities were reading the orders of the Nazi High Command."

e. Possible restraints: The four other Justices in the six-man majority believed that prior restraint of news publication could sometimes occur, but not in this case. This group, consisting of Brennan, Stewart, White and Marshall, argued that there must be a ***virtual certainty*** that grave damage to the country would result if publication were not enjoined; as Justice Stewart, joined by White, expressed the test, there must be a showing that disclosure "will ***surely result*** in ***direct, immediate, and irreparable damage*** to our Nation or its people."

i. Danger not substantially certain: Most or all of these Justices seemed to believe that publication would ***probably*** damage the nation. It was only because there was not a ***substantial certainty*** of such damage that they voted to strike the injunction.

ii. Absence of statutory authorization: To all of these four Justices except Brennan, an important weakness of the government's position was that ***no statute*** provided for an injunction against news publication in circumstances like these. Separation of powers principles made it impermissible for the Court to issue an injunction where Congress had declined to act. (But Justices Stewart and White seemed to say that even in the ***absence*** of statutory authorization, a certainty of direct, immediate and irreparable damage to the country might permit issuance of an injunction. This view would probably command a majority of the Court today. See 94 HARV. L. REV. 7.)

f. Dissent: Three Justices, Harlan, Burger and Blackmun, dissented. They criticized the haste with which the Court heard and decided the case. (Less than one week elapsed between filing of the case and announcement of the decision.) Only one Justice, Harlan, formulated a test for evaluating the constitutionality of such injunctions.

i. Harlan's test: In Harlan's view, the Court's role should be limited to determining: (1) whether the subject matter of the dispute lies within the ***proper scope*** of the ***President's foreign relations power***; and if the answer is "yes," (2) whether the determination that disclosure would irreparably impair the national security was personally made by the head of the relevant executive department, here, the Secretary of State or Secretary of Defense. If the answer to this question, too, was "yes," the injunction should be upheld.

ii. Rationale: Harlan argued that it was a violation of separation of powers principles for the judiciary to go beyond these two inquiries and to "redetermine for itself the probable impact of disclosure on the national security."

g. Receipt of stolen goods: As is well known, the newspapers' source for the Pentagon Papers was Daniel Ellsberg, who was given them in confidence while he did work for

the government. Had the government been able to show that the newspapers were ***receivers of stolen goods***, by showing that the newspapers were aware that Ellsberg's making and distributing copies was a violation of his obligation of confidentiality, it is possible that the Court might have found this to be grounds for an injunction. No subsequent case to reach the Court has faced this question squarely.

i. **Difficulty:** One difficulty with allowing an injunction based on such a receivership-of-stolen-goods theory is that "requiring a newspaper to decide at its peril whether information that it has received about an official proceeding is confidential would have a chilling effect upon the publication of legitimate news." 94 HARV. L. REV. 12.

5. **The *Progressive* H-bomb case:** At least one court has interpreted the *Pentagon Papers* case to ***permit*** an injunction against publication of newsworthy information if a statute so authorizes, and if the danger is sufficiently compelling. In *U.S. v. The Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), the district court enjoined a magazine from publishing an article containing ***technical information about the H-bomb***. At least some of the materials had previously been declassified. But the U.S. convinced the court that these materials, taken together with other classified information (also sought to be released by the magazine), could pose a direct threat to national security by possibly "allow[ing] a medium size nation to move faster in developing a hydrogen weapon."

   a. **Rationale:** The judge reasoned that two main considerations made this case distinguishable from the *Pentagon Papers* case: (1) here, a statute, the Atomic Energy Act, authorized an injunction against publication of certain information relating to the use or manufacture of nuclear weapons (including some of the information in the proposed article); and (2) publication might well lead to nuclear proliferation, which in turn might lead to "thermonuclear annihilation for us all."

   b. **Balancing test:** The court then balanced the dangers to the paper's First Amendment rights against the danger to the nation. As to the former, although the injunction might interfere with the magazine's broadly-defined First Amendment rights, it would not interfere with its "laudable crusade to stimulate public knowledge of nuclear armament and bring about enlightened debate on national policy questions." The balance was struck in favor of the injunction; the "disparity of risk" between the danger to the nation and the damage to the paper's First Amendment rights justified what the court conceded was "the first instance of prior restraint against a publication in this fashion in the history of this country."

   c. **Outcome:** Before the paper's appeal could be heard, the government's attempt to get a permanent injunction against it was dropped, because the information was published elsewhere.

6. **"Gag orders" and preservation of fair trials:** The media's exercise of its First Amendment rights may sometimes come into conflict with a ***criminal defendant's right to a fair trial***. Extensive pre-trial publicity, including disclosure of confessions (possibly inadmissible) by the defendant, may make it much more difficult to find jurors who can be impartial. Nonetheless, the United States has never gone even a single step towards the English rule, which makes illegal the pre-trial publication of information that might cause prejudice.

a. Standard for biased jury: If the defendant can show that the jury was biased against him, he is entitled to a ***reversal*** of his conviction. But it is ***not*** sufficient for him to show that the jurors had ***knowledge before they were sworn in about the facts and issues involved in the case*** — requiring complete ignorance would be virtually impossible in important trials, given today's mass communications. Rather, the defendant must show that the jury was ***prejudiced*** against him as the result of pre-trial publicity.

b. Publicity during trial: Similarly, publicity ***during*** the trial may be so great that, if the jury is exposed to it, the defendant's right to a fair trial will be found to have been violated. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the famous Sam Sheppard murder case, where massive prejudicial publicity during the trial, to which the jury was exposed, was held to be grounds for reversal; the Court observed that the problem could have been avoided by ***sequestering*** the jury for the length of the trial.

c. Gag orders: Because of these dangers of publicity, especially before the trial begins, trial judges have sought ways of assuring that they will be able to find an unbiased jury. One appealing method that some seized upon is the ***"gag order,"*** a pre-trial order ***prohibiting the press from publishing certain types of information*** about the case. But as the result of the one case involving a gag order to reach the Court, such orders will ***almost never be constitutionally permissible***. That case is ***Nebraska Press Ass'n v. Stuart***, 427 U.S. 539 (1976).

i. Facts of *Nebraska Press:* In *Nebraska Press*, a man was about to be tried for a heinous mass murder, which had attracted widespread media attention. The trial judge, in order to assure his ability to select an unprejudiced jury, issued an order prohibiting the press from reporting any confessions or admissions by the defendant, or any other fact "strongly implicative" of him, until after impaneling of the jury.

ii. Holding: The Supreme Court held unanimously that the gag order ***violated*** the press' First Amendment rights.

iii. Majority opinion: The majority opinion was written by Chief Justice Burger, with whom four other Justices joined. Burger declined to hold that a ban on pretrial publicity could ***never*** be constitutional. Instead, he applied a test long ago advocated by Learned Hand for subversive-advocacy cases: the restraint should be allowed only if the "gravity of the 'evil,' discounted by its improbability" is greater than the damage from impairment of First Amendment rights.

(1) Standard not met: Here, Burger said, this test was not satisfied. The trial judge's conclusion that pretrial publicity would impair the defendant's rights "was of necessity ***speculative***," rather than certain. Furthermore, the trial judge should have considered ***other alternatives*** for reducing the harmful effect of such publicity (e.g., change of venue, postponement of trial, careful *voir dire*, restricting statements by the lawyers, police and witnesses, etc.). Finally, the trial judge should have considered whether his gag order would even be effective, in view of the rumors which usually circulate in a sensational case. On balance, then, it was not sufficiently established that the benefits of the gag order outweighed its First Amendment dangers.

d. Significance: *Nebraska Press* probably presents about the strongest case imaginable for a gag order furthering the right of fair trial. Therefore, the result of that decision is that such orders will virtually never be constitutional, at least as long as the press acquires its information without violating the law.

e. Distinguished from subsequent punishment: What made the order in *Nebraska Press* a "prior restraint" was not simply that it forbade publishing a certain type of material; it was that the restriction took the form of an order applicable to one particular, specifically-identified factual setting (this particular trial). Had the ***legislature*** made it a ***crime*** to publish prejudicial information in advance of *any* criminal trial, such a statute could ***not properly be termed a prior restraint***, and would ***not*** necessarily be unconstitutional.

i. Analysis: General First Amendment principles might be interpreted to make such a statute violative of freedom of expression, but the heavy presumption against prior restraints would have nothing to do with the decision.

f. Silencing the lawyer: The "gag order" in *Nebraska Press* was directed at the media; the case establishes that such press-directed orders will rarely be constitutional. But courts have a far greater ability to issue a constitutional gag order against the ***lawyers*** in the case, as the result of a post-*Nebraska Press* case decision. In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), the Court held that states may prevent a lawyer from making any statement that would have a ***"substantial likelihood of materially prejudicing"*** an adjudicative proceeding. The Court upheld a Nevada rule patterned on the American Bar Association's Model Rule (prohibiting statements posing a substantial likelihood of material prejudice) over the lawyer's claim that a "clear and present danger" standard should be used.

g. Closure orders: Since trial judges will almost never be permitted to use a pre-trial gag order directed at the press, an obvious alternative is for them simply to ***close pretrial proceedings to the public (and press)***. The use of such closure orders, at least where they are limited to pretrial proceedings and are not opposed by either the prosecution or the defense, was upheld by the Supreme Court, in *Gannett Co. v. DePasquale*, discussed *infra*, p. 638.

D. Governmental demands for information held by press: First Amendment issues may arise when the government seeks ***disclosure*** of information ***obtained by the press*** during its news-gathering activities, but not yet published. Typically, the government seeks such disclosure as part of its ***law enforcement*** efforts. The two Supreme Court cases on point, one involving a grand jury investigation and the other the use of an *ex parte* search warrant, indicate that the press is ***not entitled to any special First Amendment protection*** against what would otherwise be proper compulsory disclosure of information obtained during news-gathering.

