

# 2

## THE FIRST AMENDMENT

### Speech and Press Freedoms in Theory and Reality

#### SUPPOSE . . .

. . . an anonymous source gives newspapers copies of classified federal government documents that show the government has been lying publicly about U.S. casualties and the U.S. war abroad. After the newspapers begin publishing stories based on the documents, the government obtains a court order to stop further stories, on the grounds coverage will jeopardize military operations and undermine national security. The newspapers challenge the ban in court, arguing that they have a First Amendment right to publish the information and the public has a need to know the truth.

Does the government's power to classify government records as secret allow it to prevent publication of classified government information once disclosed? Does the First Amendment allow government to prevent media coverage of issues of national importance? Does it matter how the newspapers obtained the documents? Look for the answers to these questions in this chapter's discussion of *New York Times Co. v. United States* and its case excerpt at the end of the chapter.

The First Amendment to the U.S. Constitution includes only 45 words. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Since the adoption of the Bill of Rights in 1791, thousands of articles, books and legal cases have tried to interpret the First Amendment and define the

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##### When "the Press" Changes

##### How the First Amendment Is Understood

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##### How Government Restrains First Amendment Freedoms

##### How the Supreme Court Reviews Laws Affecting First Amendment Rights

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##### Assembling and Speaking in Public and Nonpublic Places

Private Property as a Public Forum  
Funding as Forum

##### Associating Freely

##### Emerging Law

##### Cases for Study

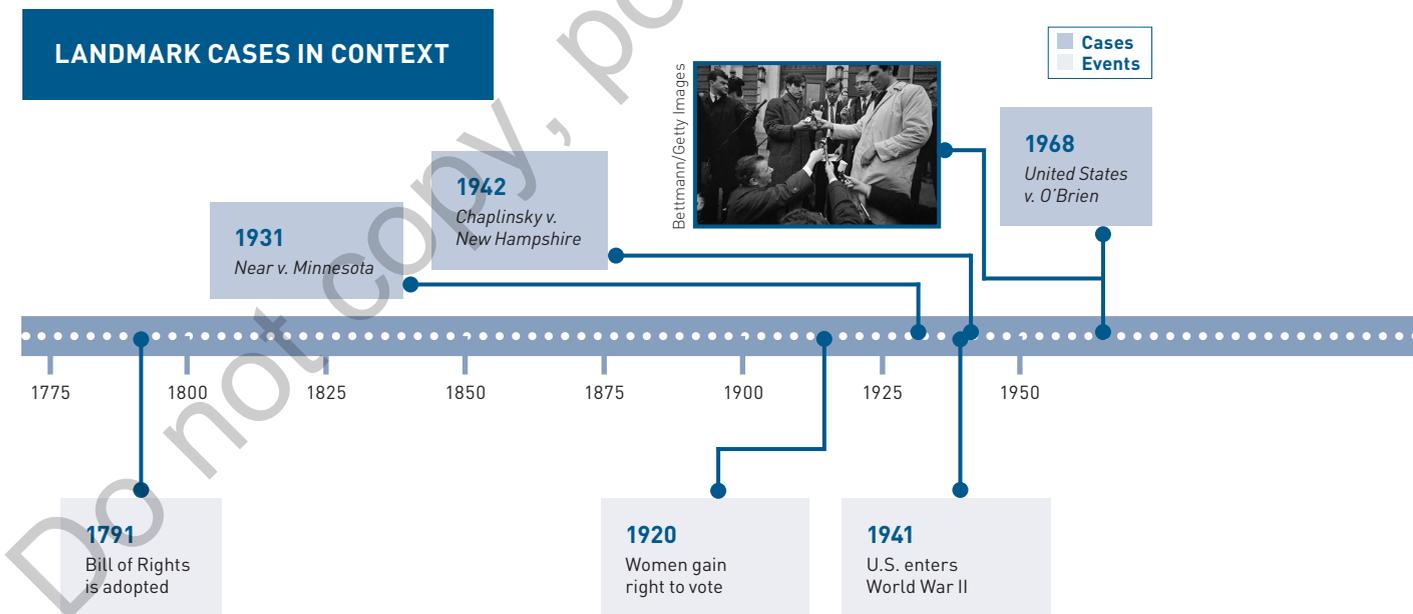
- *New York Times Co. v. United States*
- *Reed v. Town of Gilbert*

boundaries of the six freedoms it protects.<sup>2</sup> A literal interpretation of the First Amendment would completely ban Congress, and only Congress, from “abridging” the freedom of speech or of the press in any way. However, in 1925, the U.S. Supreme Court said the First Amendment applied to state legislatures as well as to Congress.<sup>3</sup> Supreme Court decisions also make clear that although the First Amendment says government “shall make no law,” the First Amendment’s ban is *not* absolute.<sup>4</sup>

