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Freedom of Speech and Press: Exceptions to the First Amendment

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Freedom of Speech and Press: Exceptions to the First Amendment

Summary

The First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech, or of the press...." This language restricts government both more and less than it would if it were applied literally. It restricts government more in that it applies not only to Congress, but to all branches of the federal government, and to all branches of state and local government. It restricts government less in that it provides no protection to some types of speech and only limited protection to others.

This report provides an overview of the major exceptions to the First Amendment — of the ways that the Supreme Court has interpreted the guarantee of freedom of speech and press to provide no protection or only limited protection for some types of speech. For example, the Court has decided that the First Amendment provides no protection to obscenity, child pornography, or speech that constitutes "advocacy of the use of force or of law violation ... where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

The Court has also decided that the First Amendment provides less than full protection to commercial speech, defamation (libel and slander), speech that may be harmful to children, speech broadcast on radio and television, and public employees' speech. Even speech that enjoys the most extensive First Amendment protection may be subject to "regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." And, even speech that enjoys the most extensive First Amendment protection may be restricted on the basis of its content if the restriction passes "strict scrutiny," i.e., if the government shows that the restriction serves "to promote a compelling interest" and is "the least restrictive means to further the articulated interest."

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Freedom of Speech and Press: Exceptions to the First Amendment

Introduction

The First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech, or of the press...." This language restricts government both more and less than it would if it were applied literally. It restricts government more in that it applies not only to Congress, but to all branches of the federal government, and to all branches of state and local government.[1] It restricts government less in that it provides no protection to some types of speech and only limited protection to others.

This report provides an overview of the major exceptions to the First Amendment — of the ways that the Supreme Court has interpreted the guarantee of freedom of speech and press to provide no protection or only limited protection for some types of speech.[2] For example, the Court has decided that the First Amendment provides no protection to obscenity, child pornography, or speech that constitutes "advocacy of the use of force or of law violation ... where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

The Court has also decided that the First Amendment provides less than full protection to commercial speech, defamation (libel and slander), speech that may be harmful to children, speech broadcast on radio and television, and public employees' speech. Even speech that enjoys the most extensive First Amendment protection may be subject to "regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." And, even speech that enjoys the most extensive First Amendment protection may be restricted on the basis of its content if the restriction passes "strict scrutiny," i.e., if the government shows that the restriction serves "to promote a compelling interest" and is "the least restrictive means to further the articulated interest."

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[1] Herbert v. Lando, 441 U.S. 153, 168 n.16 (1979).

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

Obscenity[3]

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

What is obscenity? It is not synonymous with pornography, as most pornography is not legally obscene; i.e., most pornography is protected by the First Amendment. To be obscene, pornography must, at a minimum, "depict or describe patently offensive 'hard core' sexual conduct."[6] The Supreme Court has created a three-part test, known as the *Miller* test, to determine whether a work is obscene. The *Miller* test asks:

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

The Supreme Court has clarified that only "the first and second prongs of the *Miller* test — appeal to prurient interest and patent offensiveness — are issues of fact for the jury to determine applying contemporary community standards."[8] As for the third prong, "[t]he proper inquiry is not whether an ordinary member of any given

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[3] For additional information, see CRS Report 95-804, *Obscenity and Indecency: Constitutional Principles and Federal Statutes*, by Henry Cohen.

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

[5] *Id.* at 485.

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

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

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

community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole."[9]

The Supreme Court has allowed one exception to the rule that obscenity is not protected by the First Amendment: one has a constitutional right to possess obscene material "in the privacy of his own home."[10] However, there is no constitutional right to provide obscene material for private use[11] or even to acquire it for private use.[12]

Child Pornography[13]

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

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

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

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

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

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

[13] For additional information, see CRS Report 95-406, *Child Pornography: Constitutional Principles and Federal Statutes*, by Henry Cohen.

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

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

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

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

[18] *Id.* at 253.

minor engaging in sexually explicit conduct." It also prohibits "a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that ... depicts a minor engaging in sexually explicit conduct," and is obscene or lacks serious literary, artistic, political, or scientific value.

Content-Based Restrictions

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

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.... The question in every case is whether the words used ... create a clear and present danger....[19]

In its current formulation of this principle, the Supreme Court held that "advocacy of the use of force or of law violation" is protected unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[20] Similarly, the Court held that a statute prohibiting threats against the life of the President could be applied only against speech that constitutes a "true threat," and not against mere "political hyperbole."[21]

In cases of content-based restrictions of speech other than advocacy or threats, the Supreme Court generally applies "strict scrutiny," which means that it will uphold a content-based restriction only if it is necessary "to promote a compelling interest," and is "the least restrictive means to further the articulated interest."[22]

Thus, it is ordinarily unconstitutional for a state to proscribe a newspaper from publishing the name of a rape victim, lawfully obtained.[23] This is because there

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

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

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

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

[23] The Florida Star v. B.J.F., 491 U.S. 524 (1989). The Court left open the question "whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, the government may ever punish not only the unlawful acquisition, but the ensuing publication as well." *Id.* at 535 n.8 (emphasis in original). In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the Court held that a content-neutral statute prohibiting the publication of illegally intercepted communications (in this case a cell phone conversation) violates free speech where the person who publishes the material did not participate in the interception,

(continued...)

ordinarily is no compelling governmental interest in protecting a rape victim's privacy.[24] By contrast, "[n]o 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."[25] Similarly, the government may proscribe "'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[26] Here the Court was referring to utterances that constitute "epithets or personal abuse" that "are no essential part of any exposition of ideas," as opposed to, for example, flag burning, which is discussed below, under "Symbolic Speech."

Non-Content-Based Restrictions

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

Two types of speech restrictions that receive this "intermediate" scrutiny are (1) time, place, or manner restrictions, and (2) incidental restrictions, which are restrictions aimed at conduct other than speech, but that incidentally restrict speech. This report includes separate sections on these two types of restrictions. In addition, restrictions on commercial speech, though content-based, are subject to similar intermediate scrutiny; this report also includes a separate section on commercial speech. Finally, zoning restrictions on pornographic theaters and bookstores, although discriminating on the basis of the content of speech, receive intermediate scrutiny because, according to the Supreme Court, they are aimed at combating "secondary effects," such as crime, and not at the content of speech. For additional information on this subject, see CRS Report 95-804, *Obscenity and Indecency: Constitutional Principles and Federal Statutes*, by Henry Cohen.

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[23] (...continued)
and the communication concerns a public issue.

[24] However, the Court did "not rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be ... overwhelmingly necessary to advance" a compelling state interest. *Id.* at 537.

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

[26] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Campus "hate speech" prohibitions at public colleges (the First Amendment does not apply to private colleges) are apparently unconstitutional, even as applied to fighting words, if they cover only certain types of hate speech, such as speech based on racial hatred. This conclusion is based on the cross-burning case, *R.A.V. v. City of St. Paul*, *infra* note 129.

Prior Restraint

There are two ways in which the government may attempt to restrain speech. The more common is to make a particular category of speech, such as obscenity or defamation, subject to criminal prosecution or civil suit, and then, if someone engages in the proscribed category of speech, to hold a trial and impose sanctions if appropriate. The second way is by prior restraint; i.e., for a court to issue a temporary restraining order or an injunction against engaging in particular speech — publishing the Pentagon Papers, for example.[27] The Supreme Court has written:

> [P]rior restraints are the most serious and least tolerable infringement on First Amendment rights.... A prior restraint, ... by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time. The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events.[28]

"The special vice of a prior restraint is that communication will be suppressed ... before an adequate determination that it is unprotected by the First Amendment."[29] The prohibition on prior restraint, thus, is essentially a limitation on restraints until a final judicial determination that the restricted speech is not protected by the First Amendment. It is a limitation, in other words, against temporary restraining orders and preliminary injunctions pending final judgment, not against permanent injunctions after a final judgment is made that the restricted speech is not protected by the First Amendment.[30]

Prior restraints are permitted in some circumstances. "The vast majority of [federal] circuits ... do not apply the doctrine of prior restraint to commercial speech."[31] Furthermore, "*only* content-based injunctions are subject to prior restraint

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[27] The Supreme Court struck down an injunction against publishing the Pentagon Papers, writing: "Any system of prior restraints of expression comes to the Court bearing a heavy presumption against its constitutional validity." New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

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

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

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

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

analysis."[32] In addition, prior restraint is generally permitted, even in the form of preliminary injunctions, in intellectual property cases, such as those for copyright infringement.[33]

Commercial Speech

"The Constitution ... affords a lesser protection to commercial speech than to other constitutionally guaranteed expression."[34] Commercial speech is "speech that *proposes* a commercial transaction."[35] That books and films are published and sold for profit does not make them commercial speech; i.e., it does not "prevent them from being a form of expression whose liberty is safeguarded [to the maximum extent] by the First Amendment."[36] Commercial speech, however, may be banned if it is false or misleading, or if it advertises an illegal product or service. Even if fits in none of these categories, the government may regulate it more than it may regulate fully protected speech.

