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FIRST AMENDMENT

RELIGION AND EXPRESSION

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RELIGION AND FREE EXPRESSION

FIRST AMENDMENT

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

RELIGION

An Overview

Madison's original proposal for a bill of rights provision concerning religion read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretence, infringed."[1] The language was altered in the House to read: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[2] In the Senate, the section adopted read: "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion, . . ."[3] It was in the conference committee of the two bodies, chaired by Madison, that the present language was written with its some-

[1] 1 ANNALS OF CONGRESS 434 (June 8, 1789).

[2] The committee appointed to consider Madison's proposals, and on which Madison served, with Vining as chairman, had rewritten the religion section to read: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." After some debate during which Madison suggested that the word "national" might be inserted before the word "religion" as "point[ing] the amendment directly to the object it was intended to prevent," the House adopted a substitute reading: "Congress shall make no laws touching religion, or infringing the rights of conscience." 1 ANNALS OF CONGRESS 729–31 (August 15, 1789). On August 20, on motion of Fisher Ames, the language of the clause as quoted in the text was adopted. Id. at 766. According to Madison's biographer, "[t]here can be little doubt that this was written by Madison." I. BRANT, JAMES MADISON—FATHER OF THE CONSTITUTION 1787–1800 at 271 (1950).

[3] This text, taken from the Senate JOURNAL of September 9, 1789, appears in 2 B. SCHWARTZ (ED.), THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1153 (1971). It was at this point that the religion clauses were joined with the freedom of expression clauses.

what more indefinite "respecting" phraseology.[4] Debate in Congress lends little assistance in interpreting the religion clauses; Madison's position, as well as that of Jefferson who influenced him, is fairly clear,[5] but the intent, insofar as there was one, of the others in Congress who voted for the language and those in the States who voted to ratify is subject to speculation.

Scholarly Commentary.—The explication of the religion clauses by the scholars has followed a restrained sense of their meaning. Story, who thought that "the right of a society or government to interfere in matters of religion will hardly be contested by any persons, who believe that piety, religion, and morality are intimately connected with the well being of the state, and indispensable to the administration of civil justice,"[6] looked upon the prohibition simply as an exclusion from the Federal Government of all power to act upon the subject. "The situation . . . of the different states equally proclaimed the policy, as well as the necessity of such an exclusion. In some of the states, episcopalians constituted the predominant sect; in others presbyterians; in others, congregationalists; in others, quakers; and in others again, there was a close numerical rivalry among contending sects. It was impossible, that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by a declaration

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[4] 1 ANNALS OF CONGRESS 913 (September 24, 1789). The Senate concurred the same day. *See* I. BRANT, JAMES MADISON—FATHER OF THE CONSTITUTION 1787–1800, 271–72 (1950).

[5] During House debate, Madison told his fellow Members that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any Manner contrary to their conscience." 1 Annals of Congress 730 (August 15, 1789). That his conception of "establishment" was quite broad is revealed in his veto as President in 1811 of a bill which in granting land reserved a parcel for a Baptist Church in Salem, Mississippi; the action, explained President Madison, "comprises a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.'" 8 THE WRITINGS OF JAMES MADISON (G. Hunt. ed.) 132–33 (1904). Madison's views were no doubt influenced by the fight in the Virginia legislature in 1784–1785 in which he successfully led the opposition to a tax to support teachers of religion in Virginia and in the course of which he drafted his "Memorial and Remonstrance against Religious Assessments" setting forth his thoughts. Id. at 183–91; I. BRANT, JAMES MADISON—THE NATIONALIST 1780–1787, 343–55 (1948). Acting on the momentum of this effort, Madison secured passage of Jefferson's "Bill for Religious Liberty". Id. at 354; D. MALONE, JEFFERSON THE VIRGINIAN 274–280 (1948). The theme of the writings of both was that it was wrong to offer public support of any religion in particular or of religion in general.

[6] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1865 (1833).

of the right of the free exercise of religion, and a prohibition (as we have seen) of all religious tests. Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship."[7]

"Probably," Story also wrote, "at the time of the adoption of the constitution and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation."[8] The object, then, of the religion clauses in this view was not to prevent general governmental encouragement of religion, of Christianity, but to prevent religious persecution and to prevent a national establishment.[9]

This interpretation has long since been abandoned by the Court, beginning, at least, with *Everson v. Board of Education*,[10] in which the Court, without dissent on this point, declared that the Establishment Clause forbids not only practices that "aid one religion" or "prefer one religion over another," but as well those that "aid all religions." Recently, in reliance on published scholarly research and original sources, Court dissenters have recurred to the argument that what the religion clauses, principally the Establishment Clause, prevent is "preferential" governmental promotion of some religions, allowing general governmental promotion of all religion in general.[11] The Court has not responded, though Justice Souter in a major concurring opinion did undertake to rebut the argument and to restate the *Everson* position.[12]

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[7] Id. at 1873.

[8] Id. at 1868.

[9] For a late expounding of this view, *see* T. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES 224–25 (3d ed. 1898).

[10] 330 U.S. 1, 15 (1947). Establishment Clause jurisprudence since, whatever its twists and turns, maintains this view.

[11] Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (then-Justice Rehnquist dissenting). More recently, dissenters, including now-Chief Justice Rehnquist, have appeared reconciled to a "constitutional tradition" in which governmental endorsement of religion is out of bounds, even if it is not correct as a matter of history. *See* Lee v. Weisman, 112 S. Ct. 2649, 2678, 2683–84 (1992) (Justice Scalia, joined by the Chief Justice and Justices White and Thomas, dissenting).

[12] Lee v. Weisman, 112 S. Ct. 2649, 2667 (1992) (Justice Souter, joined by Justices Stevens and O'Connor, concurring).

Court Tests Applied to Legislation Affecting Religion.— Before considering the development of the two religion clauses by the Supreme Court, one should notice briefly the tests developed by which religion cases are adjudicated by the Court. While later cases rely on a series of rather well-defined, if difficult-to-apply, tests, the language of earlier cases "may have [contained] too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles."[13] It is well to recall that "the purpose [of the religion clauses] was to state an objective, not to write a statute."[14]

In 1802, President Jefferson wrote a letter to a group of Baptists in Danbury, Connecticut, in which he declared that it was the purpose of the First Amendment to build "a wall of separation between Church and State."[15] In *Reynolds v. United States,*[16] Chief Justice Waite for the Court characterized the phrase as "almost an authoritative declaration of the scope and effect of the amendment." In its first encounters with religion-based challenges to state programs, the Court looked to Jefferson's metaphor for substantial guidance.[17] But a metaphor may obscure as well as illuminate, and the Court soon began to emphasize neutrality and voluntarism as the standard of restraint on governmental action.[18]

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[13] Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

[14] Id.

[15] 16 THE WRITINGS OF THOMAS JEFFERSON 281 (A. Libscomb ed., 1904).

[16] 98 U.S. 145, 164 (1879).

[17] Everson v. Board of Education, 330 U.S. 1, 16 (1947); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 211, 212 (1948); *cf.* Zorach v. Clauson, 343 U.S. 306, 317 (1952) (Justice Black dissenting). In Lemon v. Kurtzman, 403 U.S. 602, 614 (1971), Chief Justice Burger remarked that "the line of separation, far from being a 'wall,' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." Similar observations were repeated by the Chief Justice in his opinion for the Court in Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (the metaphor is not "wholly accurate"; the Constitution does not "require complete separation of church and state [but] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

[18] Zorach v. Clauson, 343 U.S. 306, 314 (1952); Engel v. Vitale, 370 U.S. 421 (1962); Sherbert v. Verner, 374 U.S. 398 (1963); Abington School District v. Schempp, 374 U.S. 203, 305 (1963) (Justice Goldberg concurring); Walz v. Tax Comm'n, 397 U.S. 664, 694–97 (1970) (Justice Harlan concurring). In the opinion of the Court in the latter case, Chief Justice Burger wrote: "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Id. at 669.

The concept of neutrality itself is "a coat of many colors,"[19] and three standards that could be stated in objective fashion emerged as tests of Establishment Clause validity. The first two standards were part of the same formulation. "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[20] The third test is whether the governmental program results in "an excessive government entanglement with religion. The test is inescapably one of degree . . . [T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement."[21] In 1971 these three tests were combined and restated in Chief Justice Burger's opinion for the Court in *Lemon v. Kurtzman*,[22] and are frequently referred to by reference to that case name.

Although at one time accepted in principle by all of the Justices,[23] the tests have sometimes been difficult to apply,[24] have recently come under direct attack by some Justices,[25] and in two in-

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[19] Board of Education v. Allen, 392 U.S. 236, 249 (1968) (Justice Harlan concurring).

[20] Abington School District v. Schempp, 374 U.S. 203, 222 (1963).

[21] Walz v. Tax Comm'n, 397 U.S. 664, 674–75 (1970).

[22] 403 U.S. 602, 612–13 (1971).

[23] E.g., Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 653 (1980), and id. at 665 (dissenting opinion); Stone v. Graham, 449 U.S. 39, 40 (1980), and id. at 43 (dissenting opinion).

[24] The tests provide "helpful signposts," Hunt v. McNair, 413 U.S. 734, 741 (1973), and are at best "guidelines" rather than a "constitutional caliper;" they must be used to consider "the cumulative criteria developed over many years and applying to a wide range of governmental action." Inevitably, "no 'bright line' guidance is afforded." Tilton v. Richardson, 403 U.S. 672, 677–78 (1971). *See also* Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 761 & n.5, 773 n.31 (1973); Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980), and id. at 663 (Justice Blackmun dissenting).

[25] *See, e.g.,* Edwards v. Aguillard, 482 U.S. 578, 636–40 (1987) (Justice Scalia, joined by Chief Justice Rehnquist, dissenting) (advocating abandonment of the "purpose" test); Wallace v. Jaffree, 472 U.S. 38, 108–12 (1985) (Justice Rehnquist dissenting); Aguilar v. Felton, 473 U.S. 402, 426–30 (1985) (Justice O'Connor, dissenting) (addressing difficulties in applying the entanglement prong); Roemer v. Maryland Bd. of Public Works, 426 U.S. 736, 768–69 (Justice White concurring in judgment) (objecting to entanglement test). Justice Kennedy has also acknowledged criticisms of the *Lemon* tests, while at the samed time finding no need to reexamine them. *See, e.g.,* Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 655–56 (1989). At least with respect to public aid to religious schools, Justice Stevens would abandon the tests and simply adopt a "no-aid" position. Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980).

stances have not been applied at all by the Court.[26] While continued application is uncertain, the *Lemon* tests nonetheless have served for twenty years as the standard measure of Establishment Clause validity and explain most of the Court's decisions in the area.[27] As of the end of the Court's 1991–92 Term, there was not yet a consensus among *Lemon* critics as to what substitute test should be favored.[28] Reliance on "coercion" for that purpose would eliminate a principal distinction between establishment cases and free exercise cases and render the Establishment Clause largely duplicative of the Free Exercise Clause.[29]

Government Neutrality in Religious Disputes.—One value that both clauses of the religion section serve is to enforce governmental neutrality in deciding controversies arising out of religious disputes. Schism sometimes develops within churches or between a local church and the general church, resulting in secession or expulsion of one faction or of the local church. A dispute over which body is to have control of the property of the church will then often be taken into the courts. It is now established that both religion clauses prevent governmental inquiry into religious doctrine in settling such disputes, and instead require courts simply to look to the decision-making body or process in the church and to give effect to whatever decision is officially and properly made.

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[26] *See* Marsh v. Chambers, 463 U.S. 783 (1983) (upholding legislative prayers on the basis of historical practice); Lee v. Weisman, 112 S. Ct. 2649, 2655 (1992) (rejecting a request to reconsider *Lemon* because the practice of invocations at public high school graduations was invalid under established school prayer precedents). The Court has also held that the tripartite test is not applicable when law grants a denominational preference, distinguishing between religions; rather, the distinction is to be subjected to the strict scrutiny of a suspect classification. Larson v. Valente, 456 U.S. 228, 244–46 (1982).

[27] Justice Blackmun, concurring in *Lee*, contended that *Marsh* was the only one of 31 Establishment cases between 1971 and 1992 not to be decided on the basis on the *Lemon* tests. 112 S. Ct. at 2663, n.4.

[28] In 1990 Justice Kennedy, joined by Justice Scalia, proposed that "neutral" accommodations of religion should be permissible so long as they do not establish a state religion, and so long as there is no "coercion" to participate in religious exercises. Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226, 260–61. The two Justices parted company, however, over the permissiblity of invocations at public high school graduation ceremonies, Justice Scalia in dissent strongly criticizing Justice Kennedy's approach in the opinion of the Court for its reliance on psychological coercion. Justice Scalia would not "expand[ ] the concept of coercion beyond acts backed by threat of penalty." Lee v. Weisman, 112 S. Ct. 2649, 2684 (1992). Chief Justice Rehnquist has advocated limiting application to a prohibition on establishing a national (or state) church or favoring one religious group over another. Wallace v. Jaffree, 472 U.S. 38, 98, 106 (1985) (dissenting).

[29] Abington School District v. Schempp, 374 U.S. 203, 222–23 (1963). *See also* Board of Education v. Allen, 392 U.S. 236, 248–49 (1968); and Tilton v. Richardson, 403 U.S. 672, 689 (1971); Lee v. Weisman, 112 S. Ct. 2649, 2673 (Justice Souter concurring) ("a literal application of the coercion test would render the Establishment Clause a virtual nullity").

The first such case was *Watson v. Jones,*[30] which was decided on common-law grounds in a diversity action without explicit reliance on the First Amendment. A constitutionalization of the rule was made in *Kedroff v. St. Nicholas Cathedral,*[31] in which the Court held unconstitutional a state statute that recognized the autonomy and authority of those North American branches of the Russian Orthodox Church which had declared their independence from the general church. Recognizing that *Watson v. Jones* had been decided on nonconstitutional grounds, the Court thought nonetheless that the opinion "radiates . . . a spirit of freedom for religious organizations, and independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[32] The power of civil courts to resolve church property disputes was severely circumscribed, the Court held, because to permit resolution of doctrinal disputes in court was to jeopardize First Amendment values. What a court must do, it was held, is to look at the church rules: if the church is a hierarchical one which reposes determination of ecclesiastical issues in a certain body, the resolution by that body is determinative, while if the church is a congregational one prescribing action by a majority vote, that determination will prevail.[33] On the other hand, a court confronted with a church property dispute could apply "neutral principles of law, developed for use in all property disputes," when to do so would not require resolution of doctrinal issues.[34] In a later case the Court elaborated on the limits of proper inquiry, holding that an argument over a matter of internal church government, the power to reorganize the dioceses of a hierarchical church in this country, was "at the core of ecclesiastical affairs" and a court could not interpret the church constitution to make an inde-

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[30] 80 U.S. (13 Wall.) 679 (1872).

[31] 344 U.S. 94 (1952). *Kedroff* was grounded on the Free Exercise Clause. Id. at 116. But the subsequent cases used a collective "First Amendment" designation.

[32] Id. at 116. On remand, the state court adopted the same ruling on the merits but relied on a common-law rule rather than the statute. This too was struck down. Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960).

[33] Presbyterian Church v. Hull Memorial Presbyterian Church, 393 U.S. 440, 447, 450–51 (1969); Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, 396 U.S. 367 (1970). For a similar rule of neutrality in another context, *see* United States v. Ballard, 322 U.S. 78 (1944) (denying defendant charged with mail fraud through dissemination of purported religious literature the right to present to the jury evidence of the truthfulness of the religious views he urged).

[34] Presbyterian Church v. Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969); Maryland and Virginia Eldership of the Churches of God v. Church of God of Sharpsburg, 396 U.S. 367, 368 (1970). *See also* id. at 368–70 (Justice Brennan concurring).

pendent determination of the power but must defer to the interpretation of the body authorized to decide.[35]

In *Jones v. Wolf*,[36] however, a divided Court, while formally adhering to these principles, appeared to depart in substance from their application. A schism had developed in a local church which was a member of a hierarchical church, and the majority voted to withdraw from the general church. The proper authority of the general church determined that the minority constituted the "true congregation" of the local church and awarded them authority over it. The Court approved the approach of the state court in applying neutral principles by examining the deeds to the church property, state statutes, and provisions of the general church's constitution concerning ownership and control of church property in order to determine that no language of trust in favor of the general church was contained in any of them and that the property thus belonged to the local congregation.[37] Further, the Court held, the First Amendment did not prevent the state court from applying a presumption of majority rule to award control to the majority of the local congregation, provided that it permitted defeasance of the presumption upon a showing that the identity of the local church is to be determined by some other means as expressed perhaps in the general church charter.[38] The dissent argued that to permit a court narrowly to view only the church documents relating to property ownership permitted the ignoring of the fact that the dispute was over ecclesiastical matters and that the general church had decided which faction of the congregation was the local church.[39]

Thus, it is unclear where the Court is on this issue. *Jones v. Wolf* restated the rule that it is improper to review an ecclesiastical dispute and that deference is required in those cases, but by approving a neutral principles inquiry which in effect can filter out the doctrinal issues underlying a church dispute, the Court seems

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[35] The Serbian Eastern Orthodox Diocese v. Dionisije Milivojevich, 426 U.S. 697, 720–25 (1976). In Gonzalez v. Archbishop, 280 U.S. 1 (1929), the Court had permitted limited inquiry into the legality of the actions taken under church rules. The *Serbian Eastern* Court disapproved of this inquiry with respect to concepts of "arbitrariness," although it reserved decision on the "fraud" and "collusion" exceptions. 426 U.S. at 708–20.

[36] 443 U.S. 595 (1979). In the majority were Justices Blackmun, Brennan, Marshall, Rehnquist, and Stevens. Dissenting were Justices Powell, Stewart, White, and Chief Justice Burger.

[37] Id. at 602–06.

[38] Id. at 606–10. Because it was unclear whether the state court had applied such a rule and applied it properly, the Court remanded.

[39] Id. at 610.

to have approved at least an indirect limitation of the authority of hierarchical churches.[40]

Establishment of Religion

"[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[41] However, the Court's reading of the clause has never resulted in the barring of all assistance which aids, however incidentally, a religious institution. Outside this area, the decisions generally have more rigorously prohibited what may be deemed governmental promotion of religious doctrine.

Financial Assistance to Church-Related Institutions.— The Court's first opportunity to rule on the validity of governmental financial assistance to a religiously affiliated institution occurred in 1899, the assistance being a federal grant for the construction of a hospital owned and operated by a Roman Catholic order. The Court viewed the hospital as a secular institution so chartered by Congress and not as a religious or sectarian body, thus avoiding the constitutional issue.[42] But when the right of local authorities to provide free transportation for children attending parochial schools reached the Court, it adopted very restrictive language. "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining

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[40] The Court indicated that the general church could always expressly provide in its charter or in deeds to property the proper disposition of disputed property. But here the general church had decided which faction was the "true congregation," and this would appear to constitute as definitive a ruling as the Court's suggested alternatives. Id. at 606.

[41] Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970). "Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools. . . . In my opinion both avenues were closed by the Constitution." Everson v. Board of Education, 330 U.S. 1, 63 (1947) (Justice Rutledge dissenting).

[42] Bradfield v. Roberts, 175 U.S. 291 (1899). *Cf.* Abington School District v. Schempp, 374 U.S. 203, 246 (1963) (Justice Brennan concurring). In Cochran v. Board of Education, 281 U.S. 370 (1930), a state program furnishing textbooks to parochial schools was sustained under a due process attack without reference to the First Amendment. *See also* Quick Bear v. Leupp, 210 U.S. 50 (1908) (statutory limitation on expenditures of public funds for sectarian education does not apply to treaty and trust funds administered by the Government for Indians).

or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"[43] But the majority sustained the provision of transportation. While recognizing that "it approaches the verge" of the State's constitutional power, still, Justice Black thought, the transportation was a form of "public welfare legislation" which was being extended "to all its citizens without regard to their religious belief."[44] "It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State."[45] Transportation benefited the child, just as did police protection at crossings, fire protection, connections for sewage disposal, public highways and sidewalks. Thus was born the "child benefit" theory.[46]

The Court in 1968 relied on the "child benefit" theory to sustain state loans of textbooks to parochial school students.[47] Utilizing the secular purpose and effect tests,[48] the Court determined that the purpose of the loans was the "furtherance of the educational opportunities available to the young," while the effect was hardly less secular. "The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools. Perhaps free books make it more likely that some children choose to attend a sectarian

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[43] Everson v. Board of Education, 330 U.S. 1, 15–16 (1947).

[44] Id. at 16.

[45] Id. at 17. It was in *Everson* that the Court, without much discussion of the matter, held that the Establishment Clause applied to the States through the Fourteenth Amendment and limited both national and state governments equally. Id. at 8, 13, 14–16. The issue is discussed at some length by Justice Brennan in Abington School Dist. v. Schempp, 374 U.S. 203, 253–58 (1963).

[46] *And see* Zorach v. Clauson, 343 U.S. 306, 312–13 (1952) (upholding program allowing public schools to excuse students to attend religious instruction or exercises).

[47] Board of Education v. Allen, 392 U.S. 236 (1968).

[48] Supra, p. 973.

school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution."[49]

From these beginnings, the case law on the discretion of state and federal governmental assistance to sectarian elementary and secondary schools has multiplied. Through the 1970s, at least, the law became as restrictive in fact as the dicta in the early cases suggested, save for the provision of some assistance to children under the "child benefit" theory. Recent decisions evince a somewhat more accommodating approach permitting public assistance if the religious missions of the recipient schools may be only marginally served, or if the directness of aid to the schools is attenuated by independent decisions of parents who receive the aid initially. Throughout, the Court has allowed greater discretion when colleges affiliated with religious institutions are aided. Moreover, the opinions reveal a deep division among the Justices over the application of the *Lemon* tripartite test to these controversies.

A secular purpose is the first requirement to sustain the validity of legislation touching upon religion, and upon this standard the Justices display little disagreement. There are adequate legitimate, non-sectarian bases for legislation to assist nonpublic, religious schools: preservation of a healthy and safe educational environment for all school children, promotion of pluralism and diversity among public and nonpublic schools, and prevention of overburdening of the public school system that would accompany the financial failure of private schools.[50]

Varied views have been expressed by the Justices, however, upon the tests of secular primary effect and church-state entanglement. As to the former test, the Court has formulated no hard-and-fast standard permitting easy judgment in all cases.[51] In providing

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[49] 392 U.S. at 243–44 (1968).

[50] Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973). *See also* id. at 805 (Chief Justice Burger dissenting), 812–13 (Justice Rehnquist dissenting), 813 (Justice White dissenting). *And see* Wolman v. Walter, 433 U.S. 229, 240 (1977) (plurality opinion); Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 653–654 (1980), and id. at 665 (Justice Blackmun dissenting).

[51] Justice White has argued that the primary effect test requires the Court to make an "ultimate judgment" whether the primary effect of a program advances religion. If the primary effect is secular, i.e., keeping the parochial school system alive and providing adequate secular education to substantial numbers of students, then the incidental benefit to religion was only secondary and permissible. Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 822–24 (1973) (dissenting). The Court rejected this view: "[o]ur cases simply do not support the notion that a law found to have a 'primary' effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion." Id. at 873 n.39.

assistance, government must avoid aiding the religious mission of such schools directly or indirectly. Thus, for example, funds may not be given to a sectarian institution without restrictions that would prevent their use for such purposes as defraying the costs of building or maintaining chapels or classrooms in which religion is taught.[52] Loan of substantial amounts of purely secular educational materials to sectarian schools can also result in impermissible advancement of sectarian activity where secular and sectarian education are inextricably intertwined.[53] Even the provision of secular services in religious schools raises the possibility that religious instruction might be introduced into the class and is sufficient to condemn a program.[54] The extent to which the religious mission of the entity is inextricably intertwined with the secular mission and the size of the assistance furnished are factors for the reviewing court to consider.[55] But the fact that public aid to further secular purposes of the school will necessarily "free up" some of the institution's funds which it may apply to its religious mission is not alone sufficient to condemn the program.[56] Rather, it must always be determined whether the religious effects are substantial or whether they are remote and incidental.[57] Upon that determination and

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[52] Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 774–80 (1973).

[53] Meek v. Pittenger, 421 U.S. 349, 362–66 (1975). *See also* Wolman v. Walter, 433 U.S. 229, 248–51 (1977) (loan of same instructional material and equipment to pupils or their parents).

[54] *Compare* Meek v. Pittenger, 421 U.S. 349, 367–72 (1975), *with* Wolman v. Walter, 433 U.S. 229, 238–48 (1977) and Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 654–57 (1980).

[55] Lemon v. Kurtzman, 403 U.S. 602, 616–19 (1971). The existence of what the Court perceived to be massive aid and of religion-pervasive recipients constituted a major backdrop in Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), and Meek v. Pittenger, 421 U.S. 349 (1973). When the aid is more selective and its permissible use is cabined sufficiently, the character of the institution assumes less importance. Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 661–62 (1980). When the entity is an institution of higher education, the Court appears less concerned with its religious character but it still evaluates the degree to which it is pervasively sectarian. Hunt v. McNair, 413 U.S. 734 (1973); Roemer v. Maryland Public Works Bd., 426 U.S. 736 (1976).

[56] Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 658–59 (1980).

[57] The form which the assistance takes may have little to do with the determination. One group of Justices has argued that when the assistance is given to parents, the dangers of impermissible primary effect and entanglement are avoided and it should be approved. Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 801–05 (1973) (dissenting). The Court denied a controlling significance to delivery of funds to parents rather than schools; government must always ensure a secular use. Id. at 780. Another group of Justices has argued that the primary effect test does not permit direct financial support to sectarian schools, Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 665–69 (1980) (dissenting), but the Court held that provision of direct aid with adequate assurances of nonreligious use does not constitute a forbidden primary effect. Id. at

upon the guarantees built into any program to assure that public aid is used exclusively for secular, neutral, and nonideological purposes rests the validity of public assistance.

The greater the necessity of policing the entity's use of public funds to ensure secular effect, the greater the danger of impermissible entanglement of government with religious matters. Any scheme that requires detailed and continuing oversight of the schools and that requires the entity to report to and justify itself to public authority has the potential for impermissible entanglement.[58] However, where the nature of the assistance is such that furthering of the religious mission is unlikely and the public oversight is concomitantly less intrusive, a review may be sustained.[59]

Thus, government aid which is directed toward furthering secular interests in the welfare of the child or the nonreligious functions of the entity will generally be permitted where the entity is not so pervasively religious that secular and sectarian activities may not be separated. But no mere statement of rules can adequately survey the cases.

Substantial unanimity, at least in result, has prevailed among the Justices in dealing with direct financial assistance to sectarian schools, as might have been expected from the argument over the primary effect test.[60] State aid to church-connected schools was first found to have gone over the "verge"[61] in *Lemon v. Kurtzman*.[62] Involved were two state statutes, one of which authorized the "purchase" of secular educational services from nonpublic elementary and secondary schools, a form of reimbursement for the cost to religious schools of the teaching of such things as mathematics, modern foreign languages, and physical sciences, and the other of which provided salary supplements to nonpublic school teachers who taught courses similar to those found in public

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661–62. More recently, in Mueller v. Allen, 463 U.S. 388 (1983), the views of the first group noted above controlled.

[58] Lemon v. Kurtzman, 403 U.S. 602, 619–20, 621–22 (1971); Meek v. Pittenger, 421 U.S. 349, 367–72 (1975); Wolman v. Walter, 433 U.S. 229, 254–55 (1977). Another aspect of entanglement identified by the Court is the danger that an aid program would encourage continuing political strife through disputes over annual appropriations and enlargements of programs. *Lemon*, 403 U.S. at 622–24; Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794–98 (1973); *Meek*, 421 U.S. at 372. This concern appeared to have lessened somewhat in subsequent cases. Roemer v. Maryland Public Works Board, 426 U.S. 736, 763–66 (1976); Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 661 n.8 (1980).

[59] Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 659–61 (1980); Wolman v. Walter, 433 U.S. 229, 240–41, 242–44, 248 (1977).

[60] *But see* discussion infra p., on the Court's recent approval of the Adolescent Family Life Act, involving direct grants to religious institutions.

[61] Everson v. Board of Education, 330 U.S. 1, 16 (1947).

[62] 403 U.S. 602 (1971).

schools, used textbooks approved for use in public schools, and agreed not to teach any classes in religion. Accepting the secular purpose attached to both statutes by the legislature, the Court did not pass on the secular effect test, inasmuch as excessive entanglement was found. This entanglement arose because the legislature "has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion."[63] Because the schools concerned were religious schools, because they were under the control of the church hierarchy, because the primary purpose of the schools was the propagation of the faith, a "comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions [on religious utilization of aid] are obeyed and the First Amendment otherwise respected."[64] Moreover, the provision of public aid inevitably will draw religious conflict into the public arena as the contest for adequate funding goes on. Thus, the Court held, both programs were unconstitutional because the state supervision necessary to ensure a secular purpose and a secular effect inevitably involved the state authorities too deeply in the religious affairs of the aided institutions.[65]

Two programs of assistance through provision of equipment and services to private, including sectarian, schools were invalidated in *Meek v. Pittenger*.[66] First, the loan of instructional material and equipment directly to qualifying nonpublic elementary and secondary schools was voided as an impermissible extension of assistance of religion. This conclusion was reached on the basis that 75 percent of the qualifying schools were church-related or religiously affiliated educational institutions and the assistance was available without regard to the degree of religious activity of the schools. The materials and equipment loaned were religiously neutral, but the substantial assistance necessarily constituted aid to the sectarian school enterprise as a whole and thus had a primary effect of advancing religion.[67] Second, the provision of auxiliary

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[63] Id. at 619.

[64] Id.

[65] Only Justice White dissented. Id. at 661. In Lemon v. Kurtzman, 411 U.S. 192 (1973), the Court held that the State could reimburse schools for expenses incurred in reliance on the voided program up to the date the Supreme Court held the statute unconstitutional. *But see* New York v. Cathedral Academy, 434 U.S. 125 (1977).

[66] 421 U.S. 349 (1975). Chief Justice Burger and Justices Rehnquist and White dissented. Id. at 385, 387.

[67] Id. at 362–66. *See also* Wolman v. Walter, 433 U.S. 229, 248–51 (1977). The Court in Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646,

services—remedial and accelerated instruction, guidance counseling and testing, speech and hearing services—by public employees on nonpublic school premises was invalidated because the Court thought the program had to be policed closely to ensure religious neutrality and it saw no way that could be done without impermissible entanglement. The fact that the teachers would, under this program and unlike one of the programs condemned in *Lemon v. Kurtzman*, be public employees rather than employees of the religious schools and possibly under religious discipline was insufficient to permit the State to fail to make certain that religion was not inculcated by subsidized teachers.[68]

The Court in two 1985 cases again struck down programs of public subsidy of instructional services provided on the premises of sectarian schools, and relied on the effects test as well as the entanglement test. In *Grand Rapids School District v. Ball*,[69] the Court invalidated two programs conducted in leased private school classrooms, one taught during the regular school day by public school teachers,[70] and the other taught after regular school hours by part-time "public" teachers otherwise employed as full-time teachers by the sectarian school.[71] Both programs, the Court held, had the effect of promoting religion in three distinct ways. The teachers might be influenced by the "pervasively sectarian nature" of the environment and might "subtly or overtly indoctrinate the students in particular religious tenets at public expense"; use of the parochial school classrooms "threatens to convey a message of state support for religion" through "the symbolic union of government and religion in one sectarian enterprise"; and "the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects."[72] In *Aguilar v. Felton*,[73] the Court invalidated a

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661–62 (1980), held that *Meek* did not forbid all aid that benefited religiously pervasive schools to some extent, so long as it was conferred in such a way as to prevent any appreciable risk of being used to transmit or teach religious views. *See also* Wolman v. Walter, supra at 262 (Justice Powell concurring in part and dissenting in part).

[68] Meek v. Pittenger, 421 U.S. 349, 367–72 (1975). *But see* Wolman v. Walter, 433 U.S. 229, 238–48 (1977).

[69] 473 U.S. 373 (1985).

[70] The vote on this "Shared Time" program was 5–4, the opinion of the Court by Justice Brennan being joined by Justices Marshall, Blackmun, Powell, and Stevens. The Chief Justice, and Justices White, Rehnquist, and O'Connor dissented.

[71] The vote on this "Community Education" program was 7–2, Chief Justice Burger and Justice O'Connor concurring with the "Shared Time" majority.

[72] 473 U.S. at 397.

[73] 473 U.S. 402 (1985). This was another 5–4 decision, with Justice Brennan's opinion of the Court being joined by Justices Marshall, Blackmun, Powell, and Stevens, and with Chief Justice Burger and Justices White, Rehnquist, and O'Connor dissenting.

program under which public school employees provided instructional services on parochial school premises to educationally deprived children. The program differed from those at issue in *Grand Rapids* because the classes were closely monitored for religious content. This "pervasive monitoring" did not save the program, however, because, by requiring close cooperation and day-to-day contact between public and secular authorities, the monitoring "infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement."[74]

A state program to reimburse nonpublic schools for a variety of services mandated by state law was voided because the statute did not distinguish between secular and potentially religious services the costs of which would be reimbursed.[75] Similarly, a program of direct monetary grants to nonpublic schools to be used for the maintenance of school facilities and equipment failed to survive the primary effect test because it did not restrict payment to those expenditures related to the upkeep of facilities used exclusively for secular purposes and because "within the context of these religion-oriented institutions" the Court could not see how such restrictions could effectively be imposed.[76] But a plan of direct monetary grants to nonpublic schools to reimburse them for the costs of state-mandated record-keeping and of administering and grading state-prepared tests and which contained safeguards against religious utilization of the tests was sustained even though the Court recognized the incidental benefit to the schools.[77]

The "child benefit" theory, under which it is permissible for government to render ideologically neutral assistance and services to pupils in sectarian schools without being deemed to be aiding the religious mission of the schools, has not proved easy to apply. A number of different forms of assistance to students were at issue

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[74] 473 U.S. at 413.

[75] Levitt v. Committee for Public Educ. & Religious Liberty, 413 U.S. 472 (1973). Justice White dissented, Id. at 482. Among the services reimbursed was the cost of preparing and grading examinations in the nonpublic schools by the teachers there. In New York v. Cathedral Academy, 434 U.S. 125 (1977), the Court struck down a new statutory program entitling private schools to obtain reimbursement for expenses incurred during the school year in which the prior program was voided in *Levitt*.

[76] Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 774–80 (1973). Chief Justice Burger and Justice Rehnquist concurred, Id. at 798, and Justice White dissented. Id. at 820.

[77] Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980). Justices Blackmun, Brennan, Marshall, and Stevens dissented. Id. at 662, 671. The dissenters thought that the authorization of direct reimbursement grants was distinguishable from previously approved plans that had merely relieved the private schools of the costs of preparing and grading state-prepared tests. *See* Wolman v. Walter, 433 U.S. 229, 238–41 (1977).

in *Wolman v. Walter.*[78] The Court approved the following: standardized tests and scoring services used in the public schools, with private school personnel not involved in the test drafting and scoring; speech, hearing, and psychological diagnostic services provided in the private schools by public employees; and therapeutic, guidance, and remedial services for students provided off the premises of the private schools. In all these, the Court thought the program contained adequate built-in protections against religious utilization. But while the Court adhered to its ruling permitting the States to loan secular textbooks used in the public schools to pupils attending religious schools,[79] it declined to extend the precedent to permit the loan to pupils or their parents of instructional materials and equipment, such as projectors, tape recorders, maps, globes and science kits, although they were identical to those used in the public schools.[80] Nor was a State permitted to expend funds to pay the costs to religious schools of field trip transportation such as was provided to public school students.[81]

Substantially similar programs from New York and Pennsylvania providing for tuition reimbursement aid to parents of religious school children were struck down in 1973. New York's program provided reimbursements out of general tax revenues for tuition paid by low-income parents to send their children to nonpublic elementary and secondary schools; the reimbursements were of fixed amounts but could not exceed 50 percent of actual tuition paid.

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[78] 433 U.S. 229 (1977). The Court deemed the situation in which these services were performed and the nature of the services to occasion little danger of aiding religious functions and thus requiring little supervision that would give rise to entanglement. All the services fell "within that class of general welfare services for children that may be provided by the States regardless of the incidental benefit that accrues to church-related schools." Id. at 243, quoting Meek v. Pittenger, 421 U.S. 349, 371 n. 21 (1975). Justice Brennan would have voided all the programs because, considered as a whole, the amount of assistance was so large as to constitute assistance to the religious mission of the schools. Id. at 433 U.S. at 255. Justice Marshall would have approved only the diagnostic services, id. at 256, while Justice Stevens would generally approve closely administered public health services. Id. at 264.

[79] Meek v. Pittenger, 421 U.S. 349, 359–72 (1975); Wolman v. Walter, 433 U.S. 229, 236–38 (1977). *Allen* was explained as resting on "the unique presumption" that "the educational content of textbooks is something that can be ascertained in advance and cannot be diverted to sectarian uses." There was "a tension" between *Nyquist, Meek,* and *Wolman,* on the one hand, and *Allen* on the other; while *Allen* was to be followed "as a matter of stare decisis," the "presumption of neutrality" embodied in *Allen* would not be extended to other similar assistance. Id. at 251 n.18. A more recent Court majority revived the *Allen* presumption, however, applying it to uphold tax deductions for tuition and other school expenses in *Mueller v. Allen,* 463 U.S. 388 (1983). Justice Rehnquist wrote the Court's opinion, joined by Justices White, Powell, and O'Connor, and by Chief Justice Burger.

[80] 433 U.S. at 248–51. *See also* id. at 263–64 (Justice Powell concurring in part and dissenting in part).

[81] Id. at 252–55. Justice Powell joined the other three dissenters who would have approved this expenditure. Id. at 264.

Pennsylvania provided fixed-sum reimbursement for parents who send their children to nonpublic elementary and secondary schools, so long as the amount paid did not exceed actual tuition, the funds to be derived from cigarette tax revenues. Both programs, it was held, constituted public financial assistance to sectarian institutions with no attempt to segregate the benefits so that religion was not advanced.[82]

New York had also enacted a separate program providing tax relief for low-income parents not qualifying for the tuition reimbursements; here relief was in the form of a deduction or credit bearing no relationship to the amounts of tuition paid, but keyed instead to adjusted gross income. This too was invalidated in *Nyquist*. "In practical terms there would appear to be little difference, for purposes of determining whether such aid has the effect of advancing religion, between the tax benefit allowed here and the tuition [reimbursement] grant. . . . The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. We see no answer to Judge Hays' dissenting statement below that '[i]n both instances the money involved represents a charge made upon the state for the purpose of religious education.'"[83] Some difficulty, however, was experienced in distinguishing this program from the tax exemption approved in *Walz*.[84]

Two subsidiary arguments were rejected by the Court in these cases. First, it had been argued that the tuition reimbursement program promoted the free exercise of religion in that it permitted low-income parents desiring to send their children to school in accordance with their religious views to do so. The Court agreed that "tension inevitably exists between the Free Exercise and the Establishment Clauses," but explained that the tension is ordinarily re-

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[82] Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789–798 (1973) (New York); Sloan v. Lemon, 413 U.S. 825 (1973) (Pennsylvania). The Court distinguished *Everson* and *Allen* on the grounds that in those cases the aid was given to all children and their parents and that the aid was in any event religiously neutral, so that any assistance to religion was purely incidental. 413 U.S. at 781–82. Chief Justice Burger thought that *Everson* and *Allen* were controlling. Id. at 798.

[83] Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789–94 (1973). The quoted paragraph is id. 790–91.

[84] Id. at 791–94. Principally, *Walz* was said to be different because of the age of exemption there dealt with, because the *Walz* exemption was granted in the spirit of neutrality while the tax credit under consideration was not, and the fact that the *Walz* exemption promoted less entanglement while the credit would promote more.

solved through application of the "neutrality" principle: government may neither advance nor inhibit religion. The tuition program inescapably advanced religion and thereby violated this principle.[85] In the Pennsylvania case, it was argued that because the program reimbursed parents who sent their children to nonsectarian schools as well as to sectarian ones, the portion respecting the former parents was valid and "parents of children who attended sectarian schools are entitled to the same aid as a matter of equal protection. The argument is thoroughly spurious. . . . The Equal Protection Clause has never been regarded as a bludgeon with which to compel a State to violate other provisions of the Constitution."[86]

The *Nyquist* holding was substantially undermined in 1983, the Court taking a more accommodationist approach toward indirect subsidy of parochial schools. In *Mueller v. Allen*,[87] the Court upheld a Minnesota deduction from state income tax available to parents of elementary and secondary school children for expenses incurred in providing tuition, transportation, textbooks, and various other school supplies. Because the Minnesota deduction was available to parents of public and private schoolchildren alike, the Court termed it "vitally different from the scheme struck down in *Nyquist*," and more similar to the benefits upheld in *Everson* and *Allen* as available to *all* schoolchildren.[88] The Court declined to look behind the "facial neutrality" of the law and consider empirical evidence of its actual impact, citing a need for "certainty" and the lack of "principled standards" by which to evaluate such evidence.[89] Also important to the Court's refusal to consider the al-

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[85] Id. at 788–89. *But cf.* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (due to Free Exercise Clause, Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions").

[86] Sloan v. Lemon, 413 U.S. 825, 833–35 (1973). In any event, the Court sustained the district court's refusal to sever the program and save that portion as to children attending non-sectarian schools on the basis that since so large a portion of the children benefitted attended religious schools it could not be assumed the legislature would have itself enacted such a limited program.

In Wheeler v. Barrera, 417 U.S. 402 (1974), the Court held that States receiving federal educational funds were required by federal law to provide "comparable" but not equal services to both public and private school students within the restraints imposed by state constitutional restrictions on aid to religious schools. In the absence of specific plans, the Court declined to review First Amendment limitations on such services.

[87] 463 U.S. 388 (1983).

[88] 463 U.S. at 398. *Nyquist* had reserved the question of "whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." 413 U.S. at 782–83 n.38.

[89] 463 U.S. at 401. Justice Marshall's dissenting opinion, joined by Justices Brennan, Blackmun, and Stevens, argued that the tuition component of the deduction, unavailable to parents of most public schoolchildren, was by far the most sig-

leged disproportionate benefits to parents of parochial schools was the assertion that, "whatever unequal effect may be attributed to the statutory classification can fairly be regarded as a rough return for the benefits . . . provided to the State and all taxpayers by parents sending their children to parochial schools."[90]

A second factor important in *Mueller*, present but not controlling in *Nyquist*, was that the financial aid was provided to the parents of schoolchildren rather than to the school, and thus in the Court's view was "attenuated" rather than direct; since aid was "available only as a result of decisions of individual parents," there was no "'impramatur of state approval.'" The Court noted that, with the exception of *Nyquist*, "all . . . of our recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the State to the schools themselves."[91] Thus *Mueller* seemingly stands for the proposition that state subsidies of tuition expenses at sectarian schools are permissible if contained in a facially neutral scheme providing benefits, at least nominally, to parents of public and private schoolchildren alike.[92]

The Court, although closely divided at times, has approved quite extensive public assistance to institutions of higher learning. On the same day that it first struck down an assistance program for elementary and secondary private schools, the Court sustained construction grants to church-related colleges and universities.[93] The specific grants in question were for construction of two library buildings, a science building, a music, drama, and arts building, and a language laboratory. The law prohibited the financing of any facility for, or the use of any federally-financed building for, reli-

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nificant, and that the deduction as a whole "was little more that a subsidy of tuition masquerading as a subsidy of general educational expenses." 463 U.S. at 408–09. *Cf.* Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985), where the Court emphasized that 40 of 41 nonpublic schools at which publicly funded programs operated were sectarian in nature; and Widmar v. Vincent, 454 U.S. 263, 275 (1981), holding that a college's open forum policy had no primary effect of advancing religion "[a]t least in the absence of evidence that religious groups will dominate [the] forum." *But cf.* Bowen v. Kendrick, 487 U.S. 589 (1988), permitting religious institutions to be recipients under a "facially neutral" direct grant program.

[90] 463 U.S. at 402.

[91] 463 U.S. at 399.

[92] *See also* Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986), in which the Court held that provision of vocational assistance for the blind to a student who used the aid for tuition at a sectarian college did not have a primary effect of advancing religion. Without citing *Mueller*, the Court relied on the fact that the aid is paid directly to the student for use at the institution of his or her choice, so that religious institutions received aid "only as a result of the genuinely independent and private choices of aid recipients," and on the additional fact that there was nothing in the record to indicate that "any significant portion of the aid" from the program as a whole would go to religious education. 474 U.S. at 487, 488.

[93] Tilton v. Richardson, 403 U.S. 672 (1971). This was a 5–4 decision.

gious purposes, although the restriction on use ran for only twenty years.[94] The Court found that the purpose and effect of the grants were secular and that, unlike elementary and secondary schools, religious colleges were not so permeated with religious inculcations.[95] The supervision required to ensure conformance with the non-religious-use requirement was found not to constitute "excessive entanglement," inasmuch as a building is nonideological in character, unlike teachers, and inasmuch as the construction grants were onetime things and did not continue as did the state programs.

Also sustained was a South Carolina program under which a state authority would issue revenue bonds for construction projects on campuses of private colleges and universities. The Court did not decide whether this special form of assistance could be otherwise sustained, because it concluded that religion was neither advanced nor inhibited, nor was there any impermissible public entanglement. "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting."[96] The colleges involved, though they were affiliated with religious institutions, were not shown to be so pervasively religious—no religious test existed for faculty or student body, a substantial part of the student body was not of the religion of the affiliation—and state law precluded the use of any state-financed project for religious activities.[97]

The kind of assistance permitted by *Tilton* and by *Hunt v. McNair* seems to have been broadened when the Court sustained a Maryland program of annual subsidies to qualifying private institutions of higher education; the grants were noncategorical but could not be used for sectarian purposes, a limitation to be policed

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[94] Because such buildings would still have substantial value after twenty years, a religious use then would be an unconstitutional aid to religion, and the period of limitation was struck down, Id. at 682–84.

[95] It was no doubt true, Chief Justice Burger conceded, that construction grants to religious-related colleges did in some measure benefit religion, since the grants freed money that the colleges would be required to spend on the facilities for which the grants were made. Bus transportation, textbooks, and tax exemptions similarly benefited religion and had been upheld. "The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." Id. at 679.

[96] Hunt v. McNair, 413 U.S. 734, 743 (1973).

[97] Id. at 739–40, 741–45. Justices Brennan, Douglas, and Marshall, dissenting, rejected the distinction between elementary and secondary education and higher education and foresaw a greater danger of entanglement than did the Court. Id. at 749.

by the administering agency.[98] The plurality opinion found a secular purpose; found that the limitation of funding to secular activities was meaningful,[99] since the religiously affiliated institutions were not so pervasively sectarian that secular activities could not be separated from sectarian ones; and determined that excessive entanglement was improbable, given the fact that aided institutions were not pervasively sectarian. The annual nature of the subsidy was recognized as posing the danger of political entanglement, but the plurality thought that the character of the aided institutions—"capable of separating secular and religious functions"—was more important.[100]

In *Bowen v. Kendrick*[101] the Court by a 5–4 vote upheld the Adolescent Family Life Act (AFLA)[102] against facial challenge. The Act permits direct grants to religious organizations for provision of health care and for counseling of adolescents on matters of pregnancy prevention and abortion alternatives, and requires grantees to involve other community groups, including religious organizations, in delivery of services. All of the Justices agreed that AFLA had valid secular purposes; their disagreement related to application of the effects and entanglement tests. The Court relied on

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[98] Roemer v. Maryland Public Works Bd., 426 U.S. 736 (1976). Justice Blackmun's plurality opinion was joined only by Chief Justice Burger and Justice Powell. Justices White and Rehnquist concurred on the basis of secular purpose and no primary religious benefit, rejecting entanglement. Id. at 767. Justice Brennan, joined by Justice Marshall, dissented, and Justices Stewart and Stevens each dissented separately. Id. at 770, 773, 775.

[99] Id. 755. In some of the schools mandatory religion courses were taught, the significant factor in Justice Stewart's view, id. at 773, but overweighed by other factors in the plurality's view.

[100] Id. at 765–66. The plurality also relied on the facts that the student body was not local but diverse, and that large numbers of non-religiously affiliated institutions received aid. A still further broadening of governmental power to extend aid affecting religious institutions of higher education may be discerned in the Court's summary affirmance of two lower-court decisions upholding programs of assistance—scholarships and tuitions grants—to students at college and university as well as vocational programs in both public and private—including religious—institutions; one of the programs contained no secular use restriction at all and in the other one the restriction seemed somewhat pro forma. Smith v. Board of Governors of Univ. of North Carolina, 434 U.S. 803 (1977), aff'g 429 F. Supp. 871 (W.D.N.C. 1977); Americans United v. Blanton, 434 U.S. 803 (1977), aff'g 433 F. Supp. 97 (M.D. Tenn. 1977). In Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986), the Court upheld use of a vocational rehabilitation scholarship at a religious college, emphasizing that the religious institution received the public money as a result of the "genuinely independent and private choices of the aid recipients," and not as the result of any decision by the State to sponsor or subsidize religion.

[101] 487 U.S. 589 (1988). Chief Justice Rehnquist wrote the Court's opinion, and was joined by Justices White, O'Connor, Scalia, and Kennedy; in addition, Justice O'Connor and Justice Kennedy, joined by Justice Scalia, filed separate concurring opinions. Justice Blackmun's dissenting opinion was joined by Justices Brennan, Marshall, and Stevens.

[102] Pub. L. 97–35, 95 Stat. 578 (1981), codified at 42 U.S.C. § 300z *et seq.*

analogy to the higher education cases rather than the cases involving aid to elementary and secondary schools.[103] The case presented conflicting factual considerations. On the one hand, the class of beneficiaries was broad, with religious groups not predominant among the wide range of eligible community organizations. On the other hand, there were analogies to the parochial school aid cases: secular and religious teachings might easily be mixed, and the age of the targeted group (adolescents) suggested susceptibility. The Court resolved these conflicts by holding that AFLA is facially valid, there being insufficient indication that a significant proportion of the AFLA funds would be disbursed to "pervasively sectarian" institutions, but by remanding to the district court to determine whether particular grants to pervasively sectarian institutions were invalid. The Court emphasized in both parts of its opinion that the fact that "views espoused [during counseling] on matters of premarital sex, abortion, and the like happen to coincide with the religious views of the AFLA grantee would not be sufficient to show [an Establishment Clause violation]."[104]

Although the Court applied the *Lemon* three-part test in *Kendrick*, the case may signal a changing approach to direct aid cases. The distinction between facial and as-applied invalidity is new in this context, and may have implications for other Establishment Clause challenges. Also noteworthy is the fact that the Court expressed tolerance for a level of monitoring that would be impermissible for "pervasively sectarian" organizations, rejecting the "'Catch–22' argument" that excessive entanglement would result. Perhaps most significant is the fact that Justice Kennedy indicated in his separate concurring opinion that he would look behind the "pervasively sectarian" nature of aid recipients and focus on how aid money is actually being spent; only if aid is being spent for religious purposes would he hold that there has been a violation.[105] This apparent contrast with the approach previously advocated by Justice Powell suggests that the balance on the Court may have shifted toward a less restrictive approach in the parochial school aid context.

Governmental Encouragement of Religion in Public Schools: Released Time.—Introduction of religious education into the public schools, one of Justice Rutledge's "great drives,"[106] has

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[103] The Court also noted that the 1899 case of *Bradfield v. Roberts* had established that religious organizations may receive direct aid for support of secular social-welfare cases.

[104] 487 U.S. at 621.

[105] Id. at 624–25.

[106] Everson v. Board of Education, 330 U.S. 1, 63 (Justice Rutledge dissenting) (quoted supra p. 977, n.41).

also occasioned a substantial amount of litigation in the Court. In its first two encounters, the Court voided one program and upheld another, in which the similarities were at least as significant as the differences. Both cases involved "released time" programs, the establishing of a period during which pupils in public schools were to be allowed, upon parental request, to receive religious instruction. In the first, the religious classes were conducted during regular school hours in the school building by outside teachers furnished by a religious council representing the various faiths, subject to the approval or supervision of the superintendent of schools. Attendance reports were kept and reported to the school authorities in the same way as for other classes, and pupils not attending the religious instruction classes were required to continue their regular studies. "The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment . . . ."[107] The case was also noteworthy because of the Court's express rejection of the contention "that historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions."[108]

Four years later, the Court upheld a different released-time program.[109] In this one, schools released pupils during school hours, on written request of their parents, so that they might leave the school building and go to religious centers for religious instruction or devotional exercises. The churches reported to the schools the names of children released from the public schools who did not report for religious instruction; children not released remained in the classrooms for regular studies. The Court found the differences between this program and the program struck down in *McCollum* to be constitutionally significant. Unlike *McCollum*, where "the classrooms were used for religious instruction and force of the public school was used to promote that instruction," religious instruction was conducted off school premises and "the public schools do

[107] Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 209–10 (1948).
[108] Id. at 211.
[109] Zorach v. Clauson, 343 U.S. 306 (1952). Justices Black, Frankfurter, and Jackson dissented. Id. at 315, 320, 323.

no more than accommodate their schedules."[110] We are a religious people whose institutions presuppose a Supreme Being," Justice Douglas wrote for the Court. "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe."[111]

Governmental Encouragement of Religion in Public Schools: Prayers and Bible Reading.—Upon recommendation of the state governing board, a local New York school required each class to begin each school day by reading aloud the following prayer in the presence of the teacher: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers and our country." Students who wished to do so could remain silent or leave the room. Said the Court: "We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York had adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. . . . [W]e think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[112] "Neither the fact that the prayer may be nondenominationally neutral nor the fact that its observance on

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[110] Id. at 315. *See also* Abington School Dist. v. Schempp, 374 U.S. 203, 261–63 (1963) (Justice Brennan concurring) (suggesting that the important distinction was that "the *McCollum* program placed the religious instruction in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects, while the *Zorach* program did not").

[111] Id. at 313–14. These cases predated formulation of the *Lemon* three-part test for religious establishment, and the status of that test—as well as the constitutional status of released-time programs—is unclear. The degree of official and church cooperation may well not rise to a problem of excessive entanglement, but *quaere*, what is the secular purpose and secular effect of such programs? Some guidance may be provided by Grand Rapids School District v. Ball, 473 U.S. 373 (1985), and Aguilar v. Felton, 473 U.S. 402 (1985), striking down programs using public school teachers for instruction of parochial school students in parochial school facilities, but these were 5–4 decisions and the Court's membership has since changed.

[112] Engel v. Vitale, 370 U.S. 421, 424, 425 (1962).

the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause. . . . The Establishment Clause . . . does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." [113]

Following the prayer decision came two cases in which parents and their school age children challenged the validity under the Establishment Clause of requirements that each school day begin with readings of selections from the Bible. Scripture reading, like prayers, the Court found, was a religious exercise. "Given that finding the exercises and the law requiring them are in violation of the Establishment Clause." [114] Rejected were contentions by the State that the object of the programs was the promotion of secular purposes, such as the expounding of moral values, the contradiction of the materialistic trends of the times, the perpetuation of traditional institutions, and the teaching of literature [115] and that to forbid the particular exercises was to choose a "religion of secularism" in their place. [116] Though the "place of religion in our society is an exalted one," the Establishment Clause, the Court continued, prescribed that in "the relationship between man and religion," the State must be "firmly committed to a position of neutrality." [117]

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[113] Id. at 430. Justice Black for the Court rejected the idea that the prohibition of religious services in public schools evidenced "a hostility toward religion or toward prayer." Id. at 434. Rather, such an application of the First Amendment protected religion from the coercive hand of government and government from control by a religious sect. Dissenting alone, Justice Stewart could not "see how an 'official religion' is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation." Id. at 444, 445.

[114] Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963). "[T]he States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools. None of these factors, other than compulsory school attendance, was present in the program upheld in *Zorach v. Clauson*." Id.

[115] Id. at 223–24. The Court thought the exercises were clearly religious.

[116] Id. at 225. "We agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.' *Zorach v. Clauson*, supra, at 314. We do not agree, however, that this decision in any sense has that effect."

[117] Id. 226. Justice Brennan contributed a lengthy concurrence in which he attempted to rationalize the decisions of the Court on the religion clauses and to delineate the principles applicable. He concluded that what the establishment clause foreclosed "are those involvements of religious with secular institutions which (a)

In *Wallace v. Jaffree,*[118] the Court held invalid an Alabama statute authorizing a 1-minute period of silence in all public schools "for meditation or prayer." Because the only evidence in the record indicated that the words "or prayer" had been added to the existing statute by amendment for the sole purpose of returning voluntary prayer to the public schools, the Court found that the first prong of the *Lemon* test had been violated, i.e. that the statute was invalid as being entirely motivated by a purpose of advancing religion. The Court characterized the legislative intent to return prayer to the public schools as "quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday,"[119] and both Justices Powell and O'Connor in concurring opinions suggested that other state statutes authorizing moments of silence might pass constitutional muster.[120]

The school prayer decisions served as precedent for the Court's holding in *Lee v. Weisman*[121] that a school-sponsored invocation at a high school commencement violated the Establishment Clause. The Court rebuffed a request to reexamine the *Lemon* test, finding "[t]he government involvement with religious activity in this case [to be] pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school." State officials not only determined that an invocation and benediction should be given, but also selected the religious participant and provided him with guidelines for the content of nonsectarian prayers. The Court, in an opinion by Justice Kennedy, viewed this state participation

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serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice." Id. at 230, 295. Justice Stewart again dissented alone, feeling that the claims presented were essentially free exercise contentions which were not supported by proof of coercion or of punitive official action for nonparticipation.

While numerous efforts were made over the years to overturn these cases, through constitutional amendment and through limitations on the Court's jurisdiction, the Supreme Court itself has had no occasion to review the area again. *But see* Stone v. Graham, 449 U.S. 39 (1980) (summarily reversing state court and invalidating statute requiring the posting of the Ten Commandments, purchased with private contributions, on the wall of each public classroom).

[118] 472 U.S. 38 (1985).

[119] Id. at 59.

[120] Justice O'Connor's concurring opinion is notable for its effort to synthesize and refine the Court's Establishment and Free Exercise tests (*see also* the Justice's concurring opinion in *Lynch v. Donnelly*), and Justice Rehnquist's dissent for its effort to redirect Establishment Clause analysis by abandoning the tripartite test, discarding any requirement that government be neutral between religion and "irreligion," and confining the scope to a prohibition on establishing a national church or otherwise favoring one religious group over another.

[121] 112 S. Ct. 2649 (1992).

as coercive in the elementary and secondary school setting.[122] The state "in effect required participation in a religious exercise," since the option of not attending "one of life's most significant occasions" was no real choice. "At a minimum," the Court concluded, the Establishment Clause "guarantees that government may not coerce anyone to support or participate in religion or its exercise."

Governmental Encouragement of Religion in Public Schools: Curriculum Restriction.—In *Epperson v. Arkansas*,[123] the Court struck down a state statute which made it unlawful for any teacher in any state-supported educational institution "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals," or "to adopt or use in any such institution a textbook that teaches" this theory. Agreeing that control of the curriculum of the public schools was largely in the control of local officials, the Court nonetheless held that the motivation of the statute was a fundamentalist belief in the literal reading of the Book of Genesis and that this motivation and result required the voiding of the law. "The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read. Plainly, the law is contrary to the mandate of the First . . . Amendment to the Constitution."[124]

Similarly invalidated as having the improper purpose of advancing religion was a Louisiana statute mandating balanced treatment of "creation-science" and "evolution-science" in the public schools. "The preeminent purpose of the Louisiana legislature," the Court found in *Edwards v. Aguillard*, "was clearly to advance the religious viewpoint that a supernatural being created humankind."[125] The Court viewed as a "sham" the stated purpose of protecting academic freedom, and concluded instead that the legislature's purpose was to narrow the science curriculum in order to discredit evolution "by counterbalancing its teaching at every turn with the teaching of creation science."[126]

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[122] The Court distinguished Marsh v. Chambers, 463 U.S. 783, 792 (1983), holding that the opening of a state legislative session with a prayer by a state-paid chaplain does not offend the Establishment Clause. The *Marsh* Court had distinguished *Abington* on the basis that state legislators, as adults, are "presumably not readily susceptible to 'religious indoctrination' or 'peer pressure,'" and the *Lee* Court reiterated this distinction. 112 S. Ct. at 2660.

[123] 393 U.S. 97 (1968).

[124] Id. at 109.

[125] 483 U.S. 578, 591 (1987).

[126] 483 U.S. at 589. The Court's conclusion was premised on its finding that "the term 'creation science,' as used by the legislature . . . embodies the religious belief that a supernatural creator was responsible for the creation of humankind." Id. at at 592.

Access of Religious Groups to School Property.—Although government may not promote religion through its educational facilities, it may not bar student religious groups from meeting on public school property if it makes those facilities available to nonreligious student groups. To allow religious groups equal access to a public college's facilities would further a secular purpose, would not constitute an impermissible benefit to religion, and would pose little hazard of entanglement.[127] These principles apply to public secondary schools as well as to institutions of higher learning.[128] In 1990 the Court upheld application of the Equal Access Act[129] to prevent a secondary school from denying access to school premises to a student religious club while granting access to such other "noncurriculum" related student groups as a scuba diving club, a chess club, and a service club.[130]

While the greater number of establishment cases have involved educational facilities, in other areas as well there have been contentions that legislative policies have been laws "respecting" the establishment of religion.