1. Indirect impact on First Amendment rights: Observe that the nature of the interference with First Amendment expression is quite different in this compulsory-disclosure setting than in the prior restraint area. In the latter setting, restraint is almost always sought ***because of the communicative impact*** which publication would have; thus prior restraints almost always call for "track one" analysis (to use Tribe's term), and strict scrutiny is obviously appropriate. But in the compulsory disclosure area, any interference with First Amendment expression (e.g., the drying up of information from informants, because they are afraid their confidentiality will not be preserved) is ***incidental to,*** not the purpose of,

the disclosure. Therefore, these cases call for "track two" analysis, which as noted (*supra*, p. 488) is handled by a much less stringent balancing of harms and benefits. Therefore, it is not surprising that the Supreme Court has been much less quick to accept the press' arguments in the compulsory-disclosure area than in the context of prior restraints. See 94 HARV. L. REV. 55.

2. *Branzburg* and grand jury investigations: In ***Branzburg v. Hayes***, 408 U.S. 665 (1972), the Court held by a 5-4 vote that requiring newsmen to testify before ***grand juries*** concerning ***information obtained from confidential sources*** during news-gathering does ***not*** violate the First Amendment. In so deciding, the Court ***rejected*** journalists' requests for at least a ***qualified privilege*** to refuse to disclose the ***identities of confidential sources*** or the ***information*** received from them.

a. Journalists' argument: The argument raised by Branzburg and two other journalists was that news-gathering often requires confidential sources, who agree to supply the journalist with otherwise unavailable information only if non-disclosure of the informant's name and/or some of the information is promised. If a grand jury could compel disclosure, the journalists argued, not only the source of the particular information sought, but other confidential sources in the future, would be dissuaded from talking to journalists.

b. Holding: In rejecting the claim for a privilege, the Court held that such a privilege had never been found to exist, and that journalists had always been viewed as having the ***same duty as any other citizen*** to disclose to grand juries information about crime. The majority was not convinced that a significant portion of information supplied by confidential sources would dry up, especially since such information was widely available to newsmen even though no privilege had ever been recognized.

i. Balancing: Even if significant impairment of confidential sources did occur, the majority saw no reason why "[t]he public interest in possible future news about crime from undisclosed, unverified sources" should take precedence over the governmental interest in prosecuting crimes about which journalists possess evidence.

ii. Definitional problem: Also, the majority saw a ***definitional*** problem: recognition of a privilege would require the courts either to decide that only the "organized press" should be protected (and to define that term), or to make the privilege dangerously broad by protecting "lectures, political pollsters, novelists, academic researchers, dramatists" and anyone else claiming to be informing the public and to be relying on confidential sources.

c. Qualified privilege rejected: The majority also rejected even a ***qualified*** privilege, by which disclosure of confidential information could not be compelled unless the state showed that a crime had been committed and that the journalist possessed relevant information not available from other sources.

d. Protection against harassment: But the majority preserved the right of a journalist to obtain relief against ***harassment***, e.g., a subpoena issued not to pursue law enforcement ends but for the purpose of disrupting the reporter's relationship with his news sources (perhaps because of official displeasure with the newsman's work). However, so long as the questions were relevant and material, and were part of a good faith grand jury investigation, the newsman could not decline to answer.

e. Powell's concurrence: The crucial fifth vote was supplied by Justice Powell, who although he joined the Court's opinion submitted a separate concurrence as well; this concurrence made the result of the case somewhat ambiguous. Whereas the other four members of the majority rejected a qualified privilege, and left room only for a defense of harassment, Justice Powell's concurrence stated that claims of privilege should be decided on a ***case-by-case basis***, by balancing freedom of the press against the obligation of all citizens to give relevant testimony. Powell suggested, for instance, that a newsman may obtain relief if he can show that he has been asked for information bearing "only a remote and tenuous relationship to the subject of the investigation," or that his confidential sources would be compromised "without a legitimate need of law enforcement."

f. Dissent: Three of the four dissenters in *Branzburg* did not argue for an absolute privilege against grand jury disclosure of confidential sources. But they did support a type of ***strict scrutiny*** of such compulsory disclosure, by which the government would have to make three showings before a reporter could be required to reveal confidences: (1) that there is "probable cause to believe that the newsman has information which is ***clearly relevant*** to a ***specific probable violation of law***;" (2) that the information cannot be obtained by "***alternative means*** less destructive of First Amendment rights"; and (3) that the government has a "compelling and overriding interest" in the information.

i. Relation to Powell's view: As the dissenters pointed out, this type of qualified privilege may not be so different from the position taken by Justice Powell. The absolute position taken by the other four members of the majority, by contrast, would "annex the journalistic profession as an investigative arm of government," the dissenters argued.

3. Limited scope of ruling: In addition to grand jury proceedings, the rationale of *Branzburg* obviously applies to ***criminal trials*** as well. But it is not clear that the theory of *Branzburg* also deprives newsmen of a constitutional privilege regarding testimony in ***civil suits***. Some lower courts have granted a ***qualified privilege*** in this situation, which may be overcome only by a showing that the confidentially-obtained information is not available from other sources. See N&R, p. 1051.

4. Shield laws: The majority in *Branzburg* noted that Congress and state legislatures are free to enact ***statutes*** granting to newsmen a privilege against disclosure of confidential sources or information in grand jury or other proceedings. More than half of the states have, either before or after *Branzburg*, conferred such a privilege by means of so-called ***"shield laws."***

a. No Court decisions: The Supreme Court has not yet had occasion to determine whether some applications of such a shield law unconstitutionally interfere with other constitutional rights, most notably a criminal defendant's Sixth Amendment ***right to a fair trial.***

b. *Farber* case: One well-known state court case, involving a trial judge's order to a reporter to produce interview notes in connection with a murder case, concluded that such a shield law ***must yield to the defendant's Sixth Amendment rights. In re Farber***, 394 A.2d 330 (N.J. 1978).

5. ***Ex parte* search warrants:** Another press claim for special protection against compelled disclosure for law enforcement purposes failed in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). There, the Court upheld an ***ex parte warrant*** for the search of a student newspaper's offices, based on probable cause to believe that photographs of a riotous demonstration might be found there.

   a. **Usual rules applied:** The majority opinion spent most of its time talking about the Fourth Amendment, not the First, and saw no reason to depart from usual principles allowing the issuance on probable cause of *ex parte* warrants (that is, warrants issued without notice to the person whose property is to be searched).

   b. **Qualified privilege rejected:** As in *Branzburg*, the Court ***rejected*** the press' request for at least a ***qualified*** privilege, under which an *ex parte* warrant would be issued only where there was reason to believe that a ***subpoena*** might lead to the destruction of the evidence.

E. Disclosure of confidential or illegally-obtained information: To what extent may government prohibit the media from ***disclosing information*** that government believes ought to be ***secret***? The interests that government may be trying to protect can include the ***privacy of individuals***, the ***rehabilitation of juvenile offenders***, or the maintenance of ***national security***, among others. A good summary of the Court's decisions in this area is that "[i]f a newspaper ***lawfully obtains truthful information*** about a matter of ***public significance*** then [government] officials may not constitutionally punish publication of the information, absent a ***need … of the highest order***." *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

1. **Information about legal proceedings:** A number of the Court's decisions concerning publication of "secret" material have involved information about ***legal proceedings*** or ***law enforcement***. Here, government has almost always been ***unsuccessful*** in ***making it a crime to publish*** legally-obtained truthful information. Here are some examples:

   ? A broadcaster may not be held civilly liable for ***publishing the name of a rape victim***, if the name is learned from the reading of a publicly-filed indictment. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

   ? A state may not make it a crime for a newspaper to report (accurately) that a state judicial commission is contemplating an ***investigation of a particular sitting judge***. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

   ? A newspaper cannot be punished for publishing the ***name and photo of a juvenile offender***, where the newspaper obtained the name from witnesses to the crime and from law-enforcement officers who investigated it. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

2. **Information obtained by means of a crime:** An important sub-question is whether this rule — that publication of newsworthy confidential information may not be criminalized absent an extremely strong state interest — applies even to ***illegally-obtained*** information.

   a. **Where publisher has acted illegally:** If the ***publisher itself*** has ***acted illegally*** in obtaining the information, then it is quite clear that government ***may make it a crime*** to punish the information, no matter how newsworthy it is.

      Example: Suppose that, in 1974, a reporter for the *Washington Post* broke into the White House and found a tape that recorded White House officials conspiring to bur-

glarize the Democratic National Committee's offices. If the *Post* published a transcript of that tape, it's quite clear that a state could constitutionally punish the paper for the publication (apart from the break-in), because the newspaper obtained the information as a result of a crime by its own employee.

b. Where private party has acted illegally but publisher has not: On the other hand, the fact that the secret information was originally obtained illegally by a person ***acting independently*** of the eventual publisher is ***not*** enough to allow publication to be made criminal, at least where the material has significant newsworthiness.

i. Illegal interception of cellphone calls: A vivid illustration of this principle occurred in a 2001 case in which a radio station played a tape of a cellphone conversation that had been intercepted in violation of a federal wiretapping law. Because the interception occurred without the participation of the station, and because the conversation involved important public events, the station could not be prosecuted for the broadcast. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

(1) Facts: In *Bartnicki*, the conversation was a cellphone conversation between two officials of a teachers union, who were discussing a bitter contract negotiation that they were having with the local school board. During the conversation, one of the officials said that if the board remained intransigent, it might be necessary for the union to go to board members' homes and "blow off their front porches." An unknown person intercepted the conversation in violation of federal law and sent it anonymously to a radio station, which broadcast it. The two officials sued the station for damages, as allowed by federal and state wiretap statutes prohibiting the disclosure of intercepted telephone conversations.

(2) Holding: By a 6-3 vote, the Court held that the station could not constitutionally be held liable for damages — the extreme newsworthiness of the conversation outweighed the strong governmental interest in protecting the privacy of electronic communications. The majority conceded that the government had a strong interest in deterring illegal interceptions, but believed that barring publication by a third person who did not participate in the interception would not significantly deter the illegal conduct.

