

# FREEDOM OF EXPRESSION

## 17.1 INTRODUCTION TO FREEDOM OF EXPRESSION

First Amendment law is complex and chaotic. Our starting point is the text of the First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

By its terms, the rule is absolute: “Congress shall make no law . . . abridging the freedom of speech.” But it has never been interpreted that way by the full Court, although from time to time some justices have advocated an absolutist approach. The Court recognizes that Congress and the states (after the First Amendment protections were made applicable to the states through incorporation via the Due Process Clause of the Fourteenth Amendment) can limit freedom of expression in various ways, including by implementing reasonable time, place, and manner restrictions and by treating some types of expression as less protected than others.

The default rule is that all speech is protected, subject to certain limited exceptions for certain types of speech. The term “speech” is interpreted to include any means of expression, including oral, written, graphic, audio-visual, music, dance, and so on. If the government wants to regulate the content of protected speech (most speech is protected), its regulation must pass strict scrutiny. As stated by the Court:

Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.

*Reed v. Town of Gilbert*, 576 U.S. \_\_\_, \_\_\_ (2015). This use of “narrowly tailored” appears to mean that the regulations chosen by the government restrict freedom of expression in the least possible way available to meet the government’s interest. See *United States v. Alvarez*, 567 U.S. \_\_\_ (2012). Freedom of expression strict scrutiny is a difficult standard to meet, and few attempts to regulate the content of protected speech succeed.

In *Reed v. Town of Gilbert* (2015), content-based regulation is explained this way:

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. . . . The commonsense meaning of the phrase “content based” requires a court to

consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. . . . Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

*Reed v. Town of Gilbert*, 576 U.S. \_\_\_\_ (2015). Justice Thomas, who wrote the majority opinion in *Reed v. Town of Gilbert*, continued:

Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be “justified without reference to the content of the regulated speech,” or that were adopted by the government “because of disagreement with the message [the speech] conveys,” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

*Id.* at \_\_\_\_.

If the government merely wishes to regulate the time, place, and manner of the speech (as opposed to regulating *what* can be said, or as the Court describes it, the content of the speech), a lesser standard of review is used. That standard is a species of intermediate scrutiny and is generally expressed in some variant of the following:

1. The government must show that a substantial, content neutral interest is being served;
2. The regulation must be narrowly tailored to achieve that interest; and
3. There must be ample alternative avenues of expression.

At times the third element is not relevant because the problem is one of the restrictions on the particular activity as opposed to the existence of alternatives. For example, merely limiting parades to certain streets on weekends does not really implicate the third element in a strong way. At other times it seems the third element is the most important one.

The use of “narrowly tailored” for both strict scrutiny and intermediate scrutiny is confusing since it does not mean the same thing in both settings. In time, place, and manner settings, the means chosen by the government do not need to be the least restrictive or least intrusive on freedom of expression. For time, place, and manner regulation, the regulation need only be a good fit, or as stated by the court,

the requirement of narrow tailoring is satisfied “so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.”

*Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989), quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985).

In addition to the strict scrutiny standard of review for content regulation and intermediate review for time, place, and manner restrictions, other doctrines have been developed to corral government regulations targeting expression. Two of them

are that a regulation can be deemed unconstitutional as void for vagueness or as overly broad. A government regulation is too vague when either (1) the boundaries of the speech it limits cannot be determined clearly or (2) the regulation leaves too much discretion to the officers or administrators applying it. A government regulation is overly broad when it limits not only the lawfully targeted unprotected speech, but also impermissibly limits protected speech. Underlying both of these doctrines is the foundational freedom of expression principle that regulations that might chill protected speech are strongly disfavored.

Not all speech is fully protected. Many types of speech receive lesser protection than standard protected speech. If the speech falls into one or more of the lesser protected or unprotected categories, the standard of review that applies is different. Various standards of review are used depending upon the type of speech at issue. The standards of review for these other categories are less difficult to meet than the strict scrutiny applied to protected speech. As with protected speech, a regulation of unprotected or lesser-protected speech may also be unconstitutional because it is too vague or overly broad.

This chapter first provides a brief framework for analyzing freedom of expression problems before moving on to address the regulation of various types of speech. Most speech is fully protected, and the first section after the framework for analysis addresses constitutional constraints on the regulation of fully protected speech. The chapter then explores the treatment of types of speech that are either not protected or are less protected. It concludes by examining a few more specialized matters, such as prior restraint, governmental speech, and speech in primary and secondary public schools.

## 17.2 ANALYZING A FREEDOM OF EXPRESSION PROBLEM

When analyzing a freedom of expression problem, generally the first step is to determine the category of speech into which the speech in the problem falls. Once the category is determined, the standard of review to apply is mostly set. Most speech is fully protected speech. The following categories have been identified by the Court as being either nonprotected speech or lesser-protected speech:

- Obscenity
- Child pornography (textual works are treated differently from pictorial or audiovisual works)
- Defamation
- Fighting words
- Incitement to violence
- True threats
- Commercial speech.

Speech categories receiving special treatment in some situations but that are generally fully protected as to content include:

- Pornography (but avenues of dissemination can be restricted under the secondary effects theory)

- Expressive conduct (such as dancing or wearing armbands)
- Hate speech (generally fully protected, but can be used to enhance penalties for conduct that would otherwise constitute a crime regardless of the hate speech aspect).

Each category of speech has a particular standard of review and other tests that apply. In general, truly unprotected speech can be regulated (and even banned) if the rational basis standard of review is met, while the various types of lesser protected speech can be regulated provided the government regulation passes the standard of review for that type of speech.

Sometimes the most important aspect of a freedom of expression problem is not the standard of review, but rather the legal test for determining which category the speech falls into. The most famous of these legal tests is the *Miller v. California*, 413 U.S. 15 (1973), test for distinguishing unprotected obscenity from protected pornography. Obscenity is not protected speech, and so regulation of it is subject to a highly deferential rational basis standard of review. Under this deferential, low standard, almost any regulation will be approved. Consequently, the most important freedom of expression inquiry in obscenity cases relates not to the application of the standard of review, but rather to the test to determine whether the speech is obscene.

One must determine not only the proper category of speech at issue, but also other aspects of the regulation, including whether the regulation targets content or time, place, and manner; whether the regulation is unconstitutionally vague or overly broad; whether the regulation works a prior restraint on the speech (censorship); and more.

Furthermore, the medium being used by the speaker can affect the scope of regulation allowed; it sometimes matters whether the expression is on the Internet, in a film, on broadcast television, or in some other medium. In addition, the nature of the venue or location of the speech (a public forum, a designated limited public forum, a private venue, and so on), can affect the analysis. The term *public forum* does not necessarily mean a place: It has been expanded to include things like newsletters, bulletin boards, and video screens in public institutions such as state-owned universities.

In addition to all of the above, a variety of policies and principles are used in free speech analysis, foremost of which is the extent to which a regulation would chill protected speech from taking place. Other ideas that inform freedom of expression analysis are “the marketplace of ideas” and that the remedy for offensive speech not regulation but rather more speech. Regulations designed to protect minors sometimes pass constitutional muster more easily than those targeted at limiting speech directed at adult audiences.

The final step in analyzing freedom of expression problems should always include taking a step back and simply asking whether the result makes sense when judged from the perspective of the underlying principles and policies involved and, as importantly, from a common sense perspective. Not all freedom of expression rules make sense or accord with ordinary common sense, but that filter can sometimes help one avoid absurd results the law does not require.

Even after the foregoing analysis has been completed, sometimes a problem presents special circumstances that warrant special consideration such as prior restraint. This chapter concludes with a brief examination of some of them.

You should develop your own approach to analyzing freedom of expression problems. One approach is to play a sort of “twenty questions” game with it. Some students find it useful to create a flow chart or similar diagram. Complete and accurate flow charts can be difficult to construct satisfactorily, particularly for those aesthetically opposed to overly complex charts. A flow chart for some of the basic steps of analysis can be very useful, however, provided you recognize that charts are bound to be incomplete. Some students have found it helpful to develop a sort of checklist of possible free speech concerns. Some students have found the following checklist useful, while others have used it as a base, adapting or expanding it as they require. Note that some inquiries on the following analytic checklist overlap.

1. Identify the type of speech (what category is it, e.g., political speech, defamation, etc.).
2. Identify the type of regulation (is it based on content, viewpoint, or time, place, and manner).
3. Identify the medium being used to communicate the message (e.g., printed text, video, television, dance, etc.).
4. Identify who is the target of the speech (e.g., children, commercial customers, public at large, the government).
5. Articulate the relevant standard(s) of review and other legal tests.
6. Apply the legal tests to the facts.
7. Take a step back and see whether the result of your analysis makes sense in light of the policies and principles of free speech jurisprudence.

### 17.3 FULLY PROTECTED SPEECH

Most expression is protected. All types of speech, except for a few categories the Court has carved out, are fully protected. The standards of review for governmental limitations on protected speech are high. If the government wants to regulate the content of the speech, it must use a version of strict scrutiny or what the court has sometimes called “exacting scrutiny.” See *United States v. Alvarez*, 567 U.S. \_\_\_ (2012) (plurality opinion). If the government wants to regulate when, where, and how the speech can occur, then a lesser standard is used, but even the time, place, and manner level of scrutiny is far more searching than rational basis scrutiny.

In this section six topics are presented:

1. The standard of review for content-based regulation
2. The standard of review for time, place, and manner regulation
3. Expressive conduct and its standard of review
4. Vagueness
5. Overbreadth
6. The public forum doctrine.

### 17.3.1 Regulation of the Content of Protected Speech

The majority opinion written by Justice Clarence Thomas in *Reed v. Town of Gilbert, Arizona*, 576 U.S. \_\_\_ (2015), states and applies the freedom of expression strict scrutiny

Justice Breyer's proposed balancing test is akin to the European approach to regulating speech, which gives governments more latitude in regulating speech than does the current, more sharp-edged approach of the U.S. Supreme Court, as exemplified in *Reed* (2015).

standard of review and states the tests for determining when a regulation is to be considered a content-based regulation. The concurring opinion of Justice Breyer explains his preferred approach, and the concurring opinion by Justice Kagan presents yet another approach for addressing freedom of expression constitutional issues. Despite the differences in the tests they would employ, all nine justices agree that the town's regulation of signs based on the content of the signs fails to meet constitutional requirements.

Some freedom of expression scholars expect that the Court will back away from the strong, absolutist statements contained in the majority opinion of *Reed* (2015) over time because it is somewhat out of step with the subtler, more nuanced decisions in this area over the preceding two decades. Justice Kagan's approach exemplifies that subtler approach without taking a revolutionary step away from historical U.S. freedom of expression jurisprudence. Very few if any freedom of expression scholars expect Justice Breyer's approach to become the majority approach.

The town's attempt to characterize its regulations as merely time, place, and manner regulations because the town's motive was not related to the content of the message of the signs was rejected by all nine justices. The origins of the town's theory will be presented below in the secondary effects doctrine section. The secondary effects doctrine should fall after this case, but it will likely be refit into existing freedom of expression jurisprudence in some manner.

Under the majority opinion in *Reed* (2015), a regulation is content based when it "target(s) speech based on its communicative content." A law that targets speech because of the message it conveys is content-based regulation. According to *Reed* (2015), a regulation can be content based either because the regulation targets a particular subject matter or because the regulation defines the "speech by its function or purpose." This latter type of content regulation is subtler and more problematic than the former, which is usually more straightforward. A regulation banning speech about nuclear power would be content-based regulation under the subject matter test. A regulation banning speech where the purpose was to provide information about a public event without regard to what the public event was or what its purpose was would be a function or purpose regulation and would also be subject to strict scrutiny as a content-based regulation. *Reed* (2015) also held that laws enacted with a tainted purpose will be treated as content based, even though on their face they are otherwise neutral as to subject matter and the function of the speech. These are laws that in their effect, rather than on their face, regulate content.

Under freedom of expression strict scrutiny content-based regulations are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." While the phrasing is very similar to strict scrutiny in the equal protection setting, the application of it in freedom of expression cases is not quite the same.

***Reed v. Town of Gilbert, Arizona***

576 U.S. \_\_\_\_ (2015)

**Justice Thomas delivered the opinion of the Court.**

The town of Gilbert, Arizona (or Town), has adopted a comprehensive code governing the manner in which people may display outdoor signs. . . . The Sign Code identifies various categories of signs based on the type of information they convey, then subjects each category to different restrictions. One of the categories is “Temporary Directional Signs Relating to a Qualifying Event,” loosely defined as signs directing the public to a meeting of a nonprofit group. . . . The Code imposes more stringent restrictions on these signs than it does on signs conveying other messages. We hold that these provisions are content-based regulations of speech that cannot survive strict scrutiny.

...

I

A

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws “abridging the freedom of speech.” U.S. Const., Amdt. 1. Under that Clause, a government, including a municipal government . . . “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” . . . Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. . . .

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. . . . This commonsense meaning of the phrase “content based” requires a court to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. . . . Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be “justified without reference to the content of the regulated speech,” or that were adopted by the government “because of disagreement with the message [the speech] conveys,” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

B

The Town’s Sign Code is content based on its face. It defines “Temporary Directional Signs” on the basis of whether a sign conveys the message of directing

the public to church or some other “qualifying event.” . . . It defines “Political Signs” on the basis of whether a sign’s message is “designed to influence the outcome of an election.” . . . And it defines “Ideological Signs” on the basis of whether a sign “communicat[es] a message or ideas” that do not fit within the Code’s other categories. . . . It then subjects each of these categories to different restrictions.

The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. . . . On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government’s justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

### C

In reaching the contrary conclusion, the Court of Appeals offered several theories to explain why the Town’s Sign Code should be deemed content neutral. None is persuasive.

### 1

The Court of Appeals first determined that the Sign Code was content neutral because the Town “did not adopt its regulation of speech [based on] disagree [ment] with the message conveyed,” and its justifications for regulating temporary directional signs were “unrelated to the content of the sign.” . . . In its brief to this Court, the United States similarly contends that a sign regulation is content neutral—even if it expressly draws distinctions based on the sign’s communicative content—if those distinctions can be “justified without reference to the content of the regulated speech.” . . .

But this analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of “animus toward the ideas contained” in the regulated speech. . . . We have thus made clear that “[i]llicit legislative intent is not the sine qua non of a violation of the First Amendment,” and a party opposing the government “need adduce ‘no evidence of an improper censorial motive.’” . . . Although “a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary.” . . . In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

. . .  
. . . *Ward* had nothing to say about facially content-based restrictions because it involved a facially content-neutral ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city. . . . In that context, we looked to governmental motive, including whether the government had regulated speech “because of disagreement” with its message, and whether the regulation was “justified without reference to the content of the speech.” *Id.*, at 791. But *Ward*’s framework “applies only if a

statute is content neutral.” . . . Its rules thus operate “to protect speech,” not “to restrict it.” . . .

The First Amendment requires no less. Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—i.e., the “abridg[ement] of speech”—rather than merely the motives of those who enacted them. U.S. Const., Amdt. 1. “The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.” . . .

For instance, in *NAACP v. Button*, 371 U.S. 415 (1963), the Court encountered a State’s attempt to use a statute prohibiting “improper solicitation” by attorneys to outlaw litigation-related speech of the National Association for the Advancement of Colored People. *Id.*, at 438. Although *Button* predated our more recent formulations of strict scrutiny, the Court rightly rejected the State’s claim that its interest in the “regulation of professional conduct” rendered the statute consistent with the First Amendment, observing that “it is no answer . . . to say . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression.” *Id.*, at 438–439. Likewise, one could easily imagine a Sign Code compliance manager who disliked the Church’s substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services. Accordingly, we have repeatedly “rejected the argument that ‘discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.’” . . . We do so again today.

## 2

The Court of Appeals next reasoned that the Sign Code was content neutral because it “does not mention any idea or viewpoint, let alone single one out for differential treatment.” . . . It reasoned that, for the purpose of the Code provisions, “[i]t makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted.” . . .

... This analysis conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints—or the regulation of speech based on “the specific motivating ideology or the opinion or perspective of the speaker”—is a “more blatant” and “egregious form of content discrimination.” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). But it is well established that “[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.” *Consolidated Edison Co. of N.Y. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 530, 537 (1980).

Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. . . .

## 3

Finally, the Court of Appeals characterized the Sign Code's distinctions as turning on "the content-neutral elements of who is speaking through the sign and whether and when an event is occurring." . . . That analysis is mistaken on both factual and legal grounds.

To start, the Sign Code's distinctions are not speaker based. The restrictions for political, ideological, and temporary event signs apply equally no matter who sponsors them. . . .

In any case, the fact that a distinction is speaker based does not, as the Court of Appeals seemed to believe, automatically render the distinction content neutral. Because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content," . . . we have insisted that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference," . . . Thus, a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based. Likewise, a content-based law that restricted the political speech of all corporations would not become content neutral just because it singled out corporations as a class of speakers. See *Citizens United, supra*, at 340–341. . . .

Nor do the Sign Code's distinctions hinge on "whether and when an event is occurring." The Code does not permit citizens to post signs on any topic whatsoever within a set period leading up to an election, for example. Instead, come election time, it requires Town officials to determine whether a sign is "designed to influence the outcome of an election" (and thus "political") or merely "communicating a message or ideas for noncommercial purposes" (and thus "ideological"). . . . That obvious content-based inquiry does not evade strict scrutiny review simply because an event (i.e., an election) is involved.

And, just as with speaker-based laws, the fact that a distinction is event based does not render it content neutral. . . .

## III

Because the Town's Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny, "which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest," . . . Thus, it is the Town's burden to demonstrate that the Code's differentiation between temporary directional signs and other types of signs, such as political signs and ideological signs, furthers a compelling governmental interest and is narrowly tailored to that end. . . .

The Town cannot do so. It has offered only two governmental interests in support of the distinctions the Sign Code draws: preserving the Town's aesthetic appeal and traffic safety. Assuming for the sake of argument that those are compelling governmental interests, the Code's distinctions fail as hopelessly underinclusive.

Starting with the preservation of aesthetics, temporary directional signs are “no greater an eyesore,” . . . than ideological or political ones. Yet the Code allows unlimited proliferation of larger ideological signs while strictly limiting the number, size, and duration of smaller directional ones. 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.

The Town similarly has not shown that limiting temporary directional signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not. The Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting.

In light of this underinclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest. Because a “law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited,” . . . the Sign Code fails strict scrutiny.

#### IV

Our decision today will not prevent governments from enacting effective sign laws. The Town asserts that an “absolutist” content-neutrality rule would render “virtually all distinctions in sign laws . . . subject to strict scrutiny,” . . . but that is not the case. Not “all distinctions” are subject to strict scrutiny, only content-based ones are. Laws that are content neutral are instead subject to lesser scrutiny. . . .

The Town has ample content-neutral options available to resolve problems with safety and aesthetics. For example, its current Code regulates many aspects of signs that have nothing to do with a sign’s message: size, building materials, lighting, moving parts, and portability. . . . And on public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner. . . .

We acknowledge that a city might reasonably view the general regulation of signs as necessary because signs “take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation.” . . . At the same time, the presence of certain signs may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety. A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny. The signs at issue in this case, including political and ideological signs and signs for events, are far removed from those purposes. As discussed above, they are facially

content based and are neither justified by traditional safety concerns nor narrowly tailored.

\* \* \*

We reverse the judgment of the Court of Appeals and remand the case for proceedings consistent with this opinion.

**Justice Alito, with whom Justice Kennedy and Justice Sotomayor join, concurring.**

I join the opinion of the Court but add a few words of further explanation.

...

As the Court shows, the regulations at issue in this case are replete with content-based distinctions, and as a result they must satisfy strict scrutiny. This does not mean, however, that municipalities are powerless to enact and enforce reasonable sign regulations. I will not attempt to provide anything like a comprehensive list, but here are some rules that would not be content based:

- Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below.
- Rules regulating the locations in which signs may be placed. These rules may distinguish between freestanding signs and those attached to buildings.
- Rules distinguishing between lighted and unlighted signs.
- Rules distinguishing between signs with fixed messages and electronic signs with messages that change.
- Rules that distinguish between the placement of signs on private and public property.
- Rules distinguishing between the placement of signs on commercial and residential property.
- Rules distinguishing between on-premises and off-premises signs.
- Rules restricting the total number of signs allowed per mile of roadway.
- Rules imposing time restrictions on signs advertising a one-time event. Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed.\*

In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–469 (2009). They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

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\* Of course, content-neutral restrictions on speech are not necessarily consistent with the First Amendment. Time, place, and manner restrictions “must be narrowly tailored to serve the government’s legitimate, content-neutral interests.” *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). But they need not meet the high standard imposed on viewpoint- and content-based restrictions.

Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.

**Justice Breyer, concurring in the judgment.**

I join Justice Kagan's separate opinion. Like Justice Kagan I believe that categories alone cannot satisfactorily resolve the legal problem before us. The First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories, such as "content discrimination" and "strict scrutiny," would permit. In my view, the category "content discrimination" is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic "strict scrutiny" trigger, leading to almost certain legal condemnation.

To use content discrimination to trigger strict scrutiny sometimes makes perfect sense. There are cases in which the Court has found content discrimination an unconstitutional method for suppressing a viewpoint. *E.g.*, *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828–829 (1995); *see also Boos v. Barry*, 485 U. S. 312, 318–319 (1988) (plurality opinion) (applying strict scrutiny where the line between subject matter and viewpoint was not obvious). And there are cases where the Court has found content discrimination to reveal that rules governing a traditional public forum are, in fact, not a neutral way of fairly managing the forum in the interest of all speakers. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say"). In these types of cases, strict scrutiny is often appropriate, and content discrimination has thus served a useful purpose.

But content discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not always trigger strict scrutiny. To say that it is not an automatic "strict scrutiny" trigger is not to argue against that concept's use. I readily concede, for example, that content discrimination, as a conceptual tool, can sometimes reveal weaknesses in the government's rationale for a rule that limits speech. If, for example, a city looks to litter prevention as the rationale for a prohibition against placing newsracks dispensing free advertisements on public property, why does it exempt other newsracks causing similar litter? *Cf. Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). I also concede that, whenever government disfavors one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas and with an individual's ability to express thoughts and ideas that can help that individual determine the kind of society in which he wishes to live, help shape that society, and help define his place within it.

Nonetheless, in these latter instances to use the presence of content discrimination automatically to trigger strict scrutiny and thereby call into play a strong presumption against constitutionality goes too far. That is because virtually all government activities involve speech, many of which involve the regulation of speech. Regulatory programs almost always require content discrimination.

And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity.

Consider a few examples of speech regulated by government that inevitably involve content discrimination, but where a strong presumption against constitutionality has no place. Consider governmental regulation of securities, *e.g.*, 15 U.S.C. §78l (requirements for content that must be included in a registration statement); of energy conservation labeling-practices, *e.g.*, 42 U.S.C. §6294 (requirements for content that must be included on labels of certain consumer electronics); of prescription drugs, *e.g.*, 21 U.S.C. §353(b)(4)(A) (requiring a prescription drug label to bear the symbol “Rx only”); of doctor-patient confidentiality, *e.g.*, 38 U.S.C. §7332 (requiring confidentiality of certain medical records, but allowing a physician to disclose that the patient has HIV to the patient’s spouse or sexual partner); of income tax statements, *e.g.*, 26 U.S.C. §6039F (requiring taxpayers to furnish information about foreign gifts received if the aggregate amount exceeds \$10,000); of commercial airplane briefings, *e.g.*, 14 CFR §136.7 (2015) (requiring pilots to ensure that each passenger has been briefed on flight procedures, such as seatbelt fastening); of signs at petting zoos, *e.g.*, N.Y. Gen. Bus. Law Ann. §399-ff(3) (West Cum. Supp. 2015) (requiring petting zoos to post a sign at every exit “‘strongly recommend[ing] that persons wash their hands upon exiting the petting zoo area’”); and so on.

Nor can the majority avoid the application of strict scrutiny to all sorts of justifiable governmental regulations by relying on this Court’s many subcategories and exceptions to the rule. The Court has said, for example, that we should apply less strict standards to “commercial speech.” *Central Hudson Gas & Elec. Corp. v. Public Service Comm’n of N.Y.*, 447 U.S. 557, 562–563 (1980). But I have great concern that many justifiable instances of “content-based” regulation are noncommercial. And, worse than that, the Court has applied the heightened “strict scrutiny” standard even in cases where the less stringent “commercial speech” standard was appropriate. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 588 (2011) (Breyer, J., dissenting). The Court has also said that “government speech” escapes First Amendment strictures. *See Rust v. Sullivan*, 500 U.S. 173, 193–194 (1991). But regulated speech is typically private speech, not government speech. Further, the Court has said that, “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.” *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992). But this exception accounts for only a few of the instances in which content discrimination is readily justifiable.

I recognize that the Court could escape the problem by watering down the force of the presumption against constitutionality that “strict scrutiny” normally carries with it. But, in my view, doing so will weaken the First Amendment’s protection in instances where “strict scrutiny” should apply in full force.

The better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it a helpful, but not determinative legal tool, in an

appropriate case, to determine the strength of a justification. I would use content discrimination as a supplement to a more basic analysis, which, tracking most of our First Amendment cases, asks whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives. Answering this question requires examining the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so. . . . Admittedly, this approach does not have the simplicity of a mechanical use of categories. But it does permit the government to regulate speech in numerous instances where the voters have authorized the government to regulate and where courts should hesitate to substitute judicial judgment for that of administrators.

...

**Justice Kagan, with whom Justice Ginsburg and Justice Breyer join, concurring in the judgment.**

Countless cities and towns across America have adopted ordinances regulating the posting of signs, while exempting certain categories of signs based on their subject matter. For example, some municipalities generally prohibit illuminated signs in residential neighborhoods, but lift that ban for signs that identify the address of a home or the name of its owner or occupant. . . . In other municipalities, safety signs such as “Blind Pedestrian Crossing” and “Hidden Driveway” can be posted without a permit, even as other permanent signs require one. . . . Elsewhere, historic site marker—for example, “George Washington Slept Here”—are also exempt from general regulations. . . . And similarly, the federal Highway Beautification Act limits signs along interstate highways unless, for instance, they direct travelers to “scenic and historical attractions” or advertise free coffee. . . .

Given the Court’s analysis, many sign ordinances of that kind are now in jeopardy. . . . Says the majority: When laws “single[ ] out specific subject matter,” they are “facially content based”; and when they are facially content based, they are automatically subject to strict scrutiny. . . . And although the majority holds out hope that some sign laws with subject-matter exemptions “might survive” that stringent review, . . . the likelihood is that most will be struck down. After all, it is the “rare case[ ] in which a speech restriction withstands strict scrutiny.” . . . To clear that high bar, the government must show that a content-based distinction “is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.” . . . So on the majority’s view, courts would have to determine that a town has a compelling interest in informing passersby where George Washington slept. And likewise, courts would have to find that a town has no other way to prevent hidden-driveway mishaps than by specially treating hidden-driveway signs. (Well-placed speed bumps? Lower speed limits? Or how about just a ban on hidden driveways?) The consequence—unless courts water down strict scrutiny to something unrecognizable—is that our communities will find themselves in an unenviable bind: They will have to either repeal the exemptions that allow for helpful signs

on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter.

Although the majority insists that applying strict scrutiny to all such ordinances is “essential” to protecting First Amendment freedoms, . . . I find it challenging to understand why that is so. This Court’s decisions articulate two important and related reasons for subjecting content-based speech regulations to the most exacting standard of review. The first is “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.” . . . The second is to ensure that the government has not regulated speech “based on hostility—or favoritism—towards the underlying message expressed.” . . . Yet the subject-matter exemptions included in many sign ordinances do not implicate those concerns. Allowing residents, say, to install a light bulb over “name and address” signs but no others does not distort the marketplace of ideas. Nor does that different treatment give rise to an inference of impermissible government motive.

We apply strict scrutiny to facially content-based regulations of speech, in keeping with the rationales just described, when there is any “realistic possibility that official suppression of ideas is afoot.” . . . That is always the case when the regulation facially differentiates on the basis of viewpoint. . . . It is also the case (except in nonpublic or limited public forums) when a law restricts “discussion of an entire topic” in public debate. . . . We have stated that “[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose ‘which issues are worth discussing or debating.’” . . . And we have recognized that such subject-matter restrictions, even though viewpoint-neutral on their face, may “suggest[ ] an attempt to give one side of a debatable public question an advantage in expressing its views to the people.” . . . Subject-matter regulation, in other words, may have the intent or effect of favoring some ideas over others. When that is realistically possible—when the restriction “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace”—we insist that the law pass the most demanding constitutional test. . . .

But when that is not realistically possible, we may do well to relax our guard so that “entirely reasonable” laws imperiled by strict scrutiny can survive. . . . This point is by no means new. Our concern with content-based regulation arises from the fear that the government will skew the public’s debate of ideas—so when “that risk is inconsequential, . . . strict scrutiny is unwarranted.” . . . To do its intended work, of course, the category of content-based regulation triggering strict scrutiny must sweep more broadly than the actual harm; that category exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints. But that buffer zone need not extend forever. We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function.

And indeed we have done just that: Our cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws—including in cases just like this one. . . .

. . .

I suspect this Court and others will regret the majority's insistence today on [applying strict scrutiny so rigidly to all content-based regulation]. As the years go by, courts will discover that thousands of towns have such ordinances, many of them "entirely reasonable." . . . And as the challenges to them mount, courts will have to invalidate one after the other. (This Court may soon find itself a veritable Supreme Board of Sign Review.) And courts will strike down those democratically enacted local laws even though no one—certainly not the majority—has ever explained why the vindication of First Amendment values requires that result. Because I see no reason why such an easy case calls for us to cast a constitutional pall on reasonable regulations quite unlike the law before us, I concur only in the judgment.

### 17.3.1.1 Content and Viewpoint Regulation Contrasted

*Reed* (2015) employs three very broad tests for determining when a regulation is content based. These are: (1) the regulation expressly distinguishes on the basis of subject matter, or (2) the regulation regulates speech based on the purpose or function of the speech, or (3) the purpose or effect of the otherwise facially neutral regulation is to regulate content.

Content regulation generally targets the topic or subject matter of the speech. In contrast, viewpoint regulation targets the position of the speaker on a particular subject. A regulation that bans all speech about abortion regardless of which side the speaker takes would be content-based. A viewpoint-based regulation would allow speech on one side of an issue, such as the anti-abortion stance, but would prohibit speech on the other side. In practice, viewpoint regulation is subject to an almost per se rule of invalidity, although the courts actually apply strict scrutiny to overturn such regulations.

The First Amendment does not limit the power of the government itself to speak or to take positions on one side of an issue or another. The government typically does have a viewpoint on matters of health and safety and speaks forcefully on them. But the First Amendment does prohibit the government from stopping speech that takes a position contrary to that of the government. The government can promote vaccination, but it cannot stop people from speaking out against vaccinations.

### 17.3.1.2 Strict Scrutiny Applied in Other Cases

In *Reed* (2015), Justices Breyer and Kagan in their dissents correctly characterize the actual plasticity of the strict scrutiny test in its application over the past few decades. But at present they do not have the votes to adopt either Justice Breyer's more flexible, balancing-of-interests approach or Justice Kagan's content-based-regulation-plus-more approach. The term "strict scrutiny" has even been dropped, at times, in favor of "exact-ing scrutiny," as in the plurality opinion in *United States v. Alvarez*, 567 U.S. \_\_\_ (2012), for undisclosed reasons, but perhaps to move away from the rigidity of strict scrutiny, especially if that concept is ported over from equal protection in race-based affirmative action cases.

Substantively, *Alvarez* (2012) addressed the issue of whether the government can criminalize false speech even when it is not defamatory, does not constitute a commercial misrepresentation, or does not otherwise fall into one of the recognized categories of less-protected speech. The Court was *not* unanimous in its decisions (a) that the false speech in *Alvarez* (2012) was indeed protected under the First Amendment, (b) that the freedom of expression strict scrutiny test was the proper test to use, and (c) that the formulation used for what the plurality opinion labeled “exacting scrutiny” is in fact the proper formulation of the test. You should rely on the majority opinion in *Reed v. Town of Gilbert* (2015) as the current formulation of the strict scrutiny standard of review to be used in freedom of expression cases rather than the *Alvarez* (2012) approach.

The plurality in *Alvarez* (2012) emphasized the distinction between objective facts and other sorts of information. Can we so easily distinguish between objective facts and other sorts of information? Is global warming an objective fact? Is it a fact that humans have caused a significant part of this phenomenon? What about evolution? Evolution is a demonstrated scientific fact, but some still contest it because it contradicts their religious beliefs and they do not find the evidence in favor of evolution strong enough to convince them to abandon their beliefs.

Do not lose sight of the basic aspects of freedom of expression jurisprudence that nearly everyone (including all nine justices) agree upon. It is easy to get drawn into the difficulties of individual cases that are out on the edges. The basic approach of categorizing the types of speech and applying different tests to different types of speech is still the law. The distinction between content-based regulation and time, place, and manner regulation is still the law. New cases and situations will always arise, including cases on the boundary between allowed and prohibited speech. *Alvarez* (2012) was one of them.

A well-known saying in the law is that hard cases make bad law. At least one meaning of that aphorism is that the Court, when dealing with cases in which it doesn’t want to apply well-established rules in their most straightforward fashion, will at times bend the rules to reach a desired result with the effect of making the law more complex or less predictable or in some other sense “bad.” The decision upholding the incarceration of west coast Japanese-Americans in concentration camps in *Korematsu v. United States*, 323 U.S. 214 (1944), is one such example in the equal protection field. It was a hard case because the naval base in Pearl Harbor had just been attacked by Japanese forces, leaving our west coast all but defenseless. In that time of national crisis, the Court did not want to undermine the war effort or the government’s judgments on how to deal with it. *Korematsu* (1944) was a terrible decision because of what it did to people of Japanese descent living on the west coast, and the law of strict scrutiny as to treatment on the basis of race was tortured to justify the result.

Arguably the Court twisted freedom of expression law in a case involving congressional responses to terrorism in the first decade of the twenty-first century. Congress had enacted a law criminalizing providing material support to terrorists. Two nonprofit groups engaged in teaching and speech sought a court ruling regarding certain forms of teaching to designated terrorist groups, including instruction about

being better advocates for their positions at the United Nations. In *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), the Court accepted the line it said Congress drew between *independent* speech favoring groups like the Tamil Tigers or the Kurdistan Workers Party and speech *coordinated* with or through them. The former is protected and the latter can be regulated by Congress under the theory that lending “material support” to terrorists can be proscribed as illegal *conduct* antithetical to the compelling interests of the United States. In doing so the Court (uncharacteristically in the freedom of expression cases) deferred to the legislative and executive branches judgments on the extent to which helping with humanitarian aspects of an organization through educational efforts should be banned along with banning providing arms directly.

### 17.3.2 Regulation of the Time, Place, and Manner of Speech

We turn now from content-based regulation of fully protected speech to instances in which the government does not want to regulate what is being said, but rather merely when, where, and how. Mass public events like concerts and parades disrupt the lives of others through noise, traffic problems, and in other ways. Curbing these sorts of disruptions are significant interests of the government worthy of protection. However, in protecting these interests, the government cannot stop all speech, and interests regarding disruptions must be balanced against the constitutional right of freedom of expression.

The basic standard of review for a time, place, and manner restriction is:

1. The government must show that a substantial, content-neutral governmental interest is being served;
2. The regulation must be narrowly tailored to achieve that interest; and
3. There must be ample alternative avenues of expression open to the speaker.

