

2000

## A First Amendment Compass: Navigating the Speech Clause with a Five-Step Analytical Framework

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### Original Citation

Kevin F. O'Neill, A First Amendment Compass: Navigating the Speech Clause with a Five-Step Analytical Framework 29 Southwestern University Law Review 223 (2000)

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# A FIRST AMENDMENT COMPASS: NAVIGATING THE SPEECH CLAUSE WITH A FIVE-STEP ANALYTICAL FRAMEWORK

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Kevin Francis O'Neill\*

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## I. INTRODUCTION

This Article is designed to serve as a First Amendment “compass,” explaining the Speech Clause while offering a systematic method for analyzing any claim asserted under it. The need for this Article stems from the fact that First Amendment law is more than ever a labyrinth. For students, lawyers, and judges alike, it is difficult even to identify—much less to distinguish and apply—the various strands of applicable precedent. This is because the Supreme Court has developed a dense mass of overlapping doctrines: drawing distinctions between content-based<sup>1</sup> and content-neutral<sup>2</sup> restrictions; drawing further distinctions between fully-protected and “low-level” categories of expression;<sup>3</sup> creating separate bodies of precedent (overbreadth,<sup>4</sup> vagueness<sup>5</sup> and prior restraint)<sup>6</sup> that focus on impermissible *methods* of regulation; requiring particular solicitude for controversial speakers (the “hostile audience” cases);<sup>7</sup> and creating special rules for special settings (the public forum doctrine<sup>8</sup> and the discrete lines of

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1. See, e.g., *Boos v. Barry*, 485 U.S. 312, 334 (1988) (striking down, as a content-based restriction on political speech, a District of Columbia statute banning the display of any sign criticizing a foreign government within 500 feet of its embassy).

2. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1989) (upholding, as a content-neutral time, place, and manner restriction, certain noise limits on concerts in New York City’s Central Park).

3. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-83 (1992) (acknowledging that the Court employs a two-tiered “categorical” approach to direct restrictions on expressive content, striking down such restrictions as presumptively unconstitutional unless the regulated utterance belongs to a category of speech defined in advance as being unworthy of full First Amendment protection); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (recognizing that certain categories of speech are denied full First Amendment protection because they are “no essential part of any exposition of ideas, and are of [only] slight social value as a step to truth . . .”).

4. See, e.g., *Board of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 571, 577 (1987) (striking down, on overbreadth grounds, a regulation prohibiting any person “to engage in First Amendment activities within the Central Terminal Area at Los Angeles International Airport”).

5. See, e.g., *Smith v. Goguen*, 415 U.S. 566, 567-69 (1974) (striking down, on vagueness grounds, a Massachusetts statute that criminalized publicly treating the American flag “contemptuously”).

6. See, e.g., *New York Times v. United States*, 403 U.S. 713, 714 (1971) (striking down, as invalid prior restraints, certain injunctions that barred the New York Times and Washington Post from publishing excerpts from the “Pentagon Papers,” a classified Defense Department study of the Vietnam War).

7. See, e.g., *Gregory v. City of Chicago*, 394 U.S. 111, 111-13 (1969) (overturning disorderly conduct convictions of eighty-five civil rights protesters whose peaceful march to and picketing before the mayor’s residence produced a hostile reaction by the approximately 1000 onlookers).

8. See, e.g., *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79 (1992) (elaborating the public forum doctrine).

precedent governing students,<sup>9</sup> soldiers,<sup>10</sup> prisoners,<sup>11</sup> and public employees).<sup>12</sup>

This Article sorts, identifies, and explains each of the foregoing lines of precedent, while furnishing a framework that may be used in analyzing any government restriction on speech. The analytical framework is comprised of five questions that are designed to serve as an issue-spotting checklist. After outlining this five-step inquiry in Part II, the Article follows the same five-step path in Part III, offering a detailed explication of the current law governing free expression.

## II. OVERVIEW: A FIVE-STEP APPROACH TO FIRST AMENDMENT ANALYSIS

When confronted with any issue that implicates the Speech Clause of the First Amendment, ask yourself the following five questions:<sup>13</sup> (1) Is the regulation content-based or content-neutral? (2) If content-based, does the regulation restrict speech or compel speech? (3) If content-restrictive, is the regulation direct or indirect? (4) Does the regulation include characteristics of overbreadth, vagueness, or prior restraint? (5) Does the regulation pertain to one of the settings for which the Supreme Court created special rules? This Part takes a closer look at each of these five questions. After this initial overview, each question will be analyzed in-depth in Part III. We start with Question One, which inquires:

### A. *Is the Regulation Content-Based or Content-Neutral?*

When the government regulates speech, it does so in one of two ways: (1) by restricting expressive *content*,<sup>14</sup> or (2) by restricting the

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9. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 275-76 (1988) (elaborating the special First Amendment rules governing student speech).

10. See, e.g., *Brown v. Glines*, 444 U.S. 348, 360-61 (1980) (elaborating the special First Amendment standard governing speech in the military).

11. See, e.g., *Turner v. Safley*, 482 U.S. 78, 92-93 (1987) (discussing the special First Amendment standard governing speech by prisoners).

12. See, e.g., *Connick v. Myers*, 461 U.S. 138, 154 (1983) (elaborating the special First Amendment rules governing speech by public employees).

13. As a prelude to engaging in this five-step inquiry, you must confirm that you are dealing with a *government* regulation of speech because the First Amendment does not apply absent state action. See *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 378-79 (1995).

14. See, e.g., *Boos v. Barry*, 485 U.S. 312, 329-32, 334 (1988) (striking down, as an invalid content-based restriction, a District of Columbia statute that criminalized the display of any sign criticizing a foreign government within 500 feet of its embassy).

time, place, or manner of its expression.<sup>15</sup> Judicial hostility is much greater to the former than the latter.<sup>16</sup> Accordingly, the best way to begin any Speech Clause analysis is to determine whether the restriction is content-based or content-neutral. The answer to this question will dictate one of two divergent tests. In Laurence Tribe's famous formulation, they are: (1) "Track One"<sup>17</sup> analysis, requiring strict scrutiny for content-based restrictions, or (2) "Track Two"<sup>18</sup> analysis, requiring intermediate scrutiny for content-neutral time, place, and manner restrictions. "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."<sup>19</sup> The controlling factor is the government's purpose or intent.<sup>20</sup>

The Track One test for content-based restrictions<sup>21</sup> is strict scrutiny. To survive judicial review, the restriction must be "necessary, and narrowly drawn, to serve a compelling state interest."<sup>22</sup> The Track Two test for time, place, and manner restrictions is a form of intermediate scrutiny with three distinct prongs. To survive judicial review under this test, the restriction: (1) must be content-neutral in that it must be justified by the government "without reference to the

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15. See, e.g., *Stokes v. City of Madison*, 930 F.2d 1163, 1165, 1173 (7th Cir. 1991) (upholding two sound amplification ordinances as reasonable time, place, and manner restrictions, despite the "seemingly anomalous treatment of sound from churches and other exempted sources"); *Blasecki v. City of Durham*, 456 F.2d 87, 88, 93-94 (4th Cir. 1972) (upholding an ordinance as a reasonable time, place, and manner restriction that prohibited more than fifty people from assembling in a small downtown park); *Abernathy v. Conroy*, 429 F.2d 1170, 1173-74 (4th Cir. 1970) (upholding an ordinance as a reasonable time, place, and manner restriction that limited parades to the hours between 8:00 a.m. and 8:00 p.m.).

16. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995). The First Amendment generally forbids the government from silencing a speaker based on the particular message's content. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-82 (1992) ("The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.").

17. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 791 (2d ed. 1988).

18. *Id.* at 792.

19. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984)).

20. See *id.* (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986)).

21. Content-based restrictions on speech are governed by "Track One" strict scrutiny, unless the regulated utterance falls within one of the categories of "low-level" speech that does not enjoy full First Amendment protection. See *R.A.V.*, 505 U.S. at 381-82. These "low-level" speech categories include advocacy of imminent lawless action, obscenity, child pornography, fighting words, defamatory statements, commercial speech, and lewd, profane, or indecent expression. See *id.*

22. *Pinette*, 515 U.S. at 761.

content of the regulated speech,"<sup>23</sup> (2) must be "narrowly tailored to serve a significant governmental interest,"<sup>24</sup> and (3) must "leave open ample alternative channels for communicat[ing] the information."<sup>25</sup>

In Part III A, this Article elaborates the standards for gauging content-neutrality and the diverging levels of judicial scrutiny embodied in Tract One and Track Two analysis. For now, we will resume our overview of the five questions to employ as an issue-spotting checklist for claims under the Speech Clause. After inquiring whether the regulation is content-based or content-neutral, we come to Question Two, which inquires:

*B. If Content-Based, Does the Regulation Restrict Speech or Compel Speech?*

If the regulation *restricts* rather than compels expressive content, proceed directly to Question Three.<sup>26</sup> But if the regulation compels the utterance of, or identification with, a particular message or ideology, it will face special judicial hostility under a cluster of cases involving government-compelled speech.<sup>27</sup> This Article discusses the compelled-speech cases in Part III B.

*C. If Content-Restrictive, Is the Regulation Direct or Indirect?*

When the government restricts the *content* of speech, it acts in one of two ways: (1) *directly* restricting expressive content by targeting particular topics or viewpoints, or (2) restricting content *indirectly* by punishing a speaker for the reaction produced by a controversial message (the "hostile audience" cases).<sup>28</sup> In either context, a court will subject the restriction to heightened scrutiny.<sup>29</sup> The reason for distinguishing between direct and indirect restrictions on speech is that each context has given birth to distinct bodies of precedent.

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23. *Ward*, 491 U.S. at 791.

24. *Id.*

25. *Id.*

26. *See infra* Part III.C.

27. *See, e.g., West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (striking down a mandatory flag salute and pledge of allegiance statute directed at all children attending West Virginia public schools). In striking down the statute, the Court famously declared, "[i]f 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." *Id.*

28. *See infra* Part III.C.

29. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-82 (1992) ("The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.").



The *direct* regulation of expressive content is exemplified by restrictions that prohibit the expression of certain political views (criticizing a foreign government near its embassy,<sup>30</sup> for example, or expressing opposition to organized government<sup>31</sup>), or restrictions that target particular types or topics of speech (singling out hate speech, for example,<sup>32</sup> or labor speech).<sup>33</sup>

The *indirect* regulation of expressive content is usually accomplished by enforcing general prohibitions against undesirable *conduct*—statutes proscribing breach of the peace,<sup>34</sup> disorderly conduct,<sup>35</sup> or “annoying” pedestrians—<sup>36</sup> as a means of punishing controversial *speech*. Such indirect regulations are exemplified in the famous “hostile audience” cases. They hold that the expression of a controversial viewpoint may not be criminalized merely because it prompts a violent reaction amongst onlookers enraged by the ideas expressed.<sup>37</sup>

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30. See *Boos v. Barry*, 485 U.S. 312, 334 (1988) (striking down a District of Columbia statute that criminalized the display of any sign criticizing a foreign government within 500 feet of its embassy).

31. See *Stromberg v. California*, 283 U.S. 359, 361 (1931) (striking down a statute that criminalized the display of any “red flag, banner, or badge . . . [employed] as a sign, symbol, or emblem of opposition to organized government . . .”). In so holding, the Court set aside the conviction of a Youth Communist League member. See *id.* at 370.

32. See *Collin v. Smith*, 578 F.2d 1197, 1210 (7th Cir. 1978) (finding unconstitutional an array of ordinances prohibiting Nazi marches and the corresponding dissemination of Nazi materials). The ordinances were invalidated because they were deemed impermissible content-based restrictions on speech. See *id.* at 1202. Further, the court invalidated the prohibitions against the dissemination of Nazi materials on overbreadth grounds. See *id.* at 1207.

33. See *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 94 (1972) (invalidating an ordinance prohibiting all but labor picketing within 150 feet of a school because the content-based ordinance made “an impermissible distinction between labor picketing and other peaceful picketing”).

34. See, e.g., *Edwards v. South Carolina*, 372 U.S. 229, 238-40 (1963) (setting aside the breach-of-the-peace convictions of 187 civil rights protesters who marched with placards reading “down with segregation” and “you may jail our bodies but not our souls”). The marchers refused to abide by a police order to disperse and were arrested after fifteen minutes of singing and speech making. See *id.* at 240-41. In setting aside the arrests, the Court also held that the government cannot criminalize “the peaceful expression of unpopular views.” *Id.* at 237.

35. See, e.g., *Gregory v. City of Chicago*, 394 U.S. 111, 113 (1969) (overturning the disorderly conduct convictions of eighty-five civil rights protesters). The police ordered the protesters to disperse because the officers could no longer contain the hostile reactions of 1000 onlookers. See *id.* at 116. When the protesters refused, they were arrested. See *id.* Although the onlookers became hostile and unruly, the protesters’ conduct remained peaceful and lawful. See *id.* at 111.

36. *Coates v. City of Cincinnati*, 402 U.S. 611, 615-16 (1971) (striking down, as overbroad and vague, an ordinance prohibiting sidewalk meetings by three or more persons conducted in “a manner annoying to persons passing by” because “public intolerance or animosity” cannot be the basis for abridging the rights of free speech and association).

37. The fountainhead in this line of precedent is *Terminiello v. City of Chicago*, 337 U.S. 1, (1949). The Court reversed a breach-of-the-peace conviction of a widely vilified Christian Veterans of America speaker who delivered an anti-Semitic and racially inflammatory speech in a

When confronted with an *indirect* restriction on expressive content, apply the hostile audience precedents.<sup>38</sup> When confronted with a *direct* restriction on expressive content, employ Track One strict scrutiny—<sup>39</sup> unless the speech at issue falls into a category of “low-level” expression that does not enjoy full First Amendment protection.<sup>40</sup>

The Supreme Court employs a two-tiered “categorical” approach to direct restrictions on expressive content,<sup>41</sup> striking down such restrictions as presumptively unconstitutional<sup>42</sup> unless the regulated utterance belongs to a category of “low-level” speech defined in advance as being unworthy of full protection.<sup>43</sup> There are seven categories of “low-level” speech. Some are utterly unprotected by the First Amendment, while others are less-than-fully protected. The *unprotected* categories are: (1) advocacy of imminent lawless action,<sup>44</sup> (2) obscenity,<sup>45</sup> (3) child pornography,<sup>46</sup> and (4) fighting words.<sup>47</sup> The

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packed auditorium. *See id.* at 3-6. In reviewing the conviction, the Court observed that the breach-of-the-peace ordinance “permitted [the defendant’s] conviction . . . if his speech stirred people to anger, invited dispute, or brought about a condition of unrest.” *Id.* at 5. The Court concluded that “[a] conviction resting on any of those grounds cannot stand.” *Id.*

38. *See infra* Part III.C.2.

39. *See infra* Part III.C.

40. *See infra* Part III.C.1.

41. *See* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-82 (1992) (acknowledging that the Court employs a two-tiered categorical approach to direct restrictions on expressive content, striking down such restrictions as “presumptively unconstitutional,” unless the speech falls within a category of speech not receiving full First Amendment protection).

42. *See id.*

43. *See id.*

44. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (establishing that advocacy of imminent lawless action is unprotected speech under the First Amendment) Under the test established in *Brandenburg*, states may prohibit illegal advocacy of only if that advocacy is both intended and likely to produce “imminent lawless action.” *Id.*

45. *See* *Miller v. California*, 413 U.S. 15, 24 (1973) (establishing that obscenity is unprotected under the First Amendment and adopting the modern test for obscenity). Under *Miller*, speech is defined as obscene if it satisfies the following three-prong test: (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* at 24-25.

46. *New York v. Ferber*, 458 U.S. 747, 764-65 (1982) (holding that child pornography is unprotected speech under the First Amendment and deriving the test for child pornography from *Miller’s* test for obscenity). The *Ferber* Court’s child pornography test modified *Miller’s* obscenity test in the following manner: “A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that the sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole.” *Id.* at 764. As with obscenity, however, the prohibited material “must be adequately defined by the applicable state law, as written and authoritatively construed.” *Id.*

47. *See* *Cohen v. California*, 403 U.S. 15, 20 (1971) (limiting the definition of fighting words established in *Chaplinsky*). Under *Cohen*, states may prohibit speech that is “inherently likely to

*less-than-fully-protected* categories are: (1) defamatory statements,<sup>48</sup> (2) commercial speech,<sup>49</sup> and (3) lewd, profane, or indecent expression.<sup>50</sup> Speech that falls within an *unprotected* category is generally vulnerable to content-based regulation.<sup>51</sup> But content-based restric-

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provoke violent reaction" when the speech is "directed to the person of the hearer." *Id.*; see also *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (defining fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

48. See *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) (requiring a showing of "actual malice" before a false statement about a public official or public figure will be deemed defamatory). Public officials are precluded from recovering damages for "defamatory falsehoods relating to [their] official conduct unless [they] can prove that [the statement was] made with . . . knowledge that it was false or with reckless disregard of [its truth]." *Id.*

49. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980) (adopting the prevailing test regarding commercial speech). The test for commercial speech proceeds in four steps. First, is the commercial speech protected at all by the First Amendment? This depends on whether: (a) it concerns lawful activity, and (b) it is not misleading. See *id.* Second, is the asserted governmental interest substantial? See *id.* If the first two questions are answered in the affirmative, then third, does the regulation of commercial speech directly advance the asserted governmental interest? See *id.* If yes, then finally, can the governmental interest be served by a more limited restriction on the commercial speech? If yes, the regulation is invalid under the First Amendment. See *id.*

50. This category, often referred to as "indecent" speech, is not governed by any particular test. Instead, judicial scrutiny of indecent speech varies depending on the medium of expression and the context in which the speech is received. See, e.g., *Cohen v. California*, 403 U.S. 15, 16 (1971) (reversing the defendant's breach-of-the-peace conviction for walking through a courthouse corridor wearing a jacket bearing the words "fuck the draft"); *FCC v. Pacifica Found.*, 438 U.S. 726, 751 (1978) (upholding the FCC's power to sanction a radio station for the daytime broadcast of "obscene, indecent, or profane" language); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 206, 216 (1975) (invalidating an ordinance banning the showing of any films containing nudity at drive-in theaters, where the screen was visible from a public street or place); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126-27 (1989) (striking down an FCC ban on "dial-a-porn" communications by stressing *Pacifica's* "emphatically narrow" holding); *Reno v. ACLU*, 521 U.S. 844, 849, 869 (1997) (recognizing *Pacifica's* limitations by striking down a ban on the Internet transmission of indecent communications); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 732-33 (1996) (entertaining a challenge to three statutory provisions governing indecent, sex-related programming on cable television). The Court: (1) upheld a provision permitting cable system operators to prohibit such programming on leased access channels, (2) struck down a provision permitting cable operators to ban such programming on public access channels, and (3) struck down a provision that required cable operators to segregate such programming, place it on a single channel, and block that channel from viewer access unless the viewer requests access in advance and in writing. See *id.* at 733.

51. Note, however, that the government is not free, even within the confines of an unprotected category of speech, to single out particular *viewpoints* for special prohibition and punishment. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (holding that categories of unprotected speech "can, consistent with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categorized speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel [or some other unprotected category of speech]; but it may not make the further content discrimination of proscribing only libel critical of the government.")

tions are not necessarily valid when applied to the *less-than-fully-protected* categories.<sup>52</sup> Such restrictions are gauged under the particular form of intermediate scrutiny developed for each category.<sup>53</sup> Continuing our overview of the issue-spotting checklist, we turn now to Question Four, which inquires:

*D. Does the Regulation Have Characteristics of Overbreadth, Vagueness, or Prior Restraint?*

The doctrines of overbreadth, vagueness, and prior restraint are united by one common feature: each is concerned with an impermissible *method* of regulating speech. These doctrines focus not on the *content* of speech, but on the regulatory *means* employed by the government in restricting that speech.

The overbreadth doctrine may be invoked to strike down restrictions on speech that are worded in such a way that even protected expression is left vulnerable to punishment.<sup>54</sup> The vagueness doctrine may be invoked to strike down restrictions on speech that are worded in such a way that citizens cannot reasonably discern what is prohibited.<sup>55</sup> This Article discusses the overbreadth and vagueness doctrines in Part III D 2.

In reaction to the now-vilified press licensing systems of the sixteenth and seventeenth centuries,<sup>56</sup> the doctrine of prior restraint imposes severe limits on the power of government to regulate speech

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52. See, e.g., *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478 (1995) (striking down a content-based restriction on commercial speech). The *Coors* Court dealt with a labelling ban on disclosing the alcohol content of beer, and found the ban inconsistent with the First Amendment by failing to directly advance the governmental interest in preventing "strength wars" among brewers. *Id.* at 478-80.

53. See *infra* Part III.C.1.

54. See, e.g., *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 571 (1987) (striking down, on overbreadth grounds, a regulation prohibiting any person "to engage in First Amendment activities within the Central Terminal Area at Los Angeles International Airport"). The Court found the regulation sufficiently overbroad because it "prohibit[ed] even talking and reading, or the wearing of campaign buttons or symbolic clothing." *Id.* at 574-75.

55. See, e.g., *Smith v. Goguen*, 415 U.S. 566, 571-72 (1974) (sustaining a vagueness challenge to a Massachusetts statute that criminalized publicly treating the American flag "contemptuously"). The Court observed that any "unceremonial" use of the flag might be regarded by some as "contemptuous," but that casual treatment of the flag as "an object of youth fashion and high camp" was commonplace. *Id.* at 573-74. Given the prevalence of these widely divergent views, a statute criminalizing the "contemptuous" use of the flag was so vague that police, courts, and juries were free to enforce it under their own preferences for treatment of the flag. See *id.* at 574-75.

56. See generally FREDRICK SEATON SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND: 1476-1776* 47-63 (1952) (describing press licensing in England).

before it is uttered or published.<sup>57</sup> Prior restraints come in two forms: (1) speech-restrictive *injunctions*,<sup>58</sup> and (2) *licensing* systems that require a permit or fee as a prerequisite to engaging in expressive activity.<sup>59</sup> This Article discusses the doctrine of prior restraint—and the differing analytical standards for injunctions and licensing systems—in Part III D 1. Concluding our overview of the issue-spotting checklist, we turn, finally, to Question Five, which inquires:

*E. Does the Regulation Pertain to One of the Settings for Which the Supreme Court Created Special Rules?*

In developing its First Amendment jurisprudence, the Supreme Court has created special rules for special settings. Each of the following settings is governed by its own discrete body of precedent: (1) speech on public property (the “public forum” doctrine),<sup>60</sup> (2) speech in “restricted” environments (schools,<sup>61</sup> prisons,<sup>62</sup> and the military),<sup>63</sup> (3) speech by public employees,<sup>64</sup> (4) the regulation of communica-

57. See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969).

58. See, e.g., *New York Times v. United States*, 403 U.S. 713, 714 (1971) (striking down injunctions barring the *New York Times* and *Washington Post* from publishing excerpts from the “Pentagon Papers,” a classified Defense Department study of the Vietnam War).

59. See, e.g., *Shuttlesworth*, 394 U.S. at 159 (striking down a parade permit scheme that effectively vested unfettered discretion in licensing officials). “[I]n deciding whether or not to withhold a permit, the [licensing authorities] were to be guided only by their own ideas of ‘public welfare, peace, safety, health, decency, good order, morals or convenience.’” *Id.* at 150. The Court found 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.

60. See, e.g., *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 685 (1992) (describing the public forum doctrine applied to speech restrictions on public property, while sustaining a ban on solicitation in an airport terminal deemed a nonpublic forum by the Court).

61. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 256-66 (1988) (finding that “[a] school need not tolerate student speech that is inconsistent with its basic educational mission”); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (holding that the wearing of symbolic armbands by students in a non-disruptive manner is “closely akin to ‘pure speech’ [and therefore] is entitled to comprehensive protection under the First Amendment”).

62. See, e.g., *Jones v. North Carolina Prisoners’ Labor Union*, 433 U.S. 119, 121 (1977) (holding that the Department of Corrections could prohibit inmates from soliciting other inmates to join the prisoner’s union, bar meetings of the union, and refuse to deliver union publications without violating the First Amendment).