The Supreme Court has prescribed the four-prong *Central Hudson* test to determine whether a governmental regulation of commercial speech is constitutional. This test asks initially (1) whether the commercial speech at issue is protected by the First Amendment (that is, whether it concerns a lawful activity and is not misleading) and (2) whether the asserted governmental interest in restricting it is substantial. "If both inquiries yield positive answers," then to be constitutional the restriction must (3) "directly advance[ ] the governmental interest asserted," and (4) be "not more extensive than is necessary to serve that interest."[37]

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[32] DVD Copy Control Association, Inc. v. Bunner, 75 P.3d 1, 17 (Cal. 2003) (a "prior restraint is a *content-based* restriction on speech *prior to its occurrence*" (italics in original)). For the test regarding content-neutral injunctions, see text accompanying note 109, *infra*.

[33] Lemley and Volokh, *supra*, note 30 (arguing that intellectual property should have the same First Amendment protection from preliminary injunctions as other speech).

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

[35] Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 482 (1989) (emphasis in original). In *Nike, Inc. v. Kasky*, 45 P.3d 243 (2002), *cert. dismissed*, 539 U.S. 654 (2003), Nike was sued for unfair and deceptive practices for allegedly false statements it made concerning the working conditions under which its products were manufactured. The California Supreme Court ruled that the suit could proceed, and the Supreme Court granted certioriari, but then dismissed it as improvidently granted, with a concurring and two dissenting opinions. The issue left undecided was whether Nike's statements, though they concerned a matter of public debate and appeared in press releases and letters rather than in advertisements for its products, should be deemed "'commercial speech' because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions." *Id.* at 657 (Stevens, J., concurring). Nike subsequently settled the case.

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

[37] Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980).

The Supreme Court has held that, in applying the third prong of the *Central Hudson* test, the courts should consider whether the regulation, in its general application, directly advances the governmental interest asserted. If it does, then it need not advance the governmental interest as applied to the particular person or entity challenging it.[38] Its application to the particular person or entity challenging it is relevant in applying the fourth *Central Hudson* factor, although this factor too is to be viewed in terms of "the relation it bears to the overall problem the government seeks to correct."[39] The fourth prong is not to be interpreted "strictly" to require the legislature to use the "least restrictive means" available to accomplish its purpose. Instead, the Court has held, legislation regulating commercial speech satisfies the fourth prong if there is a reasonable "fit" between the legislature's ends and the means chosen to accomplish those ends.[40]

The Supreme Court has applied the *Central Hudson* test in all the commercial speech cases it has decided since *Central Hudson*, and we discuss the ten most recent below, in chronological order.[41] In nine of these cases, the Court struck down the challenged speech restriction; it has not upheld a commercial speech restriction since 1993. In its most recent commercial speech case, *Thompson v. Western States Medical Center*, the Court noted that "several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases." These justices believe that the test does not provide adequate protection to commercial speech, but the Court has found it unnecessary to consider whether to abandon the test, because it has been striking down the statutes in question anyway.

In *Cincinnati v. Discovery Network, Inc.*, the Court struck down a Cincinnati regulation that banned newsracks on public property if they distributed commercial publications, but not if they distributed news publications.[42] As for the first two prongs of the *Central Hudson* test, the Court found that the commercial publications at issue were not unlawful or misleading, and that the asserted governmental interest in safety and esthetics was substantial. As for the third and fourth prongs, although banning commercial newsracks presumably advances the asserted governmental interests, the distinction between commercial and noncommercial speech "bears no relationship *whatsoever* to the particular interests that the city has asserted."[43] The city, therefore, did not establish "the 'fit' between its goals and its chosen means that is required by our opinion in *Fox*."[44]

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[38] See, *Edge Broadcasting*, *supra* note 34, 509 U.S. at 427.

[39] *Id.* at 430.

[40] Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 480 (1989).

[41] We do not include among the ten the three cases (discussed below, at the end of the section on "Compelled Speech") involving assessments for government-compelled advertisements, because the Court did not apply the *Central Hudson* test in these cases.

[42] 507 U.S. 410 (1993).

[43] *Id.* at 424 (emphasis in original).

[44] *Id.* at 428.

In *Edenfield v. Fane*,[45] the Court struck down a Florida ban on solicitation by certified public accountants, even though the Court had previously, in *Ohralik v. Ohio State Bar Association*,[46] upheld a ban on solicitation by attorneys. The Court found that the government had substantial interests in the ban, including the prevention of fraud, the protection of privacy, and the need to maintain CPA independence and to guard against conflicts of interest. However, the Court found no evidence that the ban directly advanced these interests, and noted, among other things, that, "[u]nlike a lawyer, a CPA is not 'a professional trained in the art of persuasion,'" and "[t]he typical client of a CPA is far less susceptible to manipulation than the young accident victim in *Ohralik*."[47]

The Court added, more generally, that the government's burden in justifying a restriction on commercial speech "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[48]

In *United States v. Edge Broadcasting Co.*, the Court upheld "federal statutes that prohibit the broadcast of lottery advertising by a broadcaster licensed to a State that does not allow lotteries, while allowing such broadcasting by a broadcaster licensed to a State that sponsors a lottery...."[49] The governmental interest in the statutes was to balance the interests of states that prohibit lotteries and states that operate lotteries. The broadcaster that challenged the statutes was licensed in North Carolina, which does not allow lotteries, but broadcasted from only three miles from the Virginia border, which does allow lotteries. The broadcaster claimed that prohibiting it from broadcasting advertisements for the Virginia lottery did not advance the governmental interest or represent a "reasonable fit" because North Carolina radio listeners in its area were already inundated with advertisements from Virginia stations advertising the Virginia lottery and because most of the broadcaster's listeners were in Virginia. The Supreme Court upheld the statutes because, even if they did not advance the governmental interest or represent a reasonable fit as applied to the particular broadcaster, they did as applied to the overall problem the government sought to address.

In *Ibanez v. Florida Board of Accountancy*, the Court held that the Florida Board of Accountancy could not reprimand an accountant for truthfully referring to her credentials as a Certified Public Accountant and a Certified Financial Planner in her advertising and other communication with the public, such as her business cards

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[45] 507 U.S. 761 (1993).

[46] 436 U.S. 447 (1978).

[47] *Edenfield*, *supra* note 45, 507 U.S. at 775.

[48] *Id.* at 770-771.

[49] *Edge Broadcasting*, *supra* note 34, 509 U.S. at 421.

and stationery.[50] The Court wrote that it "cannot imagine how consumers can be misled by her truthful representation" that she was a CPA."[51]

In *Rubin v. Coors Brewing Co.*, the Court struck down a federal statute, 27 U.S.C. § 205(e), that prohibits beer labels from displaying alcohol content unless state law requires such disclosure.[52] The Court found sufficiently substantial to satisfy the second prong of the *Central Hudson* test the government's interest in curbing "strength wars" by beer brewers who might seek to compete for customers on the basis of alcohol content. However, it concluded that the ban "cannot directly and materially advance" this "interest because of the overall irrationality of the Government's regulatory scheme."[53] This irrationality is evidenced by the fact that the ban does not apply to beer advertisements, and by the fact that the statute *requires* the disclosure of alcohol content on the labels of wines and spirits.

In *Florida Bar v. Went For It, Inc.*, the Court upheld a rule of the Florida Bar that prohibited personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster.[54] The Bar argued "that it has a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers,"[55] and the Court found that "[t]he anecdotal record mustered by the Bar" to demonstrate that its rule would advance this interest in a direct and material way was "noteworthy for its breadth and detail";[56] it was not "mere speculation and conjecture."[57] Therefore, the rule passed what the Court called the second prong of the *Central Hudson* test.[58] As for the final prong, the Court found the Bar's rule to be "reasonably well tailored to its stated objective...."[59] In a subsequent case, the

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[50] 512 U.S. 136 (1994). Curiously, the Court in *Ibanez* writes that "only false, deceptive, or misleading commercial speech may be banned" (*id.* at 142), despite its decisions upholding bans of truthful commercial speech in *Edge Broadcasting*, *supra* note 34, and other cases. Perhaps the Court meant that only false, deceptive, or misleading commercial speech may be banned without consideration of the second, third, and fourth prongs of the *Central Hudson* test.

[51] *Id.* at 144.

[52] 514 U.S. 476 (1995).

[53] *Id.* at 488.

[54] 515 U.S. 618 (1995).

[55] *Id.* at 624.

[56] *Id.* at 627.

[57] *Id.* at 626.

[58] The Court referred to the *Central Hudson* test as having three parts, and referred to its second, third, and fourth prongs, as, respectively, its first, second, and third. The Court did not, however, alter the substance of the test. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 529 (1996) (O'Connor, J., concurring), the justices returned to the traditional numbering.

[59] *Id.* at 633. In *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988), the Court had (continued...)

Court wrote that, in *Florida Bar v. Went For It, Inc.*, it had "upheld a 30-day prohibition against a certain form of legal solicitation largely because it left so many channels of communication open to Florida lawyers."[60]

In *44 Liquormart, Inc. v. Rhode Island*, the Court, struck down a state statute that prohibited disclosure of retail prices in advertisements for alcoholic beverages.[61] In the process, it increased the protection that the *Central Hudson* test guarantees to commercial speech by making clear that a total prohibition on "the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process" will be subject to a stricter review by the courts than a regulation designed "to protect consumers from misleading, deceptive, or aggressive sales practices."[62]

The Court added: "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."[63] It concluded "that the price advertising ban cannot survive the more stringent constitutional review that *Central Hudson* itself concluded was appropriate for the complete suppression of truthful, nonmisleading commercial speech."[64]

In *Greater New Orleans Broadcasting Association, Inc. v. United States*,[65] the Court applied the *Central Hudson* test to strike down, as applied to advertisements of private casino gambling that are broadcast by radio or television stations located in Louisiana, where such gambling is legal, the same federal statute it had upheld in

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[59] (...continued)
previously held that a state may not place a "ban on *all* direct-mail solicitations, whatever the time frame and whoever the recipient." *Florida Bar*, 515 U.S. at 629 (emphasis in original). The Court has also held that a nonprofit organization's solicitation by letter of prospective clients is a protected form of political expression (*In re Primus*, 436 U.S. 412 (1978)), and that a state may prohibit lawyers from soliciting prospective clients in person (*Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978)). The Aviation Disaster Family Assistance Act of 1996, 49 U.S.C. § 1136(g)(2), prohibits unsolicited communications concerning a potential action for personal injury or wrongful death before the 30th day following an accident involving an air carrier providing interstate or foreign air transportation.