Tax Exemptions of Religious Property.—Every State and the District of Columbia provide for tax exemptions for religious institutions, and the history of such exemptions goes back to the time of our establishment as a polity. The only expression by a Supreme Court Justice prior to 1970 was by Justice Brennan, who deemed tax exemptions constitutional because the benefit conferred was incidental to the religious character of the institutions concerned.[131] Then, in 1970, a nearly unanimous Court sustained a state exemption from real or personal property taxation of "property used exclusively for religious, educational or charitable purposes" owned by a corporation or association which was conducted exclusively for

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[127] Widmar v. Vincent, 454 U.S. 263, 270–75 (1981).

[128] Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226 (1990). The Court had noted in *Widmar* that university students "are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion," 454 U.S. at 274 n.14. The *Mergens* plurality ignored this distinction, suggesting that the secondary school's neutrality was also evident to its students. 496 U.S. at 252.

[129] Pub. L. 98–377, title VIII, 98 Stat. 1302 (1984); 20 U.S.C. §§ 4071–74.

[130] There was no opinion of the Court on Establishment Clause issues, a plurality of four led by Justice O'Connor applying the three-part *Lemon* test, and concurring Justices Kennedy and Scalia proposing a less stringent test under which "neutral" accommodations of religion would be permissible as long as they do not in effect establish a state religion, and as long as there is no coercion of students to participate in a religious activity. Id. at 2377.

[131] "If religious institutions benefit, it is in spite of rather than because of their religious character. For religious institutions simply share benefits which government makes generally available to educational, charitable, and eleemosynary groups." Abington School Dist. v. Schempp, 374 U.S. 203, 301 (1963) (concurring opinion).

one or more of these purposes and did not operate for profit.[132] The first prong of a two-prong argument saw the Court adopting Justice Brennan's rationale. Using the secular purpose and effect test, Chief Justice Burger noted that the purpose of the exemption was not to single out churches for special favor; instead, the exemption applied to a broad category of associations having many common features and all dedicated to social betterment. Thus, churches as well as museums, hospitals, libraries, charitable organizations, professional associations, and the like, all non-profit, and all having a beneficial and stabilizing influence in community life, were to be encouraged by being treated specially in the tax laws. The primary effect of the exemptions was not to aid religion; the primary effect was secular and any assistance to religion was merely incidental.[133]

For the second prong, the Court created a new test, the entanglement test,[134] by which to judge the program. There was some entanglement whether there were exemptions or not, Chief Justice Burger continued, but with exemptions there was minimal involvement. But termination of exemptions would deeply involve government in the internal affairs of religious bodies, because evaluation of religious properties for tax purposes would be required and there would be tax liens and foreclosures and litigation concerning such matters.[135]

While the general issue is now settled, it is to be expected that variations of the exemption upheld in *Walz* will present the Court with an opportunity to elaborate the field still further.[136] For example, the Court determined that a sales tax exemption applicable only to religious publications constituted a violation of the Establishment Clause,[137] and, on the other hand, that application of a general sales and use tax provision to religious publications violates neither the Establishment Clause nor the Free Exercise Clause.[138]

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[132] Walz v. Tax Comm'n, 397 U.S. 664 (1970). Justice Douglas dissented.

[133] Id. at 672–74.

[134] Supra, p. 973.

[135] 397 U.S. at 674–76.

[136] For example, the Court subsequently accepted for review a case concerning property tax exemption for church property used as a commercial parking lot, but state law was changed, denying exemption for purely commercial property and requiring a pro rata exemption for mixed use, and the Court remanded so that the change in the law could be considered. Differderfer v. Central Baptist Church, 404 U.S. 412 (1972).

[137] Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

[138] Jimmy Swaggart Ministries v. California Bd. of Equalization, 493 U.S. 378 (1990). Similarly, there is no constitutional impediment to straightforward application of 26 U.S.C. § 170 to disallow a charitable contribution for payments to a church

Exemption of Religious Organizations from Generally Applicable Laws.—The Civil Rights Act's exemption of religious organizations from the prohibition against religious discrimination in employment[139] does not violate the Establishment Clause when applied to a religious organization's secular, nonprofit activities. The Court held in *Corporation of the Presiding Bishop v. Amos*[140] that a church-run gymnasium operated as a nonprofit facility open to the public could require that its employees be church members. Declaring that "there is ample room for accommodation of religion under the Establishment Clause,"[141] the Court identified a legitimate purpose in freeing a religious organization from the burden of predicting which of its activities a court will consider to be secular and which religious. The rule applying across-the-board to nonprofit activities and thereby "avoid[ing] . . . intrusive inquiry into religious belief" also serves to lessen entanglement of church and state.[142] The exemption itself does not have a principal effect of advancing religion, the Court concluded, but merely allows churches to advance religion.[143]

Sunday Closing Laws.—The history of Sunday Closing Laws goes back into United States colonial history and far back into English history.[144] Commonly, the laws require the observance of the Christian Sabbath as a day of rest, although in recent years they have tended to become honeycombed with exceptions. The Supreme Court rejected an Establishment Clause challenge to Sunday Closing Laws in *McGowan v. Maryland*.[145] The Court acknowledged

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found to represent a reciprocal exchange rather than a contribution or gift. Hernandez v. Commissioner, 490 U.S. 680 (1989).

[139] Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2, makes it unlawful for any employer to discriminate in employment practices on the basis of an employee's religion. Section 702, 42 U.S.C. § 2000e–1, exempts from the prohibition "a religious corporation . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation . . . of its activities."

[140] 483 U.S. 327 (1987).

[141] 483 U.S. at 338.

[142] Id. at 339.

[143] "For a law to have forbidden 'effects' . . . it must be fair to say that the *government itself* has advanced religion through its own activities and influence." 483 U.S. at 337. Justice O'Connor's concurring opinion suggests that practically any benefit to religion can be "recharacterized as simply 'allowing' a religion to better advance itself," and that a "necessary second step is to separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations." Id. at 347, 348.

[144] The history is recited at length in the opinion of the Court in McGowan v. Maryland, 366 U.S. 420, 431–40 (1961), and in Justice Frankfurter's concurrence. Id. at 459, 470–551 and appendix.

[145] 366 U.S. 420 (1961). Decision on the establishment question in this case also controlled the similar decision on that question in Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582 (1961), Braunfeld v. Brown, 366 U.S. 599 (1961),

that historically the laws had a religious motivation and were designed to effectuate concepts of Christian theology. However, "[i]n light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion. . . ."[146] "[T]he fact that this [prescribed day of rest] is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State."[147] The choice of Sunday as the day of rest, while originally religious, now reflected simple legislative inertia or recognition that Sunday was a traditional day for the choice.[148] Valid secular reasons existed for not simply requiring one day of rest and leaving to each individual to choose the day, reasons of ease of enforcement and of assuring a common day in the community for rest and leisure.[149] More recently, a state statute mandating that employers honor the Sabbath day of the employee's choice was held invalid as having the primary effect of promoting religion by weighing the employee's Sabbath choice over all other interests.[150]

Conscientious Objection.—Historically, Congress has provided for alternative service for men who had religious scruples against participating in either combat activities or in all forms of military activities; the fact that Congress chose to draw the line of exemption on the basis of religious belief confronted the Court with a difficult constitutional question, which, however, the Court chose to avoid by a somewhat disingenuous interpretation of the stat-

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and Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961). On free exercise in these cases, see infra, pp. 1011–12.

[146] McGowan v. Maryland, 366 U.S. 420, 444 (1961).

[147] Id. at 445.

[148] Id. at 449–52.

[149] Id. Justice Frankfurter, with whom Justice Harlan concurred, arrived at the same conclusions by a route that did not require approval of *Everson v. Board of Education*, from which he had dissented.

[150] Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

ute.[151] In *Gillette v. United States*,[152] a further constitutional problem arose in which the Court did squarely confront and validate the congressional choice. Congress had restricted conscientious objection status to those who objected to "war in any form" and the Court conceded that there were religious or conscientious objectors who were not opposed to all wars but only to particular wars based upon evaluation of a number of factors by which the "justness" of any particular war could be judged; "properly construed," the Court said, the statute did draw a line relieving from military service some religious objectors while not relieving others.[153] Purporting to apply the secular purpose and effect test, the Court looked almost exclusively to purpose and hardly at all to effect. Although it is not clear, the Court seemed to require that a classification must be religiously based "on its face"[154] or lack any "neutral, secular basis for the lines government has drawn"[155] in order that it be held to violate the Establishment Clause. The classification here was not religiously based "on its face," and served "a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions."[156] These purposes, related to the difficulty in separating sincere conscientious objectors to particular wars from others with fraudulent claims, included the maintenance of a fair and efficient selective service system and protection of the integrity of democratic decision-making.[157]

Regulation of Religious Solicitation.—Although the solicitation cases have generally been decided under the free exercise or free speech clauses,[158] in one instance the Court, intertwining establishment and free exercise principles, voided a provision in a state charitable solicitations law that required only those religious organizations that received less than half their total contributions

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[151] In United States v. Seeger, 380 U.S. 163 (1965), a unanimous Court construed the language of the exemption limiting the status to those who by "religious training and belief" (that is, those who believed in a "Supreme Being"), to mean that a person must have some belief which occupies in his life the place or role which the traditional concept of God occupies in the orthodox believer. After the "Supreme Being" clause was deleted, a plurality in Welsh v. United States, 398 U.S. 333 (1970), construed the religion requirement as inclusive of moral, ethical, or religious grounds. Justice Harlan concurred on constitutional grounds, believing that the statute was clear that Congress had intended to restrict conscientious objection status to those persons who could demonstrate a traditional religious foundation for their beliefs and that this was impermissible under the Establishment Clause. Id. at 344. The dissent by Justices White and Stewart and Chief Justice Burger rejected both the constitutional and the statutory basis. Id. at 367.

[152] 401 U.S. 437 (1971).

[153] Id. at 449.

[154] Id. at 450.

[155] Id. at 452.

[156] Id.

[157] Id. at 452–60.

[158] Infra, p. 1182.

from members or affiliated organizations to comply with the registration and reporting sections of the law.[159] Applying strict scrutiny equal protection principles, the Court held that by distinguishing between older, well-established churches that had strong membership financial support and newer bodies lacking a contributing constituency or that may favor public solicitation over general reliance on financial support from the members, the statute granted denominational preference forbidden by the Establishment Clause.[160]

Religion in Governmental Observances.—The practice of opening legislative sessions with prayers by paid chaplains was upheld in *Marsh v. Chambers*,[161] a case involving prayers in the Nebraska Legislature. The Court relied almost entirely on historical practice. Congress had paid a chaplain and opened sessions with prayers for almost 200 years; the fact that Congress had continued the practice after considering constitutional objections in the Court's view strengthened rather than weakened the historical argument. Similarly, the practice was well rooted in Nebraska and in most other states. Most importantly, the First Amendment had been drafted in the First Congress with an awareness of the chaplaincy practice, and this practice was not prohibited or discontinued. The Court did not address the lower court's findings,[162] amplified in Justice Brennan's dissent, that each aspect of the *Lemon v. Kurtzman* tripartite test had been violated. Instead of constituting an application of the tests, therefore, *Marsh* can be read as representing an exception to their application.[163]

A different form of governmentally sanctioned religious observance—inclusion of religious symbols in governmentally sponsored holiday displays—was twice before the Court, with varying results. In 1984, in *Lynch v. Donnelly*,[164] the Court found no violation of

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[159] Larson v. Valente, 456 U.S. 228 (1982). Two Justices dissented on the merits, id. at 258 (Justices White and Rehnquist), while two other Justices dissented on a standing issue. Id. at 264 (Chief Justice Burger and Justice O'Connor).

[160] Id. at 246–51. *Compare* Heffron v. ISKCON, 452 U.S. 640, 652–53 (1981), and id. at 659 n.3 (Justice Brennan, concurring in part and dissenting in part) (dealing with a facially neutral solicitation rule distinguishing between religious groups that have a religious tenet requiring peripatetic solicitation and those who do not).

[161] 463 U.S. 783 (1983). *Marsh* was a 6–3 decision, with Chief Justice Burger's opinion for the Court being joined by Justices White, Blackmun, Powell, Rehnquist, and O'Connor, and with Justices Brennan, Marshall, and Stevens dissenting.

[162] Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982).

[163] School prayer cases were distinguished on the basis that legislators, as adults, are presumably less susceptible than are schoolchildren to religious indoctrination and peer pressure, 463 U.S. at 792, but there was no discussion of the tests themselves.

[164] 465 U.S. 668 (1984). *Lynch* was a 5–4 decision, with Justice Blackmun, who voted with the majority in *Marsh*, joining the *Marsh* dissenters in this case. Again, Chief Justice Burger wrote the opinion of the Court, joined by the other majority

the Establishment Clause occasioned by inclusion of a Nativity scene (creche) in a city's Christmas display; in 1989, in *Allegheny County v. Greater Pittsburgh ACLU*,[165] inclusion of a creche in a holiday display was found to constitute a violation. Also at issue in *Allegheny County* was inclusion of a menorah in a holiday display; here the Court found no violation. The setting of each display was crucial to the varying results in these cases, the determinant being whether the Court majority believed that the overall effect of the display was to emphasize the religious nature of the symbols, or whether instead the emphasis was primarily secular. Perhaps equally important for future cases, however, was the fact that the four dissenters in *Allegheny County* would have upheld both the creche and menorah displays under a more relaxed, deferential standard.

Chief Justice Burger's opinion for the Court in *Lynch* began by expanding on the religious heritage theme exemplified by *Marsh*; other evidence that "'[w]e are a religious people whose institutions presuppose a Supreme Being'"[166] was supplied by reference to the national motto "In God We Trust," the affirmation "one nation under God" in the pledge of allegiance, and the recognition of both Thanksgiving and Christmas as national holidays. Against that background, the Court then determined that the city's inclusion of the creche in its Christmas display had a legitimate secular purpose in recognizing "the historical origins of this traditional event long [celebrated] as a National Holiday,"[167] and that its primary effect was not to advance religion. The benefit to religion was called "indirect, remote, and incidental," and in any event no greater than the benefit resulting from other actions that had been found to be permissible, e.g. the provision of transportation and textbooks to parochial school students, various assistance to church-supported colleges, Sunday closing laws, and legislative prayers.[168] The Court also reversed the lower court's finding of entanglement based only on "political divisiveness."[169]

Allegheny County was also decided by a 5–4 vote, Justice Blackmun writing the opinion of the Court on the creche issue, and

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Justices, and again Justice Brennan wrote a dissent, joined by the other dissenters. A concurring opinion was added by Justice O'Connor, and a dissenting opinion was added by Justice Blackmun.

[165] 492 U.S. 573 (1989).

[166] 465 U.S. at 675, quoting Zorach v. Clausen, 343 U.S. 306, 313 (1952).

[167] 465 U.S. at 680.

[168] 465 U.S. at 681–82. Note that, while the extent of benefit to religion was an important factor in earlier cases, it was usually balanced against the secular effect of the same practice rather than the religious effects of other practices.

[169] 465 U.S. at 683–84.

there being no opinion of the Court on the menorah issue.[170] To the majority, the setting of the creche was distinguishable from that in *Lynch*. The creche stood alone on the center staircase of the county courthouse, bore a sign identifying it as the donation of a Roman Catholic group, and also had an angel holding a banner proclaiming "Gloria in Exclesis Deo." Nothing in the display "detract[ed] from the creche's religious message," and the overall effect was to endorse that religious message.[171] The menorah, on the other hand, was placed outside a government building alongside a Christmas tree and a sign saluting liberty, and bore no religious messages. To Justice Blackmun, this grouping merely recognized "that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status";[172] to concurring Justice O'Connor, the display's "message of pluralism" did not endorse religion over nonreligion even though Chanukah is primarily a religious holiday and even though the menorah is a religious symbol.[173] The dissenters, critical of the endorsement test proposed by Justice O'Connor and of the three-part *Lemon* test, would instead distill two principles from the Establishment Clause: "government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a state religion or religious faith, or tends to do so.'"[174]

Miscellaneous.—In *Larkin v. Grendel's Den*,[175] the Court held that the Establishment Clause is violated by a delegation of governmental decisionmaking to churches. At issue was a state statute permitting any church or school to block issuance of a liquor license to any establishment located within 500 feet of the church or school. While the statute had a permissible secular purpose of protecting churches and schools from the disruptions often associated with liquor establishments, the Court indicated that these purposes could be accomplished by other means, e.g. an outright ban on liquor outlets within a prescribed distance, or the vesting of discretionary authority in a governmental decisionmaker required to consider the views of affected parties. However, the

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[170] Justice O'Connor, who had concurred in *Lynch*, was the pivotal vote, joining the *Lynch* dissenters to form the majority in *Allegheny County*. Justices Scalia and Kennedy, not on the Court in 1984, replaced Chief Justice Burger and Justice Powell in voting to uphold the creche display; Justice Kennedy authored the dissenting opinion, joined by the other three.

[171] 492 U.S. at 598, 600.

[172] Id. at 616.

[173] Id. at 635.

[174] Id. at 659.

[175] 459 U.S. 116 (1982).

conferral of a veto authority on churches had a primary effect of advancing religion both because the delegation was standardless (thereby permitting a church to exercise the power to promote parochial interests), and because "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some."[176] Moreover, the Court determined, because the veto "enmeshes churches in the processes of government," it represented an entanglement offensive to the "core rationale underlying the Establishment Clause"—"[to prevent] 'a fusion of governmental and religious functions.'"[177]

FREE EXERCISE OF RELIGION

"The Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions there by civil authority."[178] It bars "governmental regulation of religious *beliefs* as such,"[179] prohibiting misuse of secular governmental programs "to impede the observance of one or all religions or . . . to discriminate invidiously between religions . . . even though the burden may be characterized as being only indirect."[180] Freedom of conscience is the basis of the free exercise clause, and government may not penalize or discriminate against an individual or a group of individuals because of their religious views nor may it compel persons to affirm any particular beliefs.[181] Interpretation is complicated, however, by the fact that exercise of religion usually entails ritual or other practices that constitute "conduct" rather than pure "belief." When it comes to protecting conduct as free exercise, the Court has been inconsistent.[182] It has long been held that the Free Exercise

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[176] 459 U.S. at 125–26. *But cf.* Marsh v. Chambers, 463 U.S. 783 (1983), involving no explicit consideration of the possible symbolic implication of opening legislative sessions with prayers by paid chaplains.

[177] 459 U.S. at 126–27, quoting *Abington*, 374 U.S. 203, 222.

[178] Abington School District v. Schempp, 374 U.S. 203, 222–23 (1963).

[179] Sherbert v. Verner, 374 U.S 398, 402 (1963) (emphasis in original).

[180] Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

[181] Sherbert v. Verner, 374 U.S. 398, 402 (1963); Torcaso v. Watkins, 367 U.S. 488 (1961).

[182] Academics as well as the Justices grapple with the extent to which religious practices as well as beliefs are protected by the Free Exercise Clause. For contrasting academic views of the origins and purposes of the Free Exercise Clause, *compare* McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990) (concluding that constitutionally compelled exemptions from generally applicable laws are consistent with the Clause's origins in religious pluralism) *with* Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1989–90) (arguing that such

Clause does not necessarily prevent government from requiring the doing of some act or forbidding the doing of some act merely because religious beliefs underlie the conduct in question.[183] What has changed over the years is the Court's willingness to hold that some religiously motivated conduct is protected from generally applicable prohibitions.

The relationship between the Free Exercise and Establishment Clauses varies with the expansiveness of interpretation of the two clauses. In a general sense both clauses proscribe governmental involvement with and interference in religious matters, but there is possible tension between a requirement of governmental neutrality derived from the Establishment Clause and a Free-Exercise-derived requirement that government accommodate some religious practices.[184] So far, the Court has harmonized interpretation by denying that free-exercise-mandated accommodations create establishment violations, and also by upholding some legislative accommodations not mandated by free exercise requirements. "This Court has long recognized that government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."[185] In holding that a state could not deny unemployment benefits to Sabbatarians who refused Saturday work, for example, the Court denied that it was "fostering an 'establishment' of the Seventh-Day Adventist religion, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall."[186] Legislation granting religious exemptions not held to

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exemptions establish an invalid preference for religious beliefs over non-religious beliefs).

[183] E.g., Reynolds v. United States, 98 U.S. 145 (1879); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Prince v. Massachusetts, 321 U.S. 158 (1944); Braunfeld v. Brown, 366 U.S. 599 (1961); United States v. Lee, 455 U.S. 252 (1982); Employment Division v. Smith, 494 U.S. 872 (1990).

[184] "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." Walz v. Tax Comm'n, 397 U.S. 668–69 (1970).

[185] Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144–45 (1987). A similar accommodative approach was suggested in *Walz*: "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without [governmental] sponsorship and without interference." 397 U.S. at 669.

[186] Sherbert v. Verner, 374 U.S. 398, 409 (1963). *Accord*, Thomas v. Review Bd., 450 U.S. 707, 719–20 (1981). Dissenting in *Thomas*, Justice Rehnquist argued that *Sherbert* and *Thomas* created unacceptable tensions between the Establishment and Free Exercise Clauses, and that requiring the States to accommodate persons like

have been required by the Free Exercise Clause has also been upheld against Establishment Clause challenge,[187] although it is also possible for legislation to go too far in promoting free exercise.[188]

The Belief-Conduct Distinction.—While the Court has consistently affirmed that the Free Exercise Clause protects religious beliefs, protection for religiously motivated conduct has waxed and waned over the years. The Free Exercise Clause "embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be."[189] In its first free exercise case, involving the power of government to prohibit polygamy, the Court invoked a hard distinction between the two, saying that although laws "cannot interfere with mere religious beliefs and opinions, they may with practices."[190] The rule thus propounded protected only belief, inasmuch as religiously motivated action was to be subjected to the police power of the state to the same extent as would similar action springing from other

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Sherbert and Thomas because of their religious beliefs ran the risk of "establishing" religion under the Court's existing tests. He argued further, however, that less expansive interpretations of both clauses would eliminate this artificial tension. Thus, Justice Rehnquist would have interpreted the Free Exercise Clause as not requiring government to grant exemptions from general requirements that may burden religious exercise but that do not prohibit religious practices outright, and would have interpreted the Establishment Clause as not preventing government from voluntarily granting religious exemptions. 450 U.S. at 720–27. By 1990 these views had apparently gained ascendancy, Justice Scalia's opinion for the Court in the "peyote" case suggesting that accommodation should be left to the political process, i.e., that states could constitutionally provide exceptions in their drug laws for sacramental peyote use, even though such exceptions are not constitutionally required. Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

[187] See, e.g., Walz v. Tax Comm'n, 397 U.S. 664 (upholding property tax exemption for religious organizations); Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (upholding Civil Rights Act exemption allowing religious institutions to restrict hiring to members of religion); Gillette v. United States, 401 U.S. 437, 453–54 (1971) (interpreting conscientious objection exemption from military service).

[188] *See, e.g.,* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788–89 (1973) (tuition reimbursement grants to parents of parochial school children violate Establishment Clause in spite of New York State's argument that program was designed to promote free exercise by enabling low-income parents to send children to church schools); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (state sales tax exemption for religious publications violates the Establishment Clause) (plurality opinion).

[189] Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

[190] Reynolds v. United States, 98 U.S. 145, 166 (1878). "Crime is not the less odious because sanctioned by what any particular sect may designate as 'religion.'" Davis v. Beason, 133 U.S. 333, 345 (1890). In another context, Justice Sutherland in United States v. Macintosh, 283 U.S. 605, 625 (1931), suggested a plenary governmental power to regulate action in denying that recognition of conscientious objection to military service was of a constitutional magnitude, saying that "unqualified allegiance to the Nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God."

motives. The *Reynolds* no-protection rule was applied in a number of cases,[191] but later cases established that religiously grounded conduct is not always outside the protection of the free exercise clause.[192] Instead, the Court began to balance the secular interest asserted by the government against the claim of religious liberty asserted by the person affected; only if the governmental interest was "compelling" and if no alternative forms of regulation would serve that interest was the claimant required to yield.[193] Thus, while freedom to engage in religious practices was not absolute, it was entitled to considerable protection.

Recent cases evidence a narrowing of application of the compelling interest test, and a corresponding constriction on the freedom to engage in religiously motivated conduct. First, the Court purported to apply strict scrutiny, but upheld the governmental action anyhow. Next the Court held that the test is inappropriate in the contexts of military and prison discipline.[194] Then, more importantly, the Court ruled in *Employment Division v. Smith* that "if prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[195] Therefore, the Court concluded, the Free Exercise Clause does not prohibit a state from applying generally applicable criminal penalties to use of peyote in a religious ceremony, or from denying unemployment benefits to persons dismissed from their jobs because of religious ceremonial use of peyote. Accommodation of such religious practices must be found in "the political process," the Court noted; statutory religious-practice exceptions are permissible, but

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[191] Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination); Prince v. Massachusetts 321 U.S. 158 (1944) (child labor); Cleveland v. United States, 329 U.S. 14 (1946) (polygamy). In Sherbert v. Verner, 374 U.S. 398, 403 (1963), Justice Brennan asserted that the "conduct or activities so regulated [in the cited cases] have invariably posed some substantial threat to public safety, peace or order."

[192] Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); *cf.* Braunfeld v. Brown, 366 U.S. 599, 607 (1961): "[I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."

[193] Sherbert v. Verner, 374 U.S. 398, 403, 406–09 (1963). In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court recognized compelling state interests in provision of public education, but found insufficient evidence that those interests (preparing children for citizenship and for self-reliance) would be furthered by requiring Amish children to attend public schools beyond the eighth grade. Instead, the evidence showed that the Amish system of vocational education prepared their children for life in their self-sufficient communities.

[194] Goldman v. Weinberger, 475 U.S. 503 (1986); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

[195] 494 U.S. 872, 878 (1990).

not "constitutionally required."[196] The result is tantamount to a return to the *Reynolds* belief-conduct distinction.

The Mormon Cases.—The Court's first encounter with free exercise claims occurred in a series of cases in which the Federal Government and the territories moved against the Mormons because of their practice of polygamy. Actual prosecutions and convictions for bigamy presented little problem for the Court, inasmuch as it could distinguish between beliefs and acts.[197] But the presence of large numbers of Mormons in some of the territories made convictions for bigamy difficult to obtain, and in 1882 Congress enacted a statute which barred "bigamists," "polygamists," and "any person cohabiting with more than one woman" from voting or serving on juries. The Court sustained the law, even as applied to persons entering the state prior to enactment of the original law prohibiting bigamy and to persons as to whom the statute of limitations had run.[198] Subsequently, an act of a territorial legislature which required a prospective voter not only to swear that he was not a bigamist or polygamist but as well that "I am not a member of any order, organization or association which teaches, advises, counsels or encourages its members, devotees or any other person to commit the crime of bigamy or polygamy . . . or which practices bigamy, polygamy or plural or celestial marriage as a doctrinal rite of such organization; that I do not and will not, publicly or privately, or in any manner whatever teach, advise, counsel or encourage any person to commit the crime of bigamy or polygamy . . . ," was upheld in an opinion that condemned plural marriage and its advocacy as equal evils.[199] And, finally, the Court sustained the revocation of the charter of the Mormon Church and confiscation of all church property not actually used for religious worship or for burial.[200]

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[196] Id. at 890.

[197] Reynolds v. United States, 98 U.S. 145 (1879); *cf.* Cleveland v. United States, 329 U.S. 14 (1946) (no religious-belief defense to Mann Act prosecution for transporting a woman across state line for the "immoral purpose" of polygamy).

[198] Murphy v. Ramsey, 114 U.S. 15 (1885).

[199] Davis v. Beason, 133 U.S. 333 (1890). "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. . . . To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases." Id. at 341–42.

[200] The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890). "[T]he property of the said corporation . . . [is to be used to promote] the practice of polygamy—a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world. . . . The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity had produced in the Western world." Id. at 48–49.

The Jehovah's Witnesses Cases.—In contrast to the Mormons, the sect known as Jehovah's Witnesses, in many ways as unsettling to the conventional as the Mormons were,[201] provoked from the Court a lengthy series of decisions[202] expanding the rights of religious proselytizers and other advocates to utilize the streets and parks to broadcast their ideas, though the decisions may be based more squarely on the speech clause than on the free exercise clause. The leading case is *Cantwell v. Connecticut.*[203] Three Jehovah's Witnesses were convicted under a statute which forbade the unlicensed soliciting of funds for religious or charitable purposes, and also under a general charge of breach of the peace. The solicitation count was voided as an infringement on religion because the issuing officer was authorized to inquire whether the applicant did have a religious cause and to decline a license if in his view the cause was not religious. Such power amounted to a previous restraint upon the exercise of religion and was invalid, the Court held.[204] The breach of the peace count arose when the three accosted two Catholics in a strongly Catholic neighborhood and played them a phonograph record which grossly insulted the Christian religion in general and the Catholic Church in particular. The Court voided this count under the clear-and-present danger test, finding that the interest sought to be upheld by the State did not justify the suppression of religious views that simply annoyed listeners.[205]

There followed a series of sometimes conflicting decisions. At first, the Court sustained the application of a non-discriminatory li-

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[201] For recent cases dealing with other religious groups discomfiting to the mainstream, see Heffron v. ISKCON, 452 U.S. 640 (1981) (Hare Krishnas); Larson v. Valente, 456 U.S. 228 (1982) (Unification Church).

[202] Most of the cases are collected and categorized by Justice Frankfurter in Niemotko v. Maryland, 340 U.S. 268, 273 (1951) (concurring opinion).

[203] 310 U.S. 296 (1940).

[204] Id. at 303–07. "The freedom to act must have appropriate definition to preserve the enforcement of that protection [of society]. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. . . . [A] State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment." Id. at 304.

[205] Id. at 307–11. "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probabilities of excesses and abuses, these liberties are in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." Id. at 310.

cense fee to vendors of religious books and pamphlets,[206] but eleven months later it vacated its former decision and struck down such fees.[207] A city ordinance making it unlawful for anyone distributing literature to ring a doorbell or otherwise summon the dwellers of a residence to the door to receive such literature was held in violation of the First Amendment when applied to distributors of leaflets advertising a religious meeting.[208] But a state child labor law was held to be validly applied to punish the guardian of a nine-year old child who permitted her to engage in "preaching work" and the sale of religious publications after hours.[209] The Court decided a number of cases involving meetings and rallies in public parks and other public places by upholding licensing and permit requirements which were premised on nondiscriminatory "times, places, and manners" terms and which did not seek to regulate the content of the religious message to be communicated.[210]

Free Exercise Exemption From General Governmental Requirements.—As described above, the Court gradually abandoned its strict belief-conduct distinction, and developed a balancing test to determine when a uniform, nondiscriminatory requirement by government mandating action or nonaction by citizens must allow exceptions for citizens whose religious scruples forbid compliance. Then, in 1990, the Court reversed direction in *Employment Division v. Smith*,[211] confining application of the "compelling interest" test to a narrow category of cases.

In early cases the Court sustained the power of a State to exclude from its schools children who because of their religious beliefs would not participate in the salute to the flag,[212] only within a short time to reverse itself and condemn such exclusions, but on

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[206] Jones v. Opelika, 316 U.S. 584 (1942).

[207] Jones v. Opelika, 319 U.S. 103 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943). See also Follett v. McCormick, 321 U.S. 573 (1944) (invalidating a flat licensing fee for booksellers). *Murdock* and *Follett* were distinguished in Jimmy Swaggart Ministries v. California Bd. of Equalization, 493 U.S. 378, 389 (1990) as applying "only where a flat license fee operates as a prior restraint"; upheld in *Swaggart* was application of a general sales and use tax to sales of religious publications.

[208] Martin v. City of Struthers, 319 U.S. 141 (1943). *But cf.* Breard v. City of Alexandria, 341 U.S. 622 (1951) (similar ordinance sustained in commercial solicitation context).

[209] Prince v. Massachusetts, 321 U.S. 158 (1944).

[210] E.g., Niemotko v. Maryland, 340 U.S. 268 (1951); Kunz v. New York, 340 U.S. 290 (1951); Fowler v. Rhode Island, 345 U.S. 67 (1953); Poulos v. New Hampshire, 345 U.S. 395 (1953). *See also* Larson v. Valente, 456 U.S. 228 (1982) (solicitation on state fair ground by Unification Church members).

[211] 494 U.S. 872 (1990).

[212] Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

speech grounds rather than religious grounds.[213] Also, the Court seemed to be clearly of the view that government could compel those persons religiously opposed to bearing arms to take an oath to do so or to receive training to do so,[214] only in later cases by its statutory resolution to cast doubt on this resolution,[215] and still more recently to leave the whole matter in some doubt.[216]

Braunfeld v. Brown[217] held that the free exercise clause did not mandate an exemption from Sunday Closing Laws for an Orthodox Jewish merchant who observed Saturday as the Sabbath and was thereby required to be closed two days of the week rather than one. This requirement did not prohibit any religious practices, the Court's plurality pointed out, but merely regulated secular activity in a manner making religious exercise more expensive.[218] "If the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."[219]

Within two years the Court in *Sherbert v. Verner*[220] extended the line of analysis to require a religious exemption from a secular, regulatory piece of economic legislation. Sherbert was disqualified from receiving unemployment compensation because, as a Seventh

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[213] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). On the same day, the Court held that a State may not forbid the distribution of literature urging and advising on religious grounds that citizens refrain from saluting the flag. Taylor v. Mississippi, 319 U.S. 583 (1943).

[214] *See* United States v. Schwimmer, 279 U.S. 644 (1929); United States v. Macintosh, 283 U.S. 605 (1931); and United States v. Bland, 283 U.S. 636 (1931) (all interpreting the naturalization law as denying citizenship to a conscientious objector who would not swear to bear arms in defense of the country), all three of which were overruled by Girouard v. United States, 328 U.S. 61 (1946), on strictly statutory grounds. *See also* Hamilton v. Board of Regents, 293 U.S. 245 (1934) (upholding expulsion from state university for a religiously based refusal to take a required course in military training); In re Summers, 325 U.S. 561 (1945) (upholding refusal to admit applicant to bar because as conscientious objector he could not take required oath).

[215] United States v. Seeger, 380 U.S. 163 (1965); *see* id. at 188 (Justice Douglas concurring); Welsh v. United States, 398 U.S. 333 (1970); *and see* id. at 344 (Justice Harlan concurring).

[216] Gillette v. United States, 401 U.S. 437 (1971) (holding that secular considerations overbalanced free exercise infringement of religious beliefs of objectors to particular wars).

[217] 366 U.S. 599 (1961). On Sunday Closing Laws and the establishment clause, *see* supra, pp. 987–988.

[218] 366 U.S. at 605–06.

[219] Id. at 607 (plurality opinion). The concurrence balanced the economic disadvantage suffered by the Sabbatarians against the important interest of the State in securing its day of rest regulation. McGowan v. Maryland, 366 U.S. at 512–22 (1961). Three Justices dissented. Id. at 561 (Justice Douglas); Braunfeld v. Brown, 366 U.S. at 610 (Justice Brennan), 616 (Justice Stewart).

[220] 374 U.S. 398 (1963).

Day Adventist, she would not accept Saturday work; according to state officials, this meant she was not complying with the statutory requirement to stand ready to accept suitable employment. This denial of benefits could be upheld, the Court said, only if "her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or [if] any incidental burden on the free exercise of appellant's religions may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . .'"[221] First, the disqualification was held to impose a burden on the free exercise of Sherbert's religion; it was an indirect burden and it did not impose a criminal sanction on a religious practice, but the disqualification derived solely from her practice of her religion and constituted a compulsion upon her to forgo that practice.[222] Second, there was no compelling interest demonstrated by the State. The only interest asserted was the prevention of the possibility of fraudulent claims, but that was merely a bare assertion. Even if there was a showing of demonstrable danger, "it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[223]

Sherbert was reaffirmed and applied in subsequent cases involving denial of unemployment benefits. *Thomas v. Review Board*[224] involved a Jehovah's Witness who quit his job when his employer transferred him from a department making items for industrial use to a department making parts for military equipment. While his belief that his religion proscribed work on war materials was not shared by all other Jehovah's Witnesses, the Court held that it was inappropriate to inquire into the validity of beliefs asserted to be religious so long as the claims were made in good faith (and the beliefs were at least arguably religious). The same result was reached in a 1987 case, the fact that the employee's religious conversion rather than a job reassignment had created the conflict between work and Sabbath observance not being considered mate-

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[221] Id. at 403, quoting NAACP v. Button, 371 U.S. 415, 438 (1963).

[222] Id. at 403–06.

[223] Id. at 407. *Braunfeld* was distinguished because of "a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers." That secular objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. Requiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable. Id. at 408–09. Other Justices thought that *Sherbert* overruled *Braunfeld*. Id. at 413, 417 (Justice Stewart concurring), 418 (Justice Harlan and White dissenting).

[224] 450 U.S. 707 (1981).

rial to the determination that free exercise rights had been burdened by the denial of unemployment compensation.[225] Also, a state may not deny unemployment benefits solely because refusal to work on the Sabbath was based on sincere religious beliefs held independently of membership in any established religious church or sect.[226]

The Court applied the *Sherbert* balancing test in several areas outside of unemployment compensation. The first two such cases involved the Amish, whose religion requires them to lead a simple life of labor and worship in a tight-knit and self-reliant community largely insulated from the materialism and other distractions of modern life. *Wisconsin v. Yoder*[227] held that a state compulsory attendance law, as applied to require Amish children to attend ninth and tenth grades of public schools in contravention of Amish religious beliefs, violated the Free Exercise Clause. The Court first determined that the beliefs of the Amish were indeed religiously based and of great antiquity.[228] Next, the Court rejected the State's arguments that the Free Exercise Clause extends no protection because the case involved "action" or "conduct" rather than belief, and because the regulation, neutral on its face, did not single out religion.[229] Instead, the Court went on to analyze whether a "compelling" governmental interest required such "grave interference" with Amish belief and practices.[230] The governmental interest was not the general provision of education, inasmuch as the State and the Amish were in agreement on education through the first eight grades and since the Amish provided their children with additional education of a primarily vocational nature. The State's interest was really that of providing two additional years of public schooling. Nothing in the record, felt the Court, showed that this interest outweighed the great harm which it would do to traditional Amish religious beliefs to impose the compulsory ninth and tenth grade attendance.[231]

But in recent years the Court's decisions evidenced increasing discontent with the compelling interest test. In several cases the

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[225] Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987).

[226] Frazee v. Illinois Dep't of Employment Security, 489 U.S. 829 (1989). Cf. United States v. Seeger, 380 U.S. 163 (1965) (interpreting the religious objection exemption from military service as encompassing a broad range of formal and personal religious beliefs).

[227] 406 U.S. 205 (1972).

[228] Id. at 215–19. Why the Court felt impelled to make these points is unclear, since it is settled that it is improper for courts to inquire into the interpretation of religious belief. E.g., United States v. Lee, 455 U.S. 252, 257 (1982).

[229] Id. at 219–21.

[230] Id. at 221.

[231] Id. at 221–29.

Court purported to apply strict scrutiny but nonetheless upheld the governmental action in question. In *United States v. Lee*,[232] for example, the Court denied the Amish exemption from compulsory participation in the Social Security system. The objection was that payment of taxes by Amish employers and employees and the receipt of public financial assistance were forbidden by their religious beliefs. Accepting that this was true, the Court nonetheless held that the governmental interest was compelling and therefore sufficient to justify the burdening of religious beliefs.[233] Compulsory payment of taxes was necessary for the vitality of the system; either voluntary participation or a pattern of exceptions would undermine its soundness and make the program difficult to administer.

"A compelling governmental interest" was also found to outweigh free exercise interests in *Bob Jones University v. United States*,[234] in which the Court upheld the I.R.S.'s denial of tax exemptions to church-run colleges whose racially discriminatory admissions policies derived from religious beliefs. The Federal Government's "fundamental, overriding interest in eradicating racial discrimination in education"—found to be encompassed in common law standards of "charity" underlying conferral of the tax exemption on "charitable" institutions—"substantially outweighs" the burden on free exercise. Nor could the schools' free exercise interests be accommodated by less restrictive means.[235]

In other cases the Court found reasons not to apply compelling interest analysis. Religiously motivated speech, like other speech, can be subjected to reasonable time, place, or manner regulation serving a "substantial" rather than "compelling" governmental interest.[236] *Sherbert*'s threshold test, inquiring "whether government has placed a substantial burden on the observation of a central religious belief or practice,"[237] eliminates other issues. As long as a particular religion does not proscribe the payment of taxes (as was the case with the Amish in *Lee*), the Court has denied that there

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[232] 455 U.S. 252 (1982).

[233] The Court's formulation was whether the limitation on religious exercise was "essential to accomplish an overriding governmental interest." 455 U.S. at 257–58. *Accord*, Hernandez v. Commissioner, 490 U.S. 680, 699–700 (1989) (any burden on free exercise imposed by disallowance of a tax deduction was "justified by the 'broad public interest in maintaining a sound tax system' free of 'myriad exceptions flowing from a wide variety of religious beliefs'").

[234] 461 U.S. 574 (1983).

[235] 461 U.S. at 604.

[236] Heffron v. ISKCON, 452 U.S. 640 (1981). Requiring Krishnas to solicit at fixed booth sites on county fair grounds is a valid time, place, and manner regulation, although, as the Court acknowledged, id. at 652, peripatetic solicitation was an element of Krishna religious rites.

[237] As restated in Hernandez v. Commissioner, 490 U.S. 680, 699 (1989).

is any constitutionally significant burden resulting from "imposition of a generally applicable tax [that] merely decreases the amount of money [adherents] have to spend on [their] religious activities."[238] The one caveat the Court left—that a generally applicable tax might be so onerous as to "effectively choke off an adherent's religious practices"[239]—may be a moot point in light of the Court's general ruling in *Employment Division v. Smith*, discussed below.

The Court also drew a distinction between governmental regulation of individual conduct, on the one hand, and restraint of governmental conduct as a result of individuals' religious beliefs, on the other. *Sherbert's* compelling interest test has been held inapplicable in cases viewed as involving attempts by individuals to alter governmental actions rather than attempts by government to restrict religious practices. Emphasizing the absence of coercion on religious adherents, the Court in *Lyng v. Northwest Indian Cemetery Protective Ass'n*[240] held that the Forest Service, even absent a compelling justification, could construct a road through a portion of a national forest held sacred and used by Indians in religious observances. The Court distinguished between governmental actions having the indirect effect of frustrating religious practices and those actually prohibiting religious belief or conduct: "'the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'"[241] Similarly, even a sincerely held religious belief that assignment of a social security number would rob a child of her soul was held insufficient to bar the government from using the number for purposes of its own recordkeeping.[242] It mattered not how easily the government could accommodate the religious beliefs or practices (an exemption from the social security number requirement might have been granted with only slight impact on the government's recordkeeping capabilities), since the na-

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[238] Jimmy Swaggart Ministries v. California Bd. of Equalization, 493 U.S. 378, 391 (1990). *See also* Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985) (the Court failing to perceive how application of minimum wage and overtime requirements would burden free exercise rights of employees of a religious foundation, there being no assertion that the *amount* of compensation was a matter of religious import); and Hernandez v. Commissioner, 490 U.S. 680 (1989) (questioning but not deciding whether any burden was imposed by administrative disallowal of deduction for payments deemed to be for commercial rather than religious or charitable purposes).

[239] *Jimmy Swaggart Ministries*, 493 U.S. at 392.

[240] 485 U.S. 439 (1988).

[241] Id. at 451, quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring).

[242] Bowen v. Roy, 476 U.S. 693 (1986).

ture of the governmental actions did not implicate free exercise protections.[243]

Compelling interest analysis is also wholly inapplicable in the context of military rules and regulations, where First Amendment review "is far more deferential than . . . review of similar laws or regulations designed for civilian society."[244] Thus the Court did not question the decision of military authorities to apply uniform dress code standards to prohibit the wearing of a yarmulke by an officer compelled by his Orthodox Jewish religious beliefs to wear the yarmulke.[245]

A high degree of deference is also due decisions of prison administrators having the effect of restricting religious exercise by inmates. The general rule is that prison regulations impinging on exercise of constitutional rights by inmates are "'valid if . . . reasonably related to legitimate penological interests.'"[246] Thus because general prison rules requiring a particular category of inmates to work outside of buildings where religious services were held, and prohibiting return to the buildings during the work day, could be viewed as reasonably related to legitimate penological concerns of security and order, no exemption was required to permit Muslim inmates to participate in Jumu'ah, the core ceremony of their religion.[247] The fact that the inmates were left with no alternative means of attending Jumu'ah was not dispositive, the Court being "unwilling to hold that prison officials are required by the Constitution to sacrifice legitimate penological objectives to that end."[248]

Finally, in *Employment Division v. Smith*[249] the Court indicated that the compelling interest test may apply only in the field of unemployment compensation, and in any event does not apply to require exemptions from generally applicable criminal laws. Criminal laws are "generally applicable" when they apply across

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[243] "In neither case . . . would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity." Lyng, 485 U.S. at 449.

[244] Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

[245] Congress reacted swiftly by enacting a provision allowing military personnel to wear religious apparel while in uniform, subject to exceptions to be made by the Secretary of the relevant military department for circumstances in which the apparel would interfere with performance of military duties or would not be "neat and conservative." Pub. L. 100–180, § 508(a)(2), 101 Stat. 1086 (1987); 10 U.S.C. § 774.

[246] O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

[247] O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

[248] Id. at 351–52 (also suggesting that the ability of the inmates to engage in other activities required by their faith, e.g. individual prayer and observance of Ramadan, rendered the restriction reasonable).

[249] 494 U.S. 872 (1990) (holding that state may apply criminal penalties to use of peyote in a religious ceremony, and may deny unemployment benefits to persons dismissed from their jobs because of religiously inspired use of peyote).

the board regardless of the religious motivation of the prohibited conduct, and are "not specifically directed at . . . religious practices."[250] The unemployment compensation statute at issue in *Sherbert* was peculiarly suited to application of a balancing test because denial of benefits required a finding that an applicant had refused work "without good cause." *Sherbert* and other unemployment compensation cases thus "stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[251] *Wisconsin v. Yoder* and other decisions holding "that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action" were distinguished as involving "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections" such as free speech or "parental rights."[252] Except in the relatively uncommon circumstance when a statute calls for individualized consideration, then, the Free Exercise Clause affords no basis for exemption from a "neutral, generally applicable law." As the Court concluded in *Smith*, accommodation for religious practices incompatible with general requirements must ordinarily be found in "the political process."[253]

The ramifications of *Smith* are potentially widespread. The Court has apparently returned to a belief-conduct dichotomy under which religiously motivated conduct is not entitled to special protection. Laws may not single out religiously motivated conduct for adverse treatment, but formally neutral laws of general applicability may regulate religious conduct (along with other conduct) regardless of the adverse or prohibitory effects on religious exercise. Similar rules govern taxation. Under the Court's rulings in *Smith* and *Swaggart*, religious exemptions from most taxes are a matter of legislative grace rather than constitutional command, since most important taxes (e.g., income, property, sales and use) satisfy the criteria of formal neutrality and general applicability, and are not license fees that can be viewed as prior restraints on expression.[254] The result is equal protection, but not substantive protection, for

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[250] Id. at 878.

[251] Id. at 884.

[252] Id. at 881.

[253] Id. at 890.

[254] This latter condition derives from the fact that the Court in *Swaggart* distinguished earlier decisions by characterizing them as applying only to flat license fees. *See* n., *supra*. *See also* Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 39–41.

religious exercise.[255] The Court's approach also accords less protection to religiously-based conduct than is accorded expressive conduct that implicates speech but not religious values.[256] On the practical side, relegation of free exercise claims to the political process may, as concurring Justice O'Connor warned, result in less protection for small, unpopular religious sects.[257]

Religious Test Oaths.—However the Court has been divided in dealing with religiously-based conduct and governmental compulsion of action or nonaction, it was unanimous in voiding a state constitutional provision which required a notary public, as a condition of perfecting his appointment, to declare his belief in the existence of God. The First Amendment, considered with the religious oath provision of Article VI, makes it impossible "for government, state or federal, to restore the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly, profess to have, a belief in some particular kind of religious concept."[258]

Religious Disqualification.—Unanimously, but with great differences of approach, the Court declared invalid a Tennessee statute barring ministers and priests from service in a specially called state constitutional convention.[259] The Court's decision necessarily implied that the constitutional provision on which the statute was based, barring ministers and priests from service as state legislators, was also invalid.

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[255] Justice O'Connor, concurring in *Smith,* argued that "the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause." 494 U.S. at 901.

[256] Although neutral laws affecting expressive conduct are not measured by a "compelling interest" test, they are "subject to a balancing, rather than categorical, approach." Smith, 494 U.S. at 902 (O'Connor, J., concurring).

[257] Id. at 1613.

[258] Torcaso v. Watkins, 367 U.S. 488, 494 (1961).

[259] McDaniel v. Paty, 435 U.S. 618 (1978). The plurality opinion by Chief Justice Burger, joined by Justices Powell, Rehnquist, and Stevens, found the case governed by *Sherbert v. Verner's* strict scrutiny test. The State had failed to show that its view of the dangers of clergy participation in the political process had any validity; *Torcaso v. Watkins* was distinguished because the State was acting on the status of being a clergyman rather than on one's beliefs. Justice Brennan, joined by Justice Marshall, found *Torcaso* controlling because imposing a restriction upon one's status as a religious person did penalize his religious belief, his freedom to profess or practice that belief. Id. at 629. Justice Stewart also found *Torcaso* dispositive, id. at 642, and Justice White found an equal protection violation because of the restraint upon seeking political office. Id. at 643.

FREEDOM OF EXPRESSION—SPEECH AND PRESS

Adoption and the Common Law Background

Madison's version of the speech and press clauses, introduced in the House of Representatives on June 8, 1789, provided: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[1] The special committee rewrote the language to some extent, adding other provisions from Madison's draft, to make it read: "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed."[2] In this form it went to the Senate, which rewrote it to read: "That Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances."[3] Subsequently, the religion clauses and these clauses were combined by the Senate.[4] The final language was agreed upon in conference.

Debate in the House is unenlightening with regard to the meaning the Members ascribed to the speech and press clause and there is no record of debate in the Senate.[5] In the course of debate, Madison warned against the dangers which would arise "from discussing and proposing abstract propositions, of which the judgment may not be convinced. I venture to say, that if we confine ourselves to an enumeration of simple, acknowledged principles, the ratification will meet with but little difficulty."[6] That the "simple, acknowledged principles" embodied in the First Amendment have occasioned controversy without end both in the courts and out should alert one to the difficulties latent in such spare language. Insofar as there is likely to have been a consensus, it was no doubt the common law view as expressed by Blackstone. "The liberty of the

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[1] 1 ANNALS OF CONGRESS 434 (1789). Madison had also proposed language limiting the power of the States in a number of respects, including a guarantee of freedom of the press, Id. at 435. Although passed by the House, the amendment was defeated by the Senate, *supra,* p. 957.

[2] Id. at 731 (August 15, 1789).

[3] THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1148–49 (B. Schwartz ed. 1971).

[4] Id. at 1153.

[5] The House debate insofar as it touched upon this amendment was concerned almost exclusively with a motion to strike the right to assemble and an amendment to add a right of the people to instruct their Representatives. 1 ANNALS OF CONGRESS 731–49 (August 15, 1789). There are no records of debates in the States on ratification.

[6] Id. at 738.

press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. But to punish as the law does at present any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus, the will of individuals is still left free: the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive to the ends of society, is the crime which society corrects."[7]

Whatever the general unanimity on this proposition at the time of the proposal of and ratification of the First Amendment,[8]

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[7] 4 W. BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 151–52 (T. Cooley 2d rev. ed. 1872). *See* 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1874–86 (Boston: 1833). The most comprehensive effort to assess theory and practice in the period prior to and immediately following adoption of the Amendment is L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960), which generally concluded that the Blackstonian view was the prevailing one at the time and probably the understanding of those who drafted, voted for, and ratified the Amendment.

[8] It would appear that Madison advanced libertarian views earlier than his Jeffersonian compatriots, as witness his leadership of a move to refuse officially to concur in Washington's condemnation of "[c]ertain self-created societies," by which the President meant political clubs supporting the French Revolution, and his success in deflecting the Federalist intention to censure such societies. I. BRANT, JAMES MADISON—FATHER OF THE CONSTITUTION 1787–1800, 416–20 (1950). "If we advert to the nature of republican government," Madison told the House, "we shall find that the censorial power is in the people over the government, and not in the government over the people." 4 ANNALS OF CONGRESS 934 (1794). On the other hand, the early Madison, while a member of his county's committee on public safety, had enthusiastically promoted prosecution of Loyalist speakers and the burning of their pamphlets during the Revolutionary period. 1 PAPERS OF JAMES MADISON 147, 161–62, 190–92 (W. Hutchinson & W. Rachal eds. 1962). There seems little doubt that Jefferson held to the Blackstonian view. Writing to Madison in 1788, he said: "A declaration that the federal government will never restrain the presses from printing anything they please, will not take away the liability of the printers for false facts printed." 13 PAPERS OF THOMAS JEFFERSON 442 (J. Boyd ed. 1955). Commenting a year later to Madison on his proposed amendment, Jefferson suggested that

it appears that there emerged in the course of the Jeffersonian counterattack on the Sedition Act[9] and the use by the Adams Administration of the Act to prosecute its political opponents,[10] something of a libertarian theory of freedom of speech and press,[11] which, however much the Jeffersonians may have departed from it upon assuming power,[12] was to blossom into the theory undergirding Supreme Court First Amendment jurisprudence in modern times. Full acceptance of the theory that the Amendment operates not only to bar most prior restraints of expression but subsequent punishment of all but a narrow range of expression, in political discourse and indeed in all fields of expression, dates from a quite recent period, although the Court's movement toward that position began in its consideration of limitations on speech and press in the period following World War I.[13] Thus, in 1907, Justice Holmes

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the free speech-free press clause might read something like: "The people shall not be deprived or abridged of their right to speak, to write or otherwise to publish anything but false facts affecting injuriously the life, liberty, property, or reputation of others or affecting the peace of the confederacy with foreign nations." 15 PAPERS, *supra*, at 367.

[9] The Act, Ch. 74, 1 Stat. 596 (1798), punished anyone who would "write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute." *See* J. SMITH, FREEDOM'S FETTERS—THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1956).

[10] Id. at 159 et seq.

[11] L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY, ch. 6 (Cambridge, 1960); New York Times Co. v. Sullivan, 376 U.S. 254, 273–76 (1964). But compare L. LEVY, EMERGENCE OF A FREE PRESS (1985), a revised and enlarged edition of LEGACY OF SUPPRESSION, in which Professor Levy modifies his earlier views, arguing that while the intention of the Framers to outlaw the crime of seditious libel, in pursuit of a free speech principle, cannot be established and may not have been the goal, there was a tradition of robust and rowdy expression during the period of the framing that contradicts his prior view that a modern theory of free expression did not begin to emerge until the debate over the Alien and Sedition Acts.

[12] L. LEVY, JEFFERSON AND CIVIL LIBERTIES—THE DARKER SIDE (Cambridge, 1963). Thus President Jefferson wrote to Governor McKean of Pennsylvania in 1803: "The federalists having failed in destroying freedom of the press by their gag-law, seem to have attacked it in an opposite direction; that is, by pushing its licentiousness and its lying to such a degree of prostitution as to deprive it of all credit. . . . This is a dangerous state of things, and the press ought to be restored to its credibility if possible. The restraints provided by the laws of the States are sufficient for this if applied. And I have, therefore, long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses. Not a general prosecution, for that would look like persecution; but a selected one." 9 WORKS OF THOMAS JEFFERSON 449 (P. Ford, ed. 1905).

[13] New York Times Co. v. Sullivan, 376 U.S. 254 (1964), provides the principal doctrinal justification for the development, although the results had long since been fully applied by the Court. In *Sullivan*, Justice Brennan discerned in the controversies over the Sedition Act a crystallization of "a national awareness of the central meaning of the First Amendment," id. at 273, which is that the "right of free public

could observe that even if the Fourteenth Amendment embodied prohibitions similar to the First Amendment, "still we should be far from the conclusion that the plaintiff in error would have us reach. In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare . . . . The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all."[14] But as Justice Holmes also observed, "[t]here is no constitutional right to have all general propositions of law once adopted remain unchanged."[15]

But in *Schenck v. United States*,[16] the first of the post-World War I cases to reach the Court, Justice Holmes, in the opinion of the Court, while upholding convictions for violating the Espionage Act by attempting to cause insubordination in the military service by circulation of leaflets, suggested First Amendment restraints on subsequent punishment as well as prior restraint. "It well may be

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discussion of the stewardship of public officials . . . [is] a fundamental principle of the American form of government." Id. at 275. This "central meaning" proscribes either civil or criminal punishment for any but the most maliciously, knowingly false criticism of government. "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. . . . [The historical record] reflect[s] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." Id. at 276. Madison's Virginia Resolutions of 1798 and his *Report* in support of them brought together and expressed the theories being developed by the Jeffersonians and represent a solid doctrinal foundation for the point of view that the First Amendment superseded the common law on speech and press, that a free, popular government cannot be libeled, and that the First Amendment absolutely protects speech and press. 6 WRITINGS OF JAMES MADISON, 341–406 (G. Hunt. ed. 1908).

[14] Patterson v. Colorado, 205 U.S. 454, 462 (1907) (emphasis original). Justice Frankfurter had similar views in 1951: "The historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest. . . . 'The law is perfectly well settled,' this Court said over fifty years ago, 'that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed.' That this represents the authentic view of the Bill of Rights and the spirit in which it must be construed has been recognized again and again in cases that have come here within the last fifty years." Dennis v. United States, 341 U.S. 494, 521–522, 524 (1951) (concurring opinion). The internal quotation is from Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

[15] Patterson v. Colorado, 205 U.S. 454, 461 (1907).

[16] 249 U.S. 47, 51–52 (1919) (citations omitted).

that the prohibition of laws abridging the freedom of speech is not confined to previous restraints although to prevent them may have been the main purpose . . . . We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. . . . The question in every case is whether the words used are used in such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Justice Holmes along with Justice Brandeis soon went into dissent in their views that the majority of the Court was misapplying the legal standards thus expressed to uphold suppression of speech which offered no threat of danger to organized institutions.[17] But it was with the Court's assumption that the Fourteenth Amendment restrained the power of the States to suppress speech and press that the doctrines developed.[18] At first, Holmes and Brandeis remained in dissent, but in *Fiske v. Kansas*,[19] the Court sustained a First Amendment type of claim in a state case, and in *Stromberg v. California*,[20] a state law was voided on grounds of its interference with free speech.[21] State common law was also voided, the Court in an opinion by Justice Black asserting that the First Amendment enlarged protections for speech, press, and religion beyond those enjoyed under English common law.[22] Development over the years since has been uneven, but by 1964 the Court could say with unanimity: "we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and

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[17] Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919); Schaefer v. United States, 251 U.S. 466 (1920); Pierce v. United States, 252 U.S. 239 (1920); United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407 (1921). A state statute similar to the federal one was upheld in Gilbert v. Minnesota, 254 U.S. 325 (1920).

[18] Gitlow v. New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927). The Brandeis and Holmes dissents in both cases were important formulations of speech and press principles.

[19] 274 U.S. 380 (1927).

[20] 283 U.S. 359 (1931). By contrast, it was not until 1965 that a federal statute was held unconstitutional under the First Amendment. Lamont v. Postmaster General, 381 U.S. 301 (1965). *See also* United States v. Robel, 389 U.S. 258 (1967).

[21] *And see* Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931); Herndon v. Lowry, 301 U.S. 242 (1937); De Jonge v. Oregon, 299 U.S. 353 (1937); Lovell v. Griffin, 303 U.S. 444 (1938).

[22] Bridges v. California, 314 U.S. 252, 263–68 (1941) (overturning contempt convictions of newspaper editor and others for publishing commentary on pending cases).

sometimes unpleasantly sharp attacks on government and public officials."[23] And in 1969, it was said that the cases "have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[24] This development and its myriad applications are elaborated in the following sections.

Freedom of Expression: The Philosophical Basis

Probably no other provision of the Constitution has given rise to so many different views with respect to its underlying philosophical foundations, and hence proper interpretive framework, as has the guarantee of freedom of expression—the free speech and free press clauses.[25] The argument has been fought out among the commentators. "The outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases."[26] Some of the commentators argue in behalf of a complex of values, none of which by itself is sufficient to support a broad-based protection of freedom of expression.[27] Others would limit the basis of the First Amendment to one only among a constellation of possible values and would

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[23] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[24] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[25] While "expression" is not found in the text of the First Amendment, it is used herein, first, as a shorthand term for the freedoms of speech, press, assembly, petition, association, and the like, which are comprehended by the Amendment, and, second, as a recognition of the fact that judicial interpretation of the clauses of the First Amendment has greatly enlarged the definition commonly associated with "speech," as the following discussion will reveal. The term seems well settled, *see,* e.g., T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970), although it has been criticized. F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY, 50–52 (1982). The term also, as used here, conflates the speech and press clauses, explicitly assuming they are governed by the same standards of interpretation and that, in fact, the press clause itself adds nothing significant to the speech clause as interpreted, an assumption briefly defended *infra,* pp. 1026–29.