63. See, e.g., *Brown v. Glines*, 444 U.S. 348, 353 (1980) (upholding an Air Force regulation allowing a base commander to prevent communication that he believes threatens security).

64. See, e.g., *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (recognizing that “the government as employer indeed has far broader powers than does the government as sovereign” in regulating the speech of its employees).

tions media (print,<sup>65</sup> broadcasting,<sup>66</sup> cable television,<sup>67</sup> and the Internet),<sup>68</sup> and (5) government-funded expression.<sup>69</sup>

### III. ANALYTICAL FRAMEWORK

The previous Part provided a general overview of the five-step analytical approach presented in this Article. Now, these five steps will be examined in far greater detail, with particular emphasis on the finer points in each strand of precedent.

#### A. *Content-Based Versus Content-Neutral Restrictions: Diverging Levels of Judicial Scrutiny*

This Section corresponds to Question One in our issue-spotting checklist, which inquires whether the speech regulation is content-based or content-neutral. Discussed here, in turn, are the implications of content-neutrality (the diverging levels of judicial scrutiny under Track One and Track Two analysis),<sup>70</sup> and the standards for gauging content-neutrality.<sup>71</sup>

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65. See, e.g., *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 247, 258 (1974) (declaring invalid a Florida statute creating "a right to reply to press criticism of a candidate for election"). The Court stated that government regulation of "editorial control and judgment" cannot be exercised consistent with the First Amendment under the facts of *Tornillo*. *Id.* at 258.

66. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 741 (1978) (holding that the FCC may prohibit indecent speech on broadcast media in certain limited contexts); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369-400 (1969) (citing spectrum scarcity as a justification for *limiting* the speech rights of broadcasters and upholding FCC regulations requiring radio and television stations to afford airtime to political candidates and libel victims under certain circumstances).

67. See, e.g., *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

68. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 849 (1997) (holding that, "[n]otwithstanding the legitimacy and importance of the congressional goal of protecting children from harmful materials," statutes enacted to protect minors from "indecent" and "patently offensive" communications on the Internet improperly abridge First Amendment protections).

69. See, e.g., *National Endowment for the Arts v. Finley*, 524 U.S. 569, 572-73 (1998) (upholding an NEA regulation requiring grant applications to be judged using "general standards of decency and respect for diverse beliefs and values of the American public"). The Court found the statute facially valid because "it neither inherently interferes with First Amendment rights nor violates constitutional vagueness principles." *Id.* at 573. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 177-78 (1991) (denying a facial challenge to a Department of Health and Human Services regulation limiting the ability of government funded clinics to engage in "abortion-related activities" and expression with patients).

70. See *infra* Part III.A.1.

71. See *infra* Part III.A.2.

# 1. The Implications of Content-Neutrality: "Track One" Versus "Track Two" Scrutiny

When the government regulates speech, it does so in one of two ways: (1) restricting its expressive *content*, or (2) restricting the *time*, *place*, or *manner* of its expression.<sup>72</sup> Judicial hostility to the former is much greater than to the latter.<sup>73</sup> "It is axiomatic," the Supreme Court has stressed, "that the government may not regulate speech based on its substantive content or the message it conveys."<sup>74</sup> In regulating speech, the government "may not favor one speaker over another;"<sup>75</sup> discrimination against speech because of its message "is presumed to be unconstitutional."<sup>76</sup> When the government targets not subject matter but, even more narrowly, particular views on a given subject, the First Amendment violation "is all the more blatant."<sup>77</sup> Viewpoint discrimination is thus "an egregious form of content discrimination."<sup>78</sup> Accordingly, the government "must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."<sup>79</sup>

72. See, e.g., *Boos v. Barry*, 485 U.S. 312, 329-32, 334 (1988) (striking down, as an impermissible content-based restriction, a District of Columbia statute criminalizing the display of any sign criticizing a foreign government within 500 feet of its embassy); *Stokes v. City of Madison*, 930 F.2d 1163, 1165, 1173 (7th Cir. 1991) (upholding two sound amplification ordinances as reasonable time, place, and manner restrictions, despite the "seemingly anomalous treatment of sound from churches and other exempted sources"); *Blaseck v. City of Durham*, 456 F.2d 87, 88, 93-94 (4th Cir. 1972) (upholding an ordinance as a reasonable time, place, and manner restriction that prohibited more than fifty people from assembling in a small downtown park).

73. See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (recognizing that the government "may regulate expressive *content* only if such restriction is necessary, and narrowly drawn, to serve a compelling state interest") (emphasis in original); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-82 (1992) (recognizing that "[c]ontent-based regulations are presumptively invalid").

74. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828 (1995) (stating that "[t]he essence of . . . censorship is content control. Any restriction of expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))).

75. *Rosenberger*, 515 U.S. at 828; *accord* *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (examining "[t]he general principle that . . . the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others") (citations omitted).

76. *Rosenberger*, 515 U.S. at 828; *accord* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) ("Government action that stifles speech on account of its message, or that requires the utterance of a particular message framed by the [g]overnment, contravenes [essential First Amendment rights].").

77. *Rosenberger*, 515 U.S. at 829.

78. *Id.*

79. *Id.* (citing *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 46 (1983)).

Thus, whether a speech regulation is content-based or content-neutral will determine the level of judicial scrutiny to which it will be subjected. In Laurence Tribe's famous formulation, content-based restrictions are subjected to "Track One" analysis (strict scrutiny), while time, place, and manner restrictions are subjected to "Track Two" analysis (intermediate scrutiny).<sup>80</sup> This Article will take a closer look at these tests momentarily—but first, let us examine the various guises in which Track One and Track Two regulations appear.

Impermissible content-based restrictions appear in a variety of guises. They may be grouped into five discrete categories. First, where the government categorically suppresses or favors a particular topic or message<sup>81</sup>—as, for example, in *Boos v. Barry*,<sup>82</sup> where a District of Columbia statute banned the display of any sign criticizing a foreign government within 500 feet of its embassy.<sup>83</sup> Second, where the government serves as a content-conscious *gatekeeper*, selectively blocking access to a forum based on the speaker's intended message<sup>84</sup>—as, for example, in *Mahoney v. Babbitt*,<sup>85</sup> where the National

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80. TRIBE, *supra* note 17, § 12-2, at 791-92.

81. See, e.g., *Carey v. Brown*, 447 U.S. 455, 457-59 (1980) (striking down a statute singling out peaceful labor speech for favored treatment while barring all other residential picketing); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 123 (1991) (striking down New York's "Son of Sam" law that singled out the writings of accused or convicted criminals depicting their crimes and funneled any profits therefrom to crime victims). The Court found that, although "[t]he State's interest in compensating victims from the fruits of crime is a compelling one, . . . the Son of Sam law is not narrowly tailored to advance that objective. As a result, the statute is inconsistent with the First Amendment." *Id.*

82. 485 U.S. 312 (1988).

83. *Id.* at 318-19 (striking down the statute as an impermissible content-based restriction on political speech).

84. See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (holding that a state may not single out a Ku Klux Klan cross and bar its placement in a traditional or designated public forum, where the cross is purely private and not a state endorsement of religion); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 391 (1993) (striking down a regulation that denied a church group the opportunity to present a religious-based film series in a designated public forum); *Widmar v. Vincent*, 454 U.S. 263, 267-69 (1981) (invalidating a university policy that "discriminated against student groups and speakers based on their desire to use a generally open public forum to engage in religious worship and discussion"); *Eagon v. Elk City*, 72 F.3d 1480, 487-88 (10th Cir. 1996) (holding that the exclusion of a partisan political sign in a public forum violated the First Amendment); *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160 (6th Cir. 1993) (singling out holiday displays by the KKK and a Jewish organization); *Women Strike for Peace v. Morton*, 472 F.2d 1273, 1274 (D.C. Cir. 1972) (holding that an antiwar group has the First Amendment right to erect an antiwar display in a public area near the White House); *ACT-UP v. Walp*, 755 F. Supp. 1281, 1284, 1292 (M.D. Pa. 1991) (finding that the state violated the First Amendment rights of AIDS activists by closing the gallery of the Pennsylvania House of Representatives during the Governor's inauguration address, while denying the motion for injunctive relief on procedural grounds).

85. 105 F.3d 1452 (D.C. Cir. 1997).



Park Service sought to prevent anti-abortion protesters from displaying banners along the route of President Clinton's inaugural parade.<sup>86</sup> Third, where the government subjects unpopular speakers to a higher fee for using a forum<sup>87</sup>—as, for example, in *Forsyth County v. Nationalist Movement*,<sup>88</sup> where, under a local permit scheme, the fee for police protection could be increased if the speaker was likely to generate controversy.<sup>89</sup> Fourth, where the government withholds a service or subsidy to which the speaker would otherwise be entitled if not for the speaker's message—as, for example, in *Rosenberger v. Rector & Visitors of University of Virginia*,<sup>90</sup> where a student religious journal was denied the same subsidy for printing costs that the university furnished to all other student publications.<sup>91</sup> Fifth and finally, where the government alters the speaker's intended message as the price for use of a forum<sup>92</sup>—as, for example, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,<sup>93</sup> where, as the price for securing their permit, the private organizers of a St. Patrick's Day parade were compelled by the government to include a contingent of gay and les-

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86. *Id.* at 1458-59.

87. See, e.g., *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281, 286 (D. Md. 1988) (enjoining the Town of Thurmont "from imposing conditions of insurance coverage, hold harmless agreements, indemnification, and police protection and clean-up reimbursement on [a] KKK parade," where similar conditions were not imposed on other parade permit applicants).

88. 505 U.S. 123 (1992).

89. *Id.* at 134-35 (holding that the ordinance unconstitutionally required the administrator to examine the content of the prospective speaker's message, and to charge a higher fee for controversial viewpoints). The Court found that "the fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit." *Id.* at 134.

90. 515 U.S. 819 (1995).

91. *Id.* at 827.

92. See, e.g., *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56, 59 (N.D. Ohio 1995) (finding that the city's refusal to license its convention center for a "male only" congregation of the Nation of Islam was unconstitutional because a mixed gender audience would necessarily change the "content and character of the speech" by denying adherence to a "[sixty] year religious tradition"); *New York County Bd. of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358, 370 (S.D.N.Y. 1993) (directing the City of New York not to interfere with the AOH's St. Patrick's Day parade "by requiring the inclusion of any contingent [of paraders] which has not been approved by the AOH and the Parade Committee"); *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281, 286 (D. Md. 1988) (enjoining the Town of Thurmont from imposing on the KKK conditions of insurance coverage, indemnification, and reimbursement costs, where similar conditions were not imposed on other parade permit applicants).

93. 515 U.S. 557 (1995).

bian marchers, whose very presence would impart a message that the organizers did not wish to convey.<sup>94</sup>

Time, place, and manner restrictions come in many forms—imposing limits on the noise level of speech,<sup>95</sup> fixing caps on the number of protesters who may use a given forum,<sup>96</sup> barring early-morning or late-evening demonstrations,<sup>97</sup> and restricting the size or placement of signs on government property.<sup>98</sup> Such restrictions are frequently upheld and represent a common part of the regulatory landscape in most cities.<sup>99</sup>

The Track One test (for content-based restrictions on protected speech)<sup>100</sup> is strict scrutiny.<sup>101</sup> To survive judicial review, the restric-

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94. *Id.* at 578-79 (finding a First Amendment violation because, by compelling the inclusion of gay and lesbian groups as a condition for a parade permit, the government effectively altered the expressive content of the organizers' parade).

95. *See, e.g.,* *Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1989) (rejecting a First Amendment challenge to noise limits on band shell concerts in New York City's Central Park); *Grayned v. City of Rockford*, 408 U.S. 104, 107-08 (1972) (upholding, as a valid content-neutral restriction, an ordinance prohibiting noise making on grounds adjacent to schools); *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (upholding, as a valid content-neutral restriction, an ordinance barring "sound trucks from broadcasting in a loud and raucous manner on the streets"); *Stokes v. City of Madison*, 930 F.2d 1163, 1172-73 (7th Cir. 1991) (upholding an ordinance placing limitations on the use of sound amplification equipment at outdoor rallies as "a reasonable time, place, and manner restriction, despite the seemingly anomalous treatment of sound from churches and other exempted sources"); *Medlin v. Palmer*, 874 F.2d 1085, 1091-92 (5th Cir. 1989) (finding a noise ordinance prohibiting the use of any hand-held amplifier within 150 feet of an abortion clinic or other medical facility to be "narrowly drafted and . . . of sufficient precision so as to pass constitutional muster").

96. *See, e.g.,* *Blasecki v. City of Durham*, 456 F.2d 87, 93-94 (4th Cir. 1972) (upholding an ordinance that prohibited "the congregation of more than [fifty] persons at any time" in a small downtown park as constitutionally reasonable in light of other alternatives).

97. *See, e.g.,* *Nationalist Movement v. City of Cumming*, 92 F.3d 1135, 1137 (11th Cir. 1996) (upholding an ordinance banning Saturday morning parades as "a reasonable time, place, and manner restriction on speech"), *cert. denied*, 519 U.S. 1058 (1997); *Abernathy v. Conroy*, 429 F.2d 1170, 1174 (4th Cir. 1970) (upholding an ordinance that limited parades to the hours between 8:00 a.m. and 8:00 p.m. as an "exercise of power consistent with the governmental prerogative to regulate reasonably the time, place, manner, and duration of parades and marches").

98. *See, e.g.,* *United States v. Musser*, 873 F.2d 1513, 1517-18 (D.C. Cir. 1989) (rejecting a First Amendment challenge to a federal regulation prohibiting unattended signs in Lafayette Park); *White House Vigil for the ERA Comm'n v. Clark*, 746 F.2d 1518, 1519-20 (D.C. Cir. 1984) (upholding regulations that limited "the size, construction, and placement of signs [during demonstrations] on the White House sidewalk").

99. *See* Kevin Francis O'Neill, *Disentangling the Law of Public Protest*, 45 *Loyola L. Rev.* 411, 475-78 (1999).

100. Content-based restrictions on speech are governed by "Track One" strict scrutiny, unless the regulated utterance falls within one of the categories of "low-level" speech that does not enjoy full First Amendment protection. *See* *TRIBE, supra* note 17, § 12-2, at 791-92. The categories of "low-level" speech include advocacy of imminent lawless action, obscenity, child pornography, fighting words, defamatory statements, commercial speech, and lewd, profane, or indecent expression. *See* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992).

tion must be “necessary, and narrowly drawn, to serve a compelling state interest.”<sup>102</sup> Application of strict scrutiny is almost always fatal to the challenged restriction.<sup>103</sup> The Track Two test (for time, place, and manner restrictions) is a form of intermediate scrutiny with three distinct prongs.<sup>104</sup> To survive judicial review, the restriction: (1) must be content-neutral (i.e., it must be justified by the government without reference to the content of the regulated speech), (2) must be “narrowly tailored to serve a significant governmental interest,” and (3) must “leave open ample alternative channels” for communicating the information.<sup>105</sup> These three prongs require some further elaboration.

The first prong—content-neutrality—turns on “whether the government has adopted [the] regulation of speech because of disagreement with the message it conveys.”<sup>106</sup> The controlling factor is the government’s purpose or intent.<sup>107</sup> The second prong—narrow tailoring—is by no means stringently enforced.<sup>108</sup> Indeed, the Supreme Court watered down this requirement in *Ward v. Rock Against Ra-*

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101. See *TRIBE*, *supra* note 17, at 791.

102. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995); *accord International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (recognizing that regulations of speech in traditional public fora “survive only if they are narrowly drawn to achieve a compelling state interest”); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (noting that “[b]ecause a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest”).

103. For a rare example of a content-based restriction surviving strict scrutiny, see *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (upholding a Tennessee statute prohibiting the solicitation of votes and the display or distribution of campaign materials within 100 feet of a polling place entrance). The Court realized that the fundamental right of free speech was in direct conflict “with the right to cast a ballot in an election free from the taint of intimidation and fraud.” *Id.* Therefore, this restriction was narrowly tailored to serve the compelling state interest in preventing voter intimidation and election fraud. *See id.* But in his concurrence, Justice Scalia asserted that strict scrutiny was not the appropriate standard to apply in this case. Rather, the statute should have been sustained as a “reasonable, viewpoint neutral regulation of a nonpublic forum.” *Id.* at 214 (Scalia, J., concurring).

104. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (providing that time, place, and manner restrictions are valid if they “are justified without reference to the content of the regulated speech, they are narrowly tailored to serve a significant government interest, and they leave open ample alternative channels for communication of the information”) (citations omitted); *TRIBE*, *supra* note 17, at 791.

105. *Id.*; *accord Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (recognizing the three-prong test for intermediate scrutiny); *United States v. Grace*, 461 U.S. 171, 177 (1983) (recognizing the three-prong test for intermediate scrutiny).

106. *Ward*, 491 U.S. at 791.

107. *See id.*

108. *See id.* at 788-89 (noting that a narrowly tailored restriction “need not be the least restrictive or least intrusive means” but rather must merely promote “a substantial government interest that would be achieved less effectively absent the regulation”).

cism,<sup>109</sup> stressing that time, place, and manner restrictions need not be the least restrictive or least intrusive means of achieving the government's purpose.<sup>110</sup> Rather, "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'"<sup>111</sup> This relaxed conception of narrow tailoring is vividly reflected in the cases. Regulations that fail this test invariably feature broad restraints on expressive activity—imposing, for example, sweeping prohibitions on parades,<sup>112</sup> demonstrations,<sup>113</sup> residential picketing,<sup>114</sup> door-to-door leafleting,<sup>115</sup> or public handbilling.<sup>116</sup> A good example is *Bery v. City of New York*,<sup>117</sup> where the Second Circuit enjoined enforcement of an ordinance that prohibited visual artists from exhibiting or selling their work in public places without a general vendors license.<sup>118</sup> The court held that the ordinance was not narrowly tailored, but instead served as "a de facto bar preventing visual artists from exhibiting and selling their art in public areas of New York,"<sup>119</sup> because it placed an exceedingly low ceiling on the number of available permits, creating a waiting list so long that even the City conceded that the plaintiffs' prospects of securing a license

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109. 491 U.S. 781 (1989).

110. *Id.* at 798.

111. *Id.* at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

112. *See, e.g.*, *Sixteenth of September Planning Comm'n, Inc. v. City of Denver*, 474 F. Supp. 1333, 1335, 1341 (D. Colo. 1979) (striking down, as an impermissibly broad time, place, and manner restriction, an ordinance banning parades within a seven-square-block central business district during workdays from 7:00 a.m. to 6:00 p.m.).

113. *See, e.g.*, *United Food & Commercial Workers Union v. City of Valdosta*, 861 F. Supp. 1570, 1580-81 (M.D. Ga. 1994) (invalidating an outright ban on public assemblies in all public and quasi-public places other than parks as facially unconstitutional). The Court stated that a prohibition that sweeps within its ambit all demonstrations on "streets, roads, highways, sidewalks, driveways, and alleys . . . deprives citizens of the opportunity to express their views in public forums particularly suited to open assembly, discussion, and debate." *Id.* at 1581.

114. *See, e.g.*, *Kirkeby v. Furness*, 52 F.3d 772, 773-74 (8th Cir. 1995) (holding that anti-abortion protesters were entitled to a preliminary injunction barring enforcement of an ordinance banning picketing within 200 feet of a residential dwelling and authorizing year-long, neighborhood-wide "no-picketing zones").

115. *See, e.g.*, *Martin v. City of Struthers*, 319 U.S. 141, 148-49 (1943) (striking down an outright ban on all door-to-door leafleting as impermissibly conflicting with freedom of speech).

116. *See, e.g.*, *Henderson v. Lujan*, 964 F.2d 1179, 1180-81 (D.C. Cir. 1992) (striking down, for lack of narrow tailoring, a National Park Service regulation banning all leafleting on the sidewalks surrounding the Vietnam Veterans Memorial, where the sidewalks were more than 100 feet from the Memorial's wall). In striking down the regulation, the Court noted that "the [government] interest in maintaining a tranquil atmosphere does not justify the prohibition against the distribution of free literature." *Id.* at 1181 (citation omitted).

117. 97 F.3d 689 (2d Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997).

118. *Id.* at 698-99.

119. *Id.* at 697.

were nonexistent.<sup>120</sup> Absent this type of broad-based ban on a traditional form of expressive activity, courts routinely uphold time, place, and manner restrictions as satisfying the narrow tailoring requirement.<sup>121</sup>

The third prong of Track Two analysis requires that the regulation must “‘leave open ample alternative channels for communicat[ing]’” the speaker’s message.<sup>122</sup> In applying this requirement, it must be borne in mind that “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”<sup>123</sup> Although a speech restriction may run afoul of this requirement if it precludes “forms of expression that are much less expensive than feasible alternatives,”<sup>124</sup> the basic test for gauging the sufficiency of alternative channels is whether the speaker is afforded “a forum that is accessible and where the intended audience is expected to pass.”<sup>125</sup> A speech restriction does *not* leave open ample alternative channels if the speaker is unable to reach the intended audience.<sup>126</sup> Thus, a restriction may be invalid if it deprives speakers of “a uniquely valuable or important mode of communica-

120. *See id.*

121. *See, e.g.,* *Heffron v. International Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981) (upholding, as narrowly tailored, a state fair rule barring selling or distributing any materials on the fairgrounds except from fixed booths rented on a first-come, first-served basis); *Nationalist Movement v. City of Cumming*, 92 F.3d 1135, 1140 (11th Cir. 1996) (upholding, as narrowly tailored, an ordinance banning Saturday morning parades because “ample alternative channels of communication were available”), *cert. denied*, 519 U.S. 1058 (1997); *United States v. Musser*, 873 F.2d 1513, 1517-18 (D.C. Cir. 1989) (upholding a federal regulation prohibiting unattended signs in Lafayette Park because the “within three feet definition of attended . . . appears sufficiently narrowly tailored”).

122. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

123. *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939).

124. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 n.30 (1984); *see, e.g.,* *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) (recognizing that “door-to-door distribution of circulars is essential to the poorly financed causes of little people”). But the Supreme Court has stressed that its “special solicitude” for inexpensive forms of communication “has practical boundaries.” *Taxpayers for Vincent*, 466 U.S. at 812 n.30. “That more people may be more easily and cheaply reached by sound trucks . . . is not enough to [insulate that method of communication from regulatory restrictions] when easy means of publicity are open.” *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949).

125. *Students Against Apartheid Coalition v. O’Neil*, 660 F. Supp. 333, 339 (W.D. Va. 1987); *accord* *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) (noting that “[a]n alternative is not ample if the speaker is not permitted to reach the intended audience”).

126. *See Bay Area Peace Navy*, 914 F.2d at 1229; *see also Taxpayers for Vincent*, 466 U.S. at 812 (“[W]hile the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, . . . a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate”) (citations omitted).

tion,"<sup>127</sup> or if it "threatens their ability to communicate effectively."<sup>128</sup> These principles are illustrated by the contrast between two cases: *Dr. Martin Luther King, Jr. Movement, Incorporated v. City of Chicago*<sup>129</sup> and *United States v. Fee*.<sup>130</sup>

In *Martin Luther King Movement*, a civil rights organization sought to march through an all-white neighborhood, its previous foray there having been curtailed when bystanders pelted the procession with rocks, bricks, and explosive devices.<sup>131</sup> City officials denied the plaintiffs a permit for a second march through the same neighborhood, proposing instead an alternate route through an all-black neighborhood.<sup>132</sup> Since the whole point of the plaintiffs' march was to publicize and protest a pattern of violence against blacks attempting to reside in or travel through the specified neighborhood, the court held that the City's proposal for an alternate route—taking the plaintiffs away from that neighborhood and away from their intended audience<sup>133</sup>—was constitutionally inadequate as an alternative channel of communication.<sup>134</sup>

In *Fee*, nine environmental protesters were convicted of willfully defying a special order of the National Forest Service that closed a sector of the San Juan National Forest to all expressive activity during a 90-day period of active logging.<sup>135</sup> The protesters had entered the closed sector of the forest to protest the cutting of ancient trees there.<sup>136</sup> Rejecting the protesters' First Amendment defense, the court upheld the special order as a reasonable time, place, and manner restriction.<sup>137</sup> The order had been precipitated by prior protests in which protesters occupied a tree for twelve days, locked themselves to a cattle guard, blocked motor vehicles, rolled logs into the road, and

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127. *Taxpayers for Vincent*, 466 U.S. at 812.