[60] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 502 (1996).

[61] *Id.*

[62] *Id.* at 501. The nine justices were unanimous in striking down the law, which prohibited advertising the price of alcoholic beverages, but only parts of Justice Stevens' opinion for the Court were joined by a majority of justices. The quotations above, for example, are from Part IV of the Court's opinion, which was joined by only Justices Kennedy and Ginsburg besides Justice Stevens.

[63] *Id.* at 503.

[64] *Id.* at 508, citing *Central Hudson*, *supra* note 37, 447 U.S. at 566, n.9.

[65] 527 U.S. 173 (1999).

United States v. Edge Broadcasting Co.,[66] as applied to broadcast advertising of Virginia's lottery by a radio station located in North Carolina, where no such lottery was authorized. The Court emphasized the interrelatedness of the four parts of the *Central Hudson* test; e.g., though the government has a substantial interest in reducing the social costs of gambling, the fact that the Congress has simultaneously encouraged gambling, because of its economic benefits, makes it more difficult for the government to demonstrate that its restriction on commercial speech materially advances its asserted interest and constitutes a reasonable "fit." In this case, "[t]he operation of [18 U.S.C.] § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it. . . . [T]he regulation distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all."[67]

In *Lorillard Tobacco Co. v. Reilly*, the Supreme Court applied the *Central Hudson* test to strike down most of the Massachusetts Attorney General's regulations governing the advertising and sale of cigarettes, smokeless tobacco, and cigars.[68] The Court first found the "outdoor and point-of-sale advertising regulations targeting cigarettes" to be preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1341.[69] By its terms, however, this statute's preemption provision applies only to cigarettes, so the Court considered the smokeless tobacco and cigar petitioners' First Amendment challenges to the outdoor and point-of-sale advertising regulations. Further, the cigarette petitioners did not raise a preemption challenge to Massachusetts' sales practices regulations (regulations, described below, other than outdoor and point-of-sale advertising regulations), so the Court considered the cigarette as well as the smokeless tobacco and cigar petitioners' claim that these regulations violate the First Amendment.

The Court struck down the outdoor advertising regulations under the fourth prong of the *Central Hudson* test, finding that the prohibition of any advertising within 1,000 feet of schools or playgrounds "prohibit[ed] advertising in a substantial portion of the major metropolitan areas of Massachusetts,"[70] and that such a burden on speech did not constitute a reasonable fit between the means and ends of the regulatory scheme. "Similarly, a ban on all signs of any size seems ill suited to target the problem of highly visible billboards, as opposed to smaller signs."[71]

The Court found "that the point-of-sale advertising regulations fail both the third and fourth steps of the *Central Hudson* analysis."[72] The prohibition on advertising "placed lower than five feet from the floor of any retail establishment which is

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[66] *Edge Broadcasting*, *supra* notes 34, 49.

[67] 527 U.S. at 190, 195.

[68] 533 U.S. 525 (2001).

[69] *Id.* at 551.

[70] *Id.* at 562.

[71] *Id.* at 563.

[72] *Id.* at 566.

located within a one thousand foot radius of" any school or playground did not advance the goal of preventing minors from using tobacco products because "[n]ot all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings."[73]

The Court, however, upheld the sales practices regulations that "bar the use of self-service displays and require that tobacco products be placed out of the reach of all consumers in a location accessible only to salespersons."[74] These regulations, though they "regulate conduct that may have a communicative component," do so "for reasons unrelated to the communications of ideas."[75] The Court therefore applied the *O'Brien* test for incidental restrictions of speech (see the section below on "Incidental Restrictions") and concluded "that the State has demonstrated a substantial interest in preventing access to tobacco products by minors and has adopted an appropriately narrow means of advancing that interest."[76]

In *Thompson v. Western States Medical Center*,[77] the Court struck down section 503A of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 353a, which "exempts 'compounded drugs' from the Food and Drug Administration's standard drug approval requirements as long as the providers of those drugs abide by several restrictions, including that they refrain from advertising or promoting particular compounded drugs."[78] "Drug compounding," the Court explained, "is a process by which a pharmacist or doctor combines, mixes, or alters ingredients to create a medication tailored to the needs of an individual patient."[79] The Court found that the speech restriction in this case served "important" governmental interests, but that, "[e]ven assuming" that it directly advances these interests, it failed the fourth prong of the *Central Hudson* test.[80] In considering the fourth prong, the Court wrote that "the Government has failed to demonstrate that the speech restrictions are 'not more extensive than is necessary to serve'" the governmental interests, as "[s]everal non-speech-related means [of serving those interests] might be possible here."[81] "If the First Amendment means anything," the Court added, "it means that regulating speech must be a last — not first — resort. Yet here it seems to have been the first strategy the Government thought to try."[82] The Court noted that it had "rejected the notion that the Government has an interest in preventing the dissemination of truthful

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[73] *Id.*

[74] *Id.* at 567.

[75] *Id.* at 569.

[76] *Id.*

[77] 535 U.S. 357 (2002).

[78] *Id.* at 360.

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

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

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

[82] *Id.* at 373.

commercial information in order to prevent members of the public from making bad decisions with the information."[83]

In saying that the speech restrictions were "not more extensive than is necessary to serve" the governmental interests, the Court was quoting from the fourth prong of the *Central Hudson* test, but nowhere in *Thompson* did it note that it had previously modified the fourth prong to require merely a reasonable "fit" between the legislature's ends and means, and not use of the least restrictive means to serve the governmental interests. Rather, it wrote: "In previous cases addressing this final prong of the *Central Hudson* test, we have made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." Yet the Court did not state that it intended to overrule its reasonable "fit" construction of the fourth prong.

Defamation

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

The Supreme Court, however, has granted limited First Amendment protection to defamation. The Court has held that public officials and public figures may not recover damages for defamation unless they prove, with "convincing clarity," that the defamatory statement was made with "'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[84]

The Court has also held that a private figure who sues a media defendant for defamation may not recover without some showing of fault, although not necessarily of actual malice (unless the relevant state law requires it). However, if a defamatory falsehood involves a matter of public concern, then even a private figure must show actual malice in order to recover presumed damages (i.e., not actual financial damages) or punitive damages.[85]

Speech Harmful to Children

Speech that is otherwise fully protected by the First Amendment may be restricted in order to protect children. This is because the Court has "recognized that there is a compelling interest in protecting the physical and psychological well-being

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[83] *Id.* at 374.

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

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

of minors."[86] However, any restriction must be accomplished "'by narrowly drawn regulations without unnecessarily interfering with First Amendment freedoms.' It is not enough to show that the government's ends are compelling; the means must be carefully tailored to achieved those ends."[87]

Thus, the government may prohibit the sale to minors of material that it deems "harmful to minors" ("so called 'girlie' magazines"), whether or not they are not obscene as to adults.[88] It may prohibit the broadcast of "indecent" language on radio and television during hours when children are likely to be in the audience, but it may not ban it around the clock unless it is obscene.[89] Federal law currently bans indecent broadcasts between 6 a.m. and 10 p.m.[90] Similarly, Congress may not ban dial-a-

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[86] Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989). A federal district court noted that, in cases that involve a restriction of minors' access to sexually explicit material, "the Supreme Court's jurisprudence does not require empirical evidence. Only some minimal amount of evidence is required...." Playboy Entertainment Group, Inc. v. U.S., 30 F. Supp.2d 702, 716 (D. Del. 1998); *aff'd*, 529 U.S. 803 (2000). By contrast, in cases not involving access of minors to sexually explicit material, the Supreme Court requires that the government, to justify a restriction even on speech with less than full First Amendment protection, "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." Turner Broadcasting System v. FCC, 512 U.S. 622, 664 (1994) (incidental restriction on speech). See also, Edenfield v. Fane, 507 U.S. 761, 770-771 (1993) (restriction on commercial speech); Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 392 (2000) (restriction on campaign contributions).

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

[88] Ginsberg v. New York, 390 U.S. 629, 631 (1968).

[89] Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978); Action for Children's Television v. Federal Communications Commission, 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996). The Supreme Court has stated that, to be indecent, a broadcast need not have prurient appeal; "the normal definition of 'indecent' refers merely to nonconformance with accepted standards of morality," *Pacifica*, 438 U.S. at 740. The FCC holds that the concept "is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." *Id.* at 732. The FCC applied this definition in a case in which the singer Bono said at the Golden Globe Awards that his award was "f[***]ing brilliant." The FCC Enforcement Bureau found that use of the word "as an adjective or expletive to emphasize an exclamation" did not fall within the definition of "indecent." The Commission, however, overturned the Bureau, ruling that "any use of that word or a variation, in any context, inherently has a sexual connotation...." In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, File No. EB-03-IH-0110 (Mar. 3, 2004). For additional information, including an analysis of whether prohibiting the broadcast of "indecent" words regardless of context would violate the First Amendment, see CRS Report RL32222, *Regulation of Broadcast Indecency: Background and Legal Analysis*, by Angie A. Welborn and Henry Cohen.