(3) Newsworthiness: It seems clear that the extremely strong ***newsworthiness*** of the conversation in *Bartnicki* — which contained not only news about the bitter negotiation but a possible threat to people's physical safety — played a key role in the Court's decision.

(4) Significance: So what we know from *Bartnicki* is merely that where a publisher innocently comes into possession of illegally-intercepted conversations, and those conversations involve matters of unusually great public interest, the publisher may not be punished for disseminating them. There is a good chance that where the conversation involves matters that are ***not*** of major public interest (e.g., trade secrets or personal gossip), publication *can* be criminalized. And, of course, the person who does the illegal intercepting may be punished for publishing, no matter how great the public interest in the intercepted conversation.

3. **Enforcement of confidentiality promises:** Now consider one last aspect of government's power to enforce the confidentiality of information: if a journalist promises confidentiality to a source and then breaches that promise by publishing the confidential information, may the state allow the source to recover damages? The brief answer is "yes" — the Supreme Court has held that the states may ***enforce such confidentiality promises*** as they would any other contract, without thereby running afoul of the First Amendment. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

F. Right of access to government-held information: Much newsworthy information is ***within the government's possession*** or control. Until recently, nothing in any Supreme Court decision supported any First Amendment right on the part of the press to have ***access*** to this newsworthy information. Thus although the press has long been recognized to have a broad First Amendment right to publish information which it obtains, the press has ***not*** been constitutionally entitled to ***assistance in obtaining information.*** Such a right of access has still not been explicitly recognized by the Court, but the decision in *Richmond Newspapers, Inc. v. Virginia*, discussed *infra*, p. 638, upholding a right of access to criminal trials, may presage some form of right of access to government-controlled newsworthy material.

1. **Access to jails:** Several cases have established that the press has little or no special right of access to information about ***prison conditions***.

   a. ***Pell* and *Saxbe:*** In the companion cases of *Pell v. Procunier*, 417 U.S. 817 (1974) and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), the Court ***upheld*** state and federal regulations ***prohibiting press interviews*** with any specific prisoner. The Court rejected First Amendment claims raised by both the media and by prisoners. The majority opinion in both cases, by Justice Stewart, relied mainly on the fact that the regulations ***treated the press no worse than they did members of the general public***. While the First Amendment prevents the government from interfering with the media's attempt to gather news, it does ***not*** "require government to accord the press special access to information not shared by members of the public generally."

2. **Access to pretrial proceedings:** Trial judges are ***not*** permitted to issue pretrial ***"gag orders"*** in order to preserve the defendant's right to an unbiased jury, except where the danger to the defendant's right to a fair trial is unusually great. See *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539 (1976). Therefore, some courts have instead ***closed pretrial proceedings to the public***. In *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), the Court held that such pretrial closure orders are at least ***sometimes constitutional***; the Court's opinion may even mean that the press and public ***never*** have a First Amendment right to attend such pretrial proceedings.

3. **Closure of criminal trials:** One key question left unresolved by *Gannett* was whether a criminal defendant's interest in a fair trial could be preserved by ***closing the entire trial*** to the public. In ***Richmond Newspapers, Inc. v. Virginia***, 448 U.S. 555 (1980), the Court answered this question largely in the ***negative***, holding that "absent an ***overriding interest*** articulated in findings," the First Amendment requires that "[t]he ***trial of a criminal case must be open to the public***." Although the vote was 7-1, there was no majority opinion, and the precise scope of the decision remains unclear.

   a. **Significance of case:** At a minimum, *Richmond Newspapers* establishes that the public and press have a First Amendment right to attend criminal trials, and that entire trials can be closed only if that right is outweighed by ***overriding*** interests which ***can-***

not be satisfied by less restrictive means. Whether the decision means more than that is not clear.

i. **Civil trials:** It seems probable that the decision is also applicable to ***civil trials***, since such trials, like criminal ones, have traditionally been open to the public, and since there is a strong public interest in observing the administration of civil justice. Several of the Justices in *Richmond Newspapers* specifically stated that they believed the decision to be applicable to such civil proceedings.

ii. **Pretrial context:** The First Amendment right of access to criminal trials recognized in *Richmond Newspapers* has been extended to certain ***pretrial proceedings***. For instance, the public has a right to attend the *voir dire* of the jury; see *Press Enterprise Co. v. Superior Court,* 467 U.S. 501 (1984).

iii. **Closure of portions of trial:** Trial judges presumably retain their traditional power to close ***certain portions*** of a criminal trial in order to protect the integrity of the proceedings. For instance, testimony of a particular witness might be held outside of the presence of the public, in order to prevent other witnesses from hearing his testimony and adjusting their own to match it (though sequestration of subsequent witnesses is a preferable technique for solving this problem). Also, any trial proceedings ***not held in the presence of the jury*** (e.g., discussions of the admissibility of evidence) probably may be closed to the public.

iv. **Limited seats:** Also, the right of access to public trials does not mean that ***every*** person who desires to see a particular trial has a right to do so. Obviously, courtrooms have limited seating, and a trial judge may use a reasonable scheme of allocating seats. However, the First Amendment right recognized by *Richmond Newspapers* probably does require that ***at least some seats be given to media representatives***.

4. **Less-restrictive alternative required:** Although *Richmond Newspapers* established that there is a First Amendment right to access to criminal trials, ***no*** Justice suggested that that right is an ***absolute*** one. The test for determining when that right is outweighed by other countervailing interests has been developed in later cases.

a. ***Globe Newspapers:*** In *Globe Newspapers v. Superior Court*, 457 U.S. 596 (1982), the Court applied what amounted to a traditional ***strict scrutiny*** standard: access to criminal trials may be denied only if the denial is "necessitated by a ***compelling governmental interest***, and is ***narrowly tailored to serve that interest***." Under this test, a Massachusetts statute was unconstitutional in ***requiring*** the exclusion of the press and public from the courtroom during the testimony of any minor who is allegedly the victim of a sex offense.

G. Regulation of broadcast media: The Supreme Court has always recognized that the ***broadcast*** media may be subject to ***closer regulation*** than newspapers and other non-broadcasters. The closer regulation of broadcasters derives from the fact that broadcast frequencies are a ***naturally scarce*** commodity — whereas there can in theory be an unlimited number of newspapers serving any particular market, the technology of broadcasting is such that there could only be a strictly limited number of television and radio stations serving any particular market. (This distinction is, in practical terms, much less convincing in today's world of UHF and cable television, massive FM as well as AM radio, Internet video, etc., than it was when

broadcasting was largely limited to VHF television and AM radio. But the Court has not fundamentally altered its willingness to tolerate closer regulation of the broadcast media.)

1. **Means of regulation:** This regulation has generally been carried on through the Federal Communications Commission (FCC). The Court has several times sustained the FCC's power to ensure various types of ***public access*** to the broadcast media. See, e.g., *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969), in which the Court upheld the FCC's "fairness" doctrine, by which broadcasters are compelled to grant individuals the right to reply on the air to political editorials or personal attacks. Similarly, the Court is probably more willing to tolerate closer regulation of ***context*** where the source of speech is a broadcaster; see, e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), in which the Court permitted the FCC to ban language that was "indecent" (but not "obscene") from the airwaves during afternoon hours when children were likely to be in the audience.

2. **"Mere-rationality" review for content-neutral regulations:** Where regulations against broadcasters are ***content-neutral***, these regulations are judged very deferentially, essentially according to the "mere-rationality" standard. For instance, *Red Lion*, *supra*, seems to have applied "mere-rationality" review to the FCC's fairness doctrine, on the theory that that doctrine is essentially content-neutral.

3. **Middle-level scrutiny for content-based restrictions:** However, where the regulation against broadcasters is ***content-based***, the Court seems to apply a ***middle-level scrutiny***, more stringent than "mere-rationality" review. But even here the standard of review reflects the Court's view that broadcasters should be subjected to tighter regulation because of their access to scarce airwaves: the mid-level review given to content-based broadcasting regulations is clearly less stringent than the "strict" (and almost always fatal) review given to content-based regulations against newspapers and other non-broadcasters. (See *supra*, p. 479.) This middle-level scrutiny was demonstrated in ***FCC v. League of Women Voters***, 468 U.S. 364 (1984), a 5-4 decision.

   a. **Ban on editorializing struck down:** In *League of Women Voters*, the Court struck down (by a 5-4 vote), a congressional prohibition on ***editorializing*** by public broadcasters who receive federal funding. The majority viewed the ban as being non-content-neutral. The test set forth by the Court was that such restrictions impinging on broadcasters' First Amendment rights will be upheld only if they are ***"narrowly tailored*** to further a ***substantial governmental interest***, such as ensuring adequate and balanced coverage of public issues. … "

   b. **Test not satisfied:** The Court concluded that the ban on editorializing could not survive this middle-level review. For instance, Congress may have had a substantial governmental interest in making sure that public broadcasters did not become "vehicles for governmental propagandizing" as the result of federal funding, but there were other, more narrowly-tailored, ways of making sure that government did not interfere with the broadcasting judgment of station officials.