In the lead case used in this section, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the issue revolves around controlling the volume at music concerts in a public place: Central Park in New York City. Note that this five to four decision turns not on whether such an event can be subjected to reasonable time, place, and manner restrictions, including volume limitations (all nine justices agree on that basic proposition), but rather the disagreement concerns the more narrow issue of whether the means chosen meet the test of being narrowly tailored. The justices agree on what the test is, but disagree on its proper application in this case.

*Ward v. Rock Against Racism* (1989) was relied upon and distinguished in *Reed v. Town of Gilbert* (2015) with respect to the test used to distinguish content-based regulation from time, place, and manner regulation. The Court in *Reed* (2015) emphasized the facially neutral regulation at issue in *Ward* (1989) and so distinguished *Ward* as not involving the first-stage review of content-based regulation that arises when the law is making a content based distinction on its face.

The use of “narrowly tailored” here does not mean the same in time, place, and manner regulation as it means in content-based regulation as in *Reed* (2015). This terminological confusion is unfortunate, but it is what the law has left us so far.

***Ward v. Rock Against Racism***

491 U.S. 781 (1989)

**Justice Kennedy delivered the opinion of the Court.**

In . . . New York City's Central Park, . . . there is an amphitheater and stage structure known as the Naumberg Acoustic Bandshell. The bandshell faces west across the remaining width of the park. In close proximity to the bandshell, and lying within the directional path of its sound, is a grassy open area called the Sheep Meadow. The city has designated the Sheep Meadow as a quiet area for passive recreations like reclining, walking, and reading. Just beyond the park, and also within the potential sound range of the bandshell, are the apartments and residences of Central Park West.

This case arises from the city's attempt to regulate the volume of amplified music at the bandshell so the performances are satisfactory to the audience without intruding upon those who use the Sheep Meadow or live on Central Park West and in its vicinity.

The city's regulation requires bandshell performers to use sound amplification equipment and a sound technician provided by the city. The challenge to this volume control technique comes from the sponsor of a rock concert. . . .

I

. . .

The city considered various solutions to the sound amplification problem. The idea of a fixed decibel limit for all performers using the bandshell was rejected because the impact on listeners of a single decibel level is not constant, but varies in response to changes in air temperature, foliage, audience size, and like factors. The city also rejected the possibility of employing a sound technician to operate the equipment provided by the various sponsors of bandshell events because the city's technician might have had difficulty satisfying the needs of sponsors while operating unfamiliar, and perhaps inadequate, sound equipment. Instead, the city concluded that the most effective way to achieve adequate but not excessive sound amplification would be for the city to furnish high quality sound equipment and retain an independent, experienced sound technician for all performances at the bandshell. After an extensive search, the city hired a private sound company capable of meeting the needs of all the varied users of the bandshell.

. . .

We granted certiorari to clarify the legal standard applicable to governmental regulation of the time, place, or manner of protected speech. . . .

II

Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. . . . The Constitution

prohibits any like attempts in our own legal order. Music, as a form of expression and communication, is protected under the First Amendment. . . .

We . . . decide the case as one in which the bandshell is a public forum for performances in which the government's right to regulate expression is subject to the protections of the First Amendment. . . . Our cases make clear, however, that even in a public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions

are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

. . . We consider these requirements in turn.

#### A

The principal inquiry in determining content-neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages, but not others. . . . Government regulation of expressive activity is content-neutral so long as it is "justified without reference to the content of the regulated speech." . . .

The principal justification for the sound amplification guideline is the city's desire to control noise levels at bandshell events, in order to retain the character of the Sheep Meadow and its more sedate activities, and to avoid undue intrusion into residential areas and other areas of the park. This justification for the guideline "ha[s] nothing to do with content," . . . and it satisfies the requirement that time, place, or manner regulations be content-neutral.

. . .

#### B

The city's regulation is also "narrowly tailored to serve a significant governmental interest." . . . Despite respondent's protestations to the contrary, it can no longer be doubted that government "ha[s] a substantial interest in protecting its citizens from unwelcome noise." . . . This interest is perhaps at its greatest when government seeks to protect "the wellbeing, tranquility, and privacy of the home," . . . but it is by no means limited to that context, for the government may act to protect even such traditional public forums as city streets and parks from excessive noise. . . .

We think it also apparent that the city's interest in ensuring the sufficiency of sound amplification at bandshell events is a substantial one. The record indicates that inadequate sound amplification has had an adverse affect on the ability of some audiences to hear and enjoy performances at the bandshell. The city enjoys

a substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer, from amplified music to silent meditation. . . .

. . .

The Court of Appeals erred in sifting through all the available or imagined alternative means of regulating sound volume in order to determine whether the city's solution was "the least intrusive means" of achieving the desired end. This

less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation.

. . . Instead, our cases quite clearly hold that restrictions on the time, place, or manner of protected speech are not invalid "simply because there is some imaginable alternative that might be less burdensome on speech." . . .

The Court of Appeals apparently drew its least-intrusive-means requirement from *United States v. O'Brien*, 391 U.S. at 377, the case in which we established the standard for judging the validity of restrictions on expressive conduct. . . . The court's reliance was misplaced, however, for we have held that the *O'Brien* test, "in the last analysis, is little, if any, different from the standard applied to time, place, or manner restrictions." . . . Indeed, in *Community for Creative Non-Violence*, we squarely rejected reasoning identical to that of the court below:

We are unmoved by the Court of Appeals' view that the challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest in preserving park lands. . . . We do not believe . . . that either *United States v. O'Brien* or the time, place, or manner decisions assign to the judiciary the authority to replace the [parks department] as the manager of the [city's] parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained."

468 U.S. 299.

Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests, but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied

so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.

. . . . To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. . . . So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the

government's interest could be adequately served by some less-speech-restrictive alternative. . . .

It is undeniable that the city's substantial interest in limiting sound volume is served in a direct and effective way by the requirement that the city's sound technician control the mixing board during performances. . . .

The city's second content-neutral justification for the guideline, that of ensuring "that the sound amplification [is] sufficient to reach all listeners within the defined concert-ground," also supports the city's choice of regulatory methods. By providing competent sound technicians and adequate amplification equipment, the city eliminated the problems of inexperienced technicians and insufficient sound volume that had plagued some bandshell performers in the past. . . .

. . . .  
. . . . Since the guideline allows the city to control volume without interfering with the performer's desired sound mix, it is not "substantially broader than necessary" to achieve the city's legitimate ends and thus it satisfies the requirement of narrow tailoring.

### C

The final requirement, that the guideline leave open ample alternative channels of communication, is easily met. Indeed, in this respect the guideline is far less restrictive than regulations we have upheld in other cases, for it does not attempt to ban any particular manner or type of expression at a given place or time. . . . Rather, the guideline continues to permit expressive activity in the bandshell, and has no effect on the quantity or content of that expression beyond regulating the extent of amplification. That the city's limitations on volume may reduce to some degree the potential audience for respondent's speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate. . . .

### III

The city's sound amplification guideline is narrowly tailored to serve the substantial and content-neutral governmental interests of avoiding excessive sound volume and providing sufficient amplification within the bandshell concert-ground, and the guideline leaves open ample channels of communication. Accordingly, it is valid under the First Amendment as a reasonable regulation of the place and manner of expression. The judgment of the Court of Appeals is

Reversed.

**Justice Blackmun concurs in the result.**

**Justice Marshall, with whom Justice Brennan and Justice Stevens join, dissenting.** *[Omitted.]*

### 17.3.2.1 After *Ward* (1989): Regarding Time, Place, and Manner Restrictions

As noted previously, “narrow tailoring” means one thing when content is regulated and another when the regulation is content neutral. When the government seeks to regulate content, the Court uses the freedom of expression version of strict scrutiny, which it has expressed in various ways, including:

1. The government must demonstrate a compelling governmental interest for the regulation; and
2. The restriction must be narrowly tailored and “actually necessary” to accomplish that compelling interest.

Under this strict scrutiny, the “narrowly tailored” language indicates that the means chosen must impose the least restrictions of freedom of expression while still accomplishing the compelling interest being served.

In contrast, the time, place, and manner test for governmental regulation of protected speech is as follows:

1. There must be a must be substantial, content-neutral governmental interest being served;
2. The regulation must be narrowly tailored to achieve that interest; and
3. There must be ample alternative avenues of expression.

The use of “narrowly tailored” in this context means that the methods chosen by the government need *not* be the least restrictive or least intrusive on freedom expression; rather the term means something more like that the methods chosen must be a good fit. For time, place, and manner regulation, as stated by the Court,

the requirement of narrow tailoring is satisfied “so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” . . . To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government’s legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.

*Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

Time, place, and manner restrictions include such things as obtaining permits to conduct a parade or to use a city park for a concert or political rally. For the most part these are well understood and not problematic.

Nonetheless, cases continue to arise in various contexts. For example, a city could ban picketing and demonstrating outside someone’s home in a residential neighborhood, even though the demonstration was on the sidewalk, a traditional public forum. *Frisby v Schultz*, 487 U.S. 474 (1988). The Court held the privacy interest and the interests of traffic flow and conducting ordinary neighborhood activities justified this restriction as a time, place, and manner restriction. Importantly, the restriction was not targeting any particular subject matter nor targeting the purpose or function of the speech. The regulation simply aimed to protect people’s interest in privacy where they live, and it did so by a content-neutral regulation.

Many suburbs have restrictive zoning that limits what people can do with their homes, including legislation regarding how long one can display holiday lights, what sorts of signs can be posted in the yard, and many, many more. The City of Ladue, Missouri, banned signs in yards. In 1990, Margaret Gilleo, in violation of the law, posted a sign in her yard opposing the first Iraq War, fought in that year. She applied for a variance, but was denied. She sued the mayor and the city in federal court. The courts ruled in her favor, all the way up to the Supreme Court. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). The unanimous Supreme Court held that the regulation was content neutral and so the time, place, and manner standard applied. However, no reasonable substitutes for a yard sign existed through which Gilleo could effectively communicate her views to her neighbors and passers-by, and the ban excluded too much protected speech. The ordinance had exceptions for “home for sale” signs and street address markers and the like, but not for speech generally. Perhaps after *Reed* (2015) this regulation would now be treated as content-based insofar as signs for some purposes (sale of the home) but not others (political statements) were allowed. One of the ongoing problems with freedom of expression jurisprudence is the inconsistency of the Court’s decisions. As a result, each new case seems to call into question at least some of the reasoning and even results in some older cases.

One area of contention involving freedom of expression is the use of buffer zones around entrances to buildings. The Court has not approved of such buffer zones in general when they restrict speech. The leading case concerning buffer zones arises in the context of patients seeking to enter and leave abortion clinics safely and freely. In 2014, the majority of the Court ruled that a buffer zone that kept people away from the entrance to the clinics burdened more speech than was necessary to support the interest of the state in ensuring safe access to and egress from the clinics. *McCullen v. Coakley*, 573 U.S. \_\_\_ (2014). The Court held that rather than creating a buffer zone, the government could simply make obstructing the entrances and exits illegal and enforce those laws when violations arise. By creating the buffer zone, the state burdened the speech of those who would want to engage those going to the clinics in quiet, one-to-one counseling before they entered, thus distinguishing it from the boisterous demonstrators in *Frisby* (1988).

For the most part, time, place, and manner restrictions can be analyzed in a relatively straightforward manner by applying the appropriate standard of review. Sometimes, however, determining whether the restriction is content based can be problematic, and with the advent of the purpose-of-the-regulation test for whether it is content based things can become complicated.

When the District of Columbia sought to protect foreign embassies from demonstrators, the Court held that doing so was content based because only certain types of signs or “congregations” of people were prohibited, that is, those criticizing the foreign government. The mere posting of signs provision was held to violate freedom of expression under the strict scrutiny standard. The “congregations” portion was upheld, because it was interpreted to mean that only congregations that threatened the embassy’s “security or peace” could be dispersed; other groups were not so limited. Protecting security or peace is a compelling interest and simply making it illegal

was the least restrictive means available to accomplish that compelling interest. *Boos v. Barry*, 485 U.S. 312 (1988).

The purpose-of-the-regulation test (mentioned in *Ward* (1989) and *Reed* (2015) above) will be considered in more detail below in the section on obscenity (unprotected speech) and pornography (protected speech) when the secondary-effects doctrine is presented. Under *Reed* (2015), a purpose of limiting certain types of content will taint an otherwise facially neutral regulation of time, place, and manner. The secondary effects problem arises from the inverse of that: If the purpose of the regulation is to protect an interest not related to the speech, e.g., volume of a concert, traffic flow, commercial efforts, that would be considered a time, place, and manner restriction even though only certain types of speech would be affected. If only certain types of speech are affected, under *Reed* (2015), that is content-based regulation. But, in a set of cases involving pornography and adult entertainment, the Court has permitted governments to regulate places offering adult entertainment, e.g., lap dancing, naked dancing, pornographic movies, and so on, under the lesser time, place, and manner standard rather than under the content-based regulation standard of strict scrutiny. The Court created the “secondary effects” doctrine under which the regulation was not treated as a content-based regulation provided the regulation was adopted only to address certain secondary effects caused by the certain type of speech being regulated.

For the most part, you should treat time, place, and manner regulation as something that in fact regulates without regard to content at all. Nonetheless, keep in mind the exception created for adult entertainment under which the Court shifted time, place, and manner regulation from its self-defining nature to a conception based (in part) on the interest being asserted by the government.

### 17.3.2.2 Licenses and Permits

A primary principle in freedom of expression jurisprudence is that governmental censorship is to be avoided except in the most stringent of circumstances. (See the “Prior Restraint” section below.) Licensing is included here because the Court has allowed prior restraints of the licensing and permitting variety based on what amounts to a time, place, or manner standard of review provided certain requirements are met, such as the licensing and permitting is not content-based.

When the government requires someone to get a license or permit to speak, it is engaging in a form of prior restraint insofar as it is requiring someone to get governmental permission before speaking. The strong policy against censorship and against chilling speech generally have led the Court to establish fairly tight constraints on when and how the government can require permits and licenses for matters such as parades and use of public facilities for speaking. These constraints change what could be a prior restraint subject to the strictest of strict scrutiny into what amounts to a time, place, and manner scrutiny. Essentially, permitting and licensing requirements are constitutional as long as the government uses the permitting/licensing process to allocate access to government venues based neither on content nor viewpoint, with the intention of avoiding conflicts among speakers; serving non-speech-related interests

such as safety, crowd control, and traffic flow; and allowing the permitting authority sufficient time to provide security for controversial speakers/marchers.

A significant concern is the amount of discretion given the permitting authority to grant or deny a permit. To comply with the constitutional requirements, the discretion in the permitting official must be severely limited: The permitting law must provide “narrow, objective, and definite standards to guide the licensing authority.” The standards for obtaining a permit must be content and viewpoint neutral, must not be vague or subject to discriminatory interpretation and application, and must be objective such that the applicant and permitting authority know what standards must be met. As was common in the mid-twentieth-century rights revolution in the Supreme Court, one of the leading cases in this area arose out of racial discrimination. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

### *Shuttlesworth v. City of Birmingham*

394 U.S. 147 (1969)

**Mr. Justice Stewart delivered the opinion of the Court.**

The petitioner stands convicted for violating an ordinance of Birmingham, Alabama, making it an offense to participate in any “parade or procession or other public demonstration” without first obtaining a permit from the City Commission. The question before us is whether that conviction can be squared with the Constitution of the United States.

On the afternoon of April 12, Good Friday, 1963, 52 people, all Negroes, were led out of a Birmingham church by three Negro ministers, one of whom was the petitioner, Fred L. Shuttlesworth. They walked in orderly fashion, two abreast for the most part, for four blocks. The purpose of their march was to protest the alleged denial of civil rights to Negroes in the city of Birmingham. The marchers stayed on the sidewalks except at street intersections, and they did not interfere with other pedestrians. No automobiles were obstructed, nor were traffic signals disobeyed. The petitioner was with the group for at least part of this time, walking alongside the others, and once moving from the front to the rear. As the marchers moved along, a crowd of spectators fell in behind them at a distance. The spectators at some points spilled out into the street, but the street was not blocked and vehicles were not obstructed.

At the end of four blocks, the marchers were stopped by the Birmingham police, and were arrested for violating §1159 of the General Code of Birmingham. That ordinance reads as follows:

It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.

To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along

or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

The two preceding paragraphs, however, shall not apply to funeral processions.

The petitioner was convicted for violation of §1159 and was sentenced to 90 days' imprisonment at hard labor and an additional 48 days at hard labor in default of payment of a \$75 fine and \$24 costs. The Alabama Court of Appeals reversed the judgment of conviction, holding the evidence was insufficient "to show a procession which would require, under the terms of §1159, the getting of a permit," that the ordinance had been applied in a discriminatory fashion, and that it was unconstitutional in imposing an "invidious prior restraint" without ascertainable standards for the granting of permits. . . . The Supreme Court of Alabama, however, giving the language of §1159 an extraordinarily narrow construction, reversed the judgment of the Court of Appeals and reinstated the conviction. . . .

We granted certiorari to consider the petitioner's constitutional claims.

There can be no doubt that the Birmingham ordinance, as it was written, conferred upon the City Commission virtually unbridled and absolute power to prohibit any "parade," "procession," or "demonstration" on the city's streets or public ways. For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of "public welfare, peace, safety, health, decency, good order, morals or convenience." This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.

It is settled by a long line of recent decisions of this Court that an

ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

. . . And our decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.

The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality because he has not yielded to its demands.

. . .

It is argued, however, that what was involved here was not “pure speech,” but the use of public streets and sidewalks, over which a municipality must rightfully exercise a great deal of control in the interest of traffic regulation and public safety. That, of course, is true. We have emphasized before this that

the First and Fourteenth Amendments [do not] afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.

. . . “Governmental authorities have the duty and responsibility to keep their streets open and available for movement.” . . .

But our decisions have also made clear that picketing and parading may nonetheless constitute methods of expression, entitled to First Amendment protection. . . .

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

. . .

Accordingly,

[a]lthough this Court has recognized that a statute may be enacted which prevents serious interference with normal usage of streets and parks, . . . we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places.

. . . Even when the use of its public streets and sidewalks is involved, therefore, a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the “welfare,” “decency,” or “morals” of the community.

Understandably, under these settled principles, the Alabama Court of Appeals was unable to reach any conclusion other than that §1159 was unconstitutional. The terms of the Birmingham ordinance clearly gave the City Commission extensive authority to issue or refuse to issue parade permits on the basis of broad criteria entirely unrelated to legitimate municipal regulation of the public streets and sidewalks.

It is said, however, that, no matter how constitutionally invalid the Birmingham ordinance may have been as it was written, nonetheless the authoritative

construction that has now been given it by the Supreme Court of Alabama has so modified and narrowed its terms as to render it constitutionally acceptable. It is true that, in affirming the petitioner's conviction in the present case, the Supreme Court of Alabama performed a remarkable job of plastic surgery upon the face of the ordinance. The court stated that, when §1159 provided that the City Commission could withhold a permit whenever "in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require," the ordinance really meant something quite different:

[W]e do not construe this [language] as vesting in the Commission an unfettered discretion in granting or denying permits, but, in view of the purpose of the ordinance, one to be exercised in connection with the safety, comfort and convenience in the use of the streets by the general public. . . . The members of the Commission may not act as censors of what is to be said or displayed in any parade. . . .

. . . [We] do not construe §1159 as conferring upon the 'commission' of the City of Birmingham the right to refuse an application for a permit to carry on a parade, procession or other public demonstration solely on the ground that such activities might tend to provoke disorderly conduct. . . .

We also hold that, under §1159, the Commission is without authority to act in an arbitrary manner or with unfettered discretion in regard to the issuance of permits. Its discretion must be exercised with uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment with reference to the convenience of public use of the streets and sidewalks must be followed. Applications for permits to parade must be granted if, after an investigation, it is found that the convenience of the public in the use of the streets or sidewalks would not thereby be unduly disturbed.

21 Ala. at 545-546, 206 So.2d at 350-352.

In transforming §1159 into an ordinance authorizing no more than the objective and even-handed regulation of traffic on Birmingham's streets and public ways, the Supreme Court of Alabama made a commendable effort to give the legislation "a field of operation within constitutional limits." . . . We may assume that this exercise was successful, and that the ordinance, as now authoritatively construed, would pass constitutional muster. It does not follow, however, that the severely narrowing construction put upon the ordinance by the Alabama Supreme Court in November of 1967 necessarily serves to restore constitutional validity to a conviction that occurred in 1963 under the ordinance as it was written. The inquiry in every case must be that stated by Chief Justice Hughes in *Cox v. New Hampshire*, 312 U.S. 569, whether control of the use of the streets for a parade or procession was, in fact,

exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.

*Id.* at 312 U.S. 574.

...  
... In April of 1963, the ordinance that was on the books in Birmingham contained language that affirmatively conferred upon the members of the Commission absolute power to refuse a parade permit whenever they thought “the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused.” It would have taken extraordinary clairvoyance for anyone to perceive that this language meant what the Supreme Court of Alabama was destined to find that it meant more than four years later; and, with First Amendment rights hanging in the balance, we would hesitate long before assuming that either the members of the Commission or the petitioner possessed any such clairvoyance at the time of the Good Friday march.

But we need not deal in assumptions. . . .

Uncontradicted testimony was offered in [a case decided by the Supreme Court two years earlier, arising at the same time from the same facts] to show that, over a week before the Good Friday march, petitioner Shuttlesworth sent a representative to apply for a parade permit. She went to the City Hall and asked “to see the person or persons in charge to issue permits, permits for parading, picketing, and demonstrating.” She was directed to Commissioner Connor, who denied her request in no uncertain terms. “He said, No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail,’ and he repeated that twice.” 388 U.S. at 317, n. 9, 325, 335, 339.

Two days later, petitioner Shuttlesworth himself sent a telegram to Commissioner Connor requesting, on behalf of his organization, a permit to picket “against the injustices of segregation and discrimination.” His request specified the sidewalks where the picketing would take place, and stated that “the normal rules of picketing” would be obeyed. In reply, the Commissioner sent a wire stating that permits were the responsibility of the entire Commission, rather than of a single Commissioner, and closing with the blunt admonition: “I insist that you and your people do not start any picketing on the streets in Birmingham, Alabama.” *Id.* at 388 U.S. 318, n. 10, 325, 335-336, 339-340.

These “surrounding relevant circumstances” make it indisputably clear, we think, that, in April of 1963—at least with respect to this petitioner and his organization—the city authorities thought the ordinance meant exactly what it said. The petitioner was clearly given to understand that under no circumstances would he and his group be permitted to demonstrate in Birmingham, not that a demonstration would be approved if a time and place were selected that would minimize traffic problems. There is no indication whatever that the authorities considered themselves obligated—as the Alabama Supreme Court more than four years later said that they were—to issue a permit

if, after an investigation, [they] found that the convenience of the public in the use of the streets or sidewalks would not thereby be unduly disturbed.

This case, therefore, is a far cry from *Cox v. New Hampshire*, [(1941)], where it could be said that there was nothing to show “that the statute has been administered otherwise than in the . . . manner which the state court has construed it to

require.” Here, by contrast, it is evident that the ordinance was administered so as, in the words of Chief Justice Hughes,

to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought . . . immemorially associated with resort to public places.

The judgment is  
*Reversed.*

### 17.3.2.3 Permitting Fees

A special set of rules have been developed for fees and bond or insurance requirements for speaker and parade permits. Fees cannot exceed the actual cost to the government to regulate the speech or the parade, such as for providing police protection or crowd control. The speakers or parade sponsors cannot be charged for the costs of additional police needed to control opponents of the speakers. A bond or insurance can be required, but it cannot in effect bar the parade or speech from taking place. If an organization cannot meet the bonding requirement, the government must provide an exception so there is no untoward economic bar to speaking.

In one procedurally difficult case arising out of the Civil Rights Era, a city had denied a parade permit to civil rights marchers. The city then obtained a court injunction against the march. Even though marching in defiance of the refusal of the city to issue the permit could not have been punished because the denial was unconstitutional, the marchers were not entitled to ignore the court order and so could be held in contempt for violating the unconstitutional court order. The only avenue of recourse for the marchers was the slow process of appeal of the court order before demonstrating. *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

### 17.3.3 HYPOTHETICALS: CONTENT-BASED AND TIME, PLACE, AND MANNER REGULATION

Which of the following are content-based regulations and which are time, place, and manner regulations?

1. A city bans all speech in a meditation park.
2. A city prohibits all speech about abortion at public meetings.
3. A city prohibits at city council meetings all speech favoring a woman’s right to choose to get an abortion, but allows speech in favor of banning abortion.
4. A state law prohibits public nudity.
5. A state law prohibits public nudity unless it is part of a professional theatrical production.
6. A city requires organizations wanting to hold parades on city streets to get a permit from the city sixty days before the parade.
7. A city prohibits parades for any purpose other than those supporting patriotism and community spirit.

### 17.3.4 Facial or As-Applied Challenges

Another important concept used by the Court in rights cases, including freedom of expression cases, is the ability to challenge a government regulation either on its face or as applied. Typically, a facial challenge asserts that the regulation as written by itself, without more, violates freedom of expression, typically because it is too vague or is overly broad “on its face.” (The concepts of vagueness and overbreadth are more formally below.) A facial challenge, as in *Reed* (2015) and *Alvarez* (2012), can also be premised on the regulation being impermissibly content or viewpoint based.

An “as-applied” challenge, on the other hand, refers to a regulation that is, in general, valid and acceptable on its face under the First Amendment but that has been applied by a particular government official against a particular person in an unconstitutional way. For example, an otherwise valid time, place, and manner requirement that those who want to conduct a parade on public streets get a permit to do so could be administered unconstitutionally and would be subject to challenge as applied. If the applicant were excluded because of the point or purpose or message of the parade, for example, to celebrate Native American heritage, that would be a content-based regulation and thus invalid as a time, place, and manner regulation; how it was applied in that particular instance would need to pass strict scrutiny.

In *Shuttlesworth v. City of Birmingham* (1969), the Court held the statute unconstitutional on its face. If the interpretation later given it by the Alabama Supreme Court had been done before the application of it to Shuttlesworth and if the regulation had still been applied to deny Shuttlesworth the permit to march, then the ordinance as interpreted would be treated as facially acceptable, but as applied it would have been unconstitutional.

#### 17.3.4.1 HYPOTHETICALS: FACIAL OR AS-APPLIED REGULATION

Which of the following are as-applied problems and which present constitutional problems on the face of the law?

8. The state law prohibits all speech designed to cause racial hatred.
9. A state prohibits speech that is likely to cause a breach of the peace.
10. When speaking to a Muslim congregation, the speaker accuses all Muslims of being radical terrorists bent on destroying all other religions. The speaker is arrested and charged with violating a law banning hate speech.
11. Same facts as in c, but now the speaker is arrested under the law prohibiting a breach of the peace, which, with respect to speech, has been interpreted to mean speech reasonably calculated to incite others to commit violent acts. (You should assume for now that such an interpretation would make the law constitutional.)

### 17.3.5 Content, Conduct, and Expressive Content

People communicate not just by the written or spoken word, but also by conduct. Mere conduct is not protected under freedom of expression law, but expressive conduct is. Expressive conduct is conduct intended to convey a message. Dance is a common example, as would be pantomime and other conduct that expresses or conveys an idea or an emotion.

If someone communicates using expressive conduct, then the standard of review turns on whether the governmental regulation targets the conduct or the message. If the government targets the message, then the free speech strict scrutiny standard must be met. But if the government targets the expressive *conduct* without regard to the *content* of the message, that is, without regard to what is being expressed, then only the lesser standard of review used in time, place, and manner regulation needs to be satisfied. If the government targets conduct that does not have an expressive component to it at all, then normal standards of review apply, most particularly deferential rational basis. For example, jaywalking can be made illegal using only the rational basis standard of review: Jaywalking is not expression; no message is sent by the mere act of jaywalking.

A leading case on the conduct/content distinction is *Cohen v. California*, 403 U.S. 15 (1971). *Cohen* (1971) is factually easy, and the holding is clear, but the exact basis for the decision is harder to tease out. *Cohen* (1971) was a five to four decision holding that a person wearing a jacket with the phrase “Fuck the Draft” printed on the back could not be prosecuted under a general disturbing-the-peace statute for wearing the jacket in a courthouse corridor. Advocacy against the draft is protected speech under by the First Amendment. The Court held that the speech was protected speech and the government action did not pass strict scrutiny.

The case first turned on whether these words were fighting words (see below in section 17.4.1.2 for an exploration of the concept of “fighting words”). If the expression constituted fighting words, the speech was not protected speech and could be regulated under a rational basis standard. The Court held that the lack of a particularized audience who could be expected to retaliate meant that the words were not fighting words and so were protected speech.

The Court then had to consider whether the speech was pure speech or expressive conduct. The Court considered *Cohen* (1971) *not* as an expressive conduct case, but rather as a pure message case with the consequences that the content of the message is fully protected and that expressing the message is fully protected. That the government was targeting the message was clear from the fact that no other messages printed on clothing were restricted.

In the portion of the *Cohen* case included below the Court focuses mostly on the distinction between content and conduct, message and actions. A very limited portion of the fighting words portion of the case is retained and should be kept in mind when we study fighting words later.

When studying the freedom of expression by reading cases, it is very difficult to isolate discrete topics. Chopping cases into small pieces, putting each piece in the separate subsection in which it most properly belongs topically, is often not the better option for this course because such atomization distracts from learning important interrelationships.

*Cohen v. California*

403 U.S. 15 (1971)

**Mr. Justice Harlan delivered the opinion of the Court.**

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

Appellant Paul Robert Cohen was convicted in the Los Angeles Municipal Court of violating that part of California Penal Code §415 which prohibits “maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct. . . .” He was given 30 days’ imprisonment. The facts upon which his conviction rests are detailed in the opinion of the Court of Appeal of California, Second Appellate District, as follows:

On April 26, 1968, the defendant was observed in the Los Angeles County Courthouse in the corridor outside of division 20 of the municipal court wearing a jacket bearing the words ‘Fuck the Draft’ which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.

The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest.

1 Cal. App. 3d 94, 97-98, 81 Cal. Rptr. 503, 505 (1969).

In affirming the conviction, the Court of Appeal held that “offensive conduct” means “behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace,” and that the State had proved this element because, on the facts of this case,

[i]t was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forcibly remove his jacket.

1 Cal. App. 3d at 99-100, 81 Cal. Rptr. at 506. The California Supreme Court declined review by a divided vote. We brought the case here, postponing the consideration of the question of our jurisdiction over this appeal to a hearing of the case on the merits. We now reverse.

...

I

In order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does *not* present.

The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public. The only “conduct” which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon “speech,” not upon any separately identifiable

conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message, and hence arguably could be regulated without effectively repressing Cohen's ability to express himself. Further, the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected.

Appellant's conviction, then, rests squarely upon his exercise of the "freedom of speech" protected from arbitrary governmental interference by the Constitution, and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. This does not end the inquiry, of course, for the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses. In this vein, too, however, we think it important to note that several issues typically associated with such problems are not presented here.

...

This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not "directed to the person of the hearer." *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940). No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. There is, as noted above, no showing that anyone who saw Cohen was, in fact, violently aroused, or that appellant intended such a result.

Finally, in arguments before this Court, much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, we have at the same time consistently stressed that "we are often captives outside the sanctuary of the home and subject to objectionable speech." . . . The ability of

government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home. Given the subtlety and complexity of the factors involved, if Cohen's "speech" was otherwise entitled to constitutional protection, we do not think the fact that some unwilling "listeners" in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact, object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all "offensive conduct" that disturbs "any neighborhood or person."

## II

Against this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.

The rationale of the California court is plainly untenable. At most, it reflects an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, at 508 (1969). We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that, to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves.

...

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

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why “[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats’ poems or Donne’s sermons,” . . . and why, “so long as the means are peaceful, the communication need not meet standards of acceptability” . . .

Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man’s vulgarity is another’s lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, as Mr. Justice Frankfurter has said,

[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism, but the freedom to speak foolishly and without moderation.

. . .

Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. Because that is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be Reversed.

**Mr. Justice Blackmun, with whom Chief Justice Burger and Mr. Justice Black join, dissenting.**

I dissent, and I do so for two reasons:

1. Cohen's absurd and immature antic, in my view, was mainly conduct, and little speech. The California Court of Appeal appears so to have described it . . . and I cannot characterize it otherwise. Further, the case appears to me to be well within the sphere of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) [on fighting words]. As a consequence, this Court's agonizing over First Amendment values seems misplaced and unnecessary.

...

**Mr. Justice White concurs in Paragraph 2 of Mr. Justice Blackmun's dissenting opinion.**

### 17.3.5.1 After *Cohen* (1971)

In *Cohen*, the Court clearly treats the words on the jacket as expression for freedom of expression purposes. The conduct of wearing the jacket with the message on it was correctly deemed not to be the target of the state's regulation. Thus freedom of expression strict scrutiny would apply, and the state could not meet that standard. But note that the Court does not actually apply strict scrutiny: It merely says the general rule that governmental regulation of content is not allowed controls the result because none of the categorical exceptions apply. That is not quite how the freedom of expression law is applied today.

The Court explained why it rejected the idea that the government can regulate speech on the basis that it contains offensive language or that the message itself is offensive. The Court also engaged in an extended rhapsody on the importance of and values protected by the right of freedom of expression. Those values still underlie most freedom of expression cases and are recited in one form or another repeatedly, including in *Reed* (2015) above.

The statute at issue was a statewide statute. Could a courthouse promulgate rules of decorum as to language and dress that would prohibit such a jacket from being worn in the courthouse foyer and hallways? Would such a restriction be a time, place, and manner restriction or a content based restriction?

### 17.3.5.2 The Expressive Conduct Standard of Review

*Cohen* (1971) is a pure expression case and illustrates the distinction between expression and conduct: California was punishing Cohen only for the message, not for the conduct of wearing a jacket. In some cases, the conduct cannot be so easily separated from the content. In other cases, the two can be separated, but the state targets not the language or expression or message per se, but rather targets only the conduct. A rule that said, “no jackets may be worn in the courthouse” would be one targeting only the conduct because it would apply regardless of any message printed on the jacket.

Expressive conduct is protected. If the state targets the message, then strict scrutiny applies or the message must itself be the sort of content that is not protected, for example, fighting words or obscenity. But if the state targets only the conduct part of the expressive conduct with the intention of only regulating the conduct, then it may do so using the applicable standard of review as described below, which is almost if not exactly equivalent to the time, place, and manner standard of review. Cross burning is conduct, but it is always accompanied by a message of either solidarity (for example, at a hidden Ku Klux Klan rally), or intimidation (on a target’s yard), or both (at a public or publicized KKK rally). The government can ban all open fires (conduct), but it cannot ban a message of hatred (content) toward a particular group expressed by the conduct of burning a symbol (expressive conduct) unless the governmental regulation passes the applicable standard of review.

The leading case on regulating expressive conduct is *United States v. O’Brien*, 391 U.S. 367 (1968), in which the Court held that burning a draft registration card in protest of the U.S. participation in the Vietnam War and of the draft itself (the expressive purpose of the conduct) was subject not to First Amendment strict scrutiny, as ordinary political expression would be, but rather to a test akin to the standard time, place, and manner test. When a law prohibits conduct that combines expressive and nonexpressive aspects (burning a card is itself just conduct; burning it with the intent to send a message is expressive), “a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” *Id.* at 376.