### WHERE THE FIRST AMENDMENT CAME FROM

Historians of the First Amendment generally agree that the First Amendment was intended to prevent the U.S. government from adopting the types of suppressive laws that flourished in England following the introduction of the printing press in 1450. Beginning in the early 1500s, the British Crown controlled all presses in England through its licensing power. King Henry VIII and the Roman Catholic Church sought to suppress challenges to their power by outlawing critical views as heresy (criticism of the church) or sedition (challenges to government). They jointly imposed a strict system of licensing of printers and prior review of all publications.

Review before printing enabled the king’s officers to ban disfavored authors and ideas. Printers suspected of publishing outlawed texts faced fines, prison, torture or even



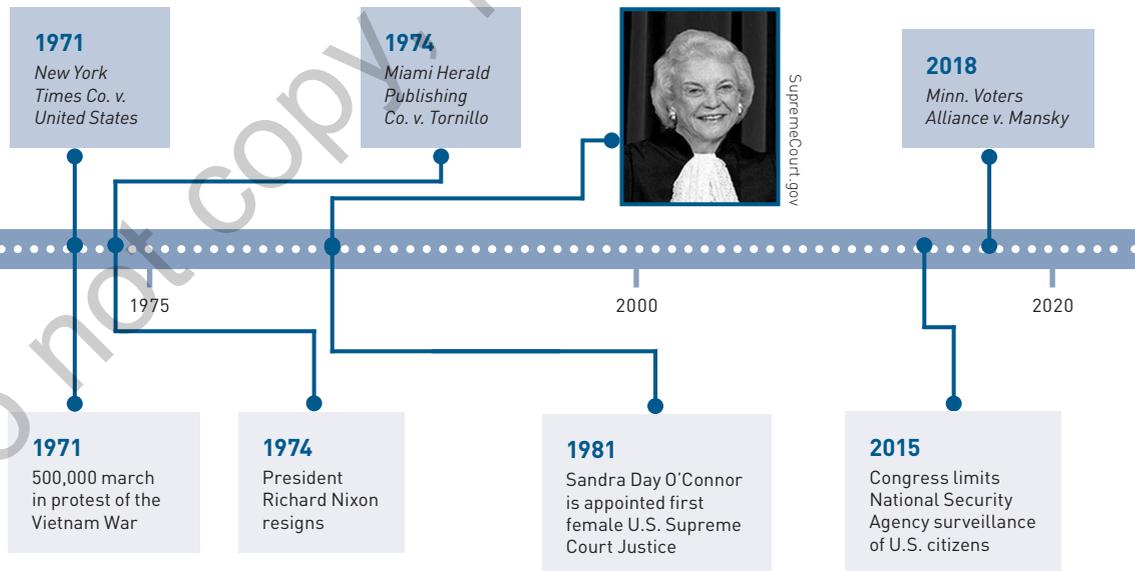
execution. In exchange for lucrative monopoly printing contracts, licensed printers reported and attacked unlicensed printers and destroyed their presses, but unlicensed texts continued to appear.

### Foundations of First Amendment Theory

In 1643, the power of prior review shifted from the king's officers to the British Parliament. Authors and publishers protested government censorship and developed theories to justify press freedom. In 1644, English poet John Milton's unlicensed "Areopagitica" argued that an open marketplace of ideas advanced the interests of society and humankind. Milton, who was angered by church and state attempts to destroy his pamphlet advocating divorce, said the free exchange of ideas was vital to the discovery of truth. He wrote, famously,

Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?<sup>5</sup>

By the late 1600s, English philosopher and political theorist John Locke argued that government censorship was an improper exercise of power.<sup>6</sup> Locke first said that all people



have fundamental natural rights, including life, personal liberty and self-fulfillment. Freedom of expression is central to these natural rights. Government has no innate rights or authority, and its power derives solely through grant from the people. Government actions outside the sphere of power granted by the people are illegitimate. The people do not give government the power over their natural human rights. Accordingly, government censorship is always illegitimate. Locke's vision of government was revolutionary.

#### **prior restraint**

Action taken by the government to prohibit publication of a specific document or text before it is distributed to the public; a policy that requires government approval before publication.

#### **defamation**

A false communication that harms another's reputation and subjects him or her to ridicule and scorn; incorporates both libel and slander.

#### **sedition libel**

Communication meant to incite people to change the government; criticism of the government.