4. **Cable gets greater free speech:** The Court has held that ***cable*** television is, in effect, ***somewhere between broadcast TV and newspapers*** in terms of the amount of government regulation of speech that operators must tolerate.

   a. **Content-neutral regulation:** Thus where the regulation of cable TV is ***content-neutral***, ***mid-level review*** is to be used. In *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*"Turner I"*), the Court held that where cable TV operators are sub-

jected to content-neutral regulations, mid-level review, not the easy-to-satisfy "mere-rationality" standard used in the over-the-air broadcast cases, should be used.

i. **Regulations upheld:** But content-neutral governmental regulation of cable TV certainly can sometimes ***pass*** constitutional muster, even though mid-level rather than rational-relation review is used. For instance, Congress has enacted "must carry" provisions, which require cable TV systems to devote some of their channels, free of charge, to the retransmission of local broadcast TV stations. In a successor to *Turner I*, *supra*, the Court upheld these must-carry rules after mid-level review. The Court gave special deference to Congress' legislative findings on the need for must-carry, because Congress was better equipped than the judiciary to "amass and evaluate the ***vast amounts of data***" bearing on legislative questions, especially ones concerning "regulatory schemes of the ***inherent complexity***" and "assessments about the likely interaction of ***industries undergoing rapid economic and technological change***." *Turner Broadcasting System Inc. v. FCC*, 520 U.S. 180 (1997) (*"Turner II"*).

b. Content-based regulation: Where cable TV operators and programmers are regulated in a ***content-based*** way, ***strict scrutiny*** must be used. See *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

Quiz Yourself on

REGULATION IN POLITICAL CAMPAIGNS; SPECIAL CONTEXTS; FREEDOM OF ASSOCIATION; DENIAL OF PUBLIC JOBS OR BENEFITS; SPECIAL PROBLEMS OF THE MEDIA

90. The legislature of the state of Langdell decided that there was too much money being spent on political campaigns in the state. Therefore, the legislature passed a statute providing for several limits on how much money could be spent in any year in connection with any person's campaign to be elected to a statewide office. These limits included the following:

[1] No donor could contribute more than $5,000 per year to any one candidate.

[2] No candidate could spend more than $250,000 of his or her own funds on advertising or promoting that candidate's election.

[3] No donor could give a total of more than $50,000 to all statewide candidates together.

[4] No individual could expend more than $10,000 in trying to bring about the election or defeat of a candidate other than himself, even if the individual's spending was done entirely independently of any candidate.

Which of these restrictions violates the free speech rights of the person whose spending is being limited?

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91. The State of Unionville enacted a statute providing that any union representing government employees in the state may withhold from the paycheck of each non-union-member an amount in lieu of dues (a "mandatory agency fee") equal to the union's cost of representing that member in collective bargaining. The Unionville State Teachers Union therefore charges each teacher in the state's public schools who chooses not to join the union a mandatory agency fee equal to 75% of the amount each union member pays in dues. Pete, a teacher who has not joined the Union, sues it, claiming that the mandatory agency fee vio-

lates his freedom of expression, by forcing him to subsidize union speech that he disagrees with. (He claims that the Union's pursuit of higher teacher salaries is worsening Unionville's budget deficit.)

(a) What standard should the court use in reviewing the mandatory agency fee statute? _____

(b) Applying that standard, should the court agree with Pete that the agency fee violates his First Amendment rights? _____

92. Patti was the starting point guard for the girls' varsity basketball team at Prep, a public high school in Prep township. Coach, the team's head coach, after repeatedly telling Patti that she had been shooting too much and passing too little, benched Patti for most of the next three games. On the Sunday following the last benching, Patti, from her home, posted a TikToc video showing her shooting a basketball, with a text superimposed over it reading, "Fuck Girls Basketball. I'm sooo tired of being benched for 'excess shooting,' even though I'm the best shooter on the team." The post was seen by two of Patti's teammates. Three hours after posting the video, Patti removed it, but by then one of the two teammates who saw it, Angela, had emailed a screenshot of it to Coach, together with a message from Angela saying, "I'm really upset about this – Patti's complaining is bad for team morale." The next school day, Coach criticized Patti for the post, and Patti immediately apologized. Nonetheless, Coach suspended Patti from the team for the rest of the season, with the explanation that "Your vulgar language, and your public criticism of my coaching decisions, are conduct detrimental to the team's welfare, for which a season-ending suspension is an appropriate punishment."

Patti has now brought a federal-court civil suit against the Prep Board of Education (the "Board of Ed"), arguing that the suspension has infringed her freedom of expression. At a bench trial, the parties together have proved the above facts. The Board of Ed defends by arguing that the suspension was an appropriate punishment given that Patti's post violated both (1) the school's written policy against "vulgar or lewd language in connection with a school-sponsored extra-curricular activity"; and (2) a second written policy of the school, barring "language or conduct that substantially disrupts an extra-curricular activity." No evidence has been presented concerning any team member's knowledge of, or reaction to, Patti's post prior to the suspension, except for Angela's message to Coach. Nor has any evidence been presented about whether the Board of Ed has ever attempted to prevent or punish other episodes in which a student has made (in person or on social media) off-campus remarks containing vulgar or lewd language in connection with a school activity.

Should the judge find that the Board of Ed (acting through its employee, Coach) has violated Patti's freedom of expression, and why? _____

93. There have been several bombings of government office buildings on the island of Puerto Rico recently. After each bombing, an anonymous caller has told the local newspaper that the bomb was planted by "People for a Free Puerto Rico" (PFPR), an organization dedicated to using any means necessary to end Puerto Rico's status as a United States territory and establishing it as a sovereign nation. There is evidence that the PFPR was able to plant the bombs so successfully inside the buildings because its members or sympathizers have jobs in government agencies located in those buildings, who could furnish information and access for placement of the bombs. To deal with the threat, the territorial government of Puerto Rico has now imposed a requirement that any new applicant for any government position must before being hired sign a loyalty oath stating, among other things, that "I am not a member of the People for a Free Puerto Rico or of any group advocating the use of force to alter the territorial status of Puerto Rico." Ramona, an applicant for a position as a clerical worker in the Puerto Rican government, has declined to

sign the oath, without specifying her reasons. Can the government constitutionally decline to hire her on the grounds that she has refused to sign? _____

94. Sheryl was a low-level clerk in her state's Department of Motor Vehicles. News reports were published stating that Horace, the Commissioner of the Department of Motor Vehicles (and thus, ultimately, Sheryl's boss) may have taken payments from Computer Systems Inc. in return for helping Computer Systems get a contract to install a large new computer system at the Department. Horace protested his innocence, and the District Attorney eventually decided that no charges should be brought. Shortly thereafter, Sheryl said to a co-worker, while on the job, "I still think Horace took the money, and I think he's a crook." Another employee who overheard the remark reported it to Horace, who immediately fired Sheryl for insubordination and fomenting discord in the Department. Under the relevant Civil Service rules, Sheryl was an at-will employee who had no reason to expect continued employment. Sheryl now seeks a court order restoring her position, on the grounds that she was fired in violation of her First Amendment rights. Should the court grant reinstatement to Sheryl? _____

95. The state of West Carolina has assigned to the state's Attorney General's office the responsibility for ensuring that charities that solicit in the state do not commit fraud. Years ago, the A.G. promulgated a rule ("Rule 100") requiring any charity that solicits more than $10,000 in total donations in any year from West Carolina residents to report to the A.G. the names and addresses of any donor (whether residing in West Carolina or not) who has contributed more than $5,000 in that year. Rule 100 includes a promise by the A.G.'s office that it will keep any reported information secret from the public. (However, several years ago, due to a clerical error in the office, the Rule 100 donor reports from several charities were made publicly available on the office's website.) The administrative history of Rule 100 shows that it was enacted so that if the A.G.'s office ever had reason to suspect that a given charity was committing fraud in soliciting, that charity's up-to-date donor information would already be present in the A.G.'s files, eliminating any need for the office to subpoena records from the charity at the start of an investigation.

Toys for Kids, a Nevada-based charity that raises about $100,000 per year from West Carolina residents, has sued the A.G.'s office in federal court, claiming that Rule 100 violates Toys' (and its donors') First Amendment freedom of association. The charity argues that given the risk that the identities of its donors might be leaked by mistake (as happened previously), Rule 100 cannot survive the relevant standard of review — whatever that standard is — because any interest the A.G.'s office may have in combating fraudulent solicitations can be adequately served by the less-intrusive alternative of issuing document subpoenas to a particular charity when and if the office has reason to suspect the charity of fraud.

(a) What standard should the court use in determining whether Rule 100, as applied to Toys, violates Toys' and its donors First Amendment freedom of association? _____

(b) Using the standard you supplied in part (a), should the court find that Rule 100 is unconstitutional as applied to Toys? _____

(c) For this part only, assume (whether the assumption is correct or not) that the court finds that Rule 100 unconstitutionally violates Toys' freedom of association. Should the court also hold that the Rule is invalid "on its face," i.e., that it cannot constitutionally be applied to *any* charity, including those not presently before the court? _____

96. P.J. Summers, a former football player turned sports announcer, was charged with the brutal murder of his wife. While in police custody, Summers gave a confession. In pretrial hearings, the trial judge determined that the *Miranda* rules had not been complied with, and decided that the confession would not be admissible at the trial. The press learned of the confession through pretrial proceedings in open court, and did not

act improperly in obtaining this information. Prosecutors decided to try Summers as a principal in the murder, and also decided to charge B.C. Scowling, a long-time friend of Summers, as an accomplice. Both trials were to be held simultaneously (but in front of separate juries) in proceedings conducted by Judge Jones.

Judge Jones was very worried that disclosures about the confession might make it difficult or impossible to impanel a jury that would be fair to Summers. Therefore, several days before jury selection was to start, Jones issued two orders from the bench: (1) he ordered that no newspaper, magazine or broadcaster report the existence or details of the inadmissible confession until after the jury had been picked (once the jury was picked, it could be sequestered, so that prejudicial disclosures would not matter anymore); (2) he also ordered that no lawyer on the case, including the lawyer for Scowling, disclose to the press or to anyone else the existence of Summers' confession. (There was reason to believe that Scowlings' lawyer planned to say in a public press conference, "My client is innocent; P.J. confessed, and in his confession he said that he acted alone").