In *Clark v. CCNV*, 468 U.S. 288 (1984), the Court slightly modified the four-factor test from *United States v. O’Brien* (1968) holding that the revised test in *Clark* is “in the last analysis . . . little, if any, different from the standard applied to time, place, or manner restrictions.” Thus, after *Clark v. CCNV*, the standard of review for regulating expressive conduct is that the regulation:

1. Addresses conduct that is within the power of the government to regulate;
2. Is content neutral and is unrelated to the expression involved;
3. Is in furtherance of a substantial governmental interest;

4. Is narrowly tailored to achieve that interest; and
5. Leaves open reasonable alternative channels to communicate the information.

*Clark v. CCNV*, 468 U.S. 288, 293 (1984).

*Clark v. CCNV* (1984) involved the Washington, D.C., nongovernmental organization (NGO) called Community for Creative Non-Violence's (CCNV), which conducted various social justice initiatives. One of them was an ongoing demonstration in Lafayette Park, located immediately across from the White House, to dramatize the plight of the homeless. The park is administered by the National Park Service, which prohibited sleeping or camping but permitted demonstrations, placards, and the like in that location. The Court upheld the no-sleeping restriction ruling that it was within the power of the government to prohibit camping and sleeping on government property without a permit and, in the case of this park, prohibiting those activities entirely; that the purpose of the regulation was unrelated to the content of the message; that the interest of the government in protecting the parks from overuse and property damage was substantial; that the regulations were narrowly tailored insofar as they addressed conduct only and the Court deferred to the judgment of the park service on the means to be used to serve the governmental interest; and there were ample means to convey the message of the plight of the homeless without sleeping in the park. The demonstrations were allowed to continue, provided they did not include sleeping in the park.

The third core expressive conduct case involves flag burning. In *Texas v. Johnson*, 491 U.S. 397 (1989), the Court, in a split five to four decision, invalidated a state anti-flag desecration law that prohibited burning the U.S. flag for protest purposes. This was clearly content-based regulation because one of the recognized means of disposing of a worn-out flag properly is, in fact, burning it. Thus the anti-desecration statute was inevitably targeting the content of the expression, that is, the message of protest, not the conduct (burning the flag) itself.

The question was, according to the state of Texas, whether Texas's purpose in banning flag desecration was sufficient to uphold the statute where that governmental purpose was unrelated to suppressing the expressive purpose of those charged under the statute. The purpose of the statute, according to Texas, was to protect its interests in avoiding breaches of the peace that can result from the high emotional attachment to the flag itself as a symbol and in supporting a venerated symbol of the nation. The point of the statute was not to stop the content or viewpoint of the anti-government speech that burning the flag represented. The Court rejected the breach of the peace justification because Texas already had a breach of the peace law and the application of the *Brandenburg v. Ohio*, 395 U.S. 444 (1969), imminence requirement (see below in section 17.4.1 on incitement to illegal activity as not protected) was not met on the facts of this case: No showing was made of any likelihood of a breach of the peace from the burning at issue.

The Court found that the second interest asserted by the state, "preserving the flag as a symbol of nationhood and national unity," *Texas v. Johnson* at 407, was "related to the

Note how critical analogical reasoning is in these cases. Application of the standard of review is the starting point, but analogizing and distinguishing similar cases is a feature of all of these cases.

suppression of expression,” thus taking the case out of the *O’Brien/Clark* test altogether and putting it under *Cohen* (1971). “Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values.” Strict scrutiny must therefore be applied. *Texas* at 412. Supporting the flag as a symbol of nationhood and national unity were not sufficiently compelling reasons to prevent it from being burned to convey a message.

A federal law attempting to ban desecration of the flag fell for the same reasons. *United States v. Eichman*, 496 U.S. 310 (1990).

### 17.3.5.3 HYPOTHETICALS: CONTENT, CONDUCT, OR EXPRESSIVE CONDUCT

Consider which of the following situations involve content regulation and which involve conduct regulation.

12. The state law prohibits jay walking.
13. A city ordinance prohibits public nudity.
14. A city ordinance prohibits dancing.
15. A city ordinance prohibits dancing except when done for religious purposes.
16. A city ordinance imposes a dress code for anyone entering the courts and for all official public buildings, including city hall.

### 17.3.5.4 EXAM TIPS: EXPRESSIVE CONDUCT

The conduct/content distinction is an easy one to test simply by having someone intending to convey a message through conduct. Whenever someone is sending a message or communicating an idea or emotion through conduct, several layers of analysis should be conducted. If the government is targeting the message itself as in the flag burning cases and as in *Cohen* (1971) (the words “Fuck the Draft” on a jacket), then strict scrutiny is applied if the message is protected speech. If the message is not protected speech such as obscenity, then the standard of review for the type of speech at issue is applied.

If the government is targeting only the conduct without regard to the message, and if the conduct is intended to convey a message thereby making it expressive conduct, then the intermediate standard of review of time, place, and manner as articulated in *Clark v. CCNV* (1984) is applied.

If the government is targeting only conduct and no message is intended to be conveyed through the conduct, then deferential rational basis scrutiny is applied. Not all conduct is expressive.

### 17.3.6 Public Forum Doctrine

Certain public places are open to people for public speaking in general; they are called public forums. Publicly owned sidewalks and parks are generally such places. While the government can impose reasonable time, place, and manner restrictions on the use of public forums, it cannot restrict the content or the message or viewpoint to be expressed of fully protected speech in a general or traditional public forum unless the content-based regulation can pass strict scrutiny.

Over time the public forum doctrine has been refined. For example, the doctrine has been extended beyond physical places to certain mediums of communication such as state university supported newsletters or bulletin boards. See, e.g., *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); and *Christian Legal Society v. Martinez*, 561 U.S. 310 (2010). Concomitantly with expanding the doctrine to such venues, the Court has developed the concept of a designated or limited public forum, and has recognized that some government-owned spaces are off limits for freedom of expression purposes. For example, the area in front of a jail is not a public forum for speech purposes and is deemed off limits for freedom of expression. *Adderley v. Florida*, 385 U.S. 39 (1966). Each of the three types of spaces has its own rules regarding freedom of expression.

When the government opens up an area or a service to the public, the government can designate the proper scope of use of that forum both with respect to content and with respect to who can use it, although it cannot limit access based on the viewpoint of the speaker. Thus a state university can constitutionally open its designated spaces or services (for example, an electronically published calendar of events) only to recognized student organizations as opposed to the public in general. See *Widmar v. Vincent*, 454 U.S. 263 (1981); *Christian Legal Society v. Martinez*, 561 U.S. 310 (2010). And it can open its designated spaces or services only to some types of content (for example, university-related events but not general political rallies). See *Christian Legal Society v. Martinez*, 561 U.S. 310 (2010). In *Christian Legal Society v. Martinez* (2010), the Court held that the University of California Hastings Law School could require all student organizations to adopt an all-comers nondiscrimination policy to become recognized student organization and that the school could limit access to school-sponsored facilities, such as rooms, newspapers, electronic bulletin boards, and so on, only to recognized student organizations. The facilities to which only recognized student organizations were given access were considered limited designated public forums.

Applying this doctrine back to *Cohen v. California*, 403 U.S. 15 (1971) (the “Fuck the Draft” case), the state could probably not remove public corridors in a courthouse from being a general public forum during the hours they are open, but it could certainly impose restrictions on the use consistent with time, place, and manner test. In *Clark v. CCNV* (1984), the public park was a public forum for all purposes, but it too was subject to reasonable time, place, and manner restrictions, although not content or viewpoint restrictions. Thus the park service could prohibit camping and sleeping in the park, but it could not prohibit people from making political statements there.

Matters are never easy in freedom of expression. For example, a sidewalk is a general, unrestricted public forum, and people have the right to speak and to assemble there,

subject to limits primarily concerned with not obstructing others using the walkways. Nonetheless, when protesters assembled on the public sidewalk in front of a public official's private home in a residential neighborhood to picket against a position taken by that official, the government was allowed to restrict that action. *Frisby v. Schultz*, 487 U.S. 474 (1988). In *Frisby*, the Court by a six to three vote held that the state interest in protecting the privacy of its residents, both the target and his family and neighbors, was sufficient to prohibit such assembly and speech even though it was on a public street and walkway.

On the other hand, the Court rejected the use of buffer zones around abortion clinics as not being narrowly tailored to accomplishing the state's interest in ensuring ingress and egress from the building. Rather than creating buffer zones, the state could simply ban obstruction of ingress and egress directly by making obstruction of access itself illegal. *McCullen v. Coakley*, 573 U.S. \_\_\_ (2014).

The public forum doctrine has two other aspects to be considered here: The company town and privately-owned shopping malls. In some rural areas, particularly in mining areas, companies might own all of the property and build a town, complete with streets, post office, sidewalks, and so on. Eventually the Supreme Court considered the question of whether the First Amendment protections (incorporated through the Fourteenth Amendment to apply to state and local governments) would apply to these company-owned towns. In *Marsh v. Alabama*, 326 U.S. 501 (1946), the Court held that the state trespassing law could not be used by the company to ban First Amendment activities on the town's sidewalk, even though all of the property was in fact privately owned by the company.

The same rules do not apply to shopping malls, even though in many communities, especially suburban ones, the "downtown" and the public spaces people gather for entertainment and shopping are in fact shopping malls. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Hudgens v. NLRB*, 424 U.S. 507 (1976). However, states are free to provide greater rights than those granted under the federal Constitution, and when California required private shopping malls that are generally open to the public to allow patrons to exercise their rights to freedom of expression, the Supreme Court upheld this state-level right. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

The designated or limited public forum concept will be developed more fully as it arises in cases throughout this chapter and in sections 19.5 and 20.4.7 of later chapters.

### 17.3.7 Vagueness and Overbreadth Doctrines

Two additional doctrines for safeguarding protected speech under which governmental regulation of speech can be ruled unconstitutional are vagueness and overbreadth. A government regulation is too vague either when

1. The speech it limits cannot be determined clearly; or
2. The regulation leaves too much discretion in the officers or administrators applying it.

*United States v. Williams*, 553 U.S. 285, 304 (2008). A government regulation is overbroad when it limits not only the lawfully targeted unprotected speech but also limits too much protected speech. Underlying both of these doctrines is the principle that regulations that might chill protected speech are disfavored.

### 17.3.7.1 Vagueness

Void for vagueness is primarily a due process concept. Any law that does not give proper notice of what a person must do to conform their behavior to the law can be ruled void for being too vague. This rule has the most traction in criminal law and in regulations of speech. If a law would impose a punishment on a person for saying the wrong things, that law must clearly delineate what it is targeting. If a person cannot tell what the contours of the regulation are, then it is vague.

A classic vagueness case is more of a First Amendment right of association case or even right of assembly case than a free speech case, but it best illustrates the nature of vagueness. In *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), the city ordinance made it

unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings.

The tests for unconstitutional vagueness are whether the law “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *United States v. Williams*, 553 U.S. 285, 304 (2008). The majority of the Court in *Coates* (1971) held that because “annoying conduct” means different things to different people, “men of common intelligence must necessarily guess at its meaning,” and the ordinance was therefore unconstitutionally vague. The Court also noted that the ordinance was ripe for discriminatory enforcement: What would be annoying to a particular police officer might well not be annoying to another and could be culturally linked. *Coates*, at 615-16.

While some laws are void for vagueness outright, for example, “annoying behavior” or “unlawful assembly” laws, other laws are intended to hit a particular, well-defined core target, but sometimes the edges of that target are so unclear that a person cannot tell what is proscribed and what is permitted. This is the perhaps the more common sort of vagueness problem: fuzziness at the edges. This sort of vagueness raises some procedural concerns as well. For now it is sufficient to note that special standing rules exist for freedom of expression and that vagueness-at-the-edges has its own special subset of those standing rules.

### 17.3.7.2 Overbreadth

A law limiting some speech or conduct that can constitutionally be limited may nonetheless be unconstitutional if at the same time it limits speech that cannot constitutionally be so limited. Governments can constitutionally prohibit false advertising of goods for sale, but they cannot make all false statements illegal. *United States v. Alvarez*, 567 U.S. \_\_\_ (2012). Thus a law that read: “Making a false statement of a knowable fact is illegal,” would be unconstitutional. That law would capture some proscribable statements (false advertising), but it would extend far into areas of protected speech that the government cannot reach, and it would therefore be unconstitutionally overly broad. Note that the hypothetical law is not vague: Either the statement of fact can be known to be false or it cannot; it is merely overbroad.

A law can be both vague and overbroad. For example, a law prohibiting loitering is vague insofar as one cannot tell what conduct is actually loitering as opposed to gathering to talk with friends on a street corner or waiting for the bus. It can also be overly broad because some forms of loitering may be constitutionally proscribed (for example, sleeping on park benches overnight), while standing in a public park advocating for a political issue or candidate cannot be (subject to reasonable time, place, and manner restrictions).

A law can be challenged under the First Amendment as being overbroad on its face. That is, the law as written is substantially overbroad and can be ruled unconstitutional even if it is not applied to protected speech. A law will be unconstitutional under the overbreadth doctrine if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008).

Perhaps the most memorable and absurd example of overbreadth is a case that reached the Supreme Court in 1987. Los Angeles passed a law that prohibited all “First Amendment speech” at the Los Angeles airport (LAX). *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). The Court reasoned as follows:

On its face, the resolution at issue in this case reaches the universe of expressive activity, and, by prohibiting all protected expression, purports to create a virtual “First Amendment Free Zone” at LAX. . . . The resolution therefore does not merely reach the activity of respondents at LAX; it prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing. Under such a sweeping ban, virtually every individual who enters LAX may be found to violate the resolution by engaging in some “First Amendment activit[y].” We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum, because no conceivable governmental interest would justify such an absolute prohibition of speech.

*Id.* at 474.

The Board of Airport Commissioners tried to argue that it would limit the application to non-airport-related activities, to which the Court responded:

The petitioners suggest that the resolution is not substantially overbroad, because it is intended to reach only expressive activity unrelated to airport-related purposes. Such a limiting construction, however, is of little assistance in substantially reducing the overbreadth of the resolution. Much nondisruptive speech—such as the wearing of a T-shirt or button that contains a political message—may not be “airport-related,” but is still protected speech even in a nonpublic forum.

One must assume that in drafting the ordinance the commissioners did not have competent legal advice or, if they did, that they chose to ignore it. This subjective “we know what we mean” approach to drafting is all too common.

*Id.* at 476. Because the ordinance was overly broad and was not susceptible to a limiting construction that would save it, it was held unconstitutional.

### 17.3.7.3 HYPOTHETICALS: VAGUENESS AND OVERBREADTH

Are the following laws or regulations unconstitutionally overly broad, unconstitutionally vague, both, or neither?

17. Loud music in residential neighbors is prohibited after 10:00 p.m.
18. Any person maintaining a public nuisance can be required to abate it by officials of the jurisdiction in which the public nuisance exists.
19. Under the city's civility policy, all offensive speech is banned.
20. The city council adopted an ordinance requiring all sexually explicit material to be removed from the public library.
21. The city council adopted an ordinance requiring all computers provided for public use in the public libraries with access to the Internet to have filters preventing access to online pornography.
22. Assume the same situation as e, but now the ordinance includes a detailed definition of pornography.

### 17.3.8 EXAM TIPS: PROTECTED SPEECH

Most freedom of expression exam issues probably arise from one of the categories of speech that receive lesser protection or no protection. Nonetheless, many issues can be tested in the protected speech context. Time, place, and manner restriction problems can test your knowledge of the content/non-content regulation distinction as well as your knowledge of the public forum doctrine. Because such problems are often fact-specific, they also test your ability to do factual analysis, rule-based reasoning, and analogical reasoning. One problem can test multiple facets of freedom of expression as well as crossing boundaries into freedom of association and freedom of religion, among others.

Hate speech (see below in the next section) continues to be a fruitful area for testing because (1) for the most part, hate speech is protected speech; (2) it blends into other areas, like fighting words; (3) the line between time, place and manner regulation and content regulation can be difficult to discern; (4) the public forum doctrine is often in play; and (5) vagueness and overbreadth issues are often lurking around.

Vagueness and overbreadth doctrines can apply to all types expression, not only to protected speech, so watch for them in any freedom of expression exam question.

## 17.4 THE CATEGORICAL APPROACH TO LESSER PROTECTED AND UNPROTECTED SPEECH

The rules discussed above relate to governmental regulation of protected speech. The government has far more latitude to regulate types of speech the Court has deemed either unprotected or deserving of less protection than fully protected speech. This part of the chapter considers the categories of speech identified by the Court as not fully

protected. For each type of speech, the legal test for determining whether the target speech fits in the particular category is stated, as is the standard of review applicable to that type of speech. For most categories, the leading case or cases are included, although for some categories only explanations and brief examples are used.

Some categories have few cases, so the treatment below, although brief, is relatively complete, for example, defamation. Other categories, obscenity and pornography, for example, are well developed with many cases, and the presentation is briefer, focusing on core principles. Fighting words, inducement to break the law, hate speech, and offensive speech are covered more generally. Settings in which the government can broadly regulate the speech, such as true threats and fighting words, are contrasted with others such as hate speech and adult entertainment for which the Court has refused to allow the government much latitude in regulating the speech.

This section focuses heavily on doctrine at the expense of history and some deeper issues. Policy, principle, and purposes are not eschewed, but they are not the main focus. Nor are the reasons for and against the Court's categorizing approach explored. (Such topics are the focus of in-depth study in upper-level courses on freedom of expression.) Nonetheless, you should expect some classroom discussion around those deeper issues.

To simplify matters somewhat, the categories are presented in clusters:

1. Incitement to illegal activity, fighting words, true threats, hate speech, and offensive speech generally
2. Defamation, intentional infliction of emotional distress, and privacy (and the regulation of speech through tort law generally)
3. Obscenity and pornography
4. Commercial speech
5. Special matters including campaign financing, criminal speech, fraud, and copyright.

### **17.4.1 The Cluster of Incitement to Illegal Activity, Fighting Words, True Threats, Hate Speech, and Offensive Speech**

A rights revolution occurred in the middle of the twentieth century. Internationally, human rights of citizens within countries became a proper subject of international concern following the end of World War II in 1945. In the United States the Supreme Court began to use the Bill of Rights and the Fourteenth Amendment to limit what state and local governments could do to state residents. The 1950s and 1960s saw the development of a variety of criminal rights, including the adoption of the *Miranda* warning. *Miranda v. Arizona*, 384 U.S. 436 (1966). Equal protection became a force with the rejection of the separate-but-equal rule of *Plessy v. Ferguson*, 163 U.S. 537 (1896), when the Court unanimously decided *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954).

Similar solicitude toward individual rights arose in freedom of religion and freedom of expression. Interestingly, and perhaps not coincidentally, some of the major

developments in freedom of expression arose out of cases that concern race in one respect or another. The substance of the law of freedom of expression is color blind to the point of not recognizing hate speech as a type of speech subject to lesser protection than other sorts of protected speech. Nonetheless, race issues during the Civil Rights Era played a role in the development of freedom of expression law, at least insofar as cases arose involving things like KKK rallies, *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and the civil rights struggle in Alabama, *Sullivan v. New York Times*, 376 U.S. 254 (1964).

### 17.4.1.1 Incitement to Illegal Activity

The historical development of the freedom of expression standards with respect to people speaking out against the government is a fascinating subject, but one that must be almost entirely omitted from this coursebook, which considers constitutional law more broadly. A brief summary of some of the earlier cases, followed by a jump to the leading case on the ability of the government to regulate incitement of others to commit illegal acts, *Brandenburg v. Ohio*, 395 U.S. 444 (1969), sharpens the focus on the legal tests used and why this type of speech is in the nonprotected category.

Prior to *Brandenburg* (1969), the Court had often allowed people to be prosecuted for advocating against the United States government. In the 1910s, union organizers were convicted for advocating that people resist the draft and U.S. participation in World War I. *Schenck v. United States*, 249 U.S. 47 (1919). A number of so-called “anti-syndicalism” statutes were enacted in states under which advocating the overthrow of the government or of the capitalist system was criminalized, and the Court upheld these laws. See *Whitney v. California*, 274 U.S. 357 (1927).

With the rise of communism overseas after World War I (most notably through the Russian Revolution, which deposed the tsar and installed the Bolshevik communist government under Lenin in 1917), some Americans bought into communism as a possible alternative to the inequalities brought about by laissez faire capitalism. Those who were charged were often convicted, and their convictions were upheld on the grounds that the government was not required to wait until the last possible moment to defend itself. E.g., *Dennis v. United States*, 341 U.S. 494 (1951).

These cases gave birth to what came to be known as the “clear and present danger test.” “Clear and present danger” is the descriptive name of the test; it is not the test itself. Indeed, although it is often still called the “clear and present danger test,” the term is misleading under current law. The current test is that developed in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

In *Brandenburg* (1969), the state of Ohio used its anti-syndicalism statute to prosecute an Ohio leader of a Ku Klux Klan group. The question before the Court was whether the racial separation and racial violence against blacks advocated by the KKK was protected speech or was constitutionally unprotected because it constituted incitement to illegal action. The Court in *Brandenburg* (1969) adopted new language calling the test the “imminent lawless action test” and articulated three elements:

1. Intent to incite illegal action;
2. Imminence of the illegal action; and
3. Likelihood of actual incitement.

The *Brandenburg* (1969) Court held that

the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

*Brandenburg v. Ohio*, 295 U.S. 444, 447 (1969). After *Brandenburg* (1969) pure advocacy of *any* position is constitutionally protected. Only when the advocacy crosses over to inciting imminent breaking of the law can the government proscribe it. Thus one is free to advocate the overthrow of the United States government by violent means without the government being able to proscribe it. But if a person advocates the violent overthrow of the government and immediately incites a mob to violence in service of that end, that person can still be convicted.

### *Brandenburg v. Ohio*

395 U.S. 444 (1969)

**Per curiam.**

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for “advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” and for

voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.

Ohio Rev. Code Ann. §2923.13. He was fined \$1,000 and sentenced to one to 10 years’ imprisonment. The appellant challenged the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution. . . .

The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan “rally” to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

The prosecution’s case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the

film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews. Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio, Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.

We are marching on Congress July the Fourth, four hundred thousand strong. From there, we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.

The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of “revengeance” was omitted, and one sentence was added: “Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel.” Though some of the figures in the films carried weapons, the speaker did not.

The Ohio Criminal Syndicalism Statute was enacted in 1919. . . . In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, . . . the text of which is quite similar to that of the laws of Ohio. *Whitney v. California*, 274 U.S. 357 (1927). The Court upheld the statute on the ground that, without more, “advocating” violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. . . . But *Whitney* has been thoroughly discredited by later decisions. See *Dennis v. United States*, 341 U.S. 494, 507 (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in *Noto v. United States*, 367 U.S. 290, 297-298 (1961),

the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action.

. . . A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. . . .

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who “advocate or teach the duty, necessity, or propriety” of violence “as a means of accomplishing industrial or political reform”; or

who publish or circulate or display any book or paper containing such advocacy; or who “justify” the commission of violent acts “with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism”; or who “voluntarily assemble” with a group formed “to teach or advocate the doctrines of criminal syndicalism.” Neither the indictment nor the trial judge’s instructions to the jury in any way refined the statute’s bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney v. California*, *supra*, cannot be supported, and that decision is therefore overruled.

Reversed.

**Concurring opinions.** [Omitted.]

#### 17.4.1.2 Fighting Words

*Brandenburg v. Ohio*, 395 U.S. 444 (1969), remains the leading case for incitement to illegal activity. Note again the setting in which incitement exception applies:

1. The government must be regulating something it has the power to regulate (assault, riots, arson, and so on), and
2. The person must be inciting others to violate the law against a third party, including the government.

If those two predicate conditions are met, then the test for whether the words qualify as incitement to illegal activity is applied. The elements of the test for whether speech would qualify as incitement can be usefully truncated to the labels of

1. Intent to incite
2. Imminence
3. Likelihood.

In contrast to the incitement to illegal action category, the fighting words category focuses primarily not on inciting others to break the law against third parties, but rather on whether the particular expression is likely to provoke someone to attack the person speaking because of what was said. Incitement essentially wants others to “storm the barricades,” while fighting words essentially insult someone in such a way that it would be likely to spark physical retaliation. One can easily enough imagine some words that would fall into both categories, depending on the makeup of the audience.

The primary legal issue in a fighting words case is whether the words meet the test of being fighting words. If they do, the First Amendment provides no shelter against government regulation rationally related to serving a legitimate end such as keeping

the peace. In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the test articulated by the Court was that fighting words are “those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky* has not been overruled, but *Cohen v. California*, 403 U.S. 15 (1971) (“Fuck the Draft”) (included above to illustrate the distinction between conduct and content), and the hate speech cases, for example, *Virginia v. Black*, 538 U.S. 343 (2003) (cross burning) (included below in the hate speech section), may limit its scope significantly. The modern trend seems to require people to be less thin-skinned about speech they find offensive.

Vagueness and overbreadth problems often arise in a fighting words statute: How would one write a statute that gives notice to people as to what statements are fighting words without including many examples of statements that would be proscribed and those that would not? How would the police or others enforce a “fighting words” statute without encountering the problem of essentially unbridled discretion in determining what constitutes fighting words, thus running afoul of the other prong of the vagueness test?

Now consider hate speech. Hate speech can incite violence against others and can spark the urge to retaliate physically against the speaker, but if the particular hate speech does not rise to either of those recognized exceptions to protected speech, it is treated as protected speech. As will be discussed in connection with hate speech, the international standards are quite different and indeed require countries to ban hate speech in certain circumstances. International Covenant on Civil and Political Rights (ICCPR) Art. 20.

As you read through these cases consider what sorts of statements spoken today would rise to the level of fighting words and whether both fighting words and incitement are still viable categories of unprotected speech. After *Brandenburg* (1969) (above) and *Cohen* (1971) (above, but consider it again after *Chaplinsky* (1942), below), it seems that only vestiges of both of these theories remain.

### *Chaplinsky v. New Hampshire*

315 U.S. 568 (1942)

#### **Mr. Justice Murphy delivered the opinion of the Court.**

Appellant, a member of the sect known as Jehovah’s Witnesses, was convicted in the municipal court of Rochester, New Hampshire, for violation of Chapter 378, §2, of the Public Laws of New Hampshire:

No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

The complaint charged that appellant,

with force and arms, in a certain public place in said city of Rochester, to-wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat the words following, addressed to

the complainant, that is to say, 'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists,' the same being offensive, derisive and annoying words and names.

...

There is no substantial dispute over the facts. Chaplinsky was distributing the literature of his sect on the streets of Rochester on a busy Saturday afternoon. Members of the local citizenry complained to the City Marshal, Bowering, that Chaplinsky was denouncing all religion as a "racket." Bowering told them that Chaplinsky was lawfully engaged, and then warned Chaplinsky that the crowd was getting restless. Some time later, a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station, but did not inform him that he was under arrest or that he was going to be arrested. On the way, they encountered Marshal Bowering, who had been advised that a riot was under way and was therefore hurrying to the scene. Bowering repeated his earlier warning to Chaplinsky, who then addressed to Bowering the words set forth in the complaint.

Chaplinsky's version of the affair was slightly different. He testified that, when he met Bowering, he asked him to arrest the ones responsible for the disturbance. In reply, Bowering cursed him and told him to come along. Appellant admitted that he said the words charged in the complaint, with the exception of the name of the Deity.

Over appellant's objection, the trial court excluded, as immaterial, testimony relating to appellant's mission "to preach the true facts of the Bible," his treatment at the hands of the crowd, and the alleged neglect of duty on the part of the police. This action was approved by the court below, which held that neither provocation nor the truth of the utterance would constitute a defense to the charge.

It is now clear that

Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.

*Lovell v. Griffin*, 303 U.S. 444, 450 [(1938)]. Freedom of worship is similarly sheltered. *Cantwell v. Connecticut*, 310 U.S. 296, 303 [(1940)].

Appellant assails the statute as a violation of all three freedoms, speech, press and worship, but only an attack on the basis of free speech is warranted. The spoken, not the written, word is involved. And we cannot conceive that cursing a public officer is the exercise of religion in any sense of the term. But even if the activities of the appellant which preceded the incident could be viewed as religious in character, and therefore entitled to the protection of the Fourteenth Amendment, they would not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute. We turn, therefore, to an examination of the statute itself.

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

*Cantwell v. Connecticut*, 310 U.S. 296, 309-310.

The state statute here challenged comes to us authoritatively construed by the highest court of New Hampshire. It has two provisions—the first relates to words or names addressed to another in a public place; the second refers to noises and exclamations. The court said:

The two provisions are distinct. One may stand separately from the other. Assuming, without holding, that the second were unconstitutional, the first could stand if constitutional.

We accept that construction of severability and limit our consideration to the first provision of the statute. On the authority of its earlier decisions, the state court declared that the statute’s purpose was to preserve the public peace, no words being “forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed.” It was further said:

The word ‘offensive’ is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which, by general consent, are ‘fighting words’ when said without a disarming smile. . . . [S]uch words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker—including ‘classical fighting words,’ words in current use less ‘classical’ but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.

We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly

drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. This conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law.

Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argument is unnecessary to demonstrate that the appellations "damned racketeer" and "damned Fascist" are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

The refusal of the state court to admit evidence of provocation and evidence bearing on the truth or falsity of the utterances is open to no Constitutional objection. Whether the facts sought to be proved by such evidence constitute a defense to the charge, or may be shown in mitigation, are questions for the state court to determine. Our function is fulfilled by a determination that the challenged statute, on its face and as applied, does not contravene the Fourteenth Amendment.

Affirmed.

### 17.4.1.3 CAUTION

Do not rely on the Court's listing of the various types of speech excluded from protection under freedom of expression because the law has changed significantly since 1942 with respect to unprotected or lesser-protected categories of speech, especially lewd, profane, and defamatory speech. Each of these are now at least partially protected in many circumstances.

### 17.4.1.4 True Threats, Criminal Speech, and Hate Speech

Certain speech can be criminalized when the speech itself is integral to criminal conduct, such as conspiracy to commit murder: Conspirators speaking about their plans is not protected. *See, e.g., Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949). It is a crime to threaten someone, and the speech used to convey the threat is not protected speech and can itself be criminalized. That is, not only is a threat itself subject to being criminalized (think of the horse's head scene from *The Godfather*), but so are the words used to convey that threat. The threat could be to kill a person; words that convey the threat could be as simple as "I'm going to kill you!" Conduct that conveys the threat could be pointing a gun at the target.

Hate speech, on the other hand, is protected speech unless it is also, in the context of the utterance, fighting words or a true threat. For example, burning a cross in the yard of an African American quite clearly conveys a threat and would be both hate speech and a true threat and therefore proscribable; it is proscribable not because it

is hate speech, but rather because it is a true threat. Burning a cross at a KKK rally is hate speech but would, at least sometimes, not be a true threat to an identifiable target. It is surely perceived as threatening by traditional targets of the KKK, and it is surely intended to send a message and to intimidate, but those aspects do not convert the protected hate speech into unprotected true threats. To meet the test of being a true threat for constitutional purposes, there must be a specific target, an intention to threaten that person, and the person targeted needs to know of the threat and feel threatened. An uncommunicated threat does not implicate the rationale for the exclusion from protection of threats and so a threat expressed to a third party and not communicated to the target cannot be regulated as a true threat until the requisite communication to the target takes place.

At present the law is this: Fighting words and true threats are not protected speech. Hate speech is protected speech. Government cannot target hate speech per se by banning it or otherwise regulating it directly.

As you are no doubt aware, the popular press regularly speaks of certain crimes as “hate crimes,” and indeed crime statistics often include a category for hate crimes. Hate crimes are actions that would otherwise be crimes but that are done with a motivation based on a characteristic of the target that the criminal “hates,” such as ethnicity, race, religion, immigrant status, or sexual identity. Even though hate speech is protected, the motivation for committing a particular crime can affect the severity of the punishment for the crime. Thus the government can use the speaker’s animus against a target group to enhance penalties for actions that would otherwise be a crime regardless of a motive of prejudice or hatred. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). For example, assault can be criminalized; assault done because someone is homosexual can be subjected to a heavier sentence than ordinary assaults.

Two of the most important cases in this area arise from cross burnings: *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), and *Virginia v. Black*, 538 U.S. 343 (2003). In *R.A.V.* (1992) a divided Court held that a St. Paul, Minnesota, ordinance criminalizing cross burning when motivated by race, creed, color, or religion was unconstitutional as content-based and indeed viewpoint-based discrimination.

In *Virginia v. Black*, 538 U.S. 343 (2003), a Virginia law targeting cross burnings was upheld by the Court because the statute banned cross burning when done with the specific intention to intimidate, without regard to the reason for the intimidation. That is, unlike in *R.A.V.* (1992), the conduct itself was criminalized if accompanied by a specific intent to intimidate. However, the Court held that the intimidation could not be proven merely from the cross burning itself. Consequently, the part of the Virginia statute stating that cross burning itself was prima facie evidence of an intention to intimidate was unconstitutional, although the prohibition of intimidation through cross burning was constitutional. The Court ruled that an anti-intimidation statute need not make all intimidation modes illegal and that the government could choose which ones to target (here, cross burning). When the expression is itself not protected speech, the government can choose to target some of it and not others: It need not target the entire area of unprotected speech, such as true threats, but rather it can target a subset of that type of speech. Here, the intimidation requirement placed the expression within the category of true threats, and so it was unprotected speech.

As you read *Virginia v. Black* (2003), please evaluate it under Article 20 of the International Covenant on Civil and Political Rights (ICCPR), one of the primary sources for international human rights law. Article 20 essentially requires countries to ban hate speech. It provides as follows:

### **ARTICLE 20**

1. Any propaganda for war shall be prohibited by law.  
Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Under international law a country can become a party to certain multilateral treaties even if the country does not agree to all of the provisions. The mechanism for indicating nonagreement is for the country to make a reservation against a particular provision. The full legal import of such reservations is something explored in courses on international law, including advanced courses on the law of treaties.

The United States ratified the ICCPR in 1992, but reserved against several provisions, including in particular Article 20, primarily on the grounds that provisions of Article 20 would be unconstitutional under the U.S. Constitution. Provisions of a treaty cannot, of course, supersede the Constitution. It should be obvious that the United States regularly engages in “propaganda for war” and certainly cannot outlaw someone advocating that the United States should go to war, both of which are things that Article 20 would prohibit.

Here we are concerned with the second paragraph of Article 20 concerning hate speech. Note that it does not ban all “advocacy of national, racial or religious hatred.” Such a ban would clearly violate the Constitution as currently interpreted. The provision instead limits its reach to advocacy of hatred that “constitutes incitement to discrimination, hostility or violence.” Could the United States, consistent with its prior cases, have interpreted the First Amendment such that that narrower category of hate speech is unprotected, like fighting words or incitement to violence generally? Could the Supreme Court have expanded the category of “incitement to violence” to include, when there is a specific motive of hatred toward a group, “incitement to discrimination [or] hostility”?

### ***Virginia v. Black***

538 U.S. 343 (2003)

#### **Justice O’Connor announced the judgment of the Court**

and delivered the opinion of the Court with respect to Parts I, II, and III, and an opinion with respect to Parts IV and V, in which Chief Justice Rehnquist, Justice Stevens, and Justice Breyer join.

In this case we consider whether the Commonwealth of Virginia’s statute banning cross burning with “an intent to intimidate a person or group of persons” violates the First Amendment. Va. Code Ann. §18.2-423 (1996). We conclude that while a State, consistent with the First Amendment, may ban cross

burning carried out with the intent to intimidate, the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional. . . .