128. *Id.*

129. 419 F. Supp. 667 (N.D. Ill. 1976).

130. 787 F. Supp. 963 (D. Colo. 1992).

131. *Martin Luther King Movement*, 419 F. Supp. at 672.

132. *See id.* (enumerating the reasons for the denial as " (1) the size of the parade; . . . (2) the route the march was to take; [and] . . . (3) the fact that a previous parade in the proposed area had created problems for city authorities, including the police").

133. *See id.* at 673-74.

134. *See id.* (finding that "[t]he alternate route . . . was the suggestion of a forum that had the effect of depriving plaintiffs of their First Amendment rights").

135. *Fee*, 787 F. Supp. at 964-65 (establishing that certain defendants "deliberately entered the portion of the forest that had been closed, . . . knowing that to do so was a violation of the closure order").

136. *See id.* at 965.

137. *See id.* at 968-70.

surrounded both loggers and trees to prevent cutting.<sup>138</sup> In upholding the order, the court concluded that it left open sufficient alternative channels through which the protesters could communicate their message.<sup>139</sup> Though the protesters wanted to demonstrate “where the trees were endangered,”<sup>140</sup> they had been permitted to protest at the point where the road entered the logging area.<sup>141</sup> This, the court held, was constitutionally sufficient because it afforded these speakers the requisite platform from which to convey their outrage at the felling of ancient trees.<sup>142</sup>

The guiding principle reconciling *Martin Luther King Movement* and *Fee* is that a speech restriction will be struck down, as failing to afford sufficient alternative channels of communication, only if it largely impairs a speaker’s capacity to reach an intended audience.

## 2. Gauging Content-Neutrality: *Ward*, *O’Brien*, and “Secondary Effects”

Under *Ward v. Rock Against Racism*,<sup>143</sup> “[t]he principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”<sup>144</sup> The controlling factor is the government’s purpose or intent.<sup>145</sup> Flunking the content-neutrality test was the speech restriction in *Boos v. Berry*,<sup>146</sup> where the Supreme Court struck down a District of Columbia statute that criminalized the display of any sign criticizing a foreign government within 500 feet of its embassy.<sup>147</sup> The Court held that the statute’s display clause was content-based because its sole justification was “to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments.”<sup>148</sup> This justification focused “*only* on the content of the speech and its direct impact [upon] listeners.”<sup>149</sup> Thus, the statute

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138. *See id.* at 964, 969.

139. *See id.* at 969-70.

140. *Id.* at 969.

141. *See id.*

142. *See id.* at 969-70.

143. 491 U.S. 781 (1989).

144. *Id.* at 791; *accord* *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984) (finding that a restriction is constitutional if it “is content-neutral and is not being applied because of disagreement with the message presented”).

145. *See Ward*, 491 U.S. at 791; *Paulsen v. County of Nassau*, 925 F.2d 65, 70 (2d Cir. 1991).

146. 485 U.S. 312 (1988).

147. *Id.* at 320.

148. *Id.* at 321.

149. *Id.* (emphasis in original).

"must be considered content-based" because it "regulates speech due to its potential primary impact."<sup>150</sup>

By contrast, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."<sup>151</sup> "Government regulation of expressive activity is content-neutral so long as it is justified without reference to the content of the regulated speech."<sup>152</sup> Employing these standards, courts have held that the following speech restrictions—even though they imposed a greater hardship on particular speakers or messages—were nonetheless content-neutral: (1) a noise regulation limiting the decibel level at Central Park concerts—even though the restriction proved especially burdensome for rock musicians—where the government's stated purpose was to preserve the quietude of adjacent property;<sup>153</sup> (2) a National Park Service ban on camping in Lafayette Park and the Mall—even though its enforcement against homeless advocates prevented them from sleeping overnight in "tent cities" near the White House—where the ban's underlying purpose was to maintain Washington's parks "in an attractive and intact condition;"<sup>154</sup> (3) a regulation banning the overnight maintenance of any "props" on the U.S. Capitol grounds—even though it effectively thwarted a plan by homeless advocates to erect, as part of a seven-day vigil, a 500-pound clay statue of a man, woman, and child huddled over a steam grate<sup>155</sup>—where the overnight ban was justified as affording the government meaningful day-to-day control over the Capitol grounds;<sup>156</sup> and (4) an order banning all expressive activity within a sector of a national forest closed for logging—even though the ban's impact was entirely one-sided, since only *environmentalists* sought to protest among the trees<sup>157</sup>—where the government justified its ban as protecting "health and safety and . . . property."<sup>158</sup>

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150. *Id.*

151. *Ward*, 491 U.S. at 791 (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986)).

152. *Id.* (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); accord *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981).

153. See *Ward*, 491 U.S. at 781.

154. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295-96.

155. See *Community for Creative Non-Violence v. Kerrigan*, 865 F.2d 382, 387 (D.C. Cir. 1989).

156. See *id.*

157. *United States v. Fee*, 787 F. Supp. 963, 969 (D. Colo. 1992).

158. See *id.*



These cases illustrate that speech restrictions will be deemed "content-neutral," even if they impinge more severely on a particular speaker or message, so long as the government can justify its regulation as serving purposes that have nothing to do with the content of speech. Closely related to this theme are two strands of precedent that directly implicate the question of content-neutrality: the secondary effects doctrine and the *O'Brien* doctrine.

Under the secondary effects doctrine, a restriction on speech will be deemed content-neutral, even though its language is content-discriminatory, so long as the government's regulatory aim is unrelated to the speech's communicative impact.<sup>159</sup> The secondary effects doctrine has been successfully invoked in the regulation of adult entertainment establishments.<sup>160</sup> In *Renton v. Playtime Theatres, Incorporated*,<sup>161</sup> the Supreme Court upheld a zoning ordinance limiting adult movie theaters to a concentrated area in the city.<sup>162</sup> The stated purpose of the ordinance was to avoid the spread of blight caused by the proliferation of such theaters.<sup>163</sup> While conceding that "the ordinance treats [adult] theaters . . . differently from other kinds of theaters," the Court upheld the ordinance because "[it] is aimed not at the *content* of the films shown . . . but rather at the *secondary effects* of such theaters on the surrounding community."<sup>164</sup> Since the regulatory aim of the *Renton* ordinance was directed at the crime and declining property values that frequently accompany adult theaters, not the sexually explicit content of the films they exhibit,<sup>165</sup> the Court concluded that the ordinance is "completely consistent with our defi-

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159. See *Young v. American Mini-Theaters, Inc.*, 427 U.S. 50, 72-73 (1976) (upholding Detroit's "Anti-Skid Row Ordinance"). The ordinance imposed a zoning restriction on the location of adult theaters, forcing their dispersal to avert the creation of "red light" districts. *Id.* at 54-55. The Court, in first adopting the doctrine, noted that "[i]t is the *secondary effect* which these zoning ordinances attempt to avoid, not dissemination of 'offensive speech.'" *Id.* at 71 n.34 (emphasis added).

160. See *id.* at 72-73. But the secondary effects doctrine has had little impact on the right to engage in public protest. In *Boos v. Berry*, the government invoked the doctrine unsuccessfully when it sought to justify a ban on the display of any sign criticizing a foreign government within 500 feet of its embassy. 485 U.S. 312, 315 (1988). The government argued that the ban was content-neutral because "the real concern is a secondary effect, namely, our international law obligation to shield diplomats from speech that offends their dignity." *Id.* at 320. But the Court rejected this argument and invalidated the ban under strict scrutiny, holding that "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*." *Id.* at 320-21.

161. 475 U.S. 41 (1986).

162. *Id.* at 48.

163. See *id.* at 43-44.

164. *Id.* at 47 (emphasis in original).

165. See *id.* at 48.

nition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.'"<sup>166</sup>

Like the secondary effects doctrine, the *O'Brien* doctrine erects a shield of content-neutrality when the government regulates expressive activity for reasons other than its communicative impact.<sup>167</sup> Under *United States v. O'Brien*,<sup>168</sup> where the government regulates *conduct* that has a communicative quality, the regulation will survive a First Amendment challenge if the governmental justification for restricting the conduct is important and unrelated to the suppression of ideas.<sup>169</sup> The *O'Brien* Court upheld a federal statute criminalizing the burning of draft cards<sup>170</sup>—notwithstanding legislative history that revealed an overriding impulse to punish such conduct precisely because of its anti-war message—<sup>171</sup> where the government justified the prohibition as furthering its administration of the Selective Service system.<sup>172</sup>

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166. *Id.* at 48-49 (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)) (emphasis in original).

167. See *United States v. O'Brien*, 391 U.S. 367, 367-77 (1968).

168. 391 U.S. 367 (1968).

169. *Id.* at 376-77. More precisely, *O'Brien* sets forth a four-part test for gauging the validity of regulations directed at conduct comprised of both speech and non-speech components in cases where the government has an interest in regulating the non-speech component. *Id.* at 377. Such a regulation is justified: "[1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*

170. *Id.* The defendant in *O'Brien* was sentenced to confinement for up to six years. See *id.* at 369 n.2.

171. *Id.* at 383. Although the Court went out of its way to avoid examining the legislative history, the floor debates leave little doubt about the intent of Congress:

What emerges with indisputable clarity from an examination of the legislative history of the [draft-card-burning] amendment is that the intent of its framers was purely and simply to put a stop to this particular form of antiwar protest, which they deemed extraordinarily contemptible and vicious—even treasonous—at a time when American troops were engaged in combat . . . . On the basis of this legislative history, it is not open to doubt that the attitude of defiance manifested in the draft-card burnings was what represented the threat seen by Congress, and that the infuriating offensiveness of this mode of dissent was what drove Congress to prohibit it.

Dean Alfange, Jr., *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 15-16. Especially revealing are the remarks of Representative William G. Bray of Indiana, who, during the floor debates asserted "[t]he need of this legislation is clear. Beatniks and so-called 'campus cults' have been publicly burning their draft cards to demonstrate their contempt for the United States and our resistance to Communist takeovers." *Id.* at 6 n.20 (quoting 111 CONG. REC. at 19871-72).

172. See *O'Brien*, 391 U.S. at 377-80.

*B. Restricting Expression or Compelling It: Special Judicial Hostility to Government-Compelled Speech*

This Section corresponds to Question Two in our issue-spotting checklist, which inquires whether the regulation, if content-based, *restricts* speech or *compels* speech. If the regulation is content-*restrictive*, proceed directly to Question Three, which inquires whether a content-restrictive regulation is direct or indirect.<sup>173</sup> But if the regulation *compels* the utterance of, or identification with, a particular message or ideology, it will face special judicial hostility under a cluster of cases involving government-compelled speech.

The fountainhead in this line of precedent is *West Virginia State Board of Education v. Barnette*,<sup>174</sup> where the Supreme Court struck down a mandatory flag salute and pledge of allegiance law directed at all children enrolled in West Virginia public schools.<sup>175</sup> The challenge was brought by Jehovah's Witnesses, who refused to salute the flag on religious grounds, because it required them to bow down before a "graven image."<sup>176</sup> In one of the most famous passages in First Amendment jurisprudence, Justice Jackson observed: "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."<sup>177</sup>

In *Wooley v. Maynard*,<sup>178</sup> the Supreme Court struck down a New Hampshire law that criminalized covering up the state motto, "Live Free or Die," that was emblazoned on all state license plates.<sup>179</sup> The Court held that a state may not "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."<sup>180</sup> Invoking *Barnette*, the Court embraced a "freedom of mind" that protects an

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173. See *infra* Part III.C.

174. 319 U.S. 624 (1943).

175. *Id.* at 626, 642.

176. *Id.* at 629. The Court was sympathetic to the petitioners' claim, realizing that "[c]hildren of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency." *Id.* at 630.

177. *Id.* at 642.

178. 430 U.S. 705 (1977).

179. *Id.* at 706-07.

180. *Id.* at 713.

individual from being coerced by the state to convey an officially-mandated ideology.<sup>181</sup>

More recently, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,<sup>182</sup> the Court held that Massachusetts could not invoke its public accommodations law to force the private organizers of a St. Patrick's Day parade to include a contingent of Irish gays and lesbians.<sup>183</sup> The gay and lesbian group desired to march under a distinct banner and convey a message that the organizers did not wish to impart.<sup>184</sup> The Court concluded that compelling the inclusion of this group would effectively alter the expressive content of the organizers' parade—a type of compelled speech that violates the First Amendment.<sup>185</sup>

Closely related to the compelled-speech cases are those involving the compelled *revelation* of a speaker's identity or associational membership. The most famous of these cases is *NAACP v. Alabama*,<sup>186</sup> where the Supreme Court struck down the enforcement of Alabama's corporate "doing-business" statute,<sup>187</sup> by which the government sought to compel the disclosure of the NAACP's membership list. Likening such compelled disclosure to "[a] requirement that adherents of particular religious faiths or political parties wear identifying armbands,"<sup>188</sup> the Court asserted that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of [First Amendment freedoms], particularly where a group espouses dissident beliefs."<sup>189</sup>

This recognition—that the protective cloak of anonymity helps to preserve the First Amendment freedoms of political minorities—proved equally pivotal in *McIntyre v. Ohio Elections Commission*<sup>190</sup> and *Talley v. California*,<sup>191</sup> where the Court struck down bans on anonymous leafleting.<sup>192</sup> In *Talley*, which involved the distribution of unsigned handbills urging readers to boycott certain Los Angeles

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181. *Id.* at 714-15.

182. 515 U.S. 557 (1995).

183. *Id.* at 559.

184. *See id.*

185. *See id.* at 572-73.

186. 357 U.S. 449 (1958).

187. *Id.* at 451-52.

188. *Id.* at 462 (quoting *American Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950)).

189. *Id.*

190. 514 U.S. 334 (1995).

191. 362 U.S. 60 (1960).

192. *McIntyre*, 514 U.S. at 337; *Talley*, 362 U.S. at 64-65.

merchants for engaging in discriminatory employment practices,<sup>193</sup> Justice Black observed that “[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.”<sup>194</sup> Writing for the Court in *McIntyre*, Justice Stevens concluded:

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent. Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hands of an intolerant society.<sup>195</sup>

C. *Direct Versus Indirect Regulation of Content: The Court’s “Categorical” Approach to Direct Restrictions; the Hostile Audience” Scenario as in Indirect Restriction*

This Section corresponds to Question Three in our issue-spotting check-list, which inquires whether the regulation, if content-restrictive, is *direct* or *indirect*. When the government restricts the *content* of speech, it acts in one of two ways: (1) *directly* restricting expressive content by targeting particular topics or viewpoints, or (2) restricting content *indirectly* by punishing a speaker for the *reaction* produced by a controversial message (the “hostile audience” cases). In either context, a court will subject the restriction to heightened scrutiny.

The *direct* regulation of expressive content is exemplified by restrictions that prohibit the expression of certain political views (criti-

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193. *Talley*, 362 U.S. at 61.

194. *Id.* at 64. The Court stated further that “[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.” *Id.* The Court cited the experience of American colonists, who “frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts.” *Id.* at 65. In fact, “[e]ven the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names.” *Id.*

195. *McIntyre*, 514 U.S. at 357 (citations omitted). As in *Talley*, the *McIntyre* Court recognized the historical value inherent in anonymous authorship by surveying a broad range of literary and political authors who chose to publish either anonymously or under pseudonyms, including Mark Twain, Voltaire, George Sand, George Eliot, Charles Dickens, and during the period surrounding our Revolution and founding “Publius,” “Junius,” “Cato,” “Centinel,” and “The Federal Farmer.” *Id.* at 341-43. Not yet resolved is whether the right of anonymous expression recognized in *Talley* and *McIntyre* extends to the realm of cyberspace. See, e.g., *ACLU of Georgia v. Miller*, 977 F. Supp. 1228, 1232-35 (N.D. Ga. 1997) (striking down a state statute that criminalized anonymous speech on the Internet).

cizing a foreign government near its embassy,<sup>196</sup> for example, or expressing opposition to organized government),<sup>197</sup> or restrictions that target particular types or topics of speech (singling out hate speech,<sup>198</sup> for example, or labor speech<sup>199</sup>).

The *indirect* regulation of expressive content is usually accomplished by enforcing general prohibitions against undesirable *conduct*—for example, statutes proscribing breach of the peace,<sup>200</sup> disorderly conduct,<sup>201</sup> and “annoying” pedestrians—as a means of punishing controversial *speech*. These are the famous<sup>202</sup> “hostile audience” cases.<sup>203</sup> They hold that the expression of a controversial view-

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196. See *Boos v. Barry*, 485 U.S. 312, 318-19 (1988) (striking down a District of Columbia statute criminalizing the display of any sign criticizing a foreign government within 500 feet of its embassy as an improper content-based restriction on speech in a traditional public forum).

197. See *Stromberg v. California*, 283 U.S. 359, 368-70 (1931) (overturning the conviction of a Youth Communist League member by striking down a facially vague state statute that criminalized the display of any red flag, banner, or badge employed “as a sign, symbol, or emblem of opposition to organized government”).

198. See *Collin v. Smith*, 578 F.2d 1197, 1202-07 (7th Cir. 1978) (striking down, as content-based and overly broad restrictions on speech, an array of ordinances enacted by the Village of Skokie, including a prohibition against disseminating materials that promote hatred toward persons on the basis of their heritage).

199. See *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 92-94 (1972) (striking down, as a content-based restriction on public forum speech, an ordinance that prohibited all picketing within 150 feet of a school, except for picketing involving labor disputes).

200. See *Edwards v. South Carolina*, 372 U.S. 229, 236-38 (1963) (setting aside the breach-of-the-peace convictions of 187 civil rights protesters who peacefully marched on a sidewalk around the State House grounds). The protesters carried placards reading “Down with Segregation,” “I Am Proud to be a Negro.” *Id.* at 235. They were arrested after failing to abide by a police dispersal order prompted by a tense and angry crowd of 200 to 300 onlookers. See *id.* at 235-36. The Court stated that the state may not “make criminal the peaceful expression of unpopular views.” *Id.* at 237.

201. See *Gregory v. City of Chicago*, 394 U.S. 111, 111-12 (1969) (overturning the disorderly conduct convictions of eighty-five civil rights protesters whose picketing before the mayor’s residence resulted in a hostile reaction by 1000 onlookers). The Court held that the First Amendment barred the protesters’ convictions, notwithstanding the hostile reaction of the onlookers, because the protesters remained peaceful throughout their demonstration and they were arrested only after refusing a police dispersal demand prompted solely by the onlookers’ unruliness. See *id.*

202. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (striking down an ordinance, as vague and overly broad, that prohibited sidewalk meetings by three or more people conducted “in a manner annoying to persons passing by”). The Court observed that “mere public intolerance or animosity” cannot be the basis for abridging the rights of free assembly and association. *Id.* at 615.

203. Within this famous line of cases, the most prominent are: *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963); and *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

point may not be criminalized merely because it prompts a violent reaction among onlookers enraged by the ideas expressed.<sup>204</sup>

When confronted with an *indirect* restriction on expressive content, apply the hostile audience precedents.<sup>205</sup> When confronted with a *direct* restriction on expressive content, employ Track One strict scrutiny<sup>206</sup>— unless the speech at issue falls into a category of “low-level” expression that does not enjoy full First Amendment protection.<sup>207</sup>

### 1. Direct Regulation of Content: The Court’s “Categorical” Approach

The Supreme Court employs a two-tiered “categorical” approach to direct restrictions on expressive content,<sup>208</sup> striking down such restrictions as presumptively unconstitutional<sup>209</sup> unless the regulated utterance belongs to a category of speech defined in advance as being unworthy of full protection.<sup>210</sup> These “low-level” categories of speech are denied full First Amendment protection because “such utterances are no essential part of any exposition of ideas,” and are of only “slight social value as a step to truth.”<sup>211</sup>

There are seven categories of “low-level” speech. Some are utterly unprotected by the First Amendment, while others are less-than-fully-protected. The *unprotected* categories are: (1) advocacy of imminent lawless action,<sup>212</sup> (2) obscenity,<sup>213</sup> (3) child pornography,<sup>214</sup>

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204. The fountainhead in this line of precedent is *Terminiello v. City of Chicago*, where the Court reversed the breach-of-the-peace conviction of a widely vilified Christian Veterans of America speaker who delivered an anti-Semitic and racially inflammatory speech in an auditorium filled with 800 people, while outside a crowd of 1000 “angry and turbulent” protesters strained against a cordon of police. 337 U.S. 1, 5-6 (1949). The Court found that the breach-of-the-peace ordinance “permitted [the defendant’s] conviction . . . if his speech stirred people to anger, invited dispute, or brought about a condition of unrest.” *Id.* at 5. The Court concluded that “[a] conviction resting on those grounds may not stand.” *Id.*

205. See *infra* Part III.C.2.

206. See *supra* Part III A.1.

207. See *infra* Part III C.1 for a full discussion of “low-level” speech categories.

208. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992) (discussing the Court’s two-tiered categorical approach).

209. A law that regulates speech on the basis of its content is “presumptively invalid.” *Id.* at 381-82.

210. See *id.* at 382-83 (discussing categories of speech that are not afforded full First Amendment protection, including advocacy of imminent lawless action, fighting words, obscenity, defamation, indecency, and commercial speech).

211. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

212. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (permitting punishment only for speech that is intended to produce and likely to produce imminent lawless action).

and (4) fighting words.<sup>215</sup> The *less-than-fully-protected* categories are: (1) defamatory statements,<sup>216</sup> (2) commercial speech,<sup>217</sup> and (3) lewd, profane, or indecent expression.<sup>218</sup> Speech that falls within an unpro-

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213. See *Miller v. California*, 413 U.S. 15, 24-25 (1973) (adopting test for determining whether speech is obscene and unprotected by First Amendment). Under *Miller*, expression is obscene if it satisfies the following three-prong test: (1) "whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest," (2) "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," and (3) "whether the work, taken as a whole, lacks serious literary, artistic, political, and scientific value." *Id.*

214. See *New York v. Ferber*, 458 U.S. 747, 764 (1982) (modifying *Miller*'s obscenity test as applied to child pornography). As in *Miller*, prohibited sexual conduct must be adequately defined by the applicable state law. See *id.* But unlike *Miller*, a trier of fact need not find that the material appeals to the prurient interest of the average person, the sexual conduct need not be portrayed in a patently offensive manner, and the material at issue need not be considered as a whole. See *id.* at 764-65.

215. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (finding that "fighting words" are utterly unprotected and defining fighting words as "those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace"). Subsequent to *Chaplinsky*, the Court narrowed the "fighting words" doctrine by essentially confining fighting words to unambiguous invitations to brawl. See *Cohen v. California*, 403 U.S. 15, 20 (1971) (finding that the defendant could not be punished for invoking fighting words because there was "no showing that anyone who saw [the defendant] was in fact violently aroused or that [he] intended such a result").

216. See *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) (adopting "actual malice" standard under which public officials are precluded from recovering damages for defamatory falsehoods uttered in reference to their official conduct, unless they can prove that the statement was made "with knowledge that it was false or with reckless disregard of [its truth]").

217. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980) (adopting the test for permissible regulations of commercial speech). In applying the test, the Court asks first "whether the [commercial] expression is protected by the First Amendment." *Id.* This will depend on whether the commercial expression concerns lawful activity and is not misleading. See *id.* Second, the Court asks "whether the asserted governmental interest is substantial." *Id.* If the first two questions are answered in the affirmative, the Court then asks "whether the regulation [of commercial expression] directly advances the governmental interest asserted." *Id.* If the answer to this question is "yes," the Court finally asks "whether [the regulation] is not more extensive than is necessary to serve [the governmental] interest." *Id.* If the regulation is more extensive than necessary, it is invalid under the First Amendment. See *id.*

218. This category, often referred to simply as "indecent" speech, is not governed by any particular test. Instead, judicial scrutiny of indecent speech will vary depending on the *medium* of expression and the *context* in which the speech is uttered and received. See, e.g., *Cohen v. California*, 403 U.S. 15, 26 (1971) (holding that the First Amendment precluded the defendant's breach-of-the-peace conviction for walking through a courthouse corridor wearing a jacket bearing the words "Fuck the Draft" by refusing to "indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process"); *FCC v. Pacifica Found.*, 438 U.S. 726, 751 (1978) (upholding the FCC's limited authority to sanction a radio station for the daytime broadcast of George Carlin's "filthy words" monologue in which he repeatedly spoke the seven indecent words that "you couldn't say . . . you definitely wouldn't say, ever," on the air: "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits"); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211-14 (1975) (striking down, as overly broad, an ordinance banning the showing of any films containing nudity at drive-in theaters).



tected category is generally vulnerable to content-based regulation.<sup>219</sup> But content-based restrictions are not necessarily valid when applied to the less-than-fully-protected categories.<sup>220</sup> Such restrictions are gauged under the particular form of intermediate scrutiny developed for each category. The following Section takes a closer look at each of these “low-level” categories.