In 1694, the British Parliament failed to renew the Licensing Act, and official **prior restraint** of publications ended. But for the next 100 years, the British government enacted and enforced laws that punished immoral, illegal or dangerous speech after the fact. Political thinkers of the day generally did not view punishment after the fact as censorship because it allowed people to speak and publish and held them accountable for the harms their speech was believed to cause, such as sedition, **defamation** (criticism of individuals) and blasphemy (sacrilegious speech about God).

The British licensed presses in the colonies, and government censors previewed publications until the 1720s. The crime of **sedition libel** made it illegal to publish anything harmful to the reputation of a colonial governor. Truth was not a defense because truthful criticism still harmed the governor's reputation, and the governor had a legal right to be compensated for that harm.

Nearly half a century later, French political philosopher Jean-Jacques Rousseau advanced the idea of a social contract between the people and their government in which the people limit some individual freedoms for a government that advances the collective interest.<sup>7</sup> Rousseau said all people are born free and equal but need the constraints of morality and law to become civilized and nonviolent. Accordingly, people form a social contract in which they remain sovereign and retain their human rights. Therefore, government censorship can never be justified.

British legal scholar Sir William Blackstone described the prevailing understanding of the free press under the common law of the day.<sup>8</sup> He wrote,

The liberty of the press is indeed essential to the nature of a free state, but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public, to forbid this is to destroy the freedom of the press, but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.<sup>9</sup>

Blackstone's view of freedom of the press and of British licensing, taxation and common law restraints on speech and press traveled to the American colonies.<sup>10</sup>

With growing independence, the colonies attempted to dismantle some British common law traditions. In the case of John Peter Zenger, this publisher of a newspaper in New York clearly had broken the sedition law by printing criticism of colonial Gov. William Cosby. Cosby jailed Zenger to stop the publications. Arguing for the defense, Andrew Hamilton said

## INTERNATIONAL LAW

### THE U.S. WAR ON INFORMATION?

Some see the annual Google transparency report as a barometer of internet freedom, and in 2019, it ranked the United States third in online censorship of the leading 20 industrialized nations.<sup>i</sup> Russia was by far the most aggressive government in removing content from the web, but the United States followed closely behind No. 2: Turkey. China ranked 14, behind Germany, France, the United Kingdom and Canada, among others.

Notions that established, Western democracies are less likely to engage in censorship are not accurate, according to a recent study of social media.<sup>ii</sup> Evidence suggests the contrary; there may be a greater tendency to censor in more

open societies that have “more at stake.” The responses of democratic nations to social media activism “have not differed significantly from the responses of authoritarian regimes,” the study concluded.

The government’s own records show that the United States “censored, withheld or said it couldn’t find” more public records requested under the Freedom of Information Act (see Chapter 7) in 2017 than in any year in the past decade.<sup>iii</sup> FOIA requests for government files that year came up empty or censored 78 percent of the time, and the government spent more than \$40 million defending its records denials and redactions.

no one should be jailed for publishing truthful and fair criticism of government. The jury agreed and acquitted Zenger in 1734 despite the contrary common law.

Very few trials for seditious libel followed. However, the struggle to define the acceptable limits of free speech and a free press continued in colonial legislatures that used their power to question, convict, jail and fine those who published criticism of the legislature or breach of parliamentary privilege.

This mixed history shaped First Amendment freedoms of speech and of the press. The Constitution’s framers understood both the British tradition of punishment for sedition, blasphemy and libel, and the colonists’ growing enthusiasm for increasingly free debate. It seems clear the authors of the First Amendment intended to provide a ban on prior restraints. Less clear is whether they intended to eliminate the common law regarding sedition, blasphemy and libel.<sup>11</sup>

As the 18th century ended, U.S. laws continued to punish criticism of government. Seven years after the adoption of the First Amendment, the Sedition Act imposed heavy fines and jail time on individuals who stirred up public emotions or expressed malicious views against the government. More than a dozen prosecutions and convictions under the Alien and Sedition Acts targeted outspoken publishers and political opponents of President John Adams.<sup>12</sup> The Alien and Sedition Acts expired without the U.S. Supreme Court reviewing their constitutionality, but more than 150 years later, Justice William J. Brennan said that “the court of history” clearly found the Sedition Act unconstitutional.<sup>13</sup>

## WHEN “THE PRESS” CHANGES

In 1791, when the First Amendment was adopted, speaking to crowds in town squares and the printed word, the press, was *the* medium of mass communication. Printing of pamphlets, posters, books and newspapers was the primary means to distribute your message, and the masses reached were small. The largest 18th-century newspapers had circulations of no more than 200 or so readers. Word of mouth, speech, remained essential to spreading timely information.