I

Respondents Barry Black, Richard Elliott, and Jonathan O'Mara were convicted separately of violating Virginia's cross-burning statute, §18.2-423. That statute provides:

It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.

Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

On August 22, 1998, Barry Black led a Ku Klux Klan rally in Carroll County, Virginia. Twenty-five to thirty people attended this gathering, which occurred on private property with the permission of the owner, who was in attendance. The property was located on an open field just off Brushy Fork Road (State Highway 690) in Cana, Virginia.

When the sheriff of Carroll County learned that a Klan rally was occurring in his county, he went to observe it from the side of the road. . . .

. . .

When the sheriff observed the cross burning, he informed his deputy that they needed to "find out who's responsible and explain to them that they cannot do this in the State of Virginia." *Id.*, at 72. The sheriff then went down the driveway, entered the rally, and asked "who was responsible for burning the cross." *Id.*, at 74. Black responded, "I guess I am because I'm the head of the rally." . . .

Black was charged with burning a cross with the intent of intimidating a person or group of persons, in violation of §18.2-423. At his trial, the jury was instructed that "intent to intimidate means the motivation to intentionally put a person or a group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused rather than from some mere temperamental timidity of the victim." *Id.*, at 146. The trial court also instructed the jury that "the burning of a cross by itself is sufficient evidence from which you may infer the required intent." . . . When Black objected to this last instruction on First Amendment grounds, the prosecutor responded that the instruction was "taken straight out of the [Virginia] Model Instructions." *Id.*, at 134. The jury found Black guilty, and fined him \$2,500. The Court of Appeals of Virginia affirmed Black's conviction. . . .

On May 2, 1998, respondents Richard Elliott and Jonathan O'Mara, as well as a third individual, attempted to burn a cross on the yard of James Jubilee. Jubilee, an African American, was Elliott's next-door neighbor in Virginia Beach, Virginia. Four months prior to the incident, Jubilee and his family had moved from California to Virginia Beach. Before the cross burning, Jubilee spoke to

Elliott's mother to inquire about shots being fired from behind the Elliott home. Elliott's mother explained to Jubilee that her son shot firearms as a hobby, and that he used the backyard as a firing range.

On the night of May 2, respondents drove a truck onto Jubilee's property, planted a cross, and set it on fire. Their apparent motive was to "get back" at Jubilee for complaining about the shooting in the backyard. *Id.*, at 241. Respondents were not affiliated with the Klan. The next morning, as Jubilee was pulling his car out of the driveway, he noticed the partially burned cross approximately 20 feet from his house. After seeing the cross, Jubilee was "very nervous" because he "didn't know what would be the next phase," and because "a cross burned in your yard . . . tells you that it's just the first round." *Id.*, at 231.

Elliott and O'Mara were charged with attempted cross burning and conspiracy to commit cross burning. O'Mara pleaded guilty to both counts, reserving the right to challenge the constitutionality of the cross-burning statute. The judge sentenced O'Mara to 90 days in jail and fined him \$2,500. The judge also suspended 45 days of the sentence and \$1,000 of the fine.

At Elliott's trial, the judge originally ruled that the jury would be instructed "that the burning of a cross by itself is sufficient evidence from which you may infer the required intent." *Id.*, at 221-222. At trial, however, the court instructed the jury that the Commonwealth must prove that "the defendant intended to commit cross burning," that "the defendant did a direct act toward the commission of the cross burning," and that "the defendant had the intent of intimidating any person or group of persons." *Id.*, at 250. The court did not instruct the jury on the meaning of the word "intimidate," nor on the prima facie evidence provision of §18.2-423. The jury found Elliott guilty of attempted cross burning and acquitted him of conspiracy to commit cross burning. It sentenced Elliott to 90 days in jail and a \$2,500 fine. The Court of Appeals of Virginia affirmed the convictions of both Elliott and O'Mara. . . .

Each respondent appealed to the Supreme Court of Virginia. . . . The Supreme Court of Virginia . . . held that the statute is unconstitutional on its face. . . .

We granted certiorari. 535 U.S. 1094 (2002).

## II

Cross burning originated in the 14th century as a means for Scottish tribes to signal each other. See M. Newton & J. Newton, *The Ku Klux Klan: An Encyclopedia* 145 (1991). Sir Walter Scott used cross burnings for dramatic effect in *The Lady of the Lake*, where the burning cross signified both a summons and a call to arms. See W. Scott, *The Lady of the Lake*, canto third [(1810)]. Cross burning in this country, however, long ago became unmoored from its Scottish ancestry. Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan.

The first Ku Klux Klan began in Pulaski, Tennessee, in the spring of 1866. Although the Ku Klux Klan started as a social club, it soon changed into something far different. The Klan fought Reconstruction and the corresponding drive to allow freed blacks to participate in the political process.

Soon the Klan imposed “a veritable reign of terror” throughout the South. S. Kennedy, *Southern Exposure* 31 (1991) (hereinafter Kennedy). The Klan employed tactics such as whipping, threatening to burn people at the stake, and murder. W. Wade, *The Fiery Cross: The Ku Klux Klan in America* 48-49 (1987) (hereinafter Wade). The Klan’s victims included blacks, southern whites who disagreed with the Klan, and “carpetbagger” northern whites.

The activities of the Ku Klux Klan prompted legislative action at the national level. In 1871, “President Grant sent a message to Congress indicating that the Klan’s reign of terror in the Southern States had rendered life and property insecure.” *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 722 (1989) (internal quotation marks and alterations omitted). In response, Congress passed what is now known as the Ku Klux Klan Act. See “An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes,” 17 Stat. 13 (now codified at 42 U.S.C. §§1983, 1985, and 1986). President Grant used these new powers to suppress the Klan in South Carolina, the effect of which severely curtailed the Klan in other States as well. By the end of Reconstruction in 1877, the first Klan no longer existed.

The genesis of the second Klan began in 1905, with the publication of Thomas Dixon’s *The Clansmen: An Historical Romance of the Ku Klux Klan*. Dixon’s book was a sympathetic portrait of the first Klan, depicting the Klan as a group of heroes “saving” the South from blacks and the “horrors” of Reconstruction. Although the first Klan never actually practiced cross burning, Dixon’s book depicted the Klan burning crosses to celebrate the execution of former slaves. *Id.*, at 324-326; see also *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 770-771 (1995) (Thomas, J., concurring). Cross burning thereby became associated with the first Ku Klux Klan. When D.W. Griffith turned Dixon’s book into the movie *The Birth of a Nation* in 1915, the association between cross burning and the Klan became indelible. In addition to the cross burnings in the movie, a poster advertising the film displayed a hooded Klansman riding a hooded horse, with his left hand holding the reins of the horse and his right hand holding a burning cross above his head. Wade 127. Soon thereafter, in November 1915, the second Klan began.

From the inception of the second Klan, cross burnings have been used to communicate both threats of violence and messages of shared ideology.

...  
The Klan continued to use cross burnings to intimidate after World War II. . . . [I]ncidents of cross burning . . . helped prompt Virginia to enact its first version of the cross-burning statute in 1950.

The decision of this Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), along with the civil rights movement of the 1950’s and 1960’s, sparked another outbreak of Klan violence. These acts of violence included bombings, beatings, shootings, stabbings, and mutilations. See, e. g., Chalmers 349-350; Wade 302-303. Members of the Klan burned crosses on the lawns of those associated with the civil rights movement, assaulted the Freedom Riders, bombed churches, and murdered blacks as well as whites whom the Klan viewed as sympathetic toward the civil rights movement.

Throughout the history of the Klan, cross burnings have also remained potent symbols of shared group identity and ideology. The burning cross became a symbol of the Klan itself and a central feature of Klan gatherings.

...

To this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a “symbol of hate.” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S., at 771 (Thomas, J., concurring). . . .

In sum, while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful.

### III

#### A

The First Amendment, applicable to the States through the Fourteenth Amendment, provides that “Congress shall make no law . . . abridging the freedom of speech.” The hallmark of the protection of free speech is to allow “free trade in ideas”—even ideas that the overwhelming majority of people might find distasteful or discomfiting. . . . Thus, the First Amendment “ordinarily” denies a State “the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.” . . . The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech.

The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution. . . . The First Amendment permits “restrictions upon the content of speech in a few limited areas, which 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.’” *R.A.V. v. City of St. Paul*, *supra*, at 382-383 (quoting *Chaplinsky v. New Hampshire*, *supra*, at 572).

Thus, for example, a State may punish those words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” . . . We have consequently held that fighting words—“those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction”—are generally proscribable under the First Amendment. . . . Furthermore, “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*). And the First Amendment also permits a State to ban a “true threat.” *Watts v. United States*, 394 U.S. 705, 708 (1969) (*per curiam*) (internal quotation marks omitted). . . .

“True threats” encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats “protect[s] individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.” . . . Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As noted in Part II, *supra*, the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.

## B

. . . It is true, as the Supreme Court of Virginia held, that the burning of a cross is symbolic expression. The reason why the Klan burns a cross at its rallies, or individuals place a burning cross on someone else’s lawn, is that the burning cross represents the message that the speaker wishes to communicate. Individuals burn crosses as opposed to other means of communication because cross burning carries a message in an effective and dramatic manner.

The fact that cross burning is symbolic expression, however, does not resolve the constitutional question. . . .

In *R.A.V.*, we held that a local ordinance that banned certain symbolic conduct, including cross burning, when done with the knowledge that such conduct would “‘arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender’” was unconstitutional. *Id.*, at 380 (quoting the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code §292.02 (1990)). We held that the ordinance did not pass constitutional muster because it discriminated on the basis of content by targeting only those individuals who “provoke violence” on a basis specified in the law. 505 U.S., at 391. The ordinance did not cover “[t]hose who wish to use ‘fighting words’ in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality.” . . . This content-based discrimination was unconstitutional because it allowed the city “to impose special prohibitions on those speakers who express views on disfavored subjects.” *Ibid.*

. . .  
 . . . Virginia’s statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R.A.V.*, the Virginia statute does not single out for opprobrium only that speech directed toward “one of the specified disfavored topics.” *Id.*, at 391. It does not matter whether an individual burns a cross with intent to intimidate because of the victim’s race, gender, or religion, or because of the victim’s “political affiliation, union membership, or homosexuality.” . . .

The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R.A.V.* and is proscribable under the First Amendment.

#### IV

. . . [R]espondents do not argue that the prima facie evidence provision is unconstitutional as applied to anyone of them. Rather, they contend that the provision is unconstitutional on its face.

. . .

As interpreted by the jury instruction, the provision chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute-and potentially convict-somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.

As the history of cross burning indicates, a burning cross is not always intended to intimidate. Rather, sometimes the cross burning is a statement of ideology, a symbol of group solidarity. . . .

The prima facie provision makes no effort to distinguish among these different types of cross burnings. It does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim. . . .

It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings. . . . The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.

For these reasons, the prima facie evidence provision, as interpreted through the jury instruction and as applied in Barry Black's case, is unconstitutional on its face. . . . [W]e hold . . . that because of the interpretation of the prima facie evidence provision given by the jury instruction, the provision makes the statute facially invalid at this point. We also recognize the theoretical possibility that the court, on remand, could interpret the provision in a manner different from that so far set forth in order to avoid the constitutional objections we have described. We leave open that possibility. We also leave open the possibility that the provision is severable, and if so, whether Elliott and O'Mara could be retried under §18.2-423.

## V

With respect to Barry Black, we agree with the Supreme Court of Virginia that his conviction cannot stand, and we affirm the judgment of the Supreme Court of Virginia. With respect to Elliott and O'Mara, we vacate the judgment of the Supreme Court of Virginia, and remand the case for further proceedings.

It is so ordered.

**Justice Stevens, concurring.** *[Omitted.]*

**Justice Scalia, with whom Justice Thomas joins as to Parts I and II, concurring in part, concurring in the judgment in part, and dissenting in part.** *[Omitted.]*

**Justice Souter, with whom Justice Kennedy and Justice Ginsburg join, concurring in the judgment in part and dissenting in part.** *[Omitted.]*

**Justice Thomas, dissenting.**

In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred, *see Texas v. Johnson*, 491 U.S. 397, 422-429 (1989) (Rehnquist, C. J., dissenting) (describing the unique position of the American flag in our Nation's 200 years of history), and the profane. I believe that cross burning is the paradigmatic example of the latter.

## I

Although I agree with the majority's conclusion that it is constitutionally permissible to "ban . . . cross burning carried out with the intent to intimidate," . . . I believe that the majority errs in imputing an expressive component to the activity in question. . . . In my view, whatever expressive value cross burning has, the legislature simply wrote it out by banning only intimidating conduct undertaken by a particular means. A conclusion that the statute prohibiting cross burning with intent to intimidate sweeps beyond a prohibition on certain conduct into the zone of expression overlooks not only the words of the statute but also reality.

. . .

#### **17.4.1.4.1 Hate Speech and Enhanced Criminal Penalties**

One year after *R.A.V.* (1992) was decided, the Court held that a motivation of discrimination or hatred toward a person because of his or her status can be considered in determining the severity of a crime and in determining the punishment for the crime consistent with the First Amendment. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). That is, if someone is targeted because he or she is black, homosexual, Muslim, or for any other characteristic, that reason can be used by the legislature in setting the severity of the crime and punishment, by the prosecutor in deciding whether to prosecute, and by the court in sentencing. In short, the severity of punishment for conduct that is otherwise a

crime can be increased because of hate-crime motive. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). The Court wrote:

[T]he Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its amici, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. . . . The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases. As Blackstone said long ago, "it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness." 4 W. Blackstone, Commentaries \*16.

*Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993).

#### **17.4.1.4.2 *Offensive Speech in Relation to Hate Speech, True Threats, and Fighting Words***

Incitement to illegal activity, true threats, and fighting words are not protected speech. Hate speech and offensive speech generally are protected speech, unless they also fit within one of the other categories. That is, in the right setting, hate speech or offensive speech could be fighting words insofar as they would be likely to provoke an ordinary person against whom they were directed to retaliate physically. But speech that is "merely" hateful or offensive does not by that reason alone lose its First Amendment protected status. The strong policy against chilling speech is sufficient to discourage expansion of the categories of unprotected speech to include hate speech or offensive speech more generally.

#### **17.4.1.5 HYPOTHETICALS: INCITEMENT TO ILLEGAL ACTIVITY, FIGHTING WORDS, TRUE THREATS, HATE SPEECH, AND OFFENSIVE SPEECH**

Evaluate the following situations under the types of speech in this cluster and assess the extent to which, if at all, the government could regulate the speech or sanction the speaker.

23. A speaker at populist rally advocates a march on the offices of the National Bank of Wealth on Wall Street.
24. Marti Jones, a speaker at a radical socialist rally, advocates looting the National Bank of Wealth in order to redistribute the wealth.
25. Marti Jones whips up the people at the rally into an aggressive emotional state such that they are about to immediately go loot the National Bank of Wealth.
26. When confronted by a police officer telling her to tone it down, Marti Jones starts yelling obscenities at the officer, saying insulting things about the officer's parents and religion and using various unflattering words as name-calling. In response the officer arrests her.

27. A heckler in the crowd began calling Marti Jones names and lampooning her political anarchic statements, disrupting her speech. Marti Jones got angry and threatened the heckler saying, “If you had any guts you’d come up here and show yourself, and I’d teach you a thing or two.”
28. Marti Jones concluded her speech with a diatribe against all capitalists, trying to incite the crowd to hatred of capitalists.

#### **17.4.1.6 EXAM TIPS: ILLEGAL ACTIVITY, FIGHTING WORDS, TRUE THREATS, HATE SPEECH, AND OFFENSIVE SPEECH**

Exam problems set in this freedom of speech cluster require the student to make careful distinctions among the listed categories of speech. Most speech is protected speech, and few instances of expression will be treated as fighting words, unprotected advocacy of illegal activity, or true threats. Hate speech and offensive speech are both protected types of speech, but share a kinship with the other three types in this cluster. Watch for situations in which some of the speech is protected, even though it is hurtful and in some sense threatening, but does not therefore lose its protected status.

Don’t forget about time, place, and manner restrictions. Context matters: Speech that is appropriate in one setting may be prohibited in another.

### **17.4.2 The Cluster of Defamation, Intentional Infliction of Emotional Distress, and Invasion of Privacy**

Freedom of speech is not the only interest protected by the law. A person’s reputation and privacy are also legally protected interests. When speech invades another’s legitimate interest in his or her reputation or privacy, an accommodation between those interests and freedom of expression is reached. Typically, the result is a lower standard of review (not strict scrutiny) to determine whether the limitation on expression is constitutional. The cases turn upon several factors, including:

- Whether the target of the speech is a public official, public figure, or private individual;
- The extent to which the offending speech is about a matter of public concern as opposed to merely a private concern; and
- Where and how the speech takes place.

The next case constitutionalized defamation law: *New York Times v. Sullivan*, 376 U.S. 254 (1964). Other important cases, summarized below, include *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); and *Snyder v. Phelps*, 562 U.S. 443 (2011) (the Westboro Baptist Church case), which together provide guidance for future development in using tort law to regulate speech.

For a long time, the Court treated defamation as a category of speech outside the protections of the First Amendment. Consequently, making false statements that harmed another's reputation was not protected by the First Amendment and was fully subject to state tort law.

Under the law of unintended consequences, the change in defamation law arguably contributed to the development of increasingly less responsible and less careful journalism, because since *NYT v. Sullivan* (1964) journalists and commentators have been heavily insulated from suits for defamation for false and defamatory statements about a public official about a public issue.

This changed in 1964 when, at the height of the Civil Rights movement, certain Alabama public officials used the Alabama tort law of defamation (libel, since it involved printed material) to sue the *New York Times* in state court for a paid advertisement it had published. The subject of the advertisement was the abuse of African Americans at the hands of Alabama public officials. The jury found the *New York Times* liable, and that decision was affirmed by the Alabama Supreme Court. The *New York Times* appealed to the United States Supreme Court. By the time of the appeal in 1964, an estimated \$300,000,000 in defamation judgments had been made across the South against the press for its coverage of the ongoing civil rights struggle.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court dramatically changed defamation law across the country to protect the Fourth Estate. After *New York Times v. Sullivan* (1964) reporters and commentators need only the flimsiest grounds to support a statement they make and, under some circumstances, such as fast-breaking news, no grounds at all other than it sounded like it could be true. No other country has such broad protection for defamers, and international standards do not require this degree of protection. Take note of the opening paragraph and how Justice Brennan frames the issue; it is carefully crafted to set up the radical departure from prior law that is about to take place. Consider the importance of such rhetorical techniques in Supreme Court jurisprudence.

### *New York Times v. Sullivan*

376 U.S. 254 (1964)

#### **Mr. Justice Brennan delivered the opinion of the Court.**

We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.

Respondent L. B. Sullivan is one of the three elected Commissioners of the City of Montgomery, Alabama. He testified that he was

Commissioner of Public Affairs, and the duties are supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales.

He brought this civil libel action against the four individual petitioners, who are Negroes and Alabama clergymen, and against petitioner the New York Times

Company, a New York corporation which publishes the New York Times, a daily newspaper. A jury in the Circuit Court of Montgomery County awarded him damages of \$500,000, the full amount claimed, against all the petitioners, and the Supreme Court of Alabama affirmed. . . .

Respondent's complaint alleged that he had been libeled by statements in a full-page advertisement that was carried in the New York Times on March 29, 1960. Entitled "Heed Their Rising Voices," the advertisement began by stating that,

As the whole world knows by now, thousands of Southern Negro students are engaged in widespread nonviolent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights.

It went on to charge that,

in their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . .

Succeeding paragraphs purported to illustrate the "wave of terror" by describing certain alleged events. The text concluded with an appeal for funds for three purposes: support of the student movement, "the struggle for the right to vote," and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery.

The text appeared over the names of 64 persons, many widely known for their activities in public affairs, religion, trade unions, and the performing arts. Below these names, and under a line reading "We in the south who are struggling daily for dignity and freedom warmly endorse this appeal," appeared the names of the four individual petitioners and of 16 other persons, all but two of whom were identified as clergymen in various Southern cities. The advertisement was signed at the bottom of the page by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," and the officers of the Committee were listed.

Of the 10 paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel. They read as follows:

Third paragraph:

In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to reregister, their dining hall was padlocked in an attempt to starve them into submission.

Sixth paragraph:

Again and again, the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home, almost

killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a *felony* under which they could imprison him for *ten years*...

Although neither of these statements mentions respondent by name, he contended that the word "police" in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of "ringing" the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission. As to the sixth paragraph, he contended that, since arrests are ordinarily made by the police, the statement "They have arrested [Dr. King] seven times" would be read as referring to him; he further contended that the "They" who did the arresting would be equated with the "They" who committed the other described acts and with the "Southern violators." Thus, he argued, the paragraph would be read as accusing the Montgomery police, and hence him, of answering Dr. King's protests with "intimidation and violence," bombing his home, assaulting his person, and charging him with perjury. Respondent and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.

It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro students staged a demonstration on the State Capitol steps, they sang the National Anthem and not "My Country, 'Tis of Thee." Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time "ring" the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four, and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.

On the premise that the charges in the sixth paragraph could be read as referring to him, respondent was allowed to prove that he had not participated in the events described. Although Dr. King's home had, in fact, been bombed twice when his wife and child were there, both of these occasions antedated

respondent's tenure as Commissioner, and the police were not only not implicated in the bombings, but had made every effort to apprehend those who were. Three of Dr. King's four arrests took place before respondent became Commissioner. Although Dr. King had, in fact, been indicted (he was subsequently acquitted) on two counts of perjury, each of which carried a possible five-year sentence, respondent had nothing to do with procuring the indictment.

Respondent made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel. One of his witnesses, a former employer, testified that, if he had believed the statements, he doubted whether he "would want to be associated with anybody who would be a party to such things that are stated in that ad," and that he would not reemploy respondent if he believed "that he allowed the Police Department to do the things that the paper say he did." But neither this witness nor any of the others testified that he had actually believed the statements in their supposed reference to respondent. The cost of the advertisement was approximately \$4800, and it was published by the Times upon an order from a New York advertising agency acting for the signatory Committee. The agency submitted the advertisement with a letter from A. Philip Randolph, Chairman of the Committee, certifying that the persons whose names appeared on the advertisement had given their permission. Mr. Randolph was known to the Times' Advertising Acceptability Department as a responsible person, and, in accepting the letter as sufficient proof of authorization, it followed its established practice. There was testimony that the copy of the advertisement which accompanied the letter listed only the 64 names appearing under the text, and that the statement, "We in the south . . . warmly endorse this appeal," and the list of names thereunder, which included those of the individual petitioners, were subsequently added when the first proof of the advertisement was received. Each of the individual petitioners testified that he had not authorized the use of his name, and that he had been unaware of its use until receipt of respondent's demand for a retraction. The manager of the Advertising Acceptability Department testified that he had approved the advertisement for publication because he knew nothing to cause him to believe that anything in it was false, and because it bore the endorsement of "a number of people who are well known and whose reputation" he "had no reason to question." Neither he nor anyone else at the Times made an effort to confirm the accuracy of the advertisement, either by checking it against recent Times news stories relating to some of the described events or by any other means.

Alabama law denies a public officer recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply. Alabama Code, Tit. 7, §914. Respondent served such a demand upon each of the petitioners. None of the individual petitioners responded to the demand, primarily because each took the position that he had not authorized the use of his name on the advertisement, and therefore had not published the statements that respondent alleged had libeled him.

The Times did not publish a retraction in response to the demand, but wrote respondent a letter stating, among other things, that “we . . . are somewhat puzzled as to how you think the statements in any way reflect on you,” and “you might, if you desire, let us know in what respect you claim that the statements in the advertisement reflect on you.” Respondent filed this suit a few days later without answering the letter. The Times did, however, subsequently publish a retraction of the advertisement upon the demand of Governor John Patterson of Alabama, who asserted that the publication charged him with

grave misconduct and . . . improper actions and omissions as Governor of Alabama and Ex-Officio Chairman of the State Board of Education of Alabama.

When asked to explain why there had been a retraction for the Governor but not for respondent, the Secretary of the Times testified:

We did that because we didn’t want anything that was published by The Times to be a reflection on the State of Alabama, and the Governor was, as far as we could see, the embodiment of the State of Alabama and the proper representative of the State, and, furthermore, we had by that time learned more of the actual facts which the and purported to recite and, finally, the ad did refer to the action of the State authorities and the Board of Education, presumably of which the Governor is the ex-officio chairman. . . .

On the other hand, he testified that he did not think that “any of the language in there referred to Mr. Sullivan.”

The trial judge submitted the case to the jury under instructions that the statements in the advertisement were “libelous *per se*,” and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made “of and concerning” respondent. The jury was instructed that, because the statements were libelous *per se*, “the law . . . implies legal injury from the bare fact of publication itself,” “falsity and malice are presumed,” “general damages need not be alleged or proved, but are presumed,” and “punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown.” An award of punitive damages—as distinguished from “general” damages, which are compensatory in nature—apparently requires proof of actual malice under Alabama law, and the judge charged that

mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages.

He refused to charge, however, that the jury must be “convinced” of malice, in the sense of “actual intent” to harm or “gross negligence and recklessness,” to make such an award, and he also refused to require that a verdict for respondent differentiate between compensatory and punitive damages. The judge rejected petitioners’ contention that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments.

In affirming the judgment, the Supreme Court of Alabama sustained the trial judge's rulings and instructions in all respects. 273 Ala. 656, 144 So.2d 25. It held that,

where the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tend to bring the individual into public contempt,

they are "libelous *per se*"; that "the matter complained of is, under the above doctrine, libelous *per se*, if it was published of and concerning the plaintiff", and that it was actionable without "proof of pecuniary injury . . . such injury being implied." *Id.* at 673, 676, 144 So.2d at 37, 41. It approved the trial court's ruling that the jury could find the statements to have been made "of and concerning" respondent, stating:

We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and, more particularly, under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body.

*Id.* at 674-675, 144 So.2d at 39. In sustaining the trial court's determination that the verdict was not excessive, the court said that malice could be inferred from the Times' "irresponsibility" in printing the advertisement while

the Times, in its own files, had articles already published which would have demonstrated the falsity of the allegations in the advertisement;

from the Times' failure to retract for respondent while retracting for the Governor, whereas the falsity of some of the allegations was then known to the Times and "the matter contained in the advertisement was equally false as to both parties", and from the testimony of the Times' Secretary that, apart from the statement that the dining hall was padlocked, he thought the two paragraphs were "substantially correct." *Id.* at 686-687, 144 So.2d at 50-51. The court reaffirmed a statement in an earlier opinion that "There is no legal measure of damages in cases of this character." *Id.* at 686, 144 So.2d at 50. It rejected petitioners' constitutional contentions with the brief statements that "The First Amendment of the U.S. Constitution does not protect libelous publications," and "The Fourteenth Amendment is directed against State action, and not private action." *Id.* at 676, 144 So.2d at 40.

Because of the importance of the constitutional issues involved, we granted the separate petitions for certiorari of the individual petitioners and of the Times. 371 U.S. 946. We reverse the judgment. We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct. We further hold that, under the proper safeguards,

the evidence presented in this case is constitutionally insufficient to support the judgment for respondent.

## I

*[The court held that state courts adjudicating the state tort defamation law was state action for Fourteenth Amendment purposes and that the fact that the New York Times was paid for the political editorial did not convert it to commercial speech, which at the time was largely excluded from First Amendment protections.]*

## II

Under Alabama law, as applied in this case, a publication is “libelous *per se*” if the words “tend to injure a person . . . in his reputation” or to “bring [him] into public contempt”; the trial court stated that the standard was met if the words are such as to “injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust. . . . The jury must find that the words were published “of and concerning” the plaintiff, but, where the plaintiff is a public official, his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge. Once “libel *per se*” has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. . . . His privilege of “fair comment” for expressions of opinion depends on the truth of the facts upon which the comment is based. . . . Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may, in any event, forestall a punitive award by a retraction meeting the statutory requirements. Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight. . . .

The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.

Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications. Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials. . . .

In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet “libel” than we have to other “mere labels” of state law. *NAACP v. Button*, 371 U.S. 415, 429 [(1963)]. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the

repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” . . .

The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.

. . . “[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions,” . . . and this opportunity is to be afforded for “vigorous advocacy” no less than “abstract discussion.” . . .

The First Amendment, said Judge Learned Hand,

presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many, this is, and always will be, folly, but we have staked upon it our all.

*United States v. Associated Press*, 52 F. Supp. 362, 372 (D.C. S.D.N.Y. 1943). Mr. Justice Brandeis, in his concurring opinion in *Whitney v. California*, 274 U.S. 357, 375-376 [(1927)], gave the principle its classic formulation:

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

Thus, we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. . . . The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that

protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

...

That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the “breathing space” that they “need . . . to survive”. . . .

...

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystallized a national awareness of the central meaning of the First Amendment. That statute made it a crime, punishable by a \$5,000 fine and five years in prison,

if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . or the President . . . with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States.

The Act allowed the defendant the defense of truth, and provided that the jury were to be judges both of the law and the facts. Despite these qualifications, the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison. In the famous Virginia Resolutions of 1798, the General Assembly of Virginia resolved that it

doth particularly protest against the palpable and alarming infractions of the Constitution in the two late cases of the ‘Alien and Sedition Acts,’ passed at the last session of Congress. . . . [The Sedition Act] exercises . . . a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto—a power which, more than any other, ought to produce universal alarm because it is leveled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.

4 Elliot’s *Debates*, *supra*, pp. 553-554. Madison prepared the Report in support of the protest. His premise was that the Constitution created a form of government under which “The people, not the government, possess the absolute sovereignty.” The structure of the government dispersed power in reflection of the people’s distrust of concentrated power, and of power itself at all levels. This form of government was “altogether different” from the British form, under which the Crown was sovereign and the people were subjects. “Is it not natural and necessary, under such different circumstances,” he asked, “that a different degree of freedom in the use of the press should be contemplated?” *Id.*, pp. 569-570. Earlier, in a debate in the House of Representatives, Madison had said:

If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.

4 Annals of Congress, p. 934 (1794). . . .

Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. Calhoun, reporting to the Senate on February 4, 1836, assumed that its invalidity was a matter “which no one now doubts.” Report with Senate bill No. 122, 24th Cong., 1st Sess., p. 3. Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating:

I discharged every person under punishment or prosecution under the sedition law because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.

Letter to Mrs. Adams, July 22, 1804, 4 Jefferson’s Works (Washington ed.), pp. 555, 556. . . . These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.

. . .

The state rule of law is not saved by its allowance of the defense of truth. A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge which, in *Smith v. California*, 361 U. S. 147, we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale. . . . A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . “self-censorship.” Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which “steer far wider of the unlawful zone.” . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments. The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

. . .

Such a privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen. . . .

We conclude that such a privilege is required by the First and Fourteenth Amendments.

### III

We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable. . . .

Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. . . .

Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. . . .

. . .

Raising as it does the possibility that a good faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression. We hold that . . . an otherwise impersonal attack on governmental operations [cannot be held to be] a libel of an official responsible for those operations. Since it was relied on exclusively here, and there was no other evidence to connect the statements with respondent, the evidence was constitutionally insufficient to support a finding that the statements referred to respondent.

The judgment of the Supreme Court of Alabama is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

**Mr. Justice Black with whom Mr. Justice Douglas joins, concurring.**

I concur in reversing this half-million-dollar judgment against the New York Times Company and the four individual defendants. In reversing, the Court holds that

the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct.

. . . I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely "delimit" a State's power to award damages to "public officials against critics of their official conduct," but completely prohibit a State from exercising such a power. . . . I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials. . . .

The half-million-dollar verdict does give dramatic proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials. The factual background of this case emphasizes the imminence and enormity of that threat. One of the acute and highly emotional issues in this country arises out of efforts of many people, even including some public officials, to continue state-commanded segregation of races in the public schools and other public places despite our several holdings that such a state practice is forbidden by the Fourteenth Amendment. Montgomery is one of the localities in which widespread hostility to desegregation has been manifested. This hostility has sometimes extended itself to persons who favor desegregation, particularly to so-called “outside agitators,” a term which can be made to fit papers like the Times, which is published in New York. The scarcity of testimony to show that Commissioner Sullivan suffered any actual damages at all suggests that these feelings of hostility had at least as much to do with rendition of this half-million-dollar verdict as did an appraisal of damages. Viewed realistically, this record lends support to an inference that, instead of being damaged, Commissioner Sullivan’s political, social, and financial prestige has likely been enhanced by the Times’ publication. Moreover, a second half-million-dollar libel verdict against the Times based on the same advertisement has already been awarded to another Commissioner. There, a jury again gave the full amount claimed. There is no reason to believe that there are not more such huge verdicts lurking just around the corner for the Times or any other newspaper or broadcaster which might dare to criticize public officials. In fact, briefs before us show that, in Alabama, there are now pending eleven libel suits by local and state officials against the Times seeking \$5,600,000, and five such suits against the Columbia Broadcasting System seeking \$1,700,000. Moreover, this technique for harassing and punishing a free press—now that it has been shown to be possible—is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make, local as well as out-of-state, newspapers easy prey for libel verdict seekers.

In my opinion, the Federal Constitution has dealt with this deadly danger to the press in the only way possible without leaving the free press open to destruction—by granting the press an absolute immunity for criticism of the way public officials do their public duty.

...

**Mr. Justice Goldberg with whom Mr. Justice Douglas joins, concurring in the result.** [Omitted.]

#### 17.4.2.1 Developments after *NYT v. Sullivan* (1964)

After *New York Times v. Sullivan* (1964) changed the face of defamation law in the United States, several issues remained regarding the scope of the decision and its implications for other defamation suits not involving public officials in the performance of their official duties.

The *NYT v. Sullivan* (1964) so-called “actual malice” rule, that is, whether the defamatory statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not,” was extended from public officials to public figures. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Private individuals may become public figures even when they do not hold public office. A person could be a public figure for all purposes if they are famous enough and insert themselves into matters of public concern.

A person could also be a limited-purpose public figure. The first and perhaps most common type of a limited-purpose public figure is one who actively participates in a public controversy, typically through speaking about it, and who, because of his or her stature or resources can protect him- or herself through access to the media to get his or her position out. The second type of limited-purpose public figure is one who is involuntarily thrust into the public eye through his or her actions. For example, an air traffic controller on duty at time of fatal crash was held to be an involuntary, limited-purpose public figure, due to his role in a major public event. *Dameron v. Washington Magazine, Inc.*, 250 U.S. App. D.C. 346 (1985).

In 1974, the Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), also held that even for private plaintiffs, that is, those who are not public figures or public officials, states could no longer impose strict liability. At a minimum a negligence standard was required. However, private plaintiffs need not meet the “actual malice” standard. In *Gertz*, the Court also held that actual damages had to be proven and could not be presumed.

Later, in *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985), the Court held that Dun & Bradstreet’s defamatory, false reporting that Greenmoss Builders had filed for bankruptcy was subject to merely a negligence standard because Greenmoss Builders was a private party, not a public figure for any purpose. Negligence as to the truth of the statements was sufficient to support a defamation claim, provided the other elements are met. The Court also permitted the recovery of presumed and punitive damages in cases of defamation per se where the statements were not on matters of public concern. The *Gertz* holding on damages was distinguished on the grounds that *Gertz* involved a matter of public concern, not merely private matters such as the financial status of a business.