[90] For additional information, see CRS Report 95-804, *Obscenity and Indecency:* (continued...)

porn, but it may (as it does at 47 U.S.C. § 223) prohibit it from being made available to minors or to persons who have not previously requested it in writing.[91]

In *Reno v. American Civil Liberties Union*, the Supreme Court declared unconstitutional two provisions of the Communications Decency Act (CDA) that prohibited indecent communications to minors on the Internet.[92] The Court held that the CDA's "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." "[T]he governmental interest in protecting children from harmful materials ... does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not 'reduc[e] the adult population ... to ... only what is fit for children.'"[93]

The Court distinguished the Internet from radio and television because (1) "[t]he CDA's broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet,"(2) the CDA imposes criminal penalties, and the Court has never decided whether indecent broadcasts "would justify a criminal prosecution," and (3) radio and television, unlike the Internet, have, "as a matter of history ... 'received the most limited First Amendment protection, ... in large part because warnings could not adequately protect the listener from unexpected program content.... [On the Internet], the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material."

In 1998, Congress enacted the Child Online Protection Act (COPA), P.L. 105-277, title XIV, to replace the CDA. COPA differs from the CDA in two main respects: (1) it prohibits communication to minors only of "material that is harmful to minors," rather than material that is indecent, and (2) it applies only to communications for commercial purposes on publicly accessible websites. COPA has not taken effect, because a constitutional challenge was brought and the district court, finding a likelihood that the plaintiffs would prevail, issued a preliminary injunction against enforcement of the statute, pending a trial on the merits. The Third Circuit affirmed, but, in 2002, in *Ashcroft v. American Civil Liberties Union*, the Supreme Court held that COPA's use of community standards to define "material that is harmful to minors" does not by itself render the statute unconstitutional. The Supreme Court, however, did not remove the preliminary injunction against enforcement of the statute, and remanded the case to the Third Circuit to consider whether it is unconstitutional nonetheless. In 2003, the Third Circuit again found the

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[90] (...continued)
Constitutional Principles and Federal Statutes, by Henry Cohen. Restrictions on cable television intended to protect children are discussed in that report and also in this report under "Radio and Television."

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

[92] 521 U.S. 844 (1997).

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

plaintiffs likely to prevail and affirmed the preliminary injunction. In 2004, the Supreme Court affirmed the preliminary injunction because it found that the government had failed to show that filtering prohibited material would not be as effective in accomplishing Congress's goals. It remanded the case for trial, however, and did not foreclose the district court from concluding otherwise.[94] On March 22, 2007, the district court found COPA unconstitutional and issued a permanent injunction against its enforcement. The grounds for its decision were that "COPA is not narrowly tailored to Congress' compelling interest," the Attorney General "failed to meet his burden of showing that COPA is the least restrictive, most effective alternative in achieving the compelling interest," and "COPA is impermissibly vague and overbroad."[95]

Children's First Amendment Rights

In a case upholding high school students' right to wear black arm bands to protest the war in Vietnam, the Supreme Court held that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[96] They do, however, shed them to some extent. The Supreme Court has upheld the suspension of a student for using a sexual metaphor in a speech nominating another student for a student office.[97] It has upheld censorship of a student newspaper produced as part of the school curriculum.[98] (Lower courts have indicated that non-school-sponsored student writings may not be censored.[99])

A plurality of the justices found that a school board must be permitted "to establish and apply their curriculum in such a way as to transmit community values," but that it may not remove school library books in order to deny access to ideas with which it disagrees for political or religious reasons.[100] Most recently, the Supreme Court held that Congress could not prohibit people 17 or younger from making contributions to political candidates and contributions or donations to political parties.[101]

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

[95] American Civil Liberties Union v. Gonzales, C.A. No. 98-5591 (E.D. Pa., Mar. 27, 2007).

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

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

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

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

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

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

Time, Place, and Manner Restrictions

Even speech that enjoys the most extensive First Amendment protection may be subject to "regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[102] In the case in which this language appears, the Supreme Court allowed a city ordinance that banned picketing "before or about" any residence to be enforced to prevent picketing outside the residence of a doctor who performed abortions, even though the picketing occurred on a public street. The Court noted that "[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech."[103]

Thus, the Court, while acknowledging that music, as a form of expression and communication, is protected under the First Amendment, upheld volume restrictions placed on outdoor music in order to prevent intrusion on those in the area.[104] Other significant governmental interests, besides protection of captive audiences, may justify content-neutral time, place, and manner restrictions. For example, in order to prevent crime and maintain property values, a city may place zoning restrictions on "adult" theaters and bookstores.[105] And, in order to maintain the orderly movements of crowds at a state fair, a state may limit the distribution of literature to assigned locations.[106]

However, a time, place, and manner restriction will not be upheld in the absence of sufficient justification or if it is not narrowly tailored. Thus, the Court held unconstitutional a total restriction on displaying flags or banners on public sidewalks surrounding the Supreme Court.[107] And a time, place, and manner restriction will not be upheld if it fails to "leave open ample alternative channels for communication." Thus, the Court held unconstitutional an ordinance that prohibited the display of signs from residences, because "[d]isplaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else...."[108]

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

[103] *Id.* at 487.

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

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

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

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

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

When a court issues an *injunction* that restricts the time, place, or manner of a particular form of expression, because prior restraint occurs, "a somewhat more stringent application of general First Amendment principles" is required than is required in the case of a generally applicable statute or ordinance that restricts the time, place, or manner of speech.[109] Instead of asking whether the restrictions are "narrowly tailored to serve a significant governmental interest," a court must ask "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."[110] Applying this standard, the Supreme Court, in *Madsen v. Women's Health Center, Inc.*, upheld a state court injunction that had ordered the establishment of a 36-foot buffer zone on a public street outside a particular health clinic that performed abortions. The Court in this case also upheld an injunction against noise during particular hours, but found that a "broad prohibition on all 'images observable' burdens speech more than necessary to achieve the purpose of limiting threats to clinic patients or their families."[111] It also struck down a prohibition on all uninvited approaches of persons seeking the services of the clinic, and a prohibition against picketing, within 300 feet of the residences of clinic staff. The Court distinguished the 300-foot restriction from the ordinance it had previously upheld that banned picketing "before or about" any residence.[112]

In *Schenck v. Pro-Choice Network of Western New York*, the Court applied *Madsen* to another injunction that placed restrictions on demonstrating outside an abortion clinic.[113] The Court upheld the portion of the injunction that banned "demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities" — what the Court called "fixed buffer zones." It struck down a prohibition against demonstrating "within fifteen feet of any person or vehicles seeking access to or leaving such facilities" — what it called "floating buffer zones." The Court cited "public safety and order" in upholding the fixed buffer zones, but it found that the floating buffer zones "burden more speech than is necessary to serve the relevant governmental interests" because they make it "quite difficult for a protester who wishes to engage in peaceful expressive activity to know how to remain in compliance with the injunction." The Court also upheld a "provision, specifying that once sidewalk counselors who had entered the buffer zones were required to 'cease and desist' their counseling, they had to retreat 15 feet from the people they had been counseling and had to remain outside the boundaries of the buffer zones."

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

[110] *Id.* This is not "prior restraint analysis," which courts apply to content-based injunctions; see, "Prior Restraint," above.

[111] *Id.* at 773.

[112] See, text accompanying notes 102-103, *supra*.

[113] 519 U.S. 357 (1997).

In *Hill v. Colorado*, the Court upheld a Colorado statute that makes it unlawful, within 100 feet of the entrance to any health care facility, to "knowingly approach" within eight feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person."[114] This decision is significant because it upheld a statute that applies to everyone, and not, as in *Madsen* and *Schenck*, merely an injunction directed to particular parties. The Court found the statute to be a content-neutral time, place, and manner regulation of speech that "reflects an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners...."[115] The restrictions are content-neutral because they regulate only the places where some speech may occur, and because they apply equally to all demonstrators, regardless of viewpoint. Although the restrictions do not apply to all speech, the "kind of cursory examination" that might be required to distinguish casual conversation from protest, education, or counseling is not "problematic."[116] The law is "narrowly tailored" to achieve the state's interests. The eight-foot restriction does not significantly impair the ability to convey messages by signs, and ordinarily allows speakers to come within a normal conversational distance of their targets. Because the statute allows the speaker to remain in one place, persons who wish to hand out leaflets may position themselves beside entrances near the path of oncoming pedestrians, and consequently are not deprived of the opportunity to get the attention of persons entering a clinic.

Incidental Restrictions

Some laws are not designed to limit freedom of expression, but nevertheless can have that effect. For example, when a National Park Service regulation prohibiting camping in certain parks was applied to prohibit demonstrators, who were attempting to call attention to the plight of the homeless, from sleeping in certain Washington, D.C. parks, it had the effect of limiting the demonstrators' freedom of expression. Nevertheless, the Court found that application of the regulation did not violate the First Amendment because the regulation was content-neutral and was narrowly focused on a substantial governmental interest in maintaining parks "in an attractive and intact condition."[117]

The Supreme Court has said that an incidental restriction on speech is constitutional if it is not "greater than necessary to further a substantial governmental interest."[118] However, the Court has made clear that an incidental restriction, unlike a content-based restriction, "need not be the least restrictive or least intrusive means"

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[114] 530 U.S. 703, 707 (2000).