(a) Is the judge's order in part (1) constitutional? _____

(b) Is the judge's order in part (2) constitutional? _____

97. Roger is a reporter for the Hillsdale Star, a local newspaper. In the most celebrated crime to hit Hillsdale in many years, Joshua, an eight-year-old boy, was found strangled in front of his house. The police have not found any suspects. One week after the killing, Roger published an article saying, "A source that I cannot identify saw the crime from a distance, and believes that the perpetrator was a young white male about 22 years old, six feet tall, weighing about 175 pounds." In the ensuing months, the police have never been able to find this or any other witness to the crime. The prosecutor called Roger in front of a grand jury, and demanded that he identify the witness who served as his source. Roger stated under oath that the witness was fearful that the killer would kill her to silence her. Roger further stated that he had signed a written pledge to the witness that he would never reveal her name; only in response to this pledge did the witness agree to speak to him. Roger did say, however, that the witness lived in the neighborhood and that in his opinion, she could be identified by good police work. The judge then ordered Roger to disclose the witness' identity, or be found in contempt of court. Roger refused. There is no state law relevant to the issue. Can Roger constitutionally be found in contempt and imprisoned until he divulges the name of the witness? _____

Answers

90. All but [1], and even the continuing validity of [1] is not certain. In a series of campaign-finance decisions beginning with the 1976 decision in *Buckley v. Valeo*, the Supreme Court has steadily broadened the types of limits that it has found to be unconstitutional restrictions on free speech. (The Court has consistently held that campaign spending is a form of speech, and is thus protected by the First Amendment, so that significant restrictions on such spending must survive strict scrutiny.)

As to [1], *Buckley* held that the interest in preventing corruption and the appearance of corruption (the *only* interest the Court has ever found to justify limits on campaign financing) justifies some limitations on donations by a single donor to a single candidate. The $5,000 limit here nearly matches the $5,200 per year federal-election donation limit in existence in 2014, the year when the Court made its decision in *McCutcheon v. FEC* on the related issue of "aggregate" donation limits. Since the Court has not so far struck down the federal limits, the $5,000 limit presumably remains a valid means of achieving the compelling governmental interest in combating corruption and its appearance. (But the Court's tendency to

strike an ever-broadening array of campaign-finance limits suggests that even this right to limit single donor-donee contributions may not remain in force indefinitely.)

[2] is clearly unconstitutional, under *Buckley* itself — the Court there held that limits on the amount that a candidate may spend from his own personal funds in order to get elected cannot be justified on the grounds that they serve the interest in avoiding corruption (since a candidate would not bribe himself). And the government's asserted interest in "leveling the playing field" (equalizing the resources of competing candidates) has been expressly rejected by the Court as an interest that can justify limits on campaign spending.

[3] is also clearly unconstitutional, under the 2014 decision in *McCutcheon v. FEC*. That decision rejected federal "aggregate" donation limits, which prevented any donor from giving more than $48,600 to all federal candidates collectively (as well as from giving more than $74,600 to all non-candidate political committees collectively). The *McCutcheon* Court found that any limits on aggregate donations are not necessary to serve the anti-corruption interest (repeatedly held by the Court to be the only interest which may support campaign-finance limits); therefore, the comparable state limit in [3] would undoubtedly also be struck down by the Court.

[4] is, too, clearly unconstitutional, and would have been so ever since the 1976 *Buckley* decision. The Court held in *Buckley* that where a person makes campaign-related expenditures ***independently*** of the candidate, there is no serious danger of a "quid pro quo," so that the government's interest in avoiding even the appearance of corruption is not significantly implicated. Therefore, a person (as well as a corporation — see *Citizens United v. FEC* (2010)) may spend unlimited funds urging the election or defeat of any candidate in any election, as long as the spender acts completely independently of any candidate.

91. (a) An "exacting scrutiny" standard, by which the agency fee scheme will be struck down unless it "serves a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." That's the standard the Supreme Court articulated for exactly this type of mandatory agency fee statute, in *Janus v. AFSCME* (2018).

(b) Yes. In *Janus*, the Supreme Court held that an Illinois mandatory agency fee statute virtually identical to the one here violated non-union-members' free speech rights, by "compelling them to ***subsidize private speech*** on matters of substantial public concern." The Court in *Janus* reasoned that the only interest advanced by Illinois in support of its statute — preventing "free riding" by non-union-member employees who get the benefit of the union's collective bargaining efforts without having to pay for those efforts — was not a "compelling" interest. The same would be true of the statute here. Therefore, the court must conclude that the Unionville statute violates the free expression rights of Pete and all other public employees who choose not to join the union.

92. Yes, because the Board of Ed's interest in regulating Patti's off-campus speech was weaker than had the speech taken place either on campus or during a team event, and that interest was outweighed by Patti's First Amendment right to criticize the way in which a school activity is conducted. The facts here are quite similar to those in *Mahanoy Area School District v. B.L.* (2021), where the Court found that the one-year-long suspension of a student (P) from the school's cheerleading squad for making a similar social-media post while off-campus violated P's freedom of expression. *Mahanoy* establishes that a school has a legitimate interest in regulating off-campus student speech that concerns school activities, but that this interest is ***relatively weak*** in an off-campus-speech scenario like this one, because (1) the school is not acting "*in loco parentis*" (as it would if the speech occurred either on-campus or during an off-campus school activity itself); (2) if the school were allowed to tightly regulate such off-campus

speech in addition to on-campus speech, every student's right to speak would be impaired for all 24 hours of the day; and (3) a school must "protect unpopular ideas," because public schools are the "nurseries of democracy."

Here, the two interests that the Board of Ed claims to have been pursuing are relatively weak (as they were in *Mahanoy*). As to the interest in avoiding "vulgar or lewd language" in connection with a school activity, the facts stipulate that the school district did not present any evidence that it has *generally* attempted to police the politeness of off-campus speech about school activities; this matters, because a similar lack of evidence caused the *Mahanoy* Court to view the school's interest in civility there as relatively weak. As to the school's interest in avoiding disruption of school activities, the fact that the only evidence of disruption in *Mahanoy* consisted of a few minutes in which a couple of P's teammates told teachers that they were "upset" by P's posts led the Court to view any disruption that occurred as minor; the same conclusion is appropriate here, where the only evidence of disruption was an email from one student (Angela), saying without elaboration that she was upset. Therefore, given that the judge is required to follow *Mahonoy* (the Court's only modern decision on when schools may regulate off-campus speech relating to school activities), the judge should find that any interest in regulation held by the Board of Ed was outweighed by Patti's First Amendment right to comment freely and publicly on school activities.

93. No. One may not be required to state in a loyalty oath that one has not performed a certain act (or that one will not perform it in the future) unless ***actual performance*** of that act would be grounds for discharge. One may not be discharged for membership in an organization advocating overthrow of the government or other illegality, unless one has ***knowledge*** of the organization's purpose and ***specific intent*** to further that purpose. Consequently, one may not be required to swear a blanket oath that one has not been a member of such an organization — language referring to the swearer's knowledge of the illegal purposes, and to her specific intent to further them, must be inserted into the oath. Since the oath here does not refer to Ramona's specific intent to use force to alter the Puerto Rican government, she cannot be penalized for refusing to sign it. See *Cole v. Richardson*.

94. Yes, probably. When government attempts to deny a public job or benefit because of a person's speech-related activities, the level of judicial review depends on whether the speech related to matters of ***"public concern."*** If the speech did relate to matters of "public concern," then the Court gives something like strict scrutiny to the situation, striking a balance between the free speech rights of the employee and the state's interest as an employer in conducting its activities efficiently. *Connick v. Myers.* Here, the speech is clearly relating to a matter of public concern, i.e., whether the head of the department took a bribe. Since Sheryl was engaging in core political speech, her interest in being allowed to do so was a strong one. On the other side of the equation, Sheryl was a low-level clerk, not a policy-making official; therefore, her speech was unlikely to have created a severe additional threat to the department's efficiency, especially since other people inside and outside the department were undoubtedly discussing the same much-publicized issue anyway. *Rankin v. McPherson*. Consequently, a court would probably conclude that Sheryl's free speech interest outweighed the department's interest in maintaining smooth operations; if so, the court should order Sheryl reinstated.

By the way, it makes a difference that here, Sheryl's statement was ***not required as part of her job duties.*** *Garcetti v. Ceballos* establishes that where an employee speaks as part of her official duties, what she says ***gets no First Amendment protection at all.*** So if, say, Sheryl's official duties had included the obligation to make a report about any conflicts-of-interest she observed on the job, her statement, "Horace took money from Computer Systems in violation of our Department's conflict-of-interest rules," made in her officially-required report, would not get First Amendment protection, and Sheryl would now not be enti-

tled to reinstatement. So it's only because Sheryl was speaking "as a citizen" (not as an employee) to her co-worker that she gets protection under *Connick v. Myers*.

Lastly, observe that because Sheryl was an at-will employee, she could be fired at any time for "no reason"; even so, under *Connick* she had a First Amendment right not to be fired for the ***particular*** reason that she was exercising her free speech rights.

95. (a) The "exacting scrutiny" standard, by which the disclosure requirement must be "narrowly tailored" to the achievement of a "sufficiently important governmental interest." The Supreme Court articulated this standard in a case involving a California disclosure requirement very similar to the one here; see *Americans for Prosperity Foundation v Bonta* (2021).

(b) **Yes, the court should find that Rule 100 unconstitutionally violates the free association rights of Toys and its donors.** The *Americans for Prosperity* case, *supra*, involved a California requirement that charities raising more than a certain total annual amount from California residents file with the state A.G.'s office a copy of the charity's federal IRS filing ("Form 990") listing the identity of significant donors. The California rule was obviously similar to Rule 100 here. The Court in *Americans for Prosperity* concluded that (1) there was a significant risk that the public would learn the identity of donors appearing on the Form 990 (as the A.G.'s office had inadvertently allowed to happen in the past); (2) members of the public might therefore harass the charity and its donors based on the leaked information; and (3) the disclosure requirement was not "narrowly tailored" to achieving the state's concededly-important goal of reducing fraudulent solicitations, because the A.G.'s office could have used the ***less-burdensome alternative*** of waiting until it had reason to suspect a particular charity of fraud, and then subpoenaing the Form 990 from the charity. That same reasoning applies here, since West Carolina (like California in *Americans for Prosperity*) could have achieved its anti-fraud objective by using the less-burdensome method of waiting until it had suspicions about a particular charity and then subpoenaing the donor records from the charity.