Elements of defamation claims today in the four relevant settings—public officials, general public figures, limited public figures, private persons—may be stated in various ways, including as follows:

1. Public Officials
  - a. The statement must be defamatory.
  - b. The statement must be false.
  - c. The statement must be identifiably about the plaintiff.
  - d. The person uttering the statement must have knowledge of the falsity of the statement or evince reckless disregard that the statement is false.
  - e. The plaintiff must prove actual harm.
2. Public Figures for All Purposes
  - a. The statement must be defamatory.
  - b. The statement must be false.

- c. The statement must be identifiably about the plaintiff.
  - d. The person uttering the statement must have knowledge of the falsity of the statement or evince reckless disregard that the statement is false.
  - e. The plaintiff must prove actual harm.
  - f. The plaintiff is a public figure.
3. Public Figures for Limited Purposes
- a. The statement must be defamatory.
  - b. The statement must be false.
  - c. The statement must be identifiably about the plaintiff.
  - d. The person uttering the statement must have knowledge of the falsity of the statement or evince reckless disregard that the statement is false.
  - e. The plaintiff must prove actual harm.
  - f. The plaintiff is a public figure for the matter about which the person is being discussed.
4. Private Persons
- a. The statement must be defamatory.
  - b. The statement must be false.
  - c. The statement must be identifiably about the plaintiff.
  - d. The person uttering the statement must have acted at least negligently with respect to determining the truth or falsity of the statement.
  - e. The plaintiff can recover presumed, actual, and punitive damages to the extent allowed by state law. The type of damages recoverable and the proof necessary under state law typically turns on whether the statements are defamatory per se or whether the action sounds in libel or slander.

Defamatory statements are statements that harm the reputation of their target. Some statements are so innately harmful that they are recognized in most states as defamation per se. If a statement is defamatory per se, then damages may be presumed and punitive damages may be recovered, at least if the defamed person is a private entity for defamation law purposes. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985). Statements that have historically been considered defamatory per se are statements

- i. that are injurious to another in their trade, business, or profession;
- ii. that assert a person has a “loathsome disease” (e.g., leprosy, sexually transmitted disease, mental illness, and possibly something extremely contagious and deadly like ebola);
- iii. that impute immorality especially unchastity (though this might be problematic today); or
- iv. that impute criminal actions to the plaintiff.

Do not forget that to be actionable a statement must be false as well as defamatory.

Given that under U.S. law defamation is now a very difficult claim to prove, some plaintiffs had been seeking judgments overseas where the defamation laws are not subject to free speech restrictions. In response, in 2010 Congress enacted and President Obama signed the Securing the Protection of our Enduring and Established

Constitutional Heritage (SPEECH) Act, 124 Stat. 2480–2484 (2010), under which a defamation judgment obtained in a foreign country is not enforceable in U.S. courts unless the judgment was obtained under defamation laws that would be constitutional under United States freedom of expression jurisprudence.

#### **17.4.2.2 International Covenant on Civil and Political Rights, Article 19**

Article 19 of the ICCPR provides that everyone has the right to freedom of expression and, importantly, that the exercise of that right can be limited under certain circumstances. As you read Article 19, consider the extent to which it would allow restrictions on speech of the types or categories allowed in the United States. Consider the extent to which the United States law provides greater or lesser protection than the ICCPR might require.

#### **ICCPR ARTICLE 19**

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Paragraph three clearly permits governments to restrict freedom of expression by law, but only to the extent necessary to protect other interests. “Other interests” include reputation (defamation law) and other rights, such as privacy and copyright. The government can also limit freedom of expression for reasons of national security, public order, public health, and morals. If those exceptions are read too broadly, they can swallow the right. What is the appropriate balance? How do the various standards of review developed by the court in the United States effectuate Article 19, paragraph 3? Keep these questions in mind as we continue our exploration of freedom of expression.

#### **17.4.2.3 Restricting Freedom of Speech through Tort Law**

Tort law, for example, defamation, intentional infliction of emotional distress, or invasion of privacy, can limit or chill speech. Thus court-made state law can run afoul of constitutional protections for freedom of speech to the same extent as legislative action (state statutes, city ordinances, or administrative agency regulations, for example) or executive actions (such as police stopping people from speaking in public).

With respect to defamation, different constitutional constraints apply depending on who the plaintiff is (public official, public figure, or private person) and on the topic being addressed (a matter of public interest or a private matter).

Other torts can impact speech. In particular, privacy claims and intentional infliction of emotional distress can chill speech. In the Westboro Baptist Church case, *Snyder v. Phelps*, 562 U.S. 443 (2011), the Court was confronted with invasion of privacy and intentional infliction of emotional distress claims involving a private person, but the speech was about a public issue. In its opinion, the Court uses several strands of free speech jurisprudence to reach the result that the speech was protected. The Court emphasizes in particular that the speech took place in a public forum, concerned matters of public interest, and did not disrupt the private ceremony taking place. In *Snyder v. Phelps* (2011), the Court also discussed time, place, and manner restrictions. Consider whether a community or state could pass a law regulating this sort of activity and speech that would pass constitutional muster and still protect the sensibilities of people attending weddings, funerals, or other private events held in part in public places.

### *Snyder v. Phelps*

562 U.S. 443 (2011)

#### **Chief Justice Roberts delivered the opinion of the Court.**

A jury held members of the Westboro Baptist Church liable for millions of dollars in damages for picketing near a soldier's funeral service. The picket signs reflected the church's view that the United States is overly tolerant of sin and that God kills American soldiers as punishment. The question presented is whether the First Amendment shields the church members from tort liability for their speech in this case.

I

A

Fred Phelps founded the Westboro Baptist Church in Topeka, Kansas, in 1955. The church's congregation believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military. The church frequently communicates its views by picketing, often at military funerals. In the more than 20 years that the members of Westboro Baptist have publicized their message, they have picketed nearly 600 funerals.

Marine Lance Corporal Matthew Snyder was killed in Iraq in the line of duty. Lance Corporal Snyder's father selected the Catholic church in the Snyders' hometown of Westminster, Maryland, as the site for his son's funeral. Local newspapers provided notice of the time and location of the service.

Phelps became aware of Matthew Snyder's funeral and decided to travel to Maryland with six other Westboro Baptist parishioners (two of his daughters and four of his grandchildren) to picket. On the day of the memorial service, the

Westboro congregation members picketed on public land adjacent to public streets near the Maryland State House, the United States Naval Academy, and Matthew Snyder's funeral. The Westboro picketers carried signs that were largely the same at all three locations. They stated, for instance: "God Hates the USA/ Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You."

The church had notified the authorities in advance of its intent to picket at the time of the funeral, and the picketers complied with police instructions in staging their demonstration. The picketing took place within a 10 by 25-foot plot of public land adjacent to a public street, behind a temporary fence. That plot was approximately 1,000 feet from the church where the funeral was held. Several buildings separated the picket site from the church. The Westboro picketers displayed their signs for about 30 minutes before the funeral began and sang hymns and recited Bible verses. None of the picketers entered church property or went to the cemetery. They did not yell or use profanity, and there was no violence associated with the picketing.

The funeral procession passed within 200 to 300 feet of the picket site. Although Snyder testified that he could see the tops of the picket signs as he drove to the funeral, he did not see what was written on the signs until later that night, while watching a news broadcast covering the event.

## B

Snyder filed suit against Phelps, Phelps's daughters, and the Westboro Baptist Church (collectively Westboro or the church) in the United States District Court for the District of Maryland under that court's diversity jurisdiction. Snyder alleged five state tort law claims: defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. Westboro moved for summary judgment contending, in part, that the church's speech was insulated from liability by the First Amendment.

The District Court awarded Westboro summary judgment on Snyder's claims for defamation and publicity given to private life, concluding that Snyder could not prove the necessary elements of those torts. A trial was held on the remaining claims. . . .

A jury found for Snyder on the intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims, and held Westboro liable for \$2.9 million in compensatory damages and \$8 million in punitive damages. Westboro filed several post-trial motions, including a motion contending that the jury verdict was grossly excessive and a motion seeking judgment as a matter of law on all claims on First Amendment grounds. The District Court remitted the punitive damages award to \$2.1 million, but left the jury verdict otherwise intact.

In the Court of Appeals, Westboro's primary argument was that the church was entitled to judgment as a matter of law because the First Amendment fully protected Westboro's speech. The Court of Appeals agreed. 580 F.3d 206, 221 (4th Cir. 2009). The court reviewed the picket signs and concluded that

Westboro's statements were entitled to First Amendment protection because those statements were on matters of public concern, were not provably false, and were expressed solely through hyperbolic rhetoric. *Id.*, at 222–224.

We granted certiorari.

## II

To succeed on a claim for intentional infliction of emotional distress in Maryland, a plaintiff must demonstrate that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress. . . . The Free Speech Clause of the First Amendment—“Congress shall make no law . . . abridging the freedom of speech”—can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress. . . .

Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case. “[S]peech on ‘matters of public concern’ . . . is ‘at the heart of the First Amendment’s protection.’” . . . The First Amendment reflects “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” . . . That is because “speech concerning public affairs is more than self-expression; it is the essence of self-government.” . . . Accordingly, “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” . . .

“[N]ot all speech is of equal First Amendment importance,” however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous. . . . That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: “[T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas”; and the “threat of liability” does not pose the risk of “a reaction of self-censorship” on matters of public import. . . .

We noted a short time ago, in considering whether public employee speech addressed a matter of public concern, that “the boundaries of the public concern test are not well defined.” . . . Although that remains true today, we have articulated some guiding principles, principles that accord broad protection to speech to ensure that courts themselves do not become inadvertent censors.

Speech deals with matters of public concern when it can “be fairly considered as relating to any matter of political, social, or other concern to the community,” . . . or when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” . . . The arguably “inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.” . . .

Our opinion in *Dun & Bradstreet*, on the other hand, provides an example of speech of only private concern. In that case we held, as a general matter, that information about a particular individual’s credit report “concerns no public

issue.” . . . The content of the report, we explained, “was speech solely in the individual interest of the speaker and its specific business audience.” . . . That was confirmed by the fact that the particular report was sent to only five subscribers to the reporting service, who were bound not to disseminate it further. . . . To cite another example, we concluded in *San Diego v. Roe* that, in the context of a government employer regulating the speech of its employees, videos of an employee engaging in sexually explicit acts did not address a public concern; the videos “did nothing to inform the public about any aspect of the [employing agency’s] functioning or operation.” . . .

Deciding whether speech is of public or private concern requires us to examine the “content, form, and context” of that speech, “as revealed by the whole record.” . . . As in other First Amendment cases, the court is obligated “to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’” . . . In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.

The “content” of Westboro’s signs plainly relates to broad issues of interest to society at large, rather than matters of “purely private concern.” . . . The placards read “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don’t Pray for the USA,” “Thank God for IEDs,” “Fag Troops,” “Semper Fi Fags,” “God Hates Fags,” “Maryland Taliban,” “Fags Doom Nations,” “Not Blessed Just Cursed,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “You’re Going to Hell,” and “God Hates You.” . . . While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import. The signs certainly convey Westboro’s position on those issues, in a manner designed, unlike the private speech in *Dun & Bradstreet*, to reach as broad a public audience as possible. . . .

Apart from the content of Westboro’s signs, Snyder contends that the “context” of the speech—its connection with his son’s funeral—makes the speech a matter of private rather than public concern. The fact that Westboro spoke in connection with a funeral, however, cannot by itself transform the nature of Westboro’s speech. Westboro’s signs, displayed on public land next to a public street, reflect the fact that the church finds much to condemn in modern society. Its speech is “fairly characterized as constituting speech on a matter of public concern,” . . . and the funeral setting does not alter that conclusion.

. . .

Snyder goes on to argue that Westboro’s speech should be afforded less than full First Amendment protection “not only because of the words” but also because the church members exploited the funeral “as a platform to bring their message to a broader audience.” . . . There is no doubt that Westboro chose to stage its picketing at the Naval Academy, the Maryland State House, and Matthew Snyder’s funeral to increase publicity for its views and because of

the relation between those sites and its views—in the case of the military funeral, because Westboro believes that God is killing American soldiers as punishment for the Nation’s sinful policies.

Westboro’s choice to convey its views in conjunction with Matthew Snyder’s funeral made the expression of those views particularly hurtful to many, especially to Matthew’s father. The record makes clear that the applicable legal term—“emotional distress”—fails to capture fully the anguish Westboro’s choice added to Mr. Snyder’s already incalculable grief. But Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a “special position in terms of First Amendment protection.” . . . “[W]e have repeatedly referred to public streets as the archetype of a traditional public forum,” noting that “[t]ime out of mind’ public streets and sidewalks have been used for public assembly and debate.” . . .

That said, “[e]ven protected speech is not equally permissible in all places and at all times.” . . . Westboro’s choice of where and when to conduct its picketing is not beyond the Government’s regulatory reach—it is “subject to reasonable time, place, or manner restrictions” that are consistent with the standards announced in this Court’s precedents. . . . Maryland now has a law imposing restrictions on funeral picketing, Md. Crim. Law Code Ann. §10–205 (Lexis Supp. 2010), as do 43 other States and the Federal Government. See Brief for American Legion as *Amicus Curiae* 18–19, n.2 (listing statutes). To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case. Maryland’s law, however, was not in effect at the time of the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional.

We have identified a few limited situations where the location of targeted picketing can be regulated under provisions that the Court has determined to be content neutral. In *Frisby*, for example, we upheld a ban on such picketing “before or about” a particular residence, 487 U. S., at 477. In *Madsen v. Women’s Health Center, Inc.*, we approved an injunction requiring a buffer zone between protesters and an abortion clinic entrance. 512 U. S. 753, 768 (1994). [*Madsen* was overruled in *McCullen v. Coakley*, 573 U.S. \_\_\_ (2014).] The facts here are obviously quite different, both with respect to the activity being regulated and the means of restricting those activities.

Simply put, the church members had the right to be where they were. Westboro alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged. The picketing was conducted under police supervision some 1,000 feet from the church, out of the sight of those at the church. The protest was not unruly; there was no shouting, profanity, or violence.

The record confirms that any distress occasioned by Westboro’s picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself. A group of parishioners standing at the very spot where Westboro stood, holding signs that said “God Bless America”

and “God Loves You,” would not have been subjected to liability. It was what Westboro said that exposed it to tort damages.

Given that Westboro’s speech was at a public place on a matter of public concern, that speech is entitled to “special protection” under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt. “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U. S. 397, 414 (1989). Indeed, “the point of all speech protection . . . is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful.” *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995).

The jury here was instructed that it could hold Westboro liable for intentional infliction of emotional distress based on a finding that Westboro’s picketing was “outrageous.” “Outrageousness,” however, is a highly malleable standard with “an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.” *Hustler*, 485 U.S., at 55 (internal quotation marks omitted). In a case such as this, a jury is “unlikely to be neutral with respect to the content of [the] speech,” posing “a real danger of becoming an instrument for the suppression of . . . ‘vehement, caustic, and sometimes unpleasan[t]’” expression. . . . Such a risk is unacceptable; “in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment.” . . . What Westboro said, in the whole context of how and where it chose to say it, is entitled to “special protection” under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous.

For all these reasons, the jury verdict imposing tort liability on Westboro for intentional infliction of emotional distress must be set aside.

. . .

#### IV

Our holding today is narrow. We are required in First Amendment cases to carefully review the record, and the reach of our opinion here is limited by the particular facts before us. As we have noted, “the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.” . . .

Westboro believes that America is morally flawed; many Americans might feel the same about Westboro. Westboro’s funeral picketing is certainly hurtful and its contribution to public discourse may be negligible. But Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The speech was indeed planned to coincide with Matthew Snyder’s funeral, but did not itself disrupt that funeral,

and Westboro's choice to conduct its picketing at that time and place did not alter the nature of its speech.

...

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.

The judgment of the United States Court of Appeals for the Fourth Circuit is affirmed.

It is so ordered.

**Justice Breyer concurred.** *[Omitted.]*

**Justice Alito, dissenting.**

Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.

Petitioner Albert Snyder is not a public figure. He is simply a parent whose son, Marine Lance Corporal Matthew Snyder, was killed in Iraq. Mr. Snyder wanted what is surely the right of any parent who experiences such an incalculable loss: to bury his son in peace.

...

When grave injury is intentionally inflicted by means of an attack like the one at issue here, the First Amendment should not interfere with recovery.

...

Exploitation of a funeral for the purpose of attracting public attention “intrud[es] upon their . . . grief,” *ibid.*, and may permanently stain their memories of the final moments before a loved one is laid to rest. Allowing family members to have a few hours of peace without harassment does not undermine public debate. I would therefore hold that, in this setting, the First Amendment permits a private figure to recover for the intentional infliction of emotional distress caused by speech on a matter of private concern.

...

Respondents' outrageous conduct caused petitioner great injury, and the Court now compounds that injury by depriving petitioner of a judgment that acknowledges the wrong he suffered.

In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like petitioner. I therefore respectfully dissent.

#### **17.4.2.3.1 After Snyder (2011)**

The Court ruled that speech about a public issue on a public sidewalk could not be limited by the tort of intentional infliction of emotional distress, not even when that

speech is outrageous and could upset or disrupt funeral or burial rites and inflict emotional distress on the mourners. In the wake of *Snyder v. Phelps*, 562 U.S. 443 (2011), many states and municipalities enacted time, place, and manner restrictions to prevent speech from disrupting private ceremonies taking place in public places, including weddings and funerals. Would such time, place, and manner restrictions be constitutional? How would you draft such an ordinance for the city council to adopt?

In *McCullen v. Coakley*, 573 U.S. \_\_\_ (2014), the Court held the Massachusetts law requiring a thirty-five-foot buffer around abortion clinic was unconstitutional as not being the least restrictive alternative the state could use to meet its compelling interest of insuring access to the clinics. In that case, the speech was that of anti-abortion advocates wanting to discuss abortion with women on their way to the abortion clinics. That speech on the sidewalk was on a protected topic in a protected space. The Court held that merely outlawing interference that kept someone from gaining access to the clinic would be a less restrictive alternative than a buffer zone excluding protesters.

After *McCullen v. Coakley* (2014), would buffer zone legislation enacted to protect weddings and funerals from disruption be constitutional? It may be considered content neutral since it is not concerned at all with the content or purpose of the speech or actions that would be disruptive. Such laws, to the extent they target only time, place, and manner and do so in a limited way, would seem to be subject to the time, place, and manner standard of review and so would probably pass muster.

Under ICCPR Article 19, the privacy interests and interest in performing important ceremonies free from disruption, even if performed in a public place, would certainly qualify as an appropriate limitation on freedom of expression.

Tort law protects various individual interests even against rights of free speech. However, tort law, being a creature of the state and thus state action, is nonetheless constrained by the First Amendment (and other constitutional provisions). The tort of defamation protects the reputational interests of people. The tort of invasion of privacy creates a state tort cause of action, thus protecting some aspects of privacy from infringement by other private actors. Dignitary interests such as reputation and privacy are protectable by the government, but the extent of that protection is limited by free speech concerns.

As a result in part of the constitutionalization of these claims making them more difficult to prove, they are rarely used, especially defamation. One can easily enough question whether the balance struck by the Court is the right one. Indeed, if the press were required to be more careful in fact checking and in making assertions wholly unsupported by evidence, would the current no-holds-barred atmosphere of outrageous accusations concerning political figures have arisen? The question is not about fair, factual criticism or criticism of policies based on ideological differences: It is about the ability of candidates and commentators to lie and distort beyond all recognition opponents' positions without fear of tort or other reprisal under the law. This point was raised not to decide it, or even to comment on it one way or the other, but merely to highlight that constitutional jurisprudence affects our lives in myriad, often hidden—and certainly unforeseen—ways.

#### 17.4.2.4 HYPOTHETICALS: DEFAMATION AND RELATED TORTS

Faux News reported that Jim Bowie, a male candidate for governor of Pennajer, was known to have engaged in homosexual relations while Bowie was married to Kayla Roe. Under which of the following circumstances, if any, would Jim Bowie have a well-founded claim for defamation?

29. The story was true, but Faux News had not checked any facts supporting the assertion.
30. The story was false and Faux News was simply reporting a rumor started by Bowie's opponent in the governor's race.
31. The story was false, but prior to reporting it Faux News had asked Bowie to confirm it. Bowie denied it, but the Faux News reporter subjectively but genuinely thought Bowie was lying.
32. The story was false, but Bowie had been a long-standing supporter of gay rights and was regularly seen eating lunch and attending sporting events with a friend, Sam Wise, who was gay.
33. Same as in d, but add that Faux News had a picture of the two men hugging when they greeted each other.
34. Same basic facts as d and e, but a Faux News editor, George Jett, had known Bowie since high school and knew he was heterosexual and knew that Sam Wise was just Bowie's platonic friend. Jett knew this because he was Wise's lover.

Which of following laws would be constitutional? In answering the question identify which tort or torts may be implicated and the interest or interests the government is seeking to protect by the law.

35. A state passes a law that prohibits demonstrations within three hundred yards and within thirty minutes of the start and end of certain listed ceremonies, including in particular weddings and funerals.
36. A state law makes it illegal to disrupt certain public ceremonies, including weddings and funerals.
37. Fred went to the funeral of an abortion doctor who had been murdered by anti-abortion activists and disrupted the eulogy with shouts about how the murder of the doctor was "God's just retribution" and a "courageous moral act" and how all who supported the deceased and abortion were damned to hell. The surviving spouse of the doctor suffered a stroke when she got up to confront Fred. Upon her recovery, she sued him for intentional infliction of emotional distress.

#### 17.4.2.5 EXAM TIPS: DEFAMATION AND RELATED TORTS

The torts of defamation, intentional infliction of emotional distress, and invasion of privacy (especially through outrageous conduct) can all implicate First Amendment freedom of expression concerns. The defamation rules are fairly well settled, but problems turn on relatively fine distinctions and often require the application of the principles that led to the adoption of those rules originally. The public figure setting is commonly tested.

One potentially open issue is the extent to which the public official doctrine extends down to lower levels of government employees. Surely a mayor is a public official, but what about janitors? Or firefighters? Or ordinary police officers?

You need to know the underlying tort elements as well as the constitutional constraints on the tort. For example, the Constitution has been held to require some degree of fault for a defamation suit to proceed: Strict liability is not allowed for defamation torts.

A more difficult sort of exam question presents a new tort or new twist on a familiar tort. In such instances the issues may well include whether and to what extent the Constitution constrains or should constrain that tort. Thus this cluster can test the student's mastery of deep First Amendment principles.

### 17.4.3 Obscenity, Pornography, Child Pornography, Violence in Entertainment Media, and the Governmental Interest in Protecting Children from Adult Entertainment

Protected speech is very strongly defended, but that does not mean speakers get *carte blanche*. In *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (upheld law criminalizing aiding terrorists), the Court allowed significant government restrictions on expression when done in service of a strong enough governmental interest, such as national security. Certain types of speech receive less protection, but those types of speech are narrowly defined and are not applied expansively. For example, the doctrines of incitement, fighting words, and true threats leave some speech outside the ambit of First Amendment protection, but they were not extended so as to exclude hate speech from nearly full protection of the First Amendment. Defamation and tort law protect important interests other than speech, but they have nonetheless been constrained by freedom of expression concerns, even when the content and timing of the speech is outrageous and harmful to others, as in *Snyder v. Phelps*, 562 U.S. 443 (2011).

This section presents the First Amendment freedom of expression limits on the power of the government over a form of speech many people find offensive: sexually explicit speech, including various forms of so-called adult entertainment, such as sexually explicit films, nude dancing, lap dancing, and so on. The first and most critical distinction is between obscenity on the one hand and pornography on the other. Obscene materials are not protected, and thus the government may regulate them and even ban commerce in them under a rational basis standard of review. Pornography is treated as protected speech, but in practice is subject to certain restrictions not generally permitted for most fully protected speech. The primary legal doctrinal vehicle for this special treatment is the secondary effects doctrine. If the Court really means what it wrote in *Reed v. Town of Gilbert, Arizona*, 576 U.S. \_\_\_ (2015), the secondary effects doctrine, relying as it does on a definition of “content neutral” that was rejected in *Reed*, has been called into question. It seems unlikely that the Court will apply *Reed* (2015) to the full extent of the natural implication of its language, such that the Court would overturn the secondary effects doctrine, but the matter has not yet been presented to the Court.

An additional layer of complexity arises with respect to certain forms of adult entertainment, such as pole and lap dancing and nude dancing in certain establishments, because of the overlay of expressive conduct/symbolic speech considerations those situations invoke. Is the state regulating the message when it bans nude dancing, or is it merely regulating conduct separate from the message?

This section first presents *Miller v. California*, 413 U.S. 15 (1973), which establishes the test for distinguishing pornography (protected) from obscenity (unprotected).

Next we examine the application of the principle of protecting children from the harm that may result from exposing them to adult material, including (1) protecting them from “dirty words,” *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and (2) the special case of child pornography, *New York v. Ferber*, 458 U.S. 747 (1982).

Next is a consideration of the use of time, place, and manner restrictions in the adult entertainment context, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (erotic nude dancing regulations), including in particular the secondary effects doctrine distortion of time, place, and manner analysis of expression in the adult entertainment context, e.g., *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Erie v. Pap’s A.M.*, 529 U.S. 277 (2000); and *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). Also addressed are the problems presented because some adult entertainment is considered expressive conduct or even merely conduct.

The chapter concludes by returning explicitly to the theme of protecting children and constitutional freedom-of-expression constraints on the regulation of Internet pornography, *Reno v. ACLU*, 521 U.S. 844 (1997), and on the regulation of violent video games, *Brown v. Entertainment Merchants Association, Inc.*, 564 U.S. 786 (2011).

### 17.4.3.1 Obscenity: Introduction to *Miller v. California* (1973)

The much maligned test for whether speech is obscene was developed over a series of cases and at one point led Justice Potter Stewart to describe a version of the test as “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (Stewart concurrence). Such a test would not pass the vagueness bar, of course. Ultimately in *Miller v. California*, 413 U.S. 15 (1973), the Court settled on the test currently in place:

1. The work at issue must depict or describe sexual conduct in a patently offensive way;
2. The sexual conduct that is to be considered obscene must be specifically defined in the law;
3. “The average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest”; and
4. The work taken as a whole “lacks serious literary, artistic, political, or scientific value.”

The *Miller* case is reproduced without most of the summary of past cases that led to the adoption of the test in *Miller*. Essentially, the prior versions of the test—which included the standard of “utterly without redeeming social value”—were deemed unworkable by the Court.

Remember: If the work is not obscene but merely pornographic, it is protected speech, and the government’s power to regulate it is dramatically limited.

*Miller v. California*

413 U.S. 15 (1973)

**Mr. Chief Justice Burger delivered the opinion of the Court.**

This is one of a group of “obscenity-pornography” cases being reviewed by the Court in a reexamination of standards enunciated in earlier cases involving what Mr. Justice Harlan called “the intractable obscenity problem.” . . .

. . .

**I**

This case involves the application of a State’s criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. . . . It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment as applicable to the States through the Fourteenth Amendment.

. . .

**II**

This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. . . . We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

The basic guidelines for the trier of fact must be: (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. . . . If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary.

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible,

however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*:

- (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
- (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. . . . For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.

...

### III

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the “prurient interest” or is “patently offensive.” These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. . . . The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a *national* “community standard” would be an exercise in futility.

...

### IV

. . . [I]n our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. . . . The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. . . .

...

Vacated and remanded.

**Concurring opinions.** [Omitted.]

**Justice Douglas and Mr. Justice Brennan, joined by Mr. Justice Stewart and Mr. Justice Marshall, dissented.** [Omitted.]

### 17.4.3.2 Protecting Minors and Specific Media-Related Regulation

A general principle of regulating speech, even protected speech, is that regulations aimed at protecting minors from access to inappropriate material and conduct are given broader latitude than those relating to adults and adult access to protected expression. This principle was used in *Miller v. California*, 413 U.S. 15 (1973), as part of the justification for regulating the commercial exploitation of obscene materials. Application of this general where minors are involved principle permits greater regulation of even protected pornographic and vulgar expression than would otherwise be allowed. Nonetheless, the reach of this principle is quite limited.

This section collects several iterations of the theme of protecting minors as addressed by the Court in the following five settings:

1. Limiting indecent or pornographic broadcasts
2. Child pornography
3. Purveying pornography to adults and providing adult entertainment generally
4. The distribution of violent video games
5. Regulation of the Internet with respect to adult material.

### 17.4.3.3 Regulating Broadcast Media

Broadcast media (over-the-air radio and television) have been recognized (1) as a limited resource, and (2) as accessible by anyone. For these two reasons the Court has allowed greater regulation of broadcast media than of books, films, or other distributed material. The Federal Communications Commission (FCC) is the primary federal agency with authority over broadcast and cable networks. The FCC has prohibited the use of indecent language over the air. Note that “indecent” is a far broader category than obscene or pornographic and includes “dirty words” and other standards of decorum. The promulgation of the applicable rules and the resulting cases predate the rise of the World Wide Web, and the extent to which that would influence decisions today is unclear. A video and a transcription of Carlin speech at issue in the next case are available online.

#### ***Federal Communications Commission v. Pacifica Foundation***

438 U.S. 726 (1978)

**Mr. Justice Stevens delivered the opinion of the Court (Parts I, II, III, and IV-C) and an opinion in which Chief Justice Burger and Justice Rehnquist joined (Parts IV-A and IV-B).**

This case requires that we decide whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene.

A satiric humorist named George Carlin recorded a 12-minute monologue entitled “Filthy Words” before a live audience in a California theater. He began by referring to his thoughts about “the words you couldn’t say on the public, ah, airwaves, um, the ones you definitely wouldn’t say, ever.” He proceeded to list those words and repeat them over and over again in a variety of colloquialisms. The transcript of the recording, which is appended to this opinion, indicates frequent laughter from the audience.

At about 2 o’clock in the afternoon on Tuesday, October 30, 1973, a New York radio station, owned by respondent Pacifica Foundation, broadcast the “Filthy Words” monologue. A few weeks later a man, who stated that he had heard the broadcast while driving with his young son, wrote a letter complaining to the Commission. He stated that, although he could perhaps understand the “record’s being sold for private use, I certainly cannot understand the broadcast of same over the air that, supposedly, you control.”

*[The FCC ruled that Pacifica Foundation had violated FCC regulations by broadcasting the indecent speech. Pacifica Foundation appealed to the U.S. Court of Appeals for the District of Columbia Circuit where it prevailed. The FCC petitioned the U.S. Supreme Court for a writ of certiorari.]*

Having granted the Commission’s petition for certiorari, we must decide: (1) whether the scope of judicial review encompasses more than the Commission’s determination that the monologue was indecent “as broadcast”; (2) whether the Commission’s order was a form of censorship forbidden by §326; (3) whether the broadcast was indecent within the meaning of §1464; and (4) whether the order violates the First Amendment of the United States Constitution.

*[The Court ruled for the FCC on the first three issues and then proceeded to consider the constitutional issue.]*

#### IV

Pacifica makes two constitutional attacks on the Commission’s order. First, it argues that the Commission’s construction of the statutory language broadly encompasses so much constitutionally protected speech that reversal is required even if Pacifica’s broadcast of the “Filthy Words” monologue is not itself protected by the First Amendment. Second, Pacifica argues that, inasmuch as the recording is not obscene, the Constitution forbids any abridgment of the right to broadcast it on the radio.

#### A

The first argument fails because our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast. As the Commission itself emphasized, its order was “issued in a specific factual context.” 59 F.C.C.2d at 893. That approach is appropriate for courts as well as the Commission when regulation of indecency is at stake, for indecency is largely a function of context—it cannot be adequately judged in the abstract.

The approach is also consistent with *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 [(1968)]. In that case, the Court rejected an argument that the Commission's regulations defining the fairness doctrine were so vague that they would inevitably abridge the broadcasters' freedom of speech. The Court of Appeals had invalidated the regulations because their vagueness might lead to self-censorship of controversial program content. *Radio Television News Directors Assn. v. United States*, 400 F.2d 1002, 1016 (7th Cir. 1968). This Court reversed. After noting that the Commission had indicated, as it has in this case, that it would not impose sanctions without warning in cases in which the applicability of the law was unclear, the Court stated:

We need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, *United States v. Sullivan*, 332 U. S. 689, 694 (1948), but will deal with those problems if and when they arise.

It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern. The danger dismissed so summarily in *Red Lion*, in contrast, was that broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine," to be applied "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U. S. 601, 613 [(1973)]. We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech.

## B

When the issue is narrowed to the facts of this case, the question is whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances. For if the government has any such power, this was an appropriate occasion for its exercise.

The words of the Carlin monologue are unquestionably "speech" within the meaning of the First Amendment. It is equally clear that the Commission's objections to the broadcast were based in part on its content. The order must therefore fall if, as *Pacifica* argues, the First Amendment prohibits all governmental regulation that depends on the content of speech. Our past cases demonstrate, however, that no such absolute rule is mandated by the Constitution.

The classic exposition of the proposition that both the content and the context of speech are critical elements of First Amendment analysis is Mr. Justice Holmes' statement for the Court in *Schenck v. United States*, 249 U. S. 47, 52 [(1919)]:

We admit that, in many places and in ordinary times, the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is

done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

The question in this case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content. Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards. . . . But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas. If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four-letter words—First Amendment protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said:

[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

*Chaplinsky v. New Hampshire*, 315 U.S. at 572 [(1942)].

Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are unquestionably protected. . . . Indeed, we may assume, *arguendo*, that this monologue would be protected in other contexts. Nonetheless, the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context. It is a characteristic of speech such as this that both its capacity to offend and its “social value,” to use Mr. Justice Murphy's term, vary with the circumstances. Words that are commonplace in one setting are shocking in another. To paraphrase Mr. Justice Harlan, one occasion's lyric is another's vulgarity. . . .

In this case, it is undisputed that the content of Pacifica's broadcast was “vulgar,” “offensive,” and “shocking.” Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the Commission's action was constitutionally permissible.

## C

We have long recognized that each medium of expression presents special First Amendment problems. And of all forms of communication, it is

broadcasting that has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve “the public interest, convenience, and necessity.” Similarly, although the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 [(1974)], it affords no such protection to broadcasters; on the contrary, they must give free time to the victims of their criticism. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 [(1969)].

The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder. . . . Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen’s written message might have been incomprehensible to a first grader, Pacifica’s broadcast could have enlarged a child’s vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in *Ginsberg v. New York*, 390 U.S. 629 [(1968)], that the government’s interest in the “wellbeing of its youth” and in supporting “parents’ claim to authority in their own household” justified the regulation of otherwise protected expression. *Id.* at 640 and 639. The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.

It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission’s decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote, a “nuisance may be merely a right thing

in the wrong place,—like a pig in the parlor instead of the barnyard.” *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 383 [(1926)]. We simply hold that, when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.

The judgment of the Court of Appeals is reversed.

*It is so ordered.*

**Mr. Justice Powell with whom Mr. Justice Blackmun joins, concurring in part and concurring in the judgment.** [*Omitted.*]

**Mr. Justice Brennan with whom Mr. Justice Marshall joins, dissenting.**

. . . I find the Court’s misapplication of fundamental First Amendment principles so patent, and its attempt to impose its notions of propriety on the whole of the American people so misguided, that I am unable to remain silent.

. . .

Without question, the privacy interests of an individual in his home are substantial, and deserving of significant protection. In finding these interests sufficient to justify the content regulation of protected speech, however, the Court commits two errors. First, it misconceives the nature of the privacy interests involved where an individual voluntarily chooses to admit radio communications into his home. Second, it ignores the constitutionally protected interests of both those who wish to transmit and those who desire to receive broadcasts that many—including the FCC and this Court—might find offensive.