[26] T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 15 (1970). The practice in the Court is largely to itemize all the possible values the First Amendment has been said to protect. *See,* e.g., Consolidated Edison Co. v. PSC, 447 U.S. 530, 534–35 (1980); First National Bank of Boston v. Bellotti, 435 U.S. 765, 776–77 (1978).

[27] T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970). For Emerson, the four values are (1) assuring individuals self-fulfillment, (2) promoting discovery of truth, (3) providing for participation in decisionmaking by all members of society, and (4) promoting social stability through discussion and compromise of differences. For a persuasive argument in favor of an "eclectic" approach, see Shriffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment,* 78 NW. U.L. REV. 1212 (1983). A compressive discussion of all the theories may be found in F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY (1982).

therefore limit coverage or degree of protection of the speech and press clauses. For example, one school of thought believes that, because of the constitutional commitment to free self-government, only political speech is within the core protected area,[28] although some commentators tend to define more broadly the concept of "political" than one might suppose from the word alone. Others recur to the writings of Milton and Mill and argue that protecting speech, even speech in error, is necessary to the eventual ascertainment of the truth, through conflict of ideas in the marketplace, a view skeptical of our ability to ever know the truth.[29] A broader-grounded view is variously expounded by scholars who argue that freedom of expression is necessary to promote individual self-fulfillment, such as the concept that when speech is freely chosen by the speaker to persuade others it defines and expresses the "self," promotes his liberty,[30] or the concept of "self-realization," the belief that free speech enables the individual to develop his powers and abilities and to make and influence decisions regarding his destiny.[31] The literature is enormous and no doubt the Justices as well as the larger society are influenced by it, and yet the decisions, probably in large part because they are the collective determination of nine individuals, seldom clearly reflect a principled and consistent acceptance of any philosophy.

Freedom of Expression: Is There a Difference Between Speech and Press

Utilization of the single word "expression" to reach speech, press, petition, association, and the like, raises the central question of whether the free speech clause and the free press clause are coextensive; does one perhaps reach where the other does not? It has

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[28] *E.g.,* A. MEIKLEJOHN, POLITICAL FREEDOM (1960); Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1 (1971); BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle,* 30 STAN. L. REV. 299 (1978). This contention does not reflect the Supreme Court's view. "It is no doubt true that a central purpose of the First Amendment 'was to protect the free discussion of governmental affairs.' . . . But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexclusive list of labels—is not entitled to full First Amendment protection." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977).

[29] The "marketplace of ideas" metaphor is attributable to Justice Holmes' opinion in Abrams v. United States, 250 U.S. 616, 630 (1919). *See* Scanlon, *Freedom of Expression and Categories of Expression,* 40 U. PITT. L. REV. 519 (1979). The theory has been the dominant one in scholarly and judicial writings. Baker, *Scope of the First Amendment Freedom of Speech,* 25 UCLA L. REV. 964, 967–74 (1978).

[30] *E.g.,* Baker *"Process of Change and the Liberty Theory of the First Amendment,* 55 S. CAL. L. REV. 293 (1982); Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech,* 130 U. PA. L. REV. 646 (1982).

[31] Redish, *The Value of Free Speech,* 130 U. PA. L. REV. 591 (1982).

been much debated, for example, whether the "institutional press" may assert or be entitled to greater freedom from governmental regulations or restrictions than are non-press individuals, groups, or associations. Justice Stewart has argued: "That the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively."[32] But as Chief Justice Burger wrote: "The Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others."[33]

Several Court holdings do firmly point to the conclusion that the press clause does not confer on the press the power to compel government to furnish information or to give the press access to information that the public generally does not have.[34] Nor in many respects is the press entitled to treatment different in kind than the treatment any other member of the public may be subjected to.[35] "Generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects."[36] Yet, it does seem clear that to some extent the press, because of the role it plays in keeping the public informed and in the dissemination of news and information, is entitled to particular if not special deference that others are not similarly entitled to, that its role constitutionally entitles it to governmental "sensitivity," to use Justice Stewart's word.[37] What difference such

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[32] Houchins v. KQED, 438 U.S. 1, 17 (1978) (concurring opinion). Justice Stewart initiated the debate in a speech, subsequently reprinted as Stewart, *Or of the Press*, 26 HASTINGS L. J. 631 (1975). Other articles are cited in First National Bank of Boston v. Bellotti, 435 U.S. 765, 795 (1978) (Chief Justice Burger concurring).

[33] Id. at 798. The Chief Justice's conclusion was that the institutional press had no special privilege as the press.

[34] Houchins v. KQED, 438 U.S. 1 (1978), and id. at 16 (Justice Stewart concurring); Saxbe v. Washington Post, 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974); Nixon v. Warner Communications, 435 U.S. 589 (1978). The trial access cases, whatever they may precisely turn out to mean, recognize a right of access of both public and press to trials. Richmond Newspapers v. Virginia, 448 U.S. 555 (1980); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

[35] Branzburg v. Hayes, 408 U.S. 665 (1972) (grand jury testimony be newspaper reporter); Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (search of newspaper offices); Herbert v. Lando, 441 U.S. 153 (1979) (defamation by press); Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (newspaper's breach of promise of confidentiality).

[36] Cohen v. Cowles Media, 501 U.S. 663, 669 (1991).

[37] *E.g.*, Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974); Landmark Communications v. Virginia, 435 U.S. 829 (1978). *See also* Zurcher v. Stanford Daily, 436 U.S. 547, 563–67 (1978), and id. at 568 (Justice Powell concurring); Branzburg v. Hayes, 408 U.S. 665, 709 (1972) (Justice Powell concurring). Several concurring opinions in Richmond Newspapers v. Virginia, 448 U.S. 555 (1980), imply recognition of some right of the press to gather information that apparently may not be

a recognized "sensitivity" might make in deciding cases is difficult to say.

The most interesting possibility lies in the area of First Amendment protection of good faith defamation.[38] Justice Stewart argued that the *Sullivan* privilege is exclusively a free press right, denying that the "constitutional theory of free speech gives an individual any immunity from liability for libel or slander."[39] To be sure, in all the cases to date that the Supreme Court has resolved, the defendant has been, in some manner, of the press,[40] but the Court's decision that corporations are entitled to assert First Amendment speech guarantees against federal and, through the Fourteenth Amendment, state regulations causes the evaporation of the supposed "conflict" between speech clause protection of individuals only and of press clause protection of press corporations as well as of press individuals.[41] The issue, the Court wrote, was not what constitutional rights corporations have but whether the speech which is being restricted is expression that the First Amendment protects because of its societal significance. Because the speech concerned the enunciation of views on the conduct of governmental affairs, it was protected regardless of its source; while the First Amendment protects and fosters individual self-expression as a worthy goal, it also and as important affords the public access to discussion, debate, and the dissemination of information and ideas. Despite *Bellotti's* emphasis upon the nature of the contested speech being political, it is clear that the same principle,

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wholly inhibited by nondiscriminatory constraints. Id. at 582–84 (Justice Stevens), 586 n.2 (Justice Brennan), 599 n.2 (Justice Stewart). On the other hand, the Court has also suggested that the press is protected in order to promote and to protect the exercise of free speech in the society, including the receipt of information by the people. E.g., Mills v. Alabama, 384 U.S. 214, 218–19 (1966); CBS v. FCC, 453 U.S. 367, 394–95 (1981).

[38] New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See* infra, pp. 1136–45.

[39] Stewart, *Or of the Press*, 26 HASTINGS, L. J. 631, 633–35 (1975).

[40] In Hutchinson v. Proxmire, 443 U.S. 111, 133 n.16 (1979), the Court noted that it has never decided whether the *Times* standard applies to an individual defendant. Some think they discern in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), intimations of such leanings by the Court.

[41] First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978). The decision, addressing a question not theretofore confronted, was 5-to–4. Justice Rehnquist would have recognized no protected First Amendment rights of corporations because, as entities entirely the creation of state law, they were not to be accorded rights enjoyed by natural persons. Id. at 822. Justices White, Brennan, and Marshall thought the First Amendment implicated but not dispositive because of the state interests asserted. Id. at 802. Previous decisions recognizing corporate free speech had involved either press corporations, id. at 781–83; and see id. at 795 (Chief Justice Burger concurring), or corporations organized especially to promote the ideological and associational interests of their members. *E.g.*, NAACP v. Button, 371 U.S. 415 (1963).

the right of the public to receive information, governs nonpolitical, corporate speech.[42]

With some qualifications, therefore, it is submitted that the speech and press clauses may be analyzed under an umbrella "expression" standard, with little, if any, hazard of missing significant doctrinal differences.

The Doctrine of Prior Restraint

"[L]iberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship."[43] "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[44] Government "thus carries a heavy burden of showing justification for the imposition of such a restraint."[45] Under the English licensing system, which expired in 1695, all printing presses and printers were licensed and nothing could be published without prior approval of the state or church authorities. The great struggle for liberty of the press was for the right to publish without a license that which for a long time could be published only with a license.[46]

The United States Supreme Court's first encounter with a law imposing a prior restraint came in *Near v. Minnesota ex rel. Olson*,[47] in which a five-to-four majority voided a law authorizing the permanent enjoining of future violations by any newspaper or periodical once found to have published or circulated an "obscene, lewd and lascivious" or a "malicious, scandalous and defamatory" issue. An injunction had been issued after the newspaper in question had printed a series of articles tying local officials to gangsters. While the dissenters maintained that the injunction constituted no prior restraint, inasmuch as that doctrine applied to prohibitions of publication without advance approval of an executive official,[48] the majority deemed the difference of no consequence, since in order to avoid a contempt citation the newspaper would have to clear future publications in advance with the

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[42] Commercial speech when engaged in by a corporation is subject to the same standards of protection as when natural persons engage in it. Consolidated Edison Co. v. PSC, 447 U.S. 530, 533–35 (1980). Nor does the status of a corporation as a government-regulated monopoly alter the treatment. Id. at 534 n.1; Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 566–68 (1980).

[43] Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931).

[44] Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963).

[45] Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

[46] Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713–14 (1931): Lovell v. Griffin, 303 U.S. 444, 451 (1938).

[47] 283 U.S. 697 (1931).

[48] Id. at 723, 733–36 (Justice Butler dissenting).

judge.[49] Liberty of the press to scrutinize closely the conduct of public affairs was essential, said Chief Justice Hughes for the Court. "[T]he administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."[50] The Court did not undertake to explore the kinds of restrictions to which the term "prior restraint" would apply nor to do more than assert that only in "exceptional circumstances" would prior restraint be permissible.[51] Nor did subsequent cases substantially illuminate the murky interior of the doctrine. The doctrine of prior restraint was called upon by the Court as it struck down a series of loosely drawn statutes and ordinances requiring licenses to hold meetings and parades and to distribute literature, with uncontrolled discretion in the licensor whether or not to issue them, and as it voided other restrictions on First Amendment rights.[52] The doctrine that generally emerged was that permit systems—prior licensing, if you will—were constitutionally valid so long as the discretion of the issuing official was limited to questions of times, places, and manners.[53] The most recent Court encounter with the doctrine in the

[49] Id. at 712–13.

[50] Id. at 719–20.

[51] Id. at 715–16.

[52] *E.g.*, Lovell v. Griffin, 303 U.S. 444 (1938); Cantwell v. Connecticut, 310 U.S. 296 (1940); Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Staub v. City of Baxley, 355 U.S. 313 (1958). For other applications, *see* Grosjean v. American Press Co., 297 U.S. 233 (1936); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Follett v. McCormick, 321 U.S. 573 (1944).

[53] Cox v. New Hampshire, 312 U.S. 569 (1941); Poulos v. New Hampshire, 345 U.S. 395 (1953). In Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968), the Court held invalid the issuance of an ex parte injunction to restrain the holding of a protest meeting, holding that usually notice must be given the parties to be restrained and an opportunity for them to rebut the contentions presented to justify the sought-for restraint. In Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), the Court held invalid as a prior restraint an injunction preventing the petitioners from distributing 18,000 pamphlets attacking respondent's alleged "blockbusting" real estate activities; he was held not to have borne the "heavy burden" of justifying the restraint. "No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court. Designating the conduct as an invasion of privacy . . . is not sufficient to support an injunction

national security area occurred when the Government attempted to enjoin press publication of classified documents pertaining to the Vietnam War[54] and, although the Court rejected the effort, at least five and perhaps six Justices concurred on principle that in some circumstances prior restraint of publication would be constitutional.[55] But no cohesive doctrine relating to the subject, its applications, and its exceptions has yet emerged.

Injunctions and the Press in Fair Trial Cases.—Confronting a claimed conflict between free press and fair trial guarantees, the Court unanimously set aside a state court injunction barring the publication of information that might prejudice the subsequent trial of a criminal defendant.[56] Though agreed on result, the Justices were divided with respect to whether "gag orders" were ever permissible and if so what the standards for imposing them were. The opinion of the Court utilized the Learned Hand formulation of the "clear and present danger" test[57] and considered as factors in

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against peaceful distribution of informational literature of the nature revealed by this record." Id. at 419–20. *See also* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) (ordinance vesting in the mayor unbridled discretion to grant or deny annual permit for location of newsracks on public property is facially invalid as prior restraint).

The necessity of immediate appellate review of orders restraining the exercise of First Amendment rights was strongly emphasized in National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977), and seems to explain the Court's action in Philadelphia Newspapers v. Jerome, 434 U.S. 241 (1978). *But see* Moreland v. Sprecher, 443 U.S. 709 (1979) (party can relinquish right to expedited review through failure to properly request it).

[54] New York Times Co. v. United States, 403 U.S. 713 (1971). The vote was six to three, with Justices Black, Douglas, Brennan, Stewart, White, and Marshall in the majority and Chief Justice Burger and Justices Harlan and Blackmun in the minority. Each Justice issued an opinion.

[55] The three dissenters thought such restraint appropriate in this case. Id. at 748, 752, 759. Justice Stewart thought restraint would be proper if disclosure "will surely result in direct, immediate, and irreparable damage to our Nation or its people," id. at 730, while Justice White did not endorse any specific phrasing of a standard. Id. at 730–733. Justice Brennan would preclude even interim restraint except upon "governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea." Id. at 712–13.

The same issues were raised in United States v. Progressive, Inc., 467 F. Supp. 990 (W.D.Wis. 1979), in which the United States obtained an injunction prohibiting publication of an article it claimed would reveal information about nuclear weapons, thus increasing the dangers of nuclear proliferation. The injunction was lifted when the same information was published elsewhere and thus no appellate review was had of the order.

With respect to the right of the Central Intelligence Agency to prepublication review of the writings of former agents and its enforcement through contractual relationships, see Snepp v. United States, 444 U.S. 507 (1980); Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), cert. denied, 421 U.S. 992 (1975); United States v. Marchetti, 446 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).

[56] Nebraska Press Ass'n. v. Stuart, 427 U.S. 539 (1976).

[57] Id. at 562, quoting Dennis v. United States, 183 F.2d 201, 212 (2d Cir. 1950), aff'd., 341 U.S. 494, 510 (1951).

any decision on the imposition of a restraint upon press reporters (a) the nature and extent of pretrial news coverage, (b) whether other measures were likely to mitigate the harm, and (c) how effectively a restraining order would operate to prevent the threatened danger.[58] One seeking a restraining order would have a heavy burden to meet to justify such an action, a burden that could be satisfied only on a showing that with a prior restraint a fair trial would be denied, but the Chief Justice refused to rule out the possibility of showing the kind of threat that would possess the degree of certainty to justify restraints.[59] Justice Brennan's major concurring opinion flatly took the position that such restraining orders were never permissible. Commentary and reporting on the criminal justice system is at the core of First Amendment values, he would hold, and secrecy can do so much harm "that there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained."[60] The extremely narrow exceptions under which prior restraints might be permissible relate to probable national harm resulting from publication, the Justice continued; because the trial court could adequately protect a defendant's right to a fair trial through other means even if there were conflict of constitutional rights the possibility of damage to the fair trail right would be so speculative that the burden of justification could not be met.[61] While the result does not foreclose the possibility of future "gag orders," it does lessen the number to be expected and

[58] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976) (opinion of Chief Justice Burger, concurred in by Justices Blackmun and Rehnquist, and, also writing brief concurrences, Justices White and Powell). Applying the tests, the Chief Justice agreed that (a) there was intense and pervasive pretrial publicity and more could be expected, but that (b) the lower courts had made little effort to assess the prospects of other methods of preventing or mitigating the effects of such publicity and that (c) in any event the restraining order was unlikely to have the desired effect of protecting the defendant's rights. Id. at 562–67.

[59] The Court differentiated between two kinds of information, however: (1) reporting on judicial proceedings held in public, which has "special" protection and requires a much higher justification than (2) reporting of information gained from other sources as to which the burden of justifying restraint is still high. Id. at 567–68, 570. *See also* Oklahoma Pub. Co. v. District Court, 430 U.S. 308 (1977) (setting aside injunction restraining news media from publishing name of juvenile involved in pending proceeding when name has been learned at open detention hearing that could have been closed but was not); Smith v. Daily Mail Pub. Co., 433 U.S. 97 (1979).

[60] Id. at 572, 588. Justices Stewart and Marshall joined this opinion and Justice Stevens noted his general agreement except that he reserved decision in particularly egregious situations, even though stating that he might well agree with Justice Brennan there also. Id. at 617. Justice White, while joining the opinion of the Court, noted that he had grave doubts that "gag orders" could ever be justified but he would refrain from so declaring in the Court's first case on the issue. Id. at 570.

[61] Id. at 588–95.

shifts the focus to other alternatives for protecting trial rights.[62] On a different level, however, are orders restraining the press as a party to litigation in the dissemination of information obtained through pretrial discovery. In *Seattle Times Co. v. Rhinehart*,[63] the Court determined that such orders protecting parties from abuses of discovery require "no heightened First Amendment scrutiny."[64]

Obscenity and Prior Restraint.—Only in the obscenity area has there emerged a substantial consideration of the doctrine of prior restraint and the doctrine's use there may be based upon the proposition that obscenity is not a protected form of expression.[65] In *Kingsley Books v. Brown*,[66] the Court upheld a state statute which, while it embodied some features of prior restraint, was seen as having little more restraining effect than an ordinary criminal statute; that is, the law's penalties applied only after publication. But in *Times Film Corp. v. City of Chicago*,[67] a divided Court specifically affirmed that, at least in the case of motion pictures, the First Amendment did not proscribe a licensing system under which a board of censors could refuse to license for public exhibition films which it found to be obscene. Books and periodicals may also be subjected to some forms of prior restraint,[68] but the thrust of the Court's opinions in this area with regard to all forms of communication has been to establish strict standards of procedural protections to ensure that the censoring agency bears the burden of proof on obscenity, that only a judicial order can restrain exhibition, and that a prompt final judicial decision is assured.[69]

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[62] One such alternative is the banning of communication with the press on trial issues by prosecution and defense attorneys, police officials, and court officers. This, of course, also raises First Amendment issues. *See, e.g.*, Chicago Council of Lawyers v. Bauer, 522 F. 2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976).

[63] 467 U.S. 20 (1984).

[64] 467 U.S. at 36. The decision was unanimous, all other Justices joining Justice Powell's opinion for the Court, but with Justices Brennan and Marshall noting additionally that under the facts of the case important interests in privacy and religious freedom were being protected. Id. at 37, 38.

[65] Infra, pp. 1149–59.

[66] 354 U.S. 436 (1957). *See also* Bantam Books v. Sullivan, 372 U.S. 58 (1963).

[67] 365 U.S. 43 (1961). *See also* Young v. American Mini Theatres, 427 U.S. 50 (1976) (zoning ordinance prescribing distances adult theaters may be located from residential areas and other theaters is not an impermissible prior restraint).

[68] Cf. Kingsley Books v. Brown, 354 U.S. 436 (1957).

[69] Freedman v. Maryland, 380 U.S. 51 (1965); Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968); Interstate Circuit v. City of Dallas, 390 U.S. 676 (1968); Blount v. Rizzi, 400 U.S. 410 (1971); United States v. Thirty-seven Photographs, 402 U.S. 363, 367–375 (1971); Southeastern Promotions v. Conrad, 420 U.S. 546 (1975); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) (ordinance requiring licensing of "sexually oriented business" places no time limit on approval by inspection agencies and fails to provide an avenue for prompt judicial review); Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) (seizure of books and films based on *ex parte* probable cause hearing under state RICO law's forfeiture procedures constitutes invalid prior restraint; instead, there must be

Subsequent Punishment: Clear and Present Danger and Other Tests

Granted that the context of the controversy over freedom of expression at the time of the ratification of the First Amendment was almost exclusively limited to the problem of prior restraint, still the words speak of laws "abridging" freedom of speech and press and the modern adjudicatory disputes have been largely fought out over subsequent punishment. "The mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications. . . .

"[The purpose of the speech-press clauses] has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. . . . The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[70] A rule of law permitting criminal or civil liability to be imposed upon those who speak or write on public issues and their superintendence would lead to "self-censorship" by all which would not be relieved by permitting a defense of truth. "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so . . . . The rule thus dampens the vigor and limits the variety of public debate."[71]

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a determination in an adversarial proceeding that the materials are obscene or that a RICO violation has occurred).

[70] 2 T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION 885–86 (8th ed. 1927).

[71] New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964). *See also* Speiser v. Randall, 357 U.S. 513, 526 (1958); Smith v. California, 361 U.S. 147, 153–154 (1959); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas, that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."[72] "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Con-

[72] Abrams v. United States, 250 U.S. 616, 630 (1919) (Justice Holmes dissenting).

stitution so that free speech and assembly should be guaranteed."[73]

"But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral."[74] The fixing of a standard is necessary, by which it can be determined what degree of evil is sufficiently substantial to justify resort to abridgment of speech and press and assembly as a means of protection and how clear and imminent and likely the danger is.[75] That standard has fluctuated over a period of some fifty years now and it cannot be asserted with a great degree of confidence that the Court has yet settled on any firm standard or any set of standards for differing forms of expression.[76] The cases are instructive of the difficulty.

Clear and Present Danger.—Certain expression, oral or written, may incite, urge, counsel, advocate, or importune the commission of criminal conduct; other expression, such as picketing, demonstrating, and engaging in certain forms of "symbolic" action may either counsel the commission of criminal conduct or itself constitute criminal conduct. Leaving aside for the moment the problem of "speech-plus" communication, it becomes necessary to determine when expression that may be a nexus to criminal conduct is subject to punishment and restraint. At first, the Court seemed disposed in the few cases reaching it to rule that if the conduct could be made criminal, the advocacy of or promotion of the conduct could be made criminal.[77] Then, in *Schenck v. United States*,[78] in which defendants had been convicted of seeking to disrupt recruitment of military personnel by dissemination of certain leaflets, Justice Holmes formulated the "clear and present danger" test which has ever since been the starting point of argument. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[79] The convictions were unanimously affirmed. One week

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[73] Whitney v. California, 274 U.S. 357, 375–76 (1927) (Justice Brandeis concurring).

[74] Id. at 373.

[75] Id. at 374.

[76] On the great range of expressive communications, see infra.

[77] Davis v. Beason, 133 U.S. 333 (1890); Fox v. Washington, 236 U.S. 273 (1915).

[78] 249 U.S. 47 (1919).

[79] Id. at 52.

later, the Court again unanimously affirmed convictions under the same Act with Justice Holmes speaking. "[W]e think it necessary to add to what has been said in *Schenck v. United States* . . . only that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."[80] And in *Debs v. United States*,[81] Justice Holmes was found referring to "the natural and intended effect" and "probable effect" of the condemned speech in common-law tones.

But in *Abrams v. United States*,[82] Justices Holmes and Brandeis dissented upon affirmance of the convictions of several alien anarchists who had printed leaflets seeking to encourage discontent with United States participation in the War. The majority simply referred to *Schenck* and *Frohwerk* to rebut the First Amendment argument, but the dissenters urged that the Government had made no showing of a clear and present danger. Another affirmance by the Court of a conviction, the majority simply saying that "[t]he tendency of the articles and their efficacy were enough for the offense," drew a similar dissent.[83] Moreover, in *Gitlow v. New York*,[84] a conviction for distributing a manifesto in violation of a law making it criminal to advocate, advise, or teach the duty, necessity, or propriety of overthrowing organized government by force or violence, the Court affirmed in the absence of any evidence regarding the effect of the distribution and in the absence of any contention that it created any immediate threat to the security of the State. In so doing, the Court discarded Holmes' test. "It is clear that the question in such cases [as this] is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. . . . In such cases it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the

[80] Frohwerk v. United States, 249 U.S., 204, 206 (1919) (citations omitted).
[81] 249 U.S. 211, 215–16 (1919).
[82] 250 U.S. 616 (1919).
[83] Schaefer v. United States, 251 U.S. 466, 479 (1920). *See also* Pierce v. United States, 252 U.S. 239 (1920).
[84] 268 U.S. 652 (1925)

legislative body might prevent. . . . [T]he general statement in the *Schenck Case* . . . was manifestly intended . . . to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character."[85] Thus, a state legislative determination "that utterances advocating the overthrow of organized government by force, violence, and unlawful means, are so inimical to the general welfare, and involve such danger of substantive evil that they may be penalized in the exercise of its police power" was almost conclusive on the Court.[86] It is not clear what test, if any, the majority would have utilized, although the "bad tendency" test has usually been associated with the case. In *Whitney v. California*,[87] the Court affirmed a conviction under a criminal syndicalism statute based on defendant's association with and membership in an organization which advocated the commission of illegal acts, finding again that the determination of a legislature that such advocacy involves "such danger to the public peace and the security of the State" was entitled to almost conclusive weight. In a technical concurrence which was in fact a dissent from the opinion of the Court, Justice Brandeis restated the "clear and present danger" test. "[E]ven advocacy of violation [of the law] . . . is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on . . . . In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."[88]

The Adoption of Clear and Present Danger.—The Court did not invariably affirm convictions during this period in cases

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[85] Id. at 670–71.

[86] Id. at 668. Justice Holmes dissented. "If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who share the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief, and, if believed, is acted on unless some other belief outweighs it, or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they would be given their chance and have their way." Id. at 673.

[87] 274 U.S. 357, 371–72 (1927).

[88] Id. at 376.

like those under consideration. In *Fiske v. Kansas,*[89] it held that a criminal syndicalism law had been invalidly applied to convict one against whom the only evidence was the "class struggle" language of the constitution of the organization to which he belonged. A conviction for violating a "red flag" law was voided as the statute was found unconstitutionally vague.[90] Neither case mentioned clear and present danger. An "incitement" test seemed to underlie the opinion in *De Jonge v. Oregon,*[91] upsetting a conviction under a criminal syndicalism statute for attending a meeting held under the auspices of an organization which was said to advocate violence as a political method, although the meeting was orderly and no violence was advocated during it. In *Herndon v. Lowry,*[92] the Court narrowly rejected the contention that the standard of guilt could be made the "dangerous tendency" of one's words, and indicated that the power of a State to abridge speech "even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government."

Finally, in *Thornhill v. Alabama,*[93] a state anti-picketing law was invalidated because "no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter." During the same term, the Court reversed the breach of the peace conviction of a Jehovah's Witness who had played an inflammatory phonograph record to persons on the street, the Court discerning no clear and present danger of disorder.[94]

The stormiest fact situation faced by the Court in applying clear and present danger occurred in *Terminiello v. City of Chicago,*[95] in which a five-to-four majority struck down a conviction obtained after the judge instructed the jury that a breach of the peace could be committed by speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." "A function of free speech under our system of government," wrote Justice Douglas for the majority, "is to invite dispute.

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[89] 274 U.S. 380 (1927).

[90] Stromberg v. California, 283 U.S. 359 (1931).

[91] 299 U.S. 353 (1937). *See* id. at 364–65.

[92] 301 U.S. 242, 258 (1937). At another point, clear and present danger was alluded to without any definite indication it was the standard. Id. at 261.

[93] 310 U.S. 88, 105 (1940). The Court admitted that the picketing did result in economic injury to the employer, but found such injury "neither so serious nor so imminent" as to justify restriction. The role of clear and present danger was not to play a future role in the labor picketing cases.

[94] Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

[95] 337 U.S. 1 (1949).

It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[96] The dissenters focused on the disorders which had actually occurred as a result of Terminiello's speech, Justice Jackson saying: "Rioting is a substantive evil, which I take it no one will deny that the State and the City have the right and the duty to prevent and punish . . . . In this case the evidence proves beyond dispute that danger of rioting and violence in response to the speech was clear, present and immediate."[97] The Jackson position was soon adopted in *Feiner v. New York*,[98] in which Chief Justice Vinson said that "[t]he findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech."

Contempt of Court and Clear and Present Danger.—The period during which clear and present danger was the standard by which to determine the constitutionality of governmental suppression of or punishment for expression was a brief one, extending roughly from *Thornhill* to *Dennis*.[99] But in one area it was vigorously, though not without dispute, applied to enlarge freedom of utterance and it is in this area that it remains viable. In early contempt-of-court cases in which criticism of courts had been punished as contempt, the Court generally took the position that even if freedom of speech and press was protected against governmental abridgment, a publication tending to obstruct the administration of justice was punishable, irrespective of its truth.[100] But in *Bridges v. California*,[101] in which contempt citations had been brought against a newspaper and a labor leader for statements made about pending judicial proceedings, Justice Black for a five-to-four Court

[96] Id. at 4–5.
[97] Id. at 25–26.
[98] 340 U.S. 315, 321 (1951).
[99] Thornhill v. Alabama, 310 U.S. 88 (1940); Dennis v. United States, 341 U.S. 494 (1951).
[100] Patterson v. Colorado, 205 U.S. 454 (1907); Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).
[101] 314 U.S. 252 (1941).

majority began with application of clear and present danger, which he interpreted to require that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[102] He noted that the "substantive evil here sought to be averted . . . appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice." The likelihood that the court will suffer damage to its reputation or standing in the community was not, Justice Black continued, a "substantive evil" which would justify punishment of expression.[103] The other evil, "disorderly and unfair administration of justice," "is more plausibly associated with restricting publications which touch upon pending litigation." But the "degree of likelihood" of the evil being accomplished was not "sufficient to justify summary punishment."[104] In dissent, Justice Frankfurter accepted the application of clear and present danger, but he interpreted it as meaning no more than a "reasonable tendency" test. "Comment however forthright is one thing. Intimidation with respect to specific matters still in judicial suspense, quite another. . . . A publication intended to teach the judge a lesson, or to vent spleen, or to discredit him, or to influence him in his future conduct, would not justify exercise of the contempt power. . . . It must refer to a matter under consideration and constitute in effect a threat to its impartial disposition. It must be calculated to create an atmospheric pressure incompatible with rational, impartial adjudication. But to interfere with justice it need not succeed. As with other offenses, the state should be able to proscribe attempts that fail because of the danger that attempts may succeed."[105]

A unanimous Court next struck down the contempt conviction arising out of newspaper criticism of judicial action already taken, although one case was pending after a second indictment. Specifically alluding to clear and present danger, while seeming to regard it as stringent a test as Justice Black had in the prior case, Justice Reed wrote that the danger sought to be averted, a "threat to the impartial and orderly administration of justice," "has not the clearness and immediacy necessary to close the door of permissible public comment."[106] Divided again, the Court a year later set aside contempt convictions based on publication, while a motion for a

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[102] Id. at 263.

[103] Id. at 270–71.

[104] Id. at 271–78.

[105] Id. at 291. Joining Justice Frankfurter in dissent were Chief Justice Stone and Justices Roberts and Byrnes.

[106] Pennekampt v. Florida, 328 U.S. 331, 336, 350 (1946). To Justice Frankfurter, the decisive consideration was whether the judge or jury is, or presently will be, pondering a decision that comment seeks to affect. Id. at 369.

new trial was pending, of inaccurate and unfair accounts and an editorial concerning the trial of a civil case. "The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, and not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."[107]

In *Wood v. Georgia*,[108] the Court again divided, applying clear and present danger to upset the contempt conviction of a sheriff who had been cited for criticizing the recommendation of a county court that a grand jury look into African American bloc voting, vote buying, and other alleged election irregularities. No showing had been made, said Chief Justice Warren, of "a substantive evil actually designed to impede the course of justice." The case presented no situation in which someone was on trial, there was no judicial proceeding pending that might be prejudiced, and the dispute was more political than judicial.[109] A unanimous Court recently seems to have applied the standard to set aside a contempt conviction of a defendant who, arguing his own case, alleged before the jury that the trial judge by his bias had prejudiced his trial and that he was a political prisoner. Though the defendant's remarks may have been disrespectful of the court, the Supreme Court noted that "[t]here is no indication . . . that petitioner's statements were uttered in a boisterous tone or in any wise actually disrupted the court proceeding" and quoted its previous language about the imminence of the threat necessary to constitute contempt.[110]

***Clear and Present Danger Revised:* Dennis.**—In *Dennis v. United States*,[111] the Court sustained the constitutionality of the Smith Act,[112] which proscribed advocacy of the overthrow by force and violence of the government of the United States, and upheld

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[107] Craig v. Harney, 331 U.S. 367, 376 (1947). Dissenting with Chief Justice Vinson, Justice Frankfurter said: "We cannot say that the Texas Court could not properly find that these newspapers asked of the judge, and instigated powerful sections of the community to ask of the judge, that which no one has any business to ask of a judge, except the parties and their counsel in open court, namely, that he should decide one way rather than another." Id. at 390. Justice Jackson also dissented. Id. at 394. *See also* Landmark Communications v. Virginia, 435 U.S. 829, 844 (1978); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562–63 (1976).

[108] 370 U.S. 375 (1962).

[109] Id. at 383–85, 386–90. Dissenting, Justices Harlan and Clark thought that the charges made by the defendant could well have influenced the grand jurors in their deliberations and that the fact that laymen rather than judicial officers were subject to influence should call forth a less stringent test than when the latter were the object of comment. Id. at 395.

[110] In re Little, 404 U.S. 553, 555 (1972). The language from Craig v. Harney, 331 U.S. 367, 376 (1947), is quoted *supra*, text accompanying n.13.

[111] 341 U.S. 494 (1951).

[112] Ch. 439, 54 Stat. 670 (1940), 18 U.S.C. § 2385.

convictions under it. *Dennis*' importance here is in the rewriting of the clear and present danger test. For a plurality of four, Chief Justice Vinson acknowledged that the Court had in recent years relied on the Holmes-Brandeis formulation of clear and present danger without actually overruling the older cases that had rejected the test; but while clear and present danger was the proper constitutional test, that "shorthand phrase should [not] be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case." It was a relative concept. Many of the cases in which it had been used to reverse convictions had turned "on the fact that the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech."[113] Here, in contrast, "[o]verthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech."[114] And in combating that threat, the Government need not wait to act until the putsch is about to be executed and the plans are set for action. "If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required."[115] Therefore, what does the phrase "clear and present danger" import for judgment? "Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' 183 F.2d at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words."[116] The "gravity of the evil, discounted by its improbability" was found to justify the convictions.[117]

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[113] Dennis v. United States, 341 U.S. 494, 508 (1951).

[114] Id. at 509.

[115] Id. at 508, 509.

[116] Id. at 510. Justice Frankfurter, concurring, adopted a balancing test, id. at 517, discussed *infra*, pp. 1023–28. Justice Jackson appeared to proceed on a conspiracy approach rather than one depending on advocacy. Id. at 561. Justices Black and Douglas dissented, reasserting clear and present danger as the standard. Id. at 579, 581. Note the recurrence to the Learned Hand formulation in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976), although the Court appeared in fact to apply balancing.

[117] In Yates v. United States, 354 U.S. 298 (1957), the Court substantially limited both the Smith Act and the *Dennis* case by interpreting the Act to require advocacy of unlawful action, to require the urging of doing something now or in the future, rather than merely advocacy of forcible overthrow as an abstract doctrine, and by finding the evidence lacking to prove the former. Of *Dennis*, Justice Harlan

Balancing.—Clear and present danger as a test, it seems clear, was a pallid restriction on governmental power after *Dennis* and it virtually disappeared from the Court's language over the next twenty years.[118] Its replacement for part of this period was the much disputed "balancing" test, which made its appearance in the year prior to *Dennis* in *American Communications Ass'n v. Douds.*[119] There the Court sustained a law barring from access to the NLRB any labor union if any of its officers failed to file annually an oath disclaiming membership in the Communist Party and belief in the violent overthrow of the government.[120] For the Court, Chief Justice Vinson rejected reliance on the clear and present danger test. "Government's interest here is not in preventing the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced. Its interest is in protecting the free flow of commerce from what Congress considers to be substantial evils of conduct that are not the products of speech at all. Section 9(h), in other words, does not interfere with speech because Congress fears the consequences of speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political affiliations and beliefs. The Board does not contend that political strikes . . . are the present or impending products of advocacy of the doctrines of Communism or the expression of belief in overthrow of the Government by force. On the contrary, it points out that such strikes are called by persons

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wrote: "The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence as 'a rule or principle of action,' and employing 'language of incitement,' id. at 511–12, is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur." Id. at 321.

[118] *Cf.* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment,* 79 HARV. L. REV. 1, 8 (1965). *See* Garner v. Louisiana, 368 U.S. 157, 185–207 (1961) (Justice Harlan concurring).

[119] 339 U.S. 382 (1950). *See also* Osman v. Douds, 339 U.S. 846 (1950). Balancing language was used by Justice Black in his opinion for the Court in Martin v. City of Struthers, 319 U.S. 141, 143 (1943), but it seems not to have influenced the decision. Similarly, in Schneider v. Irvington, 308 U.S. 147, 161–62 (1939), Justice Roberts used balancing language which he apparently did not apply.

[120] The law, § 9(h) of the Taft-Hartley Act, 61 Stat. 146 (1947), was repealed, 73 Stat. 525 (1959), and replaced by a section making it a criminal offense for any person "who is or has been a member of the Communist Party" during the preceding five years to serve as an officer or employee of any union. § 504, 73 Stat. 536 (1959); 29 U.S.C. § 504. It was held unconstitutional in United States v. Brown, 381 U.S. 437 (1965).

who, so Congress has found, have the will and power to do so without advocacy."[121]

The test, rather, must be one of balancing of interests. "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented."[122] Inasmuch as the interest in the restriction, the government's right to prevent political strikes and the disruption of commerce, is much more substantial than the limited interest on the other side in view of the relative handful of persons affected in only a partial manner, the Court perceived no difficulty upholding the statute.[123]

Justice Frankfurter in *Dennis*[124] rejected the applicability of clear and present danger and adopted a balancing test. "The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved."[125] But the "careful weighing of conflicting interests"[126] not only placed in the scale the disparately-weighed interest of government in self-preservation and the interest of defendants in advocating illegal action, which alone would have determined the balance, it also involved the Justice's philosophy of the "confines of the judicial process" within which the role of courts, in First Amendment litigation as in other, is severely limited. Thus, "[f]ull responsibility" may not be placed in the courts "to balance the relevant factors and ascertain which interest in the circumstances [is] to prevail." "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society." Rather, "[p]rimary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress."[127] Therefore, after considering at some length the factors to be balanced, Justice Frankfurter concluded: "It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours. Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech.

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[121] American Communications Ass'n v. Douds, 339 U.S. 382, 396 (1950).
[122] Id. at 399.
[123] Id. at 400–06.
[124] Dennis v. United States, 341 U.S. 494, 517 (1951) (concurring opinion).
[125] Id. at 524–25.
[126] Id. at 542.
[127] Id. at 525.

The determination was made after due deliberation, and the seriousness of the congressional purpose is attested by the volume of legislation passed to effectuate the same ends."[128] Only if the balance struck by the legislature is "outside the pale of fair judgment"[129] could the Court hold that Congress was deprived by the Constitution of the power it had exercised.[130]

Thereafter, during the 1950's and the early 1960's, the Court utilized the balancing test in a series of decisions in which the issues were not, as they were not in *Douds* and *Dennis*, matters of expression or advocacy as a threat but rather were governmental inquiries into associations and beliefs of persons or governmental regulation of associations of persons, based on the idea that beliefs and associations provided adequate standards for predicting future or intended conduct that was within the power of government to regulate or to prohibit. Thus, in the leading case on balancing, *Konigsberg v. State Bar of California*,[131] the Court upheld the refusal of the State to certify an applicant for admission to the bar. Required to satisfy the Committee of Bar Examiners that he was of "good moral character," Konigsberg testified that he did not believe in the violent overthrow of the government and that he had never knowingly been a member of any organization which advocated such action, but he declined to answer any question pertaining to membership in the Communist Party.

For the Court, Justice Harlan began by asserting that freedom of speech and association were not absolutes but were subject to various limitations. Among the limitations, "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved."[132] The governmental interest involved was the assurance that those admitted to the practice of law were committed to lawful change in society and it was proper for the State to believe that one possessed of "a belief, firm enough to be carried over into advocacy, in the use of illegal means to change the form" of government did not meet the standard of fitness.[133] On the other hand, the First Amendment interest was limited be-

[128] Id. at 550–51.
[129] Id. at 540.
[130] Id. at 551.
[131] 366 U.S. 36 (1961).
[132] Id. at 50–51.
[133] Id. at 51–52.

cause there was "minimal effect upon free association occasioned by compulsory disclosure" under the circumstances. "There is here no likelihood that deterrence of association may result from foreseeable private action . . . for bar committee interrogations such as this are conducted in private. . . . Nor is there the possibility that the State may be afforded the opportunity for imposing undetectable arbitrary consequences upon protected association . . . for a bar applicant's exclusion by reason of Communist Party membership is subject to judicial review, including ultimate review by this Court, should it appear that such exclusion has rested on substantive or procedural factors that do not comport with the Federal Constitution."[134]

Balancing was used to sustain congressional and state inquiries into the associations and activities of individuals in connection with allegations of subversion[135] and to sustain proceedings against the Communist Party and its members.[136] In certain other cases, involving state attempts to compel the production of membership lists of the National Association for the Advancement of Colored People and to investigate that organization, use of the balancing test resulted in a finding that speech and associational rights outweighed the governmental interest claimed.[137] The Court used a balancing test in the late 1960's to protect the speech rights of a public employee who had criticized his employers.[138] On the other hand, balancing was not used when the Court struck down restrictions on receipt of materials mailed from Communist countries,[139] and it was similarly not used in cases involving picketing, pamphleteering, and demonstrating in public places.[140] But the only case in which it was specifically rejected involved a statutory regulation like those which had given rise to the test in the first

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[134] Id. at 52–53. *See also* In re Anastaplo, 366 U.S. 82 (1961). The status of these two cases is in doubt after Baird v. State Bar, 401 U.S. 1 (1971), and In re Stolar, 401 U.S. 23 (1971), in which neither the plurality nor the concurring Justice making up the majority used a balancing test.

[135] Barenblatt v. United States, 360 U.S. 109 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959); Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961).

[136] Communist Party v. SACB, 367 U.S. 1 (1961); Scales v. United States, 367 U.S. 203 (1961).

[137] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964); Gibson v. Florida Legislative Investigating Committee, 372 U.S. 539 (1963).

[138] Pickering v. Board of Education, 391 U.S. 563 (1968).

[139] Lamont v. Postmaster General, 381 U.S. 301 (1965).

[140] *E.g.*, Cox v. Louisiana, 379 U.S. 536 and 559 (1965) (2 cases); Edwards v. South Carolina, 372 U.S. 229 (1963); Adderley v. Florida, 385 U.S. 39 (1966); Brown v. Louisiana, 383 U.S. 131 (1966). *But see* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), where balancing reappears and in which other considerations overbalance the First Amendment claims.

place. *United States v. Robel*[141] held invalid under the First Amendment a statute which made it unlawful for any member of an organization which the Subversive Activities Control Board had ordered to register to work in a defense establishment.[142] Although Chief Justice Warren for the Court asserted that the vice of the law was that its proscription operated *per se* "without any need to establish that an individual's association poses the threat feared by the Government in proscribing it,"[143] the rationale of the decision was not clear and present danger but the existence of less restrictive means by which the governmental interest could be accomplished.[144] In a concluding footnote, the Court said: "It has been suggested that this case should be decided by 'balancing' the governmental interests . . . against the First Amendment rights asserted by the appellee. This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other. Our inquiry is more circumscribed. Faced with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights, we have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. In making this determination we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way 'balanced' those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict."[145]

The "Absolutist" View of the First Amendment, With a Note on "Preferred Position".—During much of this period, the opposition to the balancing test was led by Justices Black and Douglas, who espoused what may be called an "absolutist" position, denying the government any power to abridge speech. But the beginnings of such a philosophy may be gleaned in much earlier cases in which a rule of decision based on a preference for First Amendment liberties was prescribed. Thus, Chief Justice Stone in his famous *Carolene Products* "footnote 4" suggested that the ordinary presumption of constitutionality which prevailed when economic

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[141] 389 U.S. 258 (1967).

[142] Subversive Activities Control Act of 1950, § 5(a)(1)(D), ch. 1024, 64 Stat. 992, 50 U.S.C. § 784(a)(1)(D).

[143] United States v. Robel, 389 U.S. 258, 265 (1967).

[144] Id. at 265–68.

[145] Id. at 268 n.20.

regulation was in issue might very well be reversed when legislation which restricted "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" is called into question.[146] Then in *Murdock v. Pennsylvania*,[147] in striking down a license tax on religious colporteurs, the Court remarked that "[f]reedom of press, freedom of speech, freedom of religion are in a preferred position." Two years later the Court indicated that its decision with regard to the constitutionality of legislation regulating individuals is "delicate . . . [especially] where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions."[148] The "preferred-position" language was sharply attacked by Justice Frankfurter in *Kovacs v. Cooper*[149] and it dropped from the opinions, although its philosophy did not.

Justice Black expressed his position in many cases but his *Konigsberg* dissent contains one of the lengthiest and clearest expositions of it.[150] That a particular governmental regulation abridged speech or deterred it was to him "sufficient to render the action of the State unconstitutional" because he did not subscribe "to the doctrine that permits constitutionally protected rights to be 'balanced' away whenever a majority of this Court thinks that a State might have an interest sufficient to justify abridgment of those freedoms . . . I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field."[151] As he elsewhere wrote: "First Amendment rights are beyond abridgment either by legislation that directly restrains their exer-

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[146] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

[147] 319 U.S. 105, 115 (1943). *See also* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

[148] Thomas v. Collins, 323 U.S. 516, 529–30 (1945).

[149] 336 U.S. 77, 89 (1949) (collecting cases with critical analysis).

[150] Konigsberg v. State Bar of California, 366 U.S. 36, 56 (1961) (dissenting opinion). *See also* Braden v. United States, 365 U.S. 431, 441 (1961) (dissenting); Wilkinson v. United States, 365 U.S. 399, 422 (1961) (dissenting); Uphaus v. Wyman, 364 U.S. 388, 392 (1960) (dissenting); Barenblatt v. United States, 360 U.S. 109, 140 (1959) (dissenting); American Communications Ass'n v. Douds, 339 U.S. 382, 445 (1950); Communist Party v. SACB, 367 U.S. 1, 137 (1961) (dissenting); Beauharnais v. Illinois, 343 U.S. 250, 267 (1952) (dissenting); New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (concurring); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (concurring). For Justice Douglas' position, *see* New York Times Co. v. United States, *supra*, 403 U.S. at 720 (concurring); Roth v. United States, 354 U.S. 476, 508 (1957) (dissenting); Brandenburg v. Ohio, 395 U.S. 444, 450 (1969) (concurring).

[151] Konigsberg v. State Bar of California, 366 U.S. 36, 60–61 (1961).

cise or by suppression or impairment through harassment, humiliation, or exposure by government."[152] But the "First and Fourteenth Amendments . . . take away from government, state and federal, all power to restrict freedom of speech, press and assembly where people have a right to be for such purpose. This does not mean however, that these amendments also grant a constitutional right to engage in the conduct of picketing or patrolling whether on publicly owned streets or on privately owned property."[153] Thus, in his last years on the Court, the Justice, while maintaining an "absolutist" position, increasingly drew a line between "speech" and "conduct which involved communication."[154]

Of Other Tests and Standards: Vagueness, Overbreadth, Least Restrictive Means, and Others.—In addition to the foregoing tests, the Court has developed certain standards that are exclusively or primarily applicable in First Amendment litigation. Some of these, such as the doctrines prevalent in the libel and obscenity areas, are very specialized,[155] but others are not. Vagueness is a due process vice which can be brought into play with regard to any criminal and many civil statutes,[156] but as applied in areas respecting expression it also encompasses concern that protected conduct will be deterred out of fear that the statute is capable of application to it. Vagueness has been the basis for voiding numerous such laws, especially in the fields of loyalty oaths,[157] obscenity,[158] and restrictions on public demonstrations.[159] It is usually combined with the overbreadth doctrine, which focuses on the

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[152] Bates v. City of Little Rock, 361 U.S. 516, 528 (1960) (concurring).

[153] Cox v. Louisiana, 379 U.S. 559, 578, 581 (1965) (dissenting).

[154] These cases involving important First Amendment issues are dealt with *infra*, pp. 1123–42. *See* Brown v. Louisiana, 383 U.S. 131 (1966); Adderley v. Florida, 385 U.S. 39 (1966).

[155] *Infra*, pp. 1136–45, 1149–59.

[156] The vagueness doctrine generally requires that a statute be precise enough to give fair warning to actors that contemplated conduct is criminal, and to provide adequate standards to enforcement agencies, factfinders, and reviewing courts. *See*, e.g., Connally v. General Construction Co., 269 U.S. 385 (1926); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Colautti v. Franklin, 439 U.S. 379 (1979); Village of Hoffman Estates v. Flipside, 455 U.S. 489 (1982).

[157] *E.g.*, Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Baggett v. Bullitt, 377 U.S. 360 (1964); Keyishian v. Board of Regents, 385 U.S. 589 (1967). See also Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) (attorney discipline, extrajudicial statements).

[158] *E.g.*, Winters v. New York, 333 U.S. 507 (1948); Burstyn v. Wilson, 343 U.S. 495 (1952); Interstate Circuit v. City of Dallas, 390 U.S. 676 (1968).

[159] *E.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940); Gregory v. City of Chicago, 394 U.S. 111 (1969); Coates v. City of Cincinnati, 402 U.S. 611 (1971). *See also* Smith v. Goguen, 415 U.S. 566 (1974) (flag desecration law); Lewis v. City of New Orleans, 415 U.S. 130 (1974) (punishment of opprobrious words); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) (door-to-door canvassing). For an evident narrowing of standing to assert vagueness, *see* Young v. American Mini Theatres, 427 U.S. 50, 60 (1976).

need for precision in drafting a statute that may affect First Amendment rights;[160] an overbroad statute that sweeps under its coverage both protected and unprotected speech and conduct will normally be struck down as facially invalid, although in a non-First Amendment situation the Court would simply void its application to protected conduct.[161] Similarly, and closely related at least to the overbreadth doctrine, the Court has insisted that when the government seeks to carry out a permissible goal and it has available a variety of effective means to the given end, it must choose the measure which least interferes with rights of expression.[162] Also, the Court has insisted that regulatory measures which bear on expression must relate to the achievement of the purpose asserted as its justification.[163] The prevalence of these standards and tests in this area would appear to indicate that while "preferred position" may have disappeared from the Court's language it has not disappeared from its philosophy.

Is There a Present Test?—Complexities inherent in the myriad varieties of expression encompassed by the First Amendment guarantees of speech, press, and assembly probably preclude any

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[160] NAACP v. Button, 371 U.S. 415, 432–33 (1963).

[161] *E.g.,* Kunz v. New York, 340 U.S. 290 (1951); Aptheker v. Secretary of State, 378 U.S. 500 (1964); United States v. Robel, 389 U.S. 258 (1967); Zwickler v. Koota, 389 U.S. 241 (1967); Lewis v. City of New Orleans, 415 U.S. 130 (1974). However, the Court's dissatisfaction with the reach of the doctrine, *see e.g.,* Younger v. Harris, 401 U.S. 37 (1971), resulted in a curbing of it in Broadrick v. Oklahoma, 413 U.S. 601 (1973), a 5-to–4 decision, in which the Court emphasized "that facial overbreadth adjudication is an exception to our traditional overbreadth adjudication," and held that where conduct and not merely speech is concerned "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep," Id. at 615. The opinion of the Court and Justice Brennan's dissent, id. at 621, contain extensive discussion of the doctrine. Other restrictive decisions are Arnett v. Kennedy, 416 U.S. 134, 158–64 (1974); Parker v. Levy, 417 U.S. 733, 757–61 (1974); and New York v. Ferber, 458 U.S. 747, 766–74 (1982). Nonetheless, the doctrine continues to be used across a wide spectrum of First Amendment cases. Bigelow v. Virginia, 421 U.S. 809, 815–18 (1975); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Doran v. Salem Inn, 422 U.S. 922, 932–34 (1975); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 633–39 (1980); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984) (charitable solicitation statute placing 25% cap on fundraising expenditures); City of Houston v. Hill, 482 U.S. 451 (1987) (city ordinance making it unlawful to "oppose, molest, abuse, or interrupt" police officer in performance of duty); Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987) (resolution banning all "First Amendment activities" at airport).

[162] Shelton v. Tucker, 364 U.S. 479 (1960); United States v. Robel, 389 U.S. 258 (1967); Schneider v. Smith, 390 U.S. 17 (1968); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 564, 565, 569–71 (1980).

[163] Bates v. City of Little Rock, 361 U.S. 516, 525 (1960); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 464 (1958); Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961). *See also* Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 564, 565, 569 (1980).

single standard. For certain forms of expression for which protection is claimed, the Court engages in "definitional balancing" to determine that those forms are outside the range of protection.[164] Balancing is in evidence to enable the Court to determine whether certain covered speech is entitled to protection in the particular context in which the question arises.[165] Utilization of vagueness, overbreadth and less intrusive means may very well operate to reduce the occasions when questions of protection must be answered squarely on the merits. What is observable, however, is the reemergence, at least in a tentative fashion, of something like the clear and present danger standard in advocacy cases, which is the context in which it was first developed. Thus, in *Brandenburg v. Ohio*,[166] a conviction under a criminal syndicalism statute of advocating the necessity or propriety of criminal or terroristic means to achieve political change was reversed. The prevailing doctrine developed in the Communist Party cases was that "mere" advocacy was protected but that a call for concrete, forcible action even far in the future was not protected speech and knowing membership in an organization calling for such action was not protected association, regardless of the probability of success.[167] In *Brandenburg*, however, the Court reformulated these and other rulings to mean "that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[168] The Court has not revisited these is-

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[164] Thus, obscenity, by definition, is outside the coverage of the First Amendment, Roth v. United States, 354 U.S. 476 (1957); Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973), as are malicious defamation, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and "fighting words," Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The Court must, of course, decide in each instance whether the questioned expression definitionally falls within one of these or another category. *See, e.g.,* Jenkins v. Georgia, 418 U.S. 153 (1974); Gooding v. Wilson, 405 U.S. 518 (1972).

[165] *E.g.,* the multifaceted test for determining when commercial speech is protected, Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 566 (1980); the standard for determining when expressive conduct is protected, United States v. O'Brien, 391 U.S. 367, 377 (1968); the elements going into decision with respect to access at trials, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606–10 (1982); and the test for reviewing press "gag orders" in criminal trials, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562–67 (1976), are but a few examples.

[166] 395 U.S. 444 (1969).

[167] Yates v. United States, 354 U.S. 298 (1957); Scales v. United States 367 U.S. 203 (1961): Noto v. United States, 367 U.S. 290 (1961). *And see* Bond v. Floyd, 385 U.S. 116 (1966); Watts v. United States, 394 U.S. 705 (1969).

[168] 395 U.S. at 447 (1969). Subsequent cases relying on *Brandenburg* indicate the standard has considerable bite, but do not elaborate sufficiently enough to begin filling in the outlines of the test. Hess v. Indiana, 414 U.S. 105 (1973); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982). *But see* Haig v. Agee, 453 U.S. 280, 308–09 (1981).

sues since *Brandenburg*, so the long-term significance of the decision is yet to be determined.

Freedom of Belief

The First Amendment does not expressly speak in terms of liberty to hold such beliefs as one chooses, but in both the religion and the expression clauses, it is clear, liberty of belief is the foundation of the liberty to practice what religion one chooses and to express oneself as one chooses.[169] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[170] Speaking in the context of religious freedom, the Court at one point said that while the freedom to act on one's beliefs could be limited, the freedom to believe what one will "is absolute."[171] But matters are not so simple.

Flag Salute Cases.—That government generally may not compel a person to affirm a belief is the principle of the second *Flag Salute Case.*[172] In *Minersville School District v. Gobitis*,[173] the Court upheld the power of the State to expel from its schools certain children, Jehovah's Witnesses, who refused upon religious grounds to join in a flag salute ceremony and recitation of the pledge of allegiance. "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[174] But three years later, a six-to-three majority of the Court reversed itself.[175] Justice Jackson for

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[169] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940); United States v. Ballard, 322 U.S. 78 (1944); Torcaso v. Watkins, 367 U.S. 488 (1961); American Communications Ass'n v. Douds, 339 U.S. 382, 408 (1950); Bond v. Floyd, 385 U.S. 116, 132 (1966); Speiser v. Randall, 357 U.S. 513 (1958); Baird v. State Bar of Arizona, 401 U.S. 1, 5–6 (1971), and id. at 9–10 (Justice Stewart concurring).

[170] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[171] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[172] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[173] 310 U.S. 586 (1940).

[174] Id. at 594. Justice Stone alone dissented, arguing that the First Amendment religion and speech clauses forbade coercion of "these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions." Id. at 601.

[175] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Justices Roberts and Reed simply noted their continued adherence to *Gobitis*. Id. at 642. Justice Frankfurter dissented at some length, denying that the First Amendment authorized the Court "to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen." Id. at 646, 647.

the Court chose to ignore the religious argument and to ground the decision upon freedom of speech. The state policy, he said, constituted "a compulsion of students to declare a belief. . . . It requires the individual to communicate by word and sign his acceptance of the political ideas [the flag] bespeaks."[176] But the power of a State to follow a policy that "requires affirmation of a belief and an attitude of mind" is limited by the First Amendment, which, under the standard then prevailing, required the State to prove that the act of the students in remaining passive during the ritual "creates a clear and present danger that would justify an effort even to muffle expression."[177]

However, the principle of *Barnette* does not extend so far as to bar government from requiring of its employees or of persons seeking professional licensing or other benefits an oath generally but not precisely based on the oath required of federal officers, which is set out in the Constitution, that the taker of the oath will uphold and defend the Constitution.[178] It is not at all clear, however, to what degree the government is limited in probing the sincerity of the person taking the oath.[179]

Imposition of Consequences for Holding Certain Beliefs.—Despite the *Cantwell* dictum that freedom of belief is absolute,[180] government has been permitted to inquire into the holding of certain beliefs and to impose consequences on the believers, primarily with regard to its own employees and to licensing certain professions.[181] It is not clear what precise limitations the Court has placed on these practices.

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[176] Id. at 631, 633.

[177] Id. at 633–34. *Barnette* was the focus of the Court's decision in Wooley v. Maynard, 430 U.S. 705 (1977), voiding the state's requirement that motorists display auto license plates bearing the motto "Live Free or Die." Acting on the complaint of a Jehovah's Witness, the Court held that one may not be compelled to display on his private property a message making an ideological statement. *Compare* PruneYard Shopping Center v. Robins, 447 U.S. 74, 85–88 (1980), and id. at 96 (Justice Powell concurring).

[178] Cole v. Richardson, 405 U.S. 676 (1972); Connell v. Higginbotham, 403 U.S. 207 (1971); Bond v. Floyd, 385 U.S. 116 (1966); Knight v. Board of Regents, 269 F. Supp. 339 (S.D.N.Y. 1967) (three-judge court), aff'd, 390 U.S. 36 (1968); Hosack v. Smiley, 276 F. Supp. 876 (C.D. Colo. 1967) (three-judge court), aff'd, 390 U.S. 744 (1968); Ohlson v. Phillips, 304 F. Supp. 1152 (C.D. Colo. 1969) (three-judge court), aff'd., 397 U.S. 317 (1970); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 161 (1971); Fields v. Askew, 279 So. 2d 822 (Fla. 1973), aff'd per curiam, 414 U.S. 1148 (1974).

[179] *Compare* Bond v. Floyd, 385 U.S. 116 (1966), *with* Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971).