[115] *Id.* at 714.

[116] *Id.* at 722.

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

[118] San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 537 (1987). This is known as the "*O'Brien* test," which was first formulated in the case cited in note 128, *infra*.

of furthering a governmental interest. Rather, the restriction must be "narrowly tailored," and "the requirement of narrow tailoring is satisfied 'so long as the ... regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation.'"[119]

The Court has noted that the standard for determining the constitutionality of an incidental restriction "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions."[120] Thus, the restriction on camping may be viewed as a restriction on conduct that only incidentally affects speech, or, if one views sleeping in connection with a demonstration as expressive conduct, then the restriction may be viewed as a time, place, and manner restriction on expressive conduct. In either case, as long as the restriction is content-neutral, the same standard for assessing its constitutionality will apply.

In 1991, the Supreme Court held that the First Amendment does not prevent the government from requiring that dancers wear "pasties" and a "G-string" when they dance (nonobscenely) in "adult" entertainment establishments. Indiana sought to enforce a state statute prohibiting public nudity against two such establishments, which asserted First Amendment protection. The Court found that the statute proscribed public nudity across the board, not nude dancing as such, and therefore imposed only an incidental restriction on expression.[121] In 2000, the Supreme Court again upheld the application of a statute prohibiting public nudity to an "adult" entertainment establishment. It found that the statute was intended "to combat harmful secondary effects," such as "prostitution and other criminal activity."[122]

In a 1994 case, the Supreme Court apparently put more teeth into the test for incidental restrictions by remanding the case for further proceedings rather than deferring to Congress's judgment as to the necessity for the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992.[123] To justify an incidental restriction of speech, the Court wrote, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the

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[119] Ward v. Rock Against Racism, 491 U.S. 781, 798-799 (1989). This case makes clear that, although both "strict scrutiny" and the *O'Brien* test for incidental restrictions require "narrow tailoring," "the same degree of tailoring is not required" under the two; under the *O'Brien* test, "least-restrictive-alternative analysis is wholly out of place." *Id.* at 798-799 n.6. It is also out of place in applying the *Central Hudson* commercial speech test.

[120] *Clark*, *supra* note 117, 468 U.S. at 298. And, "the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context." United States v. Edge Broadcasting, *supra* note 34, 509 U.S. at 430.

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

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

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

regulation will in fact alleviate these harms in a direct and material way."[124] The Court added that its

> obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with our own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.[125]

Symbolic Speech

"The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word."[126] Thus wrote the Supreme Court when it held that a statute prohibiting flag desecration violated the First Amendment. Such a statute is not content-neutral if it is designed to protect "a perceived need to preserve the flag's status as a symbol of our Nation and certain national ideals."[127]

By contrast, the Court upheld a federal statute that made it a crime to burn a draft card, finding that the statute served "the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates," and imposed only an "appropriately narrow" incidental restriction of speech.[128] Even if Congress's purpose in enacting the statute had been to suppress freedom of speech, "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[129]

In 1992, in *R.A.V. v. City of St. Paul*, the Supreme Court struck down an ordinance that prohibited the placing on public or private property of a symbol, such as "a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others, on the basis of race, color, creed, religion or gender."[130] Read literally, this ordinance would clearly violate the First Amendment, because, "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[131] In this case, however, the Minnesota Supreme Court had construed the ordinance to apply only to conduct that amounted to fighting words. Therefore, the question for the Supreme

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[124] *Id.* at 664.

[125] *Id.* at 666.

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

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

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

[129] *Id.* at 383.

[130] 505 U.S. 377 (1992).

[131] Texas v. Johnson, *supra* note 126, at 414.

Court was whether the ordinance, construed to apply only to fighting words, was constitutional.

The Court held that it was not, because, although fighting words may be proscribed "*because of their constitutionally proscribable content*," they may not "be made the vehicles for content discrimination unrelated to their distinctively proscribable content."[132] Thus, the government may proscribe fighting words, but it may not make the further content discrimination of proscribing particular fighting words on the basis of hostility "towards the underlying message expressed."[133] In this case, the ordinance banned fighting words that insult "on the basis of race, color, creed, religion or gender," but not "for example, on the basis of political affiliation, union membership, or homosexuality.... The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[134] This decision does not, of course, preclude prosecution for illegal conduct that may accompany cross burning, such as trespass, arson, or threats. As the Court put it: "St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire."[135]

In a subsequent case, the Supreme Court held that its opinion in *R.A.V.* did not mean that statutes that impose additional penalties for crimes that are motivated by racial hatred are unconstitutional. Such statutes imposed enhanced sentences not for bigoted thought, but for the commission of crimes that can inflict greater and individual and societal harm because of their bias-inspired motivation. A defendant's motive has always been a factor in sentencing, and even in defining crimes; "Title VII [of the Civil Rights Act of 1964], for example, makes it unlawful for an employer to discriminate against an employee '*because of* such individual's race, color, religion, sex, or national origin.'"[136]

In *Virginia v. Black*, the Court held that its opinion in *R.A.V.* did not make it unconstitutional for a state to prohibit burning a cross with the intent of intimidating any person or group of persons.[137] Such a prohibition does not discriminate on the basis of a defendant's beliefs — "as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities.... The First Amendment permits Virginia to outlaw cross burning done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation.

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[132] *R.A.V.*, *supra* note 130, at 384-385 (emphasis in original).

[133] *Id.* at 386.

[134] *Id.* at 391.

[135] *Id.* at 396.

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

[137] Virginia v. Black, 538 U.S. 343 (2003). A plurality held, however, that a statute may not presume, from the fact that a defendant burned a cross, that he had an intent to intimidate. The state must prove that he did, as "a burning cross is not always intended to intimidate," but may constitute a constitutionally protected expression of opinion. *Id.* at 365.

Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages....”[138]

Compelled Speech

On occasion, the government attempts to compel speech rather than to restrict it. For example, in *Riley v. National Federation of the Blind of North Carolina, Inc.*, a North Carolina statute required professional fundraisers for charities to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations.[139] The Supreme Court held this unconstitutional, writing

> There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees “freedom of speech,” a term necessarily comprising the decision of both what to say and what *not* to say.[140]

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

> constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.... [A]n advertiser’s rights are reasonably protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.... The right of a commercial speaker not to divulge accurate information regarding his services is not ... a fundamental right.[141]

In *Zauderer*, the Supreme Court upheld an Ohio requirement that advertisements by lawyers that mention contingent-fee rates disclose whether percentages are computed before or after deduction of court costs and expenses.

In *Meese v. Keene*, however, the Court upheld compelled disclosure in a noncommercial context.[142] This case involved a provision of the Foreign Agents Registration Act of 1938, which requires that, when an agent of a foreign principal seeks to disseminate foreign “political propaganda,” he must label such material with certain information, including his identity, the principal’s identity, and the fact that

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[138] *Id.* at 363.

[139] 487 U.S. 781 (1988). In *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 605 (2003), the Supreme Court held that a fundraiser who retained 85 percent of gross receipts from donors, but falsely represented that “a significant amount of each dollar donated would be paid over to” a charitable organization, could be sued for fraud. “So long as the emphasis is on what the fundraisers misleadingly convey, and not on percentage limitations on solicitors’ fees *per se*, such [fraud] actions need not impermissibly chill protected speech.” *Id.* at 619.

[140] 487 U.S. 781, 796-797 (1988) (emphasis in original).

[141] 471 U.S. 626, 651, 652 n.14 (1985) (emphasis in original).

[142] 481 U.S. 465 (1987).

he has registered with the Department of Justice. The material need not state that it is "political propaganda," but one agent objected to the statute's designating material by that term, which he considered pejorative. The agent wished to exhibit, without the required labels, three Canadian films on nuclear war and acid rain that the Justice Department had determined were "political propaganda."

In *Meese v. Keene*, the Supreme Court upheld the statute's use of the term, essentially because it considered the term not necessarily pejorative. On the subject of compelled disclosure, the Court wrote:

> Congress did not prohibit, edit, or restrain the distribution of advocacy materials.... To the contrary, Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda.[143]

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

In *Meese v. Keene*, the Court did not mention earlier cases in which it had struck down laws compelling speech in a noncommercial context. In *Wooley v. Maynard*, the Court struck down a New Hampshire statute requiring motorists to leave visible on their license plates the motto "Live Free or Die."[144] In *West Virginia State Board of Education v. Barnette*, the Court held that a state may not require children to pledge allegiance to the United States.[145] In *Miami Herald Publishing Co. v. Tornillo*, the Court struck down a Florida statute that required newspapers to grant political candidates equal space to reply to the newspapers' criticism and attacks on their record.[146]

The Court decided two cases in its 1994-1995 term involving compelled speech. In *McIntyre v. Ohio Elections Commission*, the Court, applying strict scrutiny, struck down a compelled disclosure requirement by holding unconstitutional a state statute that prohibited the distribution of anonymous campaign literature. "The State," the Court wrote, "may, and does, punish fraud directly. But it cannot seek to punish

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[143] *Id.* at 480.

[144] 430 U.S. 705 (1977).

[145] 319 U.S. 624 (1943).