. . .

I am in wholehearted agreement with my Brethren that an individual’s right “to be let alone” when engaged in private activity within the confines of his own home is encompassed within the “substantial privacy interests” to which Mr. Justice Harlan referred in *Cohen*, and is entitled to the greatest solicitude. *Stanley v. Georgia*, 394 U.S. 557 (1969). However, I believe that an individual’s actions in switching on and listening to communications transmitted over the public airways and directed to the public at large do not implicate fundamental privacy interests, even when engaged in within the home. . . . Although an individual’s decision to allow public radio communications into his home undoubtedly does not abrogate all of his privacy interests, the residual privacy interests he retains *vis-a-vis* the communication he voluntarily admits into his home are surely no greater than those of the people present in the corridor of the Los Angeles courthouse in *Cohen* who bore witness to the words “Fuck the Draft” emblazoned across Cohen’s jacket. Their privacy interests were held insufficient to justify punishing Cohen for his offensive communication.

. . .

The Court’s balance, of necessity, fails to accord proper weight to the interests of listeners who wish to hear broadcasts the FCC deems offensive. It permits majoritarian tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority. No decision of this Court supports such a result. . . .

Most parents will undoubtedly find understandable, as well as commendable, the Court's sympathy with the FCC's desire to prevent offensive broadcasts from reaching the ears of unsupervised children. Unfortunately, the facial appeal of this justification for radio censorship masks its constitutional insufficiency. Although the government unquestionably has a special interest in the wellbeing of children, and consequently "can adopt more stringent controls on communicative materials available to youths than on those available to adults," . . . the Court has . . . made it abundantly clear that, "under any test of obscenity as to minors . . . , to be obscene, *such expression must be, in some significant way, erotic.*" . . .

Because the Carlin monologue is obviously not an erotic appeal to the prurient interests of children, the Court, for the first time, allows the government to prevent minors from gaining access to materials that are not obscene, and are therefore protected, as to them. . . .

. . .

**Mr. Justice Stewart, with whom Mr. Justice Brennan, Mr. Justice White, and Mr. Justice Marshall join, dissenting.** [*Omitted.*]

#### 17.4.3.4 Child Pornography

Pornography and other expressive adult entertainment such as nude dancing are protected speech. But that does not mean that anything goes. To protect minors and to avoid inflicting pornographic material on a nonconsenting audience, restrictions not allowed for other more fully protected speech—such as political or scientific speech—are permitted. The special case of child pornography is considered below, followed by the secondary effects doctrine. Note that pornographic but not obscene works can be banned only if the pornography involves children. The leading case in this area is *New York v. Ferber*, 458 U.S. 747 (1982).

Child pornography is outside of the protection of the First Amendment, but the reach of this category is very limited.

- First, the statute must address children below a specified age, such as sixteen or eighteen.
- Second, to be excluded from protection the work must visually depict sexual conduct. Thus literature and written descriptions generally will not be excluded but rather remain protected.
- Third, sexual conduct that the government is prohibiting from being depicted must be specifically described in the statute.

The purpose of allowing governmental regulation of this type of speech is to protect children from indecent exploitation and from exposure to certain types of actions. Thus an adult actor playing a minor is not a violation, nor is the use of simulation or computer graphics programs to make an actor look younger or to generate the images entirely. Since no children are involved in the production of such works, those works and the expression they contain remain protected. See *Ashcroft v. Free Speech Coalition*,

535 U.S. 234 (2002). Cf., *Commonwealth of Virginia v. Allen* (2008) (unpublished opinion of Court of Appeals (2008); *appeal denied* by Virginia Supreme Court (2009), *cert. denied*, *sub nom Allen v. Virginia*, 558 U.S. 1111 (2010) (conviction for superimposing faces of real children on adult pornography actors upheld); see Petition for Writ of Certiorari, No. 09-306, 2009 WL 2904600.)

### *New York v. Ferber*

458 U.S. 747 (1982)

#### **Justice White delivered the opinion of the Court.**

At issue in this case is the constitutionality of a New York criminal statute which prohibits persons from knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances.

#### I

In recent years, the exploitive use of children in the production of pornography has become a serious national problem. . . .

. . .

We granted the State's petition for certiorari . . . presenting the single question:

To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?

#### II

The [New York] Court of Appeals proceeded on the assumption that the standard of obscenity incorporated in §263.10, which follows the guidelines enunciated in *Miller v. California*, 413 U.S. 15 (1973), constitutes the appropriate line dividing protected from unprotected expression by which to measure a regulation directed at child pornography. It was on the premise that "nonobscene adolescent sex" could not be singled out for special treatment that the court found §263.15 "strikingly underinclusive." Moreover, the assumption that the constitutionally permissible regulation of pornography could not be more extensive with respect to the distribution of material depicting children may also have led the court to conclude that a narrowing construction of §263.15 was unavailable.

The Court of Appeals' assumption was not unreasonable in light of our decisions. This case, however, constitutes our first examination of a statute directed at and limited to depictions of sexual activity involving children. We believe our inquiry should begin with the question of whether a State has somewhat more freedom in proscribing works which portray sexual acts or lewd exhibitions of genitalia by children.

. . .

## B

... [W]e are persuaded that the States are entitled to greater leeway in the regulation of pornographic depictions of children.

*First.* It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological wellbeing of a minor" is "compelling." ... Accordingly, we have sustained legislation aimed at protecting the physical and emotional wellbeing of youth even when the laws have operated in the sensitive area of constitutionally protected rights. In *Prince v. Massachusetts, supra*, the Court held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First Amendment activity. In *Ginsberg v. New York, supra*, we sustained a New York law protecting children from exposure to nonobscene literature. Most recently, we held that the Government's interest in the "wellbeing of its youth" justified special treatment of indecent broadcasting received by adults as well as children. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. ... The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.

*Second.* The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled. Indeed, there is no serious contention that the legislature was unjustified in believing that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies. While the production of pornographic materials is a low profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. The most expeditious, if not the only practical, method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product. ...

... We ... cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem.

*Third.* The advertising and selling of child pornography provide an economic motive for, and are thus an integral part of, the production of such materials, an activity illegal throughout the Nation. ... We note that, were the statutes outlawing the employment of children in these films and photographs fully effective, and the constitutionality of these laws has not been questioned, the First Amendment implications would be no greater than that presented by laws against

distribution: enforceable production laws would leave no child pornography to be marketed.

*Fourth.* The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*. We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work. As a state judge in this case observed, if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative. Nor is there any question here of censoring a particular literary theme or portrayal of sexual activity. The First Amendment interest is limited to that of rendering the portrayal somewhat more “realistic” by utilizing or photographing children.

*Fifth.* Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions. “The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech.” *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976) . . . Thus, it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required. When a definable class of material, such as that covered by §263.15, bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck, and that it is permissible to consider these materials as without the protection of the First Amendment.

### C

There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age. The category of “sexual conduct” proscribed must also be suitably limited and described.

The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for the purpose of clarity. The *Miller* formulation is adjusted in the following respects: a trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment

protection. As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant.

#### D

...

We hold that §263.15 sufficiently describes a category of material the production and distribution of which is not entitled to First Amendment protection. . . . It also follows that the State is not barred by the First Amendment from prohibiting the distribution of unprotected materials produced outside the State.

#### III

It remains to address the claim that the New York statute is unconstitutionally overbroad because it would forbid the distribution of material with serious literary, scientific, or educational value or material which does not threaten the harms sought to be combated by the State. Respondent prevailed on that ground below, and it is to that issue that we now turn.

...

#### A

The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. . . . [T]his rule reflects two cardinal principles of our constitutional order: the personal nature of constitutional rights, . . . and prudential limitations on constitutional adjudication. . . .

What has come to be known as the First Amendment overbreadth doctrine is one of the few exceptions to this principle, and must be justified by “weighty countervailing policies.” . . .

The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is “strong medicine,” and have employed it with hesitation, and then “only as a last resort.” . . . We have, in consequence, insisted that the overbreadth involved be “substantial” before the statute involved will be invalidated on its face.

...

The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation.

...

Applying these principles, we hold that §263.15 is not substantially overbroad. We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. . . .

#### IV

Because §263.15 is not substantially overbroad, it is unnecessary to consider its application to material that does not depict sexual conduct of a type that New York may restrict consistent with the First Amendment. As applied to Paul Ferber and to others who distribute similar material, the statute does not violate the First Amendment as applied to the States through the Fourteenth. The judgment of the New York Court of Appeals is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

So ordered.

#### 17.4.3.5 The Secondary Effects Doctrine

Although the Court treats pornography and erotic adult entertainment as protected speech, it gives them less protection than other fully protected speech, such as political speech, and it allows greater government regulation of the time, place, and manner of adult-oriented entertainment than of other sorts of speech-related entertainment. For example, the Court ruled that nude dancing could be regulated even if the regulation affected the content of the conduct. The conduct is the dancing (movement); the message is that eroticism is part of being fully human. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

The theory developed by the Court through a series of decisions is known as the secondary effects doctrine. The secondary effects doctrine is a species of time, place, and manner regulation, and the dividing line is still, in theory, content/not content regulation. But in these adult entertainment settings, the term “content” is distorted to allow regulation of certain types of content without invoking the content-based standard of review. Provided the *purpose* of the regulation is not to target or limit the content per se, but rather is to reduce the *effect* of the adult entertainment establishment on other things, the regulation has been held to be not content based. This slight of hand allows application of the lower standard for time, place, and manner regulation, thereby making it easier for the government to regulate adult entertainment without formally moving it out of the category of protected speech. The secondary effects doctrine has not been applied outside the adult entertainment and pornography settings. The development of the doctrine is traced below to highlight how *Reed v. Town of Gilbert, Arizona*, 576 U.S. \_\_\_\_ (2015), places a cloud over its continued viability and to indicate how the Court might nonetheless find a way to allow greater regulation of adult entertainment.

In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), the four-justice plurality seemed to place adult entertainment into a separate, lesser-protected, but still protected, category to which a sort of balancing test would be applied. The government interests furthered by a zoning ordinance would be weighed against the private party's interest in purveying the adult entertainment expression. Furthermore, to the extent

that the government was merely regulating when and where the expression could take place, as opposed to suppressing it completely, the regulation would be tested under a reasonable restrictions sort of test. In *Young v. Mini Theatres* (1976), the plurality wrote:

Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.

*Id.* at 7-71.

Justice Powell, the deciding vote in *Young v. American Mini Theatres*, 427 U.S. 50 (1976), in his concurrence applies a time, place, and manner analysis and finds the zoning restriction acceptable. The dissenters in *Young v. American Mini Theatres* (1976) pointed out that the restriction was indeed content-based and that the restriction could not withstand strict scrutiny. They also stated that they were unwilling to adopt another category of speech that gets lesser protection.

A decade later, in *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986), the Court adopted Justice Powell's secondary effects doctrine in the adult entertainment context, rejecting the creation of a less-important-speech approach that would use an intermediate standard of review. The majority opinion, citing Justice Powell's concurrence in *Young v. American Mini Theatres* (1976) wrote:

The Renton ordinance, like the one in *American Mini Theatres*, does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The ordinance is therefore properly analyzed as a form of time, place, and manner regulation.

. . .

In short, the Renton ordinance is completely consistent with our definition of "content-neutral" speech regulations as those that "are *justified* without reference to the content of the regulated speech." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (emphasis added). . . . The ordinance does not contravene the fundamental principle that underlies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Mosley, supra*, at 408 U.S. 95-96.

*City of Renton v. Playtime Theatres*, 475 U.S. 41, 47-49 (1986).

The Court concluded:

In sum, we find that the Renton ordinance represents a valid governmental response to the "admittedly serious problems" created by adult theaters. See [*American Mini Theatres*,] at 427 U.S. 71 (plurality opinion). Renton has not used "the power to zone as a pretext for suppressing expression," *id.* at 427 U.S. 84 (Powell, J., concurring), but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning. Here, as in

*American Mini Theatres*, the city has enacted a zoning ordinance that meets these goals while also satisfying the dictates of the First Amendment. The judgment of the Court of Appeals is therefore

*Reversed.*

*Id.* at 54-55.

This doctrine was cited in a series of later cases, including *Barnes v. Glen Theatre*, 501 U.S. 560 (1991), and *Erie v. Pap's A.M.*, 529 U.S. 277 (2000), both of which held that nude dancing is expressive conduct and is therefore subject to the time, place, and manner restrictions standard of review, not to strict scrutiny even though arguably the content more than the conduct was being regulated. In *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), a splintered Court upheld the Los Angeles adult book store zoning regulation prohibiting adult entertainment establishments from being within five hundred feet of each other, justifying it on the grounds of avoiding a “skid row” from developing. The factual basis for the legislative action was, at best, questionable, but the Court deferred to local judgment on this point. This sort of deference to factual decisions of legislative bodies is typical in most settings, but it is unusual in freedom of expression cases.

The continued viability of the secondary effects doctrine is called into question by the Court’s decision in *Reed v. Town of Gilbert, Arizona*, 576 U.S. \_\_\_\_ (2015), insofar as *Reed* states that regulating any particular *type* of speech is indeed content regulation subject to strict scrutiny. In particular, the Court in *Reed* (2015) wrote:

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. . . . This commonsense meaning of the phrase “content based” requires a court to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. . . . Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose.

*Id.* at \_\_\_\_ . In the secondary effects cases, the government is regulating a particular type of speech: pornographic speech or speech expressing “adult” messages about erotic ideas or feelings, such as nude dancing, lap dancing, or “exotic” dancing. A bookstore selling an ordinary assortment of books can be located in places where a bookstore selling pornographic books cannot. A night club featuring strippers can be regulated more closely than one featuring only musical acts or stand-up comedians. Such distinctions are all made “because of the topic discussed” or the “particular subject matter,” and thus, under *Reed* (2015), would be subject to strict scrutiny, not to time, place, and manner review. It is unclear what the Court will do when faced with the inevitable challenge to the secondary effects doctrine invited by the categorical language in *Reed* (2015). It seems unlikely that the Court will be willing to overturn the results of secondary effects cases and significantly reduce the power of governments to regulate adult entertainment. It seems possible that after *Reed* (2015) a different theory (such as demoting “adult entertainment” to a partially protected status, the approach taken by the plurality in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976)) may be used to reach the same results. The underlying reasons for treating the material differently, as explained in *Young v. American Mini Theatres* (1976), remain.

### 17.4.3.6 Regulating Pornography Online

Previous cases have shown how the Court allows greater regulation of expression if the purpose of the regulation is to protect children. The particular medium at issue, for example, broadcast radio or TV, also affects the analysis. One of the most difficult ongoing First Amendment problems is presented by the Internet, which allows easy access to pornography even by minors. Congress has attempted to regulate pornography online several times, only to be rejected by the courts each time. The Supreme Court has not been persuaded that the Internet is such a specialized medium that it justifies the regulations thus far enacted by Congress. The leading case in this area is *Reno v. ACLU*, 521 U.S. 844 (1997). Although the technology has advanced tremendously since 1997 (and indeed the opinion’s summary of the Internet seems somewhat quaint today because its many manifestations are now so integral to our lives and because this case predates Google, Facebook, and social media generally), the principles and the methods used in this case still define the Court’s approach to regulating speech online.

#### *Reno v. ACLU*

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521 U.S. 844 (1997)

**Stevens, J., delivered the opinion of the Court, in which Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer, JJ., joined. O’Connor, J., filed an opinion concurring in the judgment in part and dissenting in part, in which Rehnquist, C. J., joined.**

**Justice Stevens delivered the opinion of the Court.**

At issue is the constitutionality of two statutory provisions enacted to protect minors from “indecent” and “patently offensive” communications on the Internet. Notwithstanding the legitimacy and importance of the congressional goal of protecting children from harmful materials, we agree with the three-judge District Court that the statute abridges “the freedom of speech” protected by the First Amendment.

I

...

#### *The Internet*

The Internet is an international network of interconnected computers.

...

Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. But, as presently constituted [1997], those most relevant to this case are electronic mail (e-mail), automatic mailing list services (“mail exploders,” sometimes referred to as “listservs”), “newsgroups,” “chat rooms,” and the “World Wide Web.” All of these methods can be used to transmit text; most can transmit sound, pictures, and moving

video images. Taken together, these tools constitute a unique medium—known to its users as “cyberspace”—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.

...  
... The Web is thus comparable, from the readers’ viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.

From the publishers’ point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can “publish” information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals. Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege. “No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web.”

#### *Sexually Explicit Material*

Sexually explicit material on the Internet includes text, pictures, and chat and “extends from the modestly titillating to the hardest-core.” These files are created, named, and posted in the same manner as material that is not sexually explicit, and may be accessed either deliberately or unintentionally during the course of an imprecise search. “Once a provider posts its content on the Internet, it cannot prevent that content from entering any community.” Thus, for example,

when the UCR/California Museum of Photography posts to its Web site nudes by Edward Weston and Robert Mapplethorpe to announce that its new exhibit will travel to Baltimore and New York City, those images are available not only in Los Angeles, Baltimore, and New York City, but also in Cincinnati, Mobile, or Beijing—wherever Internet users live. Similarly, the safer sex instructions that Critical Path posts to its Web site, written in street language so that the teenage receiver can understand them, are available not just in Philadelphia, but also in Provo and Prague.

Some of the communications over the Internet that originate in foreign countries are also sexually explicit.

Though such material is widely available, users seldom encounter such content accidentally. “A document’s title or a description of the document will usually appear before the document itself . . . and in many cases the user will receive detailed information about a site’s content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content.” For that reason, the “odds are slim” that a user would enter a sexually explicit site by accident. Unlike communications received by radio or television, “the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial.

A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended.”

Systems have been developed to help parents control the material that may be available on a home computer with Internet access. A system may either limit a computer’s access to an approved list of sources that have been identified as containing no adult material, it may block designated inappropriate sites, or it may attempt to block messages containing identifiable objectionable features. “Although parental control software currently can screen for certain suggestive words or for known sexually explicit sites, it cannot now screen for sexually explicit images.” Nevertheless, the evidence indicates that “a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available.”

#### *Age Verification*

The problem of age verification differs for different uses of the Internet. The District Court categorically determined that there “is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms.” The Government offered no evidence that there was a reliable way to screen recipients and participants in such forums for age. Moreover, even if it were technologically feasible to block minors’ access to newsgroups and chat rooms containing discussions of art, politics, or other subjects that potentially elicit “indecent” or “patently offensive” contributions, it would not be possible to block their access to that material and “still allow them access to the remaining content, even if the overwhelming majority of that content was not indecent.”

...

In sum, the District Court found:

Even if credit card verification or adult password verification were implemented, the Government presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18. The burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers. . . .

## II

The Telecommunications Act of 1996 was an unusually important legislative enactment. As stated on the first of its 103 pages, its primary purpose was to reduce regulation and encourage “the rapid deployment of new telecommunications technologies.” The major components of the statute have nothing to do with the Internet; they were designed to promote competition in the local telephone service market, the multichannel video market, and the market for over-the-air broadcasting. The Act includes seven Titles, six of which are the product of extensive committee hearings and the subject of discussion in Reports

prepared by Committees of the Senate and the House of Representatives. By contrast, Title V—known as the “Communications Decency Act of 1996” (CDA)—contains provisions that were either added in executive committee after the hearings were concluded or as amendments offered during floor debate on the legislation. An amendment offered in the Senate was the source of the two statutory provisions challenged in this case. They are informally described as the “indecent transmission” provision and the “patently offensive display” provision.

...

The breadth of these prohibitions is qualified by two affirmative defenses. See §223(e)(5).<sup>26</sup> One covers those who take “good faith, reasonable, effective, and appropriate actions” to restrict access by minors to the prohibited communications. §223(e)(5)(A). The other covers those who restrict access to covered material by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number or code. §223(e)(5)(B).

...

#### IV

[T]he Government contends that the CDA is plainly constitutional under three of our prior decisions: (1) *Ginsberg v. New York*, 390 U.S. 629 (1968); (2) *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); and (3) *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). A close look at these cases, however, raises—rather than relieves—doubts concerning the constitutionality of the CDA.

In *Ginsberg*, we upheld the constitutionality of a New York statute that prohibited selling to minors under 17 years of age material that was considered obscene as to them even if not obscene as to adults. We rejected the defendant’s broad submission that “the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend on whether the citizen is an adult or a minor.” 390 U.S. at 636. In rejecting that contention, we relied not only on the State’s independent interest in the well-being of its youth, but also on our consistent recognition of the principle that “the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.”

In four important respects, the statute upheld in *Ginsberg* was narrower than the CDA. First, we noted in *Ginsberg* that “the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.” *Id.*, at 639. Under the CDA, by contrast, neither the parents’ consent—nor even their participation in the communication would avoid the application of the statute. Second, the New York statute applied only to commercial transactions, *id.*, at 647, whereas the CDA contains no such limitation. Third, the New York statute cabined its definition of material that is harmful to minors with the requirement that it be “utterly without redeeming social importance for minors.” *Id.*, at 646. The CDA fails to provide us with any definition of the term “indecent” as used in §223(a)(1) and, importantly, omits any requirement that the “patently offensive” material covered by §223(d) lack serious literary, artistic, political, or scientific value. Fourth, the New York statute

defined a minor as a person under the age of 17, whereas the CDA, in applying to all those under 18 years, includes an additional year of those nearest majority.

In *Pacifica*, we upheld a declaratory order of the Federal Communications Commission, holding that the broadcast of a recording of a 12-minute monologue entitled “Filthy Words” that had previously been delivered to a live audience “could have been the subject of administrative sanctions.” 438 U.S. at 730 (internal quotation marks omitted).

...

As with the New York statute at issue in *Ginsberg*, there are significant differences between the order upheld in *Pacifica* and the CDA. First, the order in *Pacifica*, issued by an agency that had been regulating radio stations for decades, targeted a specific broadcast that represented a rather dramatic departure from traditional program content in order to designate when—rather than whether—it would be permissible to air such a program in that particular medium. The CDA’s broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet. Second, unlike the CDA, the Commission’s declaratory order was not punitive; we expressly refused to decide whether the indecent broadcast “would justify a criminal prosecution.” 438 U.S., at 750. Finally, the Commission’s order applied to a medium which as a matter of history had “received the most limited First Amendment protection,” *id.*, at 748, in large part because warnings could not adequately protect the listener from unexpected program content. The Internet, however, has no comparable history. Moreover, the District Court found that the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material.

In *Renton*, we upheld a zoning ordinance that kept adult movie theaters out of residential neighborhoods. The ordinance was aimed, not at the content of the films shown in the theaters, but rather at the “secondary effects”—such as crime and deteriorating property values—that these theaters fostered: “‘It is these secondary effect which these zoning ordinances attempt to avoid, not the dissemination of “offensive” speech.’” 475 U.S. at 49 (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71, n. 34 (1976)). According to the Government, the CDA is constitutional because it constitutes a sort of “cyberzoning” on the Internet. But the CDA applies broadly to the entire universe of cyberspace. And the purpose of the CDA is to protect children from the primary effects of “indecent” and “patently offensive” speech, rather than any “secondary” effect of such speech. Thus, the CDA is a content-based blanket restriction on speech, and, as such, cannot be “properly analyzed as a form of time, place, and manner regulation.” 475 U.S. at 46. *See also* *Boos v. Barry*, 485 U.S. 312, 321 (1988) (“Regulations that focus on the direct impact of speech on its audience” are not properly analyzed under *Renton*); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (“Listeners’ reaction to speech is not a content-neutral basis for regulation”).

These precedents, then, surely do not require us to uphold the CDA and are fully consistent with the application of the most stringent review of its provisions.

## V

. . . [W]e [have] observed that “[e]ach medium of expression . . . may present its own problems.” Thus, some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers. . . . In these cases, the Court relied on the history of extensive Government regulation of the broadcast medium . . . ; the scarcity of available frequencies at its inception . . . ; and its “invasive” nature. . . .

Those factors are not present in cyberspace. Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. Moreover, the Internet is not as “invasive” as radio or television. The District Court specifically found that “[c]ommunications over the Internet do not ‘invade’ an individual’s home or appear on one’s computer screen unbidden. Users seldom encounter content ‘by accident.’” 929 F. Supp., at 844 (finding 88). It also found that “[a]lmost all sexually explicit images are preceded by warnings as to the content,” and cited testimony that “‘odds are slim’ that a user would come across a sexually explicit sight by accident.” *Ibid.*

. . . In attempting to justify the complete ban and criminalization of indecent commercial telephone messages, the Government [argued] that the ban was necessary to prevent children from gaining access to such messages. We agreed that “there is a compelling interest in protecting the physical and psychological well-being of minors” which extended to shielding them from indecent messages that are not obscene by adult standards, . . . but distinguished our “emphatically narrow holding” in *Pacifica* because it did not involve a complete ban and because it involved a different medium of communication. . . . We explained that “the dial-it medium requires the listener to take affirmative steps to receive the communication.” . . . “Placing a telephone call,” we continued, “is not the same as turning on a radio and being taken by surprise by an indecent message.” . . .

Finally, unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a “scarce” expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. . . . This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, “the content on the Internet is as diverse as human thought.” . . . We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.

## VI

. . .

In contrast to *Miller* and our other previous cases, the CDA thus presents a greater threat of censoring speech that, in fact, falls outside the statute’s scope.

Given the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection. That danger provides further reason for insisting that the statute not be overly broad. The CDA's burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute.

## VII

We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. 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. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

...

The breadth of the CDA's coverage is wholly unprecedented. Unlike the regulations upheld in *Ginsberg* and *Pacifica*, the scope of the CDA is not limited to commercial speech or commercial entities. Its open-ended prohibitions embrace all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors. The general, undefined terms "indecent" and "patently offensive" cover large amounts of nonpornographic material with serious educational or other value. Moreover, the "community standards" criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message. The regulated subject matter includes any of the seven "dirty words" used in the *Pacifica* monologue, the use of which the Government's expert acknowledged could constitute a felony. It may also extend to discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalog of the Carnegie Library.

...

The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so. The arguments in this Court have referred to possible alternatives such as requiring that indecent material be "tagged" in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet—such as commercial Web sites—differently from others, such as chat rooms. Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all.

...

## IX

...

We agree with the District Court's conclusion that the CDA places an unacceptably heavy burden on protected speech, and that the defenses do not

constitute the sort of “narrow tailoring” that will save an otherwise patently invalid unconstitutional provision. In *Sable*, 492 U. S., at 127, we remarked that the speech restriction at issue there amounted to “‘burn[ing] the house to roast the pig.’” The CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community.

...

## XI

...

For the foregoing reasons, the judgment of the District Court is affirmed. It is so ordered.

### **Justice O’Connor, with whom Chief Justice Rehnquist joins, concurring in the judgment in part and dissenting in part.**

I write separately to explain why I view the Communications Decency Act of 1996 (CDA) as little more than an attempt by Congress to create “adult zones” on the Internet. Our precedent indicates that the creation of such zones can be constitutionally sound. Despite the soundness of its purpose, however, portions of the CDA are unconstitutional because they stray from the blueprint our prior cases have developed for constructing a “zoning law” that passes constitutional muster.

...

#### **17.4.3.6.1 Content-Based Regulation: Protecting Minors Online**

The public interest in protecting minors from pornography was not sufficient to overcome the overbreadth challenge in *Reno v. ACLU*, 521 U.S. 844 (1997). Later attempts by Congress to pass legislation addressing the concerns of the Court met with the same fate, except for a law requiring schools and libraries serving children in grades kindergarten through twelve, as a condition of receiving federal funding, to use filters and to take other measures to protect children from pornography and other harmful online content. *United States v. American Library Association*, 539 U.S. 194 (2003). Legislation protecting minors on social networking sites and in other online contexts has been proposed, but not enacted.

#### **17.4.3.7 Content Based Regulation: Violent Video Games**

In *Brown v. Entertainment Merchants Association, Inc.*, 564 U.S. 786 (2011), the Court addressed an attempt by California to extend the policy of protection of minors in the context of pornography to the protection of minors in the context of excessively violent video games. The majority saw the case as one seeking to exclude a new category—excessive violence—from First Amendment protections. Justice Breyer, in dissent, saw the case as not creating a new category of excluded or less-protected speech, but rather as merely extending existing protections for minors into a new area spawned by a new technology—video games.

Justice Scalia, writing for the majority, refused to create a new category of lesser-protected speech (depictions of violence). Nonetheless, rather than applying the typical

strict scrutiny standard of review, the majority approached the legislation using underinclusiveness and overinclusiveness principles. These principles are sometimes fit within the strict scrutiny standard of review with respect to the requirement that the government use the least restrictive alternatives that are neither overinclusive (limit too much protected speech) nor underinclusive (failure to limit speech that creates essentially the same harm as the speech targeted in the regulation undermines the claim of narrow tailoring). Both overinclusiveness and underinclusiveness as freedom of expression principles can also stand on their own as independent bases on which to hold a regulation of expression unconstitutional. In holding the statute unconstitutional, the majority in *Brown v. Entertainment Merchants Association, Inc.*, concluded:

California's legislation straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children. Both ends are legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993). As a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto. And as a means of assisting concerned parents it is seriously overinclusive because it abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime. And the overbreadth in achieving one goal is not cured by the underbreadth in achieving the other. Legislation such as this, which is neither fish nor fowl, cannot survive strict scrutiny.

*Id.*, at 804.

Justice Breyer in his dissent articulates the normal standard of review for content-based regulation in its most typical and clear form: A law must be narrowly tailored to further a compelling interest with no less restrictive alternative available that would be at least as effective. Then he goes on to write:

I would not apply this strict standard “mechanically.” . . . Rather, in applying it, I would evaluate the degree to which the statute injures speech-related interests, the nature of the potentially-justifying “compelling interests,” the degree to which the statute furthers that interest, the nature and effectiveness of possible alternatives, and, in light of this evaluation, whether, overall, “the statute works speech-related harm . . . out of proportion to the benefits that the statute seeks to provide.”

*Id.* at 847. In doing the balancing he advocates, Justice Breyer would uphold the regulation. Justice Breyer's more flexible approach harks back to some of the language seen in earlier cases about how the First Amendment protection of freedom of expression varies with the type of speech: Not all protected speech is entitled to the same level of protection. *E.g.*, *Miller v. California*, 413 U.S. 15 (1973); *Young v. American Mimi Theatres, Inc.*, 427 U.S. 50 (1976); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Justice Breyer advocated this same balancing approach in his dissent in *Reed v. Town of Gilbert, Arizona*, 576 U.S. \_\_\_\_ (2015), and in his concurrence in *United States v. Alvarez*, 567 U.S. \_\_\_\_ (2012). It has yet to command a majority of the Court.

#### **17.4.3.7.1 DEVELOPING A WORKABLE STANDARD OF REVIEW FOR GOVERNMENTAL REGULATION OF VIOLENCE IN VIDEO GAMES**

Consider the impact of both alternative results in this case: without regard to the standard of review to be applied, should the regulation of sales of violent video games to minors be constitutional or not? Consider the extent to which the Court's reasons for its result matter with respect to the implications of the decision. Can you fashion a test and apply it to this case in such a way that the majority's concerns are met well enough that their fears would be very unlikely to be realized?

#### **17.4.3.8 HYPOTHETICALS: OBSCENITY, PORNOGRAPHY, AND PROTECTION OF MINORS**

38. Korner Porner, a small store that sells pornographic works, was prosecuted for renting out obscene material in violation of the Cleenton city ordinance. The city ordinance provided that selling or leasing any pictures or videos or films that explicitly show sexual intercourse and that involve any bondage or infliction of pain was prohibited. At trial the defense produced evidence that the local hotel not only carried HBO, but also carried a library of pay-per-view films showing explicit sex, some of which included bondage and infliction of some pain (or at least simulated pain). The evidence showed that some hotel guests were local residents and that the hotel, Staythenite, sold many more pay-per-view hours than Korner Porner ever rented. What result?
39. Cleenton also has an ordinance that prohibits all nude dancing. Another section of the ordinance prohibits lewd dancing. Another section of the ordinance prohibits sexually provocative dancing intended to arouse customers. Consider the constitutionality of these provisions.
40. Assume Congress passes a law providing that all video games must be licensed to be sold and that to get the license the games had to be rated. The rating system was designed to inform customers of the amount and graphic nature of the violence depicted in the video games. Consider the constitutionality of this law.
41. Assume Congress passes a law that is the same as that in the previous hypothetical but applies it to Internet games. Consider the constitutionality of this law.

#### **17.4.3.9 EXAM TIPS: OBSCENITY, PORNOGRAPHY, AND PROTECTION OF MINORS**

The two most conceptually difficult areas are (1) the *Miller* (1973) test to distinguish between unprotected obscene expression and protected pornographic expression, and (2) the secondary effects doctrine. Both are relatively easy to test with very fact intensive problems that require students to demonstrate facility with factual analysis and reasoning from the facts. The secondary effects doctrine has been called into

question by recent cases. A difficult exam question would require consideration of the extent to which it remains a viable doctrine at all.

Protection of minors, especially in social media and online generally, remains a political concern and a constitutionally unsettled area. This combination makes it an attractive field for testing.

#### 17.4.4 Commercial Speech

For most of the history of the United States, that is, until 1980, commercial speech, was not protected under the First Amendment. But with the rise of industrialization, mass media, and marketing; coupled with the recognition that the distinction between commercial and other speech is not always so clear and that commercial speech is often intimately related to messages about culture, society, and the economy; commercial speech started to get First Amendment protection. Today the boundary is nebulous. Nonetheless, some speech falls easily into the category of commercial speech, and regulation of it is subject to well-established constitutional constraints. This section quickly addresses the test for whether speech is commercial speech and then examines the standard of review used for commercial speech. It concludes with a case illustrating the boundary problems in this field and by briefly highlighting some of the areas remaining not fully settled, such as advertising by professionals, especially attorneys. (Thorough consideration of that area is left to courses in professional responsibility.)

Commercial speech at its core is speech that

1. Proposes a commercial transaction, including in particular, most advertising; or
2. Relates predominantly to the economic interests of the speaker and audience.

Close questions do, of course, arise in the application of these tests to particular situations, and the Court has not conclusively adopted a test for what constitutes commercial speech in every instance.

In one case the Court applied a three-factor test: (1) that the speech proposes an economic transaction, (2) that the speech refers to a specific product, and (3) that the speech is motivated by the economic interests of the speaker. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). In *Bolger v. Youngs Drug Products Corp.* (1983), Youngs Drug wanted to mail pamphlets about contraceptives, but the U.S. Postal Service was prohibited by statute from allowing such information to be mailed. Some of the pamphlets were informative and did not merely propose a commercial transaction. Nonetheless, the Court found them to be commercial speech for free speech purposes, reasoning as follows:

Most of appellee's mailings fall within the core notion of commercial speech—"speech which does 'no more than propose a commercial transaction.'" . . . Youngs' informational pamphlets, however, cannot be characterized merely as proposals to engage in commercial transactions. Their proper classification as commercial or noncommercial speech thus presents a closer question. The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. . . .

Similarly, the reference to a specific product does not, by itself, render the pamphlets commercial speech. . . . Finally, the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient, by itself, to turn the materials into commercial speech. . . .

The combination of all these characteristics, however, provides strong support for the District Court's conclusion that the informational pamphlets are properly characterized as commercial speech. The mailings constitute commercial speech notwithstanding the fact that they contain discussions of important public issues such as venereal disease and family planning. We have made clear that advertising which "links a product to a current public debate" is not thereby entitled to the constitutional protection afforded noncommercial speech. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. [557,] 563, n. 5 [(1980)]. A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions. . . . Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.