### *a. Advocacy of Imminent Lawless Action*

The advocacy of illegal conduct is a category of speech that enjoys no protection under the First Amendment.<sup>221</sup> Throughout much of the twentieth century, this category was so broadly conceived that dissident political speech fell within its ambit. It was used to criminalize anti-war speech during World War I,<sup>222</sup> protests against U.S. mili-

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where the screen is visible from a public street or place); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 127 (1989) (striking down an FCC ban on indecent “dial-a-porn” communications by stressing the “emphatically narrow” holding in *Pacifica* and finding that “[b]ecause the statute’s denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages . . . , the ban does not survive constitutional scrutiny”); *Reno v. ACLU*, 521 U.S. 844, 866-70, 885 (1997) (invalidating a ban on the Internet transmission of “indecent” and “patently” offensive communications because the “scarcity of available frequencies” and the “invasive nature” of other forms of media recognized in *Pacifica* “are not present in cyberspace, [and] the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship”); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 732-33 (1996) (upholding a provision permitting cable television operators to prohibit indecent sex-related programming, but invalidating a provision permitting cable operators to ban such programming from public access channels, and striking down a provision requiring cable operators to place indecent programming on a single, segregated channel, where that channel was to be blocked from viewer access unless a viewer, in advance, requested access, as “not appropriately tailored to achieve the basic, legitimate objective of protecting children from exposure to patently offensive material”).

219. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-86 (1992). But the government is not free, even within the confines of an unprotected category, to single particular viewpoints for special prohibition. See *id.* at 384.

220. See, e.g., *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478-81 (1995) (striking down a federal ban on disclosure of alcohol content on beer labels as a content-based restriction on commercial speech not directly advancing the “governmental interest [in preventing malt liquor alcohol strength wars] in a direct and material way”).

221. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (permitting punishment for speech that is intended to produce and likely to produce imminent lawless action).

222. See *Debs v. United States*, 249 U.S. 211, 212, 216-17 (1919) (upholding a ten-year jail sentence predicated on an Espionage Act conviction for a Socialist Party leader’s expression of anti-war sentiments during a public speech, where “the jury [was] most carefully instructed that [it] could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service . . . and unless the defendant had the specific intent to do so in his mind”); *Frohwerk v. United States*, 249 U.S. 204, 205-06, 210 (1919) (sustaining the defendant’s Espionage Act conviction and ten-year jail sentence for preparing and publishing anti-war articles in Missouri’s German-

tary intervention in the Bolshevik Revolution,<sup>223</sup> radical labor speech by the Industrial Workers of the World,<sup>224</sup> abstract calls for revolutionary mass action,<sup>225</sup> and mere membership in the Communist Party.<sup>226</sup> Gradually—through the influence of Justices Louis Brandeis<sup>227</sup> and Oliver Wendell Holmes, Jr.<sup>228</sup>—the scope of this category

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language newspaper that spoke of “the unconquerable spirit and undiminished strength of the German nation, and characterized its own discourse as words of warning to the American People”); *Schenck v. United States*, 249 U.S. 47, 49-53 (1919) (upholding the Espionage Act conviction of a Socialist Party General Secretary who, in opposition to World War I, mailed draft-age men certain leaflets urging resistance to the draft, denouncing conscription, and impugning the motives of those backing the war effort).

223. See *Abrams v. United States*, 250 U.S. 616, 617-18, 624 (1919) (sustaining the Espionage Act convictions of five defendants who distributed leaflets on the streets of New York City opposing U.S. military intervention in Russia to help overthrow the Bolshevik Revolution). The leaflets denounced the intervention, advocated solidarity with the Russian workers, and urged curtailment of the production of ordnance and ammunition to be used in the incursion. See *id.* at 617.

224. See SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 25-26 (1990) (recognizing that “[v]irtually all war critics were convicted and sentenced to long prison terms,” and because the “government directed its heaviest attacks against the Socialist Party and the IWW, neither [group] regained its prewar strength”); David M. Rabban, *The IWW Free Speech Fights and Popular Conceptions of Free Expression Before World War I*, 80 VA. L. REV. 1055, 1062-71 (1994) (recounting that “[o]fficials . . . responded to the free speech fights . . . by confiscating newspapers sympathetic to IWW positions, and by arresting people selling those newspapers”) (citations omitted).

225. See *Gitlow v. New York*, 268 U.S. 652, 654-58, 672 (1925) (sustaining the conviction of a member of the American Communist Party under New York’s criminal anarchy law for writing and disseminating a pamphlet, “The Left Wing Manifesto,” that advocated revolution in the abstract, but fell short of urging any specific, immediate illegal action).

226. See *Whitney v. California*, 274 U.S. 357, 366-72 (1927) (sustaining the California Criminal Syndicalism Act conviction of a woman who merely attended the convention of, and sought to help organize, the Communist Labor Party of California), *overruled in part by Brandenburg v. Ohio*, 395 U.S. 444 (1969).

227. See *id.* at 377 (Brandeis, J., concurring) (stressing that advocacy of illegal action cannot be criminalized unless the danger posed is imminent and “unless the evil apprehended is relatively serious”).

228. See *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (contending that advocacy of illegal conduct may be legitimately suppressed only where it creates an “emergency that makes it immediately dangerous to leave the correction of evil counsels to time”).

was narrowed,<sup>229</sup> such that it came to embrace only *imminent* and not merely theoretical calls for illegal action.<sup>230</sup>

The prevailing test, established in *Brandenburg v. Ohio*,<sup>231</sup> permits punishment only for incitement that is both *intended* and *likely* to produce “imminent lawless action.”<sup>232</sup> Under this standard, the Supreme Court reversed the conviction of an NAACP official who, while speaking to several hundred people in support of a boycott, said: “If we catch any of you going in any of those racist stores, we’re going to break your damn neck.”<sup>233</sup> The Court held that this speech, however charged with emotion, did not transcend the bounds of *Brandenburg* because it did not call for imminent lawless action.<sup>234</sup> The Court stressed that mere advocacy of illegal conduct down the road is not enough to constitute advocacy of imminent lawless action.<sup>235</sup>

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229. See, e.g., *Fiske v. Kansas*, 274 U.S. 380, 382-83, 387 (1927) (overturning, as “an arbitrary and unreasonable exercise of the police power of the state,” the Criminal Syndicalism Act conviction of an IWW organizer, where the government’s only proof was the defendant’s possession of the preamble to the IWW constitution, which advocated the need for class struggle between “the working class and the employing class, [allowing workers to] take possession of the earth and the machinery of production”); *De Jonge v. Oregon*, 299 U.S. 353, 361-66 (1937) (reversing the conviction of a defendant who had merely assisted in conducting a public meeting of the Communist Party to support a longshoremen’s strike, where the defendant was found to be “entitled to discuss the public issues of the day and thus in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances”); *Herndon v. Lowry*, 301 U.S. 242, 247-50, 261 (1937) (overturning the conviction of a Communist Party organizer found guilty of inciting an insurrection as “an unwarranted invasion of the right of freedom of speech,” where the defendant only possessed pamphlets demanding federal unemployment insurance, social security, emergency relief for farmers, and equal rights for blacks, but containing no references to violent revolution).

230. See, e.g., *Noto v. United States*, 367 U.S. 290, 299-300 (1961) (reversing a conviction for membership in the Communist Party, where evidence did not establish that the Party engaged in illegal advocacy, but rather “engaged in ‘mere doctrinal justification of forcible overthrow’”). The Court stressed that “[t]he mere abstract teaching of Communist theory . . . and 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.” *Id.* at 297-98.

231. 395 U.S. 444, 445-46 (1969) (overturning a Ku Klux Klansman’s conviction under Ohio’s Criminal Syndicalism Act, where the defendant was videotaped at a Klan rally declaring that “[i]f our [government] continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance taken”).

232. *Id.* at 447. This test supersedes the “clear and present danger” test first adopted in *Schenck v. United States*, 249 U.S. 47, 52 (1919); see also *Brandenburg*, 395 U.S. at 350-52 (wherein the Court discusses and rejects the “clear and present danger,” “bad tendency,” and “express incitement” tests adopted by the Court prior to its decision in *Brandenburg*).

233. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 902 (1982).

234. See *id.* at 928.

235. See *id.* at 928-29. Two recent cases have tested the limits of *Brandenburg*’s command that only the advocacy of *imminent* lawless action is unprotected by the First Amendment. See *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 256 (4th Cir. 1997) (holding that *Brandenburg* was no obstacle to a wrongful death action brought by the family of a contract murder victim against the publisher of *Hit Man*, a book furnishing detailed instructions on how to commit a contract mur-

*b. Fighting Words and the Controversy over Hate Speech*

Another category of speech that enjoys no protection under the First Amendment is “fighting words,” originally defined in *Chaplinsky v. New Hampshire*<sup>236</sup> as “those [statements] which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>237</sup> *Chaplinsky* is the first and last decision in which the Supreme Court has ever affirmed a “fighting words” conviction.<sup>238</sup> Time and time again—in *Street v. New York*,<sup>239</sup> *Cohen v. California*,<sup>240</sup> *Gooding v. Wilson*,<sup>241</sup> *Rosenfeld v. New Jersey*,<sup>242</sup> *Lewis v. New Orle-*

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der, because the book “constitutes the archetypal example of speech which, because it methodically prepares and steels its audience to specific criminal conduct through exhaustively detailed instructions on the planning, commission, and concealment of criminal conduct, finds no preserve in the First Amendment”), *cert. denied*, 523 U.S. 1074 (1998); *Planned Parenthood v. American Coalition of Life Activists*, 41 F. Supp. 2d 1130, 1132-33 (D. Or. 1999) (issuing a permanent injunction shutting down an anti-abortion website that listed the names and addresses of abortion providers, included photographs of doctors who performed abortions portrayed as old-west style “wanted” posters, and crossed out the names of these doctors after they were murdered). The court sidestepped *Brandenburg* at an earlier stage in the litigation by ruling that the facts were governed by the body of precedent concerning “true threats.” *Planned Parenthood v. American Coalition of Life Activists*, 23 F. Supp. 2d 1182, 1188-89 (D. Or. 1998). Concluding that the website constituted an unprotected “threat,” the court ruled that shutting down the website would not offend the First Amendment. *Planned Parenthood*, 41 F. Supp. 2d at 1155.

236. 315 U.S. 568 (1942).

237. *Id.* at 572.

238. *Id.* at 569, 574 (upholding the defendant’s conviction under a state statute that, saved by a narrowing construction, punished a spectrum of derisive statements no broader than “fighting words,” where the defendant called a city marshal “a God damned racketeer” and “a damned Fascist”).

239. 394 U.S. 576, 578-81 (1969) (vacating the defendant’s conviction under New York’s flag desecration statute, where the defendant publicly burned an American flag in response to the murder of a civil rights leader, as “unconstitutionally applied . . . because it permitted [punishment] merely for speaking defiant or contemptuous words about the American flag”). The Court found that the defendant’s “remarks were [not] so inherently inflammatory as to come within that small class of ‘fighting words’ which are ‘likely to provoke the average person to retaliation, and thereby cause a breach of the peace.’” *Id.* at 592 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942)).

240. 403 U.S. 15, 16-20 (1971) (overturning, as not likely “to provoke *others* to acts of violence,” the defendant’s breach-of-the-peace conviction for walking through a courthouse corridor wearing a jacket bearing the words “Fuck the Draft” because, “[w]hile [fuck] . . . is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not ‘directed to the person of the hearer’ [and no] individual . . . could reasonably have regarded the words on [the] jacket as a direct personal insult”) (citations omitted).

241. 405 U.S. 518, 519-20 (1972) (striking down, on vagueness and overbreadth grounds, a Georgia statute criminalizing the use of “opprobrious words or abusive language, tending to cause a breach of the peace” in the context of a clash between police and anti-war demonstrators at an army induction center). While the police attempted to move the defendant away from the facility’s entrance, a scuffle ensued, during which the defendant exclaimed: “You son of a bitch, I’ll choke you to death,,” “White son of a bitch, I’ll kill you,” and “You son of a bitch, if you ever put your hands on me again, I’ll cut you all to pieces.” *Id.* at 524. In asserting that Georgia

ans,<sup>243</sup> *Brown v. Oklahoma*,<sup>244</sup> and *Texas v. Johnson*—<sup>245</sup> the Court rejected opportunities to breathe new life into the doctrine. If the “fighting words” category is not entirely dead, as many scholars believe,<sup>246</sup> it is at least limited now to unambiguous invitations to brawl<sup>247</sup> specifically directed by one person to another.<sup>248</sup>

In the 1980s, advocates for hate speech regulations attempted to revitalize the fighting words doctrine—only to fail miserably. In the wake of *Doe v. University of Michigan*<sup>249</sup> and *R.A.V. v. City of St. Paul*,<sup>250</sup> efforts to regulate hate speech would appear to be futile—either because such prohibitions are inherently vulnerable to over-

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courts failed properly to limit the statute’s reach, Justice Brennan, writing for the Court, further limited the scope of the “fighting words” doctrine by confining it to words having “a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.” *Id.*

242. 408 U.S. 901, 901-04 (1972) (invoking *Gooding* and vacating the conviction of a defendant who used the word “mother-fucker” during a public school board meeting on four occasions—to describe the teachers, the school board, the town, and the county).

243. 408 U.S. 913, 913 (1972) (invoking *Gooding* and vacating the conviction of a woman who called the officers “God damn mother fuckers” during her son’s arrest).

244. 408 U.S. 914, 917 (1972) (invoking *Gooding* and vacating the conviction of a Black Panther who called police officers “mother fucking fascist pig cops” during his arrest).

245. 491 U.S. 397, 402-06 (1989) (striking down a Texas flag desecration statute by holding that the defendant’s flag burning during a rally protesting President Reagan was expressive conduct under the First Amendment because the government’s asserted interests were insufficient to controvert First Amendment guarantees). The Court rejected the notion that flag burning falls “within that small class of ‘fighting words’ that are ‘likely to provoke the average person to retaliation, and thereby cause a breach of the peace,’ . . . or an invitation to exchange fisticuffs.” *Id.* at 409 (citations omitted).

246. See, e.g., Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 536 (1980) (describing the “fighting words” doctrine as “nothing more than a quaint remnant of an earlier morality that has no place in a democratic society dedicated to the principle of free expression”).

247. See *Johnson*, 491 U.S. at 409 (limiting the fighting words doctrine to “a direct personal insult or an invitation to exchange fisticuffs”); *Cohen v. California*, 403 U.S. 15, 20 (1971) (finding a provocative epithet insufficient for “fighting words” and requiring a more direct personal affront).

248. See *Gooding v. Wilson*, 405 U.S. 518, 524 (1972) (finding that, for the “fighting words” doctrine to apply, a statement must be specifically and individually directed to a particular target).

249. 721 F. Supp. 852, 853, 886-87 (E.D. Mich. 1989) (striking down, on overbreadth and vagueness grounds, a campus hate speech code prohibiting “‘stigmatizing or victimizing’ individuals or groups on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status”).

250. 505 U.S. 377, 380, 396 (1992) (striking down an ordinance criminalizing “bias-motivated disorderly conduct” that singled out the public display of symbols that “arouse anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender”). The Court ruled that the statute was fatally flawed because it singled out a particularized list of hateful sentiments as a form of “content-based, even viewpoint-based, discrimination.” *Id.* at 394.

breadth and vagueness challenges,<sup>251</sup> or because they necessarily entail a form of viewpoint discrimination that is presumptively unconstitutional.<sup>252</sup>

*c. Obscenity, Pornography, and Profanity*

This Section considers three distinct categories of low-level speech: obscenity, child pornography, and lewd, profane, or indecent expression. Speech will not be deemed unprotected merely because it is overtly sexual.<sup>253</sup> Within the broad spectrum of sexually explicit material, only the narrow subsets of obscenity<sup>254</sup> and child pornography<sup>255</sup> may be criminalized. The Supreme Court's struggle to define obscenity—once prompting Justice Potter Stewart to declare “I know it when I see it”<sup>256</sup>—ultimately convinced some members of the Court that the government cannot legitimately regulate sexual expression at all.<sup>257</sup> But such a view has never commanded a majority of the Court, and the test for obscenity announced in 1973 remains the standard today. That test, from *Miller v. California*,<sup>258</sup> provides that expression will be deemed obscene, and hence utterly unprotected by the First Amendment, if it satisfies each of the following three elements: (1)

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251. See, e.g., *Doe*, 721 F. Supp. 852, 886-87 (E.D. Mich. 1989) (striking down a campus hate speech code on vagueness and overbreadth grounds).

252. See, e.g., *R.A.V.*, 505 U.S. at 380 (1992) (invalidating hate speech ordinance because content-based or viewpoint-based regulations of speech are presumptively unconstitutional, unless such regulations survive strict judicial scrutiny).

253. See, e.g., *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (reversing the obscenity conviction of a film exhibitor for showing “Carnal Knowledge, a highly-acclaimed Hollywood film that contained occasional scenes of nudity, but no graphic depictions of sexual intercourse, on the grounds that obscenity prosecutions cannot be premised on materials that fall short of hard-core sexual acts squarely depicted”).

254. See *Miller v. California*, 413 U.S. 15, 27 (1973) (holding that obscenity is unprotected by the First Amendment and providing that an obscenity prosecution requires that the purportedly obscene materials “depict or describe patently offensive ‘hardcore’ sexual conduct specifically defined by the regulating state law, as written or construed”).

255. See *New York v. Ferber*, 458 U.S. 747, 764 (1982) (finding that “[w]hen a definable class of material . . . bears so heavily and pervasively on the welfare of children engaged in its production, . . . the balance of competing interests is clearly struck and [it is] permissible to consider these materials as without the protection of the First Amendment”).

256. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

257. See *Liles v. Oregon*, 425 U.S. 963, 965 (1976) (Brennan, J., dissenting) (recognizing “the difficulty and arbitrariness inherent in any attempt to articulate a standard of obscenity”); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 70-73 (1973) (Douglas, J., dissenting) (finding no constitutional basis for a rule making people “criminally responsible” for failing “to take affirmative steps to protect the consumer against literature, books, or movies offensive to those who temporarily occupy the seats of the mighty”); *Jacobellis v. Ohio*, 378 U.S. 184, 196-97 (1964) (Black, J., concurring) (finding that an obscenity conviction for “exhibiting a motion picture [containing nudity] abridges the freedom of the press as safeguarded by the First Amendment”).

258. 413 U.S. 15 (1973).

“the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest,”<sup>259</sup> (2) the work “depicts or describes, in a patently offensive way,”<sup>260</sup> sexual conduct specifically defined by the applicable state law, and (3) “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”<sup>261</sup>

In a less-than-helpful elaboration of the first prong, the Court stressed that a “prurient” interest in sex is one that is “shameful or morbid” rather than “normal” and “healthy.”<sup>262</sup> The “patently offensive” requirement in prong two is gauged under local community standards,<sup>263</sup> but the “lacks serious . . . value” requirement in prong three is judged under a national, objective test.<sup>264</sup> Though the private possession of obscene material is protected from prosecution,<sup>265</sup> the public exhibition of such material—even in a theater open only to consenting adults—is not.<sup>266</sup> Likewise, there is no protection for importing,<sup>267</sup> transporting,<sup>268</sup> or distributing<sup>269</sup> obscene material, even if solely for private use.<sup>270</sup>

Under *New York v. Ferber*,<sup>271</sup> child pornography may be criminalized under the *Miller* obscenity test as modified in the following ways.<sup>272</sup> As under *Miller*, the prohibited conduct must be adequately defined by a state statute.<sup>273</sup> But unlike *Miller*, a trier of fact need not find that the material appeals to the prurient interest of the average person.<sup>274</sup> Further, it is not required that the sexual conduct be portrayed in a patently offensive manner,<sup>275</sup> and the material at issue need not be considered as a whole.<sup>276</sup> In another departure from

259. *Id.* at 24.

260. *Id.*

261. *Id.*

262. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498-99 (1985).

263. *See Smith v. United States*, 431 U.S. 291, 302 (1977).

264. *See Pope v. Illinois*, 481 U.S. 497, 500-01 (1987).

265. *See Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (holding that “statutes regulating obscenity . . . do not . . . reach into the privacy of one’s own home”).

266. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973).

267. *See United States v. 12 200-Foot Reels*, 413 U.S. 123, 128 (1973).

268. *See United States v. Orito*, 413 U.S. 139, 143 (1973).

269. *See United States v. Reidel*, 402 U.S. 351, 356 (1971).

270. *See 12 200 Foot Reels*, 413 U.S. at 128.

271. 458 U.S. 747 (1982).

272. *Id.* at 764-65.

273. *See id.* at 764.

274. *See id.* at 764-65.

275. *See id.* at 765.

276. *See id.*

traditional obscenity precedents, even the private possession of child pornography may be criminalized.<sup>277</sup>

In a unique ordinance drafted by feminist scholars, the City of Indianapolis attempted to ban *all* pornography as a species of hate literature.<sup>278</sup> The ordinance defined "pornography" as:

[T]he graphic sexually explicit subordination of women, whether in pictures or in words, that also includes, one or more of the following . . . (1) women . . . presented as sexual objects who enjoy pain or humiliation; (2) women . . . presented as sexual objects who experience sexual pleasure in being raped; (3) women . . . presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt . . . ; (4) women . . . presented as being penetrated by objects or animals; (5) women . . . presented in scenarios of degradation, injury, abasement, torture . . . ; or (6) women . . . presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.<sup>279</sup>

In striking down this ordinance, the Seventh Circuit held that its restrictions were viewpoint-based<sup>280</sup> because "[s]peech that 'subordinates' women [is] forbidden, [but speech] that portrays women in positions of equality is lawful," no matter how graphic the sexual content.<sup>281</sup> This, the court concluded, is "thought control. Those who espouse the approved view may use sexual images; those who do not, may not."<sup>282</sup>

Turning, finally, to lewd, profane, or indecent expression, this "low-level" category is not governed by any particular test. Nevertheless, the cases do permit a few conclusions about how such speech will be treated in the courts. Under *Cohen v. California*,<sup>283</sup> profanity in the service of core political speech will receive heightened indul-

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277. See *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (recognizing that, "[g]iven the gravity of the State's interests in this context, [it is permissible to] constitutionally proscribe the possession and viewing of child pornography").

278. See *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 324-25 (7th Cir. 1985).

279. *Id.* at 324.

280. See *id.* at 332-33.

281. *Id.* at 328.

282. *Id.* The court found that, in enacting the ordinance, the legislature acted as director of approved viewpoints, regulating noxious sentiment to promote the purification of our culture. See *id.* at 328-30. The Court refused to declare government "the great censor and director of which thoughts are good for us." *Id.* at 330.

283. 403 U.S. 15 (1971).



gence<sup>284</sup>—and the government cannot remove certain profane words, like “fuck,” from the lexicon of public discourse.<sup>285</sup> Conversely, *Young v. American Mini-Theatres*,<sup>286</sup> *Renton v. Playtime Theatres*,<sup>287</sup> and *Barnes v. Glen Theatre*<sup>288</sup> indicate that, when it comes to adult theaters and nude dancing, courts will be especially deferential to restrictions that are justified as targeting the harmful “secondary effects” of such establishments. The cases featuring broadcast,<sup>289</sup> cable,<sup>290</sup> and Internet<sup>291</sup> regulation of “indecenty” make clear that judicial scrutiny will vary depending on the medium of expression. Finally, *FCC v. Pacifica Foundation*,<sup>292</sup> *Erznoznik v. City of*

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284. *Id.* at 16-20 (overturning the defendant’s breach-of-the-peace conviction for walking through a courthouse corridor wearing a jacket bearing the words “Fuck the Draft” as an invalid content-based restriction on speech).