[146] 418 U.S. 241 (1974). In *Pacific Gas & Electric Co .v. Public Utilities Commission of California*, 475 U.S. 1 (1986), the Court held that a state may not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees. While a plurality opinion adhered to by four justices relied heavily on *Tornillo*, there was not a Court majority consensus as to rationale.

fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented."[147]

In *Hurley v. Irish-American Gay Group of Boston*, the Court held that Massachusetts could not require private citizens who organize a parade to include among the marchers a group imparting a message — in this case support for gay rights — that the organizers do not wish to convey. Massachusetts had attempted to apply its statute prohibiting discrimination on the basis of sexual orientation in any place of public accommodations, but the Court held that parades are a form of expression, and the state's "[d]isapproval of a private speaker's statement does not legitimatize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others."[148]

In *Glickman v. Wileman Brothers & Elliott, Inc.*, the Supreme Court upheld the constitutionality of marketing orders promulgated by the Secretary of Agriculture that imposed assessments on fruit growers to cover the cost of generic advertising of fruits.[149] The First Amendment, the Court held, does not preclude the government from "compel[ling] financial contributions that are used to fund advertising," provided that such contributions do not finance "political or ideological" views.[150]

In *United States v. United Foods, Inc.*, the Court struck down a federal statute that mandated assessments on handlers of fresh mushrooms to fund advertising for the product.[151] The Court did not apply the *Central Hudson* commercial speech test, but rather found "that the mandated support is contrary to First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity."[152] It distinguished *Glickman* on the ground that "[i]n *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing authority. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme."[153]

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

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[147] 514 U.S. 334, 357 (1995).

[148] 515 U.S. 557, 581 (1995).

[149] 521 U.S. 457 (1997).

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

[151] 533 U.S. 405 (2001).

[152] *Id.* at 413.

[153] *Id.* at 411.

consumption of beef and beef products.[154] The Court found that, unlike in *Glickman* and *United Foods*, where "the speech was, or was presumed to be, that of an entity other than the government itself," in *Johanns* the promotional campaign constituted the government's own speech and therefore was "exempt from First Amendment scrutiny."[155] It did not matter "whether the funds for the promotions are raised by general taxes or through targeted assessment."[156] As for the plaintiffs' contention "that crediting the advertising to 'America's Beef Producers'" attributes the speech to them, the Court found that, because the statute does not *require* such attribution, it does not violate the First Amendment, but the plaintiffs' contention might form the basis for challenging the manner in which the statute is applied.[157]

Radio and Television

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

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.[158]

The Court made this statement in upholding the constitutionality of the Federal Communication Commission's "fairness doctrine," which required broadcast media licensees to provide coverage of controversial issues of interest to the community and to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues.

Later, in *Federal Communications Commission v. Pacifica Foundation*, the Court upheld the power of the FCC "to regulate a radio broadcast that is indecent but not obscene."[159] The Court cited two distinctions between broadcasting and other media: "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans ... confront[ing] the citizen, not only in public, but also in the privacy of the home," and "Second, broadcasting is uniquely accessible to children."[160]

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[154] 544 U.S. 550 (2005).

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

[156] *Id.* at 562.

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

[158] 395 U.S. 367, 388 (1969).

[159] 438 U.S. 726, 729 (1978).

[160] *Id.* at 748-749. In *Action for Children's Television v. Federal Communications Commission* (ACT III), 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996), the court of appeals, in upholding a ban on indecent broadcasts from 6 a.m. to

(continued...)

In *Turner Broadcasting System, Inc. v. Federal Communications Commission*, the Court declined to question the continuing validity of the scarcity rationale, but held that "application of the more relaxed standard of scrutiny adopted in *Red Lion* and other broadcast cases is inapt when determining the First Amendment validity of cable regulation."[161] In *Turner*, however, the Court found the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992, which require cable television systems to devote a portion of their channels to the transmission of local broadcast television stations, to be content-neutral in application and subject only to the test for incidental restrictions on speech. Attempting to apply this test, however, the Court found "genuine issues of material fact still to be resolved" as to whether "broadcast television is in jeopardy" and as to "the actual effects of must-carry on the speech of cable operators and cable programmers."[162] It therefore remanded the case for further proceedings.[163]

In *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*, a plurality of the Supreme Court (four justices) apparently retreated from the Court's position in *Turner* that cable television is entitled to full First Amendment protection.[164] In Part II of its opinion, the plurality upheld § 10(a) of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 532(h), which permits cable operators to prohibit indecent material on leased access channels. (The Cable Communications Policy Act of 1984 had required cable operators to provide leased access and public access channels free of operator editorial control.) In upholding § 10(a), the Court, citing *Pacifica*, noted that cable television "is as 'accessible to children' as over-the-air broadcasting," has also "established a uniquely pervasive presence in the lives of all Americans," and can also "'confron[t] the citizen' in 'the privacy of the home,' ... with little or no prior warning."[165] It also noted that its "distinction in *Turner*, ... between cable and broadcast television, relied on the inapplicability of the spectrum scarcity problem to cable," but that that distinction "has little to do with a case that involves the effects of television viewing on children."[166] Applying something less than strict scrutiny,

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[160] (...continued)
10 p.m., wrote: "While we apply strict scrutiny to regulations of this kind regardless of the medium affected by them, our assessment of whether section 16(a) survives that scrutiny must necessarily take into account the unique context of the broadcast media." See, "Speech Harmful to Children," above.

[161] *Turner*, *supra* note 123, 512 U.S. at 639.

[162] *Id.* at 667-668.

[163] On remand, the lower court upheld the must-carry rules, and the Supreme Court affirmed, finding "that the must-carry provisions further important governmental interests; and ... do not burden substantially more speech than necessary to further those interests." Turner Broadcasting System, Inc. v. Federal Communications Commission, 520 U.S. 180, 185 (1997).

[164] 518 U.S. 727 (1996).

[165] *Id.* at 745.

[166] *Id.* at 748.

the Court concluded "that § 10(a) is a sufficiently tailored response to an extraordinarily important problem."[167]

In Part III of *Denver Area*, a majority of the Court (six justices) struck down § 10(b) of the 1992 Act, 47 U.S.C. § 532(j), which required cable operators, if they do not prohibit such programming on leased access channels, to segregate it on a single channel and block that channel unless the subscriber requests access to it in writing. In this part of the opinion, the Court seemed to apply strict scrutiny, finding "that protection of children is a 'compelling interest,'" but "that, not only is it not a 'least restrictive alternative,' and is not 'narrowly tailored' to meet its legitimate objective, it also seems considerably 'more extensive than necessary.'"[168]

In Part IV, which only three justices joined, the Court struck down § 10(c), 42 U.S.C. § 531 note, which permitted cable operators to prohibit indecent material on public access channels. Without specifying the level of scrutiny they were applying, the justices concluded "that the Government cannot sustain its burden of showing that § 10(c) is necessary to protect children or that it is appropriately tailored to secure that end."[169]

In *United States v. Playboy Entertainment Group, Inc.*, the Supreme Court made clear, as it had not in *Denver Consortium*, that strict scrutiny applies to content-based speech restriction on cable television.[170] The Court struck down a federal statute designed to "shield children from hearing or seeing images resulting from signal bleed," which refers to blurred images or sounds that come through to non-subscribers. The statute required cable operators, on channels primarily dedicated to sexually oriented programming, either to fully scramble or otherwise fully block such channels, or to not provide such programming when a significant number of children are likely to be viewing it, which, under an FCC regulation meant to transmit the programming only from 10 p.m. to 6 a.m. The Court apparently assumed that the government had a compelling interest in protecting children from sexually oriented signal bleed, but found that Congress had not used the least restrictive means to do so. Congress in fact had enacted another provision that was less restrictive and that served the government's purpose. This other provision requires that, upon request by a cable subscriber, a cable operator, without charge, fully scramble or fully block any channel to which a subscriber does not subscribe.

Freedom of Speech and Government Funding

The Supreme Court has held that Congress, incident to its power to provide for the general welfare (Art. I, § 8, cl. 1),

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[167] *Id.* at 743.

[168] *Id.* at 755.

[169] *Id.* at 766.

[170] 529 U.S. 803 (2000).

> may attach conditions on the receipt of federal funds, and has repeatedly employed the power "to further broad policy objectives by conditioning receipt of federal moneys upon compliance with federal statutory and administrative directives." ... The breadth of this power was made clear in *United States v. Butler*, 297 U.S. 1, 66 (1936), where the Court ... determined that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." Thus, objectives not thought to be within Article I's "enumerated legislative fields," *id.*, at 65, may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.[171]

This means that Congress may regulate matters by attaching conditions to the receipt of federal funds that it might lack the power to regulate directly. However, the Court added, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds." One of these other constitutional provisions is the First Amendment. The Court has held, in fact, that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech."[172] Similarly, in *Federal Communications Commission v. League of Women Voters*, the Court declared unconstitutional a federal statute that prohibited noncommercial television and radio stations that accepted federal funds from engaging in editorializing, even with nonfederal funds.[173]

Congress would have the authority to prohibit television and radio stations from using the federal funds they accept to engage in editorializing, as the Court would view Congress in that case not as limiting speech, but as choosing to fund one activity to the exclusion of another.[174] "A refusal to fund protected activity [i.e., speech], without more, cannot be equated with the imposition of a 'penalty' on that activity."[175] In *Rust v. Sullivan*, the case in which this quotation appears, the Court upheld a "gag order" that prohibited family planning clinics that accept federal funds from engaging in abortion counseling or referrals. The Court found that, in this case, "the government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for purposes for which they were authorized."[176]

In *Rust v. Sullivan*, the Court also indicated that it will allow Congress to condition the receipt of federal funds on acceptance of a limitation on the use of nonfederal funds as well as of federal funds, but apparently will not allow Congress to limit the use of nonfederal funds outside the project that accepts the federal

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[171] South Dakota v. Dole, 483 U.S. 203, 206-207 (1987).