We conclude, therefore, that all of the mailings in this case are entitled to the qualified but nonetheless substantial protection accorded to commercial speech.

*Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-68 (1983). The Court has not yet used the *Bolger* test in other cases.

Once the speech is determined to be commercial speech, the Court then applies a special commercial speech standard of review to evaluate the constitutionality of the government's regulation of it. The leading case is still *Central Hudson Gas & Elec. v. Public Svc. Comm'n*, 447 U.S. 557 (1980), which established the following commercial speech standard of review:

1. The speech must not be false or deceptive and must be about a lawful subject;
2. The government must have a substantial interest being served by the restrictions;
3. The regulation must directly advance the governmental interest; and
4. The regulation is not more extensive than necessary to serve that interest.

### *Central Hudson Gas & Electric v. Public Service Commission*

447 U.S. 557 (1980)

#### **Mr. Justice Powell delivered the opinion of the Court.**

This case presents the question whether a regulation of the Public Service Commission of the State of New York violates the First and Fourteenth Amendments because it completely bans promotional advertising by an electrical utility.

I

In December, 1973, the Commission, appellee here, ordered electric utilities in New York State to cease all advertising that "promot[es] the use of

electricity.” . . . The order was based on the Commission’s finding that “the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973–1974 winter.” . . .

Three years later, when the fuel shortage had eased, the Commission requested comments from the public on its proposal to continue the ban on promotional advertising. Central Hudson Gas & Electric Corp., the appellant in this case, opposed the ban on First Amendment grounds. After reviewing the public comments, the Commission extended the prohibition in a Policy Statement issued on February 25, 1977.

The Policy Statement divided advertising expenses

into two broad categories: promotional—advertising intended to stimulate the purchase of utility services—and institutional and informational, a broad category inclusive of all advertising not clearly intended to promote sales.

. . . The Commission declared all promotional advertising contrary to the national policy of conserving energy. . . .

The Commission’s order explicitly permitted “informational” advertising designed to encourage “*shifts of consumption*” from peak demand times to periods of low electricity demand. . . . (emphasis in original). Informational advertising would not seek to increase aggregate consumption, but would invite a leveling of demand throughout any given 24-hour period. . . .

. . .

Appellant challenged the order in state court, arguing that the Commission had restrained commercial speech in violation of the First and Fourteenth Amendments. . . .

## II

The Commission’s order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience. . . . The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. . . . Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the “highly paternalistic” view that government has complete power to suppress or regulate commercial speech.

[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . .

. . . . Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all. . . .

Nevertheless, our decisions have recognized

the ‘common sense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.

. . . The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

The First Amendment’s concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, . . . or commercial speech related to illegal activity . . . .

If the communication is neither misleading nor related to unlawful activity, the government’s power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State’s goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

. . .

The second criterion recognizes that the First Amendment mandates that speech restrictions be “narrowly drawn.” The regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest, nor can it completely suppress information when narrower restrictions on expression would serve its interest as well. . . .

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

### III

We now apply this four-step analysis for commercial speech to the Commission’s arguments in support of its ban on promotional advertising.

. . .

**B**

The Commission offers two state interests as justifications for the ban on promotional advertising. The first concerns energy conservation. . . . In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial.

. . . The State's concern that rates be fair and efficient represents a clear and substantial governmental interest.

**C**

Next, we focus on the relationship between the State's interests and the advertising ban. Under this criterion, the Commission's laudable concern over the equity and efficiency of appellant's rates does not provide a constitutionally adequate reason for restricting protected speech. The link between the advertising prohibition and appellant's rate structure is, at most, tenuous. . . . Such conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising.

In contrast, the State's interest in energy conservation is directly advanced by the Commission order at issue here. There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

**D**

We come finally to the critical inquiry in this case: whether the Commission's complete suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the State's interest in energy conservation. The Commission's order reaches all promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests.

. . .

The Commission's order prevents appellant from promoting electric services that would reduce energy use by diverting demand from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources. In neither situation would the utility's advertising endanger conservation or mislead the public. To the extent that the Commission's order suppresses speech that in no way impairs the State's interest in energy conservation, the

Commission's order violates the First and Fourteenth Amendments, and must be invalidated.

The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression. . . . In the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.

...

**Concurring opinions.** [Omitted.]

**Mr. Justice Rehnquist dissenting.**

The Court today invalidates an order issued by the New York Public Service Commission designed to promote a policy that has been declared to be of critical national concern. The order was issued by the Commission in 1973 in response to the Mideastern oil embargo crisis. It prohibits electric corporations "from *promoting* the use of electricity through the use of advertising, subsidy payments . . . or employee incentives." . . . (emphasis added). Although the immediate crisis created by the oil embargo has subsided, the ban on promotional advertising remains in effect. . . .

The Court's asserted justification for invalidating the New York law is the public interest discerned by the Court to underlie the First Amendment in the free flow of commercial information. Prior to this Court's recent decision in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), however, commercial speech was afforded no protection under the First Amendment whatsoever. . . . Given what seems to me full recognition of the holding of *Virginia Pharmacy Board* that commercial speech is entitled to some degree of First Amendment protection, I think the Court is nonetheless incorrect in invalidating the carefully considered state ban on promotional advertising in light of pressing national and state energy needs.

...

I remain of the view that the Court unlocked a Pandora's Box when it "elevated" commercial speech to the level of traditional political speech by according it First Amendment protection. . . . The line between "commercial speech," and the kind of speech that those who drafted the First Amendment had in mind may not be a technically or intellectually easy one to draw, but it surely produced far fewer problems than has the development of judicial doctrine in this area since *Virginia Pharmacy Board*. For in the world of political advocacy and its marketplace of ideas, there is no such thing as a "fraudulent" idea: there may be useless proposals, totally unworkable schemes, as well as very sound proposals that will receive the imprimatur of the "marketplace of ideas" through our majoritarian system of election and representative government. The free flow of information is important in this context not because it will lead to the

discovery of any objective “truth,” but because it is essential to our system of self-government.

The notion that more speech is the remedy to expose falsehood and fallacies is wholly out of place in the commercial bazaar, where, if applied logically, the remedy of one who was defrauded would be merely a statement, available upon request, reciting the Latin maxim “*caveat emptor*.” But since “fraudulent speech” in this area is to be remediable under *Virginia Pharmacy Board, supra*, the remedy of one defrauded is a lawsuit or an agency proceeding based on common law notions of fraud that are separated by a world of difference from the realm of politics and government. What time, legal decisions, and common sense have so widely severed, I declined to join in *Virginia Pharmacy Board*, and regret now to see the Court reaping the seeds that it there sowed. For in a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence.

...

#### 17.4.4.1 Commercial Speech Today

In the next case, the Court continues smudging the line between commercial and other speech. The Court seems to reaffirm the *Central Hudson* test for commercial speech regulation, but it also brings in other principles of freedom of expression, such as viewpoint discrimination, content-based regulation, and speaker-based regulation that point in general not only to heightened scrutiny but to freedom of expression strict scrutiny. The majority opinion illustrates the increasing tendency (at least until *Reed* (2015)), to treat freedom of expression cases very individually, to reason by analogy, and to analyze the issues using the policies and principles of freedom of expression law more than relatively rote application of the *Central Hudson* (1980) standard of review.

In the dissent in *Sorrell v. IMS Health Inc.*, (2011), the *Central Hudson* (1980) standard of review is more conservatively (and simply) applied. The dissent goes even further and argues that the issue is nothing but ordinary economic regulation and as such should receive only rational basis review. Indeed the dissent brings up the ghost of the *Lochner* Era to haunt the majority’s decision. In essence the dissent says regulation of commercial information is just a regulation of a commodity and should be treated like any other marketplace regulation and given great deference by the Court.

#### 17.4.4.2 QUESTIONS CONCERNING COMMERCIAL SPEECH STANDARD OF REVIEW

How do you view regulation of commercial of speech? Should it be protected at all? Where should the line be drawn and what should the measuring stick—the standard of review—be? What would be the result under ICCPR Article 19? Does it provide a better way to think about these issues?

***Sorrell v. IMS Health Inc.***

564 U.S. 522 (2011)

**Justice Kennedy delivered the opinion of the Court.**

Vermont law restricts the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors. Subject to certain exceptions, the information may not be sold, disclosed by pharmacies for marketing purposes, or used for marketing by pharmaceutical manufacturers. Vermont argues that its prohibitions safeguard medical privacy and diminish the likelihood that marketing will lead to prescription decisions not in the best interests of patients or the State. It can be assumed that these interests are significant. Speech in aid of pharmaceutical marketing, however, is a form of expression protected by the Free Speech Clause of the First Amendment. As a consequence, Vermont’s statute must be subjected to heightened judicial scrutiny. The law cannot satisfy that standard.

...

II

The beginning point is the text of §4631(d). . . . It prohibits pharmacies, health insurers, and similar entities from disclosing or otherwise allowing prescriber-identifying information to be used for marketing. And it bars pharmaceutical manufacturers and detailers from using the information for marketing. The questions now are whether §4631(d) must be tested by heightened judicial scrutiny and, if so, whether the State can justify the law.

A

1

On its face, Vermont’s law enacts content and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information. The provision first forbids sale subject to exceptions based in large part on the content of a purchaser’s speech. For example, those who wish to engage in certain “educational communications,” §4631(e)(4), may purchase the information. The measure then bars any disclosure when recipient speakers will use the information for marketing. Finally, the provision’s second sentence prohibits pharmaceutical manufacturers from using the information for marketing. The statute thus disfavors marketing, that is, speech with a particular content. More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers. . . . The law on its face burdens disfavored speech by disfavored speakers.

. . . Here, the Vermont Legislature explained that detailers, in particular those who promote brand-name drugs, convey messages that “are often in conflict with the goals of the state.” . . . Given the legislature’s expressed statement of purpose, it is apparent that §4631(d) imposes burdens that are based on the content of speech and that are aimed at a particular viewpoint.

...

The First Amendment requires heightened scrutiny whenever the government creates “a regulation of speech because of disagreement with the message it conveys.” *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989). . . . Commercial speech is no exception. . . . A “consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.” *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977). That reality has great relevance in the fields of medicine and public health, where information can save lives.

2

The State argues that heightened judicial scrutiny is unwarranted because its law is a mere commercial regulation. It is true that restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct. It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech. That is why a ban on race-based hiring may require employers to remove “White Applicants Only” signs, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006); why “an ordinance against outdoor fires” might forbid “burning a flag,” *R.A.V.*, *supra*, at 385; and why antitrust laws can prohibit “agreements in restraint of trade,” *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

But §4631(d) imposes more than an incidental burden on protected expression. Both on its face and in its practical operation, Vermont’s law imposes a burden based on the content of speech and the identity of the speaker. . . . While the burdened speech results from an economic motive, so too does a great deal of vital expression. . . . Vermont’s law does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers. . . .

Vermont further argues that §4631(d) regulates not speech but simply access to information. Prescriber-identifying information was generated in compliance with a legal mandate, the State argues, and so could be considered a kind of governmental information. . . . Vermont’s law imposes a content and speaker-based burden on respondents’ own speech. That consideration provides a separate basis for distinguishing *United Reporting* and requires heightened judicial scrutiny.

The State also contends that heightened judicial scrutiny is unwarranted in this case because sales, transfer, and use of prescriber-identifying information are conduct, not speech. . . .

This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment. . . . Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes.

...

B

...

Under a commercial speech inquiry, it is the State’s burden to justify its content-based law as consistent with the First Amendment. To sustain the

targeted, content-based burden §4631(d) imposes on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest. . . . There must be a “fit between the legislature’s ends and the means chosen to accomplish those ends.” . . . As in other contexts, these standards ensure not only that the State’s interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message. . . .

The State’s asserted justifications for §4631(d) come under two general headings. First, the State contends that its law is necessary to protect medical privacy, including physician confidentiality, avoidance of harassment, and the integrity of the doctor-patient relationship. Second, the State argues that §4631(d) is integral to the achievement of policy objectives—namely, improved public health and reduced healthcare costs. Neither justification withstands scrutiny.

...

2

...

While Vermont’s stated policy goals may be proper, §4631(d) does not advance them in a permissible way. . . . The State seeks to achieve its policy objectives through the indirect means of restraining certain speech by certain speakers—that is, by diminishing detailers’ ability to influence prescription decisions. Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the “fear that people would make bad decisions if given truthful information” cannot justify content-based burdens on speech. . . . “The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.” . . . These precepts apply with full force when the audience, in this case prescribing physicians, consists of “sophisticated and experienced” consumers. . . .

. . . There are divergent views regarding detailing and the prescription of brand-name drugs. Under the Constitution, resolution of that debate must result from free and uninhibited speech. As one Vermont physician put it: “We have a saying in medicine, information is power. And the more you know, or anyone knows, the better decisions can be made.” . . . There are similar sayings in law, including that “information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.” . . . The choice “between the dangers of suppressing information, and the dangers of its misuse if it is freely available” is one that “the First Amendment makes for us.” . . .

Vermont may be displeased that detailers who use prescriber-identifying information are effective in promoting brand-name drugs. The State can express that view through its own speech. . . . But a State’s failure to persuade does not allow it to hamstring the opposition. The State may not burden the speech of others in order to tilt public debate in a preferred direction. “The commercial

marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.” . . .

. . .

. . .

The capacity of technology to find and publish personal information, including records required by the government, presents serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure. In considering how to protect those interests, however, the State cannot engage in content-based discrimination to advance its own side of a debate.

If Vermont’s statute provided that prescriber-identifying information could not be sold or disclosed except in narrow circumstances then the State might have a stronger position. Here, however, the State gives possessors of the information broad discretion and wide latitude in disclosing the information, while at the same time restricting the information’s use by some speakers and for some purposes, even while the State itself can use the information to counter the speech it seeks to suppress. Privacy is a concept too integral to the person and a right too essential to freedom to allow its manipulation to support just those ideas the government prefers.

When it enacted §4631(d), the Vermont Legislature found that the “marketplace for ideas on medicine safety and effectiveness is frequently one-sided in that brand-name companies invest in expensive pharmaceutical marketing campaigns to doctors.” 2007 Vt. Laws No. 80, §1(4). “The goals of marketing programs,” the legislature said, “are often in conflict with the goals of the state.” §1(3). The text of §4631(d), associated legislative findings, and the record developed in the District Court establish that Vermont enacted its law for this end. The State has burdened a form of protected expression that it found too persuasive. At the same time, the State has left unburdened those speakers whose messages are in accord with its own views. This the State cannot do.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

**Justice Breyer, with whom Justice Ginsburg and Justice Kagan join, dissenting.**

The Vermont statute before us adversely affects expression in one, and only one, way. It deprives pharmaceutical and data-mining companies of data, collected pursuant to the government’s regulatory mandate, that could help pharmaceutical companies create better sales messages. In my view, this effect on expression is inextricably related to a lawful governmental effort to regulate a commercial enterprise. The First Amendment does not require courts to apply a special “heightened” standard of review when reviewing such an effort. And, in any event, the statute meets the First Amendment standard this Court has previously applied when the government seeks to regulate commercial speech. For any or all of these reasons, the Court should uphold the statute as constitutional.

. . .

Nothing in Vermont’s statute undermines the ability of persons opposing the State’s policies to speak their mind or to pursue a different set of policy objectives through the democratic process. Whether Vermont’s regulatory statute “targets” drug companies (as opposed to affecting them unintentionally) must be beside the First Amendment point.

This does not mean that economic regulation having some effect on speech is always lawful. Courts typically review the lawfulness of statutes for rationality and of regulations (if federal) to make certain they are not “arbitrary, capricious, [or] an abuse of discretion.” 5 U.S.C. §706(2)(A). And our valuable free-speech tradition may play an important role in such review. But courts do not normally view these matters as requiring “heightened” First Amendment scrutiny—and particularly not the unforgiving brand of “intermediate” scrutiny employed by the majority. Because the imposition of “heightened” scrutiny in such instances would significantly change the legislative/judicial balance, in a way that would significantly weaken the legislature’s authority to regulate commerce and industry, I would not apply a “heightened” First Amendment standard of review in this case.

### III

Turning to the constitutional merits, I believe Vermont’s statute survives application of *Central Hudson*’s “intermediate” commercial speech standard as well as any more limited “economic regulation” test.

...

Vermont has thus developed a record that sufficiently shows that its statute meaningfully furthers substantial state interests. Neither the majority nor respondents suggests any equally effective “more limited” restriction. And the First Amendment harm that Vermont’s statute works is, at most, modest. I consequently conclude that, even if we apply an “intermediate” test such as that in *Central Hudson*, this statute is constitutional.

...

### V

In sum, I believe that the statute before us satisfies the “intermediate” standards this Court has applied to restrictions on commercial speech. *A fortiori* it satisfies less demanding standards that are more appropriately applied in this kind of commercial regulatory case—a case where the government seeks typical regulatory ends (lower drug prices, more balanced sales messages) through the use of ordinary regulatory means (limiting the commercial use of data gathered pursuant to a regulatory mandate). The speech-related consequences here are indirect, incidental, and entirely commercial. . . .

The Court reaches its conclusion through the use of important First Amendment categories—“content-based,” “speaker-based,” and “neutral”—but without taking full account of the regulatory context, the nature of the speech effects, the values these First Amendment categories seek to promote, and prior precedent. ... At best the Court opens a Pandora’s Box of First Amendment challenges to many

ordinary regulatory practices that may only incidentally affect a commercial message. . . . At worst, it reawakens *Lochner's* pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue. See *Central Hudson*, 447 U.S., at 589 (Rehnquist, J., dissenting).

Regardless, whether we apply an ordinary commercial speech standard or a less demanding standard, I believe Vermont's law is consistent with the First Amendment. And with respect, I dissent.

#### 17.4.4.3 COMMERCIAL SPEECH: CONCLUDING THOUGHTS

Consider again ICCPR Article 19. Would the interest in privacy of consumers of drugs allow this sort of restriction on free speech under ICCPR Article 19, paragraph 3?

Generally speaking, commercial speech is economic in nature and intended to lead to a transaction. The most typical sort of commercial speech is advertising. Other than requiring that it not be false or misleading, most restrictions on advertising are now unconstitutional. An ongoing area of development concerns advertising by attorneys and other professionals.

The type of intermediate scrutiny used for restrictions on commercial speech has allowed greater regulation than is allowed for fully protected speech, but over time the Court has intruded itself and the Constitution further and further into regulation of commercial speech, giving it greater and greater protection. It has become quite difficult for governments to convince the Court that they have tailored their regulations narrowly enough to accomplish the substantial interests they articulate.

#### 17.4.4.4 HYPOTHETICALS: COMMERCIAL SPEECH

Which of the following regulations, if any, would be constitutional?

42. A state law bans all false and misleading advertising of goods and services.
43. The state bar association, the state's regulatory body for attorneys, prohibits members from advertising the following matters or in the following ways:
  - a. Areas of expertise
  - b. Win/loss record in court
  - c. Size of settlements and verdicts obtained
  - d. Names of particular clients
  - e. How much the attorney charges for services
  - f. Negative advertising
  - g. Advertising concerning any ongoing lawsuit; and
  - h. Advertising to solicit clients for suits against doctors for personal injury, suits involving medical devices, or suits involving defective or dangerous products.

#### 17.4.4.5 EXAM TIPS: COMMERCIAL SPEECH

Know the *Central Hudson* (1980) test and watch for it in an advertising context, especially with respect to the regulation of professionals and licensed trades and businesses. Whether speech qualifies as commercial can be a difficult question, and it is relatively easy to test. Thus commercial speech problems often have at least two issues: Is the speech commercial speech? And if it is, is the regulation constitutional?

## 17.5 SPECIAL MATTERS

What follows are a series of topics involving freedom of expression in specialized ways and in specialized settings. First is the prior restraint doctrine. The next three items concern speech in particular settings: campaign financing, governmental and government-sponsored speech, and restrictions on freedom of expression in primary and secondary public schools. The remaining items address speech where the speech itself is part of a crime (for example, conspiracy) or of wrong-doing (for example, fraud) or is restricted for other reasons (for example, copyright).

### 17.5.1 Prior Restraint

The government can criminalize speech that it cannot constitutionally prevent from being expressed. Even if the government can constitutionally jail someone for violating a proper regulation of free speech, it normally cannot censor the content of the speech before it is made. That is the essence of the prior restraint doctrine. Here we meet the strictest of the strict scrutiny standards of review. Not only must the state have a compelling state interest, and not only must the means used be the least restrictive alternative possible, but the harm to be avoided must be certain, substantial, and imminent. See *New York Times Co. v. United States*, 403 U.S. 713 (1971) (Pentagon Papers). In *United States v. Alvarez*, 567 U.S. \_\_\_\_ (2012) (the stolen valor case), the Court described speech that can be subjected to prior restraint as its own substantive category: “speech presenting some grave and imminent threat the government has the power to prevent.” This is a very special category under which the government can not only regulate the speech, but it can censor it before it is spoken. The classic example would be troop movements or war plans generally. Despite the *Alvarez* Court’s characterization of expression subject to prior restraint as a category of speech, it is probably better to treat the prior restraint doctrine as procedural and as applicable to any type of speech rather than as a type of speech itself.

The two leading cases are *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), and *New York Times Co. v. United States*, 403 U.S. 713 (1971) (Pentagon Papers). The first is included below. Unfortunately, *Near v. Minnesota* (1931) is hard going because it is written poorly with many circumlocutions, tedious and tendentious verbosity, and general opacity. Nonetheless, it contains important content that must be understood, and it remains the leading case in this area.

***Near v. Minnesota ex rel. Olson***

283 U.S. 697 (1931)

**Mr. Chief Justice Hughes delivered the opinion of the Court.**

... [A] Minnesota [statute] provides for the abatement, as a public nuisance, of a “malicious, scandalous and defamatory newspaper, magazine or other periodical.”

...

Under this statute, the County Attorney of Hennepin County brought this action to enjoin the publication of what was described as a “malicious, scandalous and defamatory newspaper, magazine and periodical” known as “The Saturday Press,” published by the defendants in the city of Minneapolis. The complaint alleged that the defendants, on September 24, 1927, and on eight subsequent dates in October and November, 1927, published and circulated editions of that periodical which were “largely devoted to malicious, scandalous and defamatory articles” . . .

... [T]he articles charged in substance that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties. . . . [T]he articles made serious accusations against the public officers named and others in connection with the prevalence of crimes and the failure to expose and punish them.

At the beginning of the action, . . . an order was made directing the defendants to show cause why a temporary injunction should not issue and meanwhile forbidding the defendants to publish, circulate or have in their possession any editions of the periodical from September 24, 1927, to November 19, 1927, inclusive, and from publishing, circulating, or having in their possession, “any future editions of said The Saturday Press” and

any publication, known by any other name whatsoever containing malicious, scandalous and defamatory matter of the kind alleged in plaintiff’s complaint herein or otherwise.

...

Thereupon, the defendant Near, the present appellant, answered the complaint. He averred that he was the sole owner and proprietor of the publication in question. He admitted the publication of the articles in the issues described in the complaint, but denied that they were malicious, scandalous or defamatory as alleged. He expressly invoked the protection of the due process clause of the Fourteenth Amendment. The case then came on for trial. . . . The defendant then rested without offering evidence. The plaintiff moved that the court direct the issue of a permanent injunction, and this was done.

...

This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. It is no longer

open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. . . . In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise.

. . .

. . . [T]he operation and effect of the statute . . . is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter . . . and, unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the [published] charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. . . .

. . .

. . . [I]t is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. . . . The law of criminal libel rests upon that secure foundation. There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions. . . . In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit by his publications the State appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication.

The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases:

When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right.

*Schenck v. United States*, 249 U. S. 47, 52 [(1919)]. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. . . . These limitations are not applicable here. . . .

. . .

The fact that, for approximately one hundred and fifty years, there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions.

. . .

The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. . . . If this can be done, the legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends, and restrain publication accordingly. And it would be but a step to a complete system of censorship. . . . Th[is] freedom . . . does not depend . . . on proof of truth. . . .

Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. . . .

. . .

For these reasons we hold the statute, so far as it authorized [prior restraint of the publication by court injunction], to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. . . .

*Judgment reversed.*

**Mr. Justice Butler's dissent.** [Omitted.]

### 17.5.1.1 Introduction to *NYT v. U.S.* (1971) (Pentagon Papers case)

In 1971, a portion of a Department of Defense internal report prepared in 1967 concerning the conduct of the Vietnam War was leaked to the *New York Times* and the *Washington Post*. The United States government sought to enjoin the publication because publication of it violated the law regarding disclosure of government secrets. The Court acted quickly to rule that no injunction could be issued because it would violate the rule against prior restraints. The decision issued *per curiam* with majority agreement on the result but with multiple concurrences employing somewhat different approaches to the problem, none of which standing alone commanded a majority of the justices.

Justice Brennan wrote that

only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.

*New York Times v. United States*, 403 U.S. 713, 726-27 (1971).

Justice Stewart in concurrence wrote:

I am convinced that the Executive is correct [that harm will result from disclosure] with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people.

*Id.* at 730. Thus the Court seems to impose an even higher standard of review than the more standard prior restraint test as set in *Near v. Minnesota* (1931) insofar as at least these two justices would also require a showing of irreparable damage before an injunction can issue. If the balance of the justices were to agree, then the standard of review for a prior restraint would be (1) that the government needs to show a compelling interest, (2) that the means (an injunction) is the least restrictive alternative to meeting that interest, (3) that the harm must be inevitable, direct, and immediate, and (perhaps) (4) the harm must also be “grave and irreparable” and with a seriousness on the order of potentially contributing to the risk of sinking transport vessels in wartime.

Chief Justice Burger dissented partially on the grounds of the rushed nature of the decision making and partially on the grounds that a better process would be to allow the government to screen the proposed publication before it is issued given the sensitive nature of the information contained in the report. Justice Harlan, joined by Chief Justice Burger and Justice Blackmun also dissented.

Justice Blackmun in dissent wrote:

I, for one, have now been able to give at least some cursory study not only to the affidavits, but to the material itself. I regret to say that, from this examination, I fear that Judge Wilkey’s [the district court judge] statements have possible foundation. I therefore share his concern. I hope that damage has not already been done. If, however, damage has been done, and if, with the Court’s action today, these newspapers proceed to publish the critical documents and there results therefrom

“the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate,”

to which list I might add the factors of prolongation of the war and of further delay in the freeing of United States prisoners, then the Nation’s people will know where the responsibility for these sad consequences rests.

*Id.* at 762-63.

The *Washington Post* and the *New York Times* published excerpts from the Pentagon Papers the next day, and most of the Department of Defense 1967 report was published in book form and available to the public shortly thereafter.

### 17.5.1.2 Requiring Permission Prior to Use of a Public Forum

This topic was presented in section 7.3.2.2 of this chapter concerning time, place, and manner restrictions on speech because the Court allows licensing, permitting, and the charging of fees as a condition to using public forums for certain purposes provided the prior restraint concern of no content regulation is met. The concern is censorship of particular content or viewpoints through prior restraint. If there is not a risk of censorship of the content, the government can implement appropriate requirements and procedures to regulate the time, place, and manner of the expression. The standard for licensing and permitting not based on content is thus significantly different from that in *Near v. Minnesota* (1931) and the Pentagon Papers case.

### 17.5.1.3 HYPOTHETICALS: PRIOR RESTRAINT

44. Which of the following are constitutional?
  - a. A city's requirement that everyone who wants to hold a parade to get a permit at least sixty days in advance and to post a bond to cover security and cleanup costs.
  - b. A city grants discretion to the official in charge of granting permits for use of the city park for speeches, rallies, and concerts to refuse to grant a permit "whenever in the official's sound judgment the event would be divisive to the community."
45. Assume an employee of the National Security Agency (NSA) illegally took many documents showing that the NSA was spying on U.S. citizens within the United States. The government sues to prevent him from disclosing the information, claiming disclosure will compromise (a) ongoing investigations of terrorists, and (b) the methods and procedures use by the NSA to gather information on terrorists and their plans. Would a court injunction against disclosure constitute an illegal prior restraint?

## 17.5.2 Campaign Financing

In the United States, political campaigns for office are funded by the candidates through their own funds and through contributions from individuals, businesses, unions, and other organizations. Congress has attempted to regulate campaign financing to reduce the risk that contributors might gain improper influence over elected officials. However, the Supreme Court has limited the power of Congress to regulate contributions, citing freedom of expression concerns.

Campaign financing regulation seeks to further democratic ideals of equality and the meaningful participation of the people in elections and to reduce the impact of money on elected officials. While these are important interests worth protecting, in the campaign financing setting they clash head-on with the First Amendment's most

important type of protected speech: political speech. See *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). The United States provides almost absolute protection for political speech, including spending money and campaign contributions for political ends. *Id.*; *McCutcheon v. Federal Election Commission*, 572 U.S. \_\_\_\_ (2014). The Court has allowed Congress to enact a reporting requirement for campaign contributions, but it has not allowed limits on certain types of campaign contributions, on certain types of advocacy paid for or made by others on behalf of candidates, or on candidates spending their own funds on their own political campaigns. The Court has decreed that money is speech, and thus spending cannot be limited except when strict scrutiny is satisfied.

The area of public financing of elections, like election law and voting laws generally, is complex, with many special aspects beyond the scope of this introductory text. Nonetheless, given the prominence of the issues and the importance of them, parts of *Citizens United* (2010) are included below.

While reading the case, consider whether “corporations are people, too” in the context of freedom of speech and other constitutional protections. Neither the Court nor lawyers versed in the field contend that corporations are protected by constitutional rights to the same extent and in the same ways as individuals in all circumstances. But corporations do have many rights and are treated essentially the same as individuals for free speech purposes. Should they be? If distinctions are to be made, should they be made in the area of campaign financing?

### *Citizens United v. Federal Election Commission*

558 U. S. 310 (2010)

#### **Justice Kennedy delivered the opinion of the Court.**

Federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an “electioneering communication” or for speech expressly advocating the election or defeat of a candidate. 2 U.S.C. §441b. Limits on electioneering communications were upheld in *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 203–209 (2003). The holding of *McConnell* rested to a large extent on an earlier case, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). *Austin* had held that political speech may be banned based on the speaker’s corporate identity.

In this case we are asked to reconsider *Austin* and, in effect, *McConnell*. It has been noted that “*Austin* was a significant departure from ancient First Amendment principles,” *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 490 (2007) (*WRTL*) (Scalia, J., concurring in part and concurring in judgment). We agree with that conclusion and hold that *stare decisis* does not compel the continued acceptance of *Austin*. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether. We turn to the case now before us.

...

## III

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” Laws enacted to control or suppress speech may operate at different points in the speech process. The following are just a few examples of restrictions that have been attempted at different stages of the speech process—all laws found to be invalid: restrictions requiring a permit at the outset, *Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 153 (2002); imposing a burden by impounding proceeds on receipts or royalties, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108, 123 (1991); seeking to exact a cost after the speech occurs, *New York Times Co. v. Sullivan*, 376 U.S., at 267; and subjecting the speaker to criminal penalties, *Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969) (*per curiam*).

The law before us is an outright ban, backed by criminal sanctions. Section 441b makes it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. Thus, the following acts would all be felonies under §441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate’s defense of free speech. These prohibitions are classic examples of censorship.

...

Section 441b’s prohibition on corporate independent expenditures is thus a ban on speech. As a “restriction on the amount of money a person or group can spend on political communication during a campaign,” that statute “necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.” *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (*per curiam*). Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process. See *McConnell*, *supra*, at 251 (opinion of Scalia, J.) (Government could repress speech by “attacking all levels of the production and dissemination of ideas,” for “effective public communication requires the speaker to make use of the services of others”). If §441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect.

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. See *Buckley*, *supra*, at 14–15 (“In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential”). The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to

enlightened self-government and a necessary means to protect it. The First Amendment “has its fullest and most urgent application’ to speech uttered during a campaign for political office.” *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). . . .

For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are “subject to strict scrutiny,” which requires the Government to prove that the restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.” *WRTL*, 551 U.S., at 464 (opinion of Roberts, C.J.). While it might be maintained that political speech simply cannot be banned or restricted as a categorical matter, see *Simon & Schuster*, 502 U.S., at 124 (Kennedy, J., concurring in judgment), the quoted language from *WRTL* provides a sufficient framework for protecting the relevant First Amendment interests in this case. We shall employ it here.

...

#### A

1

The Court has recognized that First Amendment protection extends to corporations. . . . *New York Times Co. v. United States*, 403 U.S. 713 (1971) (*per curiam*); . . . *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). . . .

This protection has been extended by explicit holdings to the context of political speech. . . . The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not “natural persons.” . . .

...

#### B

The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker’s corporate identity and a post-*Austin* line that permits them. No case before *Austin* had held that Congress could prohibit independent expenditures for political speech based on the speaker’s corporate identity. . . .

...

*Austin* interferes with the “open marketplace” of ideas protected by the First Amendment. . . . It permits the Government to ban the political speech of millions of associations of citizens. . . . Most of these are small corporations without large amounts of wealth. . . . This fact belies the Government’s argument that the statute is justified on the ground that it prevents the “distorting effects of immense aggregations of wealth.” *Austin*, 494 U.S., at 660. It is not even aimed at amassed wealth.

...

Even if §441b’s expenditure ban were constitutional, wealthy corporations could still lobby elected officials, although smaller corporations may not have

the resources to do so. And wealthy individuals and unincorporated associations can spend unlimited amounts on independent expenditures. See, e.g., *WRTL*, 551 U.S., at 503–504 (opinion of Scalia, J.) (“In the 2004 election cycle, a mere 24 individuals contributed an astounding total of \$142 million to [26 U.S.C. §527 organizations]”). Yet certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political speech.

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 distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.

## 2

What we have said also shows the invalidity of other arguments made by the Government. For the most part relinquishing the antidistortion rationale, the Government falls back on the argument that corporate political speech can be banned in order to prevent corruption or its appearance. In *Buckley*, the Court found this interest “sufficiently important” to allow limits on contributions but did not extend that reasoning to expenditure limits. 424 U.S., at 25. When *Buckley* examined an expenditure ban, it found “that the governmental interest in preventing corruption and the appearance of corruption [was] inadequate to justify [the ban] on independent expenditures.” *Id.*, at 45.

...

The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.

...

... This case ... is about independent expenditures, not soft money. When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption.

...

## C

...

Due consideration leads to this conclusion: *Austin*, 494 U. S. 652, should be and now is overruled. We return to the principle established in *Buckley* and *Bellotti*

that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.

#### D

*Austin* is overruled, so it provides no basis for allowing the Government to limit corporate independent expenditures. As the Government appears to concede, overruling *Austin* “effectively invalidate[s] not only BCRA Section 203, but also 2 U.S.C. 441b’s prohibition on the use of corporate treasury funds for express advocacy.” Brief for Appellee 33, n.12. Section 441b’s restrictions on corporate independent expenditures are therefore invalid and cannot be applied to *Hillary*.

Given our conclusion we are further required to overrule the part of *McConnell* that upheld BCRA §203’s extension of §441b’s restrictions on corporate independent expenditures. *See* 540 U. S., at 203–209. The *McConnell* Court relied on the antidistortion interest recognized in *Austin* to uphold a greater restriction on speech than the restriction upheld in *Austin*, *see* 540 U. S., at 205, and we have found this interest unconvincing and insufficient. This part of *McConnell* is now overruled.