285. *See id.*

286. 427 U.S. 50, 70-73 (1976) (upholding a zoning restriction on the location of adult theaters that forced their dispersal to prevent the creation of “red light” districts). The Court upheld the restriction because “[i]t is [the] secondary effects [of adult theaters] it attempts to avoid, not the dissemination of ‘offensive speech.’” *Id.* at 71 n.34.

287. 475 U.S. 41, 48-49 (1986) (upholding, as a content-neutral restriction, a zoning ordinance requiring the concentration of adult movie theaters, where the regulatory aim of the ordinance was directed at the crime and declining property values frequently accompanying adult theaters, not the sexually explicit nature of the films exhibited in such theaters).

288. 501 U.S. 560, 565-67, 581 (1991) (upholding Indiana’s public indecency statute as applied to nude dancing, where the statute required dancers to wear pasties and G-strings, on the grounds that nude dancing is only marginally within the ambit of the First Amendment and the ordinance only minimally restricted the expressive abilities of the dancers). In a pivotal concurrence, Justice Souter focused “not on the possible sufficiency of society’s moral views [as a regulatory justification], but on the State’s substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified [here].” *Id.* at 582 (Souter, J., concurring).

289. *See FCC v. Pacifica Found.*, 438 U.S. 726, 747-48 (1978) (upholding the FCC’s authority to sanction a radio station for the daytime broadcast of George Carlin’s “filthy words” monologue by stressing the sharply diminished speech rights of broadcasters vis-a-vis their counterparts in the print media).

290. *See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 733 (1996) (striking down two of three provisions governing indecent, sex-related programming on cable television). The plurality opinion leaves open the possibility that a lesser First Amendment standard may eventually apply to cable television operators.

291. *See Reno v. ACLU*, 521 U.S. 844, 849 (1997) (striking down, as an unconstitutional abridgment of free speech, a ban on the Internet transmission of indecent communications). The Court found that the factors justifying heightened regulation of broadcast media are not present in cyberspace. *See id.* at 868-70. These factors include a history of extensive government regulation of broadcasting, the scarcity of available frequencies at inception, and the “invasive” nature of the medium. *See id.* In the absence of these factors, there is no basis for qualifying the level of First Amendment scrutiny that should be applied to content-based restrictions on Internet speech. *See id.* Accordingly, speech in cyberspace enjoys the same enhanced protection as that reserved for the print media. *See id.*

292. 438 U.S. 726, 748-49 (1978) (upholding the FCC’s authority to sanction a radio station for the afternoon broadcast of George Carlin’s “filthy words” monologue because it was transmitted at a time of day when children would likely be listening). The Court stressed that the

*Jacksonville*,<sup>293</sup> *Sable Communications v. FCC*,<sup>294</sup> and *Reno v. ACLU*<sup>295</sup> demonstrate that indecent speech faces greater judicial hostility the more it is seen to bombard an unwilling audience.

d. *Commercial Speech*

The prevailing test for commercial speech is derived from *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*.<sup>296</sup> Commercial speech—which the court defined as “expression related solely to the economic interests of the speaker and its audience”<sup>297</sup>—usually means commercial advertising. Any restriction on commercial speech must satisfy the test articulated in *Central Hudson*. The test proceeds in four steps. First, is the advertisement protected at all by the First Amendment?<sup>298</sup> Such protection is withheld unless the advertisement concerns lawful activity and is not misleading.<sup>299</sup> Second, is the asserted governmental interest in regulating the speech “substantial”?<sup>300</sup> If the first two questions are answered yes, then third, does the regulation *directly advance* the asserted govern-

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broadcast media “have established a uniquely pervasive presence in the lives of all Americans.” *Id.* at 748. Further, “indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of the intruder.” *Id.* The Court’s holding turned on the fact that, “[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content [and] . . . broadcasting is uniquely accessible to children, even those too young to read.” *Id.* at 748-49.

293. 422 U.S. 205, 217-18 (1975) (striking down, as facially invalid, an ordinance banning the showing of any films containing nudity at drive-in theaters, where the screen was visible from a public street or place). The Court found that “the limited privacy interests of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content.” *Id.* at 212. In so ruling, the Court rejected the city’s argument that it was free to protect the public, as a “captive audience,” from exposure to offensive speech, because: (1) the regulated expression does not bombard the home and it does not affect an audience trapped in an enclosed space, and (2) the state is sharply limited in its ability to single out one type of supposedly “offensive speech” and banning it alone. *See id.* at 209-10.

294. 492 U.S. 115, 126 (1989) (striking down, as not narrowly tailored, an FCC ban on indecent “dial-a-porn” communications). The Court stressed that, in contrast to broadcasting, where a person can turn on the radio and be taken by surprise by an indecent message, “the dial-it-medium requires the listener to take affirmative steps to receive the communication.” *Id.* at 127-28.

295. 521 U.S. 844, 868-69 (1997) (striking down the Communication and Decency Act’s ban on indecent Internet communications because, in contrast to broadcasting, “‘communications over the Internet do not ‘invade’ an individual’s home or appear on one’s computer screen unbidden’”) (quoting *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

296. 447 U.S. 557 (1980).

297. *Id.* at 561 (citations omitted).

298. *See id.* at 566.

299. *See id.*

300. *Id.*

mental interest?<sup>301</sup> If yes, then fourth and finally, could the governmental interest be served by a more limited restriction on the speech?<sup>302</sup> If so, the regulation is invalid under the First Amendment.<sup>303</sup>

In applying the *Central Hudson* test, bear in mind that the Supreme Court has relaxed its enforcement of the fourth prong, no longer treating it as a “least restrictive means” test.<sup>304</sup> But the Court will strike down, as overly paternalistic, those regulations in which the government broadly proscribes the dissemination of prices<sup>305</sup> or other consumer-oriented information regarding the contents or characteristics of a product.<sup>306</sup>

*e. Tortious Expression: Defamation, Invasion of Privacy, and Infliction of Emotional Distress*

Throughout much of our history, critics of government sought in vain to establish legal protection for their utterances.<sup>307</sup> Prior to 1804, even a truthful statement was no defense to a seditious libel prosecution.<sup>308</sup> But in the rough and tumble of political debate, even falsehoods may be blurted out in the heat of the moment. In *New York Times Company v. Sullivan*,<sup>309</sup> the Supreme Court took the momentous step of affording limited legal protection to *false* statements uttered by critics of government officials.<sup>310</sup> In *Sullivan*, the Court

301. *See id.*

302. *See id.*

303. *See id.* at 561.

304. *See* Board of Trustees of SUNY v. Fox, 492 U.S. 469, 480 (1989) (holding that the fourth prong of *Central Hudson*’s test is satisfied where the regulation is “reasonable,” with a scope “in proportion to the interest served,” or where the regulation employs “a means narrowly tailored to achieve the desired objective”).

305. *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (striking down a Virginia statute banning pharmacists from publishing any price information about prescription drugs, which effectively thwarted any dissemination of prescription drug prices, because only licensed pharmacists were authorized to disperse such drugs).

306. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (striking down a state law banning the advertisement of retail liquor prices because the statute was not sufficiently tailored to meet its stated objectives); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490-91 (1995) (striking down, as not directly advancing the governmental interest in preventing malt liquor “strength wars,” a federal ban on the disclosure of alcohol content on beer labels).

307. *See generally* LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 3-15 (1985) (tracing the bleak history of restrictions on seditious speech).

308. It was not until Alexander Hamilton’s pioneering accomplishment in *People v. Crosswell*, 3 Johns. Cases 336 (N.Y. 1804) that a judicial decision recognized that truth should be a defense to a charge of seditious libel. *Id.* at 376-77, 393-94.

309. 376 U.S. 254 (1964).

310. *Id.* at 279-80 (holding that a public official is prohibited from “recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was

reversed a \$500,000 libel award to a Southern official who, following a clash with civil rights demonstrators, identified certain factual inaccuracies in a published advertisement recounting the event.<sup>311</sup> Though most of the inaccuracies were trivial,<sup>312</sup> the advertisement did accuse local police officers of padlocking a campus dining hall when in fact they never did.<sup>313</sup> The issue before the Court was whether that type of falsehood, uttered in the heat of a civil rights protest, should leave the speakers vulnerable to a huge libel award.<sup>314</sup>

Recognizing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government officials,"<sup>315</sup> the Court established qualified protection for defamatory falsehoods uttered by critics of government officials.<sup>316</sup> The Court observed that "erroneous statement is inevitable in free debate, [and that] it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" <sup>317</sup> As such, the Court held that public officials are precluded from recovering damages for defamatory falsehoods uttered in reference to their official conduct unless they can prove "that the statement was made . . . with knowledge that it was false or with reckless disregard of [its truth]." <sup>318</sup>

This "*Times* malice" standard extends not only to public officials but also to public figures<sup>319</sup> (i.e., people who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large").<sup>320</sup> As for libel actions by purely private figures, the *Times* malice standard limits

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made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not").

311. *Id.* at 256-57.

312. The advertisement incorrectly asserted that the students sang "My Country, 'Tis of Thee" during demonstrations at the Georgia State Capitol and that Rev. Dr. Martin Luther King, Jr. was arrested seven times. *See id.* at 258. In actuality, the students sang the "Star Spangled Banner" and King was arrested on only four occasions. *See id.* at 258-59.

313. *See id.* at 259.

314. *See id.* at 271.

315. *Id.* at 270 (citations omitted).

316. *See id.* at 264-65.

317. *Id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). The Court further recognized that "compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.'" *Id.* at 279.

318. *Id.* at 279-80.

319. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164 (1967).

320. *Id.*

only the availability of punitive damages; compensatory damages may be awarded merely upon proof that the falsehood was published negligently.<sup>321</sup> The *Times* malice standard has now been extended to other tortious statements—including false light invasions of privacy<sup>322</sup> and intentional infliction of emotional distress.<sup>323</sup>

## 2. Indirect Regulation of Content: The “Hostile Audience” Cases

In contrast to *direct* regulation of expressive content, which is usually accomplished by restrictions affirmatively suppressing a particular message,<sup>324</sup> content is regulated *indirectly* by punishing a speaker for the *reaction* to the speaker’s controversial speech.<sup>325</sup> These are the so-called “hostile audience” cases, which hold that the expression of a controversial viewpoint may not be criminalized merely because it prompts a violent response amongst onlookers enraged by the ideas expressed.<sup>326</sup>

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321. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-49 (1974).

322. See *Time, Inc. v. Hill*, 385 U.S. 374, 376-77, 387-88 (1967) (addressing the false light actionability of a magazine article reporting that “a new play portrayed [a true-crime] experience suffered by [the plaintiff] and his family,” and holding that a state statute may not “redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth”); *Cantrell v. Forest City Publ’g Co.*, 419 U.S. 245, 247, 251-52 (1974) (addressing the false light actionability of a series of newspaper articles stressing the plaintiff’s “abject poverty” in interviews covering the accidental death of the plaintiff’s husband, and applying *Sullivan*’s actual malice standard to reject the common law’s malice standard that focused on “the defendant’s attitude toward the plaintiff’s privacy [instead of] the truth or falsity of the material published”).

323. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (declining to find “a state’s interest in protecting public figures from emotional distress . . . sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved”). In *Hustler*, the Court dealt with disparaging remarks about Jerry Falwell appearing in a parodic ad in the magazine. See *id.* at 48. The Court held that “public figures and public officials may not recover [for intentional infliction of emotional distress] without showing . . . actual malice.” *Id.* at 56.

324. See, e.g., *Boos v. Barry*, 485 U.S. 312, 315, 334 (1988) (striking down, as an impermissible content-based restriction, a District of Columbia statute criminalizing the display of any sign criticizing a foreign government within 500 feet of its embassy).

325. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 409 (1997) (recognizing that the Court will not permit “the government to assume that every expression of a provocative idea will incite a riot, [but] requires careful consideration of the actual circumstances surrounding such expression, asking whether the expression ‘is directed to inciting or producing imminent lawless action and is likely to [do so]’”) (citation omitted).

326. See, e.g., *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) (recognizing that the Constitution “does not permit a state to make criminal the peaceful expression of unpopular views”); *Johnson*, 491 U.S. at 409 (overturning a flag-burning conviction on the grounds that “the government may [not] ban the expression of certain disagreeable ideas on the unsupported pre-

The fountainhead in this line of precedent is *Terminiello v. City of Chicago*,<sup>327</sup> where the Supreme Court reversed the breach-of-the-peace conviction of a widely vilified speaker whose anti-Semitic and racially inflammatory speech produced a near riot.<sup>328</sup> Calling his antagonists "'slimy scum,' 'snakes,' [and] 'bedbugs,'"<sup>329</sup> the defendant delivered a venomous speech to an auditorium packed with 800 supporters,<sup>330</sup> while outside, straining against a cordon of police, "'a surging, howling mob [of 1000 people] hurl[ed] epithets' at individuals attempting to enter and 'tried to tear their clothes off.'"<sup>331</sup> At trial, the defendant's conviction followed a jury instruction that authorized punishment for speech that "'stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance,'"<sup>332</sup> Holding that this instruction violated the First Amendment,<sup>333</sup> the Court declared:

[A] function of free speech under our system of government is to invite dispute. 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 . . . . 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 serious substantive evil that rises far above public inconvenience, annoyance, or unrest.<sup>334</sup>

Two years later, in an apparent retreat from *Terminiello*, the Court decided *Feiner v. New York*,<sup>335</sup> which upheld the disorderly conduct conviction of a college student whose streetcorner harangue produced racial friction among eighty onlookers.<sup>336</sup> But the Court's

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sumption that their very disagreeableness will provoke violence . . . . [Nor may the government] assume that every expression of a provocative idea will incite a riot.")

327. 337 U.S. 1 (1949).

328. *Id.* at 2-3, 6.

329. *Id.* at 26.

330. *See id.* at 3.

331. *Id.* at 16.

332. *Id.* at 3 (quoting trial court's jury instruction).

333. *See id.* at 2-3.

334. *Id.* at 4 (citations omitted).

335. 340 U.S. 315 (1951).

336. *Id.* at 321. The defendant stood atop a soapbox and, with a loudspeaker, gave a street corner speech to approximately eighty onlookers. *See id.* at 316-17. The speech included derogatory remarks about President Truman, the American Legion, the Mayor of Syracuse, and other local officials. *See id.* at 317. The speech inspired a hostile reaction from the onlookers. *See id.* The Court upheld the conviction on the grounds that the defendant encouraged his audience to become racially divided, the gathering interfered with traffic, and the defendant repeatedly refused police orders to cease speaking. *See id.* at 319 n.2. But in dissent, Justice Black commented that "[i]t is neither unusual nor unexpected that some people at public meetings mutter,

subsequent decisions—in *Edwards v. South Carolina*,<sup>337</sup> *Cox v. Louisiana*,<sup>338</sup> and *Gregory v. City of Chicago*<sup>339</sup>—have reinforced the vitality of *Terminiello*, overturning the convictions of equally unpopular speakers who prompted equally hostile reactions by equally sizable crowds.

*Feiner's* contrary result is attributable to one crucial fact that sets it apart from the other cases: The speaker encouraged his audience to become racially divided into hostile camps.<sup>340</sup> In other words, the speaker engaged in a mischievous, bad faith effort to produce violent clashes among his listeners.<sup>341</sup> From a First Amendment perspective, such behavior is fundamentally different from the expression of provocative *ideas*—different, even, from the use of exaggeration or vilification in pressing one's *beliefs*. As the Court observed in *Cantwell v. Connecticut*:<sup>342</sup>

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

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mill about, push, shove, or disagree, even violently, with the speaker. Indeed, it is rare where controversial topics are discussed that an outdoor crowd does not do some or all of these things.” *Id.* at 325-26 (Blank, J., dissenting).

337. 372 U.S. 229, 233, 238 (1963) (setting aside the breach-of-the-peace convictions of 187 civil rights protesters who were arrested after refusing a police order to disperse their peaceful demonstration on a sidewalk around the State House grounds). The demonstration produced a tense crowd of 300 onlookers, reacting to the demonstrators' signs reading “Down with Segregation,” “I Am Proud To Be a Negro,” and similar messages. *Id.* at 231. Notwithstanding the crowd's reaction, the Court held that a state cannot criminalize “the peaceful expression of unpopular views.” *Id.* at 237.

338. 379 U.S. 536, 551, 575 (1965) (invoking the overbreadth doctrine in striking down Louisiana's breach-of-the-peace statute, which “as authoritatively interpreted by the Louisiana Supreme Court . . . would allow persons to be punished merely for peacefully expressing unpopular views”). In *Cox*, the plaintiff was a civil rights activist who led a peaceful march of some 2,000 students to a state courthouse, where they protested the arrest and incarceration of fellow activists. *Id.* at 538-40. The protest produced “muttering” and “grumbling” among several white onlookers. *Id.* at 543. The demonstration ended in chaos when, after the protesters refused to disperse, police fired tear gas into the crowd. *See id.* at 544. In assessing the situation, the Court found “the ‘compelling answer . . . [to be] that constitutional rights may not be denied simply because of hostility to their assertion or exercise.’” *Id.* at 551 (quoting *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963)).

339. 394 U.S. 111, 111-13 (1969) (holding that the First Amendment barred the disorderly conduct convictions of eighty-five civil rights protesters who remained peaceful, although they were pelted with rocks and eggs, and were arrested after refusing a police dispersal order prompted solely by the onlookers' unruliness).

340. *Feiner v. New York*, 340 U.S. 315, 317 (1951).

341. *See id.*

342. 310 U.S. 296, 303, 311 (1940) (setting aside the breach-of-the-peace conviction of a Jehovah's Witness who, in the course of his sidewalk proselytizing, incensed onlookers by playing a phonograph record that expressed virulently anti-Catholic sentiments). The Court found that, because the defendant's conduct was neither truculent nor abusive, he could not be convicted of breach of the peace based on the hostile reaction of his audience. *See id.* at 310-11.

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 probability 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.<sup>343</sup>

The underlying rationale of the hostile audience cases is to prevent a "heckler's veto" of minority opinions.<sup>344</sup> The idea is to give minority viewpoints a chance to enter the marketplace of ideas and gain adherents.<sup>345</sup> This principle is traceable to James Madison's idea that the purpose of the Bill of Rights is to prevent the tyranny of the majority.<sup>346</sup> Although, in operation, the principle is often invoked by those who espouse racist,<sup>347</sup> fascist,<sup>348</sup> anti-Semitic,<sup>349</sup> or anti-Catho-

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343. *Id.* at 310.

344. *Glasson v. City of Louisville*, 518 F.2d 899, 901 (6th Cir. 1975) (sustaining a section 1983 action brought by a solitary anti-Nixon protester who, while waiting along the route of a presidential motorcade amid a sea of Nixon supporters, inspired a hostile audience reaction that prompted police to censor her expression). The protester unfurled an anti-Nixon sign prompting grumbling and muttered threats from onlookers. *See id.* at 902. The onlookers cheered when, in the face of the defendant's refusal to remove her sign, a police officer took the sign from her and tore it up. *See id.* The court held that to permit the officer's action would "incorporate into [the First Amendment] a 'heckler's veto' which would empower an audience to cut-off the expression of a speaker with whom it disagreed. The state may not rely on community hostility and threats of violence to justify censorship." *Id.* at 905-06.

345. *See, e.g., Hurwitt v. City of Oakland*, 247 F. Supp. 995, 999-1000, 1006 (N.D. Cal. 1965) (enjoining city officials from prohibiting a parade protesting American military intervention in Vietnam, even though the plaintiffs' previous peaceful marches were disrupted by angry spectators who hurled tear gas bombs, broke through police cordons, ripped banners, and disabled loudspeakers). The court rejected the notion that a citizen may be denied the right to speak based on the likely antagonism that his message may inspire. *See id.* at 1001. The court observed that "under such a doctrine, unpopular political groups might be rendered virtually inarticulate." *Id.*

346. *See* 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1029 (Bernard Schwartz ed., 1971) (remarks of June 8, 1789, House of Representatives).

347. *See, e.g., Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 972 F.2d 365, 374, 376 (D.C. Cir. 1992) (issuing a preliminary injunction to allow a KKK march on the grounds that the "proposed restriction of the location of the Klan's march, resting as it did on the threat of listeners' violent reaction to the message being delivered, was content based").

348. *See, e.g., Collin v. Chicago Park District*, 460 F.2d 746, 748, 757 (7th Cir. 1972) (finding an ordinance invoked to deny a parade permit to a Nazi group to be "in violation of the First Amendment insofar as it fails to provide for adequate notice and a prompt final judicial decision where prior restraint is imposed upon the exercise of the freedom of assembly and freedom of speech").

349. *See, e.g., Terminiello v. City of Chicago*, 337 U.S. 1, 6 (1949) (overturning the breach-of-the-peace conviction of an anti-Semitic speaker for "vigorously, if not viciously, criticiz[ing] vari-



lic<sup>350</sup> sentiments, there are equally important hostile audience cases where the unpopular viewpoints receiving protection went on to secure a majority of adherents: namely, the fights for racial equality<sup>351</sup> and an end to the Vietnam War.<sup>352</sup> Indeed, many ideas that are now popularly held were once maintained only by a small minority of citizens—including the notions that women should vote and that contraception should not be banned.<sup>353</sup>

Ultimately, the hostile audience cases permit the following conclusions. *Terminiello* and its progeny make clear that a speaker cannot be punished for an angry reaction to the speaker's ideas—<sup>354</sup> even, per *Cantwell*, if he resorts to exaggeration or vilification in pressing his beliefs.<sup>355</sup> Such protection does not extend to the speaker who undertakes a mischievous, bad faith effort to instigate violent clashes among his listeners.<sup>356</sup> Though *Cantwell* suggests that speech rights may necessarily be suspended in the face of an ongoing and uncontrollable crowd reaction,<sup>357</sup> Justice Black's dissenting opinion in *Feiner*, that police have a duty to *protect* the unpopular speaker,<sup>358</sup> is a principle now firmly established in the lower courts.<sup>359</sup>

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ous political and racial groups whose activities he denounced as inimical to the nation's welfare").

350. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (overturning the breach-of-the-peace conviction of a Jehovah's Witness for publicly making anti-Catholic remarks because, although the speech "unnaturally aroused animosity," the ordinance was not "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State").

351. See, e.g., *Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago*, 419 F. Supp. 667, 675 (N.D. Ill. 1976) (recognizing that "[t]he threat of a hostile audience cannot be considered in determining whether a permit shall be granted or in a ruling on a request for an injunction against a demonstration").

352. See, e.g., *Hurwitt v. City of Oakland*, 247 F. Supp. 995, 1005-06 (N.D. Cal. 1965) (issuing an injunction to allow a Vietnam War protest because, "if denied permission to march under reasonable conditions and regulations [the plaintiffs and others similarly situated] will suffer irreparable injury in that they will be denied their constitutional right of free speech, assembly and petition").

353. See Walker, *supra* note 233, at 34, 52, 61, 83-85; David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 STAN. L. REV. 47, 90-93 (1992).

354. See *Terminiello v. Chicago*, 337 U.S. 1, 4 (1948).

355. See *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

356. See *Feiner v. New York*, 340 U.S. 315, 317-18, 320-21 (1951).

357. *Cantwell*, 310 U.S. at 308.

358. *Feiner*, 340 U.S. at 327 (Black, J., dissenting) (recognizing that the officers' duty "was to protect petitioner's right to talk, even to the extent of arresting the man who threatened to interfere").

359. See *Sabel v. Stynchcombe*, 746 F.2d 728, 731 & n.7 (11th Cir. 1984) (noting that the police "could have taken steps to protect [the protesters] while allowing the demonstration to continue"); *Glasson v. City of Louisville*, 518 F.2d 899, 906 (6th Cir. 1975) (recognizing the po-

### D. Other Regulatory Flaws: Prior Restraint, Overbreadth, and Vagueness

This Section corresponds to Question Four in our issue-spotting checklist, which inquires whether the regulation has characteristics of overbreadth, vagueness, or prior restraint. We turn first to prior restraints, examining the two guises in which they appear: speech-restrictive *injunctions*, and speech *licensing* systems. We then examine the related doctrines of overbreadth and vagueness.