(c) Yes, the court should find Rule 100 unconstitutional "on its face." This is exactly what the Supreme Court did as to the California disclosure requirement struck down in *Americans for Prosperity*, *supra*. In the First Amendment area, the ***"overbreadth"*** doctrine makes it especially easy for a court to find a law to be invalid on its face: the law will be struck down as overly broad "if a ***substantial number*** of its ***applications*** are unconstitutional, judged in ***relation to the statute's plainly legitimate sweep***." *Id*. The Court in *Americans for Prosperity* decided that in First Amendment cases in which the law (such as the disclosure requirement there) fails the relevant "exacting scrutiny" test, then even the mere ***"theoretical risk"*** that the law will have a ***"chilling effect"*** on the freedom of association will compel the court to rule that the law is overbroad and thus invalid on its face. The same conclusion is required on our facts, since (as described in Part (b)) Rule 100 fails "exacting scrutiny," and will thus be deemed to have a chilling effect on the freedom of association of donors to any charity covered by the Rule, including charities not before the court.

96. (a) No. "Gag orders" — that is, pretrial orders prohibiting the press from publishing certain types of information about the case — are virtually never constitutionally permissible. See *Nebraska Press Ass'n v. Stuart*. A gag order is a species of prior restraint, so it can be allowed only if its benefits substantially outweigh its First Amendment dangers, something that will virtually never happen. Here, there are other methods available to the judge to help assure a fair trial (e.g., careful *voir dire* to make sure that each juror has either not heard about the confession or understands that it is to be absolutely disregarded). (A gag order might be allowed if the press had ***illegally*** gotten the information, e.g., by bribing a member of the police department to release sealed information; but where the press comes by the information legally, a

gag order preventing it from disseminating the material will almost never be upheld.)

(b) Yes, probably. States may prevent a lawyer from making any statement that would have a ***"substantial likelihood of materially prejudicing"*** an adjudicative proceeding. *Gentile v. State Bar of Nevada*. The state must give guidelines that are reasonably specific about what kinds of disclosures are and are not allowed. The ban here, which refers specifically to the facts of the confession, seems to have adequate specificity. While some sorts of gag orders might unconstitutionally restrict a defense lawyer's right to defend his client in the public eye (e.g., the states probably can't prevent a lawyer from asserting that his client is innocent, or from generally describing the client's proposed defense), references to a co-defendant's inadmissible confession are probably the sort of unduly prejudicial remarks that a lawyer falling within the court's jurisdiction may be barred from making.

97. Yes. The First Amendment is not violated when a reporter is required to testify before a grand jury concerning information obtained from confidential sources during newsgathering. In fact, reporters are not even entitled to a ***qualified privilege*** to refuse to identify their sources or information received from those sources — thus a reporter, like any other citizen, may be required to divulge information that could be obtained by police or prosecutors from other sources. *Branzburg v. Hayes.* (Over half of the states have enacted ***statutes*** that grant reporters a privilege against disclosure of confidential sources or information. If such a "shield law" existed here, it would prevent Roger from being held in contempt on these facts.)

Exam Tips on FREEDOM OF EXPRESSION

Freedom of expression typically makes up a larger portion of a full-year Con. Law exam than does any other single topic. Almost any regulation of an individual's conduct may pose a free expression issue, so think very broadly. Here are some particular things to keep in mind:

? Remember that free expression issues are posed not just where government is regulating "speech" but also where government is regulating ***"conduct"*** that includes an ***expressive component***. So for each activity that's being restricted, first deal with the issue: "Is there an expressive component to the activity?" If you answer "yes," you've got a free expression issue. (*Example:* Panhandling on the subway has been held to be expressive — and thus protected — conduct.)

? Always keep in mind the five ***"unprotected categories,"*** the categories thought to be of ***so little value*** that they get ***no First Amendment protection at all*** (as long as government is not singling out particular disfavored ***viewpoints,*** something that will trigger strict scrutiny even for an unprotected category). If your facts fall into an unprotected category, you don't have to worry about whether the government is unreasonably restraining expression, as long as government is being content-neutral.

? Here is a list of the five unprotected categories:

[1] ***"Incitement."*** This category includes advocacy of ***imminent lawless behavior***, as well as the utterance of ***"fighting words,"*** i.e., words that are likely to precipitate an immediate physical conflict.

[2] ***Obscenity***.

[3] ***Misleading or deceptive speech (i.e., fraud)***.

[4] Speech ***integral to criminal conduct***, such as speech that is part of a ***conspiracy*** to commit a crime or speech ***proposing an illegal transaction***.

[5] ***Defamation***.

Example: A state can flatly ***forbid all obscenity,*** without even trying to make its ban narrowly tailored to achieve a significant governmental interest (something government would have to do for a content-neutral regulation outside an unprotected category).

? Once you've identified a situation where government is "substantially impairing" protected speech or expressive conduct, decide whether the regulation is ***"content-neutral"*** or not.

? A tip to help you decide: Ask whether the harm the government is trying to prevent would exist to the same degree if the listener/reader didn't understand English. If the answer is "no," the government's action is probably content-based.

? Always consider the government's ***motive*** in regulating the speech — the issue is what the government wished to do: did it want to suppress/control ideas, or did it really want to regulate "secondary" concerns not related to the expressive content?

? If you decide that the regulation is "content-based," apply ***strict scrutiny***. That is, write that the regulation must be struck down unless the government shows that the restriction is ***necessary*** to achieve a ***compelling*** governmental purpose. You should almost always then conclude that the government restriction can't survive. (Usually, the key reason will be that there is some less restrictive way to deal with the problem, even if that less restrictive way is not an absolutely perfect way of handling the problem.)

? One commonly-tested scenario: A public school district allows community groups to use the school for their own purposes after hours. A particular group is denied access because of the type of activity, or because of the group's controversial views. (Typically, you should conclude that the restriction here is content-based, and therefore apply strict scrutiny.)

? Keep in mind that strict scrutiny for content-based regulations limits a state's right to ***impose civil liability for hurtful speech.*** So, for instance, be ready to say that there is a First Amendment violation if the state lets a person against whom ***intentionally-offensive speech is directed*** recover under state law for ***intentional infliction of emotional distress (IIED).*** (Cite to *Snyder v. Phelps*, where funeral picketers were shielded from IIED liability.)

? For a regulation to be "content-neutral," the regulation must be more than just ***"viewpoint"*** neutral. "Content neutral" means "without reference to the content." And that, in turn, means that restrictions that put ***whole topics*** off limits — or ***circumscribe discussion*** of certain topics — are not content-neutral.

Example: Assume the federal government refuses to allow people to register ***trademarks*** for ***"offensive"*** terms, like "Nigger" or "Kike." Say that this prohibition is content-based (not content-neutral), so that it must be strictly scrutinized (which the

restriction here won't survive). Cite to *Matal v. Tam* (federal government can't use a "no offensive trademarks rule" to refuse registration for "Slants," because the rule can't survive strict scrutiny).

? If you conclude that the regulation is truly "content-neutral," use a three-part test. For instance, any regulation of the ***"time, place and manner"*** of demonstrations or other expressive conduct will be analyzed by this test if you find that it is content-neutral. Here are the three parts (***all*** of which must be satisfied):

  ? The regulation must serve a "***significant*** governmental interest";

  ? The regulation must be ***narrowly tailored*** to achieve that objective; and

  ? The regulation must leave open adequate ***alternative channels*** for communication.

  ? Look most closely at the ***second*** of the above parts most closely: whether the regulation is ***narrowly-tailored*** to achieving the governmental interest. When content-neutral restrictions are subjected to mid-level review and the government loses, the narrow-tailoring requirement is usually the reason. Remember, if the restriction burdens ***"substantially more speech than is necessary"*** to achieve the objective, that will mean that the restriction wasn't narrowly-tailored, thus flunking mid-level review.

  Example: A state passes a statute making it a felony for any person convicted of sexual assault of a minor to post any message on any social-media website, including Facebook. P, who has such a conviction, makes a one-sentence post on Facebook having nothing to do with sex or minors, and the state prosecutes him. The statute is a violation of P's First Amendment freedom — even though the state has a more-than-significant interest in preventing convicted sex-offenders' use of the Internet to locate new underaged victims, the statute restricts much more expression than would be reasonably necessary to achieve that objection. (However, a statute that just prohibited P from posting on, say, a website designed for minors would probably *not* fail to be narrowly-tailored to meet the state's stop-sexual-assault-of-minors objective.) (Cite to *Packingham v. North Carolina.)*

Note: In assessing any "time, place and manner" restriction, consider whether a ***public forum*** is involved. The "narrowly tailored" and "alternative channels left open" requirements are ***more strictly construed when a public forum is involved.*** (The public forum is discussed further below.)

? Always consider whether either of two key First Amendment doctrines applies:

  ? First, ***overbreadth***. Remember that most litigants in Con. Law are not permitted to assert the rights of others. But under First Amendment overbreadth, P is allowed to assert that the government regulation violates the rights of a person who is not now before the court. (*Example:* A city bans the sale of "sexually explicit" materials. P is charged with violating the statute. The materials sold by him are clearly obscene. Yet, he can defeat the prosecution by showing that the ban also applies to non-obscene sexually explicit materials, which cannot be constitutionally prohibited.)

  ? Second, ***vagueness***. Remember, a statute or regulation is unconstitutionally vague if a person of normal intelligence wouldn't know whether the action in question was for-

bidden or not. (*Examples:* Statutes forbidding conduct that is "demeaning," "offensive," or "disruptive to public order" might all be found to be unconstitutionally vague, because it is not clear where the line is between what they do and do not proscribe.)