#### IV

##### A

Citizens United next challenges BCRA’s disclaimer and disclosure provisions as applied to *Hillary* and the three advertisements for the movie. Under BCRA §311, televised electioneering communications funded by anyone other than a candidate must include a disclaimer that “\_\_ is responsible for the content of this advertising.” 2 U.S.C. §441d(d)(2). The required statement must be made in a “clearly spoken manner,” and displayed on the screen in a “clearly readable manner” for at least four seconds. . . . It must state that the communication “is not authorized by any candidate or candidate’s committee”; it must also display the name and address (or Web site address) of the person or group that funded the advertisement. §441d(a)(3). Under BCRA §201, any person who spends more than \$10,000 on electioneering communications within a calendar year must file a disclosure statement with the FEC. 2 U.S.C. §434(f)(1). That statement must identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors. §434(f)(2).

Disclaimer and disclosure requirements may burden the ability to speak, but they “impose no ceiling on campaign-related activities,” *Buckley*, 424 U.S., at 64, and “do not prevent anyone from speaking,” *McConnell*, *supra*, at 201 (internal quotation marks and brackets omitted). The Court has subjected these requirements to “exacting scrutiny,” which requires a “substantial relation” between the disclosure requirement and a “sufficiently important” governmental interest. . . .

In *Buckley*, the Court explained that disclosure could be justified based on a governmental interest in “provid[ing] the electorate with information” about the

sources of election-related spending. . . . The Court therefore upheld BCRA §§201 and 311 on the ground that they would help citizens “make informed choices in the political marketplace.” . . .

Although both provisions were facially upheld, the Court acknowledged that as-applied challenges would be available if a group could show a “reasonable probability” that disclosure of its contributors’ names “will subject them to threats, harassment, or reprisals from either Government officials or private parties.” *Id.*, at 198 (quoting *Buckley, supra*, at 74).

For the reasons stated below, we find the statute valid as applied to the ads for the movie and to the movie itself.

## B

. . .

The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. . . . For these reasons, we reject Citizens United’s contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.

Citizens United also disputes that an informational interest justifies the application of §201 to its ads, which only attempt to persuade viewers to see the film. Even if it disclosed the funding sources for the ads, Citizens United says, the information would not help viewers make informed choices in the political marketplace. This is similar to the argument rejected above with respect to disclaimers. Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election. Because the informational interest alone is sufficient to justify application of §201 to these ads, it is not necessary to consider the Government’s other asserted interests.

Last, Citizens United argues that disclosure requirements can chill donations to an organization by exposing donors to retaliation.

. . .

The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

## C

For the same reasons we uphold the application of BCRA §§201 and 311 to the ads, we affirm their application to *Hillary*. We find no constitutional impediment to the application of BCRA’s disclaimer and disclosure requirements to a movie broadcast via video-on-demand. And there has been no showing that, as applied in this case, these requirements would impose a chill on speech or expression.

## V

. . .

Modern day movies, television comedies, or skits on Youtube.com might portray public officials or public policies in unflattering ways. Yet if a covered

transmission during the blackout period creates the background for candidate endorsement or opposition, a felony occurs solely because a corporation, other than an exempt media corporation, has made the “purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value” in order to engage in political speech. 2 U.S.C. §431(9)(A)(i). Speech would be suppressed in the realm where its necessity is most evident: in the public dialogue preceding a real election. Governments are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute’s purpose and design.

Some members of the public might consider *Hillary* to be insightful and instructive; some might find it to be neither high art nor a fair discussion on how to set the Nation’s course; still others simply might suspend judgment on these points but decide to think more about issues and candidates. Those choices and assessments, however, are not for the Government to make. “The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it.” *McConnell, supra*, at 341 (opinion of Kennedy, J.).

The judgment of the District Court is reversed with respect to the constitutionality of 2 U.S.C. §441b’s restrictions on corporate independent expenditures. The judgment is affirmed with respect to BCRA’s disclaimer and disclosure requirements. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

**Justice Stevens, with whom Justice Ginsburg, Justice Breyer, and Justice Sotomayor join, concurring in part and dissenting in part.**

The real issue in this case concerns how, not if, the appellant may finance its electioneering. Citizens United is a wealthy nonprofit corporation that runs a political action committee (PAC) with millions of dollars in assets. Under the Bipartisan Campaign Reform Act of 2002 (BCRA), it could have used those assets to televise and promote *Hillary: The Movie* wherever and whenever it wanted to. It also could have spent unrestricted sums to broadcast *Hillary* at any time other than the 30 days before the last primary election. Neither Citizens United’s nor any other corporation’s speech has been “banned”. . . . All that the parties dispute is whether Citizens United had a right to use the funds in its general treasury to pay for broadcasts during the 30-day period. The notion that the First Amendment dictates an affirmative answer to that question is, in my judgment, profoundly misguided. Even more misguided is the notion that the Court must rewrite the law relating to campaign expenditures by *for-profit* corporations and unions to decide this case.

The basic premise underlying the Court’s ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker’s identity, including its “identity” as a corporation. While that glittering generality has rhetorical appeal, it is not a correct statement

of the law. Nor does it tell us when a corporation may engage in electioneering that some of its shareholders oppose. It does not even resolve the specific question whether Citizens United may be required to finance some of its messages with the money in its PAC. The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case.

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.

The majority's approach to corporate electioneering marks a dramatic break from our past. Congress has placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in 1907, ch. 420, 34 Stat. 864. We have unanimously concluded that this "reflects a permissible assessment of the dangers posed by those entities to the electoral process," *FEC v. National Right to Work Comm.*, 459 U.S. 197, 209 (1982) (*NRWC*), and have accepted the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," *id.*, at 209–210. The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). Relying largely on individual dissenting opinions, the majority blazes through our precedents, overruling or disavowing a body of case law including *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL*), *McConnell v. FEC*, 540 U.S. 93 (2003), *FEC v. Beaumont*, 539 U.S. 146 (2003), *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), *NRWC*, 459 U.S. 197, and *California Medical Assn. v. FEC*, 453 U.S. 182 (1981).

...

### 17.5.2.1 After *Citizens United* (2010)

Four years after *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 360 (2010), the Court ruled that campaign contribution limitations enacted by Congress are unconstitutional unless quid pro quo corruption can be shown. *McCutcheon v. Federal Election Commission*, 572 U.S. \_\_\_\_ (2014). Money is speech because money is used to get the message out, corporations have the right of free speech, and neither money spent campaigning nor corporate political speech can be limited by Congress. Congress can impose disclosure requirements, however. A four-justice plurality of the Court held:

In a series of cases over the past 40 years, we have spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the

political process and the impermissible desire simply to limit political speech. We have said that government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. “Ingratiation and access . . . are not corruption.” *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 360 (2010). They embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.

Any regulation must instead target what we have called “quid pro quo” corruption or its appearance. See *id.*, at 359. That Latin phrase captures the notion of a direct exchange of an official act for money. See *McCormick v. United States*, 500 U.S. 257, 266 (1991). “The hallmark of corruption is the financial quid pro quo: dollars for political favors.” *Federal Election Comm’n v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985). Campaign finance restrictions that pursue other objectives, we have explained, impermissibly inject the Government “into the debate over who should govern.” *Bennett*, *supra*, at \_\_\_\_ (slip op., at 25). And those who govern should be the last people to help decide who should govern.

*Id.* at \_\_\_\_ . They were joined by Justice Thomas in a concurring opinion that would have gone further to overturn the contribution limits.

Justice Breyer wrote for the four dissenting justices:

The justification for aggregate contribution restrictions is strongly rooted in the need to assure political integrity and ultimately in the First Amendment itself. . . . The threat to that integrity posed by the risk of special access and influence remains real. . . . Even taking the plurality on its own terms and considering solely the threat of quid pro quo corruption (i.e., money-for-votes exchanges), the aggregate limits are a necessary tool to stop circumvention. . . . And there is no basis for finding a lack of “fit” between the threat and the means used to combat it, namely the aggregate limits. . . .

The plurality reaches the opposite conclusion. The result, as I said at the outset, is a decision that substitutes judges’ understandings of how the political process works for the understanding of Congress; that fails to recognize the difference between influence resting upon public opinion and influence bought by money alone; that overturns key precedent; that creates huge loopholes in the law; and that undermines, perhaps devastates, what remains of campaign finance reform.

*Id.* at \_\_\_\_ .

The result in *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 360 (2010), spawned a movement aimed at getting it overturned through a constitutional amendment if necessary. Retired Justice Stevens proposed that the Constitution be amended in several ways, including one overturning *Citizens United* (2010):

Neither the First Amendment nor any other provision of this Constitution shall be construed to prohibit the Congress or any state from imposing reasonable limits on the amount of money that candidates for public office, or their supporters, may spend in election campaigns.

John Paul Stevens, *SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION* 79 (2014).

### 17.5.2.2 HYPOTHETICALS: CAMPAIGN FINANCING

Which of the following laws would be constitutional?

46. A law limits the total amount that a candidate can spend to try to get elected to public office.
47. A law limits the total amount that can be spent by or on behalf of a candidate for public office.
48. A law requires candidates to disclose the sources of their funds.
49. A law requires everyone, including all sorts of for profit and not-for-profit businesses and organizations, to disclose all funds spent for or on behalf of or contributed to candidates.
50. A law requires everyone, including all sorts of for profit and not-for-profit businesses and organizations, to disclose all donors of funds spent by the organization for or on behalf of or contributed to candidates.

### 17.5.3 Government Speech and Regulating the Speech of Governmental Employees

The government has the right to speak and to advocate for any position it deems appropriate, subject to constitutional limits such as nonestablishment of religion, due process, and equal protection. The government can advocate for unions or against unions. It can advocate for a national health care system or against it. It can advocate for or against birth control. It can advocate for or against smoking. It can advocate for or against a clean environment. Or it can stay out of any subject entirely. The government can push a particular viewpoint. What it cannot do is prevent others from advocating the side opposite to its own. *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

A recurring problem relates to the free speech rights of governmental employees. If a public school system takes a zero-tolerance stand against drugs, can it require teachers to read a statement to that effect each day? Or to report suspected drug use? Can it fire a teacher for making statements advocating legalization of marijuana? This can be a difficult and subtle area. The case below provides some guidance as to how these issues are addressed, but context matters heavily in the application of the general rules.

#### *Garcetti v. Ceballos*

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547 U.S. 410 (2006)

#### **Justice Kennedy delivered the opinion of the Court.**

... The question presented by the instant case is whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties.

...

## II

As the Court's decisions have noted, for many years "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick v. Myers*, 461 U.S. 138, 143 (1983). That dogma has been qualified in important respects. . . . The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. See, e.g., *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568 (1968). . . .

*Pickering* provides a useful starting point in explaining the Court's doctrine. There the relevant speech was a teacher's letter to a local newspaper addressing issues including the funding policies of his school board. 391 U.S., at 566. "The problem in any case," the Court stated, "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*, at 568. . . .

*Pickering* and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. See *id.*, at 568. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. See *Connick*, *supra*, at 147. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. . . . This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

. . .

When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. See, e.g., *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion) ("[T]he government as employer indeed has far broader powers than does the government as sovereign"). Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. . . . Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a

public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. . . . So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. . . .

. . . [T]he First Amendment interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion. . . . The Court's approach acknowledged the necessity for informed, vibrant dialogue in a democratic society. . . . See, e.g., *San Diego v. Roe*, 543 U.S. 77, 82 (2004) (*per curiam*) ("Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it" (citation omitted)). . . .

. . . Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to "constitutionalize the employee grievance." *Connick*, 461 U.S., at 154.

### III

With these principles in mind we turn to the instant case. Respondent Ceballos believed the affidavit used to obtain a search warrant contained serious misrepresentations. He conveyed his opinion and recommendation in a memo to his supervisor. That Ceballos expressed his views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive First Amendment protection for expressions made at work. . . . Many citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like "any member of the general public," *Pickering*, 391 U.S., at 573, to hold that all speech within the office is automatically exposed to restriction.

The memo concerned the subject matter of Ceballos' employment, but this, too, is nondispositive. The First Amendment protects some expressions related to the speaker's job. . . . As the Court noted in *Pickering*: "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." 391 U.S., at 572. The same is true of many other categories of public employees.

The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. . . . That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First

Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do. . . .

Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.

...

. . . [T]oday's decision may have important ramifications for academic freedom, at least as a constitutional value. . . . There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

#### IV

...

We reject . . . the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties. Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.

### 17.5.3.1 Regulating Speech of Governmental Employees after *Garcetti* (2006)

In 2014, the Court modified the seemingly blanket protection it established in *Garcetti* (2006) for governmental employers with respect to employee speech within the course and scope of their employment. The speech of an employee speaking as a citizen on a matter of general concern to citizens is likely to be protected. In *Lane v. Franks*, 573 U.S. \_\_\_\_ (2014), the Court wrote:

*Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment. The *Garcetti* Court made explicit that its holding did not turn on the fact that the memo at issue “concerned the subject matter of [the prosecutor’s] employment,” because “[t]he First Amendment protects some expressions related to the speaker’s job.” *Id.*, at 421. . . . In other words, the mere fact that a citizen’s speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.

It bears emphasis that our precedents dating back to *Pickering* [(1968)] have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment.

*Id.* at \_\_\_\_.

The issues in *Lane v. Franks* (2014) arose in a special circumstance: The employee was subpoenaed to testify at trial and therefore was not *voluntarily* speaking on an issue of public concern. The language of the unanimous Court is, as quoted above, quite broad, but the setting out of which *Lane v. Franks* (2014) arose provides grounds for later courts to distinguish it.

### 17.5.3.2 HYPOTHETICALS: SPEECH BY THE GOVERNMENT AND GOVERNMENTAL EMPLOYEES

Which of the following actions concerning speech by the government would be constitutional?

51. The federal government spends \$10 million on a public service advertising campaign against abortion.
52. A state government spends \$10 million to attract tourists to the state.
53. A city government refuses to allow a private organization to erect a permanent monument in the city park honoring homosexual scientists and their contributions to society.
54. A city government allows President Roosevelt's Four Freedoms speech to be chiseled in stone and erected in the city park.
55. A city requires all employees to spend one hour each day walking the streets and parks distributing informational brochures against taking action to mitigate global climate change.
56. A school board fired a teacher because she spoke publicly to the press against the latest reforms of instructional methods required to be used by all teachers.

### 17.5.4 Speech in Public Schools

This topic is often covered in specialized courses in education law and in courses focusing on freedom of expression or on the First Amendment more generally.

As with many areas, speech in public primary and secondary schools has given rise to special rules.

In 1969, students in Des Moines protested the Vietnam War by wearing black armbands to school. *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). The Supreme Court ruled that the school district could not prevent this speech merely because the school officials disliked it. Schools could limit student speech only if they know

facts which might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.

*Id.* at 514. Mere suspicion of potential disruption was held not to be enough.

When a student was disciplined by a school for using vulgar words in a school speech, the Court upheld the school's decision stating, "Surely, it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Bethel School District. No. 403 v. Fraser*, 478 U.S. 675 (1986). The Court established a balancing test to be used in such cases:

the freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior.

*Id.* at 681. Since the use of vulgar language was deemed not "socially appropriate," the student lost.

In a case involving student newspapers, the Court upheld the school principal's censorship of two student articles in the student newspaper because they were on controversial topics: pregnancy and divorce. The Court used a limited public forum analysis to rule that since the school did not need to provide the forum (the newspaper) at all, in creating and providing it, the school retained control over its contents. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

In a case demonstrating how far away from the *Tinker* (1969) standard we have moved, the Court upheld the suspension of a student for holding up a banner that said "Bong hits 4 Jesus" at the parade route for the passing of the Olympic torch in 2002. *Morse v. Frederick*, 551 U.S. 393 (2007). The banner was displayed outside and not as part of any particular school activity, and no disruption of education occurred. Nonetheless, the Court held that since the school had allowed and encouraged students to attend the event of the Olympic torch being carried past the school, it was a school-sponsored and school-supervised event. Since the speech occurred at a school-sponsored event, the school had power to regulate the speech to some extent. Where the school has an important and perhaps even compelling interest in deterring drug use, the school can prohibit speech encouraging drug use. The sign, whatever "Bong Hits 4 Jesus" might actually mean, could reasonably be interpreted to encourage drug use. The reach of *Morse v. Frederick* (2007) is uncertain given the unusual nature of the facts, but it clearly allows for schools to censor messages and viewpoints contrary to their positions on a particular topic, provided the school's interest is strong enough.

### 17.5.5 Freedom of Expression and Copyright

Paragraph 3 of Article 3 of the International Covenant on Civil and Political Rights provides::

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Among the “rights of others” under paragraph 3(a) are intellectual property rights, especially copyrights. Certain intellectual property rights are recognized under paragraph 1(c) of Article 15 of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), which provides as follows: “The States Parties to the present Covenant recognize the right of everyone . . . [t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” This seems to recognize a human right to a property interest in patent and copyright. Given that one has an internationally recognized right to protect a copyright, it would seem that such rights are included in ICCPR Article 19, paragraph 3(a).

One need not rely on international treaties as the source of such rights. The United States Constitution expressly grants power to Congress to create a copyright regime, and it has done so. The problem is how to reconcile the two interests: property rights in intellectual property, especially copyright, and freedom of speech. The Copyright Act, Title 17 of the U.S. Code, limits the reach of copyright in significant ways, including (1) copyright does not extend to ideas themselves, only to the particular expression of the ideas; (2) fair use; and (3) many other explicit limitations on the scope of the rights granted in the statute. Thus copyright accommodates freedom of expression. As noted by the Court:

The *First Amendment* securely protects the freedom to make—or decline to make—one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches. To the extent such assertions raise *First Amendment* concerns, copyright’s built-in free speech safeguards are generally adequate to address them. . . . [W]hen, as in this case, Congress has not altered the traditional contours of copyright protection, further *First Amendment* scrutiny is unnecessary.

*Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

### 17.5.6 Fraud and Crime

Speech that constitutes fraud can be prohibited by the government both through criminal penalties and by allowing private civil suits. See *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). The tort elements of fraud vary somewhat from jurisdiction to jurisdiction, but they are generally considered to include (1) the intentional misrepresentation or concealment of a material fact, (2) upon which the target is meant to rely; (3) the target does in fact so rely, and (4) the reliance causes harm to the target. Speech constituting fraud is not protected by the First Amendment.

Similarly, speech integral to criminal conduct is not protected. In *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949), the Court held that “it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”

### 17.5.7 EXAM TIPS: FREEDOM OF EXPRESSION: SPECIAL MATTERS

Content-based prior restraints get the strictest of the strict standards of review because they are the most disfavored of all restrictions on speech. Nonetheless, most prior restraints are constitutional as time, place, and manner restrictions, provided the permitting or licensing requirements for parades or other public gatherings meet constitutional requirements. Prior restraints in the online context can still raise some special concerns.

Campaign financing is difficult to test in an introductory course because it involves highly complex and specialized regulations. Nonetheless, the basics of the current doctrine can be tested, and the student's understanding and ability to apply the underlying ideas to new attempts to regulate campaign financing would be fair game.

The problematic nature of regulating nonsanctioned speech by government employees makes it highly testable, but it, like campaign financing, would tend to be more likely explored in some depth in an upper level course.

## 17.6 RACE, SOCIAL JUSTICE, AND FREEDOM OF EXPRESSION

As should be obvious from reading the cases in this chapter, many of them involve race, including *Brandenburg v. Ohio* (1969) (KKK rallies are protected speech), *New York Times v. Sullivan* (1964) (limiting use of tort of defamation to attack the Civil Rights movement by constitutionalizing defamation law), *Shuttlesworth v. City of Birmingham* (1969) (parade permit standards limiting discretion), and *Virginia v. Black* (2003) (hate speech, including burning a cross, a symbol of the KKK, is protected speech). These same cases illustrate the importance of the Fourteenth Amendment, which made the First Amendment freedom of expression constraint applicable to the states through the doctrine of incorporation: These are all cases involving states. Not coincidentally, other than *Virginia v. Black* (2003), these cases arose and were decided during the height of the Civil Rights movement and during a time when the Supreme Court was active in defining and expanding rights protected by the Constitution.

Freedom of expression cases often involve claims for protection by marginalized or disfavored groups against the "tyranny of the majority." Those protected at various times include union organizers, members of the communist party, anti-war protesters, American Nazis, the Ku Klux Klan, Jehovah's Witnesses, and more. In these cases the Court exercised its role as a protector of individual rights against majoritarian actions.

These cases show the Court acting to empower the individual or small or marginalized groups by protecting their ability to express themselves without undue governmental encumbrance. But that is not all there is to it. Limiting speech with respect to pornography and adult entertainment for the protection of children accords with the wishes of the majority on such matters insofar as it involves limiting unwilling

exposure to such material. Limiting commercial speech by allowing the government to require that it not be false or misleading also protects people, although in such cases the government acts in general to protect rather than to control or prohibit. (Any regulatory effort can overreach the proper bounds, however.)

Similarly, protecting the intellectual efforts of authors through copyright can empower all creators of works, including those in marginalized communities. Carving out exceptions and limiting an absolutist approach to free speech can work to advance interests of inclusion and empowerment.

Conceptions of social justice and matters of race are not the only driving forces behind freedom of expression law, but they both have played a significant role in its development over time.

### 17.7 CONCLUDING NOTES ON FREEDOM OF EXPRESSION

Freedom of expression is a difficult, complex field. In general, speech is strongly protected in the United States, far more strongly than international standards would require or than in most countries. The three most problematic areas are pornography with respect to protection of minors; defamation rules that allow speakers to “report” stories on the flimsiest of suspicions; and campaign financing for which the Court refuses to recognize congressional judgment regarding the undue influence of money on elected officials.

The following are the most important points to take away from this chapter:

1. Most expression is protected.
2. Protected expression can be regulated with respect to content only if the government regulation passes strict scrutiny.
3. Protected expression can be regulated as to time, place, and manner using a version of intermediate scrutiny.
4. The Court has identified numerous categories of expression that receive lesser or no protection. Each category has its own test for what sorts of expression fall within the category, and each has its own, not necessarily unique, standard of review.
5. Several overarching rules or principles apply in freedom of expression cases: vagueness, overbreadth, chilling effect, and prior restraint.
6. Special rules have been developed to protect minors.

The next three chapters on freedom of the press, freedom of association, and freedom of religion include additional aspects of freedom of expression. In general, freedom of the press is treated like freedom of expression (*e.g.*, *NYT v. Sullivan* (1964) and *Near v. Minnesota* (1931)). Freedom of association is often considered in connection with freedom of expression since a purpose of some associations is expression or advocacy. Many of the key freedom of religion cases are also freedom of expression cases.

## 17.8 DOCTRINAL SUMMARY OF FREEDOM OF EXPRESSION

Two words of caution: First, the following summary of First Amendment freedom of expression rules is not complete. Second as with other black-letter rules in the field of constitutional law, the application of these tests is often more pliable than the formula of words implies.

- I. Content based regulation is presumptively invalid, and the state can constitutionally justify it only if it meets the freedom of expression strict scrutiny standard of review. Under freedom of expression strict scrutiny the government must show:
  - A. That it is protecting a compelling government interest;
  - B. That the law is necessary to achieve that interest; and
  - C. That the means chosen are the least restrictive on expression necessary to accomplish the compelling interest.
    1. A law that is significantly underinclusive, i.e., one that allows appreciable damage to the claimed compelling interest from speech or expression that the law does not regulate, “cannot be regarded as protecting an interest of the highest order [a compelling interest], and thus as justifying a restriction on truthful speech.” *Reed v. Town of Gilbert* (2015).
- II. Content-based regulation:
  - A. Regulations may be deemed to regulate content facially, or based on governmental intent or purpose, or on how they are applied.
  - B. Regulations that apply to particular speech because of the topic of the speech or the idea or message expressed are content-based regulations.
  - C. Regulations that define the regulated speech by its function or purpose are content-based regulations.
  - D. Laws that are facially content neutral are nonetheless considered content-based regulations of speech if:
    1. The regulations cannot be justified without reference to the content of the regulated speech;
    2. The regulations were adopted by the government because of disagreement with the message the speech conveys; or
    3. The regulations are applied to improperly target content.
- III. For time, place, and manner regulation, the Court employs an intermediate standard of review:
  - A. The government must show that a substantial, content neutral interest is being served;
  - B. The regulation must be narrowly tailored to accomplishing that important or substantial governmental interest; and
  - C. There must be ample alternative avenues of expression available to the speaker.
- IV. Requiring permits, licenses, and payment of fees prior to speaking or parading raise special problems that have been addressed essentially as time, place, and manner regulations in such a way as to avoid content-based censorship or prior restraint concerns.

- A. Licensing/permitting standards
  - 1. A proper non-content related governmental purpose is required such as:
    - a. To regulate access to a public forum so as to avoid conflicts;
    - b. To address impact on street traffic/street closings; or
    - c. Provide security for speakers or marchers.
  - 2. The discretion in permitting authority to grant or deny the permit must be strictly limited so as to avoid content or viewpoint based discrimination in the administration of the licensing or permitting scheme:
    - a. Standards for obtaining a permit must be content neutral.
    - b. The standards and procedures for obtaining a permit must:
      - i. Provide objective criteria for permitting officials to apply;
      - ii. Not be vague and subject to discriminatory interpretation and application.
  - 3. Fees and bonds
    - a. Fees cannot exceed the actual cost to the government to regulate the speech or the parade, e.g., for police protection or crowd control.
    - b. The speakers or parade sponsors cannot be charged for the costs of additional police needed to control opponents of the speakers.
    - c. A bond or insurance can be required, but it cannot in effect bar the parade or speech from taking place.
- V. *Vagueness*. Regulation of expression can be unconstitutional because it is too vague. For freedom of expression purposes the void for vagueness tests are:
  - A. The boundaries of the speech it limits cannot be determined adequately clearly; or
  - B. The regulation leaves too much discretion in the officers or administrators applying it.
- VI. *Overbreadth*. A regulation of expression that is overly broad is unconstitutional. A government regulation suffers from overbreadth when it limits not only the lawfully targeted unprotected speech, but also impermissibly limits too much protected speech.
- VII. Various categories of speech are subject to specific tests to determine whether the speech falls within that special category and to specific tests for the constitutionality of the regulation of that speech.
  - A. Fighting words are:
    - 1. Words that by their “very utterance inflict injury or tend to incite an immediate breach of the peace.”
      - a. Context matters immensely: Words that might be protected in most settings might not be in some settings.
    - 2. Delivered in manner and circumstances likely to cause an immediate and serious harm; typically, a violent reaction from the listener.
    - 3. The standard for regulation is the “clear and present danger” test.
  - B. Advocacy of or inducement to illegal conduct:
    - 1. Are the words intended to incite others to engage in illegal conduct?
    - 2. Is there a likelihood of imminent or immediate carrying out of the incited unlawful conduct?
    - 3. This is another application of the “clear and present danger” test.

- C. True threats are:
  - 1. Statements where the speaker communicates a serious expression of an intent to commit an act of unlawful violence against someone.
    - a. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats “protect[s] individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.”
    - b. If the target of the threat is unaware of the threat, it is not a “true threat” for freedom of expression purposes.
- D. Hate speech is protected speech unless it also constitutes one of the other sorts of unprotected speech such as true threats or fighting words.
  - 1. But the government can enhance penalties when otherwise illegal acts (such as assault) are committed with specific animus toward a group.
- E. *Obscenity*. The primary task is to distinguish merely pornographic material, which is protected, from obscene material, which is not.
  - 1. Test for obscenity is:
    - a. The work at issue must depict or describe sexual conduct in a patently offensive way;
    - b. The sexual conduct that is to be considered obscene must be specifically defined in the law;
    - c. The sexual conduct, applying contemporary community standards, appeals to the prurient interest; and
    - d. The work taken as a whole “lacks serious literary, artistic, political, or scientific value.”
  - 2. Standard of review for government regulation of obscene expression is deferential rational basis:
    - a. The government regulation must be rationally related to accomplishing a legitimate governmental purpose.
    - b. The judgment of the governmental body taking the action under review is entitled to a high degree of deference when making the judgment about the ends and about the means chosen and about the relationship between the two.
- F. Protecting minors
  - 1. The government can limit broadcast content for the protection of minors.
  - 2. Child pornography is not protected speech for pictorial or audio-visual works; it is protected in textual works, which are subject to the standard obscenity test. States can control child pornography when the following test is met:
    - a. The statute must address children below a specified age such as sixteen or eighteen.
    - b. The work must visually depict sexual conduct. Thus literature and written descriptions generally will not be excluded but rather are protected.
    - c. The sexual conduct that cannot be depicted must be specifically described in the statute.

3. The purpose of the special treatment for minors is to protect children from indecent exploitation and exposure to certain types of actions. Where children are not involved in the production of the works, the works remain protected.
    - a. An adult actor playing a minor is not a violation.
    - b. Simulation or computer graphics programs to make an actor look younger or to generate the images entirely is not a violation.
- G. Secondary effects doctrine
1. Allows regulation of pornography and adult entertainment such as lap dancing and nude dancing:
    - a. to protect children from exposure to pornography; or
    - b. to further other governmental interests not related to the content of the pornography per se.
  2. Regulation of the time, place, and manner of the speech is allowed because it is how one accomplishes legitimate state interests in mitigating the secondary effects.
    - a. Not treated as content regulation because not purposefully targeting content per se but rather the effects of that content.
  3. Test for the secondary effects doctrine is essentially the same as that for time, place, and manner regulation:
    - a. Substantial state interest not related to the speech itself except insofar as the speech causes the secondary effects (pornography or adult entertainment);
    - b. Narrowly tailored;
    - c. Adequate alternative channels to communicate the content are available.
- H. Defamation
1. First one must determine whether the speech would be sanctionable under the applicable state tort law of defamation. The elements of defamation vary from state to state. The Supreme Court decisions in the area of defamation place constraints on the permissible elements of a state tort of defamation. These constraints are premised upon the First Amendment guarantee of freedom of expression. Note that it is not the private defamation itself that is constrained by the First Amendment, but rather the state action, i.e., the state's definition of the elements of the tort cause of action of defamation whether by statute or case law, that is constrained.
  2. Essentially, the tort of defamation is the communication of a false statement to another about a person that harms that person's reputation. A defamatory statement communicated solely to the person being defamed is not sufficient to support the cause of action in court. The "person" can be a natural person or other juridical entity, such as a business or nongovernmental organization.
  3. The state of mind and intention of the speaker with respect to what is said matters. It is on this aspect that the Supreme Court chose to place the most important constraints on defamation. Thus the speaker must at least be negligent in making the statement for a defamation cause of action; strict liability is not constitutional, even for so-called private entity defamation.

4. The nature of the plaintiff in the particular case
  - a. For public officials, the defamed person must show that the speaker spoke with “actual malice,” which is defined as reckless disregard for truth or falsity or knowledge of falsity of the statement.
  - b. For public figures, the same standard is used as for public officials. The two kinds of public figures are (1) those who are essentially public figures for all purposes, and (2) those who by choice or circumstance become newsworthy with respect to a particular issue or event.
  - c. For private plaintiffs, i.e., those who are not public officials or public figures for defamation purposes, the defamed plaintiff must show that the speaker was at least negligent with respect to determining the truth or falsity of defamatory statement made.
5. There are additional constraints with respect to presumed, actual, and punitive damages that vary with the type of plaintiff.
6. The nature of the issue being addressed also plays a role in assessing liability.
- I. Intentional infliction of emotional distress (IIED)
  1. The Court has indicated that the tort of intentional infliction of emotional distress can survive a freedom of expression challenge, but the test for it to do so is unclear.
  2. Protesters on public walk/street/area speaking about a matter of public interest and not actually disruptive of the funeral could not be held liable under IIED consistent with freedom of expression.
  3. Satirical statements about a public figure’s parentage were held not actionable.
- J. Commercial speech. As with other types of speech under the categorical approach, one must first identify the speech as commercial and then apply the proper standard of review.
  1. Commercial speech is speech:
    - a. That proposes a commercial transaction, including in particular most advertising; or
    - b. That relates predominantly to the economic interests of the speaker and audience.
  2. The *Central Hudson* standard of review for commercial speech is:
    - a. The speech must not be false or deceptive and must be about a lawful subject;
    - b. The government must have a substantial interest served by the restrictions;
    - c. The regulation directly advances the governmental interest; and
    - d. The regulation is not more extensive than necessary to serve that interest.
- VIII. Other speech categories that receive special treatment based on the speaker, the situation, or the purpose of the speech, but not based on the type of speech per se:
  - A. Campaign finance
    1. Can be regulated only to address quid pro quo corruption.
    2. Disclosure of sponsorship and disclaimers for campaign speech have been upheld because of “a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.”

## B. Student speech

1. Material disruption test (*Tinker*: armbands protesting Vietnam War)
2. Limits on school newspapers: allowed broadly if for “legitimate educational reasons” (*Hazelwood*)
3. Messages contrary to school position (e.g., drugs: “Bong hits 4 Jesus”) can be banned at school events, even off school grounds (*Morse v. Frederick*)
4. Indecent speech can be banned (*Bethel School District v. Fraser*)
5. Public forum rules apply: a school is not a public forum in general (*Perry Educators Association*)

## C. Government speech

1. The government can speak, can have a viewpoint, and is not bound to be fair, to give equal time to opponents, etc.
2. Government can require employees to speak and can limit employee speech.
  - a. Employees have some rights of freedom of expression, but those rights can be limited.
    - i. Hatch Act: nonendorsement of candidates, limits on political speech.
  - b. Speaking on matters of public interest against one’s governmental employer is generally protected (*Pickering* and *Connick*) provided:
    - i. The matter about which one is speaking is a matter of public concern; and
    - ii. Employee’s interest outweighs the government’s interest in maintaining an efficient and effective workplace.
      - a. Government must prove the adverse effect of the speech on the workplace.
      - b. No presumption exists in favor of the government on this point.
    - iii. But, if the employee is speaking out about official duties, the employee can be disciplined for content of speech.
      - a. Thus whistle-blowers need statutory protection against governmental employer retaliation.

## IX. Other speech topics

A. Expressive conduct (such as wearing armbands or dancing) is subject to the *O’Brien* test, as modified by *Clark*:

1. The government has the power to regulate the conduct itself;
2. The regulation is content neutral and is unrelated to the expression involved;
3. The regulation is in furtherance of a substantial governmental interest;
4. The regulation is narrowly tailored to achieve that interest; and
5. The regulation leaves open reasonable alternative channels to communicate the information.

## B. Prior restraint: Strictest of the strict standards of review

1. Standard of review:
  - a. Compelling state interest,
  - b. Least restrictive alternative, and

- c. Immediate serious harm (e.g., disclosure of troop movements; not fully adopted by majority). (*Pentagon Papers* case was a splintered opinion.)
  - d. *Pentagon Papers* case (may violate law by publishing, but cannot stop publication before published).
- C. Public forum doctrine
- 1. Traditional public forum
    - a. Speech in places such as sidewalks and parks cannot be limited except by reasonable time, place, and manner restrictions.
  - 2. Designated limited public forum
    - a. The government can designate the subject matter of the limited public forum but cannot engage in viewpoint discrimination.
    - b. Public forum includes nonphysical spaces such as access to electronic media.
  - 3. Private spaces of governmental buildings
    - a. Off limits with no public right of access under freedom of expression.
  - 4. Special settings
    - a. Company town
    - b. Shopping malls
    - c. Nonphysical public forum (e.g., newsletters, bulletin boards)