[180] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[181] The issue has also arisen in the context of criminal sentencing. Evidence that racial hatred was a motivation for a crime may be taken into account, Barclay v. Florida, 463 U.S. 939, 949 (1983), but evidence of the defendant's membership in a racist group is inadmissible where race was not a factor and no connection had

In its disposition of one of the first cases concerning the federal loyalty security program, the Court of Appeals for the District of Columbia asserted broadly that "so far as the Constitution is concerned there is no prohibition against dismissal of Government employees because of their political beliefs, activities or affiliations."[182] On appeal, this decision was affirmed by an equally divided Court, it being impossible to determine whether this issue was one treated by the Justices.[183] Thereafter, the Court dealt with the loyalty-security program in several narrow decisions not confronting the issue of denial or termination of employment because of beliefs or "beliefs plus." But the same issue was also before the Court in related fields. In *American Communications Ass'n v. Douds*,[184] the Court was again evenly divided over a requirement that, in order for a union to have access to the NLRB, each of its officers must file an affidavit that he neither believed in, nor belonged to an organization that believed in, the overthrow of government by force or by illegal means. Chief Justice Vinson thought the requirement reasonable because it did not prevent anyone from believing what he chose but only prevented certain people from being officers of unions, and because Congress could reasonably conclude that a person with such beliefs was likely to engage in political strikes and other conduct which Congress could prevent.[185] Dissenting, Justice Frankfurter thought the provision too vague,[186] Justice Jackson thought that Congress could impose no disqualification upon anyone for an opinion or belief which had not manifested itself in any overt act,[187] and Justice Black thought that government had no power to penalize beliefs in any way.[188] Fi-

been established between the defendant's crime and the group's objectives. Dawson v. Delaware, 112 S. Ct. 4197 (1992). *See also* United States v. Abel, 469 U.S. 45 (1984) (defense witness could be impeached by evidence that both witness and defendant belonged to group whose members were sworn to lie on each other's behalf).

[182] Bailey v. Richardson, 182 F. 2d 46, 59 (D.C. Cir. 1950). The premise of the decision was that government employment is a privilege rather than a right and that access thereto may be conditioned as the Government pleases. But this basis, as the Court has said, "has been thoroughly undermined in the ensuing years." Board of Regents v. Roth, 408 U.S. 564, 571 n.9 (1972). For the vitiation of the right-privilege distinction, see *infra*, p. 1085.

[183] Bailey v. Richardson, 341 U.S. 918 (1951). *See also* Washington v. McGrath, 341 U.S. 923 (1951), aff'g by an equally divided Court, 182 F. 2d 375 (D.C. Cir. 1950). While no opinions were written in these cases, several Justices expressed themselves on the issues in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951), decided the same day.

[184] 339 U.S. 382 (1950). In a later case raising the same point, the Court was again equally divided. Osman v. Douds, 339 U.S. 846 (1950).

[185] 339 U.S. at 408–09, 412.

[186] Id. at 415.

[187] Id. at 422.

[188] Id. at 445.

nally, in *Konigsberg v. State Bar of California*,[189] a majority of the Court was found supporting dictum in Justice Harlan's opinion in which he justified some inquiry into beliefs, saying that "[i]t would indeed be difficult to argue that a belief, firm enough to be carried over into advocacy, in the use of illegal means to change the form of the State or Federal Government is an unimportant consideration in determining the fitness of applicants for membership in a profession in whose hands so largely lies the safekeeping of this country's legal and political institutions."

When the same issue returned to the Court years later, three five-to-four decisions left the principles involved unclear.[190] Four Justices endorsed the view that beliefs could not be inquired into as a basis for determining qualifications for admission to the bar;[191] four Justices endorsed the view that while mere beliefs might not be sufficient grounds to debar one from admission, the States were not precluded from inquiring into them for purposes of determining whether one was prepared to advocate violent overthrow of the government and to act on his beliefs.[192] The decisive vote in each case was cast by a single Justice who would not permit denial of admission based on beliefs alone but would permit inquiry into those beliefs to an unspecified extent for purposes of determining that the required oath to uphold and defend the Constitution could be taken in good faith.[193] Changes in Court personnel following this decision would seem to leave the questions presented open to further litigation.

Right of Association

"It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Of course, it

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[189] 336 U.S. 36, 51–52 (1961). *See also* In re Anastaplo, 336 U.S. 82, 89 (1961). Justice Black, joined by Justice Douglas and Chief Justice Warren, dissented on the ground that the refusal to admit the two to the state bars was impermissibly based upon their beliefs. Id. at 56, 97.

[190] Baird v. State Bar of Arizona, 401 U.S. 1 (1971); In re Stolar, 401 U.S. 23 (1971); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971).

[191] 401 U.S. at 5–8; id. at 28–29 (plurality opinions of Justices Black, Douglas, Brennan, and Marshall in *Baird* and *Stolar*, respectively); id. at 174–76, 178–80 (Justices Black and Douglas dissenting in *Wadmond*), 186–90 (Justices Marshall and Brennan dissenting in *Wadmond*).

[192] 401 U.S. at 17–19, 21–22 (Justices Blackmun, Harlan, and White, and Chief Justice Burger dissenting in *Baird*).

[193] 401 U.S. at 9–10; id. at 31 (Justice Stewart concurring in *Baird* and *Stolar*, respectively). How far Justice Stewart would permit government to go is not made clear by his majority opinion in *Wadmond*. Id. at 161–66.

is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[194] It would appear from the Court's opinions that the right of association is derivative from the First Amendment guarantees of speech, assembly, and petition,[195] although it has at times seemingly been referred to as a separate, independent freedom protected by the First Amendment.[196] The doctrine is a fairly recent construction, the problems associated with it having previously arisen primarily in the context of loyalty-security investigations of Communist Party membership, and these cases having been resolved without giving rise to any separate theory of association.[197]

Freedom of association as a concept thus grew out of a series of cases in the 1950's and 1960's in which certain States were attempting to curb the activities of the National Association for the Advancement of Colored People. In the first case, the Court unanimously set aside a contempt citation imposed after the organization refused to comply with a court order to produce a list of its members within the State. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."[198] "[T]hese indispensable liberties, whether of speech, press, or association,"[199] may be abridged by governmental action either directly or indirectly, wrote Justice Harlan, and the State had failed to demonstrate a need for the lists which would outweigh the harm to associational rights which disclosure would produce.

Applying the concept in subsequent cases, the Court again held in *Bates v. City of Little Rock*,[200] that the disclosure of membership lists, because of the harm to be caused to "the right of association," could only be compelled upon a showing of a subordinating interest; ruled in *Shelton v. Tucker*,[201] that while a State had a broad inter-

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[194] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460–61 (1958).

[195] Id.; Bates v. City of Little Rock, 361 U.S. 516, 522–23 (1960); United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 578–79 (1971); Healy v. James, 408 U.S. 169, 181 (1972).

[196] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 461, 463 (1958); NAACP v. Button, 371 U.S. 415, 429–30 (1963); Cousins v. Wigoda, 419 U.S. 477, 487 (1975); In re Primus, 436 U.S. 412, 426 (1978); Democratic Party v. Wisconsin, 450 U.S. 107, 121 (1981).

[197] *Infra*, pp. 1067–78.

[198] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958).

[199] Id. at 461.

[200] 361 U.S. 516 (1960).

[201] 364 U.S. 479 (1960).

est to inquire into the fitness of its school teachers, that interest did not justify a regulation requiring all teachers to list all organizations to which they had belonged within the previous five years; again struck down an effort to compel membership lists from the NAACP;[202] and overturned a state court order barring the NAACP from doing any business within the State because of alleged improprieties.[203] Certain of the activities condemned in the latter case, the Court said, were protected by the First Amendment and, while other actions might not have been, the State could not so infringe on the "right of association" by ousting the organization altogether.[204]

A state order prohibiting the NAACP from urging persons to seek legal redress for alleged wrongs and from assisting and representing such persons in litigation opened up new avenues when the Court struck the order down as violating the First Amendment.[205] "[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. . . . In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. . . .

"We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record, whereby Negroes seek through lawful means to achieve legitimate political ends, subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity."[206] This decision was

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[202] Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961).

[203] NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964).

[204] Id. at 308, 309.

[205] NAACP v. Button, 371 U.S. 415 (1963).

[206] Id. at 429–30. *Button* was applied in In re Primus, 436 U.S. 412 (1978), in which the Court found foreclosed by the First and Fourteenth Amendments the discipline visited upon a volunteer lawyer for the American Civil Liberties Union who had solicited someone to utilize the ACLU to bring suit to contest the sterilization of Medicaid recipients. Both the NAACP and the ACLU were organizations that engaged in extensive litigation as well as lobbying and educational activities, all of which were means of political expression. "[T]he efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants." Id. at 431. "[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." Id. at 426. However, ordinary law practice for commercial ends is not given special protection. "A lawyer's procurement of remunera-

followed in three subsequent cases in which the Court held that labor unions enjoyed First Amendment protection in assisting their members in pursuing their legal remedies to recover for injuries and other actions. In the first case, the union advised members to seek legal advice before settling injury claims and recommended particular attorneys;[207] in the second the union retained attorneys on a salary basis to represent members;[208] in the third, the union maintained a legal counsel department which recommended certain attorneys who would charge a limited portion of the recovery and which defrayed the cost of getting clients together with attorneys and of investigation of accidents.[209] Wrote Justice Black: "[T]he First Amendment guarantees of free speech, petition, and assembly give railroad workers the rights to cooperate in helping and advising one another in asserting their rights. . . ."[210]

Thus, a right to associate together to further political and social views is protected against unreasonable burdening,[211] but the evolution of this right in recent years has passed far beyond the relatively narrow contexts in which it was given birth.

Social contacts that fall short of organization or association to "engage in speech" may be unprotected, however. In holding that a state may restrict admission to certain licensed dance halls to persons between the age of 14 and 18, the Court declared that there is no "generalized right of 'social association' that includes chance encounters in dance halls."[212]

In a series of three decisions, the Court explored the extent to which associational rights may be burdened by nondiscrimination

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tive employment is a subject only marginally affected with First Amendment concerns." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 459 (1978). *See also* Bates v. State Bar of Arizona, 433 U.S. 350, 376 n.32 (1977).

[207] Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964).

[208] United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

[209] United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971).

[210] Id. at 578–79. These cases do not, however, stand for the proposition that individuals are always entitled to representation of counsel in administrative proceedings. *See* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985) (upholding limitation to $10 of fee that may be paid attorney in representing veteran's death or disability claims before VA).

[211] *E.g.,* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907–15 (1982) (concerted activities of group protesting racial bias); Healy v. James, 408 U.S. 169 (1972) (denial of official recognition to student organization by public college without justification abridged right of association). The right does not, however, protect the decision of entities not truly private to exclude minorities. Runyon v. McCrary, 427 U.S. 160, 175–76 (1976); Norwood v. Harrison, 413 U.S. 455, 469–70 (1973); Railway Mail Ass'n v. Corsi, 326 U.S. 88, 93–94 (1945); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

[212] City of Dallas v. Stanglin, 490 U.S. 19 (1989). The narrow factual setting—a restriction on adults dancing with teenagers in public—may be contrasted with the Court's broad assertion that "coming together to engage in recreational dancing . . . is not protected by the First Amendment." Id. at 25.

requirements. First, *Roberts v. United States Jaycees*[213] upheld application of the Minnesota Human Rights Act to prohibit the United States Jaycees from excluding women from full membership. Three years later in *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*,[214] the Court applied *Roberts* in upholding application of a similar California law to prevent Rotary International from excluding women from membership. Then, in *New York State Club Ass'n v. New York City*,[215] the Court upheld against facial challenge New York City's Human Rights Law, which prohibits race, creed, sex, and other discrimination in places "of public accommodation, resort, or amusement," and applies to clubs of more than 400 members providing regular meal service and supported by nonmembers for trade or business purposes. In *Roberts*, both the Jaycees' nearly indiscriminate membership requirements and the State's compelling interest in prohibiting discrimination against women were important to the Court's analysis. On the one hand, the Court found, "the local chapters of the Jaycees are large and basically unselective groups," age and sex being the only established membership criteria in organizations otherwise entirely open to public participation. The Jaycees, therefore, "lack the distinctive characteristics [e.g. small size, identifiable purpose, selectivity in membership, perhaps seclusion from the public eye] that might afford constitutional protection to the decision of its members to exclude women."[216] Similarly, the Court determined in *Rotary International* that Rotary Clubs, designed as community service organizations representing a cross section of business and professional occupations, also do not represent "the kind of intimate or private relation that warrants constitutional protection."[217] And in the *New York City* case, the fact that the ordinance "certainly could be constitutionally applied at least to some of the large clubs, under [the] decisions in *Rotary* and *Roberts*, the applicability criteria "pinpointing organizations which are 'commercial' in nature," helped to defeat the facial challenge.[218]

Some amount of First Amendment protection is still due such organizations; the Jaycees and its members had taken public positions on a number of issues, and had engaged in "a variety of civic, charitable, lobbying, fundraising and other activities worthy of constitutional protection." However, the *Roberts* Court could find "no basis in the record for concluding that admission of women as full

[213] 468 U.S. 609 (1984).
[214] 481 U.S. 537 (1987).
[215] 487 U.S. 1 (1988).
[216] 468 U.S. at 621.
[217] 481 U.S. at 546.
[218] 487 U.S. at 12.

voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views."[219] Moreover, the State had a "compelling interest to prevent . . . acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages."[220]

Because of the near-public nature of the Jaycees and Rotary Clubs—the Court in *Roberts* likening the situation to a large business attempting to discriminate in hiring or in selection of customers—the cases may be limited in application, and should not be read as governing membership discrimination by private social clubs.[221] In *New York City*, the Court noted that "opportunities for individual associations to contest the constitutionality of the Law as it may be applied against them are adequate to assure that any overbreadth . . . will be curable through case-by-case analysis of specific facts."[222]

Political Association.—The major expansion of the right of association has occurred in the area of political rights. "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom."[223] Usually in combination with an equal protection analysis, the Court since *Williams v. Rhodes*[224] has passed on numerous state restrictions that have an impact upon the ability of individuals or groups to join one or the other of the major parties or to form and join an independent political party to further political, social and economic goals.[225] Of course, the right is not absolute. The Court has recognized that there must be substantial state regulation of the election process which necessarily will work a diminu-

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[219] 468 U.S. at 626–27.

[220] 468 U.S. at 628.

[221] The Court in *Rotary* rejected an assertion that *Roberts* had recognized that Kiwanis Clubs are constitutionally distinguishable, and suggested that a case-by-case approach is necessary to determine whether "the 'zone of privacy' extends to a particular club or entity." 481 U.S. at 547 n.6.

[222] 487 U.S. at 15.

[223] Kusper v. Pontikes, 414 U.S. 51, 56–57 (1973).

[224] 393 U.S. 23 (1968).

[225] *E.g.,* Rosario v. Rockefeller, 410 U.S. 752 (1973) (time deadline for enrollment in party in order to vote in next primary); Kusper v. Pontikes, 414 U.S. 51 (1973) (barring voter from party primary if he voted in another party's primary within preceding 23 months); American Party of Texas v. White, 415 U.S. 767 (1974) (ballot access restriction); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (number of signatures to get party on ballot); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1982) (limit on contributions to associations formed to support or oppose referendum measure); Clements v. Fashing, 457 U.S. 957 (1982) (resign-to-run law).

tion of the individual's right to vote and to join with others for political purposes. The validity of governmental regulation must be determined by assessing the degree of infringement of the right of association against the legitimacy, strength, and necessity of the governmental interests and the means of implementing those interests.[226] Many restrictions upon political association have survived this sometimes exacting standard of review, in large measure upon the basis of some of the governmental interests found compelling.[227]

A significant extension of First Amendment association rights in the political context occurred when the Court curtailed the already limited political patronage system. At first holding that a nonpolicy-making, nonconfidential government employee cannot be discharged from a job that he is satisfactorily performing upon the sole ground of his political beliefs or affiliations,[228] the Court subsequently held that "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[229]

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[226] Williams v. Rhodes, 393 U.S. 23, 30–31 (1968); Bullock v. Carter, 405 U.S. 134, 142–143 (1972); Storer v. Brown, 415 U.S. 724, 730 (1974); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 183 (1979).

[227] Thus, in Storer v. Brown, 415 U.S. 724, 736 (1974), the Court found "compelling" the state interest in achieving stability through promotion of the two-party system, and upheld a bar on any independent candidate who had been affiliated with any other party within one year. *Compare* Williams v. Rhodes, 393 U.S. 23, 31–32 (1968) (casting doubt on state interest in promoting Republican and Democratic voters). The state interest in protecting the integrity of political parties was held to justify requiring enrollment of a person in the party up to eleven months before a primary election, Rosario v. Rockefeller, 410 U.S. 752 (1973), but not to justify requiring one to forgo one election before changing parties. Kusper v. Pontikes, 414 U.S. 51 (1973). *See also* Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (efficient operation of government justifies limits on employee political activity); Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982) (permitting political party to designate replacement in office vacated by elected incumbent of that party serves valid governmental interests). Storer v. Brown was distinguished in Anderson v. Celebrezze, 460 U.S. 780 (1983), holding invalid a requirement that independent candidates for President and Vice-President file nominating petitions by March 20 in order to qualify for the November ballot; state interests in assuring voter education, treating all candidates equally (candidates participating in a party primary also had to declare candidacy in March), and preserving political stability, were deemed insufficient to justify the substantial impediment to independent candidates and their supporters. *See also* Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) (state interests are insubstantial in imposing "closed primary" under which a political party is prohibited from allowing independents to vote in its primaries).

[228] Elrod v. Burns, 427 U.S. 347 (1976). The limited concurrence of Justices Stewart and Blackmun provided the qualification for an otherwise expansive plurality opinion. Id. at 374.

[229] Branti v. Finkel, 445 U.S. 507, 518 (1980). On the same page, the Court refers to a position in which "party membership was *essential* to a discharge of the employee's governmental responsibilities." (emphasis supplied). A great gulf separates "appropriate" from "essential," so that much depends on whether the Court

The concept of policymaking, confidential positions was abandoned, the Court noting that some such positions would nonetheless be protected whereas some people filling positions not reached by the description would not be.[230] The opinion of the Court makes difficult an evaluation of the ramifications of the decision, but it seems clear that a majority of the Justices adhere to a doctrine of broad associational political freedom that will have substantial implications for governmental employment. Refusing to confine *Elrod* and *Branti* to their facts, the court in *Rutan v. Republican Party of Illinois*[231] held that restrictions on patronage apply not only to dismissal or its substantial equivalent, but also to promotion, transfer, recall after layoffs, and hiring of low-level public employees.

The protected right of association extends as well to coverage of party principles, enabling a political party to assert against some state regulation an overriding interest sufficient to overcome the legitimate interests of the governing body. Thus, a Wisconsin law that mandated an open primary election, with party delegates bound to support at the national convention the wishes of the voters expressed in that primary election, while legitimate and valid in and of itself, had to yield to a national party rule providing for the acceptance of delegates chosen only in an election limited to those voters who affiliated with the party.[232]

Provisions of the Federal Election Campaign Act requiring the reporting and disclosure of contributions and expenditures to and by political organizations, including the maintenance by such organizations of records of everyone contributing more than $10 and the reporting by individuals and groups that are not candidates or political committees who contribute or expend more than $100 a year for the purpose of advocating the election or defeat of an identified candidate, were sustained.[233] "[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment. . . . We long have recognized

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was using the two words interchangeably or whether the stronger word was meant to characterize the position noted and not to particularize the standard.

[230] Justice Powell's dissents in both cases contain lengthy treatments of and defenses of the patronage system as a glue strengthening necessary political parties. Id. at 520.

[231] 497 U.S. 62 (1990). *Rutan* was a 5–4 decision, with Justice Brennan writing the Court's opinion. The four dissenters indicated, in an opinion by Justice Scalia, that they would not only rule differently in *Rutan*, but that they would also overrule *Elrod* and *Branti*.

[232] Democratic Party v. Wisconsin ex rel. LaFollette, 450 U.S. 107 (1981). *See also* Cousins v. Wigoda, 419 U.S. 477 (1975) (party rules, not state law, governed which delegation from State would be seated at national convention; national party had protected associational right to sit delegates it chose).

[233] Buckley v. Valeo, 424 U.S. 1, 60–84 (1976).

the significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. . . . We have required that the subordinating interests of the State must survive exacting scrutiny. We have also insisted that there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed."[234] The governmental interests effectuated by these requirements—providing the electorate with information, deterring corruption and the appearance of corruption, and gathering data necessary to detect violations—were found to be of sufficient magnitude to be validated even though they might incidentally deter some persons from contributing.[235] A claim that contributions to minor parties and independents should have a blanket exemption from disclosure was rejected inasmuch as an injury was highly speculative; but any such party making a showing of a reasonable probability that compelled disclosure of contributors' names would subject them to threats or reprisals could obtain an exemption from the courts.[236] The *Buckley* Court also narrowly construed the requirement of reporting independent contributions and expenditures in order to avoid constitutional problems.[237]

Conflict Between Organization and Members.—It is to be expected that disputes will arise between an organization and some of its members, and that First Amendment principles may be implicated. Of course, unless there is some governmental connection, there will be no federal constitutional application to any such controversy.[238] But at least in some instances, when government compels membership in an organization or in some manner lends its authority to such compulsion, there may well be constitutional limitations. Disputes implicating such limitations can arise in connection with union shop labor agreements permissible under the National Labor Relations Act and the Railway Labor Act.[239]

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[234] Id. at 64 (footnote citations omitted).

[235] Id. at 66–68.

[236] Id. at 68–74. Such a showing, based on past governmental and private hostility and harassment, was made in Brown v. Socialist Wrokers '74 Campaign Comm., 459 U.S. 87 (1982).

[237] 424 U.S. at 74–84.

[238] The Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 537, 29 U.S.C. §§ 411–413, enacted a bill of rights for union members, designed to protect, inter alia, freedom of speech and assembly and the right to participate in union meetings on political and economic subjects.

[239] § 8(a)(3) of the Labor-Management Relations Act of 1947, 61 Stat. 140, 29 U.S.C. § 158(a)(3), permits the negotiation of union shop but not closed shop agreements, which, however, may be outlawed by contrary state laws. § 14(b), 61 Stat. 151, 29 U.S.C. § 164(b). *See* Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); AFL v. American Sash & Door Co., 335 U.S. 538

Initially, the Court avoided constitutional issues in resolving a challenge by union shop employees to use of their dues money for political causes. Acknowledging "the utmost gravity" of the constitutional issues, the Court determined that Congress had intended that dues money obtained through union shop agreements should be used only to support collective bargaining and not in support of other causes.[240] Justices Black and Douglas, in separate opinions, would have held that Congress could not constitutionally provide for compulsory membership in an organization which could exact from members money which the organization would then spend on causes which the members opposed; Justices Frankfurter and Harlan, also reaching the constitutional issue, would have held that the First Amendment was not violated when government did not compel membership but merely permitted private parties to enter into such agreements and that in any event so long as members were free to espouse their own political views the use by a union of dues money to support political causes which some members opposed did not violate the First Amendment.[241]

In *Abood v. Detroit Board of Education*,[242] the Court applied *Hanson* and *Street* to the public employment context. Recognizing that employee associational rights were clearly restricted by any system of compelled support, because the employees had a right not to associate, not to support, the Court nonetheless found the governmental interests served by the agency shop provision—the promotion of labor peace and stability of employer-employee relations—to be of overriding importance and to justify the impact upon employee freedom.[243] But a different balance was drawn

(1949). In industries covered by the Railway Labor Act, union shop agreements may be negotiated regardless of contrary state laws. 64 Stat. 1238, 45 U.S.C. § 152, Eleventh; Railway Employees Dept. v. Hanson, 351 U.S. 225 (1956).

[240] International Ass'n of Machinists v. Street, 367 U.S. 740 (1961). The quoted phrase is at 749.

[241] Id. at 775 (Justice Douglas concurring), 780 (Justice Black dissenting), 797 (Justices Frankfurter and Harlan dissenting). On the same day, a majority of the Court declined, in Lathrop v. Donohue, 367 U.S. 820 (1961), to reach the constitutional issues presented by roughly the same fact situation in a suit by lawyers compelled to join an "integrated bar." These issues were faced squarely in Keller v. State Bar of California, 496 U.S. 1 (1990). An integrated state bar may not, against a members' wishes, devote compulsory dues to ideological or other political activities not "necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal service available to the people of the State." Id. at 14.

[242] 431 U.S. 209 (1977). That a public entity was the employer and the employees consequently were public employees was deemed constitutionally immaterial for the application of the principles of *Hanson* and *Street*, id. at 226–32, but Justice Powell found the distinction between public and private employment crucial. Id. at 244.

[243] Id. at 217–23. The compelled support was through the agency shop device. Id. at 211, 217 n. 10. Justice Powell, joined by Chief Justice Burger and Justice

when the Court considered whether employees compelled to support the union were constitutionally entitled to object to the use of those exacted funds to support political candidates or to advance ideological causes not germane to the union's duties as collective-bargaining representative. To compel one to expend funds in such a way is to violate his freedom of belief and the right to act on those beliefs just as much as if government prohibited him from acting to further his own beliefs.[244] However, the remedy was not to restrain the union from making non-collective bargaining related expenditures but to require that those funds come only from employees who do not object. Therefore, the lower courts were directed to oversee development of a system whereby employees could object generally to such use of union funds and could obtain either a proportionate refund or reduction of future exactions.[245] Later, the Court further tightened the requirements. A proportionate refund is inadequate because "even then the union obtains an involuntary loan for purposes to which the employee objects;"[246] an advance reduction of dues corrects the problem only if accompanied by sufficient information by which employees may gauge the propriety of the union's fee.[247] Therefore, the union procedure must also "provide for a reasonably prompt decision by an impartial decisionmaker."[248]

On a related matter, the Court held that a labor relations body could not prevent a union member or employee represented exclusively by a union from speaking out at a public meeting on an issue of public concern, simply because the issue was a subject of collective bargaining between the union and the employer.[249]

Maintenance of National Security and the First Amendment

Preservation of the security of the Nation from its enemies, foreign and domestic, is the obligation of government and one of the foremost reasons for government to exist. Pursuit of this goal may

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Blackmun, would have held that compelled support by public employees of unions violated their First Amendment rights. Id. at 244. For an argument over the issue of corporate political contributions and shareholder rights, see First National Bank v. Bellotti, 435 U.S. 765, 792–95 (1978), and id. at 802, 812–21 (Justice White dissenting).

[244] 431 U.S. at 232–37.

[245] Id. at 237–42. On the other hand, nonmembers may be charged for such general union expenses as contributions to state and national affiliates, expenses of sending delegates to state and national union conventions, and costs of a union newsletter. Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991).

[246] Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, 466 U.S. 435 (1984).

[247] Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986).

[248] Id. at 309.

[249] Madison School Dist. v. WERC, 429 U.S. 167 (1977).

lead government officials at times to trespass in areas protected by the guarantees of speech and press and may require the balancing away of rights which might be preserved inviolate at other times. The drawing of the line is committed, not exclusively but finally, to the Supreme Court. In this section, we consider a number of areas in which the necessity to draw lines has arisen.

Punishment of Advocacy.—Criminal punishment for the advocacy of illegal or of merely unpopular goals and of ideas did not originate in the United States in the post-World War II concern with Communism. Enactment of and prosecutions under the Sedition Act of 1798[1] and prosecutions under the federal espionage laws[2] and state sedition and criminal syndicalism laws[3] in the 1920's and early 1930's have been alluded to earlier.[4] But it was in the 1950's and the 1960's that the Supreme Court confronted First Amendment concepts fully in determining the degree to which government could proceed against persons and organizations which it believed were plotting and conspiring both to advocate the overthrow of government and to accomplish that goal.

The Smith Act of 1940[5] made it a criminal offense for anyone to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing the Government of the United States or of any State by force or violence, or for anyone to organize any association which teaches, advises, or encourages such an overthrow, or for anyone to become a member of or to affiliate with any such association. No case involving pros-

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[1] *Supra*, p. 1022.

[2] *Supra*, pp. 1022–24, 1036–38. The cases included Schenck v. United States, 249 U.S. 47 (1919) (affirming conviction for attempting to disrupt conscription by circulation of leaflets bitterly condemning the draft); Debs v. United States, 249 U.S. 211 (1919) (affirming conviction for attempting to create insubordination in armed forces based on one speech advocating socialism and opposition to war, and praising resistance to the draft); Abrams v. United States, 250 U.S. 616 (1919) (affirming convictions based on two leaflets, one of which attacked President Wilson as a coward and hypocrite for sending troops into Russia and the other of which urged workers not to produce materials to be used against their brothers).

[3] *Supra*, p. 1039. The cases included Gitlow v. New York, 268 U.S. 652 (1925) (affirming conviction based on publication of "manifesto" calling for the furthering of the "class struggle" through mass strikes and other mass action); Whitney v. California, 274 U.S. 357 (1927) (affirming conviction based upon adherence to party which had platform rejecting parliamentary methods and urging a "revolutionary class struggle," the adoption of which defendant had opposed).

[4] *See also* Taylor v. Mississippi, 319 U.S. 583 (1943), setting aside convictions of three Jehovah's Witnesses under a statute which prohibited teaching or advocacy intended to encourage violence, sabotage, or disloyalty to the government after the defendants had said that it was wrong for the President "to send our boys across in uniform to fight our enemies" and that boys were being killed "for no purpose at all." The Court found no evil or sinister purpose, no advocacy of or incitement to subversive action, and no threat of clear and present danger to government.

[5] Ch. 439, 54 Stat. 670, 18 U.S.C. § 2385.

ecution under this law was reviewed by the Supreme Court until in *Dennis v. United States*[6] it considered the convictions of eleven Communist Party leaders on charges of conspiracy to violate the advocacy and organizing sections of the statute. Chief Justice Vinson's plurality opinion for the Court applied a revised clear and present danger test[7] and concluded that the evil sought to be prevented was serious enough to justify suppression of speech. "If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase 'clear and present danger' of the utterances bringing about the evil within the power of Congress to punish. Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required."[8] "The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score."[9]

Justice Frankfurter in concurrence developed a balancing test, which, however, he deferred to the congressional judgment in applying, concluding that "there is ample justification for a legislative judgment that the conspiracy now before us is a substantial threat to national order and security."[10] Justice Jackson's concurrence was based on his reading of the case as involving "a conviction of conspiracy, after a trial for conspiracy, on an indictment charging conspiracy, brought under a statute outlawing conspiracy." Here the Government was dealing with "permanently organized, well-financed, semi-secret, and highly disciplined organizations" plotting

[6] 341 U.S. 494 (1951).
[7] Id. at 510, quoted *supra*, p. 1023.
[8] Id. at 509.
[9] Id. at 510–11.
[10] Id. at 517, 542

to overthrow the Government; under the First Amendment "it is not forbidden to put down force and violence, it is not forbidden to punish its teaching or advocacy, and the end being punishable, there is no doubt of the power to punish conspiracy for the purpose."[11] Justices Black and Douglas dissented separately, the former viewing the Smith Act as an invalid prior restraint and calling for reversal of the convictions for lack of a clear and present danger, the latter applying the Holmes-Brandeis formula of clear and present danger to conclude that "[t]o believe that petitioners and their following are placed in such critical positions as to endanger the Nation is to believe the incredible."[12]

In *Yates v. United States*,[13] the convictions of several second-string Communist Party leaders were set aside, a number ordered acquitted, and others remanded for retrial. The decision was based upon construction of the statute and appraisal of the evidence rather than on First Amendment claims, although each prong of the ruling seems to have been informed with First Amendment considerations. Thus, Justice Harlan for the Court wrote that the trial judge had given faulty instructions to the jury in advising that all advocacy and teaching of forcible overthrow was punishable, whether it was language of incitement or not, so long as it was done with an intent to accomplish that purpose. But the statute, the Justice continued, prohibited "advocacy of action," not merely "advocacy in the realm of ideas." "The essential distinction is that those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something."[14] Second, the Court found the evidence insufficient to establish that the Communist Party had engaged in the required advocacy of action, requiring the Government to prove such advocacy in each instance rather than presenting evidence generally about the Party. Additionally, the Court found the evidence insufficient to link five of the defendants to advocacy of action, but sufficient with regard to the other nine.[15]

Compelled Registration of Communist Party.—The Internal Security Act of 1950 provided for a comprehensive regulatory scheme by which "Communist-action organizations" and "Com-

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[11] Id. at 561, 572, 575.

[12] Id. at 579 (Justice Black dissenting), 581, 589 (Justice Douglas dissenting).

[13] 354 U.S. 298 (1957).

[14] Id. at 314, 315–16, 320, 324–25.

[15] Id. at 330–31, 332. Justices Black and Douglas would have held the Smith Act unconstitutional. Id. at 339. Justice Harlan's formulation of the standard by which certain advocacy could be punished was noticeably stiffened in Brandenburg v. Ohio, 395 U.S. 444 (1969).

munist-front organizations" could be curbed.[16] Organizations found to fall within one or the other of these designations were required to register and to provide for public inspection membership lists, accountings of all money received and expended, and listings of all printing presses and duplicating machines; members of organizations which failed to register were required to register and members were subject to comprehensive restrictions and criminal sanctions. After a lengthy series of proceedings, a challenge to the registration provisions reached the Supreme Court, which sustained the constitutionality of the section under the First Amendment, only Justice Black dissenting on this ground.[17] Employing the balancing test, Justice Frankfurter for himself and four other Justices concluded that the threat to national security posed by the Communist conspiracy outweighed considerations of individual liberty, the impact of the registration provision in this area in any event being limited to whatever "public opprobrium and obloquy" might attach.[18] Three Justices based their conclusion on the premise that the Communist Party was an anti-democratic, secret organization, subservient to a foreign power, utilizing speech-plus in attempting to achieve its ends and therefore subject to extensive governmental regulation.[19]

Punishment for Membership in an Organization Which Engages in Proscribed Advocacy.—It was noted above that the Smith Act also contained a provision making it a crime to organize or become a member of an organization which teaches, advocates, or encourages the overthrow of government by force or violence.[20] The Government used this authority to proceed against Communist Party members. In *Scales v. United States*,[21] the Court affirmed a conviction under this section and held it constitutional against First Amendment attack. Advocacy such as the Communist Party

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[16] Ch. 1024, 64 Stat. 987. Sections of the Act requiring registration of Communist-action and Communist-front organizations and their members were repealed in 1968. Pub. L. 90–237, § 5, 81 Stat. 766.

[17] Communist Party v. SACB, 367 U.S. 1 (1961). The Court reserved decision on the self-incrimination claims raised by the Party. The registration provisions ultimately floundered on this claim. Albertson v. SACB, 382 U.S. 70 (1965).

[18] Id. at 88–105. The quoted phrase is id. at 102.

[19] Id. at 170–175 (Justice Douglas dissenting on other grounds), 191 (Justice Brennan and Chief Justice Warren dissenting on other grounds). Justice Black's dissent on First Amendment grounds argued that "Congress has [no] power to outlaw an association, group or party either on the ground that it advocates a policy of violent overthrow of the existing Government at some time in the distant future or on the ground that it is ideologically subservient to some foreign country." Id. at 147.

[20] *Supra*, p. 1067.

[21] 367 U.S. 203 (1961). Justices Black and Douglas dissented on First Amendment grounds, id. at 259, 262, while Justice Brennan and Chief Justice Warren dissented on statutory grounds. Id. at 278

engaged in, Justice Harlan wrote for the Court, was unprotected under *Dennis*, and he could see no reason why membership which constituted a purposeful form of complicity in a group engaging in such advocacy should be a protected form of association. Of course, "[i]f there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired, but . . . [t]he clause does not make criminal all association with an organization which has been shown to engage in illegal advocacy." Only an "active" member of the Party—one who with knowledge of the proscribed advocacy intends to accomplish the aims of the organization—was to be punished, the Court said, not a "nominal, passive, inactive or purely technical" member.[22]

Disabilities Attaching to Membership in Proscribed Organizations.—The consequences of being or becoming a member of a proscribed organization can be severe. Aliens are subject to deportation for such membership.[23] Congress made it unlawful for any member of an organization required to register as a "Communist-action" or a "Communist-front" organization to apply for a passport or to use a passport.[24] A now-repealed statute required as a condition of access to NLRB processes by any union that each of

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[22] Id. 228–30. In Noto v. United States, 367 U.S. 290 (1961), the Court reversed a conviction under the membership clause because the evidence was insufficient to prove that the Party had engaged in unlawful advocacy. "[T]he mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it." Id. at 297–98.

[23] *Supra*, pp. 280–81. *See* 66 Stat. 205 (1952), 8 U.S.C. § 1251(a)(6). "Innocent" membership in an organization which advocates violent overthrow of the government is apparently insufficient to save an alien from deportation. Galvan v. Press, 347 U.S. 522 (1954). More recent cases, however, seem to impose a high standard of proof on the Government to show a "meaningful association," as a matter of statutory interpretation. Rowoldt v. Perfetto, 355 U.S. 115 (1957); Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963).

[24] Subversive Activities Control Act of 1950, § 6, ch. 1024, 64 Stat. 993, 50 U.S.C. § 785. The section was declared unconstitutional in Aptheker v. Secretary of State, 378 U.S. 500 (1964), as an infringement of the right to travel, a liberty protected by the due process clause of the Fifth Amendment. But the Court considered the case as well in terms of its restrictions on "freedom of association," emphasizing that the statute reached membership whether it was with knowledge of the organization's illegal aims or not, whether it was active or not, and whether the member intended to further the organization's illegal aims. Id. at 507–14. *But see* Zemel v. Rusk, 381 U.S. 1, 16–17 (1965), in which the Court denied that State Department area restrictions in its passport policies violated the First Amendment, because the policy inhibited action rather than expression, a distinction the Court continued in Haig v. Agee, 453 U.S. 280, 304–10 (1981).

its officers must file affidavits that he was not a member of the Communist Party or affiliated with it.[25] The Court has sustained state bar associations in their efforts to probe into applicants' membership in the Communist Party in order to determine whether there was knowing membership on the part of one sharing a specific intent to further the illegal goals of the organization.[26] A section of the Communist Control Act of 1954 was designed to keep the Communist Party off the ballot in all elections.[27] The most recent interpretation of this type of disability is *United States v. Robel*,[28] in which the Court held unconstitutional under the First Amendment a section of the Internal Security Act which made it unlawful for any member of an organization compelled to register as a "Communist-action" or "Communist-front" organization to work thereafter in any defense facility. For the Court, Chief Justice Warren wrote that a statute which so infringed upon freedom of association must be much more narrowly drawn to take precise account of the evils at which it permissibly could be aimed. One could be disqualified from holding sensitive positions on the basis of active, knowing membership with a specific intent to further the unlawful goals of an organization, but that membership which was passive or inactive, or by a person unaware of the organization's unlawful aims, or by one who disagreed with those aims, could not be grounds for disqualification, certainly not for a non-sensitive position.[29]

A somewhat different matter is disqualifying a person for public benefits of some sort because of membership in a proscribed organization or because of some other basis ascribable to doubts about his loyalty. The First Amendment was raised only in dissent when in *Flemming v. Nestor*[30] the Court sustained a statute which required the termination of Social Security old age benefits to an

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[25] This part of the oath was sustained in American Communications Ass'n v. Douds, 339 U.S. 382 (1950), and Osman v. Douds, 339 U.S. 846 (1950). With regard to another part of the required oath, *see supra*, p. 1055.

[26] Konigsberg v. State Bar of California, 366 U.S. 36 (1961); In re Anastaplo, 366 U.S. 82 (1961); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971). Membership alone, however, appears to be an inadequate basis on which to deny admission. Id. at 165–66; Baird v. State Bar of Arizona, 401 U.S. 1 (1971); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

[27] Ch. 886, § 3, 68 Stat. 775, 50 U.S.C. § 842. The section was at issue without a ruling on the merits in Mitchell v. Donovan, 290 F. Supp. 642 (D. Minn. 1968) (ordering names of Communist Party candidates put on ballot); 300 F. Supp. 1145 (D. Minn. 1969) (dismissing action as moot); 398 U.S. 427 (1970) (dismissing appeal for lack of jurisdiction).

[28] 389 U.S. 258 (1967).

[29] Id. at 265–66. *See also* Schneider v. Smith, 390 U.S. 17 (1968).

[30] 363 U.S. 603 (1960). Justice Black argued the applicability of the First Amendment. Id. at 628 (dissenting). Chief Justice Warren and Justices Douglas and Brennan also dissented. Id. at 628, 634.

alien who was deported on grounds of membership in the Communist Party. Proceeding on the basis that no one was "entitled" to Social Security benefits, Justice Harlan for the Court concluded that a rational justification for the law might be the deportee's inability to aid the domestic economy by spending the benefits locally, although a passage in the opinion could be read to suggest that termination was permissible because alien Communists are undeserving of benefits.[31] Of considerable significance in First Amendment jurisprudence is *Speiser v. Randall*,[32] in which the Court struck down a state scheme for denying veterans' property tax exemptions to "disloyal" persons. The system, as interpreted by the state courts, denied the exemption only to persons who engaged in speech which could be criminally punished consistent with the First Amendment, but the Court found the vice of the provision to be that after each claimant had executed an oath disclaiming his engagement in unlawful speech, the tax assessor could disbelieve the oath taker and deny the exemption, thus placing on the claimant the burden of proof of showing that he was loyal. "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact-finding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens . . . . In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free."[33]

Employment Restrictions and Loyalty Oaths.—An area in which significant First Amendment issues are often raised is the establishment of loyalty-security standards for government employees. Such programs generally take one of two forms or may com-

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[31] Id. at 612. The suggestive passage reads: "Nor . . . can it be deemed irrational for Congress to have concluded that the public purse should not be utilized to contribute to the support of those deported on the grounds specified in the statute." Ibid. *But see* Sherbert v. Verner, 374 U.S. 398, 404–05, 409 n.9 (1963). While the right-privilege distinction is all but moribund, *Flemming* has been strongly reaffirmed in recent cases by emphasis on the noncontractual nature of such benefits. Richardson v. Belcher, 404 U.S. 78, 80–81 (1971); United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 174 (1980).

[32] 357 U.S. 513 (1958).

[33] Id. at 526. For a possible limiting application of the principle, *see* Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 162–64 (1971), and id. at 176–78 (Justices Black and Douglas dissenting), id. at 189 n.5 (Justices Marshall and Brennan dissenting).

bine the two. First, government may establish a system investigating employees or prospective employees under standards relating to presumed loyalty. Second, government may require its employees or prospective employees to subscribe to a loyalty oath disclaiming belief in or advocacy of, or membership in an organization which stands for or advocates, unlawful or disloyal action. The Federal Government's security investigation program has been tested numerous times and First Amendment issues raised, but the Supreme Court has never squarely confronted the substantive constitutional issues, and it has not dealt with the loyalty oath features of the federal program.[34] The Court has, however, had a long running encounter with state loyalty oath programs.[35]

First encountered[36] was a loyalty oath for candidates for public office rather than one for public employees. Accepting the state court construction that the law required each candidate to "make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government by *force or violence*,' and that he is not knowingly a member of an organization engaged in such an attempt," the Court unanimously sustained the provision in a one-paragraph per curiam opinion.[37] Less than two months later, the Court did uphold a requirement that employees take an oath that they had not within a prescribed period advised, advocated, or taught the overthrow of government by unlawful

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[34] The federal program is primarily grounded in two Executive Orders by President Truman and President Eisenhower, E.O. 9835, 12 Fed. Reg. 1935 (1947), and E.O. 10450, 18 Fed. Reg. 2489 (1953), and a significant amendatory Order issued by President Nixon, E.O. 11605, 36 Fed. Reg. 12831 (1971). Statutory bases include 5 U.S.C. §§ 7311, 7531–32. Cases involving the program were decided either on lack of authority for the action being reviewed, e.g., Cole v. Young, 351 U.S. 536 (1956); and Peters v. Hobby, 349 U.S. 331 (1955), or on procedural due process grounds, Greene v. McElroy, 360 U.S. 474 (1959); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961). *But cf.* United States v. Robel, 389 U.S. 258 (1967); Schneider v. Smith, 390 U.S. 17 (1968). A series of three-judge district court decisions, however, invalidated federal loyalty oaths and inquiries. Soltar v. Postmaster General, 277 F. Supp. 579 (N.D. Calif. 1967); Haskett v. Washington, 294 F. Supp. 912 (D.D.C. 1968); Stewart v. Washington, 301 F. Supp. 610 (D.D.C. 1969); National Ass'n of Letter Carriers v. Blount, 305 F. Supp. 546 (D.D.C. 1969) (no-strike oath).

[35] So-called negative oaths or test oaths are dealt with in this section; for the positive oaths, *see supra*, pp. 1055–56.

[36] Test oaths had first reached the Court in the period following the Civil War, at which time they were voided as ex post facto laws and bills of attainder. Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867); Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867)

[37] Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951) (emphasis original). In Indiana Communist Party v. Whitcomb, 414 U.S. 411 (1974), a requirement that parties and candidates seeking ballot space subscribe to a similar oath was voided because the oath's language did not comport with the advocacy standards of Brandenburg v. Ohio, 395 U.S. 444 (1969). Four Justices concurred more narrowly. 414 U.S. at 452 n.3. *See also* Whitcomb v. Communist Party of Indiana, 410 U.S. 976 (1973).

means, nor been a member of an organization with similar objectives; every employee was also required to swear that he was not and had not been a member of the Communist Party.[38] For the Court, Justice Clark perceived no problem with the inquiry into Communist Party membership but cautioned that no issue had been raised whether an employee who was or had been a member could be discharged merely for that reason.[39] With regard to the oath, the Court did not discuss First Amendment considerations but stressed that it believed the appropriate authorities would not construe the oath adversely against persons who were innocent of an organization's purpose during their affiliation, or persons who had severed their associations upon knowledge of an organization's purposes, or persons who had been members of an organization at a time when it was not unlawfully engaged.[40] Otherwise, the oath requirement was valid as "a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty" and as being "reasonably designed to protect the integrity and competency of the service."[41]

In the following Term, the Court sustained a state statute disqualifying for government employment persons who advocated the overthrow of government by force or violence or persons who were members of organizations which so advocated; the statute had been supplemented by a provision applicable to teachers calling for the drawing up of a list of organizations which advocated violent overthrow and making membership in any listed organization prima facie evidence of disqualification.[42] Justice Minton observed that everyone had a right to assemble, speak, think, and believe as he pleased, but had no right to work for the State in its public school system except upon compliance with the State's reasonable terms. "If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly?

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[38] Garner v. Board of Public Works, 341 U.S. 716 (1951). Justice Frankfurter dissented in part on First Amendment grounds, id. at 724, Justice Burton dissented in part, id. at 729, and Justices Black and Douglas dissented completely, on bill of attainder grounds, id. at 731.

[39] Id. at 720. Justices Frankfurter and Burton agreed with this ruling. Id. at 725–26, 729–30.

[40] Id. at 723–24.

[41] Id. at 720–21. Justice Frankfurter objected that the oath placed upon the takers the burden of assuring themselves that every organization to which they belonged or had been affiliated with for a substantial period of time had not engaged in forbidden advocacy.

[42] Adler v. Board of Education, 342 U.S. 485 (1952). Justice Frankfurter dissented because he thought no party had standing. Id. at 497. Justices Black and Douglas dissented on First Amendment grounds. Id. at 508.

We think not."[43] A State could deny employment based on a person's advocacy of overthrow of the government by force or violence or based on unexplained membership in an organization so advocating with knowledge of the advocacy.[44] With regard to the required list, the Justice observed that the state courts had interpreted the law to provide that a person could rebut the presumption attached to his mere membership.[45]

Invalidated the same year was an oath requirement, addressed to membership in the Communist Party and other proscribed organizations, which the state courts had interpreted to disqualify from employment "solely on the basis of organizational membership." Stressing that membership might be innocent, that one might be unaware of an organization's aims, or that he might have severed a relationship upon learning of its aims, the Court struck the law down; one must be or have been a member with knowledge of illegal aims.[46] But subsequent cases firmly reiterated the power of governmental agencies to inquire into the associational relationships of their employees for purposes of determining fitness and upheld dismissals for refusal to answer relevant questions.[47] In *Shelton v. Tucker*,[48] however, a five-to-four majority held that, while a State could inquire into the fitness and competence of its teachers, a requirement that every teacher annually list every organization to which he belonged or had belonged in the previous five years was invalid because it was too broad, bore no rational relationship to the State's interests, and had a considerable potential for abuse.

Vagueness was then employed by the Court when loyalty oaths aimed at "subversives" next came before it. *Cramp v. Board of Public Instruction*[49] unanimously held too vague an oath which required one to swear, inter alia, that "I have not and will not lend my aid, support, advice, counsel or influence to the Communist

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[43] Id. at 492.

[44] Ibid.

[45] Id. at 494–96.

[46] Wieman v. Updegraff, 344 U.S. 183 (1952).

[47] Beilan v. Board of Education, 357 U.S. 399 (1958); Lerner v. Casey, 357 U.S. 458 (1958); Nelson v. County of Los Angeles, 362 U.S. 1 (1960). *Compare* Slochower v. Board of Higher Education, 350 U.S. 551 (1956). The self-incrimination aspects of these cases are considered *infra*, under analysis of the Fifth Amendment.

[48] 364 U.S. 479 (1960). "It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." Id. at 485–86. Justices Frankfurter, Clark, Harlan, and Whittaker dissented. Id. at 490, 496.

[49] 368 U.S. 278 (1961). For further proceedings on this oath, *see* Connell v. Higginbotham, 305 F. Supp. 445 (M.D. Fla. 1970). aff'd in part and rev'd in part, 403 U.S. 207 (1971).

Party." Similarly, in *Baggett v. Bullitt,*[50] two oaths, one requiring teachers to swear that they "will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government," and the other requiring all state employees to swear, inter alia, that they would not "aid in the commission of any act intended to overthrow, destroy, or alter or assist in the overthrow, destruction, or alteration" of government. Although couched in vagueness terms, the Court's opinion stressed that the vagueness was compounded by its effect on First Amendment rights and seemed to emphasize that the State could not deny employment to one simply because he unintentionally lent indirect aid to the cause of violent overthrow by engaging in lawful activities that he knew might add to the power of persons supporting illegal overthrow.[51]

More precisely drawn oaths survived vagueness attacks but fell before First Amendment objections in the next three cases. *Elfbrandt v. Russell*[52] involved an oath that as supplemented would have been violated by one who "knowingly and willfully becomes or remains a member of the communist party . . . or any other organization having for its purposes the overthrow by force or violence of the government" with "knowledge of said unlawful purpose of said organization." The law's blanketing in of "knowing but guiltless" membership was invalid, wrote Justice Douglas for the Court, because one could be a knowing member but not subscribe to the illegal goals of the organization; moreover, it appeared that one must also have participated in the unlawful activities of the organization before public employment could be denied.[53] Next, in *Keyishian v. Board of Regents,*[54] the oath provisions sustained in *Adler*[55] were declared unconstitutional. A number of provisions were voided as vague,[56] but the Court held invalid a new provision making Communist Party membership prima facie evidence of disqualification for employment because the opportunity to rebut the presumption was too limited. It could be rebutted only by denying membership, denying knowledge of advocacy of illegal overthrow,

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[50] 377 U.S. 360 (1964). Justices Clark and Harlan dissented. Id. at 380

[51] Id. at 369–70.

[52] 384 U.S. 11 (1966). Justices White, Clark, Harlan, and Stewart dissented. Id. at 20.

[53] Id. at 16, 17, 19. "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities pose no threat, either as citizens or public employees." Id. at 17.

[54] 385 U.S. 589 (1967). Justices Clark, Harlan, Stewart, and White dissented. Id. at 620.

[55] Adler v. Board of Education, 342 U.S. 485 (1952).

[56] Keyishian v. Board of Regents, 385 U.S. 589, 597–604 (1967).

or denying that the organization advocates illegal overthrow. But "legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations."[57] Similarly, in *Whitehill v. Elkins*,[58] the oath, revised, upheld in *Gerende*,[59] was voided because the Court thought it might include within its proscription innocent membership in an organization which advocated illegal overthrow of government.

More recent cases do not illuminate whether membership changes in the Court presage a change in view with regard to the loyalty-oath question. In *Connell v. Higginbotham*[60] an oath provision reading "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence" was invalidated because the statute provided for summary dismissal of an employee refusing to take the oath, with no opportunity to explain that refusal. *Cole v. Richardson*[61] upheld a clause in an oath "that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence, or by any illegal or unconstitutional method" upon the construction that this clause was mere "repetition, whether for emphasis or cadence," of the first part of the oath, which was a valid "uphold and defend" positive oath.

Legislative Investigations and the First Amendment.— The power of inquiry by congressional and state legislative committees in order to develop information as a basis for legislation[62] is subject to some uncertain limitation when the power as exercised results in deterrence or penalization of protected beliefs, associations and conduct. While the Court initially indicated that it would scrutinize closely such inquiries in order to curb First Amendment infringement,[63] later cases balanced the interests of the legislative bodies in inquiring about both protected and unprotected associations and conduct against what were perceived to be limited restraints upon the speech and association rights of witnesses, and

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[57] Id. at 608. Note that the statement here makes specific intent or active membership alternatives in addition to knowledge while Elfbrandt v. Russell, 384 U.S. 11, 19 (1966), requires both in addition to knowledge.

[58] 389 U.S. 54 (1967). Justices Harlan, Stewart, and White dissented. Id. at 62.

[59] Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951).

[60] 403 U.S. 207 (1971).

[61] 405 U.S. 676, 683–84 (1972).

[62] *Supra*, pp. 93–105.

[63] *See* United States v. Rumely, 345 U.S. 41 (1953); Watkins v. United States, 354 U.S. 178, 197–98 (1957); Sweezy v. New Hampshire, 354 U.S. 234, 249–51 (1957). Concurring in the last case, Justices Frankfurter and Harlan would have ruled that the inquiry there was precluded by the First Amendment. Id. at 255.

upheld wide-ranging committee investigations.[64] More recently, the Court has placed the balance somewhat differently and required that the investigating agency show "a subordinating interest which is compelling" to justify the restraint on First Amendment rights which the Court found would result from the inquiry.[65] The issues in this field, thus, must be considered to be unsettled pending further judicial consideration.

Interference With War Effort.—Unlike the dissent to United States participation in World War I, which provoked several prosecutions,[66] the dissent to United States action in Vietnam was subjected to little legal attack. Possibly the most celebrated governmental action, the prosecution of Dr. Spock and four others for conspiring to counsel, aid, and abet persons to evade or to refuse obligations under the Selective Service System, failed to reach the Supreme Court.[67] Aside from a comparatively minor case,[68] the Court's sole encounter with a Vietnam War protest allegedly involving protected "symbolic conduct" was *United States v. O'Brien*.[69] That case affirmed a conviction and upheld a congressional prohibition against destruction of draft registration certificates; O'Brien had publicly burned his card. "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on

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[64] Barenblatt v. United States, 360 U.S. 109 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959); Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961). Chief Justice Warren and Justices Black, Douglas, and Brennan dissented in each case.

[65] Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963). Justices Harlan, Clark, Stewart, and White dissented. Id. at 576, 583. *See also* DeGregory v. Attorney General of New Hampshire, 383 U.S. 825 (1966).

[66] *Supra*, pp. 1036–38.

[67] United States v. Spock, 416 F.2d 165 (1st Cir. 1969).

[68] In Schacht v. United States, 398 U.S. 58 (1970), the Court reversed a conviction under 18 U.S.C. § 702 for wearing a military uniform without authority. The defendant had worn the uniform in a skit in an on-the-street anti-war demonstration, and 10 U.S.C. § 772(f) authorized the wearing of a military uniform in a "theatrical production" so long as the performance did not "tend to discredit" the military. This last clause the Court held unconstitutional as an invalid limitation of freedom of speech.

[69] 391 U.S. 367 (1968).

First Amendment freedoms."[70] Finding that the Government's interest in having registrants retain their cards at all times was an important one and that the prohibition of destruction of the cards worked no restriction of First Amendment freedoms broader than that needed to serve the interest, the Court upheld the statute. More recently, the Court upheld a "passive enforcement" policy singling out for prosecution for failure to register for the draft those young men who notified authorities of an intention not to register for the draft and those reported by others.[71]

Suppression of Communist Propaganda in the Mails.—A 1962 statute authorizing the Post Office Department to retain all mail from abroad which was determined to be "communist political propaganda" and to forward it to an addressee only upon his request was held unconstitutional in *Lamont v. Postmaster General.*[72] The Court held that to require anyone to request receipt of mail determined to be undesirable by the Government was certain to deter and inhibit the exercise of First Amendment rights to receive information.[73] Distinguishing *Lamont*, the Court in 1987 upheld statutory classification as "political propaganda" of communications or expressions by or on behalf of foreign governments, foreign "principals," or their agents, and reasonably adapted or intended to influence United States foreign policy.[74] "The physical detention of materials, not their mere designation as 'communist political propaganda,' was the offending element of the statutory scheme [in *Lamont*]."[75]

Exclusion of Certain Aliens as a First Amendment Problem.—While a nonresident alien might be able to present no claim, based on the First Amendment or on any other constitutional provision, to overcome a governmental decision to exclude him from the country, it was arguable that United States citizens who could

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[70] Id. at 376–77. For recent cases with suggestive language, *see* Snepp v. United States, 444 U.S. 507 (1980); Haig v. Agee, 453 U.S. 280 (1981).

[71] *Wayte v. United States*, 470 U.S. 598 (1985). The incidental restriction on First Amendment rights to speak out against the draft was no greater than necessary to further the government's interests in "prosecutorial efficiency," obtaining sufficient proof prior to prosecution, and promoting general deterrence (or not appearing to condone open defiance of the law). *See also* United States v. Albertini, 472 U.S. 675 (1985) (order banning a civilian from entering military base valid as applied to attendance at base open house by individual previously convicted of destroying military property).

[72] 381 U.S. 301 (1965). The statute, Pub. L. 87–793, § 305, 76 Stat. 840, was the first federal law ever struck down by the Court as an abridgment of the First Amendment speech and press clauses.

[73] Id. at 307. Justices Brennan, Harlan, and Goldberg concurred, spelling out in some detail the rationale of the protected right to receive information as the basis for the decision.

[74] Meese v. Keene, 481 U.S. 465 (1987).

[75] Id. at 480.

assert a First Amendment interest in hearing the alien and receiving information from him, such as the right recognized in *Lamont*, could be able to contest such exclusion.[76] But the Court declined to reach the First Amendment issue and to place it in balance when it found that a governmental refusal to waive a statutory exclusion[77] was on facially legitimate and neutral grounds; the Court's emphasis, however, upon the "plenary" power of Congress over admission or exclusion of aliens seemed to indicate where such a balance might be drawn.[78]

Particular Governmental Regulations Which Restrict Expression

Government adopts and enforces many measures which are designed to further a valid interest but which may have restrictive effects upon freedom of expression. As an employer, government is interested in attaining and maintaining full production from its employees in a harmonious environment. As enforcer of the democratic method of carrying out selection of public officials, it is interested in outlawing "corrupt practices" and promoting a fair and smoothly-functioning electoral process. As regulator of economic affairs, its interests are extensive. As educator, it desires to impart knowledge and training to the young with as little distraction as possible. All of these interests may be achieved with some restriction upon expression, but if the regulation goes too far expression may be abridged and the regulation will fail.[79]

Government as Employer: Political Activities.—Abolition of the "spoils system" in federal employment brought with it con-

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[76] The right to receive information has been prominent in the rationale of several cases, e.g., Martin v. City of Struthers, 319 U.S. 141 (1943); Thomas v. Collins, 323 U.S. 516 (1945); Stanley v. Georgia, 394 U.S. 557 (1969).

[77] By §§ 212(a)(28)(D) and (G) of the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1182(a)(28)(D) and (G), aliens who advocate or write and publish "the economic, international, and governmental doctrines of world communism" are made ineligible to receive visas and are thus excluded from the United States. Upon the recommendation of the Secretary of State, however, the Attorney General is authorized to waive these provisions and to admit such an alien temporarily into the country. INA § 212(d)(3)(A), 8 U.S.C. § 1182(d)(3)(A).

[78] Kleindienst v. Mandel, 408 U.S. 753 (1972).

[79] Highly relevant in this and subsequent sections dealing with governmental incidental restraints upon expression is the distinction the Court has drawn between content-based and content-neutral regulations, a distinction designed to ferret out those regulations which indeed serve other valid governmental interests from those which in fact are imposed because of the content of the expression reached. *Compare* Police Department v. Mosley, 408 U.S. 92 (1972); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); and Schacht v. United States, 398 U.S. 58 (1970), *with* Greer v. Spock, 424 U.S. 828 (1976); Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973); and United States v. O'Brien, 391 U.S. 367 (1968). Content-based regulations are subjected to strict scrutiny, while content-neutral regulations are not.

sequent restrictions upon political activities by federal employees. In 1876, federal employees were prohibited from requesting from, giving to, or receiving from any other federal employee money for political purposes, and the Civil Service Act of 1883 more broadly forbade civil service employees to use their official authority or influence to coerce political action of any person or to interfere with elections.[80] By the Hatch Act, federal employees, and many state employees as well, are forbidden to "take any active part in political management or in political campaigns."[81] As applied through the regulations and rulings of the Office of Personnel Management, formerly the Civil Service Commission, the Act prevents employees from running for public office, distributing campaign literature, playing an active role at political meetings, circulating nomination petitions, attending a political convention except as a spectator, publishing a letter soliciting votes for a candidate, and all similar activity.[82] The question is whether government, which may not prohibit citizens in general from engaging in these activities, may nonetheless so control the off-duty activities of its own employees.