#### 1. The Two Guises of Prior Restraint: Speech-Restrictive Injunctions and Licensing Systems

In reaction to the now-vilified press licensing systems of the sixteenth and seventeenth centuries,<sup>360</sup> the doctrine of prior restraint imposes severe limits on the power of government to regulate speech before it is uttered or published.<sup>361</sup> Prior restraints come in two forms: (1) speech-restrictive *injunctions*,<sup>362</sup> and (2) *licensing* systems that require a permit or fee as a prerequisite to engaging in expressive activity.<sup>363</sup>

There are four basic points to bear in mind with regard to speech-restrictive injunctions: (1) a flat, pre-publication gag order is presump-

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lice officers' duty to "take reasonable action to protect from violence persons exercising their constitutional rights"); *Wolin v. Port of New York Auth.*, 392 F.2d 83, 94 (2d Cir. 1968) (holding that, "[i]n the exercise of his rights under fair and reasonable regulations, the plaintiff is . . . entitled to protection by [the] police"); *Downie v. Powers*, 193 F.2d 760, 764 (10th Cir. 1951) (realizing that, "[o]nce charged with the duty of keeping the peace, a police officer cannot be an innocent bystander where the constitutionally protected rights of persons are being invaded"); *Hurwitz v. City of Oakland*, 247 F. Supp. 995, 1001 (N.D. Cal. 1965) (imposing on public officials and police officers the "duty to maintain order by taking such steps as may be reasonably necessary and feasible to protect peaceful, orderly speakers").

360. See generally SEIBERT, *supra* note 57, at 47-63 (describing the sixteenth and seventeenth century press licensing system in England).

361. See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969) (holding that "[a] law subjecting the exercise of First Amendment freedoms to prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional").

362. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (striking down injunctions barring the New York Times and Washington Post from publishing excerpts from the "Pentagon Papers," a top-secret Defense Department study of the Vietnam War).

363. See, e.g., *Shuttlesworth*, 394 U.S. at 149-51, 159 (1969) (striking down a parade licensing scheme that effectively vested unfettered discretion in licensing officials). The licensing authorities "were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience.'" *Id.* at 150 (quoting the licensing ordinance). In the face of such a scheme, the Court held 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.

tively unconstitutional,<sup>364</sup> (2) injunctions that impose time, place, or manner restrictions are subject to a heightened form of intermediate scrutiny,<sup>365</sup> (3) speech-restrictive injunctions must not be granted *ex parte*, and their restraints must be limited to the narrowest possible scope,<sup>366</sup> and (4) under the “collateral bar” rule, speech-restrictive injunctions must be obeyed, even if they are unconstitutional.<sup>367</sup>

“Any prior restraint on expression [arrives in court] with a ‘heavy presumption’ against its constitutional validity,”<sup>368</sup> and with the burden on the *government* to prove that such a restriction is justified.<sup>369</sup> The Supreme Court has shown special hostility to any injunction that imposes a flat, pre-publication gag order on protected expression—striking down such injunctions in *Nebraska Press Association v. Stuart*,<sup>370</sup> *New York Times Company v. United States*,<sup>371</sup> and *Near v. Minnesota*<sup>372</sup>—because prior restraints on publication violate even the narrow common law conception of press freedom that prevailed in the

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364. See, e.g., *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 558 (1976) (recognizing that “[a]ny prior restraint on expression carries . . . with it a ‘heavy presumption’ against its constitutional validity”) (citations omitted).

365. See, e.g., *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 764-65 (1994) (holding that differences between injunctions and generally applicable ordinances “require a somewhat more stringent application of general First Amendment principles in [the time, place, and manner] context”).

366. See, e.g., *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 180-84 (1968) (noting that “[t]here is a place in our jurisprudence for *ex parte* issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate”).

367. See *Walker v. City of Birmingham*, 388 U.S. 307, 317-19 (1967) (upholding the criminal contempt convictions of eight black ministers, who defied an arguably unconstitutional injunction prohibiting a civil rights march, because they were barred from using the injunction’s invalidity as a defense to criminal contempt charges for violating the court order); Randy Barnett, *The Puzzle of Prior Restraint*, 29 *Stan. L. Rev.* 539, 553 (1997).

368. *Nebraska Press*, 427 U.S. at 558 (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-20 (1971)); accord *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963)).

369. See *Nebraska Press*, 427 U.S. at 558; *New York Times*, 403 U.S. at 714.

370. 427 U.S. 539, 541-44, 570 (1976) (striking down a gag order on press coverage of a murder trial, where the injunction barred newspapers and broadcasters from reporting any confession by or inculpatory information about the accused).

371. 403 U.S. 713, 714 (1971) (striking down injunctions barring the *New York Times* and *Washington Post* from publishing excerpts from the “Pentagon Papers,” a top secret Defense Department study of the Vietnam War).

372. 283 U.S. 697, 701-04, 722-23 (1931) (striking down an injunction perpetually enjoining the *Saturday Press* from publishing any “malicious, scandalous, or defamatory” material, where the paper accused the Minneapolis police chief of corruption).

eighteenth century.<sup>373</sup> In *New York Times*, the Court struck down injunctions that barred both the Times and the Washington Post from publishing excerpts from the "Pentagon Papers," a top secret Defense Department study of the Vietnam War.<sup>374</sup> Though some of the Justices expressed concern that lifting the injunctions with the war still pending would compromise national security,<sup>375</sup> the Papers merely disclosed the history of the war rather than current tactics and troop movements.<sup>376</sup> And the history they revealed was deeply unflattering to the Executive Branch because it showed that the American public had been lied to and kept in the dark about the conduct of the war.<sup>377</sup> If ever the media did seek to disclose current troop movements (which, in this day and age, would be instantly available to television viewers throughout the world on CNN, not to mention the Internet), the Court likely would uphold a prior restraint.<sup>378</sup> The test currently employed by the Court is to treat pre-publication injunctions as presumptively unconstitutional,<sup>379</sup> and to entertain even the possibility of a gag order by weighing the answers to two questions: (1) how great is the harm posed by the publication?, and (2) how speculative is the

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373. In 1769, Sir William Blackstone wrote that "[t]he liberty of the press . . . consists in laying no *previous* restraints upon publications." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151-52 (1979) (emphasis in original). For a general discussion of the English press licensing system, see SIEBERT, *supra* note 57, at 47-63. An awareness of this history informed the Supreme Court's early cases in the area of prior restraint. See *Near*, 283 U.S. at 713-14 (invoking Blackstone and the history of English press licensing in striking down a pre-publication gag order). Knowledge of the English system also helps to explain why some of the Justices were so incensed by the Pentagon Papers injunctions. See *NEW YORK TIMES CO. v. UNITED STATES*, 403 U.S. 713, 714-15 (1971) (Black, J., concurring) (believing that "every moment's continuance of the injunctions against [the *New York Times* and *Washington Post*] amounts to a flagrant, indefensible, and continuing violation of the First Amendment").

374. *New York Times*, 403 U.S. at 714.

375. See *id.* at 762-63 (Blackmun, J., dissenting).

376. See *United States v. The Progressive, Inc.*, 467 F. Supp. 990, 991-94 (W.D. Wis. 1979) (distinguishing the Pentagon Papers case issuing an injunction barring a magazine from publishing information about how to construct a hydrogen bomb, in part, because the information sought to be published in *New York Times* was "historical data relating to events that occurred some three to twenty years previously").

377. See GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 1167 (3d ed. 1996).

378. But this has been the law, it seems, since *Near v. Minnesota*, 283 U.S. 697 (1931), where the Court observed that no one "would question but that the government might prevent . . . the publication of the sailing dates of transports or the number and location of troops." *Id.* at 716. Even the Pentagon Papers concurrence of Justice Brennan concedes as much—though Brennan envisions a willingness only to enjoin little else: "[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order." *New York Times*, 403 U.S. at 726-27 (Brennan, J., concurring).

379. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976).

proof of that harm.<sup>380</sup> An extremely rare<sup>381</sup> example of a court granting a pre-publication injunction is *United States v. The Progressive, Incorporated*,<sup>382</sup> where a federal district court barred the publication of a magazine article offering detailed instructions on how to construct a hydrogen bomb.<sup>383</sup> Finding “no plausible reason why the public needs to know the technical details about hydrogen bomb construction to carry on an informed debate on this issue,”<sup>384</sup> and stressing that it was dealing with “the most destructive weapon in the history of mankind,”<sup>385</sup> the court reluctantly concluded that an injunction was warranted.<sup>386</sup> The court reasoned that “[a] mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot.”<sup>387</sup>

Injunctions that impose content-neutral time, place, or manner restrictions are subject to a heightened form of intermediate scrutiny<sup>388</sup>—under a test that is slightly more stringent than that for legislation.<sup>389</sup> Observing that “[i]njunctions . . . carry greater risks of censorship and discriminatory application than do general ordinances,” the Supreme Court held in 1994 that appellate courts should subject speech-restrictive injunctions to more “stringent” First Amendment scrutiny than comparable legislation.<sup>390</sup> “Accordingly, when evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous.”<sup>391</sup> Announcing a new standard of review for content-neutral injunctions, the Court held that, rather than inquiring whether the order is narrowly tailored to serve a significant governmental interest, “[w]e must

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380. See *id.* at 562 (adopting the Learned Hand test that examines whether “‘the gravity of the ‘evil’ [posed by publication], discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger’”) (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950)).

381. The author’s research uncovered no other example.

382. 467 F. Supp. 990 (W.D. Wis. 1979).

383. *Id.* at 991, 1000 (granting a preliminary injunction against a magazine seeking to discredit the government’s system of classification and secrecy by publishing an article revealing that much of the information necessary for constructing a hydrogen bomb was already contained in publicly available literature). For an excellent discussion of the *Progressive* case, see STONE, *supra* note 386, at 1169-71.

384. *Progressive*, 467 F. Supp. at 994.

385. *Id.* at 995.

386. See *id.*

387. *Id.* at 996.

388. See *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 764 (1994).

389. See *id.* at 764-65.

390. *Id.*

391. *Id.* at 765.

ask instead whether the challenged provisions of the injunction *burden no more speech than necessary* to serve a significant government interest.”<sup>392</sup>

Speech-restrictive injunctions must not be issued *ex parte* and their restraints must be limited to the narrowest possible scope.<sup>393</sup> These twin teachings were emphatically delivered in *Carroll v. President & Commissioners of Princess Anne*,<sup>394</sup> where the Supreme Court struck down a ten-day injunction, issued *ex parte*, that banned further demonstrations by a white supremacist group.<sup>395</sup> The Court found that *ex parte* speech injunctions are presumptively unconstitutional; this is because, by definition, their issuance takes place without the crucial benefit of evidentiary input from both sides of the dispute.<sup>396</sup> Thus, the procedural safeguards necessary for sustaining a prior restraint are entirely lacking.<sup>397</sup> The *Carroll* injunction offended the First Amendment not only for its *ex parte* issuance,<sup>398</sup> but also for its broad scope by enjoining a group from holding meetings or rallies anywhere in the county “which will tend to disturb and endanger” the local citizenry.<sup>399</sup> The Court stressed that speech-restrictive injunctions “must be couched in the narrowest terms that will accomplish the pinpointed objective permitted by constitutional mandate and the essential needs of public order.”<sup>400</sup>

Under the “collateral bar” rule, speech-restrictive injunctions *must* be obeyed, even if they are unconstitutional.<sup>401</sup> By engaging in expressive activity in defiance of such an injunction, a speaker places herself in contempt of court—and, under the collateral bar rule,<sup>402</sup> the injunction’s unconstitutionality is no defense to a contempt citation.<sup>403</sup> An example of this is *Walker v. City of Birmingham*,<sup>404</sup> where the Supreme Court upheld the criminal contempt convictions of eight black

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392. *Id.* (emphasis added).

393. *See Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 183-84 (1968).

394. 393 U.S. 175 (1968).

395. *Id.* at 180-81.

396. *See id.* at 183.

397. *See id.* at 181.

398. *Id.* at 180-81.

399. *Id.* at 177.

400. *Id.* at 184.

401. *See GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 386 (1980) (discussing the “established doctrine that persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order”).

402. *See id.*

403. *See id.*; Barnett, *supra* note 367, at 553.

404. 388 U.S. 307 (1967).

ministers who defied a temporary restraining order requiring them to secure a permit before conducting a civil rights march.<sup>405</sup> Though the Court acknowledged that the injunction might well have been constitutionally suspect,<sup>406</sup> it refused to reach that issue, holding<sup>407</sup> that the ministers, while free to challenge the injunction in court, were not free to defy it.<sup>408</sup> One unfortunate effect of the collateral bar rule is that prospective speakers, confronted by an unconstitutional injunction, can be silenced for months while they pursue the path of judicial review.

Of the two basic forms of prior restraint, speech-restrictive *injunctions* are one type, while speech-restrictive *licensing* schemes are the other. Let us turn from our review of injunctions to an examination of speech licensing schemes. Such licensing schemes will run afoul of the First Amendment if they fail to limit: (1) the licensor's discretion in issuing a permit or fee, or (2) the time frame for issuing a license.<sup>409</sup> In *FW/PBS, Incorporated v. City of Dallas*,<sup>410</sup> the Supreme Court identified the "two evils" of speech licensing schemes "that will not be tolerated"<sup>411</sup>—vesting "unbridled discretion" in the licensing authority,<sup>412</sup> and "fail[ing] to place limits on the time frame within which the decisionmaker must issue the license."<sup>413</sup> Let us examine these "two evils" in turn.

Courts have consistently invalidated permit schemes vesting government officials with unfettered discretion to forbid or allow certain speech activities<sup>414</sup>—striking down discretionary limits on parades,<sup>415</sup>

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405. *Id.* at 315-17.

406. *See id.* at 316-19.

407. *See id.* at 319.

408. *See id.* at 319-20.

409. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990).

410. 493 U.S. 215 (1990).

411. *Id.* at 225-27.

412. *Id.* at 225-26.

413. *Id.* at 226.

414. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56 (1988) (addressing a scheme requiring a permit to place newsracks on public property and holding that, "when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license"); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547, 551-53 (1975) (addressing a permit to use a city auditorium and enjoining city from preventing the performance of "Hair," observing that "the danger of censorship and abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use").

415. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969) (striking down a parade licensing scheme because "a law subjecting the exercise of First Amendment freedoms to

demonstrations,<sup>416</sup> sidewalk preaching,<sup>417</sup> leafleting,<sup>418</sup> rallies in public parks,<sup>419</sup> and the use of sound amplification equipment.<sup>420</sup> Any scheme that vests arbitrary discretion in the licensing official "has the potential for becoming a means of suppressing a particular point of view."<sup>421</sup> Accordingly, a permit scheme will survive constitutional scrutiny only if it employs content-neutral criteria, and only if it contains "narrowly drawn, reasonable, and definite standards for the [licensing] officials to follow."<sup>422</sup> Without such standards, "post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression."<sup>423</sup>

Closely akin to these "unfettered discretion" cases are those in which the permit scheme allows licensing officials to consider either the controversial nature of a speaker's message or its potential for inspiring a hostile response.<sup>424</sup> These schemes are struck down just as readily—and for the same reason—as schemes affording unbridled discretion. In both contexts, the First Amendment flaw is the same: the right to speak is left to hinge on the *popularity* of the speaker's

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the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional").

416. See *Hague v. C.I.O.*, 307 U.S. 496, 512 (1939) (striking down a licensing scheme affecting peaceful demonstrations because "it is clear that the right peaceably to assemble . . . is a privilege inherent in the citizenship of the United States which the [First] Amendment protects").

417. See *Kunz v. New York*, 340 U.S. 290, 290-93 (1951) (striking down a statute proscribing public worship meetings on public sidewalks, streets, and parks as an invalid prior restraint on speech because "'streets and parks . . . [are] held in trust for the use of the public and [are] used for purposes of assembly, communicating thoughts between citizens, and discussing public questions'" (quoting *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939))).

418. See *Schneider v. New Jersey*, 308 U.S. 147, 157, 165 (1939) (striking down an ordinance requiring prior written permission for canvassing and distributing unsolicited material, and proscribing punishment for "acting without a permit").

419. See *Niemotko v. Maryland*, 340 U.S. 268, 271-72 (1951) (striking down a licensing scheme "prohibiting or regulating the use of [a] park without a permit, whereby all authority to grant permits for use of the park is in the Park Commissioner and the City Council").

420. See *Saia v. New York*, 334 U.S. 558, 560 (1948) (striking down an ordinance requiring "a permit from the Chief of Police . . . [to] use a loud-speaker or amplifier," characterizing it as without standards "for the exercise of . . . discretion . . . [and] not narrowly drawn to regulate").

421. *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981).

422. *Niemotko*, 340 U.S. at 271.

423. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1989).

424. See, e.g., *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 132-35 (1992) (recognizing that "[n]othing in the [subject] law or its application prevents [an] official from encouraging some views and discouraging others through the arbitrary application of fees" before allowing a potentially disruptive speaker to use a public forum).



message. The permit schemes in this line of precedent are of two (equally fatal) types: (1) those allowing the licensor to forbid or restrict speech activities based on concerns that the speaker's message will inspire a hostile response,<sup>425</sup> and (2) those allowing the licensor to charge a higher police protection fee based on the anticipated level of hostility among onlookers.<sup>426</sup>

Courts will treat as "a species of unbridled discretion" any failure by a licensing scheme to place limits on the *time frame* for issuing a permit.<sup>427</sup> A licensing scheme may run afoul of this requirement in one of two ways: (1) by failing to afford prompt processing of permit applications or prompt judicial review of permit denials,<sup>428</sup> or (2) by imposing advance registration requirements that build into the application process a lengthy delay before the licensee may speak.<sup>429</sup>

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425. See, e.g., *Village of Skokie v. National Socialist Party of America*, 366 N.E.2d 347, 352-53 (Ill. 1977) (declining to enjoin a Nazi group from marching through an Illinois suburb populated by hundreds of Holocaust survivors on the grounds that "[t]he threat of a hostile audience cannot be considered in determining whether a permit shall be granted or in a ruling on a request for an injunction against a demonstration"); *Williams v. Wallace*, 240 F. Supp. 100, 109-10 (M.D. Ala. 1965) (ordering Alabama officials to permit Martin Luther King, Jr.'s march from Selma to Montgomery by noting that the "defendants' contention that there is some hostility to [the] march will not justify its denial").

426. See, e.g., *Forsyth County*, 505 U.S. at 134 (striking down a permit scheme under which "those wishing to express views unpopular with bottle throwers . . . may have to pay more for their permit"). The Court was clear in asserting that "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." *Id.* at 134-35.

427. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223-24 (1990).

428. See, e.g., *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965) (striking down a Maryland statute regarding motion picture censorship as an invalid prior restraint because the statute's procedural safeguards were inadequate). In *FW/PBS*, the Court distilled the procedural safeguards required in *Freedman* in the following manner:

(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

*FW/PBS*, 493 U.S. at 227 (citing *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965)).

429. See, e.g., *NAACP v. City of Richmond*, 743 F.2d 1346, 1357-58 (9th Cir. 1984) (rejecting an ordinance thwarting plans for an immediate protest with a twenty-day advance registration requirement). The court invalidated the ordinance because it effectively "outlaw[ed] spontaneous expression." *Id.* at 1355. The court stressed that "simple delay may permanently vitiate the expressive content of a demonstration. A spontaneous parade expressing a viewpoint on a topical issue will almost inevitably attract more participants and more press attention, and generate more emotion, than the 'same' parade 20 days later. The later parade can never be the same. Where spontaneity is part of the message, dissemination delayed is dissemination denied." *Id.* at 1356.

## 2. Overbreadth and Vagueness

In common with prior restraint, the doctrines of overbreadth and vagueness are united by one common feature: each is concerned with an impermissible *method* of regulating speech.<sup>430</sup> These doctrines focus not on the *content* of speech, but on the regulatory *means* employed by the government in restricting it.<sup>431</sup> The overbreadth doctrine may be invoked to strike down restrictions on speech that are worded in such a way that even protected expression is left vulnerable to punishment.<sup>432</sup> The vagueness doctrine may be invoked to strike down restrictions on speech that are worded in such a way that citizens cannot reasonably discern what is prohibited.<sup>433</sup>

An excellent example of the overbreadth doctrine is *Board of Airport Commissioners of Los Angeles v. Jews for Jesus*,<sup>434</sup> where the Supreme Court struck down, on overbreadth grounds, a regulation prohibiting any person "to engage in First Amendment activities within the Central Terminal Area at Los Angeles International Airport."<sup>435</sup> This regulation was fatally overbroad, held the Court, because "it prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing."<sup>436</sup>

There are two justifications for the overbreadth doctrine: (1) concerns about the chilling effect of overbroad prohibitions on speech,<sup>437</sup>

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430. See *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-31 (1992).

431. See *id.*

432. See *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (striking down, as facially overbroad, provisions of the Communications Decency Act, a federal statute that criminalized the Internet transmission of "indecent" materials to persons under the age of eighteen, and stressing that "[i]n order to deny minors access to potentially harmful speech, the [Act] effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another"); *City of Houston v. Hill*, 482 U.S. 451, 461-62 (1987) (striking down, as facially overbroad, an ordinance prohibiting speech that "in any manner" interrupts a police officer in performing his duties). The Court observed that the ordinance was so broadly worded that it was violated every day and effectively gave police unfettered discretion to arrest individuals for words or conduct that merely annoyed or offended them. See *id.* at 461-63.

433. See *Smith v. Goguen*, 415 U.S. 566, 568-69, 578 (1974) (sustaining a vagueness challenge to a Massachusetts statute that criminalized publicly treating the American flag "contemptuously"). The Court observed that any "unceremonial" use of the flag may be regarded by some as "contemptuous," but casual treatment of the flag as "an object of youth fashion and high camp" is commonplace. *Id.* at 573-74. Given the prevalence of these widely divergent views, a statute criminalizing the "contemptuous" use of the flag was so vague that police, courts, and juries were free to enforce it under their own preferences for treatment of the flag. See *id.* at 574-75.

434. 482 U.S. 569 (1987).

435. *Id.* at 574-75.

436. *Id.* at 575.

437. See *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984).

and (2) a recognition that the broader the statute, the broader will be the discretion enjoyed by government officials to engage in selective enforcement.<sup>438</sup> Much of the overbreadth doctrine's complexity derives from its *procedural* aspects. The overbreadth doctrine: (1) permits *facial* rather than *as-applied* challenges,<sup>439</sup> (2) relaxes the normal rules governing who may bring a constitutional challenge,<sup>440</sup> (3) is limited by the power of a court to save an overbroad statute through a "narrowing construction,"<sup>441</sup> and (4) is limited by the requirement of "substantial" overbreadth.<sup>442</sup> Let us examine these procedural aspects in the foregoing order.

The doctrine authorizes a *facial* challenge to an overbroad statute that, if successful, results in the statute's *total* invalidation.<sup>443</sup> This is very different, and far more devastating, than the result of an *as-applied* challenge. A successful facial challenge effectively wipes the offending statute out of the code books, barring its enforcement in all circumstances.<sup>444</sup> But a successful as-applied challenge leaves the statute in effect, barring its enforcement only in a certain manner or under certain circumstances.<sup>445</sup> Thus, when a speech restriction is declared facially overbroad, its enforcement by the government in *any* context is impermissible.<sup>446</sup>

The overbreadth doctrine authorizes a relaxation of normal standing requirements by allowing a judge to consider the effect of a challenged regulation on third parties not presently before the court.<sup>447</sup> In this regard, the Supreme Court:

has altered its traditional rules of standing to permit—in the First Amendment area—"attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own [speech] could not be [punished if the] statute [were] drawn with the requisite narrow specificity." Litigants, therefore, are permitted to challenge a statute not because their own rights of free

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438. See *Saia v. New York*, 344 U.S. 558, 560-62 (1948).

439. See *Taxpayers for Vincent*, 466 U.S. at 796.

440. See *id.* at 796-98.

441. *Id.* at 800 n.19.

442. *Id.* at 799-800.