[172] Perry v. Sindermann, 408 U.S. 593, 597 (1972) (striking down state university's refusal to renew teacher's contract because of his public criticism of the college administration).

[173] 468 U.S. 364 (1984).

[174] See, *id.* at 400.

[175] Rust v. Sullivan, 500 U.S. 173, 193 (1991).

[176] *Id.* at 196.

funds.[177] Justice Blackmun, dissenting, feared that, "[u]nder the majority's reasoning, the First Amendment could be read to tolerate *any* governmental restriction upon an employee's speech so long as that restriction is limited to the funded workplace."[178]

The Court also "recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment."[179]

In *National Endowment for the Arts v. Finley*, the Supreme Court upheld the constitutionality of a federal statute (20 U.S.C. § 954(d)(1)) requiring the NEA, in awarding grants, to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[180] The Court acknowledged that, if the statute were "applied in a manner that raises concern about the suppression of disfavored viewpoints,"[181] then such application might be unconstitutional. The statute on its face, however, is constitutional because it "imposes no categorical requirement," being merely "advisory."[182] "Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding.... The 'very assumption' of the NEA is that grants will be awarded according to the 'artistic worth of competing applications,' and absolute neutrality is simply 'inconceivable.'"[183]

The Court also found that the terms of the statute, "if they appeared in a criminal statute or regulatory scheme, ... could raise substantial vagueness concerns.... But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe."[184]

In *Legal Services Corporation v. Velazquez*, the Court struck down a provision of the Legal Services Corporation Act that prohibited recipients of Legal Services Corporation (LSC) funds (i.e., legal-aid organizations that provide lawyers to the

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[177] *Id.* at 196. Thus, a grantee who accepts federal funds to operate a family planning clinic may be prohibited from using nonfederal funds to provide abortion counseling through the clinic, but may not be prohibited from using nonfederal funds to provide abortion counseling outside the clinic.

[178] *Id.* at 213 (emphasis in original).

[179] *Id.* at 200.

[180] 524 U.S. 569, 572 (1998).

[181] *Id.* at 587.

[182] *Id.* at 581. Justice Scalia, in a concurring opinion, claimed that this interpretation of the statute "gutt[ed] it." He believed that the statute "establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated. And that is perfectly constitutional." *Id.* at 590.

[183] *Id.* at 585.

[184] *Id.* at 588-589.

poor in civil matters) from representing a client who seeks "to amend or otherwise challenge existing [welfare] law."[185] This meant that, even with non-federal funds, a recipient of federal funds could not argue that a state welfare statute violated a federal statute or that a state or federal welfare law violated the U.S. Constitution. If a case was underway when such a challenge became apparent, the attorney had to withdraw.

The Supreme Court distinguished this situation from that in *Rust v. Sullivan* on the ground "that the counseling activities of the doctors under Title X amounted to governmental speech," whereas "an LSC-funded attorney speaks on behalf of the client in a claim against the government for welfare benefits."[186] Furthermore, the restriction in this case "distorts the legal system" by prohibiting "speech and expression upon which courts must depend for the proper exercise of the judicial power," and thereby is "inconsistent with accepted separation-of-powers principles."[187]

In *United States v. American Library Association*,[188] the Supreme Court followed *Rust v. Sullivan*, and upheld the Children's Internet Protection Act, which requires schools and libraries that accept federal funds to purchase computers used to access the Internet to block or filter minors' Internet access to visual depictions that are obscene, child pornography, or "harmful to minors"; and to block or filter adults' Internet access to visual depictions that are obscene or child pornography. Blocking or filtering technology may be disabled, however, "to enable access for bona fide research or other lawful purpose."

The plurality noted that "Congress may not 'induce' the recipient [of federal funds] 'to engage in activities that would themselves be unconstitutional.'"[189] The plurality therefore viewed the question before the Court as "whether [public] libraries would violate the First Amendment by employing the filtering software that CIPA requires."[190] Does CIPA, in other words, effectively violate library *patrons* rights? The plurality concluded that it does not, as "Internet access in public libraries is neither a 'traditional' or a 'designated' public forum,"[191]and that therefore it would not be appropriate to apply strict scrutiny to determine whether the filtering requirements are constitutional.

But the plurality also considered whether CIPA imposes an unconstitutional condition on the receipt of federal assistance — in other words, does it violate public *libraries'* rights by requiring them to limit their freedom of speech if they accept

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[185] 531 U.S. 533 (2001).

[186] *Id.* at 541, 542.

[187] *Id.* at 544, 545, 546.

[188] 539 U.S. 194 (2003).

[189] *Id.* at 203.

[190] *Id.*

[191] *Id.* at 205.

federal funds? The plurality found that, assuming that government entities have First Amendment rights (it did not decide the question), CIPA does not infringe them. This is because CIPA does not deny a benefit to libraries that do not agree to use filters; rather, as in *Rust v. Sullivan*, the statute "simply insist[s] that public funds be spent for the purposes for which they were authorized."[192] "CIPA does not 'penalize' libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, CIPA simply reflects Congress' decision not to subsidize their doing so."[193]

The Court distinguished *Velazquez* on the ground that public libraries have no role comparable to that of legal aid attorneys "that pits them *against* the Government, and there is no comparable assumption that they must be free of any conditions that their benefactors might attach to the use of donated funds or other assistance."[194]

In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, the Supreme Court upheld the Solomon Amendment, which provides that, in the Court's summary, "if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds."[195] FAIR, the group that challenged the Solomon Amendment, is an association of law schools that barred military recruiting on their campuses because of the military's discrimination against homosexuals. FAIR challenged the Solomon Amendment as violating the First Amendment because it forced schools to choose between enforcing their nondiscrimination policy against military recruiters and continuing to receive specified federal funding.

The Court first rejected an interpretation of the Solomon Amendment that would have avoided the constitutional issue; under this interpretation, "a school excluding military recruiters would comply with the Solomon Amendment so long as it also excluded any other employer that violates its nondiscrimination policy."[196] The Court instead construed the Solomon Amendment to require schools to allow the military the same access as *any* other employer, including employers who do not discriminate and whom the schools allow on campus.

Interpreting the Solomon Amendment as such, the Court concluded: "Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds."[197] The Court added: "The Solomon Amendment neither limits what law schools may say nor requires them to say anything.... It affects what law schools must *do* — afford equal access to military

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[192] *Id.* at 211.

[193] *Id.* at 212.

[194] *Id.* at 213 (emphasis in original).

[195] 126 S. Ct. 1297, 1302 (2006).

[196] *Id*. at 1305.

[197] *Id*. at 1307.

recruiters — not what they may or may not *say*."[198] The law schools' conduct in barring military recruiters, the Court found, "is not inherently expressive," and, therefore, unlike flag burning, for example, is not "symbolic speech."[199] Applying the *O'Brien* test for restrictions on conduct that have an incidental effect on speech, the Court found that the Solomon Amendment clearly "promotes a substantial government interest that would be achieved less effectively absent the regulation."[200]

The Court also found that the Solomon Amendment did not unconstitutionally compel schools to speak, or even to host or accommodate the government's message. As for compelling speech, law schools must "send e-mails and post notices on behalf of the military to comply with the Solomon Amendment ... This sort of recruiting assistance, however, is a far cry from the compelled speech in *Barnette* and *Wooley*.[201] ... [It] is plainly incidental to the Solomon Amendment's regulation of conduct." As for forcing one speaker to host or accommodate another, "[t]he compelled speech violation in each of our prior cases ... resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate."[202] By contrast, the Court wrote, "Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies."[203]

Finally, the Court found that the Solomon Amendment was not analogous to the New Jersey law that had required the Boy Scouts to accept a homosexual scoutmaster, and which the Supreme Court struck down as violating the Boy Scouts' "right of expressive association."[204] Recruiters, unlike the scoutmaster, are "outsiders who come onto campus for the limited purpose of trying to hire students — not to become members of the school's expressive association."[205]

Free Speech Rights of Government Employees and Government Contractors

Government Employees

In *Pickering v. Board of Education*, the Supreme Court said that "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the

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[198] *Id*. at 1311.

[199] *Id*. at 1310. The flag burning cases are quoted at notes 126 and 127, *supra*.

[200] *Id* at 1311. The *O'Brien* test is quoted in the text accompanying note 118, *supra*.

[201] *Id* at 1308. *Barnette* and *Wooley* are cited, respectively, in notes 145 and 144, *supra*.

[202] *Id*. at 1309. The Court cited *Hurley*, *supra*, note 148, and *Tornillo*, *supra*, note 146.

[203] *Id*. at 1310.

[204] *Id*. at 1312, quoting Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000).