In *United Public Workers v. Mitchell*,[83] the Court answered in the affirmative. While the Court refused to consider the claims of persons who had not yet engaged in forbidden political activities, it did rule against a mechanical employee of the Mint who had done so. The opinion of the Court, by Justice Reed, recognized that the restrictions of political activities imposed by the Act did in some measure impair First Amendment and other constitutional rights,[84] but it placed its decision upon the established principle that no right is absolute. The standard by which the Court judged the validity of the permissible impairment of First Amendment rights, however, was a due process standard of reasonableness.[85] Thus, changes in the standards of judging incidental restrictions on expression suggested the possibility of a reconsideration of *Mitch-*

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[80] Ch. 287, 19 Stat. 169, § 6, 18 U.S.C. §§ 602–03, sustained in Ex parte Curtis, 106 U.S. 371 (1882); Ch. 27, 22 Stat. 403, as amended, 5 U.S.C. § 7323.

[81] Ch. 410, 53 Stat. 1148 § 9(a), (1939), as amended, 5 U.S.C. § 7324(a)(2). By Ch. 640, 54 Stat. 767 (1940), as amended, 5 U.S.C. §§ 1501–08, the restrictions on political activity were extended to state and local governmental employees working in programs financed in whole or in part with federal funds. This provision was sustained against federalism challenges in Oklahoma v. Civil Service Comm'n, 330 U.S. 127 (1947). All the States have adopted laws patterned on the Hatch Act. *See* Broadrick v. Oklahoma, 413 U.S. 601, 604 (1973).

[82] The Commission on Political Activity of Government Personnel, Findings and Recommendations 11, 19–24 (Washington: 1968).

[83] 330 U.S. 75, 94–104 (1947). The decision was 4-to–3, with Justice Frankfurter joining the Court on the merits only after arguing the Court lacked jurisdiction.

[84] Id. at 94–95.

[85] Id. at 101, 102.

ell.[86] But a divided Court, reaffirming *Mitchell*, sustained the Act's limitations upon political activity against a range of First Amendment challenges.[87] It emphasized that the interest of the Government in forbidding partisan political activities by its employees was so substantial that it overrode the rights of those employees to engage in political activities and association;[88] therefore, a statute which barred in plain language a long list of activities would be clearly valid.[89] The issue in *Letter Carriers*, however, was whether the language Congress did enact, forbidding employees to take "an active part in political management or in political campaigns," was unconstitutional on its face, either because the statute was too imprecise to allow government employees to determine what was forbidden and what was permitted, or because the statute swept in under its coverage conduct that Congress could not forbid as well as conduct subject to prohibition or regulation. In respect to vagueness, plaintiffs contended and the lower court had held that the quoted proscription was inadequate to provide sufficient guidance and that the only further elucidation Congress had provided was to enact that the forbidden activities were the same activities which the Commission had as of 1940, and reaching back to 1883, "determined are at the time of the passage of this act prohibited on the part of employees . . . by the provisions of the civil-service rules. . . ." This language had been included, it was contended, to deprive the Commission of power to alter thousands of rulings made by it which were not available to employees and which were in any event mutually inconsistent and too broad.

The Court held, on the contrary, that Congress had intended to confine the Commission to the boundaries of its rulings as of 1940 but had further intended the Commission by a process of case-by-case adjudication to flesh out the prohibition and to give content to it. That the Commission had done. It had regularly summarized in understandable terms the rules which it applied, and it was authorized as well to issue advisory opinions to employees un-

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[86] The Act was held unconstitutional by a divided three-judge district court. National Ass'n of Letter Carriers v. Civil Service Comm'n, 346 F. Supp. 578 (D.D.C. 1972).

[87] Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973). In Broadrick v. Oklahoma, 413 U.S. 601 (1973), the Court refused to consider overbreadth attacks on a state statute of much greater coverage because the plaintiffs had engaged in conduct that the statute could clearly constitutionally proscribe.

[88] The interests recognized by the Court as served by the proscription on partisan activities were (1) the interest in the efficient and fair operation of governmental activities and the appearance of such operation, (2) the interest in fair elections, and (3) the interest in protecting employees from improper political influences. 413 U.S. at 557–67.

[89] Id. at 556.

certain of the propriety of contemplated conduct. "[T]here are limitations in the English language with respect to being both specific and manageably brief," said the Court, but it thought the prohibitions as elaborated in Commission regulations and rulings were "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interests."[90] There were conflicts, the Court conceded, between some of the things forbidden and some of the protected expressive activities, but these were at most marginal. Thus, some conduct arguably protected did under some circumstances so partake of partisan activities as to be properly proscribable. But the Court would not invalidate the entire statute for this degree of overbreadth.[91] More recently, in *Bush v. Lucas*[92] the Court held that the civil service laws and regulations are sufficiently "elaborate [and] comprehensive" so as to afford federal employees adequate remedy for deprivation of First Amendment rights as a result of disciplinary actions by supervisors, and that therefore there is no need to create an additional judicial remedy for the constitutional violation.

Government as Employer: Free Expression Generally.— Change has occurred in many contexts, in the main with regard to state and local employees and with regard to varying restrictions placed upon such employees. Foremost among the changes has been the general disregarding of the "right-privilege" distinction. Application of that distinction to the public employment context was epitomized in the famous sentence of Justice Holmes: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[93] The Supreme Court embraced this application in the early 1950s, first affirming a lower court decision by equally divided vote,[94] and soon after applying the distinction itself. Upholding a prohibition on employment as

[90] Id. at 578–79.
[91] Id. at 580–81.
[92] 462 U.S. 367 (1983).
[93] McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892).
[94] Bailey v. Richardson, 182 F. 2d 46, 59 (D.C. Cir. 1950), aff'd by an equally divided Court, 341 U.S. 918 (1951). The appeals court majority, upholding the dismissal of a government employee against due process and First Amendment claims, asserted that "the plain hard fact is that so far as the Constitution is concerned there is no prohibition against the dismissal of Government employees because of their political beliefs, activities or affiliations. . . . The First Amendment guarantees free speech and assembly, but it does not guarantee Government employ." Although the Supreme Court issued no opinion in *Bailey*, several Justices touched on the issues in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951). Justices Douglas and Jackson in separate opinions rejected the privilege doctrine as applied by the lower court in *Bailey*. Id. at 180, 185. Justice Black had previously rejected the doctrine in United Public Workers v. Mitchell, 330 U.S. 75, 105 (1947) (dissenting opinion).

teachers of persons who advocated the desirability of overthrowing the government, the Court declared that "[i]t is clear that such persons have the right under our law to assemble, speak, think and believe as they will. . . . It is equally clear that they have no right to work for the state in the school system on their own terms. They may work for the school system under reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not."[95]

The same year, however, saw the express rejection of the right-privilege doctrine in another loyalty case. Voiding a loyalty oath requirement conditioned on mere membership in suspect organizations, the Court reasoned that the interest of public employees in being free of such an imposition was substantial. "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. . . . [W]e need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."[96] The premise here that if removal or rejection injures one in some fashion he is therefore entitled to raise constitutional claims against the dismissal or rejection has faded in subsequent cases; the rationale now is that while government may deny employment, or any benefit for that matter, for any number of reasons, it may not deny employment or other benefits on a basis that infringes that person's constitutionally protected interests. "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' . . . Such interference with constitutional rights is impermissible."[97]

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[95] Adler v. Board of Education, 342 U.S. 458, 492–93 (1952). Justices Douglas and Black dissented, again rejecting the privilege doctrine. Id. at 508. Justice Frankfurter, who dissented on other grounds, had previously rejected the doctrine in another case, Garner v. Board of Public Works, 341 U.S. 716, 725 (1951) (concurring in part and dissenting in part).

[96] Wieman v. Updegraff, 344 U.S. 183, 190–91, 192 (1952). Some earlier cases had utilized a somewhat qualified statement of the privilege. United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947); Garner v. Board of Public Works, 341 U.S. 716, 722 (1951).

[97] Perry v. Sindermann, 408 U.S. 593, 597 (1972). In a companion case, the Court noted that the privilege basis for the appeals court's due process holding in

However, the fact that government does not have carte blanche in dealing with the constitutional rights of its employees does not mean it has no power at all. "[I]t 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 regulation of the speech of the citizenry in general."[98] *Pickering* concerned the dismissal of a high school teacher who had written a critical letter to a local newspaper reflecting on the administration of the school system. The letter also contained several factual errors. "The problem in any case," Justice Marshall wrote for the Court, "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[99] No general standard was laid down by the Court, but a suggestive analysis was undertaken. Dismissal of a public employee for criticism of his superiors was improper, the Court indicated, where the relationship of employee to superior was not so close, such as day-to-day personal contact, that problems of discipline or of harmony among coworkers, or problems of personal loyalty and confidence, would arise.[100] The school board had not shown that any harm had resulted from the false statements in the letter, and it could not proceed on the assumption that the false statements were per se harmful, inasmuch as the statements primarily reflected a difference of opinion between the teacher and the board about the allocation of funds. Moreover, the allocation of funds is a matter of important public concern about which teachers have informed and definite opinions that the community should be aware of. "In these circumstances we conclude that the interest of the school adminis-

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Bailey "has been thoroughly undermined in the ensuing years." Board of Regents v. Roth, 408 U.S. 564, 571 n.9 (1972). The test now in due process and other such cases is whether government has conferred a property right in employment which it must respect, *see infra*, pp. 1622–31, but the inquiry when it is alleged that an employee has been penalized for the assertion of a constitutional right is that stated in the text. A finding, however, that protected expression or conduct played a substantial part in the decision to dismiss or punish does not conclude the case; the employer may show by a preponderance of the evidence that the same decision would have been reached in the absence of the protected expression or conduct. Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 416 (1979).

[98] Pickering v. Board of Education, 391 U.S. 563, 568 (1968).

[99] Id.

[100] Id. at 568–70. *Contrast* Connick v. Myers, 461 U.S. 138 (1983), where *Pickering* was distinguished on the basis that the employee, an assistant district attorney, worked in an environment where a close personal relationship involving loyalty and harmony was important. "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." Id. at 151–52.

tration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."[101]

Combining a balancing test of governmental interest and employee rights with a purportedly limiting statutory construction, the Court, in *Arnett v. Kennedy*,[102] sustained the constitutionality of a provision of federal law authorizing removal or suspension without pay of an employee "for such cause as will promote the efficiency of the service" when the "cause" cited concerned speech by the employee. He had charged that his superiors had made an offer of a bribe to a private person. The quoted statutory phrase, the Court held, "is without doubt intended to authorize dismissal for speech as well as other conduct." But, recurring to its *Letter Carriers* analysis,[103] it noted that the authority conferred was not impermissibly vague, inasmuch as it is not possible to encompass within a statutory enactment all the myriad situations that arise in the course of employment and the language used was informed by developed principles of agency adjudication coupled with a procedure for obtaining legal counsel from the agency on the interpretation of the law.[104] Neither was the language overbroad, continued the Court, because it "proscribes 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 than are necessary for the protection of the Government as an employer. . . . We hold that the language 'such cause as will promote the efficiency of the service' in the Act excludes constitutionally protected speech, and that the statute is therefore not overbroad."[105]

Pickering was distinguished in *Connick v. Myers*,[106] involving what the Court characterized in the main as an employee grievance

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[101] Id. at 570–73. *Pickering* was extended to private communications of an employee's views to the employer in Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979), although the Court recognized that different considerations might arise in context. That is, with respect to public speech, *content* may be determinative in weighing impairment of the government's interests, whereas with private speech, *manner*, *time*, and *place of delivery* may be as or more important. Id. at 415 n.4.

[102] 416 U.S. 134 (1974). The quoted language is from 5 U.S.C. § 7501(a).

[103] Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 578–79 (1973).

[104] Arnett v. Kennedy, 416 U.S. 134, 158–64 (1974).

[105] Id. at 162. In dissent, Justice Marshall argued: "The Court's answer is no answer at all. To accept this response is functionally to eliminate overbreadth from the First Amendment lexicon. No statute can reach and punish constitutionally protected speech. The majority has not given the statute a limiting construction but merely repeated the obvious." Id. at 229.

[106] 461 U.S. 138 (1983).

rather than an effort to inform the public on a matter of public concern. The employee, an assistant district attorney involved in a dispute with her supervisor over transfer to a different section, was fired for insubordination after she circulated a questionnaire among her peers soliciting views on matters relating to employee morale. This firing the Court found permissible. "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 wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[107] Whether an employee's speech addresses a matter of public concern, the Court indicated, must be determined not only by its content, but also by its form and context.[108] Because one aspect of the employee's speech did raise matters of public concern, *Connick* also applied *Pickering's* balancing test, holding that "a wide degree of deference is appropriate" when "close working relationships" between employer and employee are involved.[109] The issue of public concern is not only a threshold inquiry, but under *Connick* still figures in the balancing of interests: "the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression" and its importance to the public.[110]

On the other hand, the Court has indicated that an employee's speech may be protected as relating to matters of public concern even in the absence of any effort or intent to inform the public.[111] In *Rankin v. McPherson*[112] the Court held protected an employee's comment, made to a coworker upon hearing of an unsuccessful attempt to assassinate the President, and in a context critical of the

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[107] 461 U.S. at 146. *Connick* was a 5–4 decision, with Justice White's opinion of the Court being joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented, arguing that information concerning morale at an important government office is a matter of public concern, and that the Court extended too much deference to the employer's judgment as to disruptive effect. Id. at 163–65.

[108] Id. at 147–48. Justice Brennan objected to this introduction of context, admittedly of interest in balancing interests, into the threshold issue of public concern.

[109] Id. at 151–52.

[110] Id. at 150. The Court explained that "a stronger showing [of interference with governmental interests] may be necessary if the employee's speech more substantially involve[s] matters of public concern." Id. at 152.

[111] This conclusion was implicit in *Givhan*, *supra* n.101, characterized by the Court in *Connick* as involving "an employee speak[ing] out as a citizen on a matter of general concern, not tied to a personal employment dispute, but [speaking] privately." 461 U.S. at 148 n.8.

[112] 483 U.S. 378 (1987). This was a 5–4 decision, with Justice Marshall's opinion of the Court being joined by Justices Brennan, Blackmun, Powell, and Stevens, and with Justice Scalia's dissent being joined by Chief Justice Rehnquist, and by Justices White and O'Connor. Justice Powell added a separate concurring opinion.

President's policies, "If they go for him again, I hope they get him." Indeed, the Court in *McPherson* emphasized the clerical employee's lack of contact with the public in concluding that the employer's interest in maintaining the efficient operation of the office (including public confidence and good will) was insufficient to outweigh the employee's First Amendment rights.[113]

Thus, although the public employer cannot muzzle its employees or penalize them for their expressions and associations to the same extent that a private employer can (the First Amendment, inapplicable to the private employer, is applicable to the public employer),[114] the public employer nonetheless has broad leeway in restricting employee speech. If the employee speech does not relate to a matter of "public concern," then *Connick* applies and the employer is largely free of constitutional restraint. If the speech does relate to a matter of public concern, then *Pickering's* balancing test (as modified by *Connick*) is employed, the governmental interests in efficiency, workplace harmony, and the satisfactory performance of the employee's duties[115] being balanced against the employee's First Amendment rights. While the general approach is relatively easy to describe, it has proven difficult to apply.[116] The First Amendment, however, does not stand alone in protecting the

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[113] "Where . . . an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful function from that employee's private speech is minimal." 483 U.S. at 390–91.

[114] *See, e.g.*, Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980) (political patronage systems impermissibly infringe protected belief and associational rights of employees); Madison School Dist. v. WERC, 429 U.S. 167 (1977) (school teacher may not be prevented from speaking at a public meeting in opposition to position advanced by union with exclusive representation rights). The public employer may, as may private employers, permit collective bargaining and confer on representatives of its employees the right of exclusive representation, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 223–32 (1977), but the fact that its employees may speak does not compel government to listen to them. *See* Smith v. Arkansas State Highway Employees, 441 U.S. 463 (1979) (employees have right to associate to present their positions to their employer but employer not constitutionally required to engage in collective bargaining). *See also Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984) (public employees not members of union have no First Amendment right to meet separately with public employers compelled by state law to "meet and confer" with exclusive bargaining representative). Government may also inquire into the fitness of its employees and potential employees, but it must do so in a manner that does not needlessly endanger the expression and associational rights of those persons. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479 (1969).

[115] In some contexts, the governmental interest is more far-reaching. *See* Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (interest in protecting secrecy of foreign intelligence sources).

[116] For analysis of the efforts of lower courts to apply *Pickering* and *Connick*, *see* Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1 (1987); and Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 (1988).

speech of public employees; statutory protections for "whistle-blowers" add to the mix.[117]

Government as Educator.—While the Court had previously made clear that students in public schools were entitled to some constitutional protection[118] and that minors generally were not outside the range of constitutional protection,[119] its first attempt to establish standards of First Amendment expression guarantees against curtailment by school authorities came in *Tinker v. Des Moines Independent Community School District.*[120] There, high school principals had banned the wearing of black armbands by students in school as a symbol of protest against United States actions in Viet Nam. Reversing the refusal of lower courts to reinstate students who had been suspended for violating the ban, the Court set out the balance to be drawn. "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate. . . . On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[121] Restriction on expression by school authorities is only permissible to prevent disruption of educational discipline. "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."[122]

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[117] The principal federal law is the Whistleblower Protection Act of 1989, Pub. L. No. 101–12, 103 Stat. 16, 5 U.S.C. § 1201 *et seq.*

[118] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (flag salute); Meyer v. Nebraska, 262 U.S. 390 (1923) (limitation of language curriculum to English); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (compulsory school attendance in public rather than choice of public or private schools).

[119] In re Gault, 387 U.S. 1 (1967). Of course, children are in a number of respects subject to restrictions which would be impermissible were adults involved. *E.g.*, Ginsberg v. New York, 390 U.S. 629 (1968); Rowan v. Post Office Dept., 397 U.S. 728 (1970) (access to objectionable and perhaps obscene materials).

[120] 393 U.S. 503 (1969).

[121] Id. at 506, 507.

[122] Id. at 509. The internal quotation is from Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966). *See also* Papish v. Board of Curators, 410 U.S. 667 (1973) (state

Tinker was reaffirmed by the Court in *Healy v. James*,[123] in which it held that the withholding of recognition by a public college administration from a student organization violated the students' right of association, which is a construct of First Amendment liberties. Denial of recognition, the Court held, was impermissible if it had been based on the local organization's affiliation with the national SDS, or on disagreement with the organization's philosophy, or on a fear of disruption with no evidentiary support. "First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment' in the particular case. . . . And, where state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.'. . . Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' . . . The college classroom with its surrounding environs is peculiarly the 'market place of ideas' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."[124] But a college may impose reasonable regulations to maintain order and preserve an atmosphere in which learning may take place, and it may impose as a condition of recognition that each organization affirm in advance its willingness to adhere to reasonable campus law.[125]

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university could not expel a student for using "indecent speech" in campus newspaper). However, offensive "indecent" speech in the context of a high school assembly is punishable by school authorities. *See* Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (upholding 2-day suspension, and withdrawal of privilege of speaking at graduation, for student who used sophomoric sexual metaphor in speech given to school assembly).

[123] 408 U.S. 169 (1972).

[124] Id. at 180. The internal quotations are from Tinker, 393 U.S. 503, 506, 507 (1969), and from Shelton v. Tucker, 364 U.S. 479, 487 (1960).

[125] Healy v. James, 408 U.S. at 193. Because a First Amendment right was in issue, the burden was on the college to justify its rejection of a request for recognition rather than upon the requesters to justify affirmatively their right to be recognized. Id. at 184. Justice Rehnquist concurred in the result, because in his view a school administration could impose upon students reasonable regulations that would be impermissible if imposed by the government upon all citizens; consequently, cases cited by the Court which had arisen in the latter situation he did not think controlling. Id. at 201. *See also* Grayned v. City of Rockford, 408 U.S. 104 (1972), in which the Court upheld an antinoise ordinance that forbade persons on grounds adjacent to a school to willfully make noise or to create any other diversion during school hours that "disturbs or tends to disturb" normal school activities.

While a public college may not be required to open its facilities generally for use by student groups, once it has done so it must justify any discriminations and exclusions under applicable constitutional norms, such as those developed under the public forum doctrine. Thus, it was constitutionally impermissible for a college to close off its facilities, otherwise open, to students wishing to engage in religious speech.[126] To be sure, a decision to permit access by religious groups had to be evaluated under First Amendment religion standards, but equal access did not violate the religion clauses. Compliance with stricter state constitutional provisions on church-state was a substantial interest, but it could not justify a content-based discrimination in violation of the First Amendment speech clause.[127] By enactment of the Equal Access Act in 1984,[128] Congress applied the same "limited open [public] forum" principles to public high schools, and the Court upheld the Act against First Amendment challenge.[129]

When faced with another conflict between a school system's obligation to inculcate community values in students and the expression rights of those students, the Court splintered badly, remanding for full trial a case challenging the authority of a school board to remove certain books from high school and junior high school libraries.[130] In dispute were the school board's reasons for removing the books—whether, as the board alleged, because of vulgarity and other content-neutral reasons, or whether also because of political disagreement with contents. The plurality conceded that school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." At the same time, the plurality thought that students retained substantial free expression protections and that among these was the right to receive information and ideas. Carefully limiting its discussion to the removal of books from a school library,

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[126] Widmar v. Vincent, 454 U.S. 263 (1981).

[127] Id. at 270–76. Whether the holding extends beyond the college level to students in high school or below who are more "impressionable" and perhaps less able to appreciate that equal access does not compromise the school's neutrality toward religion, id. at 274 n.14, is unclear. *See* Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981).

[128] Pub. L. No. 98–377, title VII, 98 Stat. 1302, 20 U.S.C. §§ 4071–74.

[129] Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226 (1990). There was no opinion of the Court on the Establishment Clause holding. A plurality opinion, id. at 247–53, rejected Justice Marshall's contention, id. at 263, that compulsory attendance and other structured aspects of the particular high school setting in *Mergens* differed so significantly from the relatively robust, open college setting in *Widmar* as to suggest state endorsement of religion.

[130] Board of Education v. Pico, 457 U.S. 853 (1982).

thereby excluding acquisition of books as well as questions of school curricula, the plurality would hold a school board constitutionally disabled from removing library books in order to deny access to ideas with which it disagrees for political reasons.[131] The four dissenters basically rejected the contention that school children have a protected right to receive information and ideas and thought that the proper role of education was to inculcate the community's values, a function into which the federal courts could rarely intrude.[132] The decision provides little guidance to school officials and to the lower courts and assures a revisiting of the controversy by the Supreme Court.

Tinker was distinguished in *Hazelwood School Dist. v. Kuhlmeier*,[133] the Court relying on public forum analysis to hold that editorial control and censorship of a student newspaper sponsored by a public high school need only be "reasonably related to legitimate pedagogical concerns."[134] "The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."[135] The student newspaper had been created by school officials as a part of the school curriculum, and served "as a supervised learning experience for journalism students." Because no public forum had been created, school officials could maintain editorial control subject only to a reasonableness standard. Thus, a principal's decisions to excise from the publication an article describing student pregnancy in a manner believed inappropriate for younger students, and another article on divorce critical of a named parent, were upheld.

The category of school-sponsored speech subject to *Kuhlmeier* analysis appears to be far broader than the category of student expression still governed by *Tinker*. School-sponsored activities, the Court indicated, can include "publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a tradi-

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[131] Id. 862, 864–69, 870–72. Only Justices Marshall and Stevens joined fully Justice Brennan's opinion. Justice Blackmun joined it for the most part with differing emphases. Id. at 875. Justice White refrained from joining any of the opinions but concurred in the result solely because he thought there were unresolved issues of fact that required a trial. Id. at 883.

[132] The principal dissent was by Justice Rehnquist. Id. at 904. *See also* id. at 885 (Chief Justice Burger), 893 (Justice Powell), 921 (Justice O'Connor).

[133] 484 U.S.260 (1988).

[134] Id. at 273.

[135] Id. at 270–71.

tional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[136] Because most primary, intermediate, and secondary school environments are tightly structured, with few opportunities for unsupervised student expression,[137] *Tinker* apparently has limited applicability. It may be, for example, that students are protected for off-premises production of "underground" newspapers (but not necessarily for attempted distribution on school grounds) as well as for non-disruptive symbolic speech. For most student speech at public schools, however, *Tinker's* tilt in favor of student expression, requiring school administrators to premise censorship on likely disruptive effects, has been replaced by *Kuhlmeier's* tilt in favor of school administrators' pedagogical discretion.[138]

Governmental regulation of the school and college administration can also implicate the First Amendment. But the Court dismissed as too attenuated a claim to a First Amendment-based academic freedom privilege to withhold peer review materials from EEOC subpoena in an investigation of a charge of sex discrimination in a faculty tenure decision.[139]

Government as Regulator of the Electoral Process: Elections.—Government has increasingly regulated the electoral system by which candidates are nominated and elected, requiring disclosure of contributions and expenditures, limiting contributions and expenditures, and imposing other regulations.[140] These regula-

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[136] Id. at 271. Selection of materials for school libraries may fall within this broad category, depending upon what is meant by "designed to impart *particular* knowledge or skills." *See generally* Stewart, *The First Amendment, the Public Schools, and the Inculcation of Community Values*, 18 J. LAW & EDUC. 23 (1989).

[137] The Court in *Kuhlmeier* declined to decide "whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." 484 U.S. at 274 n.7.

[138] One exception may exist for student religious groups covered by the Equal Access Act; in this context the Court seemed to step back from *Kuhlmeier's* broad concept of curriculum-relatedness, seeing no constitutionally significant danger of perceived school sponsorship of religion arising from application of the Act's requirement that high schools provide meeting space for student religious groups on the same basis that they provide such space for student clubs. Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226 (1990).

[139] University of Pennsylvania v. EEOC, 493 U.S. 182 (1990).

[140] The basic federal legislation regulating campaign finances is spread over several titles of the United States Code. The relevant, principal modern laws are the Federal Election Campaign Act of 1971, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263, and the Federal Election Campaign Act Amendments of 1979, 93 Stat. 1339, 2 U.S.C. 431 et seq., and sections of Titles 18 and 26. The Federal Corrupt Practices Act of 1925, 43 Stat. 1074, was upheld in Burroughs v. United States, 290 U.S. 534 (1934), but there was no First Amendment challenge. All States, of course, extensively regulate elections.

tions restrict freedom of expression, which comprehends the rights to join together for political purposes, to promote candidates and issues, and to participate in the political process.[141] The Court is divided with respect to many of these federal and state restrictions, but when government acts to bar or penalize political speech directly the Justices are united. Thus, when Kentucky attempted to void an election on the grounds that the winner's campaign promise to serve at a lower salary than that affixed to the office violated a law prohibiting candidates from offering material benefits to voters in consideration for their votes, the Court ruled unanimously that the state's action violated the First Amendment.[142] Similarly, California could not prohibit official governing bodies of political parties from endorsing or opposing candidates in primary elections.[143]

In 1971 and 1974, Congress imposed new and stringent regulation of and limitations on contributions to and expenditures by political campaigns, as well as disclosure of most contributions and expenditures, setting the stage for the landmark *Buckley v. Valeo* decision probing the scope of protection afforded political activities by the First Amendment.[144] In basic unanimity, but with several Justices feeling that the sustained provisions trenched on protected expression, the Court sustained the contribution and disclosure sections of the statute but voided the limitations on expenditures.[145]

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. . . . A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth

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[141] *See, e.g.,* Mills v. Alabama, 384 U.S. 214, 218–19 (1966); Buckley v. Valeo, 424 U.S. 1, 14, 19 (1976); First National Bank of Boston v. Bellotti, 435 U.S. 765, 776–78 (1978); Brown v. Hartlage, 456 U.S. 45, 52–54 (1982).

[142] Brown v. Hartlage, 456 U.S. 45 (1982). *See also* Mills v. Alabama, 384 U.S. 214 (1966) (setting aside a conviction and voiding a statute which punished electioneering or solicitation of votes for or against any proposition on the day of the election, applied to publication of a newspaper editorial on election day supporting an issue on the ballot); Vanasco v. Schwartz, 401 F. Supp. 87 (E.D.N.Y. 1975) (three-judge court), aff'd, 423 U.S. 1041 (1976) (statute barring malicious, scurrilous, and false and misleading campaign literature is unconstitutionally overbroad).

[143] Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214 (1989). *Cf.* Burson v. Freeman, 112 S. Ct. 1846 (1992) (upholding Tennessee law prohibiting solicitation of votes and distribution of campaign literature within 100 feet of the entrance to a polling place; plurality found a "compelling" interest in preventing voter intimidation and election fraud).

[144] 424 U.S. 1 (1976).

[145] The Court's lengthy opinion was denominated *per curiam,* but five Justices filed separate opinions.

of their exploration, and the size of the audience reached."[146] The expenditure of money in political campaigns may involve speech alone, conduct alone, or mixed speech-conduct, the Court noted, but all forms of it involve communication, and when governmental regulation is aimed directly at suppressing communication it matters not how that communication is defined. As such, the regulation must be subjected to close scrutiny and justified by compelling governmental interests. When this process was engaged in, the contribution limitations, with some construed exceptions, survived, but the expenditure limitation did not.

The contribution limitation was sustained as imposing only a marginal restriction upon the contributor's ability to engage in free communication, inasmuch as the contribution is a generalized expression of support for a candidate but it is not a communication of reasons for the support; "the size of the contribution provides a very rough index of the intensity of the contributors' support for the candidate."[147] The political expression really occurs when the funds are spent by a candidate; only if the restrictions were set so low as to impede this communication would there arise a constitutional infringement. This incidental restraint upon expression may therefore be justified by Congress' purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions.[148]

Of considerable importance to the analysis of the validity of the limitations on contributions was the Court's conclusion voiding a section restricting to $1,000 a year the aggregate expenditure anyone could make to advocate the election or defeat of a "clearly identified candidate." Though the Court treated the restricted spending as purely an expenditure it seems to partake equally of the nature of a contribution on behalf of a candidate that is not given to the candidate but that is spent on his behalf. "Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or de-

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[146] Id. at 14, 19.

[147] Id. at 21.

[148] Id. at 14–38. Chief Justice Burger and Justice Blackmun would have struck down the contribution limitations. Id. at 235, 241–46, 290. *See also* California Medical Ass'n v. FEC, 453 U.S. 182 (1981), sustaining a provision barring individuals and unincorporated associations from contributing more than $5,000 per year to any multicandidate political action committee, on the basis of the standards applied to contributions in *Buckley*; and FEC v. National Right to Work Committee, 459 U.S. 197 (1982), sustaining a provision barring nonstock corporations from soliciting contributions from persons other than their members when the corporation uses the funds for designated federal election purposes.

feat of legislation."[149] The Court found that none of the justifications offered in support of a restriction on such expression was adequate; independent expenditures did not appear to pose the dangers of corruption that contributions did and it was an impermissible purpose to attempt to equalize the ability of some individuals and groups to express themselves by restricting the speech of other individuals and groups.[150]

Similarly, limitations upon the amount of funds a candidate could spend out of his own resources or those of his immediate family were voided. A candidate, no less than any other person, has a First Amendment right to advocate.[151] The limitations upon total expenditures by candidates seeking nomination or election to federal office could not be justified: the evil associated with dependence on large contributions was met by limitations on contributions, the purpose of equalizing candidate financial resources was impermissible, and the First Amendment did not permit government to determine that expenditures for advocacy were excessive or wasteful.[152]

Although the Court in *Buckley* upheld the Act's reporting and disclosure requirements, it indicated that under some circumstances the First Amendment might require exemption for minor parties able to show "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties."[153] This standard was applied both to disclosure of contributors' names and to disclosure of recipients of

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[149] Id. at 48.

[150] Id. at 39–51. Justice White dissented. Id. at 257. In an oblique return to the right-privilege distinction, the Court agreed that Congress could condition receipt of public financing funds upon acceptance of expenditure limitations. Id. at 108–09. In Common Cause v. Schmitt, 512 F. Supp. 489 (D.C. 1980), aff'd by an equally divided Court, 455 U.S. 129 (1982), a provision was invalidated which limited independent political committees to expenditures of no more than $1,000 to further the election of any presidential candidate who received public funding. An equally divided affirmance is of limited precedential value. When the validity of this provision, 26 U.S.C. § 9012(f), was again before the Court in 1985, the Court invalidated it by vote of 7–2. *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985). In an opinion by Justice Rehnquist, the Court determined that the governmental interest in preventing corruption or the appearance of corruption was insufficient justification for restricting the First Amendment rights of committees interested in making independent expenditures on behalf of a candidate, since "the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." Id. at 498.

[151] Id. at 51–54. Justices Marshall and White disagreed with this part of the decision. Id. at 286.

[152] Id. at 54–59. The reporting and disclosure requirements were sustained. Id. at 60–84. *See supra*, pp. 1063–64.

[153] 424 U.S. at 74.

campaign expenditures in *Brown v. Socialist Workers '74 Campaign Committee*,[154] in which the Court held that the minor party had established the requisite showing of likely reprisals through proof of past governmental and private hostility and harassment. Disclosure of recipients of campaign expenditures, the Court reasoned, could not only dissuade supporters and workers who might receive reimbursement for expenses, but could also dissuade various entities from performing routine commercial services for the party and thereby "cripple a minor party's ability to operate effectively."[155]

Outside the context of contributions to candidates, however, the Court has not been convinced of the justifications for limiting such uses of money for political purposes. Thus, a municipal ordinance regulating the maximum amount that could be contributed to or accepted by an association formed to take part in a city referendum was invalidated.[156] While *Buckley* had sustained limits on contributions as a prophylactic measure to prevent corruption or its appearance, no risk of corruption was found in giving or receiving funds in connection with a referendum. Similarly, the Court invalidated a criminal prohibition on payment of persons to circulate petitions for a ballot initiative.[157]

Venturing into the area of the constitutional validity of governmental limits upon political spending or contributions by corporations, a closely-divided Court struck down a state law that prohibited corporations from expending funds in order to influence referendum votes on any measure save proposals that materially affected corporate business, property, or assets. The free discussion of governmental affairs "is the type of speech indispensable to decisionmaking in a democracy," the Court said, "and this is no less true because the speech comes from a corporation rather than an individual"[158] It is the nature of the speech, not the status of the speaker, that is relevant for First Amendment analysis, thus allowing the Court to pass by the question of the rights a corporate person may have. The "materially affecting" requirement was found to

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[154] 459 U.S. 87 (1982).

[155] Id. at 97–98.

[156] Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1980). It is not clear from the opinion whether the Court was applying a contribution or an expenditure analysis to the ordinance, *see* id. at 301 (Justice Marshall concurring), or whether in this context it makes any difference.

[157] Meyer v. Grant, 486 U.S. 414 (1988).

[158] First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978). Justice Powell wrote the opinion of the Court. Dissenting, Justices White, Brennan, and Marshall argued that while corporations were entitled to First Amendment protection, they were subject to more regulation than were individuals, and substantial state interests supported the restrictions. Id. at 802. Justice Rehnquist went further in dissent, finding no corporate constitutional protection. Id. at 822.

be an impermissible proscription of speech based on content and identity of interests. The "exacting scrutiny" that restrictions on speech must pass was not satisfied by any of the justifications offered and the Court in any event found some of them impermissible.

Bellotti called into some question the constitutionality of the federal law that makes it unlawful for any corporation or labor union "to make a contribution or expenditure in connection with any election" for federal office or "in connection with any primary election or political convention or caucus held to select candidates" for such office.[159] Three times the opportunity has arisen for the Court to assess the validity of the statute and each time it has passed it by.[160] One of the dissents in *Bellotti* suggested its application to the federal law, but the Court saw several distinctions.[161]

Other aspects of the federal provision have been interpreted by the Court. First, in *FEC v. National Right to Work Committee*,[162] the Court unanimously upheld section 441b's prohibition on corporate solicitation of money from corporate nonmembers for use in federal elections. Relying on *Bellotti* for the proposition that government may act to prevent "both actual corruption and the appearance of corruption of elected representatives," the Court concluded that "there is no reason why . . . unions, corporations, and similar organizations [may not be] treated differently from individuals."[163] However, an exception to this general principle was recognized by a divided Court in *FEC v. Massachusetts Citizens for Life, Inc.*,[164] holding the section's independent expenditure limitations (not limiting expenditures but requiring only that such expendi-

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[159] 2 U.S.C. § 441b. The provision began as § 313 of the Federal Corrupt Practices Act of 1925, 43 Stat. 1074, prohibiting contributions by corporations. It was made temporarily applicable to labor unions in the War Labor Disputes Act of 1943, 57 Stat. 167, and became permanently applicable in § 304 of the Taft-Hartley Act. 61 Stat. 159.

[160] All three cases involved labor unions and were decided on the basis of statutory interpretation, apparently informed with some constitutional doubts. United States v. CIO, 335 U.S. 106 (1948); United States v. United Automobile Workers, 352 U.S. 567 (1957); Pipefitters v. United States, 407 U.S. 385 (1972).

[161] First National Bank of Boston v. Bellotti, 435 U.S. 765, 811–12 (1978) (Justice White dissenting). The Court emphasized that *Bellotti* was a referendum case, not a case involving corporate expenditures in the context of partisan candidate elections, in which the problem of corruption of elected representatives was a weighty problem. "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." Id. at 787–88 & n.26.

[162] 459 U.S. 197 (1982).

[163] 459 U.S. at 210–11.

[164] 479 U.S. 238 (1986). Justice Brennan's opinion for the Court was joined by Justices Marshall, Powell, O'Connor, and Scalia; Chief Justice Rehnquist, author of the Court's opinion in *National Right to Work Comm.*, dissented from the constitutional ruling, and was joined by Justices White, Blackmun, and Stevens.

tures be financed by voluntary contributions to a separate segregated fund) unconstitutional as applied to a corporation organized to promote political ideas, having no stockholders, and not serving as a front for a "business corporation" or union. One of the rationales for the special rules on corporate participation in elections—elimination of "the potential for unfair deployment of [corporate] wealth for political purposes"—has no applicability to such a corporation "formed to disseminate political ideas, not to amass capital."[165] The other principal rationale—protection of corporate shareholders and other contributors from having their money used to support political candidates to whom they may be opposed—was also deemed inapplicable. The Court distinguished *National Right to Work Committee* because "restrictions on contributions require less compelling justification than restrictions on independent spending," and also explained that, "given a contributor's awareness of the political activity of [MCFL], as well as the readily available remedy of refusing further donations, the interest protecting contributors is simply insufficient to support § 441b's restriction on . . . independent spending."[166] What the Court did not address directly was whether the same analysis could have led to a different result in *National Right to Work Committee.*[167]

Clarification of *Massachusetts Citizens for Life* was afforded by *Austin v. Michigan State Chamber of Commerce,*[168] in which the Court upheld application to a nonprofit corporation of Michigan's restrictions on independent expenditures by corporations. The Michigan law, like federal law, prohibited such expenditures from corporate treasury funds, but allowed them to be made from separate "segregated" funds. This arrangement, the Court decided, serves the state's compelling interest in assuring that corporate wealth, accumulated with the help of special advantages conferred by state law, does not unfairly influence elections. The law was sufficiently "narrowly tailored" because it permits corporations to make independent political expenditures through segregated funds that "accurately reflect contributors' support for the corporation's political views."[169] Also, the Court concluded that the Chamber of Commerce was unlike the MCFL in each of the three distinguishing features that had justified an exemption from operation of the federal law. Unlike MCFL, the Chamber was not organized solely

[165] 479 U.S. at 259.

[166] Id. at 259–60, 262.

[167] The Court did not spell out whether there was any significant distinction between the two organizations, NRWC and MCFL; Chief Justice Rehnquist's dissent suggested that there was not. *See* id. at 266.

[168] 494 U.S. 652 (1990).

[169] Id. at 660–61.

to promote political ideas; although it had no stockholders, the Chamber's members had similar disincentives to forego benefits of membership in order to protest the Chamber's political expression; and, by accepting corporate contributions, the Chamber could serve as a conduit for corporations to circumvent prohibitions on direct corporate contributions and expenditures.[170]

Government as Regulator of the Electoral Process: Lobbying.—Inasmuch as legislators may be greatly dependent upon representations made to them and information supplied to them by interested parties, legislators may desire to know what the real interests of those parties are, what groups or persons they represent, and other such information. But everyone is constitutionally entitled to write his congressman or his state legislator, to encourage others to write or otherwise contact legislators, and to make speeches and publish articles designed to influence legislators. Conflict is inherent. In the Federal Regulation of Lobbying Act,[171] Congress by broadly phrased and ambiguous language seemed to require detailed reporting and registration by all persons who solicited, received, or expended funds for purposes of lobbying, that is to influence congressional action directly or indirectly. In *United States v. Harriss*,[172] the Court, stating that it was construing the Act to avoid constitutional doubts,[173] interpreted covered lobbying as meaning only direct attempts to influence legislation through direct communication with members of Congress.[174] So construed, the Act was constitutional; Congress had "merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose," and this was simply a measure of "self-protection."[175]

Other statutes and governmental programs affect lobbying and lobbying activities. It is not impermissible for the Federal Government to deny a business expense tax deduction for money spent to defeat legislation which would adversely affect one's business.[176] But the antitrust laws may not be applied to a concert of business enterprises that have joined to lobby the legislative branch to pass and the executive branch to enforce laws which would have a det-

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[170] Id. at 661–65.

[171] Ch. 753, 60 Stat 812, 839 (1946), 2 U.S.C. §§ 261–70.

[172] 347 U.S. 612 (1954).

[173] Id. at 623.

[174] Id. at 617–624.

[175] Id. at 625. Justices Douglas, Black, and Jackson dissented. Id. at 628, 633. They thought the Court's interpretation too narrow and would have struck the statute down as being too broad and too vague, but would not have denied Congress the power to enact narrow legislation to get at the substantial evils of the situation. *See also* United States v. Rumely, 345 U.S. 41 (1953).

[176] Cammarano v. United States, 358 U.S. 498 (1959).

rimental effect upon competitors, even if the lobbying was conducted unethically.[177] On the other hand, allegations that competitors combined to harass and deter others from having free and unlimited access to agencies and courts by resisting before those bodies all petitions of competitors for purposes of injury to competition are sufficient to implicate antitrust principles.[178]

Government as Regulator of Labor Relations.—Numerous problems may arise in this area,[179] but the issue here considered is the balance to be drawn between the free speech rights of an employer and the statutory rights of his employees to engage or not engage in concerted activities free of employer coercion, which may well include threats or promises or other oral or written communications. The Court has upheld prohibitions against employer interference with union activity through speech so long as the speech is coercive,[180] and that holding has been reduced to statutory form.[181] Nonetheless, there is a First Amendment tension in this area, with its myriad variations of speech forms that may be denominated "predictions," especially since determination whether particular utterances have an impermissible impact on workers is vested with an agency with no particular expertise in the protection of freedom of expression.[182]

Government as Investigator: Journalist's Privilege.—News organizations have claimed that the First Amendment status of the press compels a recognition by government of an exception to the ancient rule that every citizen owes to his government a duty to give what testimony he is capable of giving.[183] The argument for a limited exemption to permit journalists to conceal their sources and to keep confidential certain information they obtain

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[177] Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961). *See also* UMW v. Pennington, 381 U.S. 657, 669–71 (1965).

[178] California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). Justices Stewart and Brennan thought that joining to induce administrative and judicial action was as protected as the concert in *Noerr* but concurred in the result because the complaint could be read as alleging that defendants sought to forestall access to agencies and courts by plaintiffs. Id. at 516.

[179] *E.g.*, the speech and associational rights of persons required to join a union, Railway Employees Dep't v. Hanson, 351 U.S. 225 (1956); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); *and see* Abood v. Detroit Bd. of Educ. 431 U.S. 209 (1977) (public employees), restrictions on picketing and publicity campaigns, Babbitt v. United Farm Workers, 442 U.S. 289 (1979), and application of collective bargaining laws in sensitive areas, NLRB v. Yeshiva Univ., 444 U.S. 672 (1980) (faculty collective bargaining in private universities); NLRB v. Catholic Bishop, 440 U.S. 490 (1979) (collective bargaining in religious schools).

[180] NLRB v. Virginia Electric & Power Co., 314 U.S. 469 (1941).

[181] Ch. 120, 61 Stat, 142, § 8(c) (1947), 29 U.S.C. § 158(c).

[182] Cf. NLRB v. Gissel Packing Co., 395 U.S. 575, 616–20 (1969).

[183] 8 J. WIGMORE, EVIDENCE 2192 (3d ed. 1940). *See* Blair v. United States, 250 U.S. 273, 281 (1919); United States v. Bryan, 339 U.S. 323, 331 (1950).

and choose at least for the moment not to publish was rejected in *Branzburg v. Hayes*[184] by a closely divided Court. "Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering which is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial."[185] Not only was it uncertain to what degree confidential informants would be deterred from providing information, said Justice White for the Court, but the conditional nature of the privilege claimed might not mitigate the deterrent effect, leading to claims for an absolute privilege. Confidentiality could be protected by the secrecy of grand jury proceedings and by the experience of law enforcement officials in themselves dealing with informers. Difficulties would arise as well in identifying who should have the privilege and who should not. But the principal basis of the holding was that the investigation and exposure of criminal conduct was a governmental function of such importance that it overrode the interest of newsmen in avoiding the incidental burden on their newsgathering activities occasioned by such governmental inquiries.[186]

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[184] 408 U.S. 665 (1972). "The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them." Id. at 682.

[185] Id. at 690–91.

[186] Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist joined the Court's opinion. Justice Powell also submitted a concurring opinion in which he suggested that newsmen might be able to assert a privilege of confidentiality if in each individual case they demonstrated that responding to the governmental inquiry at hand would result in a deterrence of First Amendment rights and privilege and that the governmental interest asserted was entitled to less weight than their interest. Id. at 709. Justice Stewart dissented, joined by Justices Brennan and Marshall, and argued that the First Amendment required a privilege which could only be overcome by a governmental showing that the information sought is clearly relevant to a precisely defined subject of inquiry, that it is reasonable to think that the witness has that information, and that there is not any means of obtaining the information less destructive of First Amendment liberties. Id. at 725. Justice Douglas also dissented. Id. at 711.

The courts have construed *Branzburg* as recognizing a limited privilege which must be balanced against other interests. *See* In re Pennington, 224 Kan. 573, 581 P.2d 812 (1978), cert. denied, 440 U.S. 929 (1979); Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980); *cf.* United States v. Criden, 633 F.2d 346 (3d Cir. 1980).

The Court observed that Congress and the States were free to develop by statute privileges for reporters as narrowly or as broadly as they chose; while efforts in Congress failed, many States have enacted such laws.[187] The assertion of a privilege in civil cases has met with mixed success in the lower courts, the Supreme Court having not yet confronted the issue.[188]

Nor does the status of an entity as a newspaper (or any other form of news medium) protect it from issuance and execution on probable cause of a search warrant for evidence or other material properly sought in a criminal investigation.[189] The press had argued that to permit searches of newsrooms would threaten the ability to gather, analyze, and disseminate news, because searches would be disruptive, confidential sources would be deterred from coming forward with information because of fear of exposure, reporters would decline to put in writing their information, and internal editorial deliberations would be exposed. The Court thought that First Amendment interests were involved, although it seemed to doubt that the consequences alleged would occur, but it observed that the built-in protections of the warrant clause would adequately protect those interests and noted that magistrates could guard against abuses when warrants were sought to search newsrooms by requiring particularizations of the type, scope, and intrusiveness that would be permitted in the searches.[190]

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[187] At least 26 States have enacted some form of journalists' shield law. E.g., CAL. EVID. CODE § 1070; N.J. REV. STAT. 2A:84A–21, 21a, –29. The reported cases evince judicial hesitancy to give effect to these statutes. *See, e.g.,* Farr v. Pitchess, 522 F. 2d 464 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1976); Rosato v. Superior Court, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), cert. denied, 427 U.S. 912 (1976). The greatest difficulty these laws experience, however, is the possibility of a constitutional conflict with the Fifth and Sixth Amendment rights of criminal defendants. *See* Matter of Farber, 78 N.J. 259, 394 A. 2d 330, cert. denied sub. nom., New York Times v. New Jersey, 439 U.S. 997 (1978). *See also* New York Times v. Jascalevich, 439 U.S. 1301, 1304, 1331 (1978) (applications to Circuit Justices for stay), and id. at 886 (vacating stay).

[188] *E.g.,* Baker v. F. & F. Investment Co., 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973); Democratic National Comm. v. McCord, 356 F. Supp. 1394 (D.D.C. 1973).

[189] Zurcher v. Stanford Daily, 436 U.S. 547, 563–67 (1978). Justice Powell thought it appropriate that "a magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment" when he assesses the reasonableness of a warrant in light of all the circumstances. Id. at 568 (concurring). Justices Stewart and Marshall would have imposed special restrictions upon searches when the press was the object, id. at 570 (dissenting), and Justice Stevens dissented on Fourth Amendment grounds. Id. at 577.

[190] Congress has enacted the Privacy Protection Act of 1980, Pub. L. No. 96–440, 94 Stat. 1879, 42 U.S.C. § 2000aa, to protect the press and other persons having material intended for publication from federal or state searches in specified circumstances, and creating damage remedies for violations.

Government and the Conduct of Trials.—Conflict between constitutionally protected rights is not uncommon. One of the most difficult to resolve is the conflict between a criminal defendant's Fifth and Sixth Amendment rights to a fair trial and the First Amendment's protection of the rights to obtain and publish information about defendants and trials. Convictions obtained in the context of prejudicial pre-trial publicity[191] and during trials that were media "spectaculars"[192] have been reversed, but the prevention of such occurrences is of paramount importance to the governmental and public interest in the finality of criminal trials and the successful prosecution of criminals. However, the imposition of "gag orders" on press publication of information directly confronts the First Amendment bar on prior restraints,[193] although the courts have a good deal more discretion in preventing the information from becoming public in the first place.[194] Perhaps the most profound debate that has arisen in recent years concerns the right of access of the public and the press to trial and pre-trial proceedings, and in those cases the Court has enunciated several important theorems of First Amendment interpretation.

When the Court held that the Sixth Amendment right to a public trial did not guarantee access of the public and the press to pre-trial suppression hearings,[195] a major debate flowered that implicated all the various strands of the extent to which, if at all, the speech and press clauses protected the public and the press in seeking to attend trials.[196] The right of access to criminal trials against the wishes of the defendant was held protected in *Richmond Newspapers v. Virginia*,[197] but the Justices could not agree upon a majority rationale that would permit principled application of the holding to other areas in which access is sought.

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[191] Irvin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963).

[192] Sheppard v. Maxwell, 384 U.S. 333 (1966); *compare* Estes v. Texas, 381 U.S. 532 (1965), *with* Chandler v. Florida, 449 U.S. 560 (1981).

[193] Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

[194] *See, e.g.*, Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) (disciplinary rules restricting extrajudicial comments by attorneys are void for vagueness, but such attorney speech may be regulated if it creates a "substantial likelihood of material prejudice" to the trial of a client); Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (press, as party to action, restrained from publishing information obtained through discovery).

[195] Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

[196] *DePasquale* rested solely on the Sixth Amendment, the Court reserving judgment on whether there is a First Amendment right of public access. 443 U.S. at 392.

[197] 448 U.S. 555 (1980). The decision was 7-to–1, Justice Rehnquist dissenting, id. at 604, and Justice Powell not participating. Justice Powell, however, had taken the view in Gannett Co. v. DePasquale, 443 U.S. 368, 397 (1979) (concurring), that the First Amendment did protect access to trials.

Chief Justice Burger pronounced the judgment of the Court, but his opinion was joined by only two other Justices (and one of them in a separate concurrence drew conclusions probably going beyond the Chief Justice's opinion).[198] Basic to the Chief Justice's view was an historical treatment which demonstrated that trials were traditionally open. This openness, moreover, was no "quirk of history" but "an indispensable attribute of an Anglo-American trial." This characteristic flowed from the public interest in seeing fairness and proper conduct in the administration of criminal trials; the "therapeutic value" to the public of seeing its criminal laws in operation, purging the society of the outrage felt with the commission of many crimes, convincingly demonstrated why the tradition developed and was maintained. Thus, "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." The presumption has more than custom to command it. "[I]n the context of trials . . . the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that amendment was adopted."[199]

Justice Brennan, joined by Justice Marshall, followed a significantly different route to the same conclusion. In his view, "the First Amendment . . . has a *structural* role to play in securing and fostering our republican system of self-government." It preserves and protects meaningful control over government through public discussion of its operation, and government therefore is compelled to see to the availability of information that people need to engage in that meaningful discussion. Thus, there is in fact a right of access that arises in the context of situations implicating self-government, including, but not limited to, trials.[200]

The trial court in *Richmond Newspapers* had made no findings of necessity for closure, and neither Chief Justice Burger nor Justice Brennan found the need to articulate a standard for determining when the government's or the defendant's interests could outweigh the public right of access. That standard was developed two years later. *Globe Newspaper Co. v. Superior Court*[201] involved a

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[198] *See* Richmond Newspapers v. Virginia, 448 U.S. 555, 582 (1980) (Justice Stevens concurring).

[199] Id. at 564–69. The emphasis on experience and history was repeated by the Chief Justice in his opinion for the Court in Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (Press-Enterprise II).

[200] Id. at 585–93.

[201] 457 U.S. 596 (1982). Joining Justice Brennan's opinion of the Court were Justices White, Marshall, Blackmun, and Powell. Justice O'Connor concurred in the judgment. Chief Justice Burger, with Justice Rehnquist, dissented, arguing that the tradition of openness that underlay *Richmond Newspapers*, was absent with respect

statute, unique to one State, that mandated the exclusion of the public and the press from trials during the testimony of a sex-crime victim under the age of 18. For the Court, Justice Brennan wrote that the First Amendment guarantees press and public access to criminal trials, both because of the tradition of openness[202] and because public scrutiny of a criminal trial serves the valuable functions of enhancing the quality and safeguards of the integrity of the factfinding process, of fostering the appearance of fairness, and of permitting public participation in the judicial process. The right is not absolute, but in order to close all or part of a trial government must show that "the denial is necessitated by a compelling governmental interest, and [that it] is narrowly tailored to serve that interest."[203] The Court was explicit that the right of access was to *criminal* trials,[204] so that the question of the openness of civil trials remains.

The Court next applied and extended the right of access in several other areas, striking down state efforts to exclude the public from *voir dire* proceedings, from a suppression hearing, and from a preliminary hearing. The Court determined in *Press-Enterprise I*[205] that historically *voir dire* had been open to the public, and that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[206] No such findings had been made by the state court, which had ordered closed, in the interest of protecting the privacy interests of some prospective jurors, 41 of the 44 days of *voir dire* in a rape-murder case. The trial court also had not considered the possibility of less restrictive alternatives, e.g. *in camera* consideration of jurors' requests for protection from publicity. In *Waller v. Georgia*,[207] the Court held that "under the Sixth Amendment, any clo-

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to sex crimes and youthful victims and that *Richmond Newspapers* was unjustifiably extended. Id. at 612. Justice Stevens dissented on mootness grounds. Id. at 620.

[202] That there was no tradition of openness with respect to the testimony of minor victims of sex crimes was irrelevant, the Court argued. As a general matter, all criminal trials have been open. The presumption of openness thus attaches to all criminal trials and to close any particular kind or part of one because of a particular reason requires justification on the basis of the governmental interest asserted. Id. at 605 n.13.

[203] Id. at 606–07. Protecting the well-being of minor victims was a compelling interest, the Court held, and might justify exclusion in specific cases, but it did not justify a mandatory closure rule. The other asserted interest, encouraging minors to come forward and report sex crimes, was not well served by the statute.

[204] The Court throughout the opinion identifies the right as access to criminal trials, even italicizing the word at one point. Id. at 605.

[205] Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984).

[206] 464 U.S. at 510.

[207] 467 U.S. 39 (1984).

sure of a suppression hearing over the objections of the accused[208] must meet the tests set out in *Press Enterprise*," and noted that the need for openness at suppression hearings "may be particularly strong" due to the fact that the conduct of police and prosecutor is often at issue.[209] And in *Press Enterprise II*,[210] the Court held that there is a similar First Amendment right of the public to access to most criminal proceedings (here a preliminary hearing) even when the accused requests that the proceedings be closed. Thus, an accused's Sixth Amendment-based request for closure must meet the same stringent test applied to governmental requests to close proceedings: there must be "specific findings . . . demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."[211] Openness of preliminary hearings was deemed important because, under California law, the hearings can be "the final and most important step in the criminal proceeding" and therefore may be "'the sole occasion for public observation of the criminal justice system,'" and also because the safeguard of a jury is unavailable at preliminary hearings.[212]

Government as Administrator of Prisons.—A prison inmate retains only those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.[213] The identifiable governmental interests at stake in administration of prisons are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners.[214] In applying these general standards, the Court at first arrived at somewhat divergent points in assessing prison restrictions on mail and on face-to-face news interviews between newsmen and prisoners. The Court's more recent deferential approach to regulation of prisoners' mail has lessened the differences.

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[208] Gannett Co. v. DePasquale, supra n., did not involve assertion *by the accused* of his 6th Amendment right to a public trial; instead, the accused in that case had requested closure. "[T]he constitutional guarantee of a public trial is for the benefit of the defendant." *DePasquale*, 443 U.S. at 381.

[209] 467 U.S. at 47.

[210] Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986).

[211] Id. at 14.

[212] Id. at 12.

[213] Pell v. Procunier, 417 U.S. 817, 822 (1974).

[214] Procunier v. Martinez, 416 U.S. 396, 412 (1974).

First, in *Procunier v. Martinez,*[215] the Court invalidated mail censorship regulations that permitted authorities to hold back or to censor mail to and from prisoners whenever they thought that the letters "unduly complain," "express inflammatory . . . views or beliefs," or were "defamatory" or "otherwise inappropriate." The Court based this ruling not on the rights of the prisoner, but instead on the outsider's right to communicate with the prisoner either by sending or by receiving mail. Under this framework, the Court held, regulation of mail must further an important interest unrelated to the suppression of expression; regulation must be shown to further the substantial interest of security, order, and rehabilitation, and it must not be utilized simply to censor opinions or other expressions. Further, a restriction must be no greater than is necessary or essential to the protection of the particular government interest involved.

However, in *Turner v. Safley,*[216] the Court made clear that a more deferential standard is applicable when only the communicative rights of inmates are at stake. In upholding a Missouri rule barring inmate-to-inmate correspondence, while striking down a prohibition on inmate marriages absent compelling reason such as pregnancy or birth of a child, the Court announced the appropriate standard. "[W]hen a regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[217] Several considerations are appropriate in determining reasonableness of a regulation. First, there must be a rational relation to a legitimate, content-neutral objective. Prison security, broadly defined, is one such objective.[218] Availability of other avenues for exercise of the inmate right suggests reasonableness. A further indicium of reasonableness is present if accommodation would have a negative effect on liberty or safety of guards or other inmates. On the other hand, an alternative to regulation "that fully accommodated the prisoner's rights at *de minimis* cost to valid penological interests" suggests

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[215] 416 U.S. 396 (1974). *But see* Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977), in which the Court sustained, while recognizing the First Amendment implications, prison regulations barring solicitation of prisoners by other prisoners to join a union, banning union meetings, and denying bulk mailings concerning the union from outside sources. The reasonable fears of correctional officers that organizational activities of the sort advocated by the union could impair discipline and lead to possible disorders justified the regulations.

[216] 482 U.S. 78 (1987).

[217] Id. at 89.

[218] All that is required is that the underlying governmental objective be content neutral; the regulation itself may discriminate on the basis of content. *See* Thornburgh v. Abbott, 490 U.S. 401 (1989) (upholding Federal Bureau of Prisons regulation allowing prison authorities to reject incoming publications found to be detrimental to prison security).

unreasonableness.[219] Two years after *Safley*, the Court directly limited *Martinez*, restricting it to regulation of *outgoing* correspondence. In the Court's current view the needs of prison security justify a more deferential standard for prison regulations restricting incoming material, whether those incoming materials are correspondence from other prisoners, correspondence from nonprisoners, or outside publications.[220]

Neither prisoners nor newsmen have any affirmative First Amendment right to face-to-face interviews, when general public access to prisons is restricted and when there are alternatives by which the news media can obtain information respecting prison policies and conditions.[221] Prison restrictions on such interviews do indeed implicate the First Amendment rights of prisoners, the Court held, but the justification for the restraint lay in the implementation of security arrangements, affected by the entry of persons into prisons, and the carrying out of rehabilitation objectives, affected by the phenomenon of the "big wheel," the exploitation of access to the news media by certain prisoners; alternatives to face-to-face interviews existed, such as mail and visitation with family, attorneys, clergy, and friends. The existence of alternatives and the presence of justifications for the restraint served to weigh the balance against the asserted First Amendment right, the Court held.[222]

While agreeing with a previous affirmation that "newsgathering is not without some First Amendment protection,"[223] the Court denied that the First Amendment accorded newsmen any affirmative obligation on the part of government. "The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally."[224] Government has an obligation not to impair the freedom of journalists to seek out newsworthy information, and not to restrain the publication of news. But it cannot be argued, the Court continued, "that the Constitution imposes upon government the affirmative

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[219] 482 U.S. at 91.

[220] Thornburgh v. Abbott, 490 U.S. 401, 411–14 (1989).