? Many exam questions involve a speaker who tries to rouse the crowd to take ***subversive*** or ***illegal action***. Be on the lookout for persons charged with "inciting to riot," "urging the overthrow of the government," "advocating illegal conduct," or the like. When you have such a fact pattern, check for three things:

  ? Was the riot or illegality ***imminent***, as opposed to something that would take place at a later date? Only speech urging imminent illegality may be punished. (*Example:* If the speaker says, "Start thinking about forming guerrilla units … ," the required imminence is not present.)

  ? Was the advocacy ***intended*** to produce illegality? (If illegality was the ***unintended by-product*** of the speaker's speech, he can't be punished for it.)

  ? Was the advocacy ***likely*** to produce the illegality? Ineffectual efforts don't count. (*Example:* If people are in a park for other purposes, happen to listen to the speaker, and then go about their business, the "likely to produce illegality" requirement probably is not met.)

? When government attempts to require a ***license*** or ***permit*** before expressive activity (typically a speech or demonstration) may occur, here are the things to check for:

  ? Make sure that the license/permit requirement is truly ***content-neutral***, both as written (i.e., "on the face" of the statute) and as applied (i.e., as the permits are actually handed out by officials). A permit/license requirement cannot be used as a smokescreen for suppressing unpopular views or unpopular topics.

  ? Make sure that the scheme does not give ***excessive discretion*** to the official charged with issuing the permit. (*Example:* If the fact pattern tells you that the permit is to be issued "based on the Police Commissioner's overall assessment of the good of the community," that's excessive discretion.) This is a commonly tested aspect.

  ? Profs frequently test on whether a speaker has a right to ***ignore*** a permit requirement.

    ? If the permit requirement is unconstitutional ***on its face*** (e.g., it's content-based, in that it requires a permit for certain topics but not others), the speaker is ***not*** required to apply for a permit. He may decline to apply, speak, and then defend on the grounds of the permit requirement's unconstitutionality.

    ? But if the permit is not facially invalid, only unconstitutional ***as applied*** to the speaker, then the speaker generally does ***not*** have the right to ignore the requirement. He must apply for the permit, then seek prompt judicial review rather than just going ahead and speaking. (But an exception exists where the applicant shows that ***sufficiently prompt judicial review*** of the denial was not available.)

    ? When the speaker is judicially ***enjoined*** from speaking, marching, etc., he generally may ***not*** ignore the injunction and then raise the constitution as a defense in a subsequent contempt proceeding. Instead, he must seek prior judicial review.

? If the above requirements are satisfied, then the permit requirement is valid. (*Example:* A permit will not be invalid merely because it is issued upon conditions that the marchers or demonstrators not block the public's access to a particular place, e.g., an abortion clinic or government building.)

? Be on the lookout for expression that may constitute ***"fighting words."*** These are words that are likely to induce the addressee to ***commit an act of violence***, typically against the speaker. Government may forbid fighting words, or punish them after they are spoken.

? But be skeptical of claims by the government that the speech in question really constituted "fighting words." Most importantly, remember that the police must ***control the crowd*** if they have the ability to do so — they can't stand back, then punish the speaker for rousing the crowd to violence.

? Also, distinguish fighting words from mere ***"offensive speech."*** Speech may not be forbidden merely because the listeners are likely to find it offensive. (*Examples:* Nazis demonstrating in front of Holocaust survivors, or black students calling white students "honkey" at a public university, are probably not using "fighting words," merely "offensive speech" — unless the circumstances made violence very likely, the speech cannot be forbidden.)

? Look out for attempts to restrict ***"hate speech."*** A ***broad ban*** on ***all fighting words*** is OK. So is a broad ban on all words or acts intended to ***harass*** or ***intimidate*** others. Government can even single outs certain intimidating acts and forbid them (e.g., ***cross burnings***, when done as a threat or intimidation), while declining to forbid other intimidating acts (e.g., burnings in effigy). But government ***can't forbid just those fighting words or threats that are motivated by particular kinds of hatred*** (e.g., racial or gender hatred). (Cite to *R.A.V. v. St. Paul* on this point.)

Example: University, a public university, passes a speech code that says "All students are forbidden to harass or threaten other students on the basis of race, gender, or sexual orientation. Violations are punishable by suspension." Since the code bans just certain types of harassment or threats (those based on race, gender and sexual orientation) and not others (e.g., those based on political affiliation), the code is a content-based regulation, and must be strictly scrutinized. It will probably fail that scrutiny, since there are content-neutral alternatives that are less restrictive of speech and will do the job almost as well (e.g., a code banning *all* harassments and threats, regardless of the speaker's motive).

? Speech cannot be banned on the mere grounds that it is ***profane***. This merely makes it "offensive," not "obscene" or "fighting words." (*Example:* D can wear a jacket saying, "Fuck the Draft." Cite to *Cohen v. California*.)

? Whenever you're dealing with a ban on "offensive" conduct or "harassment," consider the possibility that there may be a ***vagueness*** problem with the regulation.

? Whenever your fact pattern involves a restriction on speech that takes place in a ***public forum***, note this fact, and try to explain what difference it makes.

? The fact that the expressive conduct is taking place in a public forum only makes a difference if the regulation is content-neutral. Assuming that it is content-neutral, the

principal difference is that we use ***mid-level review*** (the restriction must be ***narrowly drawn to serve a significant governmental interest***, while leaving open adequate alternative channels for the communication) as opposed to "mere-rationality" review for non-public-forum speech.

? The classic ***"traditional"*** public forums are: ***streets***, ***sidewalks***, ***parks***. There are also ***"designated"*** public forums, where government has decided to open the place to a broad range of expressive activity (e.g., an open City Council meeting or a school whose classrooms are made available after hours to any community group); the same rules apply to designated forums as to true forums, except that government can change its mind and make the place a non-public forum.

  ? The mere fact that something is public property does not mean it is a public or designated-public forum. There are public spaces that are ***"non-public forums,"*** as to which "mere-rationality" review is all that is used. (*Examples:* Airport terminals, jails, military bases, courthouses, government office buildings.)

  ? But even in a non-public forum, regulation must still be ***rational*** and ***viewpoint-neutral***. Be especially alert for a violation of viewpoint-neutrality when government ***excludes religious groups*** from benefits that it gives to a wide range of non-religious groups.

    Example: A school district allows a variety of local community groups to use elementary school classrooms after hours to run programs promoting the "general welfare." However, the district excludes from this program any activity or group that is "primarily of a religious nature." This will be unconstitutional viewpoint based discrimination, even though school classrooms used this way are probably a non-public forum.

  ? Even if a private group is somehow involved in speech, check to see whether ***government*** is the ***real speaker.*** If the real speaker is government, ***don't use public-forum analysis.*** Instead, say that government-as-speaker can behave in a content-based way, delivering just the message it wants.

    Example: A private group donates a message-bearing monument that a city goverment decides to take and display in a park. Government will be deemed to be the speaker by virtue of its decision to accept and display the monument. Therefore, the city can discriminate based on the message: the city doesn't have to accept other donated monuments with messages that the city doesn't approve of. [Cite to *Pleasant Grove v. Summum.*]

? If you apply ***mid-level review*** to a content-neutral time-place-and-manner restriction on speech in a public forum, be sure to stress that the required ***"narrow tailoring"*** means that there must be a ***quite tight fit between the means and the end*** — the law will not survive if there's ***some less-speech-restrictive way*** to achieve the state's objective as well (or even ***"almost as well"***).

Example: A state bans all demonstrations within a 35 foot "buffer zone" around the entrance to any abortion clinic, to avoid harassment and blocking of the clinic entrance. Even if the court believes this is content-neutral, the fact that the state has

other means to achieve these important objectives [e.g., a specific ban on harassment, or a ban on blocking the entrance] means that the buffer zone ban is not narrowly-tailored to the state's objectives, and is a violation of protesters' free speech rights. [Cite to *McCullen v. Coakley*]

? Fact patterns often involve speech that takes place on ***private property***. Here are the two aspects that are most frequently tested:

  ? The ***public*** has no First Amendment right of access to private property. (*Example:* A person does not have a First Amendment right to distribute literature in a privately-owned shopping center.)

  ? Government may limit an owner's right to use, or to rent his property to others, for expressive purposes. Here, use standard "time, place and manner" analysis, except that no public forum is involved. Therefore, the regulation will usually be upheld if it is content-neutral and other avenues are left for the message. (*Example:* Government may prevent owners from putting signage on their property advertising their wares, as long as the ban applies to all types of signage, and there are other advertising channels available.)

? The same rules apply to regulation of *"**symbolic*** expression" as apply to speech and speech-mixed-with-conduct. "Symbolic expression" refers to ***non-verbal acts***.

  ? For instance, if government wants to ban destruction of the flag, it must do so in a content-neutral way (e.g., it cannot ban flag burning that is intended as a means of political dissent while allowing flag burning that is intended as a means of destroying worn-out flags).

? Remember that when the government regulates ***defamation***, there are First Amendment limitations:

  ? Most important, under *New York Times v. Sullivan*, if P is a ***public official*** or ***public figure***, he may only win a defamation suit against D for a statement relating to P's official conduct if P can prove that D's statement was made either "with ***knowledge*** that it was false" or "with ***reckless disregard***" of whether it was true or false. Use the phrase "actual malice" to describe this requirement.

  ? Be sure to examine whether the plaintiff is truly a public or, rather, private figure. If P is a private figure, he merely has to prove negligence rather than "actual malice."

  ? Remember that in an action for "intentional infliction of emotional distress," P must, similarly, follow *New York Times v. Sullivan* and prove "actual malice," if P is a public figure.

? Remember that government ***can't generally make it a crime to "tell a lie."*** Government can forbid making factually-false statements within certain long-established ***pre-defined categories*** (e.g., defamation, perjury, fraud). But outside those categories, government can't pass a law making it a crime to lie, even if the lie would be likely to cause harm.