[205] *Id*.

regulation of speech of the citizenry in general."[206] The First Amendment, however, "protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern."[207]

In *Pickering*, the Supreme Court held it unconstitutional for a school board to fire a teacher for writing a letter to a local newspaper criticizing the administration of the school system. The Court did not, however, hold that the teacher had the same right as a private citizen to write such a letter. Rather, because the teacher had spoken as a citizen on a matter of public concern, the Court balanced "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[208] In this case, the Court found that the statements in the letter were

> in no way directed towards any person with whom appellant [the teacher] would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board ... are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.[209]

In *Arnett v. Kennedy*, the Supreme Court again balanced governmental interests and employee rights, and this time sustained the constitutionality of a federal statute that authorized removal or suspension without pay of an employee "for such cause as will promote the efficiency of the service," where the "cause" cited was an employee's speech.[210] The employee's speech in this case, however, consisted in falsely and publicly accusing the director of his agency of bribery. The Court interpreted the statute to proscribe

> only that public speech which improperly damages and impairs the reputation and efficiency of the employing agency, and it thus imposes no greater controls on the behavior of federal employees as are necessary for the protection of the Government as employer. Indeed, the Act is not directed at speech as such, but at employee behavior, including speech, which is detrimental to the efficiency of the employing agency.[211]

In *Givhan v. Western Line Consolidated School District*, the Court upheld the First Amendment right of a public school teacher to complain to the school principal

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[206] 391 U.S. 563, 568 (1968).

[207] Garcetti v. Ceballos, 126 S. Ct. 1951, 1957 (2006).

[208] *Id.*

[209] *Id.* at 569-570.

[210] 416 U.S. 134, 140 (1974).

[211] *Id.* at 162.

about "employment policies and practices at [the] school which [she] conceived to be racially discriminatory in purpose or effect."[212]

In *Connick v. Myers*, an assistant district attorney was fired for insubordination after she circulated a questionnaire among her peers soliciting views on matters relating to employee morale.[213] The Supreme Court upheld the firing, distinguishing *Pickering* on the ground that, in that case, unlike in this one, the fired employee had engaged in speech concerning matters of public concern:

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy a wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment....
>
> We do not suggest, however, that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment. "[T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political...." ... We hold only that when a public employee speaks not as a citizen upon matters of public concern, but as an employee upon matters only of personal interest, absent the most unusual of circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[214]

In *Connick v. Myers*, however, one question in Myers' questionnaire did touch upon a matter of public concern, and, to this extent, Myers' speech was entitled to *Pickering* balancing to determine whether it was protected by the First Amendment. The Court also considered that the questionnaire interfered with working relationships, was prepared and distributed at the office, arose out of an employment dispute, and was not circulated to obtain useful research. The Court repeated something it had said in *Pickering*: it did "not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged."[215]

In *Rankin v. McPherson*, the Court upheld the right of an employee to remark, after hearing of an attempt on President Reagan's life, "If they go for him again, I hope they get him."[216] The Court considered the fact that the statement dealt with a matter of public concern, did not amount to a threat to kill the President, did not interfere with the functioning of the workplace, and was made in a private conversation with another employee and therefore did not discredit the office.

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[212] 439 U.S. 410, 413 (1979).

[213] 461 U.S. 138 (1983).

[214] *Id.* at 146-147. Subsequently, in *Garcetti v. Ceballos*, *supra* note 207, 126 S. Ct. at 1958, the Court wrote that, if an employee did not speak as a citizen on a matter of public concern, then "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. See *Connick*, *supra*, at 147."

[215] *Id.* at 154.

[216] 483 U.S. 378, 380 (1987).

Furthermore, as the employee's duties were purely clerical and encompassed "no confidential, policymaking, or public contact role," her remark did not indicate that she was "unworthy of employment."[217]

These Supreme Court cases indicate the relevant factors in determining whether a government employee's speech is protected by the First Amendment. It should be emphasized that the Court considers the time, place, and manner of expression.[218] Thus, if an employee made political speeches on work time, such that they interfered with his or others' job performance, he could likely be fired as "unworthy of employment." At the same time, he could not be fired for the particular political views he expressed, unless his holding of those views made him unfit for the job. Thus, a governmental employer could not allow employees to make speeches in support of one political candidate on work time, but not allow employees to make speeches in support of that candidate's opponent. But a Secret Service agent assigned to guard the President would not have the same right as the clerical worker in *Rankin* to express the hope that the President would be assassinated.

In *Waters v. Churchill*, a plurality of justices concluded that, in applying the *Connick* test — "what the speech was, in what tone it was delivered, what the listener's reactions were" — the court should not ask the jury to determine the facts for itself.[219] Rather, the court should apply the test "to the facts as the employer *reasonably* found them to be."[220] That is, the employer need not "come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court," but it may not come to them based on no evidence, or on "extremely weak evidence when strong evidence is clearly available."[221]

In *United States v. National Treasury Employees Union* (*NTEU*), the Court struck down a law that prohibited federal employees from accepting any compensation for making speeches or writing articles, even if neither the subject of the speech or article nor the person or group paying for it had any connection with the employee's official duties. The prohibition did not apply to books, nor to fiction or poetry.[222] The Court noted that, "[u]nlike *Pickering* and its progeny, this case does not involve a *post hoc* analysis of one employee's speech and its impact on that employee's public responsibilities.... [T]he Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action."[223] Doing the balancing it had mandated in *Pickering*, the Court concluded that "[t]he speculative benefits the honoraria ban may provide the

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

[218] See, e.g., Connick v. Myers, *supra* note 213, 461 U.S. at 152 ("Also relevant is the manner, time, and place in which the questionnaire was distributed.").

[219] 511 U.S. 661, 668 (1994).

[220] *Id.* at 677 (emphasis in original).

[221] *Id.* at 676, 677.

[222] 513 U.S. 454 (1995).

[223] *Id*. at 466-468.

Government are not sufficient to justify this crudely crafted burden on respondents' freedom to engage in expressive activities."[224]

In *City of San Diego v. Roe*, the Court held that a police department could fire a police officer who sold a video on the adults-only section of eBay that showed him stripping off a police uniform and masturbating.[225] The Court found that the officer's "expression does not qualify as a matter of public concern ... and *Pickering* balancing does not come into play."[226] The Court also noted that the officer's speech, unlike federal employees' speech in *NTEU*, "was linked to his official status as a police officer, and designed to exploit his employer's image," and therefore "was detrimental to the mission and functions of his employer."[227] Therefore, the Court had "little difficulty in concluding that the City was not barred from terminating Roe under either line of cases [i.e., *Pickering* or *NTEU*]."[228] This leaves uncertain whether, had the officer's expression not been linked to his official status, the Court would have overruled his firing under *NTEU* or would have upheld it under *Pickering* on the ground that his expression was not a matter of public concern.

In *Garcetti v. Ceballos*, the Court cut back on First Amendment protection for government employees by holding that there is no protection — *Pickering* balancing is not to be applied — "when public employees make statements pursuant to their official duties," even if those statements are about matters of public concern.[229] In this case, a deputy district attorney had presented his supervisor with a memo expressing his concern that an affidavit that the office had used to obtain a search warrant contained serious misrepresentations. The deputy district attorney claimed that he was subjected to retaliatory employment actions, and sued. The Supreme Court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[230] The fact that the employee's speech occurred inside his office, and the fact that the speech concerned the subject matter of his employment, were not sufficient to foreclose First Amendment protection.[231] Rather, the "controlling factor" was "that his expressions were made pursuant to his duties."[232] Therefore, another employee in the office, with different duties, might have had a First Amendment right to utter

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[224] *Id.* at 477.

[225] 543 U.S. 77 (2004).

[226] *Id*. at 84.

[227] *Id*.

[228] *Id*. at 80.

[229] *Garcetti*, *supra*, note 207, 126 S. Ct. at 1960.

[230] *Id*.

[231] The Court cited *Givhan*, *supra*, note 212, for these points. The difference between *Givhan* and *Ceballos* was apparently that Givhan's complaints were not made pursuant to her job duties, whereas Ceballos' were. Therefore, Givhan spoke as a citizen whereas Ceballos spoke as a government employee. See, 126 S. Ct. at 1959.

[232] *Id*. at 1959-1960.

the speech in question, and the deputy district attorney himself might have had a First Amendment right to communicate the information that he had in a letter to the editor of a newspaper. In these two instances, a court would apply *Pickering* balancing.

Government Contractors

In *Board of County Commissioners v. Umbehr*, the Court held that "the First Amendment protects independent contractors from the termination of at-will government contracts in retaliation for their exercise of the freedom of speech."[233] The Court held that, in determining whether a particular termination violates the First Amendment, "the *Pickering* balancing test, adjusted to weigh the government's interests as contractor rather than as employer," should be used.[234] The Court did "not address the possibility of suits by bidders or applicants for new government contracts...."[235]

In *Elrod v. Burns*[236] and *Branti v. Finkel*,[237] the Supreme Court held that "[g]overnment officials may not discharge public employees for refusing to support a political party or its candidates, unless political affiliation is a reasonably appropriate requirement for the job in question."[238] In *O'Hare Truck Service, Inc. v. Northlake*, the Court held "that the protections of *Elrod* and *Branti* extend to ... [a situation] where the government retaliates against a contractor, or a regular provider of services, for the exercise of rights of political association or the expression of political allegiance."[239]

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[233] 518 U.S. 668, 670 (1996).

[234] *Id.* at 673.

[235] *Id.* at 685.

[236] 427 U.S. 347 (1976).

[237] 445 U.S. 507 (1980).

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

[239] *Id.*