[221] Pell v. Procunier, 417 U.S. 817 (1974). Justices Douglas, Brennan, and Marshall dissented. Id. at 836.

[222] Id. at 829–35.

[223] Branzburg v. Hayes, 408 U.S. 665, 707 (1972), *quoted in* Pell v. Procunier, 417 U.S. 817, 833 (1974).

[224] Id. at 834.

duty to make available to journalists sources of information not available to members of the public generally."[225]

Pell and *Saxbe* did not delineate whether the "equal access" rule applied only in cases in which there was public access, so that a different rule for the press might follow when general access was denied, nor did they purport to begin defining what the rules of equal access are. No greater specificity emerged from *Houchins v. KQED*,[226] in which the broadcaster had sued for access to a prison from which public and press alike were barred and as to which there was considerable controversy over conditions of incarceration. Following initiation of the suit, the administrator of the prison authorized limited public tours. The tours were open to the press, but cameras and recording devices were not permitted, there was no opportunity to talk to inmates, and the tours did not include the maximum security area about which much of the controversy centered. The Supreme Court overturned the injunction obtained in the lower courts, the plurality reiterating that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control. . . . [U]ntil the political branches decree otherwise, as they are free to do, the media have no special right of access to the Alameda County Jail different from or greater than that accorded the public generally."[227] Justice Stewart, whose vote was necessary to the disposition of the case, agreed with the equal access holding but would have approved an injunction more narrowly drawn to protect the press' right to use cameras and recorders so as to enlarge public access to the information.[228] Thus, any question of special press access appears settled by the decision; yet there still remain the questions raised above. May everyone be barred from access and, once access is accorded, does the Constitution necessitate any limitation on the discretion of prison administrators?[229]

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[225] Id. The holding was applied to federal prisons in Saxbe v. Washington Post, 417 U.S. 843 (1974). Dissenting, Justices Powell, Brennan, and Marshall argued that an important societal function of the First Amendment is to preserve free public discussion of governmental affairs, that the press' role was to make this discussion informed through providing the requisite information, and that the ban on face-to-face interviews unconstitutionally fettered this role of the press. Id. at 850.

[226] 438 U.S. 1 (1978). The decision's imprecision of meaning is partly attributable to the fact that there was no opinion of the Court. A plurality opinion represented the views of only three Justices; two Justices did not participate, three Justices dissented, and one Justice concurred with views that departed somewhat from the plurality.

[227] Id. at 15–16.

[228] Id. at 16.

[229] The dissenters, Justices Stevens, Brennan, and Powell, believed that the Constitution protects the public's right to be informed about conditions within the

Government and Power of the Purse.—In exercise of the spending power, Congress may refuse to subsidize exercise of First Amendment rights, but it may not deny benefits solely on the basis of exercise of these rights. The distinction between these two closely related principles seemed, initially at least, to hinge on the severity and pervasiveness of the restriction placed on exercise of First Amendment rights. What has emerged is the principle that Congress may condition the receipt of federal funds on acceptance of speech limitations on persons working for the project receiving the federal funding—even if the project also receives non-federal funds—provided that the speech limitations do not extend to the use of nonfederal funds outside of the federally funded project. In *Regan v. Taxation With Representation,*[230] the Court held that Congress could constitutionally limit tax-exempt status under § 501(c)(3) of the Internal Revenue Code to charitable organizations that do not engage in lobbying. "Congress has merely refused to pay for the lobbying out of public moneys," the Court concluded.[231] The effect of the ruling on the organization's lobbying activities was minimal, however, since it could continue to receive tax-deductible contributions by creating a separate affiliate to conduct the lobbying. In *FCC v. League of Women Voters,*[232] on the other hand, the Court held that the First Amendment rights of public broadcasting stations were abridged by a prohibition on all editorializing by any recipient of public funds. There was no alternative means, as there had been in *Taxation With Representation*, by which the stations could continue to receive public funding and create an affiliate to engage in the prohibited speech. The Court rejected dissenting Justice Rehnquist's argument that the general principles of *Taxation With Representation* and *Oklahoma v. Civil Service Comm'n*[233]

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prison and that total denial of access, such as existed prior to institution of the suit, was unconstitutional. They would have sustained the more narrowly drawn injunctive relief to the press on the basis that no member of the public had yet sought access. Id. at 19. It is clear that Justice Stewart did not believe the Constitution affords any relief. Id. at 16. While the plurality opinion of the Chief Justice Burger and Justices White and Rehnquist may be read as not deciding whether any public right of access exists, overall it appears to proceed on the unspoken basis that there is none. The second question, when Justice Stewart's concurring opinion and the dissenting opinion are combined, appears to be answerable qualifiedly in the direction of constitutional constraints upon the nature of access limitation once access is granted.

[230] 461 U.S. 540 (1983).

[231] Id. at 545. *See also* Cammarano v. United States, 358 U.S. 498, 512–13 (1959) (exclusion of lobbying expenses from income tax deduction for ordinary and necessary business expenses is not a regulation aimed at the suppression of dangerous ideas, and does not violate the First Amendment).

[232] 468 U.S. 364 (1984).

[233] 330 U.S. 127 (1947). *See* discussion supra p. 156.

should be controlling.[234] Several years later, however, Chief Justice Rehnquist asserted for the Court that restrictions on abortion counseling and referral imposed on recipients of family planning funding under the Public Health Service Act did not constitute discrimination on the basis of viewpoint, but instead represented government's decision "to fund one activity to the exclusion of the other."[235] It remains to be seen what application this decision will have outside the contentious area of abortion regulation.[236]

Governmental Regulation of Communications Industries

As in the previous section, the governmental regulations here considered may have only the most indirect relation to freedom of expression, or may clearly implicate that freedom even though the purpose of the particular regulation is not to reach the content of the message. First, however, the judicially-formulated doctrine distinguishing commercial expression from other forms is briefly considered.

Commercial Speech.—In recent years, the Court's treatment of "commercial speech" has undergone a transformation, from total nonprotection under the First Amendment to qualified protection. The conclusion that expression proposing a commercial transaction is a different order of speech was arrived at almost casually in *Val-*

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[234] 468 U.S. at 399–401, & 401 n.27.

[235] Rust v. Sullivan, 111 S. Ct. 1759, 1772 (1991). Dissenting Justice Blackmun contended that *Taxation With Representation* was easily distinguishable because its restriction was on all lobbying activity regardless of content or viewpoint. Id. at 1780–81.

[236] The Court attempted to minimize the potential sweep of its ruling in *Rust*. "This is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipient to speak outside the scope of the Government-funded project, is invariably sufficient to justify government control over the content of expression." 111 S. Ct. at 1776. The Court noted several possible exceptions to the general principle: government ownership of a public forum does not justify restrictions on speech; the university setting requires heightened protections through application of vagueness and overbreadth principles; and the doctor-patient relationship may also be subject to special First Amendment protection. (The Court denied, however, that the doctor-patient relationship was significantly impaired by the regulatory restrictions at issue.) Lower courts were quick to pick up on these suggestions. *See, e.g.*, Stanford Univ. v. Sullivan, 773 F. Supp. 472, 476–78 (D.D.C. 1991) (confidentiality clause in federal grant research contract is invalid because, inter alia, of application of vagueness principles in a university setting); Gay Men's Health Crisis v. Sullivan, 792 F. Supp. 278 (S.D.N.Y. 1992) ("offensiveness" guidelines restricting Center for Disease Control grants for preparation of AIDS-related educational materials are unconstitutionally vague); Finley v. National Endowment for the Arts, 795 F. Supp. 1457 (C.D.Cal. 1992) ("decency clause" restricting grants by the National Endowment for the Arts is void for vagueness under Fifth Amendment and overbroad under First Amendment; artistic expression is entitled to the same level of protection as academic freedom).

entine v. Chrestensen,[1] in which the Court upheld a city ordinance prohibiting distribution on the street of "commercial and business advertising matter," as applied to an exhibitor of a submarine who distributed leaflets describing his submarine on one side and on the other side protesting the city's refusal of certain docking facilities. The doctrine was in any event limited to promotion of commercial activities; the fact that expression was disseminated for profit or through commercial channels did not expose it to any greater regulation than if it were offered for free.[2] The doctrine lasted in this form for more than twenty years.

"Commercial speech," the Court has held, is protected "from unwarranted governmental regulation," although its nature makes such communication subject to greater limitations than can be imposed on expression not solely related to the economic interests of the speaker and its audience.[3] Overturning of this exception in free expression doctrine was accomplished within a brief span of time in which the Justices haltingly but then decisively moved to a new position. Reasserting the doctrine at first in a narrow five-to-four decision, the Court sustained the application of a city's ban on employment discrimination to bar sex-designated employment advertising in a newspaper.[4] Granting that speech does not lose its constitutional protection simply because it appears in a commercial context, Justice Powell, for the Court, found the placing of want-ads in newspapers to be "classic examples of commercial speech," devoid of expressions of opinions with respect to issues of social policy; the ad "did no more than propose a commercial transaction." But the Justice also noted that employment discrimination, which was facilitated by the advertisements, was itself illegal.[5]

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[1] 316 U.S. 52 (1942). *See also* Breard v. City of Alexandria, 341 U.S. 622 (1951). The doctrine was one of the bases upon which the banning of all commercials for cigarettes from radio and television was upheld. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971) (three-judge court), aff'd per curiam, 405 U.S. 1000 (1972).

[2] Books that are sold for profit, Smith v. California, 361 U.S. 147, 150 (1959); Ginzburg v. United States, 383 U.S. 463, 474–75 (1966), advertisements dealing with political and social matters which newspapers carry for a fee, New York Times Co. v. Sullivan, 376 U.S. 254, 265–66 (1964), motion pictures which are exhibited for an admission fee, United States v. Paramount Pictures, 334 U.S. 131, 166 (1948); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952), were all during this period held entitled to full First Amendment protection regardless of the commercial element involved.

[3] Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 561 (1980).

[4] Pittsburgh Press Co. v. Comm'n on Human Relations, 413 U.S. 376 (1973).

[5] Id. at 385, 389. The Court continues to hold that government may ban commercial speech related to illegal activity. Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 563–64 (1980).

Next, the Court overturned a conviction under a state statute making it illegal, by sale or circulation of any publication, to encourage or prompt the obtaining of an abortion, as applied to an editor of a weekly newspaper who published an advertisement announcing the availability of legal and safe abortions in another State and detailing the assistance that would be provided state residents in going to and obtaining abortions in the other State.[6] The Court discerned that the advertisements conveyed information of other than a purely commercial nature, that they related to services that were legal in the other jurisdiction, and that the State could not prevent its residents from obtaining abortions in the other State or punish them for doing so.

Then, all these distinctions were swept away as the Court voided a statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs.[7] Accepting a suit brought by consumers to protect their right to receive information, the Court held that speech that does no more than propose a commercial transaction is nonetheless of such social value as to be entitled to protection. Consumers' interests in receiving factual information about prices may even be of greater value than political debate, but in any event price competition and access to information about it is in the public interest. State interests asserted in support of the ban, protection of professionalism and the quality of prescription goods, were found either badly served or not served by the statute.[8]

Turning from the interests of consumers to receive information to the asserted right of advertisers to communicate, the Court voided several restrictions. The Court voided a municipal ordinance which barred the display of "For sale" and "Sold" signs on residential lawns, purportedly so as to limit "white flight" resulting from a "fear psychology" that developed among white residents following sale of homes to nonwhites. The right of owners to communicate their intention to sell a commodity and the right of potential buyers to receive the message was protected, the Court determined; the community interest could have been achieved by less restrictive means and in any event could not be achieved by restricting the free flow of truthful information.[9] Similarly, deciding a question it had reserved in the *Virginia Pharmacy* case, the Court held that a State could not forbid lawyers from advertising the prices they

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[6] Bigelow v. Virginia, 421 U.S. 809 (1975).

[7] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). Justice Rehnquist dissented. Id. at 781.

[8] Id. at 763–64 (consumers' interests), 764–65 (social interest), 766–70 (justifications for the ban).

[9] Linmark Ass'n v. Township of Willingboro, 431 U.S. 85 (1977).

charged for the performance of routine legal services.[10] None of the proffered state justifications for the ban was deemed sufficient to overcome the private and societal interest in the free exchange of this form of speech.[11] Nor may a state categorically prohibit attorney advertising through mailings that target persons known to face particular legal problems,[12] or prohibit an attorney from holding himself out as a certified civil trial specialist.[13] However, a State has been held to have a much greater countervailing interest in regulating person-to-person solicitation of clients by attorneys; therefore, especially since in-person solicitation is "a business transaction in which speech is an essential but subordinate component," the state interest need only be important rather than compelling.[14]

Moreover, a statute prohibiting the practice of optometry under a trade name was sustained because there was "a significant possibility" that the public might be misled through deceptive utilization of the same or similar trade names.[15] But a state regulatory commission prohibition of utility advertisements "intended to stimulate the purchase of utility services" was held unjustified by the asserted interests in energy consumption and avoidance of subsidization of additional energy costs by all consumers.[16]

While commercial speech is entitled to First Amendment protection, the Court has clearly held that it is not wholly undifferentiable from other forms of expression; it has remarked on the commonsense differences between speech that does no more

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[10] Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Chief Justice Burger and Justices Powell, Stewart, and Rehnquist dissented. Id. at 386, 389, 404.

[11] Id. at 368–79. *See also* In re R.M.J., 455 U.S. 191 (1982) (invalidating sanctions imposed on attorney for deviating in some respects from rigid prescriptions of advertising style and for engaging in some proscribed advertising practices, because the State could show neither that his advertising was misleading nor that any substantial governmental interest was served by the restraints).

[12] Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988).

[13] Peel v. Illinois Attorney Registration and Disciplinary Comm'n, 496 U.S. 91 (1990).

[14] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). *But compare* In re Primus, 426 U.S. 412 (1978). The distinction between in-person and other attorney advertising was continued in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) ("print advertising . . . in most cases . . . will lack the coercive force of the personal presence of the trained advocate").

[15] Friedman v. Rogers, 440 U.S. 1 (1979).

[16] Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980). *See also* Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980) (voiding a ban on utility's inclusion in monthly bills of inserts discussing controversial issues of public policy). However, the linking of a product to matters of public debate does not thereby entitle an ad to the increased protection afforded noncommercial speech. Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983).

than propose a commercial transaction and other varieties.[17] Initially, the Court developed a four-pronged test to measure the validity of restraints upon commercial expression. Recent indications are that the Court has relaxed aspects of the test, making it more deferential to governmental regulation.

Under the first prong of the test as originally formulated, certain commercial speech is not entitled to protection; the informational function of advertising is the First Amendment concern and if it does not accurately inform the public about lawful activity, it can be suppressed.[18]

Second, if the speech is protected, the interest of the government in regulating and limiting it must be assessed. The State must assert a substantial interest to be achieved by restrictions on commercial speech.[19]

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[17] Commercial speech is viewed by the Court as usually hardier than other speech; because advertising is the *sine qua non* of commercial profits, it is less likely to be chilled by regulation. Thus, the difference inheres in both the nature of the speech and the nature of the governmental interest. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771–72 n.24 (1976); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978). It is, of course, important to develop distinctions between commercial speech and other speech for purposes of determining when broader regulation is permissible. The Court's definitional statements have been general, referring to commercial speech as that "proposing a commercial transaction," Ohralik v. Ohio State Bar Ass'n, supra, or as "expression related solely to the economic interests of the speaker and its audience." Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 561 (1980). It has simply viewed as noncommercial the advertising of views on public policy that would inhere to the economic benefit of the speaker. Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980). So too, the Court has refused to treat as commercial speech charitable solicitation undertaken by professional fundraisers, characterizing the commercial component as "inextricably intertwined with otherwise fully protected speech." Riley v. National Fed'n of the Blind, 487 U.S. 781, 796 (1988). By contrast, a mixing of home economics information with a sales pitch at a "Tupperware" party did not remove the transaction from commercial speech. Board of Trustees v. Fox, 492 U.S. 469 (1989).

[18] Central Hudson Gas & Electric Co. v. Public Service Comm'n, 447 U.S. 557, 563, 564 (1980). Within this category fall the cases involving the possibility of deception through such devices as use of trade names, Friedman v. Rogers, 440 U.S. 1 (1979), and solicitation of business by lawyers, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), as well as the proposal of an unlawful transaction, Pittsburgh Press Co. v. Comm'n on Human Relations, 413 U.S. 376 (1973).

[19] Central Hudson Gas & Electric Co. v. Public Service Comm'n, 447 U.S. 557, 564, 568–69 (1980). The Court deemed the State's interests to be clear and substantial. The pattern here is similar to much due process and equal protection litigation as well as expression and religion cases in which the Court accepts the proffered interests as legitimate and worthy. *See also* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987) (governmental interest in protecting USOC's exclusive use of word "Olympic" is substantial). However, in Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), the Court deemed insubstantial a governmental interest in protecting postal patrons from offensive but not obscene materials. For deferential treatment of the governmental interest, *see* Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) (Puerto Rico's "substantial" interest in discouraging casino gambling by residents justifies

Third, the restriction cannot be sustained if it provides only ineffective or remote support for the asserted purpose.[20]

Fourth, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restriction cannot survive.[21] The Court has rejected the idea that a "least restrictive means" test is required. Instead, what is now required is a "reasonable fit" between means and ends, with the means "narrowly tailored to achieve the desired objective."[22]

Thus, the "different degree of protection" accorded commercial speech means that government need not tolerate inaccuracies to the same extent it must in other areas and it may require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent it being deceptive.[23] Somewhat broader times, places, and manner regulations are to be tolerated.[24] The rule against prior re-

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ban on ads aimed at residents even though residents may legally engage in casino gambling, and even though ads aimed at tourists are permitted).

[20] Id. at 569. The ban here was found to directly advance one of the proffered interests. Contrast this holding with Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); and Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), where the restraints were deemed indirect or ineffectual.

[21] Central Hudson Gas & Electric Co. v. Public Service Comm'n, 447 U.S. 557, 565, 569–71 (1980). This test is, of course, the "least restrictive means" standard. Shelton v. Tucker, 364 U.S. 479, 488 (1960). In *Central Hudson*, the Court found the ban more extensive than was necessary to effectuate the governmental purpose. *And see* Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), where the Court held that the governmental interest in not interfering with parental efforts at controlling children's access to birth control information could not justify a ban on commercial mailings about birth control products; "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." Id. at 74. Note, however, that in San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987), the Court applied the test in a manner deferential to Congress: "the restrictions [at issue] are not broader than Congress reasonably could have determined to be necessary to further these interests."

[22] Board of Trustees v. Fox, 492 U.S. 469, 480 (1989)

[23] Bates v. State Bar of Arizona, 433 U.S. 350, 383–84 (1977); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). Requirements that advertisers disclose more information than they otherwise choose to are upheld "as long as [they] are reasonably related to the State's interest in preventing deception of consumers," the Court explaining that "[t]he right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right" requiring strict scrutiny of the disclosure requirement. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 & n.14 (1985) (upholding requirement that attorney's contingent fees ad mention that unsuccessful plaintiffs might still be liable for court costs).

[24] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976); Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977). But in Linmark Associates v. Township of Willingboro, 431 U.S. 85, 93–94 (1977), the Court refused to accept a times, places, and manner defense of an ordinance prohibiting "For Sale" signs on residential lawns. First, ample alternative channels of communication were not available, and second, the ban was seen rather as a content limitation.

straints may be inapplicable[25] and disseminators of commercial speech are not protected by the overbreadth doctrine.[26] Whether government may ban all commercial advertising of a service or product that is legal to sell is a matter of current debate. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,[27] the Court upheld a Puerto Rico ban on advertising of casino gambling aimed at residents, who nonetheless were not prohibited from engaging in casino gambling. The advertising ban was far from complete, however, since ads aimed at the lucrative tourist trade were still permitted. In any event, courts must now analyze with some care regulations of and limitations on commercial expression, the demise of the exception permitting easy resolution no longer.[28]

Taxation.—Disclaiming any intimation "that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government," the Court voided a state two-percent tax on the gross receipts of advertising in newspapers with a circulation exceeding 20,000 copies a week.[29] In the Court's view, the tax was analogous to the Eighteenth Century English practice of imposing advertising and stamp taxes on newspapers for the express purpose of pricing the opposition penny press beyond the

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[25] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771–72 n.24 (1976); Central Hudson & Electric Co. v. Public Service Comm'n, 447 U.S. 557, 571 n.13 (1980).

[26] Bates v. State Bar of Arizona, 433 U.S. 350, 379–81 (1977); Central Hudson Gas & Electric Co. v. Public Service Comm'n, 477 U.S. 557, 565 n.8 (1980).

[27] 478 U.S. 328 (1986). The Court's opinion by Justice Rehnquist distinguished earlier cases (*Carey* and *Bigelow*) invalidating bans on advertisements of contraceptives and abortion services because there "the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited." Casino gambling, on the other hand, is not such protected conduct, and the Court announced a potentially sweeping principle that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." 478 U.S. at 345–46. For discussion of the case, *see* P. Kurland, *Posadas de Puerto Rico v. Tourism Company: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful,"* 1986 SUP. CT. REV. 1. For qualification based on the commercial nature of speech in *Posadas*, *see* Meyer v. Grant, 486 U.S. 414, 424–25 (1988) (power to ban ballot initiatives entirely does not include power to limit discussion of political issues raised by initiative petitions).

[28] Easy resolution of controversies is also made impossible by Supreme Court divisions. *See, e.g.*, Metromedia v. City of San Diego, 453 U.S. 490 (1981), in which the Court held unconstitutional an ordinance prohibiting billboards and other outdoor sign displays, both commercial and noncommercial, subject to a wide array of exceptions which in some respects treated noncommercial signs more severely than commercial ones. It was on the basis of the divergence of treatment that the ordinance was held to fail. Seven of the Justices appeared to endorse the view that bans on commercial billboards are permissible ways to implement the substantial governmental interests in traffic safety and aesthetics. Id. at 503–12 (plurality opinion of Justices White, Stewart, Marshall, and Powell), 540 (Justice Stevens dissenting), 555 (Chief Justice Burger dissenting), 569 (Justice Rehnquist dissenting).

[29] Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

means of the mass of the population.[30] The tax at issue focused exclusively upon newspapers, it imposed a serious burden on the distribution of news to the public, and it appeared to be a discriminatorily selective tax aimed almost solely at the opposition to the state administration.[31] Combined with the standard that government may not impose a tax directly upon the exercise of a constitutional right itself,[32] these tests seem to permit general business taxes upon receipts of businesses engaged in communicating protected expression without raising any First Amendment issues.[33]

Ordinarily, a tax singling out the press for differential treatment is highly suspect, and creates a heavy burden of justification on the state. This is so, the Court explained in 1983, because such "a powerful weapon" to single out a small group carries with it a lessened political constraint than do those measures affecting a broader based constituency, and because "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression."[34] The state's interest in raising revenue is not sufficient justification for differential treatment of the press. Moreover, the Court refused to adopt a rule permitting analysis of the "effective burden" imposed by a differential tax; even if the current effective tax burden could be measured and upheld, the threat of increasing the burden on the press might have "censorial effects," and "courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation."[35]

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[30] Id. at 245–48.

[31] Id. at 250–51. *Grosjean* was distinguished on this latter basis in Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).

[32] Murdock v. Pennsylvania, 319 U.S. 105 (1943); Follett v. McCormick, 321 U.S. 573 (1944) (license taxes upon Jehovah's Witnesses selling religious literature invalid).

[33] Cf. City of Corona v. Corona Daily Independent, 115 Cal. App. 2d 382, 252 P.2d 56 (1953), cert. den., 346 U.S. 833 (1953) (Justices Black and Douglas dissenting). *And see* Cammarano v. United States, 358 U.S. 498 (1959) (no First Amendment violation to deny business expense tax deduction for expenses incurred in lobbying about measure affecting one's business); Leathers v. Medlock, 499 U.S. 439 (1991) (no First Amendment violation in applying general gross receipts tax to cable television services while exempting other communications media).

[34] Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983) (invalidating a Minnesota use tax on the cost of paper and ink products used in a publication, and exempting the first $100,000 of such costs each calendar year; Star & Tribune paid roughly two-thirds of all revenues the state raised by the tax). The Court seemed less concerned, however, when the affected group within the press was not so small, upholding application of a gross receipts tax to cable television services even though other segments of the communications media were exempted. Leathers v. Medlock, 499 U.S. 439 (1991).

[35] 460 U.S. at 588, 589.

Also difficult to justify is taxation that targets specific subgroups within a segment of the press for differential treatment. An Arkansas sales tax exemption for newspapers and for "religious, professional, trade, and sports journals" published within the state was struck down as an invalid content-based regulation of the press.[36] Entirely as a result of content, some magazines were treated less favorably than others. The general interest in raising revenue was again rejected as a "compelling" justification for such treatment, and the measure was viewed as not narrowly tailored to achieve other asserted state interests in encouraging "fledgling" publishers and in fostering communications.

The Court seemed to change course somewhat in 1991, upholding a state tax that discriminated among different components of the communications media, and proclaiming that "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas."[37]

The general principle that government may not impose a financial burden based on the content of speech underlay the Court's invalidation of New York's "Son of Sam" law, which provided that a criminal's income from publications describing his crime was to be placed in escrow and made available to victims of the crime.[38] While the Court recognized a compelling state interest in ensuring that criminals do not profit from their crimes, and in compensating crime victims, the law was not narrowly tailored to those ends. It applied only to income derived from speech, not to income from other sources, and it was significantly overinclusive because it reached a wide range of literature (e.g., the *Confessions of Saint Augustine* and Thoreau's *Civil Disobedience*) "that did not enable a criminal to profit from his crime while a victim remains uncompensated."[39]

Labor Relations.—Just as newspapers and other communications businesses are subject to nondiscriminatory taxation, they are entitled to no immunity from the application of general laws regulating their relations with their employees and prescribing wage and hour standards. In *Associated Press v. NLRB*,[40] the application of the National Labor Relations Act to a newsgathering agency was found to raise no constitutional problem. "The publisher of a news-

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[36] Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987).

[37] Leathers v. Medlock, 499 U.S. 439, 453 (1991) (tax applied to all cable television systems within the state, but not to other segments of the communications media).

[38] Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501 (1991).

[39] 112 S. Ct. at 511.

[40] 301 U.S. 103, 132 (1937).

paper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. . . . The regulation here in question has no relation whatever to the impartial distribution of news." Similarly, the Court has found no problem with requiring newspapers to pay minimum wages and observe maximum hours.[41]

Antitrust Laws.—Resort to the antitrust laws to break up restraints on competition in the newsgathering and publishing field was found not only to present no First Amendment problem but to comport with government's obligation under that Amendment. Said Justice Black: "It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not."[42]

Thus, both newspapers and broadcasters, as well as other such industries, may not engage in monopolistic and other anticompetitive activities free of possibility of antitrust law attack,[43] even though it may be contended that freedom of the press may thereby be preserved.[44]

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[41] Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946).

[42] Associated Press v. United States, 326 U.S. 1, 20 (1945).

[43] Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (refusal of newspaper publisher who enjoyed a substantial monopoly to sell advertising to persons also advertising over a competing radio station violates antitrust laws); United States v. Radio Corporation of America, 358 U.S. 334 (1959) (FCC approval no bar to antitrust suit); United States v. Greater Buffalo Press. Inc., 402 U.S. 549 (1971) (monopolization of color comic supplements). *See also* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) (upholding FCC rules prospectively barring, and in some instances requiring divesting to prevent, the common ownership of a radio or television broadcast station and a daily newspaper located in the same community).

[44] Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) (pooling arrangement between two newspapers violates antitrust laws; First Amendment argument that one paper will fail if arrangement is outlawed rejected). In response to this decision, Congress enacted the Newspaper Preservation Act to sanction certain joint

Radio and Television.—Because there are a limited number of broadcast frequencies for radio and non-cable television use, the Federal Government licenses access to these frequencies, permitting some applicants to utilize them and denying the greater number of applicants such permission. Even though this licensing system is in form a variety of prior restraint, the Court has held that it does not present a First Amendment issue because of the unique characteristic of scarcity.[45] Thus, the Federal Communications Commission has broad authority to determine the right of access to broadcasting,[46] although, of course, the regulation must be exercised in a manner that is neutral with regard to the content of the materials broadcast.[47]

In certain respects, however, governmental regulation does implicate First Amendment values to a great degree; insistence that broadcasters afford persons attacked on the air an opportunity to reply and that they afford a right to reply from opposing points of view when they editorialize on the air was unanimously found to be constitutional.[48] In *Red Lion*, Justice White explained that differences in the characteristics of various media justify differences in First Amendment standards applied to them.[49] Thus, while there is a protected right of everyone to speak, write, or publish as he will, subject to very few limitations, there is no comparable right of everyone to broadcast. The frequencies are limited and some few must be given the privilege over others. The particular licensee, however, has no First Amendment right to hold that license and his exclusive privilege may be qualified. Qualification by censorship of content is impermissible, but the First Amendment does not prevent a governmental insistence that a licensee "conduct

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arrangements where one paper is in danger of failing. 84 Stat. 466 (1970), 15 U.S.C. §§ 1801–1804.

[45] NBC v. United States, 319 U.S. 190 (1943); *see also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375–79, 387–89 (1969); FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 798–802 (1978).

[46] NBC v. United States, 319 U.S. 190 (1943); Federal Radio Comm. v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266 (1933); FCC v. Pottsville, 309 U.S. 134 (1940); FCC v. ABC, 347 U.S. 284 (1954); Farmers Union v. WDAY, 360 U.S. 525 (1958).

[47] "But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views or upon any other capricious basis. If it did, or if the Commission by these regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different." NBC v. United States, 319 U.S. 190, 226 (1943).

[48] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). "The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine, ..." Id. at 369. The two issues passed on in *Red Lion* were integral parts of the doctrine.

[49] Id. at 386.

himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." Further, said Justice White, "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[50] The broadcasters had argued that if they were required to provide equal time at their expense to persons attacked and to points of view different from those expressed on the air, expression would be curbed through self-censorship, for fear of controversy and economic loss. Justice White thought this possibility "at best speculative," but if it should materialize "the Commission is not powerless to insist that they give adequate and fair attention to public issues."[51]

In *Columbia Broadcasting System v. Democratic National Committee*,[52] the Court rejected claims of political groups that the broadcast networks were constitutionally required to sell them broadcasting time for the presentation of views on controversial issues. The ruling terminated a broad drive to obtain that result, but the fragmented nature of the Court's multiple opinions precluded a satisfactory evaluation of the constitutional implications of the case. However, in *CBS v. FCC*,[53] the Court held that Congress had conferred on candidates seeking federal elective office an affirmative, promptly enforceable right of reasonable access to the use of broadcast stations, to be administered through FCC control over license revocations, and held such right of access to be within Congress' power to grant, the First Amendment notwithstanding. The constitutional analysis was brief and merely restated the spectrum scarcity rationale and the role of the broadcasters as fiduciaries for the public interest.

In *FCC v. League of Women Voters*,[54] the Court took the same general approach to governmental regulation of public broadcast-

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[50] Id. at 388–90.

[51] Id. at 392–93.

[52] 412 U.S. 94 (1973).

[53] 453 U.S. 367 (1981). The dissent argued that the FCC had assumed, and the Court had confirmed it in assuming, too much authority under the congressional enactment. In its view, Congress had not meant to do away with the traditional deference to the editorial judgments of the broadcasters. Id. at 397 (Justices White, Rehnquist, and Stevens).

[54] 468 U.S. 364 (1984), holding unconstitutional § 399 of the Public Broadcasting Act of 1967, as amended. The decision was 5–4, with Justice Brennan's opinion for

ing, but struck down a total ban on editorializing by stations receiving public funding. In summarizing the principles guiding analysis in this area, the Court reaffirmed that Congress may regulate in ways that would be impermissible in other contexts, but indicated that broadcasters are entitled to greater protection than may have been suggested by *Red Lion*. "[A]lthough the broadcasting industry plainly operates under restraints not imposed upon other media, the thrust of these restrictions has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern. . . . [T]hese restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest."[55] However, the earlier cases were distinguished. "[I]n sharp contrast to the restrictions upheld in *Red Lion* or in [*CBS v. FCC*], which left room for editorial discretion and simply required broadcast editors to grant others access to the microphone, § 399 directly prohibits the broadcaster from speaking out on public issues even in a balanced and fair manner."[56] The ban on all editorializing was deemed too severe and restrictive a means of accomplishing the governmental purposes—protecting public broadcasting stations from being coerced, through threat or fear of withdrawal of public funding, into becoming "vehicles for governmental propagandizing," and also keeping the stations "from becoming convenient targets for capture by private interest groups wishing to express their own partisan viewpoints."[57] Expression of editorial opinion was described as a "form of speech . . . that lies at the heart of First Amendment protection,"[58] and the ban was said to be "defined solely on the basis of . . . content," the assumption being that editorial speech is speech directed at "controversial issues of public importance."[59] Moreover, the ban on editorializing was both overinclusive, applying to commentary on local issues of no likely interest to Congress, and underinclusive, not applying at all to expression of controversial opinion in the context of regular programming. Therefore, the Court concluded, the restriction was not narrowly enough tailored to fulfill the government's purposes.

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the Court being joined by Justices Marshall, Blackmun, Powell, and O'Connor, and with Justices White, Rehnquist (joined by Chief Justice Burger and by Justice White), and Stevens filing dissenting opinions.

[55] 468 U.S. at 380. The Court rejected the suggestion that only a "compelling" rather than "substantial" governmental interest can justify restrictions.

[56] 468 U.S. at 385.

[57] 468 U.S. at 384–85. Dissenting Justice Stevens thought that the ban on editorializing served an important purpose of "maintaining government neutrality in the free marketplace of ideas." Id. at 409.

[58] 468 U.S. at 381.

[59] 468 U.S. at 383.

Sustaining FCC discipline of a broadcaster who aired a record containing a series of repeated "barnyard" words, considered "indecent" but not obscene, the Court posited a new theory to explain why the broadcast industry is less entitled to full constitutional protection than are other communications entities.[60] "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizens, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. . . . Second, broadcasting is uniquely accessible to children, even those too young to read. . . . The ease with which children may obtain access to broadcast material . . . amply justif[ies] special treatment of indecent broadcasting."[61] The purport of the Court's new theory is hard to divine; while its potential is broad, the Court emphasized the contextual "narrowness" of its holding, which "requires consideration of a host of variables."[62] Time of day of broadcast, the likely audience, the differences between radio, television, and perhaps closed-circuit transmissions were all relevant in the Court's view. It may be, then, that the case will be limited in the future to its particular facts; yet, the pronunciation of a new theory sets in motion a tendency the application of which may not be so easily cabined.

The Court has ruled that cable television "implicates First Amendment interests," since a franchisee communicates ideas through selection of original programming and through exercise of editorial discretion in determining which stations to include in its offering, but has left for future decision how these interests are to be balanced against a community's interests in limiting franchises and preserving utility space.[63]

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[60] FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

[61] Id. at 748–51. This was the only portion of the constitutional discussion that obtained the support of a majority of the Court. Justice Stevens' opinion was joined by Chief Justice Burger and Justices Rehnquist, Powell, and Blackmun. Justices Powell and Blackmun, id. 755, concurred also in a separate opinion, which reiterated the points made in the text. Justices Brennan and Marshall dissented with respect to the constitutional arguments made by Justices Stevens and Powell. Id. at 762. Justices Stewart and White dissented on statutory grounds, not reaching the constitutional arguments. Id. at 777.

[62] Id. at 750. *See also* id. at 742–43 (plurality opinion), and id. 755–56 (Justice Powell concurring) ("Court reviews only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion.").

[63] City of Los Angeles v. Preferred Communications, 476 U.S. 488 (1986). *See also* Leathers v. Medlock, 499 U.S. 439 (1991) (application of state gross receipts tax to cable industry permissible even though other segments of the communications media were exempted).

Governmentally Compelled Right of Reply to Newspapers.—However divided it may have been in dealing with access to the broadcast media, the Court was unanimous in holding void under the First Amendment a state law that granted a political candidate a right to equal space to answer criticism and attacks on his record by a newspaper.[64] Granting that the number of newspapers had declined over the years, that ownership had become concentrated, and that new entries were prohibitively expensive, the Court agreed with proponents of the law that the problem of newspaper responsibility was a great one. But press responsibility, while desirable, "is not mandated by the Constitution," while freedom is. The compulsion exerted by government on a newspaper to print that which it would not otherwise print, "a compulsion to publish that which 'reason tells them should not be published,'" runs afoul of the free press clause.[65]

Government Restraint of Content of Expression

The three previous sections considered primarily but not exclusively incidental restraints on expression as a result of governmental regulatory measures aimed at goals other than control of the content of expression; this section considers the permissibility of governmental measures which are directly concerned with the content of expression.[66] As a general matter, government may not regulate speech "because of its message, its ideas, its subject matter, or its content."[67] Invalid content regulation includes not only

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[64] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

[65] Id. at 256. The Court also adverted to the imposed costs of the compelled printing of replies but this seemed secondary to the quoted conclusion. The Court has also 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. Pacific Gas & Elec. v. Public Utilities Comm'n, 475 U.S. 1 (1986).

[66] The distinction was sharply drawn by Justice Harlan in Konigsberg v. State Bar of California, 366 U.S. 36, 49–51 (1961): "Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand certain forms of speech, or speech in certain contexts, have been considered outside the scope of constitutional protection. . . . On the other hand, general regulatory statutes not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendments forbade Congress or the states to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved."

[67] Police Dep't v. Mosley, 408 U.S. 92, 95 (1972). *See also* Erznoznik v. City of Jacksonville, 422 U.S. 205, 208–12 (1975); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Carey v. Brown, 447 U.S. 455 (1980); Metromedia v. City of San Diego, 453 U.S. 490 (1981) (plurality opinion); Widmar v. Vincent, 454 U.S. 263 (1981); Regan v. Time, Inc., 468 U.S. 641 (1984).

restrictions on particular viewpoints, but also prohibitions on public discussion of an entire topic.[68]

Originally the Court took a "two-tier" approach to content-oriented regulation of expression. Under the "definitional balancing" of this approach, some forms of expression are protected by the First Amendment and certain categories of expression are not entitled to protection. This doctrine traces to *Chaplinsky v. New Hampshire*,[69] in which the Court opined that "certain well-defined and narrowly limited classes of speech . . . are no essential part of any exposition of ideas, and are of such slight social value as a step to truth" that government may prevent those utterances and punish those uttering them without raising any constitutional problems. If speech fell within the *Chaplinsky* categories, it was unprotected, regardless of its effect; if it did not, it was covered by the First Amendment and it was protected unless the restraint was justified by some test relating to harm, such as clear and present danger or a balancing of presumptively protected expression against a governmental interest which must be compelling.

For several decades, the decided cases reflected a fairly consistent and sustained march by the Court to the elimination of, or a severe narrowing of, the "two-tier" doctrine. The result was protection of much expression that hitherto would have been held absolutely unprotected (e.g., seditious speech and seditious libel, fighting words, defamation, and obscenity). More recently, the march has been deflected by a shift in position with respect to obscenity and by the creation of a new category of non-obscene child pornography. But in the course of this movement, differences surfaced among the Justices on the permissibility of regulation based on content and the interrelated issue of a hierarchy of speech values, according to which some forms of expression, while protected, may be more readily subject to official regulation and perhaps suppression than other protected expression. These differences were compounded in cases in which First Amendment expression values came into conflict with other values, either constitutionally protected values such as the right to fair trials in criminal cases, or societally valued interests such as those in privacy, reputation, and the protection from disclosure of certain kinds of information.

Attempts to work out these differences are elaborated in the following pages, but the effort to formulate a doctrine of permissible content regulation within categories of protected expression

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[68] Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987) (citing Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 537 (1980)).

[69] 315 U.S. 568, 571–72 (1942).

necessitates a brief treatment. It remains standard doctrine that it is impermissible to posit regulation of protected expression upon its content.[70] But in recent Terms, Justice Stevens has articulated a theory that would permit some governmental restraint based upon content. In Justice Stevens' view, there is a hierarchy of speech; where the category of speech at issue fits into that hierarchy determines the appropriate level of protection under the First Amendment. A category's place on the continuum is guided by *Chaplinsky's* formulation of whether it is "an essential part of any exposition of ideas" and what its "social value as a step to truth" is.[71] Thus, offensive but nonobscene words and portrayals dealing with sex and excretion may be regulated when the expression plays no role or a minimal role in the exposition of ideas.[72] "Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."[73]

While a majority of the Court has not joined in approving Justice Stevens' theory,[74] the Court has in some contexts of covered expression approved restrictions based on content,[75] and in still other areas, such as privacy, it has implied that some content-

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[70] *See, e.g.*, Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501 (1991).

[71] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[72] Young v. American Mini Theatres, 427 U.S. 50, 63–73 (1976) (plurality opinion); Smith v. United States, 431 U.S. 291, 317–19 (1977) (Justice Stevens dissenting); Carey v. Population Services Int., 431 U.S. 678, 716 (1977) (Justice Stevens concurring in part and concurring in the judgment); FCC v. Pacifica Found., 438 U.S. 726, 744–48 (1978) (plurality opinion); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 80, 83 (1981) (Justice Stevens concurring in judgment); New York v. Ferber, 458 U.S. 747, 781 (1982) (Justice Stevens concurring in judgment); R. A. V. v. City of St. Paul, 112 S. Ct. 2538, 2564 (1992) (Justice Stevens concurring in the judgment).

[73] Young v. American Mini Theatres, 427 U.S. 50, 70 (1976) (plurality opinion).

[74] In New York v. Ferber, 458 U.S. 747, 763 (1982), a majority of the Court joined an opinion quoting much of Justice Stevens' language in these cases, but the opinion rather clearly adopts the proposition that the disputed expression, child pornography, is not covered by the First Amendment, not that it is covered but subject to suppression because of its content. Id. at 764. And see id. at 781 (Justice Stevens concurring in judgment).

[75] *E.g.*, commercial speech, which is covered by the First Amendment but is less protected than other speech, is subject to content-based regulation. Central Hudson Gas & Electric Co. v. Public Service Comm'n, 447 U.S. 557, 568–69 (1980). *See also* Rowan v. Post Office Dep't, 397 U.S. 728 (1970) (sexually-oriented, not necessarily obscene mailings); and Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (nonobscene, erotic dancing).

based restraints on expression would be approved.[76] Moreover, the Court in recent years has emphasized numerous times the role of the First Amendment in facilitating, indeed making possible, political dialogue and the operation of democratic institutions.[77] While this emphasis may be read as being premised on a hierarchical theory of the worthiness of political speech and the subordinate position of less worthy forms of speech, more likely it is merely a celebration of the most worthy role speech plays, and not a suggestion that other roles and other kinds of discourses are relevant in determining the measure of protection enjoyed under the First Amendment.[78]

That there can be a permissible content regulation within a category of protected expression was questioned in theory, and rejected in application, in *Hustler Magazine, Inc. v. Falwell.*[79] In *Falwell* the Court refused to recognize a distinction between permissible political satire and "outrageous" parodies "doubtless gross and repugnant in the eyes of most."[80] "If it were possible by laying down a principled standard to separate the one from the other," the Court suggested, "public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description 'outrageous' does not supply one."[81] *Falwell* can also be read as consistent with the hierarchical theory of interpretation; the offensive advertisement parody was protected as within "the world of debate about public affairs," and was not "governed by any exception to . . . general First Amendment principles."[82]

So too, there can be *im*permissible content regulation within a category of otherwise *un*protected expression. In *R. A. V. v. City of St. Paul,*[83] the Court struck down a hate crimes ordinance construed by the state courts to apply only to use of "fighting words." The difficulty, the Court found, was that the ordinance made a further content discrimination, proscribing only those fighting words that would arouse anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender. This amounted to

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[76] *E.g.,* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). *See also* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

[77] E.g., First National Bank of Boston v. Bellotti, 435 U.S. 765, 776–77, 781–83 (1978); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 299–300 (1982).

[78] E.g., First National Bank v. Bellotti, 435 U.S. 765, 783 (1978); Consolidated Edison Co. v. Public Service Comm'n, 447 U.S.C. 530, 534 n.2 (1980).

[79] 485 U.S. 46 (1988).

[80] Id. at 50, 55.

[81] Id. at 55.

[82] Id. at 53.

[83] 112 S. Ct. 2538 (1992).

"special prohibitions on those speakers who express views on disfavored subjects."[84] The fact that government may proscribe areas of speech such as obscenity, defamation, or fighting words does not mean that these areas "may be made the vehicles for content discrimination unrelated to their distinctly proscribable content. . . . [G]overnment may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government."[85]

Content regulation of protected expression is measured by a compelling interest test derived from equal protection analysis: government "must show that its regulation is necessary to serve a compelling [governmental] interest and is narrowly drawn to achieve that end."[86] Application of this test ordinarily results in invalidation of the regulation.[87] Objecting to the balancing approach inherent in this test because it "might be read as a concession that [government] may censor speech whenever they believe there is a compelling justification for doing so," Justice Kennedy argues instead for a rule of *per se* invalidity.[88] But compelling interest analysis can still be useful, the Justice suggests, in determining whether a regulation is actually content-based or instead is content-neutral; in those cases in which the government tenders "a plausible justification unrelated to the suppression of expression," application of the compelling interest test may help to determine "whether the asserted justification is in fact an accurate description of the purpose and effect of the law."[89]

Seditious Speech and Seditious Libel.—Opposition to government through speech alone has been subject to punishment throughout much of history under laws proscribing "seditious" utterances. In this country, the Sedition Act of 1798 made criminal, inter alia, malicious writings which defamed, brought into contempt or disrepute, or excited the hatred of the people against the Government, the President, or the Congress, or which stirred peo-

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[84] Id. at 2547.

[85] Id. at 2543.

[86] Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987); Simon & Shuster v. New York Crime Victims Bd., 112 S. Ct. 501, 509 (1991).

[87] *But see* Burson v. Freeman, 112 S. Ct. 1846 (1992) (state law prohibiting the solicitation of votes and the display or distribution of campaign literature within 100 feet of a polling place upheld as applied to the traditional public forum of streets and sidewalks). The *Burson* plurality phrased the test not in terms of whether the law was "narrowly tailored," but instead in terms of whether the law was "necessary" to serve compelling state interests. 112 S. Ct. at 1852, 1855.

[88] Simon & Shuster v. New York Crime Victims Bd., 112 S. Ct. 501, 513 (1991) (concurring).

[89] Burson v. Freeman, 112 S. Ct. 1846, 1859 (1992) (concurring).

ple to sedition.[90] In *New York Times Co. v. Sullivan,*[91] the Court surveyed the controversy surrounding the enactment and enforcement of the Sedition Act and concluded that debate "first crystallized a national awareness of the central meaning of the First Amendment. . . . Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history . . . . [That history] reflect[s] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." The "central meaning" discerned by the Court, quoting Madison's comment that in a republican government "the censorial power is in the people over the Government, and not in the Government over the people," is that "[t]he right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government."

Little opportunity to apply this concept of the "central meaning" of the First Amendment in the context of sedition and criminal syndicalism laws has been presented to the Court. In *Dombrowski v. Pfister*[92] the Court, after expanding on First Amendment grounds the discretion of federal courts to enjoin state court proceedings, struck down as vague and as lacking procedural due process protections certain features of a state "Subversive Activities and Communist Control Law." In *Brandenburg v. Ohio,*[93] a state criminal syndicalism statute was held unconstitutional because its condemnation of advocacy of crime, violence, or unlawful methods of terrorism swept within its terms both mere advocacy as well as incitement to imminent lawless action. A seizure of books, pamphlets, and other documents under a search warrant pursuant to

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[90] Ch. 74, 1 Stat. 596, supra, p. 1022, n.9. Note also that the 1918 amendment of the Espionage Act of 1917, ch. 75, 40 Stat. 553, reached "language intended to bring the form of government of the United States . . . or the Constitution . . . or the flag . . . or the uniform of the Army or Navy into contempt, scorn, contumely, or disrepute." *Cf.* Abrams v. United States, 250 U.S. 616 (1919). For a brief history of seditious libel here and in Great Britain, *see* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 19–35, 497–516 (1941).

[91] 376 U.S. 254, 273–76 (1964). *See also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Justice Holmes dissenting).

[92] 380 U.S. 479, 492–96 (1965). A number of state laws were struck down by three-judge district courts pursuant to the latitude prescribed by this case. E.g., Ware v. Nichols, 266 F. Supp. 564 (N.D. Miss. 1967) (criminal syndicalism law); Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1966) (insurrection statute); McSurely v. Ratliff, 282 F. Supp. 848 (E.D. Ky. 1967) (criminal syndicalism). This latitude was then circumscribed in cases attacking criminal syndicalism and criminal anarchy laws. Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971).

[93] 395 U.S. 444 (1969). *See also* Garrison v. Louisiana, 379 U.S. 64 (1964); Ashton v. Kentucky, 384 U.S. 195 (1966), considered infra. pp. 1137–38.

a state subversives suppression law was struck down under the Fourth Amendment in an opinion heavy with First Amendment overtones.[94]

Fighting Words and Other Threats to the Peace.—In *Chaplinsky v. New Hampshire*,[95] the Court unanimously sustained a conviction under a statute proscribing "any offensive, derisive, or annoying word" addressed to any person in a public place under the state court's interpretation of the statute as being limited to "fighting words"—*i.e.*, to "words . . . [which] have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." The statute was sustained as "narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace."[96] The case is best known for Justice Murphy's famous dictum. "[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[97]

Chaplinsky still remains viable for the principle that "the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[98] But, in actuality, the Court has closely scrutinized statutes on vagueness and overbreadth

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[94] Stanford v. Texas, 379 U.S. 476 (1965). In United States v. United States District Court, 407 U.S. 297 (1972), a Government claim to be free to wiretap in national security cases was rejected on Fourth Amendment grounds in an opinion which called attention to the relevance of the First Amendment.

[95] 315 U.S. 568 (1942).

[96] Id. at 573.

[97] Id. at 571–72.

[98] Cohen v. California, 403 U.S. 15, 20 (1971). Cohen's conviction for breach of peace, occasioned by his appearance in public with an "offensive expletive" lettered on his jacket, was reversed, in part because the words were not a personal insult and there was no evidence of audience objection.

grounds and set aside convictions as not being within the doctrine. *Chaplinsky* thus remains formally alive but of little vitality.[99]

On the obverse side, the "hostile audience" situation, the Court once sustained a conviction for disorderly conduct of one who refused police demands to cease speaking after his speech seemingly stirred numbers of his listeners to mutterings and threatened disorders.[100] But this case has been significantly limited by cases which hold protected the peaceful expression of views which stirs people to anger because of the content of the expression, or perhaps because of the manner in which it is conveyed, and that breach of the peace and disorderly conduct statutes may not be used to curb such expression.

The cases are not clear to what extent the police must go in protecting the speaker against hostile audience reaction or whether only actual disorder or a clear and present danger of disorder will entitle the authorities to terminate the speech or other expressive conduct.[101] Neither, in the absence of incitement to illegal action, may government punish mere expression or proscribe ideas,[102] regardless of the trifling or annoying caliber of the expression.[103]

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[99] The cases hold that government may not punish profane, vulgar, or opprobrious words simply because they are offensive, but only if they are "fighting words" that do have a direct tendency to cause acts of violence by the person to whom they are directed. Gooding v. Wilson, 405 U.S. 518 (1972); Hess v. Indiana, 414 U.S. 105 (1973); Lewis v. City of New Orleans, 415 U.S. 130 (1974); Lucas v. Arkansas, 416 U.S. 919 (1974); Kelly v. Ohio, 416 U.S. 923 (1974); Karlan v. City of Cincinnati, 416 U.S. 924 (1974); Rosen v. California, 416 U.S. 924 (1974); and see Eaton v. City of Tulsa, 416 U.S. 697 (1974).

[100] Feiner v. New York, 340 U.S. 315 (1951). *See also* Milk Wagon Drivers v. Meadowmoor Dairies, 312 U.S. 287 (1941), in which the Court held that a court could enjoin peaceful picketing because violence occurring at the same time against the businesses picketed could have created an atmosphere in which even peaceful, otherwise protected picketing could be illegally coercive. *But compare* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

[101] The principle actually predates *Feiner*. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940); Terminiello v. Chicago, 337 U.S. 1 (1949). For subsequent application, *see* Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 379 U.S. 536 (1965); Brown v. Louisiana, 383 U.S. 131 (1966); Gregory v. City of Chicago, 394 U.S. 111 (1969); Bachellar v. Maryland, 397 U.S. 564 (1970). Significant is Justice Harlan's statement of the principle reflected by *Feiner*. "Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. Cf. Feiner v. New York, 340 U.S. 315 (1951)." Cohen v. California, 403 U.S. 15, 20 (1970).

[102] Cohen v. California, 403 U.S. 15 (1971); Bachellar v. Maryland, 397 U.S. 564 (1970); Street v. New York, 394 U.S. 576 (1969); Schacht v. United States, 398 U.S. 58 (1970); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959); Stromberg v. California, 283 U.S. 359 (1931).

[103] Coates v. City of Cincinnati, 402 U.S. 611 (1971); Cohen v. California, 403 U.S. 15 (1971); Gooding v. Wilson, 405 U.S. 518 (1972).

Group Libel, Hate Speech.—In *Beauharnais v. Illinois,*[104] relying on dicta in past cases,[105] the Court upheld a state group libel law which made it unlawful to defame a race or class of people. The defendant had been convicted under this statute after he had distributed a leaflet, a part of which was in the form of a petition to his city government, taking a hard-line white supremacy position and calling for action to keep African Americans out of white neighborhoods. Justice Frankfurter for the Court sustained the statute along the following reasoning. Libel of an individual, he established, was a common-law crime and was now made criminal by statute in every State in the Union. These laws raise no constitutional difficulty because libel is within that class of speech which is not protected by the First Amendment. If an utterance directed at an individual may be the object of criminal sanctions, no good reason appears to deny a State the power to punish the same utterances when they are directed at a defined group, "unless we can say that this is a willful and purposeless restriction unrelated to the peace and well-being of the State."[106] The Justice then reviewed the history of racial strife in Illinois to conclude that the legislature could reasonably fear substantial evils from unrestrained racial utterances. Neither did the Constitution require the State to accept a defense of truth, inasmuch as historically a defendant had to show not only truth but publication with good motives and for justifiable ends.[107] "Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary . . . to consider the issues behind the phrase 'clear and present danger.'"[108]

Beauharnais has little continuing vitality as precedent. Its holding, premised in part on the categorical exclusion of defamatory statements from First Amendment protection, has been substantially undercut by subsequent developments, not the least of which are the Court's subjection of defamation law to First Amendment challenge and its ringing endorsement of "uninhibited, robust, and wide-open" debate on public issues in *New York Times Co. v. Sullivan.*[109] In *R. A. V. v. City of St. Paul,* the Court, in an

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[104] 343 U.S. 250 (1952).

[105] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); Near v. Minnesota ex rel. Olson, 283 U.S. 697, 707–08 (1931).

[106] Beauharnais v. Illinois, 343 U.S. 250, 254–58 (1952).

[107] Id. at 265–66.

[108] Id. at 266.

[109] 376 U.S. 254 (1964). *See also* Collin v. Smith, 447 F. Supp. 676 (N.D.Ill.) (ordinances prohibiting distribution of materials containing racial slurs are unconstitutional), aff'd, 578 F.2d 1197 (7th Cir.), stay denied, 436 U.S. 953 (1978), cert. denied, 439 U.S. 916 (1978) (Justices Blackmun and Rehnquist dissenting on basis that Court should review case that is in "some tension" with *Beauharnais*). *But see* New

opinion by Justice Scalia, explained and qualified the categorical exclusions for defamation, obscenity, and fighting words. These categories of speech are not "entirely invisible to the Constitution," but instead "can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content*."[110] Content discrimination unrelated to that "distinctively proscribable content" runs afoul of the First Amendment. Therefore, the city's bias-motivated crime ordinance, interpreted as banning the use of fighting words known to offend on the basis of race, color, creed, religion, or gender, but not on such other possible bases as political affiliation, union membership, or homosexuality, was invalidated for its content discrimination. "The First Amendment does not permit [the city] to impose special prohibitions on those speakers who express views on disfavored subjects."[111]

Defamation.—One of the most seminal shifts in constitutional jurisprudence occurred in 1964 with the Court's decision in *New York Times Co. v. Sullivan*.[112] The *Times* had published a paid advertisement by a civil rights organization criticizing the response of a Southern community to demonstrations led by Dr. Martin Luther King, and containing several factual errors. The plaintiff, a city commissioner in charge of the police department, claimed that the advertisement had libeled him even though he was not referred to by name or title and even though several of the incidents described had occurred prior to his assumption of office. Unanimously, the Court reversed the lower court's judgment for the plaintiff. To the contention that the First Amendment did not protect libelous publications, the Court replied that constitutional scrutiny could not be foreclosed by the "label" attached to something. "Like . . . the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."[113] "The general proposition," the Court continued, "that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions . . . . [W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes un-

York v. Ferber, 458 U.S. 747, 763 (1982) (obliquely citing *Beauharnais* with approval).

[110] 112 S. Ct. at 2543 (emphasis original).

[111] Id. at 2547.

[112] 376 U.S. 254 (1964).

[113] Id. at 269. Justices Black, Douglas, and Goldberg, concurring, would have held libel laws *per se* unconstitutional. Id. at 293, 297.

pleasantly sharp attacks on government and public officials."[114] Because the advertisement was "an expression of grievance and protest on one of the major public issues of our time, [it] would seem clearly to qualify for the constitutional protection . . . [unless] it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent."[115]

Erroneous statement is protected, the Court asserted, there being no exception "for any test of truth." Error is inevitable in any free debate and to place liability upon that score, and especially to place on the speaker the burden of proving truth, would introduce self-censorship and stifle the free expression which the First Amendment protects.[116] Nor would injury to official reputation afford a warrant for repressing otherwise free speech. Public officials are subject to public scrutiny and "[c]riticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputation."[117] That neither factual error nor defamatory content could penetrate the protective circle of the First Amendment was the "lesson" to be drawn from the great debate over the Sedition Act of 1798, which the Court reviewed in some detail to discern the "central meaning of the First Amendment."[118] Thus, it appears, the libel law under consideration failed the test of constitutionality because of its kinship with seditious libel, which violated the "central meaning of the First Amendment." "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[119]

In the wake of the *Times* ruling, the Court decided two cases involving the type of criminal libel statute upon which Justice Frankfurter had relied in analogy to uphold the group libel law in *Beauharnais*.[120] In neither case did the Court apply the concept of *Times* to void them altogether. *Garrison v. Louisiana*[121] held that

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[114] Id. at 269, 270.

[115] Id. at 271.

[116] Id. at 271–72, 278–79. Of course, the substantial truth of an utterance is ordinarily a defense to defamation. *See* Masson v. New Yorker Magazine, 111 S. Ct. 2419, 2433 (1991).

[117] Id. at 272–73.

[118] Id. at 273. *See* supra, p. 1022 n.13.

[119] Id. at 279–80. The same standard applies for defamation contained in petitions to the government, the Court having rejected the argument that the petition clause requires absolute immunity. McDonald v. Smith, 472 U.S. 479 (1985).

[120] Beauharnais v. Illinois, 343 U.S. 250, 254–58 (1952).

[121] 379 U.S. 64 (1964).

a statute that did not incorporate the *Times* rule of "actual malice" was invalid, while in *Ashton v. Kentucky*[122] a common-law definition of criminal libel as "any writing calculated to create disturbances of the peace, corrupt the public morals or lead to any act, which, when done, is indictable" was too vague to be constitutional.

The teaching of *Times* and the cases following after it is that expression on matters of public interest is protected by the First Amendment. Within that area of protection is commentary about the public actions of individuals. The fact that expression contains falsehoods does not deprive it of protection, because otherwise such expression in the public interest would be deterred by monetary judgments and self-censorship imposed for fear of judgments. But, over the years, the Court has developed an increasingly complex set of standards governing who is protected to what degree with respect to which matters of public and private interest.

Individuals to whom the *Times* rule applies presented one of the first issues for determination. At first, the Court keyed it to the importance of the position held. "There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[123] But over time, this focus seems to have become diffused and the concept of "public official" has appeared to take on overtones of anyone holding public elective or appointive office.[124] Moreover, candidates for public office were subject to the *Times* rule and comment on their

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[122] 384 U.S. 195 (1966).

[123] Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

[124] Id. (supervisor of a county recreation area employed by and responsible to the county commissioners may be public official within *Times* rule). *See* Garrison v. Louisiana, 379 U.S. 64 (1964) (elected municipal judges); Henry v. Collins, 380 U.S. 356 (1965) (county attorney and chief of police); St. Amant v. Thompson, 390 U.S. 727 (1968) (deputy sheriff); Greenbelt Cooperative Pub. Ass'n v. Bresler, 398 U.S. 6 (1970) (state legislator who was major real estate developer in area); Time, Inc. v. Pape, 401 U.S. 279 (1971) (police captain). The categorization does not, however, include all government employees. Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979).

character or past conduct, public or private, insofar as it touches upon their fitness for office, is protected.[125]

Thus, with respect to both public officials and candidates, a wide range of reporting about them is protected. Certainly, the conduct of official duties by public officials is subject to the widest scrutiny and criticism.[126] But the Court has held as well that criticism that reflects generally upon an official's integrity and honesty is protected.[127] Candidates for public office, the Court has said, place their whole lives before the public, and it is difficult to see what criticisms could not be related to their fitness.[128]

For a time, the Court's decisional process threatened to expand the *Times* privilege so as to obliterate the distinction between private and public figures. First, the Court created a subcategory of "public figure," which included those otherwise private individuals who have attained some prominence, either through their own efforts or because it was thrust upon them, with respect to a matter of public interest, or, in Chief Justice Warren's words, those persons who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas

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[125] Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971).