443. See *id.* at 797-98.

444. See *id.* at 769-97.

445. See *id.*

446. See *id.* Under the First Amendment, overbreadth is not the only basis on which to assert a facial challenge. "There are two quite different ways in which a statute or ordinance may be considered invalid 'on its face'—either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected [expression] that it is unconstitutionally 'overbroad.'" *Id.* at 796.

447. See *id.* at 796-98; *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.<sup>448</sup>

*Gooding v. Wilson*<sup>449</sup> is a vivid example of the extent to which the normal rules of standing are relaxed in overbreadth challenges. It shows why the Supreme Court considers the overbreadth doctrine to be "strong medicine."<sup>450</sup> In *Gooding*, the Court sustained an overbreadth challenge to a Georgia statute that criminalized a spectrum of statements far broader than fighting words (reaching "opprobrious words or abusive language tending to cause a breach of the peace")<sup>451</sup>—but it did so in a case where the person challenging the statute likely *had* uttered fighting words.<sup>452</sup> *Gooding* stemmed from a clash between police officers and anti-war demonstrators at an army induction center.<sup>453</sup> When police officers attempted to move the defendant away from the facility's entrance, a scuffle ensued in which he said to the officers: "You son of a bitch, I'll choke you to death!" and "White son of a bitch, I'll kill you!" and "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces!"<sup>454</sup> Since these words likely fall within the definition of fighting words, it would have been constitutionally permissible to punish this defendant under an appropriately narrow statute.<sup>455</sup> But the Georgia statute was not appropriately narrow<sup>456</sup>—and because it swept so far beyond the scope of fighting words, it was vulnerable to an overbreadth challenge.<sup>457</sup>

What *Goodin* shows is that standing to assert such a challenge is available even to someone who did *not* engage in constitutionally protected speech and who could *not* have escaped conviction under an appropriately narrow statute.<sup>458</sup> And what is the reason for these relaxed standing rules? "[They are] deemed necessary," observed Justice Brennan, "because persons whose expression *is* constitutionally protected may well refrain from exercising their rights for fear of

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448. *Broadrick*, 413 U.S. at 612 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)).

449. 405 U.S. 518 (1972).

450. *Osborne v. Ohio*, 495 U.S. 103, 122 (1990); *Broadrick*, 413 U.S. at 613.

451. *Gooding*, 405 U.S. at 519.

452. *Id.* at 519-20 n.1

453. *Id.*

454. *Id.*

455. *See id.* at 521

456. *See id.*

457. *See id.*

458. *Id.*

criminal sanctions provided by a statute susceptible of application to protected expression.”<sup>459</sup>

The overbreadth doctrine is limited by the power of courts to save an overbroad statute through the issuance of a “narrowing construction.”<sup>460</sup> Such a construction effectively *rewrites* the statute, declaring its scope to be more limited than its sweeping language would suggest, and identifying the constricted range of circumstances to which it may henceforth be applied.<sup>461</sup> The Supreme Court has cautioned against the wholesale use of this approach, observing that a narrowing construction should be employed “only if it is ‘readily susceptible’ to such a construction.”<sup>462</sup> The appropriate source of a narrowing construction depends on the statute’s origin: federal courts are free to narrow federal statutes,<sup>463</sup> but state legislation should be narrowed by courts of that state.<sup>464</sup> When, in *Gooding*, the Supreme Court invoked the overbreadth doctrine to strike down Georgia’s “abusive language” statute, it observed that the Georgia courts failed to issue the sort of narrowing construction that might have saved the statute.<sup>465</sup>

In 1973, one year after deciding *Gooding*, the Supreme Court further limited the doctrine’s availability by imposing the requirement of “substantial” overbreadth.<sup>466</sup> What is meant by “substantial” overbreadth is less than clear. Straining to elaborate the Court has observed:

The concept of “substantial overbreadth” is not readily reduced to an exact definition. It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. On

459. *Id.* (emphasis added).

460. *Virginia v. American Bookseller’s Ass’n*, 484 U.S. 383, 397 (1988) (recognizing the “tenet of First Amendment law that in determining a facial challenge to a statute, if it be ‘readily susceptible’ to a narrowing construction that would make it constitutional, it will be upheld”).

461. *See id.*

462. *Reno v. ACLU*, 521 U.S. 844, 884 (1997) (quoting *Virginia v. American Bookseller’s Ass’n*, 484 U.S. 383, 397 (1988)).

463. *See id.* (recognizing the Court’s ability to “construe a statute narrowly because the text or other source of Congressional intent identif[ies] a clear line that [the] Court [can] draw”).

464. *See Gooding*, 405 U.S. at 520 (recognizing that the Court “lack[s] jurisdiction authoritatively to construe state legislation”); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975) (holding that “a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts”).

465. *Gooding*, 405 U.S. at 524.

466. *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973) (holding that “the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep”).

the contrary, . . . there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.<sup>467</sup>

An example of how the Court applies the requirement of "substantial" overbreadth is *New York v. Ferber*,<sup>468</sup> where the Court rejected an overbreadth challenge to a statute that prohibited persons from knowingly promoting a sexual performance by a child under the age of sixteen.<sup>469</sup> While recognizing that the statute might reach some forms of protected expression (like medical textbooks or pictorials in *National Geographic*),<sup>470</sup> the Court observed: "We seriously doubt . . . that these arguably impermissible applications of the statute . . . amount to more than a tiny fraction of the materials within the statute's reach."<sup>471</sup> Thus, a statute will be deemed unconstitutionally overbroad only when a substantial number of its potential applications entail protected expression.<sup>472</sup>

Turning from overbreadth to vagueness, a speech regulation is void for vagueness unless it gives a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."<sup>473</sup> In *Grayned v. City of Rockford*,<sup>474</sup> the Supreme Court identified three distinct policy grounds for striking down vague laws: (1) vague laws may trap the innocent by not providing fair warning of what is proscribed,<sup>475</sup> (2) vague laws "impermissibly delegate basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application,"<sup>476</sup> and (3) when directed at expressive activity, vague laws may inhibit the exercise of First Amendment freedoms. Indeed, vagueness can have the same *effect* as overbreadth,

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467. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984).

468. 458 U.S. 747 (1982).

469. *See id.* at 750-51.

470. *See id.* at 773.

471. *Id.*

472. *See id.* at 771 (finding substantial overbreadth only where the statute "reaches a substantial number of impermissible applications"); *Regan v. Time, Inc.*, 468 U.S. 641, 650-51 (1984) (recognizing that "an overbreadth challenge can be raised on behalf of others only when . . . the statute is unconstitutional in a substantial portion of the cases to which it applies").

473. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

474. 408 U.S. 104 (1972).

475. *Id.* at 108.

476. *Id.* at 108-09.

prompting citizens to steer a wide path around the perceived prohibition.<sup>477</sup>

In *Smith v. Goguen*,<sup>478</sup> the Court sustained a vagueness challenge to a Massachusetts statute that criminalized publicly treating the American flag “contemptuously.”<sup>479</sup> The Court observed that any “unceremonial” use of the flag might be regarded by some as “contemptuous,” but that casual treatment of the flag as “an object of youth fashion and high camp” had become commonplace.<sup>480</sup> Given the prevalence of such widely divergent views, a statute criminalizing the “contemptuous” use of the flag was so vague that police, courts, and juries were free to enforce it under their own preferences.<sup>481</sup> Accordingly, the Court ruled it void for vagueness.

In contrast to an overbreadth challenge, where the statute must be shown to reach a *substantial* number of impermissible applications,<sup>482</sup> a vagueness challenge will fail unless the statute is shown to be “impermissibly vague in *all* of its applications.”<sup>483</sup> Also in contrast to the overbreadth doctrine, vagueness challenges do *not* enjoy the same relaxed rules on standing.<sup>484</sup>

### E. Special Rules for Special Settings

This Section corresponds to Question Five in our issue-spotting checklist, which inquires whether a speech regulation pertains to one of the settings for which the Supreme Court has created special rules. We will address, in turn: (1) the particularized rules governing speech on public property, (2) the Court’s “medium-specific” approach to communications media (broadcasting, cable television, and the Internet), (3) the lesser protection afforded speech in “restricted” environments (schools, prisons, and the military), (4) the limited speech rights of public employees, and (5) the Court’s special deference to restrictions on government-funded expression.

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477. *Id.* at 109.

478. 415 U.S. 566 (1974).

479. *Id.* at 568-69, 572.

480. *Id.* at 573-74.

481. *See id.* at 574-75.

482. *See New York v. Ferber*, 458 U.S. 747, 771 (1982) (emphasis added).

483. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982) (emphasis added).

484. *See id.* at 508 (White, J., concurring) (recognizing that, unlike vagueness, “overbreadth is a standing doctrine that permits parties in cases involving First Amendment challenges to government restrictions on noncommercial speech to argue that the regulation is invalid because of its effect on the First Amendment rights of others not presently before the Court”).

### 1. Speech on Public Property

Though this Section is largely devoted to the public forum doctrine, it also briefly addresses the Supreme Court's newly-minted approach to *injunctive* restrictions on public forum access and expression.

#### a. The Public Forum Doctrine

Access to public property for speech-related activities is governed by the public forum doctrine.<sup>485</sup> The doctrine's fountainhead is *Hague v. CIO*,<sup>486</sup> where Justice Roberts, finding a constitutional right to use "streets and parks for communication of views,"<sup>487</sup> based that right on the fact that streets and parks "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."<sup>488</sup>

But the right to engage in public protest has never entailed free access to all types of government property.<sup>489</sup> The government, no less than a private property owner, "'has [the] power to preserve the property under its control for the use to which it is lawfully dedicated.'"<sup>490</sup> Nothing in the Constitution "requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities."<sup>491</sup> The First Amendment has never meant that

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485. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (recognizing that "[t]he right to use government property for one's private expression depends upon whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses").

486. 307 U.S. 496 (1939).

487. *Id.* at 515-16. The Court struck down an ordinance that prohibited the distribution of printed material in public areas, stating that an ordinance "absolutely prohibiting . . . the distribution of circulars, handbills, and placards" is unconstitutional. *Id.* at 518.

488. *Id.* at 515.

489. See *Pinette*, 515 U.S. at 761 (conditioning the use of "government property for one's private expression [on] whether the property has by law or tradition been given the status of a public forum"); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985) (recognizing that "[e]ven protected speech is not equally permissible in all places and at all times" and that "nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities") (citation omitted).

490. *Greer v. Spock*, 424 U.S. 828, 836 (1976) (quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1966)).

491. *Cornelius*, 473 U.S. at 799-800.



people who want to engage in public protest have a “‘constitutional right to do so whenever and however and wherever they please.’”<sup>492</sup>

In light of these principles, the Court has adopted a “forum-based” approach to assessing restrictions that the government seeks to place on the expressive use of its property.<sup>493</sup> Government-owned property is divided into three categories for purposes of forum analysis: (1) “traditional” public fora, (2) “designated” public fora, and (3) “nonpublic” fora, the last category comprising all of government property not embraced within the first two.<sup>494</sup> Traditional public fora are places that “by long tradition or by government fiat, have been devoted to assembly and debate”<sup>495</sup>—including, for example, public streets, parks, sidewalks,<sup>496</sup> and the curtilage of legislative seats.<sup>497</sup> Designated public fora are places that the government “has opened for expressive activity by part or all of the public”<sup>498</sup>—including, for example, university meeting facilities<sup>499</sup> and municipal theaters.<sup>500</sup> Nonpublic fora are places that by tradition, nature, or design “are not appropriate platforms for unrestrained communication”<sup>501</sup>—including, for example, military installations,<sup>502</sup> federal workplaces,<sup>503</sup> utility

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492. *Greer*, 424 U.S. at 836 (quoting *Adderley v. Florida*, 385 U.S. 39, 48 (1966)).

493. See *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (recognizing the implicit and explicit precedential acceptance of a “‘forum based’ approach for assessing restrictions that the government seeks to place on the use of its property”) (citations omitted).

494. See *id.* at 678-79.

495. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

496. See *Cornelius*, 473 U.S. at 802 (finding that “[p]ublic streets and parks fall into [the] category [of traditional public fora]”).

497. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (finding “Capitol Square [to be] a traditional public forum”).

498. *Krishna Consciousness*, 505 U.S. at 678.

499. See *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981) (finding that “through its policy of accommodating their meetings, the University [of Missouri at Kansas City] has created a forum generally open for use by student groups”).

500. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (recognizing municipal theaters as “public forums designed for and dedicated to expressive activities”).

501. *Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991).

502. See *United States v. Albertini*, 472 U.S. 675, 686 (1985) (finding that “[m]ilitary bases are generally not public fora”).

503. See *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 810 (1985) (holding that “the exclusion of respondents may reasonably be considered a means of ‘insuring peace’ in the federal workplace”).

poles,<sup>504</sup> residential letterboxes,<sup>505</sup> an interschool mail system,<sup>506</sup> and a workplace charity drive aimed at government employees.<sup>507</sup>

In forum analysis, the government's power to impose speech restrictions depends on how the affected property is categorized.<sup>508</sup> The level of judicial scrutiny hinges on whether the property is deemed a traditional, designated, or nonpublic forum.<sup>509</sup>

Traditional public fora may be regulated only via content-neutral time, place, and manner restrictions.<sup>510</sup> Consistent with Track Two scrutiny, such restrictions: (1) must be "justified without reference to the content of the regulated speech," (2) must be "narrowly tailored to serve a significant governmental interest," and (3) must "leave open ample alternative channels for communication of the information."<sup>511</sup> Government restrictions on the *content* of public forum speech are presumptively unconstitutional,<sup>512</sup> and consistent with Track One scrutiny, they will be struck down unless shown to be "necessary, and narrowly drawn, to serve a compelling state interest."<sup>513</sup>

These same standards govern the second category—restrictions on speech in *designated* public fora.<sup>514</sup> Though the government may limit access to certain speakers (e.g., student groups<sup>515</sup>) or certain sub-

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504. See *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 793 (1984) (finding that "the existence of a traditional right of access respecting such items as utility poles for purposes of . . . communication [is not] comparable to that recognized for public streets and parks").

505. See *United States Postal Serv. v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 128 (1981) (finding that "a letterbox, once designated an 'authorized depository,' does not at the same time undergo a transformation into a 'public forum'").

506. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

507. See *Cornelius*, 473 U.S. at 790, 797.

508. See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79 (1992) (enumerating the three categories of forum classification).

509. See *id.*

510. See *Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991).

511. *Ward v. Rock Against Racism*, 491 U.S. 781, 788-91 (1989).

512. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995).

513. *Capitol Square Advisory Bd. V. Pinette*, 515 U.S. 753, 761 (1995).

514. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79 (1992) (noting that a "designated public forum, whether of a limited or unlimited character, [is] property that the State has opened for expressive activity by part or all of the public"); *Cornelius*, 473 U.S. at 800 (recognizing that, "when the Government has intentionally designated a place or means of communication as a public forum, speakers cannot be excluded without a compelling governmental purpose").

515. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981) (refusing to hold "that a campus must make all of its facilities equally available to students and non-students, or that a university must grant free access to all of its grounds or buildings").

jects (e.g., school board business<sup>516</sup>), and though it need not keep a designated public forum open indefinitely,<sup>517</sup> its restrictions must be applied evenhandedly to all similarly situated parties.<sup>518</sup>

Judicial scrutiny is substantially relaxed, however, vis-a-vis the third category—restrictions on speech in *nonpublic* fora.<sup>519</sup> Here, the government enjoys “maximum control over communicative behavior” because its role is “most analogous to that of a private owner.”<sup>520</sup> The “challenged regulation need only be reasonable, so long as the regulation is not an effort to suppress expression merely because public officials oppose the speaker’s view.”<sup>521</sup> Indeed, control over access to a nonpublic forum may be based on subject matter or speaker identity, “‘so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.’”<sup>522</sup> Ultimately, the government’s decision to restrict access to a nonpublic forum “‘need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.’”<sup>523</sup>

In distinguishing among these categories, the Supreme Court advanced narrow definitions of both traditional and designated public fora.<sup>524</sup> “Traditional public fora are those places which ‘by long tradition or by government fiat have been devoted to assembly and debate’”<sup>525</sup>—whose “principal purpose . . . is the free exchange of ideas.”<sup>526</sup> Designated public fora are likewise narrowly conceived.<sup>527</sup>

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516. See, e.g., *City of Madison Joint Sch. Dist. v. Wisconsin Public Employment Relations Comm’n*, 429 U.S. 167, 175 n.8 (1976) (finding that “[p]lainly public bodies may confine their meetings to specified subject matter and may hold nonpublic sessions to transact business”).

517. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

518. See *id.* at 45-46 n.7.

519. See *Krishna Consciousness*, 505 U.S. at 678-79.

520. *Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991).

521. *Krishna Consciousness*, 505 U.S. at 679; accord *United States v. Kokinda*, 497 U.S. 720, 730 (1990); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Perry*, 460 U.S. at 46.

522. *Kokinda*, 497 U.S. at 730 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

523. *Id.* (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)) (emphasis in original). But see *Board of Airport Comm’rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 575-77 (1987) (striking down, as overbroad, a resolution banning all “First Amendment activities” in an airport terminal). The Court noted that, even if the terminal was deemed a nonpublic forum, the sweeping ban on expressive activity was facially invalid “because no conceivable governmental interest would justify such an absolute prohibition of speech.” *Id.* at 575.

524. See *Cornelius*, 473 U.S. at 800-02.

525. *Id.* at 802 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

526. *Id.* at 800.

The government does not create a designated public forum "by inaction,"<sup>528</sup> or by allowing the public "'freely to visit,'"<sup>529</sup> or by "permitting limited discourse" there.<sup>530</sup> Instead, a designated public forum is created only where the government "intentionally open[s] a nontraditional forum for public discourse."<sup>531</sup> Under these definitions, public forum status has eluded such heavily frequented public spaces as airport terminals,<sup>532</sup> state fairgrounds,<sup>533</sup> post office sidewalks,<sup>534</sup> and public housing complexes.<sup>535</sup>

In divining the requisite intent to create a designated public forum, the Court looks to the government's "policy and practice" vis-a-vis the property.<sup>536</sup> The Court likewise inquires whether the property is, by nature, "compatib[le] with expressive activity."<sup>537</sup> As the Court observed in *Cornelius*, "[w]e will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor will we

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527. See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 506 U.S. 672, 678-79 (1992) (recognizing that "a designated public forum, whether of a limited or unlimited character, [is] property that the State has opened for expressive activity by part or all of the public").

528. *Id.* at 680; *Cornelius*, 473 U.S. at 802.

529. *Krishna Consciousness*, 505 U.S. at 680 (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)).

530. *Cornelius*, 473 U.S. at 802.

531. *Krishna Consciousness*, 505 U.S. at 680; see also *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (stressing that a designated public forum is not created unless it is "expressly dedicated" by the government to "expressive activity"). It does not suffice that the government acquiesced in even a longstanding pattern of leafletting, speaking, and picketing on the premises. See *id.* "A practice of allowing some speech activities on [the] property do[es] not add up to the dedication of [that] property to speech activities." *Id.*

532. See *Krishna Consciousness*, 505 U.S. at 680, 685 (finding an ordinance banning solicitation in an airport terminal to be reasonable because "the tradition of airport activity does not demonstrate that airports have historically been made available for speech activity . . . [and legal] precedents foreclose the conclusion that airport terminals are public fora").

533. See *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981) (upholding a rule requiring state fair vendors to be licensed to sell or distribute printed material and to use designated booths rather than roaming at large on the fairgrounds because, although a state fair "is a limited public forum in that it exists to provide a means for a greater number of exhibitors temporarily to present their products or views, be they commercial, religious, or political, to a large number of people in an efficient fashion," the rule provides "organizations with an adequate means to sell and solicit on the fairgrounds").

534. See *Kokinda*, 497 U.S. at 727 (finding that a "postal sidewalk was constructed solely to provide for the passage of individuals engaged in postal business, [thus] the sidewalk leading to the entry of [a] post office is not [a] traditional public forum sidewalk").

535. See *Daniel v. City of Tampa*, 38 F.3d 546, 550 (11th Cir. 1994) (finding that the "official mission of the Housing Authority is to provide safe housing for its residents, not to supply non-residents with a place to disseminate ideas," and that because access "is carefully limited to lawful residents, their invited guests, and those conducting official business, [there is] little difficulty in concluding that the property is a nonpublic forum").

536. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

537. *Id.* at 802.

infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity.”<sup>538</sup>

*b. Injunctive Restrictions on Public Forum Access and Expression*

Injunctions that impose content-neutral time, place, or manner restrictions are subject to a heightened form of intermediate scrutiny—under a test that is slightly more stringent than that for legislation.<sup>539</sup> Observing that “[i]njunctions . . . carry greater risks of censorship and discriminatory application than do general ordinances,”<sup>540</sup> the Court held in 1994 that speech-restrictive injunctions should be subjected to more “stringent” First Amendment scrutiny than comparable legislation.<sup>541</sup> The Court noted that, “when evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous.”<sup>542</sup> Announcing a new standard of review for content-neutral injunctions, the Court held that, rather than inquiring whether the order is narrowly tailored to serve a significant government interest, “[w]e must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.”<sup>543</sup>

2. Communications Media: Broadcasting, Cable Television, and Cyberspace

In its treatment of mass communications media, the Supreme Court has adopted a “medium-specific” analysis.<sup>544</sup> The cases featuring broadcast,<sup>545</sup> cable television,<sup>546</sup> and Internet<sup>547</sup> regulation of inde-

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538. *Id.* at 803.

539. See *Madsen v. Women's Health Ctr. Inc.*, 512 U.S. 735, 764-65 (1994).

540. *Id.* at 764.

541. See *id.* at 764-65.

542. *Id.* at 765.

543. *Id.*

544. *ACLU v. Reno*, 521 U.S. 844, 863 (1997) (discussing the “medium specific” approach used by the Court).

545. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (upholding the FCC’s authority to sanction a radio station for broadcasting indecent speech during daytime hours when children were likely to be listening). The program was a daytime broadcast of George Carlin’s “filthy words” monologue, where the comedian repeatedly spoke the seven words “that you definitely wouldn’t say, ever” on the air. *Id.* at 751. The words were “shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.” *Id.*

546. See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 733 (1996) (upholding one and striking down two other statutory provisions governing indecent, sex-related programming on cable television). The first provision allowed cable system operators to decide

gency, for example, make clear that judicial scrutiny will vary depending upon the *medium* of expression. The Court is most deferential to restrictions on broadcasters<sup>548</sup> and least deferential to restrictions on the print media.<sup>549</sup> In justifying this divergent treatment, the Court has stressed the unique pervasiveness and intrusiveness of broadcasting,<sup>550</sup> and the inherent scarcity of its transmission frequencies.<sup>551</sup> When confronted with new forms of communication—such as “dial-a-porn,”<sup>552</sup> cable television,<sup>553</sup> and the unsolicited mailing of

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whether to broadcast “patently offensive” material on leased access channels. *Id.* The Court held that the provision was consistent with a balancing of government objectives and First Amendment freedoms. *See id.* at 744-45. But the second provision required leased channel operators to segregate and block “offensive programming,” while the third provision permitted discretion in broadcasting such material on “public, educational, and government channels.” *Id.* at 732-33. The Court struck down the second and third provisions because “they [were] not appropriately tailored to achieve the basic, legitimate objective of protecting children from exposure to ‘patently offensive’ material.” *Id.* As such, the four-Justice plurality decision leaves open the possibility that a lesser First Amendment standard may be applied to cable television in future cases. *See id.* at 737-38.

547. *See Reno*, 521 U.S. at 849 (striking down two statutory provisions banning “indecent” and “patently offensive” communications on the Internet). The Court identified certain factors—the extensive history of government regulation of broadcasters, the “scarcity of available frequencies,” and the “invasive” nature of the medium—as justifying the heightened regulation of broadcasting. *Id.* at 868. These justifications do not apply to the Internet. *See id.* Thus, the Court found that there is no basis on which to qualify the level of First Amendment scrutiny that should be applied to content-based restrictions on Internet speech. *See id.* at 868-69. As such, speech in cyberspace enjoys the same enhanced protection as that reserved for books and newspapers. *See id.*

548. *See Pacifica*, 438 U.S. at 748 (noting that “of all forms of communication, it is broadcasting that has received the most limited First Amendment protection”); *Red Lion Broad. Co., Inc. v. FCC*, 395 U.S. 367, 386-87 (1969) (finding that, “[a]lthough broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them”) (citation omitted).