  Example: Congress can't make it a crime to falsely state that the speaker has received the Congressional Medal of Honor. Cite to *U.S. v. Alvarez* on this point.

? ***Obscenity*** is frequently tested. Here are some of the most commonly-tested sub-issues:

- ? The relevant standard is the ***"community"*** standard — if the relevant sale and trial take place in a small town in Kansas, what counts is whether the average member of that town would find that the work as a whole appeals to the "prurient" interest.
- ? The fact that the work shows ***nakedness*** is not enough — there must be real or simulated sex that is described or portrayed.
- ? Remember that no matter how obscene the work is, its ***private possession*** by an adult in the privacy of his own home cannot be punished. (But the ***seller*** can still be punished.)
- ? Be sure to distinguish between material that is truly "obscene," and material that's merely ***"indecent."*** Mere nakedness, for instance, doesn't make something obscene (e.g., because of the possibility that the material may have artistic or social value, or because the material may not be "patently offensive.")
  - ? So if government tries to regulate "indecency," indicate that the material gets First Amendment protection and that government has to satisfy strict scrutiny.

    Example: Congress prohibits the furnishing of "indecent" material on the Internet, hoping to keep this stuff away from minors. You should apply strict scrutiny, and strike down the restriction, because the total ban is overbroad — the ban covers material that could be proscribed because it's obscene, but also material that's not obscene and thus protected as to adults. Cite to *Reno v. ACLU*.

    Same analysis if Congress, trying to avoid having minors access indecent material, says that a Web site can show such material only if the user is required to provide proof that he is an adult; this will flunk strict scrutiny if a less-restrictive and equally-effective alternative — say, user-installed filtering — is available. Cite to *Ashcroft v. ACLU*.
  - ? But government has a relatively free hand to regulate the ***"secondary effects"*** of indecent speech. (*Example:* A town can ban live nude dancing if it reasonably believes that nude dancing establishments contribute to increased drug use, prostitution, etc.)

? Ascertain whether the regulated speech is ***"commercial"*** (as opposed to core political) speech. Commercial speech is speech proposing a sale or other commercial transaction. Here are the things to remember about regulation of commercial speech:

- ? If the commercial speech is truthful and proposes a ***legal*** transaction, the Court uses ***mid-level review.*** The restriction survives only if it: (1) ***directly advances*** (2) a ***substantial*** governmental interest (3) in a way that is ***"not more extensive than is necessary"*** to achieve the government's objective. This is true even if the regulation is ***content-based***. (So it's somewhat easier for government to do content-based regulation of commercial speech than of non-commercial speech, as to which strict scrutiny has to be used.)
- ? If the speech is ***false***, ***deceptive*** or proposes an ***illegal transaction***, government can ***flatly ban*** it.

? Profs frequently test on whether the government may prohibit or regulate truthful advertising about products that are ***harmful*** but ***lawful***. Generally, this regulation gets mid-level review, which it will often ***flunk*** because ***substantially less-restrictive means are available***. (*Examples:* If government tries to prohibit or tightly regulate truthful advertising for ***cigarettes***, ***liquor*** or ***gambling***, the Court is likely to say that less-restrictive means like educational campaigns, or higher taxes, must first be tried. Cite to *Lorillard*, the Mass. case that banned outdoor tobacco advertising, on this point.)

? Restrictions on ***lawyer advertising*** are often tested. Except for some ***in-person solicitation*** by profit-motivated lawyers seeking clients, states generally can't block truthful advertising. (*Example:* States can't block a public interest lawyer or advocacy group from soliciting clients, even through direct mail or in-person contacts.)

? Be on the lookout for the First Amendment implications of ***restrictions on campaign financing.*** The government *may* place monetary limits on ***direct contributions*** by one donor to one candidate. But most other campaign-finance limits are likely to be found to be a ***violation of citizens' free speech rights.***

Example: Government may not place *any limit at all* on how much a person (or corporation) may spend to advocate the election of a particular candidate, as long as the spender/advocate is ***acting independently*** of the candidate's own efforts. Cite to *Buckley v. Valeo* and *Citizens United*.

? If the regulation is of ***public school students***, state that the courts apply a "balancing" test: the student has a limited right of free speech, to be balanced against the administration's right to ***carry out its educational mission*** and to ***maintain discipline.*** (So officials may not suppress students' speech merely because they disagree with it on ideological or political grounds, but they may ban profanity, or ban school-newspaper stories that would disturb the school's educational mission, such as stories about sex.)

? Where the student speech takes place ***off-campus,*** and is ***not part of a school-sponsored extra-curricular activity,*** say that the school may nonetheless be entitled to regulate the content or manner of the speech. But mention also that the school's interest in regulation is considerably ***weaker*** than in the case of in-school speech. Cite to *Mahanoy*.

Example: P tries out for shortstop on the varsity baseball team at Public High, but the coaches choose X instead, and put P on the junior varsity. From his home that evening, P tweets, "Fuck Public High Baseball. The coaches chose X instead of me for shortstop because X's dad lobbied them relentlessly." No other team member complains about the tweet, but the school suspends P for the year from the junior varsity under a school rule prohibiting "disruptive conduct in connection with a school activity."

You should say the P's free expression has been violated: since the speech took place off-campus (and not directly as a part of a school-sponsored activity), the school's interest in regulating that speech was relatively weak, especially since the team members' lack of reaction suggests that the tweet was not very disruptive. P's interest in commenting about a matter of public concern (his allegation that the coaches are unfairly responding to parental lobbying) outweighs the school's weak interest in regulation.

? If you have a fact pattern that involves ***group activity*** of an expressive nature, refer to the protected ***"freedom of association."*** (*Example:* If a group gets together and pursues class action litigation, their right to do so is protected by the associational freedom.)

  ? Remember that there's also a "right ***not*** to associate"; for instance, a group can't be required to take unwanted members whose presence will detract from the group's expressive activities. (*Example:* The NAACP can't be forced to accept white supremacists as members.)

? Be alert for situations in which government may be forcing a person or group to deliver a ***government-drafted message*** that the person or group ***disagrees*** with. The modern Court ***strictly scrutinizes*** these "you must deliver the following message" attempts by government, and typically strikes them down as violations of free expression.

  Example 1: A state says to pro-life "pregnancy crisis centers," "You must post a poster in your waiting room that tells women that the state provides low-cost abortions." This is an unconstitutional impairment of each center's free-expression right not to be required to deliver a message of which the center disapproves. [Cite to *Nat'l Institute v. Becerra*]

  Example 2: A state statute allows any public-employee union to charge non-members for the union's pro-rata costs of representing the non-member in collective bargaining. The statute violates each non-member's free-speech right to refuse to give financial support to a message (in this case, a collective bargaining position) that the non-member disagrees with. [Cite to *Janus v. AFSCME*]

? Many fact patterns involve the denial of ***public jobs or benefits*** to persons based upon their expressive conduct. This is a very commonly tested area. Here are some key aspects to keep in mind:

  ? In general, the standard for whether government may refuse to hire, or may fire, based on expressive conduct is the same as for when government may ***prosecute***. (*Example:* Since a person may not be prosecuted for belonging to an organization unless there is a showing that he had the specific intent to further the organization's illegal aims, so a person may not be fired for belonging to the organization without such a showing of specific intent.)

  ? A person may be required to sign a ***loyalty oath*** as a condition for getting or keeping a public job, but he may not be forced to promise to refrain from doing anything that he would be constitutionally permitted to do. (*Example:* You may be forced to sign a loyalty oath that you have not belonged to the Communist Party while specifically intending to further the overthrow of the government, but you may not be required to sign a loyalty oath stating simply that you do not belong to the Communist Party — since you can't be prosecuted for mere membership without specific intent to further illegal aims, you can't be forced to sign a loyalty oath that you won't be a mere member.)

  ? There is an ***exception*** to these limits: you can be deprived of expressive freedom where the expression would truly interfere with your ***job performance***. (*Example:* Civil servants can be forced to choose between their jobs and engaging in partisan

political activities, since there's a strong governmental interest in making sure that civil servants don't get coerced into campaigning for their elected bosses.)

- ? Where a public ***benefit*** as opposed to a job is at stake, there is no "performance" exception, and it's hard for government to restrict free speech. (*Example:* A person's right to continue as a tenant in public housing, or to receive welfare payments, generally can't be made contingent upon their forfeiting their freedom of expression, because they generally don't have a "performance" obligation that would be impaired by pursuit of expressive conduct or speech.)

? Look out for ***"unconstitutional conditions,"*** where government ***unfairly conditions*** the award of funding or other benefits on the recipient's ***waiver of constitutional rights.***

- ? Government ***can*** sometimes require as a condition to giving you a financial benefit (e.g., a subsidy) that you waive your right to free expression. But that condition can generally apply only to ***how you use the particular government-supplied funds***, not how you spend ***non-subsidy dollars***. Cite to *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*

? If your question involves restrictions placed on the ***media*** (publishers or broadcasters), there are some special considerations:

- ? If the governmental action consists of a ***prior restraint***, you should almost certainly conclude that the restraint is not valid. For instance, if the government is trying to get an injunction against a newspaper that will publish a story, it's almost impossible for the government to succeed.
- ? The media must obey a ***subpoena*** (e.g., to give information to a grand jury) pretty much the same as a private citizen must.
- ? The press does not get any special ***right of access*** to government-held information, beyond what the public as a whole has.
- ? Some issues turn on the ***type of media***:
  - ? ***Over-the-air broadcast radio and tv*** may be subjected to somewhat greater "***time, place and manner" regulation*** than print media, because these are scarce resources, and they are potentially intrusive (someone may stumble upon unwanted content while dial-turning).
  - ? ***Print publications***, and the ***Internet***, by contrast, are neither scarce nor intrusive. So these media get ***very great freedom*** from "time, place and manner" regulation.