[126] Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

[127] Garrison v. Louisiana, 379 U.S. 64 (1964), involved charges that judges were inefficient, took excessive vacations, opposed official investigations of vice, and were possibly subject to "racketeer influences." The Court rejected an attempted distinction that these criticisms were not of the manner in which the judges conducted their courts but were personal attacks upon their integrity and honesty. "Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation. . . . The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." Id. at 76–77.

[128] In Monitor Patriot Co. v. Roy, 401 U.S. 265, 274–75 (1971), the Court said: "The principal activity of a candidate in our political system, his 'office,' so to speak, consists in putting before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him. A candidate who, for example, seeks to further his cause through the prominent display of his wife and children can hardly argue that his qualities as a husband or father remain of 'purely private' concern. And the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul' when an opponent or an industrious reporter attempts to demonstrate the contrary. . . . Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks. The clash of reputations is the staple of election campaigns and damage to reputation is, of course, the essence of libel. But whether there remains some exiguous area of defamation against which a candidate may have full recourse is a question we need not decide in this case."

of concern to society at large."[129] More recently, the Court has curtailed the definition of "public figure" by playing down the matter of public interest and emphasizing the voluntariness of the assumption of a role in public affairs that will make of one a "public figure."[130]

Second, in a fragmented ruling, the Court applied the *Times* standard to private citizens who had simply been involved in events of public interest, usually, though not invariably, not through their own choosing.[131] But, in *Gertz v. Robert Welch, Inc.*[132] the Court set off on a new path of limiting recovery for defamation by private persons. Henceforth, persons who are neither public officials nor public figures may recover for the publication of defamatory falsehoods so long as state defamation law establishes a standard higher than strict liability, such as negligence; damages may not be presumed, however, but must be proved, and punitive damages will be recoverable only upon the *Times* showing of "actual malice."

The Court's opinion by Justice Powell established competing constitutional considerations. On the one hand, imposition upon the press of liability for every misstatement would deter not only false speech but much truth as well; the possibility that the press might have to prove everything it prints would lead to self-censorship and the consequent deprivation of the public of its access to information. On the other hand, there is a legitimate state interest in compensating individuals for the harm inflicted on them by de-

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[129] Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967) (Chief Justice Warren concurring in the result). *Curtis* involved a college football coach, and *Associated Press v. Walker*, decided in the same opinion, involved a retired general active in certain political causes. The suits arose from reporting that alleged, respectively, the fixing of a football game and the leading of a violent crowd in opposition to enforcement of a desegregation decree. The Court was extremely divided, but the rule that emerged was largely the one developed in the Chief Justice's opinion. Essentially, four Justices opposed application of the *Times* standard to "public figures," although they would have imposed a lesser but constitutionally-based burden on public figure plaintiffs. Id. at 133 (plurality opinion of Justices Harlan, Clark, Stewart, and Fortas). Three Justices applied *Times*, id. at 162 (Chief Justice Warren), and 172 (Justices Brennan and White). Two Justices would have applied absolute immunity. Id. at 170 (Justices Black and Douglas). *See also* Greenbelt Cooperative Pub. Ass'n v. Bresler, 398 U.S. 6 (1970).

[130] Public figures "[f]or the most part [are] those who . . . have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

[131] Rosenbloom v. Metromedia, 403 U.S. 29 (1971). *Rosenbloom* had been prefigured by Time, Inc., v. Hill, 385 U.S. 374 (1967), a "false light" privacy case considered infra.

[132] 418 U.S. 323 (1974).

famatory falsehoods. An individual's right to the protection of his own good name is, at bottom, but a reflection of our society's concept of the worth of the individual. Therefore, an accommodation must be reached. The *Times* rule had been a proper accommodation when public officials or public figures were concerned, inasmuch as by their own efforts they had brought themselves into the public eye, had created a need in the public for information about them, and had at the same time attained an ability to counter defamatory falsehoods published about them. Private individuals are not in the same position and need greater protection. "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[133] Some degree of fault must be shown, then.

Generally, juries may award substantial damages in tort for presumed injury to reputation merely upon a showing of publication. But this discretion of juries had the potential to inhibit the exercise of freedom of the press, and moreover permitted juries to penalize unpopular opinion through the awarding of damages. Therefore, defamation plaintiffs who do not prove actual malice—that is, knowledge of falsity or reckless disregard for the truth—will be limited to compensation for actual provable injuries, such as out-of-pocket loss, impairment of reputation and standing, personal humiliation, and mental anguish and suffering. A plaintiff who proves actual malice will be entitled as well to collect punitive damages.[134]

Subsequent cases have revealed a trend toward narrowing the scope of the "public figure" concept. A socially prominent litigant in a particularly messy divorce controversy was held not to be such a person,[135] and a person convicted years before of contempt after failing to appear before a grand jury was similarly not a public figure even as to commentary with respect to his conviction.[136] Also not a public figure for purposes of allegedly defamatory comment about the value of his research was a scientist who sought and received federal grants for research, the results of which were published in scientific journals.[137] Public figures, the Court reiterated, are those who (1) occupy positions of such persuasive power and influence that they are deemed public figures for all purposes or (2)

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[133] Id. at 347.

[134] Id. at 348–50. Justice Brennan would have adhered to *Rosenbloom*, id. at 361, while Justice White thought the Court went too far in constitutionalizing the law of defamation. Id. at 369.

[135] Time, Inc. v. Firestone, 424 U.S. 448 (1976).

[136] Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979).

[137] Hutchinson v. Proxmire, 443 U.S. 111 (1979).

have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved, and are public figures with respect to comment on those issues.[138]

Commentary about matters of "public interest" when it defames someone is apparently, after *Firestone*[139] and *Gertz*, to be protected to the degree that the person defamed is a public official or candidate for public office, public figure, or private figure. That there is a controversy, that there are matters that may be of "public interest," is insufficient to make a private person a "public figure" for purposes of the standard of protection in defamation actions.

The Court has elaborated on the principles governing defamation actions brought by private figures. First, when a private plaintiff sues a media defendant for publication of information that is a matter of public concern—the *Gertz* situation, in other words—the burden is on the plaintiff to establish the falsity of the information. Thus, the Court held in *Philadelphia Newspapers v. Hepps*,[140] the common law rule that defamatory statements are presumptively false must give way to the First Amendment interest that true speech on matters of public concern not be inhibited. This means, as the dissenters pointed out, that a *Gertz* plaintiff must establish falsity in addition to establishing some degree of fault (e.g. negligence).[141] On the other hand, the Court held in *Dun & Bradstreet v. Greenmoss Builders* that the *Gertz* standard limiting award of presumed and punitive damages applies only in cases involving matters of public concern, and that the sale of credit reporting information to subscribers is not such a matter of public concern.[142] What significance, if any, is to be attributed to the fact that a media defendant rather than a private defendant has been sued is left unclear. The plurality in *Dun & Bradstreet* declined to follow the lower court's rationale that *Gertz* protections are unavailable to nonmedia defendants, and a majority of Justices were

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[138] Id. at 134 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974)).

[139] Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976). *See also* Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979).

[140] 475 U.S. 767 (1986). Justice O'Connor's opinion of the Court was joined by Justices Brennan, Marshall, Blackmun, and Powell; Justice Stevens' dissent was joined by Chief Justice Burger and by Justices White and Rehnquist.

[141] 475 U.S. at 780 (Stevens, J., dissenting).

[142] 472 U.S. 749 (1985). Justice Powell wrote a plurality opinion joined by Justices Rehnquist and O'Connor, and Chief Justice Burger and Justice White, both of whom had dissented in *Gertz*, added brief concurring opinions agreeing that the *Gertz* standard should not apply to credit reporting. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented, arguing that *Gertz* had not been limited to matters of public concern, and should not be extended to do so.

in agreement on that point.[143] But in *Philadelphia Newspapers*, the Court expressly reserved the issue of "what standards would apply if the plaintiff sues a nonmedia defendant."[144]

Satellite considerations besides the issue of who is covered by the *Times* privilege are of considerable importance. The use in the cases of the expression "actual malice" has been confusing in many respects, because it is in fact a concept distinct from the common law meaning of malice or the meanings common understanding might give to it.[145] Constitutional "actual malice" means that the defamation was published with knowledge that it was false or with reckless disregard of whether it was false.[146] Reckless disregard is not simply negligent behavior, but publication with serious doubts as to the truth of what is uttered.[147] A defamation plaintiff under the *Times* or *Gertz* standard has the burden of proving by "clear and convincing" evidence, not merely by the preponderance of evidence standard ordinarily borne in civil cases, that the defendant acted with knowledge of falsity or with reckless disregard.[148] Moreover, the Court has held, a *Gertz* plaintiff has the burden of proving the actual falsity of the defamatory publication.[149] A plaintiff suing the press[150] for defamation under the *Times* or *Gertz* standards is not limited to attempting to prove his case without resort to discovery of the defendant's editorial processes in the establish-

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[143] 472 U.S. at 753 (plurality); id. at 773 (Justice White); id. at 781–84 (dissent).

[144] 465 U.S. at 779 n.4. Justice Brennan added a brief concurring opinion expressing his view that such a distinction is untenable. Id. at 780.

[145] *See, e.g.,* Herbert v. Lando, 441 U.S. 153, 199 (1979) (Justice Stewart dissenting).

[146] New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964); Garrison v. Louisiana, 379 U.S. 64, 78 (1964); Cantrell v. Forest City Publishing Co., 419 U.S. 245, 251–52 (1974).

[147] St. Amant v. Thompson, 390 U.S. 727, 730–33 (1968); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967). A finding of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" is alone insufficient to establish actual malice. Harte-Hanks Communications v. Connaughton, 491 U.S. 657 (1989) (nonetheless upholding the lower court's finding of actual malice based on the "entire record").

[148] Gertz v. Robert Welch, Inc., 418 U.S. 323, 331–32 (1974); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 83 (1967). *See* New York Times Co. v. Sullivan, 376 U.S. 254, 285–86 (1964) ("convincing clarity"). A corollary is that the issue on motion for summary judgment in a *New York Times* case is whether the evidence is such that a reasonable jury might find that actual malice has been shown with convincing clarity. Anderson v. Liberty Lobby, 477 U.S. 242 (1986).

[149] Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986) (leaving open the issue of what "quantity" or standard of proof must be met).

[150] Because the defendants in these cases have typically been media defendants (*but see* Garrison v. Louisiana, 379 U.S. 64 (1964); Henry v. Collins, 380 U.S. 356 (1965)), and because of the language in the Court's opinions, some have argued that only media defendants are protected under the press clause and individuals and others are not protected by the speech clause in defamation actions. See supra, pp. 1026–29.

ment of "actual malice."[151] The state of mind of the defendant may be inquired into and the thoughts, opinions, and conclusions with respect to the material gathered and its review and handling are proper subjects of discovery. As with other areas of protection or qualified protection under the First Amendment (as well as some other constitutional provisions), appellate courts, and ultimately the Supreme Court, must independently review the findings below to ascertain that constitutional standards were met.[152]

There had been some indications that statements of opinion, unlike assertions of fact, are absolutely protected,[153] but the Court held in *Milkovich v. Lorain Journal Co.*[154] that there is no constitutional distinction between fact and opinion, hence no "wholesale defamation exemption" for any statement that can be labeled "opinion."[155] The issue instead is whether, regardless of the context in which a statement is uttered, it is sufficiently factual to be susceptible of being proved true or false. Thus, if statements of opinion may "reasonably be interpreted as stating actual facts about an individual,"[156] then the truthfulness of the factual assertions may be tested in a defamation action. There are sufficient protections for free public discourse already available in defamation law, the Court concluded, without creating "an artificial dichotomy between 'opinion' and fact."[157]

Substantial meaning is also the key to determining whether inexact quotations are defamatory. Journalistic conventions allow some alterations to correct grammar and syntax, but the Court in *Masson v. New Yorker Magazine*[158] refused to draw a distinction on that narrow basis. Instead, "a deliberate alteration of words [in a quotation] does not equate with knowledge of falsity for purposes

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[151] Herbert v. Lando, 441 U.S. 153 (1979).

[152] New York Times Co. v. Sullivan, 376 U.S. 254, 284–86 (1964). *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933–34 (1982). Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 688 (1989) ("the reviewing court must consider the factual record in full"); Bose Corp. v. Consumers Union of United States, 466 U.S. 485 (1984) (the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a) must be subordinated to this constitutional principle).

[153] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) ("under the First Amendment there is no such thing as a false idea"); Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) (holding protected the accurate reporting of a public meeting in which a particular position was characterized as "blackmail"); Letter Carriers v. Austin, 418 U.S. 264 (1974) (holding protected a union newspaper's use of epithet "scab").

[154] 497 U.S. 1 (1990).

[155] Id. at 18.

[156] Id. at 20. In *Milkovich* the Court held to be actionable assertions and implications in a newspaper sports column that a high school wrestling coach had committed perjury in testifying about a fight involving his team.

[157] Id. at 19.

[158] 111 S. Ct. 2419 (1991).

of [*New York Times*] unless the alteration results in a material change in the meaning conveyed by the statement."[159]

Invasion of Privacy.—Governmental power to protect the privacy interests of its citizens by penalizing publication or authorizing causes of action for publication implicates directly First Amendment rights. Privacy is a concept composed of several aspects.[160] As a tort concept, it embraces at least four branches of protected interests: protection from unreasonable intrusion upon one's seclusion, from appropriation of one's name or likeness, from unreasonable publicity given to one's private life, and from publicity which unreasonably places one in a false light before the public.[161]

While the Court has variously recognized valid governmental interests in extending protection to privacy,[162] it has at the same time interposed substantial free expression interests in the balance. Thus, in *Time, Inc. v. Hill*,[163] the *Times* privilege was held to preclude recovery under a state privacy statute that permitted recovery for harm caused by exposure to public attention in any publication which contained factual inaccuracies, although not necessarily defamatory inaccuracies, in communications on matters of public interest. When in *Gertz v. Robert Welch, Inc.*,[164] the Court held that the *Times* privilege was not applicable in defamation cases unless the plaintiff is a public official or public figure, even though plaintiff may have been involved in a matter of public interest, the question arose whether *Hill* applies to all "false-light" cases or only such cases involving public officials or public figures.[165] And, more important, *Gertz* left unresolved the issue "whether the State may ever define and protect an area of privacy free from unwanted publicity in the press."[166]

In *Cox Broadcasting*, the Court declined to pass on the broad question, holding instead that the accurate publication of informa-

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[159] 111 S. Ct. at 2433.

[160] *See, e.g.*, WILLIAM PROSSER, LAW OF TORTS 117 (4th ed. 1971); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY (1987); THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 544–61 (1970). It should be noted that we do not have here the question of the protection of one's privacy from governmental invasion.

[161] Restatement (Second), of Torts §§ 652A–652I (1977). These four branches were originally propounded in Prosser's 1960 article (supra n.), incorporated in the Restatement, and now "routinely accept[ed]." McCarthy, supra n.160, § 5.8[A].

[162] Time. Inc. v. Hill, 385 U.S. 374, 383 n.7 (1967); and id. 402, 404 (Justice Harlan, concurring in part and dissenting in part), 411, 412–15 (Justice Fortas dissenting); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 487–89 (1975).

[163] 385 U.S. 374 (1967). *See also* Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974).

[164] 418 U.S. 323 (1974).

[165] Cf. Cantrell v. Forest City Publishing Co., 419 U.S. 245, 250–51 (1974); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 490 n.19 (1975).

[166] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975).

tion obtained from public records is absolutely privileged. Thus, the State could not permit a civil recovery for invasion of privacy occasioned by the reporting of the name of a rape victim obtained from court records and from a proceeding in open court.[167] Nevertheless, the Court in appearing to retreat from what had seemed to be settled principle, that truth is a constitutionally required defense in any defamation action, whether plaintiff be a public official, public figure, or private individual, may have preserved for itself the discretion to recognize a constitutionally permissible tort of invasion of privacy through publication of truthful information.[168] But in recognition of the conflicting interests—in expression and in privacy—it is evident that the judicial process in this area will be cautious.

Continuing to adhere to "limited principles that sweep no more broadly than the appropriate context of the instant case," the Court invalidated an award of damages against a newspaper for printing the name of a sexual assault victim lawfully obtained from a sheriff's department press release. The state was unable to demonstrate that imposing liability served a "need" to further a state interest of the highest order, since the same interest could have been served by the more limited means of self regulation by the police, since the particular *per se* negligence statute precluded inquiry into the extent of privacy invasion (*e.g.*, inquiry into whether the victim's identity was already widely known), and since the statute sin-

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[167] More specifically, the information was obtained "from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection." Id. at 491. There was thus involved both the First Amendment and the traditional privilege of the press to report the events of judicial proceedings. Id. at 493, 494–96.

[168] Thus, Justice White for the Court noted that the defense of truth is constitutionally required in suits by public officials or public figures. But "[t]he Court has nevertheless carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamatory action brought by a private person as distinguished from a public official or public figure." Id. at 490. If truth is not a constitutionally required defense, then it would be possible for the States to make truthful defamation of private individuals actionable and, more important, truthful reporting of matters that constitute invasions of privacy actionable. *See* Brasco v. Reader's Digest, 4 Cal. 3d 520, 483 P. 2d 34, 93 Cal. Rptr. 866 (1971); Commonwealth v. Wiseman, 356 Mass. 251, 249 N.E. 2d 610 (1969), cert. den., 398 U.S. 960 (1970). Concurring in *Cohn*, 420 U.S., 497, Justice Powell contended that the question of truth as a constitutionally required defense was long settled in the affirmative and that *Gertz* itself, which he wrote, was explainable on no other basis. But he too would reserve the question of actionable invasions of privacy through truthful reporting. "In some instances state actions that are denominated actions in defamation may in fact seek to protect citizens from injuries that are quite different from the wrongful damage to reputation flowing from false statements of fact. In such cases, the Constitution may permit a different balance. And, as today's opinion properly recognizes, causes of action grounded in a State's desire to protect privacy generally implicate interests that are distinct from those protected by defamation actions." Id. at 500.

gled out "mass communications" media for liability rather than applying evenhandedly to anyone disclosing a victim's identity.[169]

Emotional Distress Tort Actions.—In *Hustler Magazine, Inc. v. Falwell,*[170] the Court applied the *New York Times v. Sullivan* standard to recovery of damages by public officials and public figures for the tort of intentional infliction of emotional distress. The case involved an advertisement "parody" portraying the plaintiff, described by the Court as a "nationally known minister active as a commentator on politics and public affairs," as engaged in "a drunken incestuous rendezvous with his mother in an outhouse."[171] Affirming liability in this case, the Court believed, would subject "political cartoonists and satirists . . .. to damage awards without any showing that their work falsely defamed its subject."[172] A proffered "outrageousness" standard for distinguishing such parodies from more traditional political cartoons was rejected. While not doubting that "the caricature of respondent . . .. is at best a distant cousin of [some] political cartoons . . .. and a rather poor relation at that," the Court explained that "'[o]utrageousness'" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views."[173] Therefore, proof of intent to cause injury, "the gravamen of the tort," is insufficient "in the area of public debate about public figures." Additional proof that the publication contained a false statement of fact made with actual malice was necessary, the Court concluded, in order "to give adequate 'breathing space' to the freedoms protected by the First Amendment."[174]

"Right of Publicity" Tort Actions.—In *Zacchini v. Scripps-Howard Broadcasting Co.,*[175] the Court held unprotected by the First Amendment a broadcast of a video tape of the "entire act" of a "human cannonball" in the context of the performer's suit for damages against the company for having "appropriated" his act, thereby injuring his right to the publicity value of his performance. The Court emphasized two differences between the legal action permitted here and the legal actions found unprotected or not fully

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[169] The Florida Star v. B.J.F., 491 U.S. 524 (1989).

[170] 485 U.S. 46 (1988).

[171] 485 U.S. at 47–48.

[172] Id. at 53.

[173] Id. at 55.

[174] Id. at 52–53.

[175] 433 U.S. 562 (1977). The "right of publicity" tort is conceptually related to one of the privacy strands, "appropriation" of one's name or likeness for commercial purposes. Id. at 569–72. Justices Powell, Brennan, and Marshall dissented, finding the broadcast protected, id. at 579, and Justice Stevens dissented on other grounds. Id. at 582.

protected in defamation and other privacy-type suits. First, the interest sought to be protected was, rather than a party's right to his reputation and freedom from mental distress, the right of the performer to remuneration for putting on his act. Second, the other torts if permitted decreased the information which would be made available to the public, whereas permitting this tort action would have an impact only on "who gets to do the publishing."[176] In both respects, the tort action was analogous to patent and copyright laws in that both provide an economic incentive to persons to make the investment required to produce a performance of interest to the public.[177]

Publication of Legally Confidential Information.—While a State may have numerous and important valid interests in assuring the confidentiality of certain information, it may not maintain this confidentiality through the criminal prosecution of nonparticipant third parties, including the press, who disclose or publish the information.[178] The case arose in the context of the investigation of a state judge by an official disciplinary body; both by state constitutional provision and by statute, the body's proceedings were required to be confidential and the statute made the divulging of information about the proceeding a misdemeanor. For publishing an accurate report about an investigation of a sitting judge, the newspaper was indicted and convicted of violating the statute, which the state courts construed to apply to nonparticipant divulging. Although the Court recognized the importance of confidentiality to the effectiveness of such a proceeding, it held that the publication here "lies near the core of the First Amendment" because the free discussion of public affairs, including the operation of the judicial system, is primary and the State's interests were simply insufficient to justify the encroachment on freedom of speech and of the press.[179] The scope of the privilege thus conferred by this decision on the press and on individuals is, however, somewhat unclear, because the Court appeared to reserve consideration of broader questions than those presented by the facts of the

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[176] Id. at 573–74. Plaintiff was not seeking to bar the broadcast but rather to be paid for the value he lost through the broadcasting.

[177] Id. at 576–78. This discussion is the closest the Court has come in considering how copyright laws in particular are to be reconciled with the First Amendment. The Court's emphasis is that they encourage the production of work for the public's benefit.

[178] Landmark Communications v. Virginia, 435 U.S. 829 (1978). The decision by Chief Justice Burger was unanimous, Justices Brennan and Powell not participating, but Justice Stewart would have limited the holding to freedom of the press to publish. Id. at 848. *See also* Smith v. Daily Mail Pub. Co., 433 U.S. 97 (1979).

[179] Id. at 838–42. The state court's utilization of the clear-and-present-danger test was disapproved in its application; additionally, the Court questioned the relevance of the test in this case. Id. at 842–45.

case.[180] It does appear, however, that government would find it difficult to punish the publication of almost any information by a nonparticipant to the process in which the information was developed to the same degree as it would be foreclosed from obtaining prior restraint of such publication.[181] There are also limits on the extent to which government may punish disclosures by *participants* in the criminal process, the Court having invalidated a restriction on a grand jury witness's disclosure of his own testimony after the grand jury had been discharged.[182]

Obscenity.—Although public discussion of political affairs is at the core of the First Amendment, the guarantees of speech and press, it should have been noticed from the previous subsections, are broader. "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right."[1] The right to impart and to receive "information and ideas, regardless of their social worth . . . is fundamental to our free society."[2] Indeed, it is primarily with regard to the entertaining function of expression that the law of obscenity is concerned, inasmuch as the Court has rejected any concept of "ideological" obscenity.[3] However, this function is not the reason why obscenity is outside the protection of the

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[180] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), in the context of a civil proceeding, had held that the First Amendment did not permit the imposition of liability on the press for truthful publication of information released to the public in official court records, id. at 496, but had expressly reserved the question "whether the publication of truthful information withheld by law from the public domain is similarly privileged," id. at 497 n.27, and *Landmark* on its face appears to answer the question affirmatively. Caution is impelled, however, by the Court's similar reservation. "We need not address all the implications of that question here, but only whether in the circumstances of this case Landmark's publication is protected by the First Amendment." 435 U.S. at 840.

[181] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

[182] Butterworth v. Smith, 494 U.S. 624 (1990).

[1] Winters v. New York, 333 U.S. 507, 510 (1948). Illustrative of the general observation is the fact that "[m]usic, as a form of expression and communication, is protected under the First Amendment." Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989).

[2] Stanley v. Georgia, 394 U.S. 557, 564 (1969).

[3] Winters v. New York, 333 U.S. 507 (1948); Burstyn v. Wilson, 343 U.S 495 (1952); Commercial Pictures Corp. v. Regents, 346 U.S. 587 (1954); Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959). The last case involved the banning of the movie *Lady Chatterley's Lover* on the ground that it dealt too sympathetically with adultery. "It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." Id. at 688–89.

First Amendment, although the Court has never really been clear about what that reason is.

Adjudication over the constitutional law of obscenity began in *Roth v. United States,*[4] in which the Court in an opinion by Justice Brennan settled in the negative the "dispositive question" "whether obscenity is utterance within the area of protected speech and press."[5] The Court then undertook a brief historical survey to demonstrate that "the unconditional phrasing of the First Amendment was not intended to protect every utterance." All or practically all of the States which ratified the First Amendment had laws making blasphemy or profanity or both crimes, and provided for prosecutions of libels as well. It was this history which had caused the Court in *Beauharnais* to conclude that "libelous utterances are not within the area of constitutionally protected speech," and this history was deemed to demonstrate that "obscenity, too, was outside the protection intended for speech and press."[6] "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people . . . . All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[7] It was objected that obscenity legislation punishes because of incitation to impure thoughts and without proof that obscene materials create a clear and present danger of antisocial conduct. But since obscenity was not protected at all, such tests as clear and present danger were irrelevant.[8]

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[4] 354 U.S. 476 (1957). Heard at the same time and decided in the same opinion was *Alberts v. California,* involving, of course, a state obscenity law. The Court's first opinion in the obscenity field was Butler v. Michigan, 352 U.S. 380 (1957), considered infra, p. 1113 n.18. Earlier the Court had divided four-to-four and thus affirmed a state court judgment that Edmund Wilson's *Memoirs of Hecate County* was obscene. Doubleday & Co. v. New York, 335 U.S. 848 (1948).

[5] Roth v. United States, 354 U.S. 476, 481 (1957). Justice Brennan later changed his mind on this score, arguing that, because the Court had failed to develop a workable standard for distinguishing the obscene from the non-obscene, regulation should be confined to the protection of children and non-consenting adults. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 (1973), and discussion infra p. 1209, n.29.

[6] 354 U.S. at 482–83. The reference is to Beauharnais v. Illinois, 343 U.S. 250 (1952).

[7] Roth v. United States, 354 U.S. 476, 484 (1957). There then followed the well-known passage from Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); *see* supra, p. 1133.

[8] 354 U.S. at 486, also quoting Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

"However," Justice Brennan continued, "sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press . . . . It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."[9] The standard which the Court thereupon adopted for the designation of material as unprotected obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[10] The Court defined material appealing to prurient interest as "material having a tendency to excite lustful thoughts," and defined prurient interest as "a shameful or morbid interest in nudity, sex, or excretion."[11]

In the years after *Roth*, the Court struggled with many obscenity cases with varying degrees of success. The cases can be grouped topically, but with the exception of those cases dealing with protec-

[9] 354 U.S. at 487, 488.

[10] Id. at 489.

[11] Id. at 487 n.20. A statute defining "prurient" as "that which incites lasciviousness or lust" covers more than obscenity, the Court later indicated in Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1984); obscenity consists in appeal to "a shameful or morbid" interest in sex, not in appeal to "normal, healthy sexual desires." *Brockett* involved a facial challenge to the statute, so the Court did not have to explain the difference between "normal, healthy" sexual desires and "shameful" or "morbid" sexual desires.

tion of children,[12] unwilling adult recipients,[13] and procedure,[14] these cases are best explicated chronologically.

Manual Enterprises v. Day[15] upset a Post Office ban upon the mailing of certain magazines addressed to homosexual audiences, but resulted in no majority opinion of the Court. Nor did a majority opinion emerge in *Jacobellis v. Ohio*, in which conviction for exhib-

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[12] In Butler v. Michigan, 352 U.S. 380 (1957), the Court unanimously reversed a conviction under a statute which punished general distribution of materials unsuitable for children. Protesting that the statute "reduce[d] the adult population of Michigan to reading only what is fit for children," the Court pronounced the statute void. Narrowly drawn proscriptions for distribution or exhibition to children of materials which would not be obscene for adults are permissible, Ginsberg v. New York, 390 U.S. 629 (1968), although the Court insists on a high degree of specificity. Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); Rabeck v. New York, 391 U.S. 462 (1968). Protection of children in this context is concurred in even by those Justices who would proscribe obscenity regulation for adults. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73, 113 (1973) (Justice Brennan dissenting). But children do have First Amendment protection and government may not bar dissemination of everything to them. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." Erznoznik v. City of Jacksonville, 422 U.S. 205, 212–14 (1975) (in context of nudity on movie screen). *See also* FCC v. Pacifica Found., 438 U.S. 726, 749–50 (1978); Pinkus v. United States, 436 U.S. 293, 296–98 (1978).

[13] Protection of unwilling adults was the emphasis in Rowan v. Post Office Dep't, 397 U.S. 728 (1970), which upheld a scheme by which recipients of objectionable mail could put their names on a list and require the mailer to send no more such material. But, absent intrusions into the home, FCC v. Pacifica Found., 438 U.S. 726 (1978), or a degree of captivity that makes it impractical for the unwilling viewer or auditor to avoid exposure, government may not censor content, in the context of materials not meeting constitutional standards for denomination as pornography, to protect the sensibilities of some. It is up to offended individuals to turn away. Erznoznik v. City of Jacksonville, 422 U.S. 205, 208–12 (1975). *But see* Pinkus v. United States, 436 U.S. 293, 298–301 (1978) (jury in passing on what community standards are must include "sensitive persons" within the community).

[14] The First Amendment requires that procedures for suppressing distribution of obscene materials provide for expedited consideration, for placing the burden of proof on government, and for hastening judicial review. Supra, p. 1033. Additionally, Fourth Amendment search and seizure law has been suffused with First Amendment principles, so that the law governing searches for and seizures of allegedly obscene materials is more stringent than in most other areas. Marcus v. Search Warrant, 367 U.S. 717 (1961); A Quantity of Books v. Kansas, 378 U.S. 205 (1964); Heller v. New York, 413 U.S. 483 (1973); Roaden v. Kentucky, 413 U.S. 496 (1973); Lo-Ji Sales v. New York, 442 U.S. 319 (1979); and *see* Walter v. United States, 447 U.S. 649 (1980). Scienter—that is, knowledge of the nature of the materials—is a prerequisite to conviction, Smith v. California, 361 U.S. 147 (1959), but the prosecution need only prove the defendant knew the contents of the material, not that he knew they were legally obscene. Hamling v. United States, 418 U.S. 87, 119–24 (1974). *See also* Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (public nuisance injunction of showing future films on basis of past exhibition of obscene films constitutes prior restraint); McKinney v. Alabama, 424 U.S. 669 (1976) (criminal defendants may not be bound by a finding of obscenity of materials in prior civil proceeding to which they were not parties).

[15] 370 U.S. 478 (1962).

iting a motion picture was reversed.[16] Chief Justice Warren's concurrence in *Roth*[17] was adopted by a majority in *Ginzburg v. United States*,[18] in which Justice Brennan for the Court held that in "close" cases borderline materials could be determined to be obscene if the seller "pandered" them in a way that indicated he was catering to prurient interests. The same five-Justice majority, with Justice Harlan concurring, the same day affirmed a state conviction of a distributor of books addressed to a sado-masochistic audience, applying the "pandering" test and concluding that material could be held legally obscene if it appealed to the prurient interests of the deviate group to which it was directed.[19] Unanimity was shattered, however, when on the same day the Court held that *Fanny Hill*, a novel at that point 277 years old, was not legally obscene.[20] The prevailing opinion again restated the *Roth* tests that, to be considered obscene, material must (1) have a dominant theme in the work considered as a whole that appeals to prurient interest, (2) be patently offensive because it goes beyond contemporary community standards, and (3) be utterly without redeeming social value.[21]

After the divisions engendered by the disparate opinions in the three 1966 cases, the Court over the next several years submerged its differences by *per curiam* dispositions of nearly three dozen cases, in all but one of which it reversed convictions or civil determinations of obscenity. The initial case was *Redrup v. New York*,[22] in which, after noting that the cases involved did not present special questions requiring other treatment, such as concern for juve-

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[16] 378 U.S. 184 (1964). Without opinion, citing *Jacobellis*, the Court reversed a judgment that Henry Miller's *Tropic of Cancer* was obscene. Grove Press v. Gerstein, 378 U.S. 577 (1964). *Jacobellis* is best known for Justice Stewart's concurrence, contending that criminal prohibitions should be limited to "hard-core pornography." The category "may be indefinable," he added, but "I know it when I see it, and the motion picture involved in this case is not that." Id. at 197. The difficulty with this visceral test is that other members of the Court did not always "see it" the same way; two years later, for example, Justice Stewart was on opposite sides in two obscenity decisions decided on the same day. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413, 421 (1966) (concurring on basis that book was not obscene); Mishkin v. New York, 383 U.S. 502, 518 (1966) (dissenting from finding that material was obscene).

[17] Roth v. United States, 354 U.S. 476, 494 (1957).

[18] 383 U.S. 463 (1966). Pandering remains relevant in pornography cases. Splawn v. California, 431 U.S. 595 (1977); Pinkus v. United States, 436 U.S. 293, 303–04 (1978).

[19] Mishkin v. New York, 383 U.S. 502 (1966). *See* id. at 507–10 for discussion of the legal issue raised by the limited appeal of the material. The Court relied on *Mishkin* in Ward v. Illinois, 431 U.S. 767, 772 (1977).

[20] A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413 (1966).

[21] Id. at 418. On the precedential effect of the *Memoirs* plurality opinion, *see* Marks v. United States, 430 U.S. 188, 192–94 (1977).

[22] 386 U.S. 767 (1967).

niles, protection of unwilling adult recipients, or proscription of pandering,[23] the Court succinctly summarized the varying positions of the seven Justices in the majority and said: "[w]hichever of the constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand . . . ."[24] And so things went for several years.[25]

Changing membership on the Court raised increasing speculation about the continuing vitality of *Roth*; it seemed unlikely the Court would long continue its *Redrup* approach.[26] The change when it occurred strengthened the powers of government, federal, state, and local, to outlaw or restrictively regulate the sale and dissemination of materials found objectionable, and developed new standards for determining which objectionable materials are legally obscene.

At the end of the October 1971 Term, the Court requested argument on the question whether the display of sexually oriented films or of sexually oriented pictorial magazines, when surrounded by notice to the public of their nature and by reasonable protection against exposure to juveniles, was constitutionally protected.[27] By a five-to-four vote the following Term, the Court in *Paris Adult Theatre I v. Slaton* adhered to the principle established in *Roth* that obscene material is not protected by the First and Fourteenth Amendments even if access is limited to consenting adults.[28] Chief Justice Burger for the Court observed that the States have wider interests than protecting juveniles and unwilling adults from exposure to pornography; legitimate state interests, effectuated through the exercise of the police power, exist in protecting and improving the quality of life and the total community environment, in improving the tone of commerce in the cities, and in protecting public safety. It matters not that the States may be acting on the basis

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[23] Id. at 771.

[24] Id. at 770–71. The majority was thus composed of Chief Justice Warren and Justices Black, Douglas, Brennan, Stewart, White, and Fortas.

[25] *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 82–83 & n.8 (1973) (Justice Brennan dissenting) (describing *Redrup* practice and listing 31 cases decided on the basis of it).

[26] *See* United States v. Reidel, 402 U.S. 351 (1971) (federal prohibition of dissemination of obscene materials through the mails is constitutional); United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) (customs seizures of obscene materials from baggage of travelers are constitutional). In Grove Press v. Maryland State Board of Censors, 401 U.S. 480 (1971), a state court determination that the motion picture "I Am Curious (Yellow)" was obscene was affirmed by an equally divided Court, Justice Douglas not participating. And Stanley v. Georgia, 394 U.S. 557, 560–64, 568 (1969), had insisted that *Roth* remained the governing standard.

[27] Paris Adult Theatre I v. Slaton, 408 U.S. 921 (1972); Alexander v. Virginia, 408 U.S. 921 (1972).

[28] 413 U.S. 49 (1973).

of unverifiable assumptions in arriving at the decision to suppress the trade in pornography; the Constitution does not require in the context of the trade in ideas that governmental courses of action be subject to empirical verification any more than it does in other fields. Nor does the Constitution embody any concept of laissez faire, or of privacy, or of Millsean "free will," that curbs governmental efforts to suppress pornography.[29]

In *Miller v. California,*[30] the Court then undertook to enunciate standards by which unprotected pornographic materials were to be identified. Because of the inherent dangers in undertaking to regulate any form of expression, laws to regulate pornography must be carefully limited; their scope is to be confined "to works which depict or describe sexual conduct." That conduct must be specifically defined by the applicable statute, whether as written or as authoritatively construed by the courts.[31] The law "must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[32] The standard that a work must be "utterly without redeeming social value" before it may be suppressed was disavowed and discarded. In determining whether material appeals to a prurient interest or is patently offensive, the

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[29] Id. at 57, 60–62, 63–64, 65–68. Delivering the principal dissent, Justice Brennan argued that the Court's *Roth* approach allowing the suppression of pornography was a failure, that the Court had not and could not formulate standards by which protected materials could be distinguished from unprotected materials, and that the First Amendment had been denigrated through the exposure of numerous persons to punishment for the dissemination of materials that fell close to one side of the line rather than the other, but more basically by deterrence of protected expression caused by the uncertainty. Id. at 73. "I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." Id. at 113. Justices Stewart and Marshall joined this opinion; Justice Douglas dissented separately, adhering to the view that the First Amendment absolutely protected all expression. Id. at 70.

[30] 413 U.S. 15 (1973).

[31] Miller v. California, 413 U.S. 15, 24 (1973). The Court stands ready to import into the general phrasings of federal statutes the standards it has now formulated. United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 130 n.7 (1973) (Court is prepared to construe statutes proscribing materials that are "obscene," "lewd," "lascivious," "filthy," "indecent," and "immoral" as limited to the types of "hard core" pornography reachable under the *Miller* standards). For other cases applying *Miller* standards to federal statutes, *see* Hamling v. United States, 418 U.S. 87, 110–16 (1974) (use of the mails); United States v. Orito, 413 U.S. 139 (1973) (transportation of pornography in interstate commerce). The Court's insistence on specificity in state statutes, either as written by the legislature or as authoritatively construed by the state court, appears to have been significantly weakened, in fact if not in enunciation, in Ward v. Illinois, 431 U.S. 767 (1977).

[32] Miller v. California, 413 U.S. at 24.

trier of fact, whether a judge or a jury, is not bound by a hypothetical national standard but may apply the local community standard where the trier of fact sits.[33] Prurient interest and patent offensiveness, the Court indicated, "are essentially questions of fact."[34] By contrast, the third or "value" prong of the *Miller* test is not subject to a community standards test; instead, the appropriate standard is "whether a reasonable person would find [literary, artistic, political, or scientific] value in the material, taken as a whole."[35] The Court in *Miller* reiterated that it was not permitting an unlimited degree of suppression of materials. Only "hard core" materials were to be deemed without the protection of the First Amendment; its idea of the content of "hard core" pornography was revealed in its example of the types of conduct that could not be portrayed: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[36] Portrayal need not be limited to pictorial representation; books containing only descriptive language, no pictures, were subject to suppression under the standards.[37]

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[33] It is the unprotected nature of obscenity that allows this inquiry; offensiveness to local community standards is, of course, a principle completely at odds with mainstream First Amendment jurisprudence. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989); R. A. V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

[34] Id. at 30–34. "A juror is entitled to draw on his knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law." Hamling v. United States, 418 U.S. 87, 104 (1974). The holding does not compel any particular circumscribed area to be used as a "community." In federal cases, it will probably be the judicial district from which the jurors are drawn, Id. at 105–106. Indeed, the jurors may be instructed to apply "community standards" without any definition being given of the "community." Jenkins v. Georgia, 418 U.S. 153, 157 (1974). In a federal prosecution for use of the mails to transmit pornography, the fact that the legislature of the State within which the transaction takes place has abolished pornography regulation except for dealings with children does not preclude permitting the jurors in the federal case to make their own definitions of what is offensive to contemporary community standards; they may be told of the legislature's decision but they are not bound by it. Smith v. United States, 431 U.S. 291 (1977).

[35] Pope v. Illinois, 481 U.S. 497, 500–01 (1987).

[36] Miller v. California, 413 U.S. 15, 25–28 (1973). Quoting *Miller's* language in Hamling v. United States, 418 U.S. 87, 114 (1974), the Court reiterated that it was only "hard-core" material that was unprotected. "While the particular descriptions there contained were not intended to be exhaustive, they clearly indicate that there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is 'patently offensive' within the meaning of the obscenity test set forth in the *Miller* cases." Referring to this language in Ward v. Illinois, 431 U.S. 767 (1977), the Court upheld a state court's power to construe its statute to reach sadomasochistic materials not within the confines of the *Miller* language.

[37] Kaplan v. California, 413 U.S. 115 (1973).

First Amendment values, the Court stressed in *Miller*, "are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."[38] But the Court had conferred on juries as triers of fact the determination, based upon their understanding of community standards, whether material was "patently offensive." Did not this virtually immunize these questions from appellate review? In *Jenkins v. Georgia*,[39] the Court, while adhering to the *Miller* standards, stated that "juries [do not] have unbridled discretion in determining what is 'patently offensive.'" *Miller* was intended to make clear that only "hard-core" materials could be suppressed and this concept and the Court's descriptive itemization of some types of hardcore materials were "intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination." The Court's own viewing of the motion picture in question convinced it that "[n]othing in the movie falls within either of the two examples given in *Miller* of material which may constitutionally be found to meet the 'patently offensive' element of those standards, nor is there anything sufficiently similar to such material to justify similar treatment."[40] But in a companion case, the Court found that a jury determination of obscenity "was supported by the evidence and consistent with" the standards.[41]

The decisions from the *Paris Adult Theatre* and *Miller* era were rendered by narrow majorities,[42] but nonetheless have guided the Court since. There is no indication that the dissenting viewpoints in those cases will gain ascendancy in the foreseeable future;[43] if anything, government authority to define and regulate

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[38] 413 U.S. at 25.

[39] 418 U.S. 153 (1974).

[40] Id. at 161. The film at issue was *Carnal Knowledge*.

[41] Hamling v. United States, 418 U.S. 87 (1974). In Smith v. United States, 431 U.S. 291, 305–06 (1977), the Court explained that jury determinations in accordance with their own understanding of the tolerance of the average person in their community are not unreviewable. Judicial review would pass on (1) whether the jury was properly instructed to consider the entire community and not simply the members' own subjective reaction or the reactions of a sensitive or of a callous minority, (2) whether the conduct depicted fell within the examples specified in *Miller*, (3) whether the work lacked serious literary, artistic, political, or scientific value, and (4) whether the evidence was sufficient. The Court indicated that the value test of *Miller* "was particularly amenable to judicial review." The value test is not to be measured by community standards, the Court later held in Pope v. Illinois, 481 U.S. 497 (1987), but instead by a "reasonable person" standard. An erroneous instruction on this score, however, may be "harmless error." Id. at 503.

[42] For other five-to-four decisions of the era, *see* Marks v. United States, 430 U.S. 188 (1977); Smith v. United States, 431 U.S. 291 (1977); Splawn v. California, 431 U.S. 595 (1977); and Ward v. Illinois, 431 U.S. 767 (1977).

[43] None of the dissenters in *Miller* and *Paris Adult Theatre* (Douglas, Brennan, Stewart, and Marshall) remain on the Court. Justice Stevens agrees with Justice

obscenity may be strengthened. Also, the Court's willingness to allow substantial regulation of non-obscene but sexually explicit or indecent expression reduces the importance (outside the criminal area) of whether material is classified as obscene.

Even as to materials falling within the constitutional definition of obscene, the Court has recognized a limited private, protected interest in possession within the home,[44] unless those materials constitute child pornography. *Stanley v. Georgia* was an appeal from a state conviction for possession of obscene films discovered in appellant's home by police officers armed with a search warrant for other items which were not found. Unanimously,[45] the Court reversed, holding that the mere private possession of obscene materials in the home cannot be made a criminal offense. The Constitution protects the right to receive information and ideas, the Court said, regardless of their social value, and "that right takes on an added dimension" in the context of a prosecution for possession of something in one's own home. "For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[46] Despite the unqualified assertion in *Roth* that obscenity was not protected by the First Amendment, the Court observed, it and the cases following were concerned with the governmental interest in regulating commercial distribution of obscene materials." *Roth* and the cases following that decision are not impaired by today's decision," the Court insisted,[47] but in its rejection of each of the state contentions made in support of the conviction the Court appeared to be rejecting much of the basis of *Roth*. First, there is no governmental interest in protecting an individual's mind from the effect of obscenity. Second, the absence of ideological content in the films was irrelevant, since the Court will not draw a line between transmission of ideas

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Brennan that "government may not constitutionally criminalize mere possession or sale of obscene literature, absent some connection to minors or obtrusive display to unconsenting adults," Pope v. Illinois, 481 U.S. 497, 513 (Stevens, J., dissenting), but it is doubtful whether any other members of the current Court share this view. Justice White's dissenting opinion in Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2472 (1991), joined by Justice Blackmun and the now-retired Justice Marshall, seems to reflect similar views with respect to regulation of non-obscene nude dancing, but does not address regulation of obscenity. Both Justice White and Justice Blackmun voted with the majority in *Miller* and *Paris Adult Theatre*.

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

[45] Justice Marshall wrote the opinion of the Court and was joined by Justices Douglas, Harlan, and Fortas, and Chief Justice Warren. Justice Black concurred. Id. at 568. Justice Stewart concurred and was joined by Justices Brennan and White on a search and seizure point. Justice Stewart, however, had urged the First Amendment ground in an earlier case. Mapp v. Ohio, 367 U.S. 643, 686 (1961) (concurring opinion).

[46] 394 U.S. at 564.

[47] Id. at 560–64, 568.

and entertainment. Third, there is no empirical evidence to support a contention that exposure to obscene materials may incite a person to antisocial conduct; even if there were such evidence, enforcement of laws proscribing the offensive conduct is the answer. Fourth, punishment of mere possession is not necessary to punishment of distribution. Fifth, there was little danger that private possession would give rise to the objections underlying a proscription upon public dissemination, exposure to children and unwilling adults.[48]

Stanley's broad rationale has been given a restrictive reading, and the holding has been confined to its facts. Any possible implication that *Stanley* was applicable outside the home and recognized a right to obtain pornography or a right in someone to supply it was soon dispelled.[49] The Court has consistently rejected *Stanley's* theoretical underpinnings, upholding morality-based regulation of the behavior of consenting adults.[50] Also, *Stanley* has been held inapplicable to possession of child pornography in the home, the Court determining that the state interest in protecting children from sexual exploitation far exceeds the interest in *Stanley* of protecting adults from themselves.[51] Apparently for this reason, a state's conclusion that punishment of mere possession is a necessary or desirable means of reducing production of child pornography will not be closely scrutinized.[52]

Child Pornography.—In *New York v. Ferber*,[53] the Court recognized another category of expression that is outside the coverage of the First Amendment, the pictorial representation of children in films or still photographs in a variety of sexual activities or exposures of the genitals. The basic reason such depictions could be prohibited was the governmental interest in protecting the physical

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[48] Id. at 565–68.

[49] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65–68 (1973). Transportation of unprotected material for private use may be prohibited, United States v. Orito, 413 U.S. 139 (1973), and the mails may be closed, United States v. Reidel, 402 U.S. 351 (1971), as may channels of international movement, United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971); United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973).

[50] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65–70 (1973) (commercial showing of obscene films to consenting adults); Bowers v. Hardwick, 478 U.S. 186 (1986) (private, consensual, homosexual conduct); Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (regulation of non-obscene, nude dancing restricted to adults).

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

[52] Id. at 109–10.

[53] 458 U.S. 747 (1982). Decision of the Court was unanimous, although there were several limiting concurrences. *Compare*, e.g., 775 (Justice Brennan, arguing for exemption of "material with serious literary, scientific, or educational value"), *with* 774 (Justice O'Connor, arguing that such material need not be excepted). The Court did not pass on the question, inasmuch as the materials before it were well within the prohibitable category. Id. at 766–74.

and psychological well-being of children whose participation in the production of these materials would subject them to exploitation and harm. The state may go beyond a mere prohibition on the use of the children, because it is not possible to protect children adequately without prohibiting the exhibition and dissemination of the materials and advertising about them. Thus, "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required."[54] But, since expression is involved, government must carefully define what conduct is to be prohibited and may reach only "works that *visually* depict sexual conduct by children below a specified age."[55]

The reach of the state may even extend to private possession of child pornography in the home. In *Osborne v. Ohio*[56] the Court upheld a state law criminalizing the possession or viewing of child pornography as applied to someone who possessed such materials in his home. Distinguishing *Stanley v. Georgia*, the Court ruled that Ohio's interest in preventing exploitation of children far exceeded what it characterized as Georgia's "paternalistic interest" in protecting the minds of adult viewers of pornography.[57] Because of the greater importance of the state interest involved, the Court saw less need to require states to demonstrate a strong necessity for regulating private possession as well as commercial distribution and sale.

Non-obscene But Sexually Explicit and Indecent Expression.—There is expression, either spoken or portrayed, which is offensive to some but is not within the constitutional standards of unprotected obscenity. Nudity portrayed in films or stills cannot be presumed obscene[58] nor can offensive language ordinarily be punished simply because it offends someone.[59] Nonetheless, govern-

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[54] Id. at 763–64.

[55] Id. at 764 (emphasis original). The Court's statement of the modified *Miller* standards for child pornography is at id., 764–65.

[56] 495 U.S. 103 (1990).

[57] Id. at 108.

[58] Erznoznik v. City of Jacksonville, 422 U.S. 205, 212–14 (1975).

[59] E.g., Cohen v. California, 403 U.S. 15 (1971). Special rules apply to broadcast speech, which, because of its intrusion into the home and the difficulties of protecting children, is accorded "the most limited First Amendment protection" of all forms of communication; non-obscene but indecent language may be curtailed, the time of day and other circumstances determining the extent of curtailment. FCC v. Pacifica Found., 438 U.S. 726, 748 (1978). However, recent efforts by Congress and the FCC to extend the indecency ban to 24 hours a day have been rebuffed by an appeals court. Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) (invalidating regulations promulgated pursuant to Pub. L. No. 100–459, § 608), *cert. denied*, 112 S. Ct. 1281, 1282. Earlier, the same court had invalidated an FCC restriction on indecent, non-obscene broadcasts to the hours of midnight to 6 a.m., finding that the FCC had failed to adduce sufficient evidence to support the restraint. Ac-

ment may regulate sexually explicit but non-obscene expression in a variety of ways. Legitimate governmental interests may be furthered by appropriately narrow regulation, and the Court's view of how narrow regulation must be is apparently influenced not only by its view of the strength of the government's interest in regulation, but also by its view of the importance of the expression itself. In other words, sexually explicit expression does not receive the same degree of protection afforded purely political speech.[60]

Government has a "compelling" interest in the protection of children from seeing or hearing indecent material, but total bans applicable to adults and children alike are constitutionally suspect.[61] Also, government may take notice of objective conditions attributable to the commercialization of sexually explicit but non-obscene materials. Thus, the Court recognized a municipality's authority to zone land to prevent deterioration of urban areas, upholding an ordinance providing that "adult theaters" showing motion pictures that depicted "specified sexual activities" or "specified anatomical areas" could not be located within 100 feet of any two other establishments included within the ordinance or within 500 feet of a residential area.[62] Similarly, an adult bookstore is subject

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tion for Children's Television v. FCC, 852 F.2d 1332, 1335 (D.C. Cir. 1988). Congress has now imposed a similar 6 a.m.-to-midnight ban on indecent programming, with a 10 p.m.-to-midnight exception for stations that go off the air at midnight. Pub. L. 102–356, § 16 (1992), 47 U.S.C. § 303 note.

[60] Justice Scalia, concurring in *Sable Communications v. FCC*, 492 U.S. 115, 132 (1989), suggested that there should be a "sliding scale" taking into account the definition of obscenity: "[t]he more narrow the understanding of what is 'obscene,' and hence the more pornographic what is embraced within the residual category of 'indecency,' the more reasonable it becomes to insist upon greater assurance of insulation from minors." Barnes v. Glen Theatre, 111 S. Ct. 2456 (1991), upholding regulation of nude dancing even in the absence of threat to minors, may illustrate a general willingness by the Court to apply soft rather than strict scrutiny to regulation of more sexually explicit expression.

[61] *See* Sable Communications v. FCC, 492 U.S. 115 (1989) (FCC's "dial-a-porn" rules imposing a total ban on "indecent" speech are unconstitutional, given less restrictive alternatives—e.g., credit cards or user IDs—of preventing access by children). *Pacifica Foundation* is distinguishable, the Court reasoned, because that case did not involve a "total ban" on broadcast, and also because there is no "captive audience" for the "dial-it" medium, as there is for the broadcast medium. 492 U.S. at 127–28.

[62] Young v. American Mini Theatres, 427 U.S. 50 (1976). Four of the five majority Justices thought the speech involved deserved less First Amendment protection than other expression, id. at 63–71, while Justice Powell, concurring, thought the ordinance was sustainable as a measure that served valid governmental interests and only incidentally affected expression. Id. at 73. Justices Stewart, Brennan, Marshall, and Blackmun dissented. Id. at 84, 88. *Young* was followed in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), upholding a city ordinance prohibiting location of adult theaters within 1,000 feet of residential areas, churches, or parks, and within one mile of any school. Rejecting the claim that the ordinance regulated content of speech, the Court indicated that such time, place and manner regulations are valid if "designed to serve a substantial governmental interest" and if

to closure as a public nuisance if it is being used as a place for prostitution and illegal sexual activities, since the closure "was directed at unlawful conduct having nothing to do with books or other expressive activity."[63] However, a city was held constitutionally powerless to prohibit drive-in motion picture theaters from showing films containing nudity if the screen is visible from a public street or place.[64] Also, the FCC was unable to justify a ban on transmission of "indecent" but not obscene telephone messages.[65]

The Court has recently held, however, that "live" productions containing nudity can be regulated to a greater extent than had been allowed for films and publications. Whether this represents a distinction between live performances and other entertainment media, or whether instead it signals a more permissive approach overall to governmental regulation of non-obscene but sexually explicit material, remains to be seen. In *Barnes v. Glen Theatre, Inc.*,[66] the Court upheld application of Indiana's public indecency statute to require that dancers in public performances of nude, non-obscene erotic dancing wear "pasties" and a "G-string" rather than appear totally nude. There was no opinion of the Court, three Justices viewing the statute as a permissible regulation of "societal order and morality,"[67] one viewing it as a permissible means of regulating supposed secondary effects of prostitution and other criminal activity,[68] and a fifth Justice seeing no need for special First Amendment protection from a law of general applicability directed at conduct rather than expression.[69] All but one of the Justices agreed that nude dancing is entitled to some First Amendment protection,[70] but the result of *Barnes* was a bare minimum

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"allow[ing] for reasonable alternative avenues of communication." Id. at 39. The city had a substantial interest in regulating the "undesirable secondary effects" of such businesses. And, while the suitability for adult theaters of the remaining 520 acres within the city was disputed, the Court held that the theaters "must fend for themselves in the real estate market," and are entitled only to "a reasonable opportunity to open and operate." Id. at 42.

[63] Arcara v. Cloud Books, 478 U.S. 697 (1986).

[64] Erznoznik v. City of Jacksonville, 422 U.S. 204 (1975). Dissenting from Justice Powell's opinion for the Court were Chief Justice Burger and Justices White and Rehnquist. Id. at 218, 224. Only Justice Blackmun, of the Justices in the majority, remains on the Court in 1992, and it seems questionable whether the current Court would reach the same result.

[65] Sable Communications of California v. FCC, 492 U.S. 115 (1989).

[66] 111 S. Ct. 2456 (1991).

[67] Id. (Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy).

[68] Id. at 2468 (Justice Souter).

[69] Id. at 2463 (Justice Scalia). The Justice thus favored application of the same approach recently applied to free exercise of religion in Employment Division v. Smith, 494 U.S. 872 (1990).

[70] Earlier cases had established as much. *See* California v. LaRue, 409 U.S. 109, 118 (1972); Southeastern Promotions v. Conrad, 420 U.S. 546, 557–58 (1975); Doran v. Salem Inn, 422 U.S. 922, 932 (1975); Schad v. Borough of Mount Ephraim, 452

of protection. Numerous questions remain unanswered. In addition to the uncertainty over applicability of *Barnes* to regulation of the content of films or other shows in "adult" theaters,[71] there is also the issue of its applicability to nudity in operas or theatrical productions not normally associated with commercial exploitation of sex.[72] But broad implications for First Amendment doctrine are probably unwarranted.[73] The Indiana statute was not limited in application to barrooms; had it been, then the Twenty-first Amendment would have afforded additional authority to regulate the erotic dancing.[74]

U.S. 61, 66 (1981); New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 716, 718 (1981). Presumably, then, the distinction between barroom erotic dancing, entitled to minimum protection, and social "ballroom" dancing, not expressive and hence not entitled to First Amendment protection (*see* City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989)), still hangs by a few threads. Justice Souter, concurring in *Barnes*, 111 S. Ct. 2468, recognized the validity of the distinction between ballroom and erotic dancing, a validity that had been questioned by a dissent in the lower court. Miller v. Civil City of South Bend, 904 F.2d 1081, 1128–29 (7th Cir. 1990) (Easterbrook, J.).

[71] Although Justice Souter relied on what were essentially zoning cases (Young v. American Mini Theatres and Renton v. Playtime Theatres) to justify regulation of expression itself, he nonetheless pointed out that a pornographic movie featuring one of the respondent dancers was playing nearby without interference by the authorities. This suggests that, at least with respect to direct regulation of the degree of permissible nudity, he might draw a distinction between "live" and film performances even while acknowledging the harmful "secondary" effects associated with *both*.

[72] The Court has not ruled directly on such issues. *See* Southeastern Promotions v. Conrad, 420 U.S. 546 (1975) (invalidating the denial of use of a public auditorium for a production of the musical "Hair," in the absence of procedural safeguards that must accompany a system of prior restraint). Presumably the *Barnes* plurality's public morality rationale would apply equally to the "adult" stage and to the operatic theater, while Justice Souter's secondary effects rationale would not. But the plurality ducked this issue, reinterpreting the lower court record to deny that Indiana had distinguished between "adult" and theatrical productions. 111 S. Ct. at 2459 n.1 (Chief Justice Rehnquist); id. at 2464 n.2 (Justice Scalia). On the other hand, the fact that the state authorities disclaimed any intent to apply the statute to theatrical productions demonstrated to dissenting Justice White (who was joined by Justices Marshall, Blackmun, and Stevens) that the statute was *not* a general prohibition on public nudity, but instead was targeted at "the communicative aspect of the erotic dance." 111 S. Ct. at 2473.

[73] The Court had only recently affirmed that music is entitled to First Amendment protection independently of the message conveyed by any lyrics (Ward v. Rock Against Racism, 491 U.S. 781 (1989)), so it seems implausible that the Court is signalling a narrowing of protection to only ideas and opinions. Rather, the Court seems willing to give government the benefit of the doubt when it comes to legitimate objectives in regulating expressive conduct that is sexually explicit. For an extensive discourse on the expressive aspects of dance and the arts in general, and the striptease in particular, *see* Judge Posner's concurring opinion in the lower court's disposition of *Barnes*. Miller v. Civil City of South Bend, 904 F.2d 1081, 1089 (7th Cir. 1990).

[74] California v. LaRue, 409 U.S. 109 (1972); New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981).

Speech Plus—The Constitutional Law of Leafleting, Picketing, and Demonstrating

Communication of political, economic, social, and other views is not accomplished solely by face-to-face speech, broadcast speech, or writing in newspapers, periodicals, and pamphlets. There is also "expressive conduct," which includes picketing, patrolling, and marching, distribution of leaflets and pamphlets and addresses to publicly assembled audiences, door-to-door solicitation and many forms of "sit-ins." There is also a class of conduct now only vaguely defined which has been denominated "symbolic conduct," which includes such actions as flag desecration and draft-card burnings. Because all these ways of expressing oneself involve conduct—action—rather than mere speech, they are all much more subject to regulation and restriction than is simple speech. Some of them may be forbidden altogether. But to the degree that these actions are intended to communicate a point of view the First Amendment is relevant and protects some of them to a great extent. Sorting out the conflicting lines of principle and doctrine is the point of this section.