549. *See Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that “[t]he choice of material to go into a newspaper, . . . whether fair or unfair, constitute[s] the exercise of editorial control and judgment, [and] it has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of free press as they have evolved to this time”).

550. *See Pacifica*, 438 U.S. at 748-50 (recognizing that “the broadcast media have established a uniquely pervasive presence in the lives of all Americans” and “[p]atently offensive, indecent material presented over the airwaves confronts 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”).

551. *See Red Lion*, 395 U.S. at 388-90 (recognizing that “[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish”).

552. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 127-28 (1989) (finding that “the dial-it medium requires the listener to take the affirmative steps to receive the communication, [and] unlike an unexpected outburst on a radio broadcast, the message received by one

contraceptives<sup>554</sup>—the Court has struggled to analogize them either to print or broadcast media. Though the Court recently ruled that Internet communications are entitled to the same unqualified protection reserved for the print media,<sup>555</sup> it has balked at doing the same for cable television.<sup>556</sup>

### 3. Restricted Environments: Schools, Prisons, and the Military

This Section addresses the diminished speech protections that prevail in schools, prisons, and the military.

#### a. Schools

Two decisions—separated by a gulf of twenty years and mutually antithetical—govern the landscape of student speech.<sup>557</sup> The older, waning authority is *Tinker v. Des Moines School District*,<sup>558</sup> while the newer, waxing authority is *Hazelwood School District v. Kuhlmeier*.<sup>559</sup>

In *Tinker*, several high school and junior high school students were suspended for wearing black armbands as a symbol of opposition to the Vietnam War.<sup>560</sup> Two days before, and in anticipation of the

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who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it”).

553. See *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) (leaving open “the question of the proper standard for judging First Amendment challenges to a municipality’s restriction of access to cable facilities,” and recognizing the lack of factual data regarding the nature of cable television upon which to adjudge whether it is “sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics [of cable television] require a new analysis”).

554. See *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 74 (1983) (recognizing that “[t]he receipt of mail is far less intrusive and uncontrollable [than the broadcast media],” and that “the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication”) (citations omitted).

555. See *Reno v. ACLU*, 521 U.S. 868, 870 (1997) (agreeing that “the content on the Internet is as diverse as human thought,” and therefore there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to [that] medium”).

556. See *Denver Area Educ. Telecom. Consortium, Inc. v. FCC*, 518 U.S. 727, 747 (1996) (plurality opinion leaving open the possibility that a lesser First Amendment standard may be applied to cable television in future cases). Justice Thomas’s concurring opinion recognized that “First Amendment distinctions between media, dubious from their infancy, placed cable in a doctrinal wasteland in which regulators and cable operators alike could not be sure whether cable was entitled to the substantial First Amendment protections afforded the print media or was subject to the more onerous obligations shouldered by the broadcast media.” *Id.* at 813-14 (Thomas, J., concurring in part and dissenting in part).

557. See *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

558. 393 U.S. 503 (1969).

559. 484 U.S. 260 (1988).

560. *Tinker*, 393 U.S. at 504.

protest, school officials adopted a rule forbidding the wearing of such armbands.<sup>561</sup> The Supreme Court held that the prohibition against armbands violated the students' First Amendment rights because school officials were regulating expressive conduct that approached the level of "pure speech."<sup>562</sup> In arriving at this result, the *Tinker* Court announced the following analytical standard: content-based restrictions on student expression will be upheld only if necessary to serve a compelling government interest.<sup>563</sup> But school officials are nevertheless free to suppress speech and expressive conduct that "materially and substantially disrupt" the work and discipline of the school.<sup>564</sup>

Nearly twenty years later, in *Hazelwood*, the Court upheld a high school principal's decision to remove two articles from a student newspaper, finding the principal's actions "reasonable under the circumstances as he understood them."<sup>565</sup> One article examined student pregnancy; the other described the effects of divorce on students at the school.<sup>566</sup> The Court held that where a school sponsors an activity in such a way that students and others may reasonably perceive the activity as bearing the school's "imprimatur," the school's authority to restrict student speech in the context of that activity is much greater than its authority under *Tinker*.<sup>567</sup> Under this new, more deferential standard, school officials may exercise editorial control over the content of student newspapers and other school-sponsored expression if they do so in a way that is "reasonably related to legitimate pedagogical concerns."<sup>568</sup>

How do we distinguish the separate spheres of *Tinker* and *Hazelwood*? By its terms, *Hazelwood* is confined to student expression that arises in the context of *school-sponsored* activities.<sup>569</sup> *Tinker* continues to protect individual, non-sponsored expression—including buttons,<sup>570</sup> T-shirts,<sup>571</sup> underground newspapers,<sup>572</sup> and websites created

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561. *See id.*

562. *Id.* at 505-06.

563. *See id.* at 509-11.

564. *Id.* at 511.

565. *Hazelwood*, 484 U.S. at 276.

566. *Id.* at 263.

567. *Id.* at 270-71.

568. *Id.* at 272-73.

569. *Id.* at 273.

570. *See, e.g.,* Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 550 (9th Cir. 1992) (applying *Tinker* and upholding the First Amendment right of students to wear buttons bearing the word "scab" to protest the presence of replacement teachers during a strike).



off campus.<sup>573</sup> A more pressing question is whether *Hazelwood* will swallow *Tinker*. Judges inclined to ignore *Tinker* have seized upon language in *Hazelwood* that “[a] school need not tolerate student speech that is inconsistent with its ‘basic educational mission,’ ”<sup>574</sup> and that school officials may act to ensure that students “are not exposed to material that may be inappropriate for their level of maturity.”<sup>575</sup> These concerns are far afield from *Hazelwood*’s core rationale—that school officials should enjoy editorial control over student expression when the expression bears the school’s “imprimatur.”<sup>576</sup> In other words, it is because such expression bears the school’s *stamp of approval*, that school officials should be freed from *Tinker* and afforded greater power to regulate it.<sup>577</sup> By shifting the focus away from “imprimatur,”<sup>578</sup> and by stressing that school officials “need not tolerate” student speech that is “inconsistent with [their] educational mission,”<sup>579</sup> that dicta in *Hazelwood* has given the opinion far broader impact than that warranted by its facts and rationale.

In the name of *Hazelwood*, subsequent decisions have upheld the suppression of student speech that bore no trace of school sponsorship or support.<sup>580</sup> In these cases, restrictions on *individual* expression—supposedly the province of *Tinker*—were analyzed not under *Tinker*’s “substantial disruption” test, but instead by vague reference to promoting “civility [as] a legitimate pedagogical concern.”<sup>581</sup> Thus, by

571. See, e.g., *Broussard v. Norfolk*, 801 F. Supp. 1526, 1537 (E.D. Va. 1992) (applying *Tinker* and upholding the power of school officials to ban a “Drugs Suck!” T-shirt).

572. See, e.g., *Boucher v. School Bd. of the Sch. Dist. of Greenfield*, 134 F.3d 821, 828 (7th Cir. 1998) (applying *Tinker* and upholding the punishment of a student who published, in an underground newspaper, an article on how to “hack” the school’s computers).

573. See e.g. *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 n.4 (E.D. Mo. 1998) (confirming that *Tinker*, not *Hazelwood*, governs this situation and granting a preliminary injunction restraining school officials from punishing high school student whose personal Internet homepage featured derogatory comments about the school, its principal, and its teachers).

574. *Id.* at 266 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)).

575. *Id.* at 271.

576. *Id.*

577. See *id.* at 270-71 (recognizing that certain school-sponsored activities “may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences”).

578. *Id.* at 271.

579. *Id.* at 266.

580. See, e.g., *Poling v. Murphy*, 872 F. 2d 757 (6th Cir. 1989) (involving the “admittedly ‘discourteous’ and ‘rude’ remarks” made by a student about his principal during a school assembly).

581. *Id.* at 758 (holding that “[c]ivility is a legitimate pedagogical concern” and upholding the punishment of a student who made “discourteous” remarks about an assistant principal while campaigning for student office). The *Poling* court was confronted with quintessentially *individ-*

pursuing an expansive conception of “school sponsorship,”<sup>582</sup> and by treating the promotion of “civility” as a “legitimate pedagogical concern,”<sup>583</sup> some courts are broadening *Hazelwood* at *Tinker*’s expense. When *Tinker* does apply, some courts are diluting its protection by formulating a relaxed variation of *Tinker*’s “substantial disruption” standard.<sup>584</sup> And other courts have altogether abandoned *Tinker*’s “substantial disruption” test when confronted with student speech that is assertedly “vulgar.”<sup>585</sup>

b. *Prisons*

In *Jones v. North Carolina Prisoners’ Union*,<sup>586</sup> the Supreme Court upheld direct restrictions on efforts by prison inmates to form and operate a union<sup>587</sup>—including a ban on soliciting other inmates to join the union, meetings among union members, and “bulk mailings concerning the union from outside sources.”<sup>588</sup> Delivering the opinion of the Court, Justice Rehnquist established an extremely deferential standard for gauging restrictions on inmate speech.<sup>589</sup>

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ual expression—a student’s own campaign speech—that would seem to be governed by *Tinker*. *Id.* at 759. But the court ignored *Tinker* and applied *Hazelwood* instead because the speech took place at an election assembly, and was therefore, part of a “school-sponsored” activity. *Id.* at 758.

582. *Id.* at 762.

583. *Id.* at 758.

584. See *Broussard v. Norfolk*, 801 F. Supp. 1526, 1537 (E.D. Va. 1992) (holding that *Tinker*’s substantial disruption test is satisfied if school officials can demonstrate even “a reasonable forecast of disruption,” thus vesting authority in school officials to ban a “Drugs Suck” T-shirt); *Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F. Supp. 1459, 1461 (C.D. Cal. 1993) (striking down an anti-gang apparel policy banning clothing with pictures or any other insignia identifying professional or collegiate sports teams, but noting that “the First Amendment does not require school officials to wait until disruption actually occurs before they may act to curtail [student expression]”). The court recognized that the speech rights of students may be abridged if facts exist “which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.” *Id.* Further, the court found the threshold of potential “disturbance required to justify intervention” to be relatively low in the school context. *Id.* As such, the trend among some courts may evidence the erosion of *Tinker*’s requirement that student speech be afforded protection unless it “materially and substantially interfere[s] with” the work and discipline of a school. *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 509 (1969).

585. *Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157, 159 (D. Mass. 1994) (upholding a school’s ban on T-shirts bearing a “sexual double entendre,” even where there was no immediate prospect of disruption). The “vulgar” shirts at issue contained the following messages: (1) “See Dick Drink. See Dick Drive. See Dick Die. Don’t be a Dick,” and (2) “Coed Naked Band: Do it to the Rhythm.” *Id.* at 158.

586. 433 U.S. 119 (1977).

587. *Id.* at 121.

588. *Id.* at 121-22.

589. See *id.* at 128.

Recognizing “the wide-ranging deference to be accorded the decisions of prison administrators,”<sup>590</sup> Justice Rehnquist asserted that “‘in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to [security] considerations, courts should ordinarily defer to their expert judgment in such matters.’”<sup>591</sup> In dissent, Justice Marshall contended that the Court was effectively applying a test that only inquired whether prison officials had exercised their judgment in a rational manner.<sup>592</sup> In no other context, Justice Marshall asserted, is the Court this deferential.<sup>593</sup>

Ten years later, in *Turner v. Safley*,<sup>594</sup> the Court upheld broad restrictions on inmate-to-inmate correspondence<sup>595</sup>—and in the process, reaffirmed its commitment to a deferential standard in prisoner speech cases.<sup>596</sup> Announcing a test that prevails to this day,<sup>597</sup> Justice O’Connor held that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”<sup>598</sup> She identified four factors to consider when applying this standard: (1) whether there exists a “valid, rational connection” between the regulation and the governmental interest put forward to justify it, (2) whether inmates are left with “alternative means of exercising the right” that the regulation restricts, (3) whether accommodating the asserted right would have a significant “ripple effect” on fellow inmates or prison staff,” and (4) whether there is a ready alternative to the regulation that fully accommodates the asserted right “at a *de minimis* cost to valid penological interests.”<sup>599</sup>

### c. *The Military*

Recognizing profoundly limited speech protections within the context of military service, the Supreme Court in *Parker v. Levy*<sup>600</sup> upheld the court martial of an army captain who urged black enlisted

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590. *Id.* at 126.

591. *Id.* at 128 (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

592. *See id.* at 141 (Marshall, J., dissenting).

593. *See id.* (Marshall, J., dissenting).

594. 482 U.S. 78 (1987).

595. *Id.* at 91 (finding the regulations “reasonably related to legitimate security interests”).

596. *See id.* at 91-92.

597. *See Thornburgh v. Abbott*, 490 U.S. 401, 404 (1989) (confirming that “the proper inquiry [in prisoner speech cases] is whether the regulations are ‘reasonably related to legitimate penological interests’”) (quoting *Turner v. Safley*, 482 U.S. 78, 79 (1987)).

598. *Turner*, 482 U.S. at 89.

599. *Id.* at 89-91.

600. 417 U.S. 733 (1974).

men to refuse to fight in Vietnam.<sup>601</sup> Since “[a]n army is not a deliberative body,”<sup>602</sup> and since obedience to lawful command is essential to the effective functioning of military units,<sup>603</sup> the type of disobedience urged by the defendant finds no First Amendment protection.<sup>604</sup>

Citing a commander’s need to maintain morale, discipline, and readiness, the Court in *Brown v. Glines*<sup>605</sup> went far beyond *Parker*, upholding a regulation that required service members to obtain advance permission from their commander before circulating any petition on an Air Force base.<sup>606</sup> In dissent, Justice Brennan asserted: “[This] Court abdicates its responsibility to safeguard free expression when it reflexively bows before the shibboleth of military necessity.”<sup>607</sup>

#### 4. Speech Rights of Public Employees

The Supreme Court has created special rules governing the speech rights of public employees.<sup>608</sup> These rules essentially balance a government employer’s interest in promoting workplace efficiency against the employee’s interest in commenting freely on matters of public concern.<sup>609</sup> When an employee criticizes a government em-

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601. *Id.* at 356.

602. *Id.* at 743-44 (quoting *In re Grimley*, 137 U.S. 147, 153 (1890)).

603. *See id.* at 758.

604. *See id.* at 757.

605. 444 U.S. 348 (1980).

606. *Id.* at 356.

607. *Id.* at 370 (Brennan, J., dissenting).

608. *See Board of County Comm’rs v. Umbehr*, 518 U.S. 668, 674-76 (1996) (summarizing the Court’s rules concerning public employee speech in stating that “government workers are constitutionally protected from dismissal for refusing to take an oath regarding their political affiliation, for publicly or privately criticizing their employer’s policies, for expressing hostility to prominent political figures, or, except where political affiliation may reasonably be considered an appropriate job qualification, for supporting or affiliating with a particular political party”); *see also* Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529 (1998) (summarizing and critiquing existing public employee doctrine).

609. *See Waters v. Churchill*, 511 U.S. 661, 668 (1994) (finding that “[t]o be protected, the [employee’s] speech must be on a matter of public concern” and the “employee’s interest in expressing herself . . . must not be outweighed by an injury the speech could cause to ‘the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees’”) (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (recognizing that “[t]he problem in any case is to arrive at a balance between the interests of the [employee], 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”). The *Pickering* balancing test has also been applied to the First Amendment rights of independent contractors. *See Umbehr*, 518 U.S. at 678-85 (discussing application of the Court’s public employee doctrine to independent contractors and finding “no reason to believe that proper application of the *Pickering* bal-

ployer, the difficulty is to determine whether the employee's words are protected political speech or an unprotected act of insubordination.

This dichotomy is exemplified in two Supreme Court cases: *Pickering v. Board of Education*<sup>610</sup> and *Connick v. Myers*.<sup>611</sup> In *Pickering*, a public schoolteacher was terminated for publishing a letter in a local newspaper criticizing the school board's spending of tax revenues and questioning its purported need for new revenues.<sup>612</sup> In *Connick*, an assistant district attorney was fired for circulating a workplace questionnaire inquiring whether her colleagues "felt pressured to work in political campaigns" in order to keep their jobs.<sup>613</sup> The Court sided with the terminated schoolteacher in *Pickering*, holding that school tax levies are matters of legitimate public concern and teacher's should "be able to speak out freely on such questions without fear of retaliatory dismissal."<sup>614</sup> But in *Connick*, the Court sided with the employer, who described the questionnaire as an act of insubordination that prompted a "mini-insurrection" in the workplace.<sup>615</sup> The Court concluded that the questionnaire "touched upon matters of public concern in only the most limited sense," and was therefore worthy of only minimal First Amendment protection.<sup>616</sup> Thus, the balance of interests favored the employer, who was not required to "tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."<sup>617</sup>

*Connick* indicates that speech by a public employee will be afforded ever greater weight in this balancing analysis the more it ascends from a personal workplace grievance to pure political expression.<sup>618</sup> Thus, in *Rankin v. McPherson*,<sup>619</sup> the Court sided with a clerical worker in a county constable's office who was discharged for expressing her contempt for the policies of President Reagan.<sup>620</sup> Ap-

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ancing test cannot accommodate the differences between employees and independent contractors").

610. 391 U.S. 563 (1968).

611. 461 U.S. 138 (1983).

612. *Pickering*, 391 U.S. at 564.

613. *Connick*, 461 U.S. at 141.

614. *Pickering*, 391 U.S. at 571-72.

615. *Connick*, 461 U.S. at 151-52.

616. *Id.* at 154.

617. *Id.*

618. See Rosenthal, *supra* note 618, at 539-41.

619. 483 U.S. 378 (1987).

620. *Id.* at 379-81.

prised of the assassination attempt on Reagan, the employee cited his cutbacks on welfare, food stamps, and medicaid, and declared: [I]f they go for him again, I hope they get him.”<sup>621</sup> This statement, held the Court, was plainly a form of political expression, since it was uttered in the context of a conversation criticizing Reagan’s policies.<sup>622</sup> And the “inappropriate or controversial character” of the statement was “irrelevant” to whether it dealt with a matter of public concern.<sup>623</sup> Applying its balancing test, the Court concluded that the speech rights of the employee trumped the employer’s interests because there was no proof that her statement, uttered in a private conversation, either discredited the constable’s office or interfered with its efficient operation.<sup>624</sup>

In related lines of precedent, the Court has held that government workers are constitutionally protected from dismissal for refusing to take an oath regarding their political affiliation.<sup>625</sup> Likewise, except where relevant to job performance, it is unconstitutional to discharge a government worker<sup>626</sup> or deny her a promotion<sup>627</sup> based on her affiliation with a particular political party.

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621. *Id.* at 381.

622. *See id.* at 386 (holding that “[c]onsidering the statement in context, as *Connick* requires, discloses that it plainly dealt with a matter of public concern”).

623. *Id.* at 387.

624. *See id.* at 388-89 (finding that “[n]ot only was [the employee’s] discharge unrelated to the functioning of the office, it was not based on any assessment by the [employer] that the remark demonstrated a character trait that made [the employee] unfit to perform her work”).

625. *See Keyishian v. Board of Regents*, 385 U.S. 589, 609-10 (1967) (declaring invalid two laws applied to university faculty “insofar as they proscribe mere knowing membership without any showing of specific intent to further the unlawful aims of the Communist Party”); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) (invalidating the oath of office for Arizona state employees because “[a]ny law which applies to membership without the ‘specified intent’ to further the illegal aims of the organization infringes unnecessarily on protected freedoms”); *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952) (invalidating the oath of office for Oklahoma state employees because “[i]t is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory”).

626. *See Branti v. Finkel*, 445 U.S. 507, 520 (1980) (enjoining a government employee’s termination on purely political grounds); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (enjoining a government employee’s termination on the sole basis of the employee’s affiliation with the Democratic Party). These protections against patronage discharge were later extended to independent contractors. *See O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714-15 (1996) (finding that, “[a]lthough the government has broad discretion in formulating its contracting policies, . . . the protections of *Elrod* and *Branti* extend to . . . where the government retaliates against a contractor, or a regular provider of services, for the exercise of rights of political association or expression of political allegiance”).

627. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 79 (1990) (finding that “the rule of *Elrod* and *Branti* extends to promotion, transfer, recall, and hiring decisions based on party affiliation and support”).

## 5. Government-Funded Expression

In this special context—where the government is funding expressive activity, the Court's review is utterly deferential, upholding even viewpoint discrimination.

In *Rust v. Sullivan*,<sup>628</sup> the Court held that Congress did not offend the First Amendment by conditioning federal public health funding upon the recipient's abstaining from providing counseling about abortion or advocating abortion as a method of family planning.<sup>629</sup> *Rust's* upshot was to broaden the government's power to exert control over the speech of government grantees—permitting even viewpoint discrimination in doling out government subsidies.<sup>630</sup>

More recently, in *National Endowment for the Arts v. Finley*,<sup>631</sup> the Court upheld a federal statute employing viewpoint discrimination in public arts funding.<sup>632</sup> The Court found that, "as a practical matter, . . . artists may conform their speech to what they believe to be the decision making criteria in order to acquire funding."<sup>633</sup> The Court reasoned that "there is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."<sup>634</sup> In dissent, Justice Souter cited the statute's "decency and respect" proviso, which "penalizes [art] that disrespects the ideology, opinions, or convictions of a significant segment of the American [public, but not] art that reinforces those values,"<sup>635</sup> as a patent example of "viewpoint discrimination,"<sup>636</sup> and he expressed bafflement why the statute should not be struck down under the Court's well-established hostility to viewpoint-based restrictions.<sup>637</sup>

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628. 500 U.S. 173 (1991).

629. *Id.* at 203.

630. *Id.* at 193 (finding that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way"). But the Court did not consider the funding denial to abortion-related activities as viewpoint discrimination. *See id.* Rather, the Court found that Congress "has merely chosen to fund one activity to the exclusion of the other." *Id.*

631. 524 U.S. 569 (1998).

632. *Id.* at 589.

633. *Id.*

634. *Id.*

635. *Id.* at 606 (Souter, J., dissenting).

636. *Id.* (Souter, J., dissenting).

637. *See id.* (Souter, J., dissenting) (citing *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 831 (1995)).

## IV. CONCLUSION

In elaborating its Speech Clause jurisprudence, the Supreme Court has developed a dense mass of overlapping doctrines—from overbreadth,<sup>638</sup> vagueness,<sup>639</sup> and prior restraint<sup>640</sup> to the “hostile audience” cases<sup>641</sup> and the public forum doctrine.<sup>642</sup> This Article sorts, identifies, and explains the myriad lines of Speech Clause precedent, while furnishing a framework for analyzing any government restriction on speech. That analytical framework is comprised of five questions that are designed to serve as an issue-spotting checklist. It is the author’s hope that this framework will alleviate the confusion that so frequently attends the litigation of First Amendment claims—helping to identify, and to distinguish clearly among, the many strands of precedent that may govern a given case.

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638. See, e.g., *Board of Airport Comm’rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 577 (1987) (striking down, on overbreadth grounds, a regulation prohibiting any person from engaging “in First Amendment activities within the Central Terminal Area at Los Angeles International Airport”).

639. See, e.g., *Smith v. Goguen*, 415 U.S. 566, 582 (1974) (striking down, on vagueness grounds, a Massachusetts statute criminalizing publicly treating the American flag “contemptuously”).

640. See, e.g., *New York Times v. United States*, 403 U.S. 713, 714 (1971) (striking down, as prior restraints, certain injunctions barring the New York Times and Washington Post from publishing excerpts from the “Pentagon Papers,” a top-secret Defense Department study of the Vietnam War).

641. See, e.g., *Gregory v. City of Chicago*, 394 U.S. 111, 112-13 (1969) (overturning the disorderly conduct convictions of 85 civil rights protesters whose peaceful march produced a hostile reaction by approximately 1000 onlookers).

642. See, e.g., *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79 (1992) (elaborating the public forum doctrine and examining the distinctions between traditional public fora, designated public fora, and nonpublic fora).