The Public Forum.—In 1895 while he was a member of the highest court of Massachusetts, Justice Holmes rejected a contention that public property was by right open to the public as a place where the right of speech could be recognized,[75] a rejection endorsed in its rationale on review by the United States Supreme Court.[76] This point of view was rejected by the Court in *Hague v. CIO*,[77] where Justice Roberts wrote: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." While this opinion was not itself joined by a majority of the Justices, the view was subsequently endorsed by the Court in several opinions.[78]

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[75] Commonwealth v. Davis, 162 Mass. 510, 511 (1895). "For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of rights of a member of the public than for the owner of a private house to forbid it in the house."

[76] Davis v. Massachusetts, 167 U.S. 43, 48 (1897).

[77] 307 U.S. 496, 515 (1939). Only Justice Black joined the opinion and Chief Justice Hughes generally concurred in it, but only Justices McReynolds and Butler dissented from the result.

[78] E.g., Schneider v. State, 308 U.S. 147, 163 (1939); Kunz v. New York, 340 U.S. 290, 293 (1951).

It was called into question in the 1960's, however, when the Court seemed to leave the issue open[79] and when a majority endorsed an opinion of Justice Black's asserting his own narrower view of speech rights in public places.[80] More recent decisions have restated and quoted the Roberts language from *Hague* and that is now the position of the Court.[81] Public streets and parks,[82] including those adjacent to courthouses[83] and foreign embassies,[84] as well as public libraries[85] and the grounds of legislative bodies,[86] are open to public demonstrations, although the uses to which public areas are dedicated may shape the range of permissible expression and conduct that may occur there.[87] Moreover, not all public

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[79] Cox v. Louisiana, 379 U.S. 536, 555 (1965). For analysis of this case in the broader context, *see* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

[80] Adderley v. Florida, 385 U.S. 39 (1966). *See* id. at 47–48; Cox v. Louisiana, 379 U.S. 559, 578 (1965) (Justice Black concurring in part and dissenting in part); Jamison v. Texas, 318 U.S. 413, 416 (1943) (Justice Black for the Court).

[81] E.g., Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Carey v. Brown, 447 U.S. 455, 460 (1980).

[82] Hague v. CIO, 307 U.S. 496 (1939); Niemotko v. Maryland, 340 U.S. 268 (1951); Kunz v. New York, 340 U.S. 290 (1951); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Coates v. City of Cincinnati, 402 U.S. 611 (1971); Grayned v. City of Rockford, 408 U.S. 104 (1972); Greer v. Spock, 424 U.S. 828, 835–36 (1976); Carey v. Brown, 447 U.S. 455 (1980).

[83] Narrowly drawn statutes which serve the State's interests in security and in preventing obstruction of justice and influencing of judicial officers are constitutional. Cox v. Louisiana, 379 U.S. 559 (1965). A restriction on carrying signs or placards on the grounds of the Supreme Court is unconstitutional as applied to the public sidewalks surrounding the Court, since it does not sufficiently further the governmental purposes of protecting the building and grounds, maintaining proper order, or insulating the judicial decisionmaking process from lobbying. United States v. Grace, 461 U.S. 171 (1983).

[84] In Boos v. Barry, 485 U.S. 312 (1988), the Court struck down as content-based a District of Columbia law prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tends to bring the foreign government into "public odium" or "public disrepute." However, another aspect of the District's law, making it unlawful for three or more persons to congregate within 500 feet of an embassy and refuse to obey a police dispersal order, was upheld; under a narrowing construction, the law had been held applicable only to congregations directed at an embassy, and reasonably believed to present a threat to the peace or security of the embassy.

[85] Brown v. Louisiana, 383 U.S. 131 (1966) (sit-in in library reading room).

[86] Edwards v. South Carolina, 372 U.S. 229 (1963); Jeanette Rankin Brigade v. Capitol Police Chief, 342 F. Supp. 575 (D.C. 1972) (three-judge court), aff'd, 409 U.S. 972 (1972) (voiding statute prohibiting parades and demonstrations on United States Capitol grounds).

[87] E.g., Grayned v. City of Rockford, 408 U.S. 104 (1972) (sustaining ordinance prohibiting noisemaking adjacent to school if that noise disturbs or threatens to disturb the operation of the school); Brown v. Louisiana, 383 U.S. 131 (1966) (silent vigil in public library protected while noisy and disruptive demonstration would not be); Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) (wearing of black armbands as protest protected but not if it results in disruption of school); Cameron v. Johnson, 390 U.S. 611 (1968) (preservation of access to courthouse); Frisby v. Schultz, 487 U.S. 474 (1988) (ordinance prohibiting picketing "before or

properties are thereby public forums. "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government."[88] "The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time."[89] Thus, by the nature of the use to which the property is put or by tradition, some sites are simply not as open for expression as streets and parks are.[90] But if government does open non-traditional forums for expressive activities, it may not discriminate on the basis of content or viewpoint in according access.[91] The Court in accepting the public forum concept has nevertheless been divided with respect to the reach of the doctrine.[92] The concept is likely, therefore, to continue be a focal point of judicial debate in coming years.

Speech in public forums is subject to time, place, and manner regulations, which take into account such matters as control of traffic in the streets, the scheduling of two meetings or demonstrations at the same time and place, the preventing of blockages of building entrances, and the like.[93] Such regulations are closely scrutinized in order to protect free expression, and, to be valid, must be justified without reference to the content or subject matter

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about" any residence or dwelling, narrowly construed as prohibiting only picketing that targets a particular residence, upheld as furthering significant governmental interest in protecting the privacy of the home).

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

[89] Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

[90] E.g., Adderley v. Florida, 385 U.S. 39 (1966) (jails); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (advertising space in city rapid transit cars); Greer v. Spock, 424 U.S. 828 (1976) (military bases); United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (private mail boxes); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (interschool mail system); ISKCON v. Lee, 112 S. Ct. 2701 (1992) (publicly owned airport terminal).

[91] E.g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (municipal theater); Madison School District v. WERC, 429 U.S. 167 (1976) (school board meeting); Heffron v. ISKCON, 452 U.S. 640 (1981) (state fair grounds); Widmar v. Vincent, 454 U.S. 263 (1981) (university meeting facilities).

[92] *Compare* United States Postal Service v. Council of Greenburgh Civic Ass'ns, 454 U.S. 114, 128–31 (1981), with id. at 136–40 (Justice Brennan concurring), and 142 (Justice Marshall dissenting). For evidence of continuing division, *compare* ISKCON v. Lee, 112 S. Ct. 2701 (1992) with id. at 27 (Justice Kennedy concurring).

[93] *See, e.g.*, Heffron v. ISKCON, 452 U.S. 640, 647–50 (1981), and id. at 656 (Justice Brennan concurring in part and dissenting in part) (stating law and discussing cases); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (prohibition of sleep-in demonstration in area of park not designated for overnight camping).

of speech,[94] must serve a significant governmental interest,[95] and must leave open ample alternative channels for communication of the information.[96] A recent formulation is that a time, place, or manner regulation "must be narrowly tailored to serve the government's legitimate content-neutral interests, but . . . need not be the least-restrictive or least-intrusive means of doing so." All that is required is that "the means chosen are not substantially broader than necessary to achieve the government's interest."[97] Corollary to the rule forbidding regulation premised on content is the principle, a merging of free expression and equal protection standards, that government may not discriminate between different kinds of messages in affording access.[98] In order to ensure against covert forms of discrimination against expression and between different kinds of content, the Court has insisted that licensing systems be constructed as free as possible of the opportunity for arbitrary administration.[99] The Court has also applied its general strictures

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[94] Niemotko v. Maryland, 340 U.S. 268 (1951); Cox v. Louisiana, 379 U.S. 536 (1965); Police Department v. Mosley, 408 U.S. 92 (1972); Madison School District v. WERC, 429 U.S. 167 (1976); Carey v. Brown, 447 U.S. 455 (1980); Widmar v. Vincent, 454 U.S. 263 (1981). In Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), a divided Court permitted the city to sell commercial advertising space on the walls of its rapid transit cars but to refuse to sell political advertising space.

[95] E.g., the governmental interest in safety and convenience of persons using public forum, Heffron v. ISKCON, 452 U.S. 640, 650 (1981); the interest in preservation of a learning atmosphere in school, Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); and the interest in protecting traffic and pedestrian safety in the streets, Cox v. Louisiana, 379 U.S. 536, 554–55 (1965); Kunz v. New York, 340 U.S. 290, 293–94 (1951); Hague v. CIO, 307 U.S. 496, 515–16 (1939).

[96] Heffron v. ISKCON, 452 U.S. 640, 654–55 (1981); Consolidated Edison Co. v. PSC, 447 U.S. 530, 535 (1980).

[97] Ward v. Rock Against Racism, 491 U.S. 781, 798, 800 (1989).

[98] Police Department v. Mosley, 408 U.S. 92 (1972) (ordinance void which barred all picketing around school building except labor picketing); Carey v. Brown, 447 U.S. 455 (1980) (same); Widmar v. Vincent, 454 U.S. 263 (1981) (college rule permitting access to all student organizations except religious groups); Niemotko v. Maryland, 340 U.S. 268 (1951) (permission to use parks for some groups but not for others). These principles apply only to the traditional public forum and to the governmentally created "limited public forum." Government may, without creating a limited public forum, place "reasonable" restrictions on access to nonpublic areas. *See, e.g.* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 48 (1983) (use of school mail system); and Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S. 788 (1985) (charitable solicitation of federal employees at workplace). *See also* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (city may sell commercial advertising space on the walls of its rapid transit cars but refuse to sell political advertising space).

[99] E.g., Hague v. CIO, 307 U.S. 496, 516 (1939); Schneider v. State, 308 U.S. 147, 164 (1939); Cox v. New Hampshire, 312 U.S. 569 (1941); Poulos v. New Hampshire, 345 U.S. 395 (1953); Staub v. City of Baxley, 355 U.S. 313, 321–25 (1958); Cox v. Louisiana, 379 U.S. 536, 555–58 (1965); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–53 (1969). Justice Stewart for the Court described these and other cases as "holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license without narrow, objective, and definite standards to guide the licensing authority is unconstitutional." Id. at 150–51.

against prior restraints in the contexts of permit systems and judicial restraint of expression.[100]

It appears that government may not deny access to the public forum for demonstrators on the ground that the past meetings of these demonstrators resulted in violence,[101] and may not vary a demonstration licensing fee based on an estimate of the amount of hostility likely to be engendered,[102] but the Court's position with regard to the "heckler's veto," the governmental termination of a speech or demonstration because of hostile crowd reaction, remains quite unclear.[103]

A person faced with an unconstitutional licensing law may ignore it, engage in the desired conduct, and challenge the constitutionality of the permit system upon a subsequent prosecution for violating it. Id. at 151; Jones v. Opelika, 316 U.S. 584, 602 (1942) (Chief Justice Stone dissenting), adopted per curiam on rehearing, 319 U.S. 103 (1943). *See also* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) (upholding facial challenge to ordinance vesting in the mayor unbridled discretion to grant or deny annual permit for location of newsracks on public property); Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988) (invalidating as permitting "delay without limit" licensing requirement for professional fundraisers); Forsyth County v. Nationalist Movement, 112 S. Ct. 2395 (1992). *But see* Walker v. City of Birmingham, 388 U.S. 307 (1967) (same rule not applicable to injunctions).

[100] In Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969), the Court reaffirmed the holdings of the earlier cases, and, additionally, both Justice Stewart, for the Court, id. at 155 n.4, and Justice Harlan concurring, id. at 162–64, asserted that the principles of Freedman v. Maryland, 380 U.S. 51 (1965), governing systems of prior censorship of motion pictures, were relevant to permit systems for parades and demonstrations. These standards include prompt and expeditious administrative handling of requests and prompt judicial review of adverse actions. *See* National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977). The Court also voided an injunction against a protest meeting which was issued ex parte, without notice to the protestors and with, or course, no opportunity for them to rebut the representations of the seekers of the injunction. Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968).

[101] The only available precedent is Kunz v. New York, 340 U.S. 290 (1951). The holding was on a much narrower basis, but in dictum the Court said: "The court below has mistakenly derived support for its conclusions from the evidence produced at the trial that appellant's religious meetings had, in the past, caused some disorder. There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder and violence." Id. at 294. A different rule applies to labor picketing. *See* Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, 312 U.S. 287 (1941) (background of violence supports prohibition of all peaceful picketing). The military may ban a civilian, previously convicted of destroying government property, from reentering a military base, and may apply the ban to prohibit the civilian from reentering the base for purposes of peaceful demonstration during an Armed Forces Day "open house." United States v. Albertini, 472 U.S. 675 (1985).

[102] Forsyth County v. Nationalist Movement, 112 S. Ct. 2395 (1992) (a fee based on anticipated crowd response necessarily involves examination of the content of the speech, and is invalid as a content regulation).

[103] Dicta clearly indicate that a hostile reaction will not justify suppression of speech, Hague v. CIO, 307 U.S. 496, 502 (1939); Cox v. Louisiana, 379 U.S. 536, 551 (1965); Bachellar v. Maryland, 397 U.S. 564, 567 (1970), and one holding appears to point this way. Gregory v. City of Chicago, 394 U.S. 111 (1969). On the other hand, the Court has upheld a breach of the peace conviction of a speaker who

The Court has defined three different categories of public property for public forum analysis. First, there is the public forum, places such as streets and parks which have traditionally been used for public assembly and debate, where the government may not prohibit all communicative activity and must justify content-neutral time, place, and manner restrictions as narrowly tailored to serve some legitimate interest. Government may also open property for communicative activity, and thereby create a public forum. Such a forum may be limited—hence the expression "limited public forum"—for "use by certain groups, e.g. *Widmar v. Vincent* (student groups), or for discussion of certain subjects, e.g. *City of Madison Joint School District v. Wisconsin PERC* (school board business),"[104] but within the framework of such legitimate limitations discrimination based on content must be justified by compelling governmental interests.[105] Thirdly, government "may reserve a forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[106] The distinction between the second and third categories can therefore determine the outcome of a case, since speakers may be excluded from the second category only for a "compelling" governmental interest, while exclusion from the third category need only be "reasonable." Yet, distinguishing between the two categories creates no small difficulty, as evidenced by recent case law.

The Court has held that a school system did not create a limited public forum by opening an interschool mail system to use by selected civic groups "that engage in activities of interest and educational relevance to students," and that, in any event, if a limited public forum had thereby been created a teachers union rivaling the exclusive bargaining representative could still be excluded as not being "of a similar character" to the civic groups.[107] Less problematic was the Court's conclusion that utility poles and other mu-

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refused to cease speaking upon the demand of police who feared imminent violence. Feiner v. New York, 340 U.S. 315 (1951). In Niemotko v. Maryland, 340 U.S. 268, 273 (1951) (concurring opinion), Justice Frankfurter wrote: "It is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd whatever its size and temper and not against the speaker."

[104] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

[105] 460 U.S. at 46.

[106] Id.

[107] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). This was a 5–4 decision, with Justice White's opinion of the Court being joined by Chief Justice Burger and by Justices Blackmun, Rehnquist, and O'Connor, and with Justice Brennan's dissent being joined by Justices Marshall, Powell, and Stevens. *See also* Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (student newspaper published as part of journalism class is not a public forum).

nicipal property did not constitute a public forum for the posting of signs.[108] More problematic was the Court's conclusion that the Combined Federal Campaign, the Federal Government's forum for coordinated charitable solicitation of federal employees, is not a limited public forum. Exclusion of various advocacy groups from participation in the Campaign was upheld as furthering "reasonable" governmental interests in offering a forum to "traditional health and welfare charities," avoiding the appearance of governmental favoritism of particular groups or viewpoints, and avoiding disruption of the federal workplace by controversy.[109] The Court pinpointed the government's intention as the key to whether a public forum has been created: "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse."[110] Under this categorical approach, the government has wide discretion in maintaining the nonpublic character of its forums, and may regulate in ways that would be impermissible were it to designate a limited public forum.[111]

Application of the doctrine continues to create difficulty. A majority of Justices could not agree on the public forum status of a sidewalk located entirely on Postal Service property.[112] The Court was also divided over whether nonsecured areas of an airport terminal, including shops and restaurants, constituted a public forum. Holding that the terminal was not a public forum, the Court upheld restrictions on the solicitation and receipt of funds.[113] But

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[108] City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding an outright ban on use of utility poles for signs). The Court noted that "it is of limited utility in the context of this case to focus on whether the tangible property itself should be deemed a public forum." Id. at 815 n.32.

[109] Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S. 788 (1985). Precedential value of *Cornelius* may be subject to question, since it was decided by 4–3 vote, the non-participating Justices (Marshall and Powell) having dissented in *Perry*. Justice O'Connor wrote the opinion of the Court, joined by Chief Justice Burger and by Justices White and Rehnquist. Justice Blackmun, joined by Justice Brennan, dissented, and Justice Stevens dissented separately.

[110] 473 U.S. at 802. Justice Blackmun criticized "the Court's circular reasoning that the CFC is not a limited public forum because the Government intended to limit the forum to a particular class of speakers." Id. at 813–14.

[111] Justice Kennedy criticized this approach in ISKCON v. Lee, 112 S. Ct. 2701, 27, (1992) (concurring), contending that recognition of government's authority to designate the forum status of property ignores the nature of the First Amendment as "a limitation on government, not a grant of power." Justice Brennan voiced similar misgivings in his dissent in *United States v. Kokinda*: "public forum categories—originally conceived of as a way of *preserving* First Amendment rights—have been used . . . as a means of upholding restrictions on speech". 497 U.S. at 741 (emphasis original) (citation omitted).

[112] United States v. Kokinda, 497 U.S. 720 (1990) (upholding a ban on solicitation on the sidewalk).

[113] ISKCON v. Lee, 112 S. Ct. 2701 (1992).

the Court also invalidated a ban on the sale or distribution of literature to passers-by within the same terminal, four Justices believing that the terminal constituted a public forum, and a fifth contending that the multipurpose nature of the forum (shopping mall as well as airport) made restrictions on expression less "reasonable."[114]

Quasi-Public Places.—The First Amendment precludes government restraint of expression and it does not require individuals to turn over their homes, businesses or other property to those wishing to communicate about a particular topic.[115] But it may be that in some instances private property is so functionally akin to public property that private owners may not forbid expression upon it. In *Marsh v. Alabama*,[116] the Court held that the private owner of a company town could not forbid distribution of religious materials by a Jehovah's Witness on a street in the town's business district. The town, wholly owned by a private corporation, had all the attributes of any American municipality, aside from its ownership, and was functionally like any other town. In those circumstances, the Court reasoned, "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[117] This precedent lay unused for some twenty years until the Court first indicated a substantial expansion of it, and then withdrew to a narrow interpretation.

First, in *Food Employees Union v. Logan Valley Plaza*,[118] the Court held constitutionally protected the picketing of a store located in a shopping center by a union objecting to the store's employment of nonunion labor. Finding that the shopping center was

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[114] Lee v. ISKCON, 112 S. Ct. 2709 (1992).

[115] In Garner v. Louisiana, 368 U.S. 157, 185, 201–07 (1961), Justice Harlan, concurring, would have reversed breach of the peace convictions of "sit-in" demonstrators who conducted their "sit-in" at lunch counters of department stores. He asserted that the protesters were sitting at the lunch counters where they knew they would not be served in order to demonstrate that segregation at such counters existed. "Such a demonstration . . . is as much a part of the 'free trade in ideas' . . . as is verbal expression, more commonly thought of as 'speech.'" Conviction for breach of peace was void in the absence of a clear and present danger of disorder. The Justice would not, however protect "demonstrations conducted on private property over the objection of the owner . . . , just as it would surely not encompass verbal expression in a private home if the owner has not consented." He had read the record to indicate that the demonstrators were invitees in the stores and that they had never been asked to leave by the owners or managers. *See also* Frisby v. Schultz, 487 U.S. 474 (1988) (government may protect residential privacy by prohibiting altogether picketing that targets a single residence).

[116] 326 U.S. 501 (1946).

[117] Id. at 506.

[118] Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968).

the functional equivalent of the business district involved in *Marsh*, the Court announced there was "no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the 'business district' is not under the same ownership."[119] [T]he State," said Justice Marshall, "may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put."[120] The Court observed that it would have been hazardous to attempt to distribute literature at the entrances to the center and it reserved for future decision "whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put."[121]

Four years later, the Court answered the reserved question in the negative.[122] Several members of an antiwar group had attempted to distribute leaflets on the mall of a large shopping center, calling on the public to attend a protest meeting. Center guards invoked a trespass law against them, and the Court held they could rightfully be excluded. The center had not dedicated its property to a public use, the Court said; rather, it invited the public in specifically to carry on business with those stores located in the center. Plaintiffs' leafleting, not directed to any store or to the customers *qua* customers of any of the stores, was unrelated to any activity in the center. Unlike the situation in *Logan Valley Plaza*, there were reasonable alternatives by which plaintiffs could reach those who used the center. Thus, in the absence of a relationship between the purpose of the expressive activity and the business of the shopping center, the property rights of the center owner will overbalance the expressive rights to persons who would use their property for communicative purposes.

Then, the Court formally overruled *Logan Valley Plaza*, holding that shopping centers are not functionally equivalent to the company town involved in *Marsh*.[123] Suburban malls may be the

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[119] Id. at 319. Justices Black, Harlan, and White dissented. Id. at 327, 333, 337.

[120] Id. at 319–20.

[121] Id. at 320 n.9.

[122] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

[123] Hudgens v. NLRB, 424 U.S. 507 (1976). Justice Stewart's opinion for the Court asserted that *Logan Valley* had in fact been overruled by *Lloyd Corp.*, id. at

"new town squares" in the view of sociologists, but they are private property in the eye of the law. The ruling came in a case in which a union of employees engaged in an economic strike against one store in a shopping center was barred from picketing the store within the mall. The rights of employees in such a situation are generally to be governed by federal labor laws[124] rather than the First Amendment, although there is also the possibility that state constitutional provisions may be interpreted more expansively by state courts to protect some kinds of public issue picketing in shopping centers and similar places.[125] Henceforth, only when private property "'has taken on *all* the attributes of a town'" is it to be treated as a public forum.[126]

Picketing and Boycotts by Labor Unions.—Though "logically relevant" to what might be called "public issue" picketing, the cases dealing with the invocation of economic pressures by labor unions are set apart by different "economic and social interests."[127] Therefore, these cases are dealt with separately here. It was, however, in a labor case that the Court first held picketing to be entitled to First Amendment protection.[128] Striking down a flat prohibition on picketing to influence or induce someone to do something, the Court said: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution . . . .

"[T]he group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no oppor-

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517–18, but Justice Powell, the author of the *Lloyd Corp.* opinion, did not believe that to be the case, id. at 523.

[124] *But see* Sears, Roebuck & Co. v. Carpenters, 436 U.S. U.S. 180 (1978).

[125] In PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), the Court held that a state court interpretation of the state constitution to protect picketing in a privately owned shopping center did not deny the property owner any federal constitutional rights. *But cf.* Pacific Gas & Elec. v. Public Utilities Comm'n, 475 U.S. 1 (1986), holding 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, a majority of Justices distinguishing *PruneYard* as not involving such forced association with others' beliefs.

[126] Hudgens v. NLRB, 424 U.S. 507, 516–17 (1976) (quoting Justice Black's dissent in *Logan Valley Plaza*, 391 U.S. 308, 332–33 (1968).

[127] Niemotko v. Maryland, 340 U.S. 268, 276 (1951) (Justice Frankfurter concurring).

[128] Thornhill v. Alabama, 310 U.S. 88, 102, 104–05 (1940). Picketing as an aspect of communication was recognized in Senn v. Tile Layers Union, 301 U.S. 468 (1937).

tunity to test the merits of ideas by competition for acceptance in the market of public opinion."[129] Peaceful picketing in a situation in which violence had occurred and was continuing, however, was held proscribable.[130] In the absence of violence, the Court continued to find picketing protected,[131] but there soon was decided a class of cases in which the Court sustained injunctions against peaceful picketing in the course of a labor controversy when such picketing was counter to valid state policies in a domain open to state regulation.[132] These cases proceeded upon a distinction drawn by Justice Douglas. "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulations."[133] The apparent culmination of this course of decision was the *Vogt* case in which Justice Frankfurter broadly rationalized all the cases and derived the rule that "a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy."[134] There the matters rests, although there is some indication that *Thornhill* stands for something more than that a State may not enforce a blanket prohibition on picketing.[135]

Public Issue Picketing and Parading.—The early cases held that picketing and parading were forms of expression entitled

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[129] *See also* Carlson v. California, 310 U.S. 106 (1940). In AFL v. Swing, 312 U.S. 321 (1941), the Court held unconstitutional an injunction against peaceful picketing based on a State's common-law policy against picketing in the absence of an immediate dispute between employer and employee.

[130] Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941).

[131] Bakery & Pastry Drivers Local v. Wohl, 315 U.S. 769 (1942); Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942); Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943).

[132] Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); International Bhd. of Teamsters Union v. Hanke, 339 U.S. 470 (1950); Building Service Emp. Intern. Union v. Gazzam, 339 U.S. 532 (1950); Local Union, Journeymen v. Graham, 345 U.S. 192 (1953).

[133] Bakery & Pastry Drivers Local v. Wohl, 315 U.S. 769, 776–77 (1942) (concurring opinion).

[134] International Bhd. of Teamsters v. Vogt, 354 U.S. 284, 293 (1957). *See also* American Radio Ass'n v. Mobile Steamship Ass'n, 419 U.S. 215, 228–32 (1974); NLRB v. Retail Store Employees, 447 U.S. 607 (1980); International Longshoremens' Ass'n v. Allied International, 456 U.S. 212, 226–27 (1982).

[135] *Cf.* the opinions in NLRB v. Fruit & Vegetable Packers, 377 U.S. 58 (1964); Youngdahl v. Rainfair, 355 U.S. 131, 139 (1957) (indicating that where violence is scattered through time and much of it was unconnected with the picketing, the State should proceed against the violence rather than the picketing).

to some First Amendment protection.[136] Those early cases did not, however, explicate the difference in application of First Amendment principles which the difference between mere expression and speech-plus would entail. Many of these cases concerned disruptions or feared disruptions of the public peace occasioned by the expressive activity and the ramifications of this on otherwise protected activity.[137] A series of other cases concerned the permissible characteristics of permit systems in which parades and meetings were licensed, and more recent cases have expanded the procedural guarantees which must accompany a permissible licensing system.[138] In one case, however, the Court applied the rules developed with regard to labor picketing to uphold an injunction against the picketing of a grocery chain by a black group to compel the chain to adopt a quota-hiring system for blacks. The Supreme Court affirmed the state courts' ruling that, while no law prevented the chain from hiring blacks on a quota basis, picketing to coerce the adoption of racially discriminatory hiring was contrary to state public policy.[139]

A series of civil rights picketing and parading cases led the Court to formulate standards much like those it had established in the labor field, but more protective of expressive activity. The process began with *Edwards v. South Carolina*,[140] in which the Court reversed a breach of the peace conviction of several blacks for their refusal to disperse as ordered by police. The statute was so vague, the Court concluded, that demonstrators could be convicted simply because their presence "disturbed" people. Describing the demonstration upon the grounds of the legislative building in South Carolina's capital, Justice Stewart observed that "[t]he circumstances in this case reflect an exercise of these basic [First Amendment] constitutional rights in their most pristine and classic form."[141] In subsequent cases, the Court observed: "We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching,

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[136] Hague v. CIO, 307 U.S. 496 (1939); Cox v. New Hampshire, 312 U.S. 569 (1941); Kunz v. New York; 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951).

[137] Cantwell v. Connecticut, 310 U.S. 296 (1940); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Terminiello v. City of Chicago, 337 U.S. 1 (1949); Feiner v. New York, 340 U.S. 315 (1951).

[138] Supra, p. 1167.

[139] Hughes v. Superior Court, 339 U.S. 460 (1950). This ruling, allowing content-based restriction, seems inconsistent with NAACP v. Claiborne Hardware, infra, text accompanying nn.147–61.

[140] 372 U.S. 229 (1963).

[141] Id. at 235. *See also* Fields v. South Carolina, 375 U.S. 44 (1963); Henry v. City of Rock Hill, 376 U.S. 776 (1964).

and picketing on streets and highways, as those amendments afford to those who communicate ideas by pure speech."[142] "The conduct which is the subject to this statute—picketing and parading—is subject to regulation even though intertwined with expression and association. The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited."[143]

The Court must determine, of course, whether the regulation is aimed primarily at conduct, as is the case with time, place, and manner regulations, or whether instead the aim is to regulate content of speech. In a series of decisions, the Court refused to permit restrictions on parades and demonstrations, and reversed convictions imposed for breach of the peace and similar offenses, when, in the Court's view, disturbance had resulted from opposition to the messages being uttered by demonstrators.[144] More recently, however, the Court upheld a ban on residential picketing in *Frisby v. Shultz*,[145] finding that the city ordinance was narrowly tailored to serve the "significant" governmental interest in protecting residential privacy. As interpreted, the ordinance banned only picketing that targets a single residence, and it is unclear whether the Court would uphold a broader restriction on residential picketing.[146]

In 1982 the Justices confronted a case, that, like *Hughes v. Superior Court*,[147] involved a "contrary-to-public-policy" restriction on picketing and parading. *NAACP v. Claiborne Hardware Co.*[148] may join in terms of importance such cases as *New York Times Co. v. Sullivan*[149] in requiring the States to observe new and enhanced constitutional standards in order to impose liability upon persons for engaging in expressive conduct implicating the First Amendment. The case arose in the context of a protest against racial conditions by black citizens of Port Gibson, Mississippi. Listing demands that included desegregation of public facilities, hiring of black policemen, hiring of more black employees by local stores,

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[142] Cox v. Louisiana, 379 U.S. 536, 555 (1965).

[143] Id. at 563.

[144] Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 379 U.S. 536 (1965); Gregory v. City of Chicago, 394 U.S. 111 (1969); Bachellar v. Maryland, 397 U.S. 564 (1970). *See also* Collin v. Smith, 447 F. Supp. 676 (N.D.Ill.), aff'd, 578 F.2d 1197 (7th Cir.), stay den., 436 U.S. 953, cert. denied, 439 U.S. 916 (1978).

[145] 487 U.S. 474 (1988).

[146] An earlier case involving residential picketing had been resolved on equal protection rather than First Amendment grounds, the ordinance at issue making an exception for labor picketing. Carey v. Brown, 447 U.S. 455 (1980).

[147] 339 U.S. 460 (1950).

[148] 458 U.S. 886 (1982). The decision was unanimous, with Justice Rehnquist concurring in the result and Justice Marshall not participating. The Court's decision was by Justice Stevens.

[149] 376 U.S. 254 (1964).

and ending of verbal abuse by police, a group of several hundred blacks unanimously voted to boycott the area's white merchants. The boycott was carried out through speeches and nonviolent picketing and solicitation of others to cease doing business with the merchants. Individuals were designated to watch stores and identify blacks patronizing the stores; their names were then announced at meetings and published. Persuasion of others included social pressures and threats of social ostracism. Acts of violence did occur from time to time, directed in the main at blacks who did not observe the boycott.

The state Supreme Court imposed liability, joint and several, upon leaders and participants in the boycott, and upon the NAACP, for all of the merchants' lost earnings during a seven-year period on the basis of the common law tort of malicious interference with the merchants' business, holding that the existence of acts of physical force and violence and the use of force, violence, and threats to achieve the ends of the boycott deprived it of any First Amendment protection.

Reversing, the Court observed that the goals of the boycotters were legal and that most of their means were constitutionally protected; while violence was not protected, its existence alone did not deprive the other activities of First Amendment coverage. Thus, speeches and nonviolent picketing, both to inform the merchants of grievances and to encourage other blacks to join the boycott, were protected activities, and association for those purposes was also protected.[150] That some members of the group might have engaged in violence or might have advocated violence did not result in loss of protection for association, absent a showing that those associating had joined with intent to further the unprotected activities.[151] Nor was protection to be denied because nonparticipants had been urged to join by speech, by picketing, by identification, by threats of social ostracism, and by other expressive acts: "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."[152] The boycott had a disruptive

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[150] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907–08 (1982).

[151] Id. at 908.

[152] Id. at 910. The Court cited Thomas v. Collins, 323 U.S. 516, 537 (1945), a labor picketing case, and Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971), a public issues picketing case, which had also relied on the labor cases. *Compare* NLRB v. Retail Store Employees, 447 U.S. 607, 618–19 (1980) (Justice Stevens concurring) (labor picketing that coerces or "signals" others to engage in activity that violates valid labor policy, rather than attempting to engage reason, prohibitable). To the contention that liability could be imposed on "store watchers" and on a group known as "Black Hats" who also patrolled stores and identified black patronizers of the businesses, the Court did not advert to the "signal" theory. "There is nothing unlawful in standing outside a store and recording names. Simi-

effect upon local economic conditions and resulted in loss of business for the merchants, but these consequences did not justify suppression of the boycott. Government may certainly regulate certain economic activities having an incidental effect upon speech (e.g., labor picketing or business conspiracies to restrain competition),[153] but that power of government does not extend to suppression of picketing and other boycott activities involving, as this case did, speech upon matters of public affairs with the intent of affecting governmental action and motivating private actions to achieve racial equality.[154]

The critical issue, however, had been the occurrence of violent acts and the lower court's conclusion that they deprived otherwise protected conduct of protection. "The First Amendment does not protect violence . . . . No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, 'precision of regulation' is demanded . . . . Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages."[155] In other words, the States may impose damages for the consequences of violent conduct, but they may not award compensation for the consequences of nonviolent, protected activity.[156] Thus, the state courts had to compute, upon proof by the merchants, what damages had been the result of violence, and could not include losses suffered as a result of all the other activities comprising the boycott. And only those nonviolent persons who associated with others with an awareness of violence and an intent to further it could similarly be held liable.[157] Since most of the acts of violence had occurred

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larly, there is nothing unlawful in wearing black hats, although such apparel may cause apprehension in others." Id. at 458 U.S., 925.

[153] *See, e.g.*, FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) (upholding application of *per se* antitrust liability to trial lawyers association's boycott designed to force higher fees for representation of indigent defendants by court-appointed counsel).

[154] Id. at 912–15. In evaluating the permissibility of government regulation in this context that has an incidental effect on expression, the Court applied the standards of United States v. O'Brien, 391 U.S. 367, 376–77 (1968), which requires that the regulation be within the constitutional power of government, that it further an important or substantial governmental interest, that it be unrelated to the suppression of speech, and that it impose no greater restraint on expression than is essential to achievement of the interest.

[155] Id. at 458 U.S., 916–17.

[156] Id. at 917–18.

[157] Id. at 918–29, relying on a series of labor cases and on the subversive activities association cases, e.g., Scales v. United States, 367 U.S. 203 (1961), and Noto v. United States, 367 U.S. 290 (1961).

early on, in 1966, there was no way constitutionally that much if any of the later losses of the merchants could be recovered in damages.[158] As to the head of the local NAACP, the Court refused to permit imposition of damages based upon speeches that could be read as advocating violence, inasmuch as any violent acts that occurred were some time after the speeches, and a "clear and present danger" analysis of the speeches would not find them punishable.[159] The award against the NAACP fell with the denial of damages against its local head, and, in any event, the protected right of association required a rule that would immunize the NAACP without a finding that it "authorized—either actually or apparently—or ratified unlawful conduct."[160]

Claiborne Hardware is, thus, a seminal decision in the Court's effort to formulate standards governing state power to regulate or to restrict expressive conduct that comes close to or crosses over the line to encompass some violent activities; it requires great specificity and the drawing of fine discriminations by government so as to reach only that portion of the activity that does involve violence or the threat of violence, and forecloses the kind of "public policy" limit on demonstrations that was approved in *Hughes v. Superior Court*.[161]

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[158] 458 U.S. at 920–26. The Court distinguished Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941), in which an injunction had been sustained against both violent and nonviolent activity, not on the basis of special rules governing labor picketing, but because the violence had been "pervasive." 458 U.S. at 923.

[159] 458 U.S. at 926–29. The head's "emotionally charged rhetoric . . . did not transcend the bounds of protected speech set forth in Brandenburg v. Ohio, 395 U.S. 444 (1969)."

[160] Id. at 931. In ordinary business cases, the rule of liability of an entity for actions of its agents is broader. E.g., American Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982). The different rule in cases of organizations formed to achieve political purposes rather than economic goals appears to require substantial changes in the law of agency with respect to such entities. *Note*, 96 HARV. L. REV. 171, 174–76 (1982).

[161] "Concerted action is a powerful weapon. History teaches that special dangers are associated with conspiratorial activity. And yet one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means.

"[P]etitioners' ultimate objectives were unquestionably legitimate. The charge of illegality . . . derives from the means employed by the participants to achieve those goals. The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection.

"The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. [The burden can be met only] by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recog-

Leafleting, Handbilling, and the Like.—In *Lovell v. City of Griffin*,[162] the Court struck down a permit system applying to the distribution of circulars, handbills, or literature of any kind. The First Amendment, the Court said, "necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest."[163] State courts, responding to what appeared to be a hint in *Lovell* that prevention of littering and other interests might be sufficient to sustain a flat ban on literature distribution,[164] upheld total prohibitions and were reversed. "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions . . . . We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press."[165] In *Talley v. California*,[166] the Court struck down an ordinance which banned all handbills that did not carry the name and address of the author, printer, and sponsor; conviction for violating the ordinance was set aside on behalf of one distributing leaflets urging boycotts against certain merchants because of their employment discrimination. The basis of the decision is not readily ascertainable. On the one hand, the Court celebrated anonymity. "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all . . . . [I]dentification and fear of reprisal might deter perfectly peaceful discussion of public matters of importance."[167] On the

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nizes the importance of avoiding the imposition of punishment for constitutionally protected activity. . . . A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees." 458 U.S. at 933–34.

[162] 303 U.S. 444 (1938).

[163] Id. at 452.

[164] Id. at 451.

[165] Schneider v. Town of Irvington, 308 U.S. 147, 161, 162 (1939). The Court noted that the right to distribute leaflets was subject to certain obvious regulations, id. at 160, and called for a balancing, with the weight inclined to the First Amendment rights. *See also* Jamison v. Texas, 318 U.S. 413 (1943).

[166] 362 U.S. 60 (1960).

[167] Id. at 64, 65.

other hand, responding to the City's defense that the ordinance was aimed at providing a means to identify those responsible for fraud, false advertising, and the like, the Court noted that it "is in no manner so limited . . . [and] [t]herefore we do not pass on the validity of an ordinance limited to these or any other supposed evils." [168]

The handbilling cases were distinguished in *City Council v. Taxpayers for Vincent*, [169] in which the Court held that a city may prohibit altogether the use of utility poles for posting of signs. While a city's concern over visual blight could be addressed by an anti-littering ordinance not restricting the expressive activity of distributing handbills, in the case of posting signs "it is the medium of expression itself" that creates the visual blight. Hence, a prohibition on posting signs, unlike a prohibition on distributing handbills, is narrowly tailored to curtail no more speech than necessary to accomplish the city's legitimate purpose. [170]

Sound Trucks, Noise.—Physical disruption may occur by other means than the presence of large numbers of demonstrators. For example, the use of sound trucks to convey a message on the streets may disrupt the public peace and may disturb the privacy of persons off the streets. The cases, however, afford little basis for a general statement of constitutional principle. *Saia v. New York*, [171] while it spoke of "loud-speakers as today indispensable instruments of effective public speech," held only that a particular prior licensing system was void. A five-to-four majority upheld a statute in *Kovacs v. Cooper*, [172] which was ambiguous with regard to whether all sound trucks were banned or only "loud and raucous" trucks and which the state court had interpreted as having the latter meaning. In another case, the Court upheld an antinoise ordinance which the state courts had interpreted narrowly to bar only noise that actually or immediately threatened to disrupt normal school activity during school hours. [173] But the Court was careful to tie its ruling to the principle that the particular requirements

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[168] Id. at 64. In Zwickler v. Koota, 389 U.S. 241 (1967), the Court directed a lower court to consider the constitutionality of a statute which made it a criminal offense to publish or distribute election literature without identification of the name and address of the printer and of the persons sponsoring the literature. The lower court voided the law, but changed circumstances on a new appeal caused the Court to dismiss. Golden v. Zwickler, 394 U.S. 103 (1969).

[169] 466 U.S. 789 (1984).

[170] Justice Brennan argued in dissent that adequate alternative forms of communication were not readily available because handbilling or other person-to-person methods would be substantially more expensive, and that the regulation for the sake of aesthetics was not adequately justified.

[171] 334 U.S. 558, 561 (1948).

[172] 336 U.S. 77 (1949).

[173] Grayned v. City of Rockford, 408 U.S. 104 (1972).

of education necessitated observance of rules designed to preserve the school environment.[174] More recently, reaffirming that government has "a substantial interest in protecting its citizens from unwelcome noise," the Court applied time, place, and manner analysis to uphold New York City's sound amplification guidelines designed to prevent excessive noise and assure sound quality at outdoor concerts in Central Park.[175]

Door-to-Door Solicitation.—In another Jehovah's Witness case, the Court struck down an ordinance forbidding solicitors or distributors of literature from knocking on residential doors in a community, the aims of the ordinance being to protect privacy, to protect the sleep of many who worked nightshifts, and to protect against burglars posing as canvassers. The five-to-four majority concluded that on balance "[t]he dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas."[176]

More recently, while striking down an ordinance because of vagueness, the Court observed that it "has consistently recognized a municipality's power to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing. A narrowly drawn ordinance, that does not vest in municipal officers the undefined power to determine what messages residents will hear, may serve these important interests without running afoul of the First Amendment."[177] The Court indicated that its precedents supported measures that would require some form of notice to officials and the obtaining of identification in order that persons could canvas house-to-house for charitable or political purposes.

However, an ordinance which limited solicitation of contributions door-to-door by charitable organizations to those which use at least 75% of their receipts directly for charitable purposes, defined so as to exclude the expenses of solicitation, salaries, overhead, and other administrative expenses, was invalidated as overbroad.[178] A

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[174] Id. at 117. Citing *Saia* and *Kovacs* as examples of reasonable time, place, and manner regulation, the Court observed: "If overamplified loudspeakers assault the citizenry, government may turn them down." Id. at 116.

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

[176] Martin v. City of Struthers, 319 U.S. 141, 147 (1943).

[177] Hynes v. Mayor of Oradell, 425 U.S. 610, 616–17 (1976). Justices Brennan and Marshall did not agree with the part of the opinion approving the regulatory power. Id. at 623.

[178] Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980). *See also* Larson v. Valente, 456 U.S. 228 (1982) (state law distinguishing between religious organizations and their solicitation of funds on basis of whether or-

privacy rationale was rejected, inasmuch as just as much intrusion was likely by permitted solicitors as by unpermitted ones. A rationale of prevention of fraud was unavailing, inasmuch as it could not be said that all associations that spent more than 25% of their receipts on overhead were actually engaged in a profit making enterprise, and, in any event, more narrowly drawn regulations, such as disclosure requirements, could serve this governmental interest.

Shaumberg was extended in *Secretary of State of Maryland v. Joseph H. Munson Co.*,[179] and *Riley v. National Fed'n of the Blind*.[180] In *Munson* the Court invalidated a Maryland statute limiting professional fundraisers to 25% of the amount collected plus certain costs, and allowing waiver of this limitation if it would effectively prevent the charity from raising contributions. And in *Riley* the Court invalidated a North Carolina fee structure containing even more flexibility.[181] The Court sees "no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent," and is similarly hostile to any scheme that shifts the burden to the fundraiser to show that a fee structure is reasonable.[182] Moreover, a requirement that fundraisers disclose to potential donors the percentage of donated funds previously used for charity was also invalidated in *Riley*, the Court indicating that the "more benign and narrowly tailored" alternative of disclosure to the state (accompanied by state publishing of disclosed percentages) could make the information publicly available without so threatening the effectiveness of solicitation.[183]

The Problem of "Symbolic Speech."—Very little expression is "mere" speech. If it is oral, it may be noisy enough to be disturbing,[184] and, if it is written, it may be litter;[185] in either case, it may amount to conduct that is prohibitable in specific cir-

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ganizations received more than half of their total contributions from members or from public solicitation violates establishment clause). Meyer v. Grant, 486 U.S. 414 (1988) (criminal penalty on use of paid circulators to obtain signatures for ballot initiative suppresses political speech in violation of First and Fourteenth Amendments).

[179] 467 U.S. 947 (1984).

[180] 487 U.S. 781 (1988).

[181] A fee of up to 20% of collected receipts was deemed reasonable, a fee between 20 and 35% was permissible if the solicitation involved advocacy or the dissemination of information, and a fee in excess of 35% was presumptively unreasonable, but could be upheld upon one of two showings: that advocacy or dissemination of information was involved, or that otherwise the charity's ability to collect money or communicate would be significantly diminished.

[182] 487 U.S. at 793.

[183] Id. at 800. North Carolina's requirement for licensing of professional fundraisers was also invalidated in *Riley*, id. at 801–02.

[184] E.g., Saia v. New York, 334 U.S. 558 (1948); Kovacs v. Cooper, 336 U.S. 77 (1949).

[185] E.g., Schneider v. Town of Irvington, 308 U.S. 147 (1939).

cumstances.[186] Moving beyond these simple examples, one may see as well that conduct may have a communicative content, intended to express a point of view. Expressive conduct may consist in flying a particular flag as a symbol[187] or in refusing to salute a flag as a symbol.[188] Sit-ins and stand-ins may effectively express a protest about certain things.[189]

Justice Jackson wrote: "There is no doubt that, in connection with the pledge, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a short cut from mind to mind."[190] When conduct or action has a communicative content to it, governmental regulation or prohibition implicates the First Amendment, but this does not mean that such conduct or action is necessarily immune from governmental process. Thus, while the Court has had few opportunities to formulate First Amendment standards in this area, in upholding a congressional prohibition on draft-card burnings, it has stated the generally applicable rule. "[A] government regulation is sufficiently justified if it is within the constitutional power of Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that government interest."[191] The Court has suggested that this standard is virtually identical to that applied to time, place, or manner restrictions on expression.[192]

Although almost unanimous in formulating and applying the test in *O'Brien*, the Court splintered when it had to deal with one

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[186] Cf. Cohen v. California, 403 U.S. 15 (1971).

[187] Stromberg v. California, 283 U.S. 359 (1931).

[188] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[189] In Brown v. Louisiana, 383 U.S. 131 (1966), the Court held protected a peaceful, silent stand-in in a segregated public library. Speaking of speech and assembly, Justice Fortas said for the Court: "As this Court has repeatedly stated, these rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities." Id. at 141–42. *See also* Garner v. Louisiana, 368 U.S. 157, 185, 201 (1961) (Justice Harlan concurring). On a different footing is expressive conduct in a place where such conduct is prohibited for reasons other than suppressing speech. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (upholding Park Service restriction on overnight sleeping as applied to demonstrators wishing to call attention to the plight of the homeless).

[190] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

[191] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[192] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 & n.8 (1984).

of the more popular forms of "symbolic" conduct of the late 1960s and early 1970s—flag burning and other forms of flag desecration. The Court remains closely divided to this day. No unifying theory capable of application to a wide range of possible flag abuse actions emerged from the early cases. Thus, in *Street v. New York*,[193] the defendant had been convicted under a statute punishing desecration "by words or act" upon evidence that when he burned the flag he had uttered contemptuous words. The conviction was set aside because it might have been premised on his words alone or on his words and the act together, and no valid governmental interest supported penalizing verbal contempt for the flag.[194]

A few years later the Court reversed two other flag desecration convictions, one on due process/vagueness grounds, the other under the First Amendment. were decided by the Court in a manner that indicated an effort to begin to resolve the standards of First Amendment protection of "symbolic conduct." In *Smith v. Goguen*,[195] a statute punishing anyone who "publicly . . . treats contemptuously the flag of the United States . . . ," was held unconstitutionally vague, and a conviction for wearing trousers with a small United States flag sewn to the seat was overturned. The language subjected the defendant to criminal liability under a standard "so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag."[196]

The First Amendment was the basis for reversal in *Spence v. Washington*,[197] in which a conviction under a statute punishing the display of a United States flag to which something is attached or superimposed was set aside; Spence had hung his flag from his apartment window upside down with a peace symbol taped to the front and back. The act, the Court thought, was a form of communication, and because of the nature of the act, the factual context and environment in which it was undertaken, the Court held it to be protected. The context included the fact that the flag was pri-

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[193] 394 U.S. 576 (1969).

[194] Id. at 591–93. Four dissenters concluded that the First Amendment did not preclude a flat proscription of flag burning or flag desecration for expressive purposes. Id. at 594 (Chief Justice Warren), 609 (Justice Black), 610 (Justice White), and 615 (Justice Fortas). In Radich v. New York, 401 U.S. 531 (1971), aff'g 26 N.Y. 2d 114, 257 N.E. 2d 30 (1970), an equally divided Court, Justice Douglas not participating, sustained a flag desecration conviction of one who displayed sculptures in a gallery, using the flag in some apparently sexually bizarre ways to register a social protest. Defendant subsequently obtained his release on habeas corpus, United States ex rel. Radich v. Criminal Court, 459 F.2d 745 (2d Cir. 1972), cert. denied 409 U.S. 115 (1973).

[195] 415 U.S. 566 (1974).

[196] Id. at 578.

[197] 418 U.S. 405 (1974).

vately owned, that it was displayed on private property, and that there was no danger of breach of the peace. The nature of the act was that it was intended to express an idea and it did so without damaging the flag. The Court assumed that the State had a valid interest in preserving the flag as a national symbol, but whether that interest extended beyond protecting the physical integrity of the flag was left unclear.[198]

The underlying assumption that flag burning could be prohibited as a means of protecting the flag's symbolic value was later rejected. Twice, in 1989 and again in 1990, the Court held that prosecutions for flag burning at a public demonstration violated the First Amendment. First, in *Texas v. Johnson*[199] the Court rejected a state desecration statute designed to protect the flag's symbolic value, and then in *United States v. Eichman*[200] rejected a more limited federal statute purporting to protect only the flag's physical integrity. Both cases were decided by 5-to–4 votes, with Justice Brennan writing the Court's opinions.[201] The Texas statute invalidated in *Johnson* defined the prohibited act of "desecration" as any physical mistreatment of the flag that the actor knew would seriously offend other persons. This emphasis on causing offense to others meant that the law was not "unrelated to the suppression of free expression" and that consequently the deferential standard of *United States v. O'Brien* was inapplicable. Applying strict scrutiny, the Court ruled that the State's prosecution of someone who burned a flag at a political protest was not justified under the State's asserted interest in preserving the flag as a symbol of nationhood and national unity. The Court's opinion left little doubt that the existing Federal statute, 18 U.S.C. § 700, and the flag desecration laws of 47 other states would suffer a similar fate in a similar case. Doubt remained, however, as to whether the Court

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[198] Id. at 408–11, 412–13. Subsequently, the Court vacated, over the dissents of Chief Justice Burger and Justices White, Blackmun, and Rehnquist, two convictions for burning flags and sent them back for reconsideration in the light of *Goguen* and *Spence*. Sutherland v. Illinois, 418 U.S. 907 (1974); Farrell v. Iowa, 418 U.S. 907 (1974). The Court did, however, dismiss, "for want of a substantial federal question," an appeal from a flag desecration conviction of one who, with no apparent intent to communicate but in the course of "horseplay," blew his nose on a flag, simulated masturbation on it, and finally burned it. Van Slyke v. Texas, 418 U.S. 907 (1974).

[199] 491 U.S. 397 (1989).

[200] 496 U.S. 310 (1990).

[201] In each case Justice Brennan's opinion for the Court was joined by Justices Marshall, Blackmun, Scalia, and Kennedy, and in each case Chief Justice Rehnquist and Justices White, Stevens, and O'Connor dissented. In *Johnson* the Chief Justice's dissent was joined by Justices White and O'Connor, and Justice Stevens dissented separately. In *Eichman* Justice Stevens wrote the only dissenting opinion, to which the other dissenters subscribed.

would uphold a "content-neutral" statute protecting the physical integrity of the flag.

Immediately following *Johnson*, Congress enacted a new flag protection statute providing punishment for anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States."[202] The law was designed to be content-neutral, and to protect the "physical integrity" of the flag.[203] Nonetheless, in upholding convictions of flag burners, the Court found that the law suffered from "the same fundamental flaw" as the Texas law in *Johnson*. The government's underlying interest, characterized by the Court as resting upon "a perceived need to preserve the flag's status as a symbol of our Nation and certain national ideals,"[204] still related to the suppression of free expression. Support for this interpretation was found in the fact that most of the prohibited acts are usually associated with disrespectful treatment of the flag; this suggested to the Court "a focus on those acts likely to damage the flag's symbolic value."[205] As in *Johnson*, such a law could not withstand "most exacting scrutiny" analysis.

The Court's ruling in *Eichman* rekindled congressional efforts, postponed with enactment of the Flag Protection Act, to amend the Constitution to authorize flag desecration legislation at the federal and state levels. In both the House and the Senate these measures failed to receive the necessary two-thirds vote.[206]

RIGHTS OF ASSEMBLY AND PETITION

Background and Development

The right of petition took its rise from the modest provision made for it in chapter 61 of Magna Carta (1215).[207] To this meagre beginning are traceable, in some measure, Parliament itself and its procedures in the enactment of legislation, the equity jurisdiction of the Lord Chancellor, and proceedings against the Crown by "petition of right." Thus, while the King summoned Parliament for the purpose of supply, the latter—but especially the House of Com-

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[202] The Flag Protection Act of 1989, Pub. L. 101–131.

[203] *See* H.R. Rep. No. 231, 101st Cong., 1st Sess. 8 (1989) ("The purpose of the bill is to protect the physical integrity of American flags in all circumstances, regardless of the motive or political message of any flag burner").

[204] United States v. Eichman, 496 U.S. at 316.

[205] Id. at 317.

[206] The House defeated H.J. Res. 350 by vote of 254 in favor to 177 against (136 CONG. REC. H4086 (daily ed. June 21, 1990); the Senate defeated S.J. Res. 332 by vote of 58 in favor to 42 against (136 CONG. REC. S8737 (daily ed. June 26, 1990).

[207] C. STEPHENSON & F. MARCHAM, SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 125 (1937).

mons—petitioned the King for a redress of grievances as its price for meeting the financial needs of the Monarch, and as it increased in importance it came to claim the right to dictate the form of the King's reply, until, in 1414, Commons declared itself to be "as well assenters as petitioners." Two hundred and fifty years later, in 1669, Commons further resolved that every commoner in England possessed "the inherent right to prepare and present petitions" to it "in case of grievance," and of Commons "to receive the same" and to judge whether they were "fit" to be received. Finally Chapter 5 of the Bill of Rights of 1689 asserted the right of the subjects to petition the King and "all commitments and prosecutions for such petitioning to be illegal."[208]

Historically, therefore, the right of petition is the primary right, the right peaceably to assemble a subordinate and instrumental right, as if the First Amendment read: "the right of the people peaceably to assemble" in order to "petition the government."[209] Today, however, the right of peaceable assembly is, in the language of the Court, "cognate to those of free speech and free press and is equally fundamental. . . . [It] is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause. . . . The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question . . . is not as to the auspices under which the meeting is held but as to its purposes; not as to the relation of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects."[210] Furthermore, the right of petition has expanded. It is no longer confined to demands for "a redress of grievances," in any accurate meaning of these words, but comprehends demands for an exercise by the Government of its powers in furtherance of the interest and prosperity of the petitioners and of their views on politically contentious matters.[211] The right extends to the "approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of ac-

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[208] 12 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 98 (1934).

[209] United States v. Cruikshank, 92 U.S. 542, 552 (1876), reflects this view.

[210] De Jonge v. Oregon, 299 U.S. 353, 364, 365 (1937). *See also* Herndon v. Lowry, 301 U.S. 242 (1937).

[211] *See* Eastern R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961).

cess to the courts is indeed but one aspect of the right of petition."[212]

The right of petition recognized by the First Amendment first came into prominence in the early 1830's, when petitions against slavery in the District of Columbia began flowing into Congress in a constantly increasing stream, which reached its climax in the winter of 1835. Finally on January 28, 1840, the House adopted as a standing rule: "That no petition, memorial, resolution, or other paper praying the abolition of slavery in the District of Columbia, or any State or Territories of the United States in which it now exists, shall be received by this House, or entertained in any way whatever." Because of efforts of John Quincy Adams, this rule was repealed five years later.[213] For many years now the rules of the House of Representatives have provided that members having petitions to present may deliver them to the Clerk and the petitions, except such as in the judgment of the Speaker are of an obscene or insulting character, shall be entered on the Journal and the Clerk shall furnish a transcript of such record to the official reporters of debates for publication in the Record.[214] Even so, petitions for the repeal of the espionage and sedition laws and against military measures for recruiting resulted, in World War I, in imprisonment.[215] Processions for the presentation of petitions in the United States have not been particularly successful. In 1894 General Coxey of Ohio organized armies of unemployed to march on Washington and present petitions, only to see their leaders arrested for unlawfully walking on the grass of the Capitol. The march of the veterans on Washington in 1932 demanding bonus legislation was defended as an exercise of the right of petition. The Administration, however, regarded it as a threat against the Constitution and called out the army to expel the bonus marchers and burn their camps. Marches and encampments have become more common since, but the results have been mixed.

***The* Cruikshank *Case*.**—The right of assembly was first before the Supreme Court in 1876[216] in the famous case of *United*

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[212] California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). *See also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913–15 (1982); Missouri v. NOW, 620 F.2d 1301 (8th Cir.), cert. denied, 449 U.S. 842 (1980) (boycott of States not ratifying ERA may not be subjected to antitrust suits for economic losses because of its political nature).

[213] The account is told in many sources. E.g., S. BEMIS, JOHN QUINCY ADAMS AND THE UNION, chs. 17, 18 and pp. 446–47 (1956).

[214] Rule 22, ¶ 1, Rules of the House of Representatives, H.R. Doc. No. 256, 101st Congress, 2d sess. 571 (1991).

[215] 1918 ATT'Y GEN. ANN. REP. 48.

[216] *See*, however, Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868), in which the Court gave as one of its reasons for striking down a tax on persons leaving the State

States v. Cruikshank.[217] The Enforcement Act of 1870[218] forbade conspiring or going onto the highways or onto the premises of another to intimidate any other person from freely exercising and enjoying any right or privilege granted or secured by the Constitution of the United States. Defendants had been indicted under this Act on charges of having deprived certain citizens of their right to assemble together peaceably with other citizens "for a peaceful and lawful purpose." While the Court held the indictment inadequate because it did not allege that the attempted assembly was for a purpose related to the Federal Government, its dicta broadly declared the outlines of the right of assembly. "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States."[219] Absorption of the assembly and petition clauses into the liberty protected by the due process clause of the Fourteenth Amendment means, or course, that the *Cruikshank* limitation is no longer applicable.[220]

The* Hague *Case.—Illustrative of this expansion is *Hague v. CIO,*[221] in which the Court, though splintered with regard to reasoning and rationale, struck down an ordinance which vested an uncontrolled discretion in a city official to permit or deny any group the opportunity to conduct a public assembly in a public place. Justice Roberts, in an opinion which Justice Black joined and with which Chief Justice Hughes concurred, found protection against state abridgment of the rights of assembly and petition in the privileges and immunities clause of the Fourteenth Amendment. "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions

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its infringement of the right of every citizen to come to the seat of government and to transact any business he might have with it.

[217] 92 U.S. 542 (1876).

[218] Act of May 31, 1870, ch.114, 16 Stat. 141 (1870).

[219] United States v. Cruikshank, 92 U.S 542, 552–53 (1876).

[220] De Jonge v. Oregon, 299 U.S. 353 (1937); Hague v. CIO, 307 U.S. 496 (1939); Bridges v. California, 314 U.S. 252 (1941); Thomas v. Collins, 323 U.S. 516 (1945).

[221] 307 U.S. 496 (1939).

may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."[222] Justices Stone and Reed invoked the due process clause of the Fourteenth Amendment for the result, thereby claiming the rights of assembly and petition for aliens as well as citizens. "I think respodents' right to maintain it does not depend on their citizenship and cannot rightly be made to turn on the existence or non-existence of a purpose to disseminate information about the National Labor Relations Act. It is enough that petitioners have prevented respondents from holding meetings and disseminating information whether for the organization of labor unions or for any other lawful purpose."[223] This due process view of Justice Stone has carried the day over the privileges and immunities approach.

Later cases tend to merge the rights of assembly and petition into the speech and press clauses, and, indeed, all four rights may well be considered as elements of an inclusive right to freedom of expression. Certain conduct may call forth a denomination of petition[224] or assembly,[225] but there seems little question that no substantive issue turns upon whether one may be said to be engaged in speech or assembly or petition.

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[222] Id. at 515. For another holding that the right to petition is not absolute, *see* McDonald v. Smith, 472 U.S. 479 (1985) (the fact that defamatory statements were made in the context of a petition to government does not provide absolute immunity from libel).

[223] Id. at 525.

[224] E.g., United States v. Harriss, 347 U.S. 612 (1954); Eastern R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961).

[225] E.g., Coates v. City of Cincinnati, 402 U.S. 611 (1971).