Today, the First Amendment faces a very different reality. Observers long have decried the asserted threat new media pose to families, communities and society.<sup>14</sup> Established media viewed newcomers as competitors, even as new arrivals touted their ability to increase the quantity and diversity of speech and press.

New media—motion pictures, radio, television, telephone, cable, the internet, Siri—provide new types, reach, modes and uses of communication. They blur the line between press and speech, and “smart” devices challenge the “human rights” foundations of First Amendment freedoms. The bottleneck control of information by massive media conglomerates raises concerns that private owners may censor the exchange of information and ideas.<sup>15</sup>

For its part, the Supreme Court has struggled to decide whether and how the First Amendment protects new media.<sup>16</sup> For a time, the Court generally treated each medium differently on the grounds that each presented unique First Amendment capabilities. In 1949, for example, one justice argued that “the moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself.”<sup>17</sup> The Court accepted regulatory differences “justified by some special characteristic of the press”<sup>18</sup> or by specific distinctions among the media. Government could regulate broadcasters differently from newspapers because

### REAL WORLD LAW

#### WHAT’S PUBLICATION?

When an employee clicks “like” on a Facebook post, is that speech or press?

A U.S. district court in Virginia ruled that Facebook “likes” are not expression protected by the First Amendment.<sup>v</sup> Two sheriff’s employees were fired after they clicked “like” on the campaign Facebook page of their boss’s election opponent. They sued, saying the termination violated their free speech rights, but the district court rejected their challenge.

On appeal, the Fourth Circuit Court of Appeals disagreed.<sup>v</sup> It wrote:

On the most basic level, clicking on the “like” button literally published the

statement that the User “likes” something, which is itself a substantive statement. . . .

That a user may use a single mouse click to produce the message that he likes the page instead of typing the same message with several individual key strokes is of no constitutional significance.

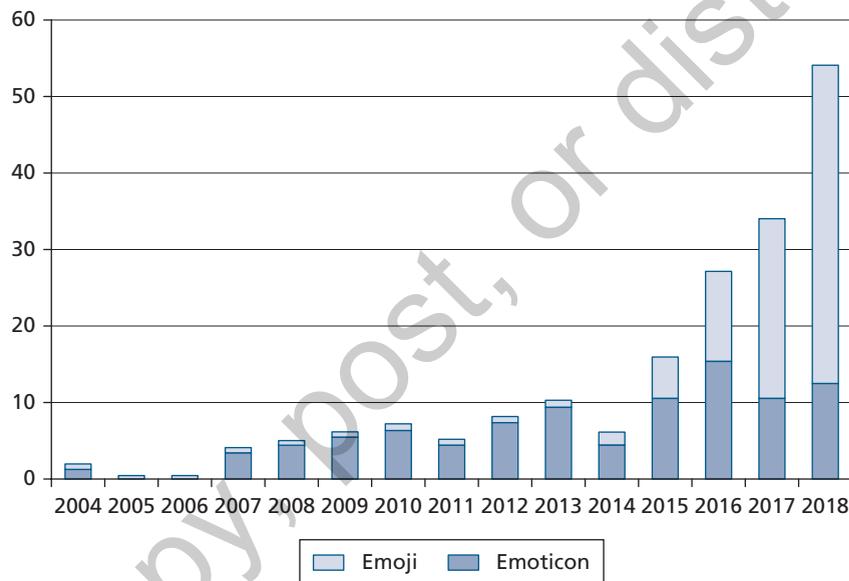
Liking a political candidate’s campaign page communicates the user’s approval of the candidate and supports the campaign by associating the user with it. In this way, it is the internet equivalent of displaying a political sign in one’s front yard, which the Supreme Court has held is substantive speech.<sup>vi</sup>

broadcasters act as trustees of scarce public airwaves.<sup>19</sup> Unique regulations on cable operators did not violate the First Amendment, the Court said, because cable threatened the survival of free over-the-air broadcasts.<sup>20</sup>

## REAL WORLD LAW

### COURTS GRAPPLE WITH MEANING/SIGNIFICANCE OF EMOJI

**FIGURE 2.1** ■ **Emoji and Emoticons Appearing in U.S. Court Evidence**



*Source:* Adapted from “Emojis and Emoticons in Court Opinions” by Eric Goldman, January 31, 2019.

Emoji, the ubiquitous pictographs of quick messaging, are showing up more often in courts’ evidence. One study found they appeared in more than 30 percent of all cases in 2018, and courts are struggling to interpret what they mean and how the First Amendment applies.<sup>vii</sup> Though they rarely have swayed case outcomes, the ambiguity of emoji and emoticons (their text-based cousins) may make them difficult for courts to interpret accurately and consistently.

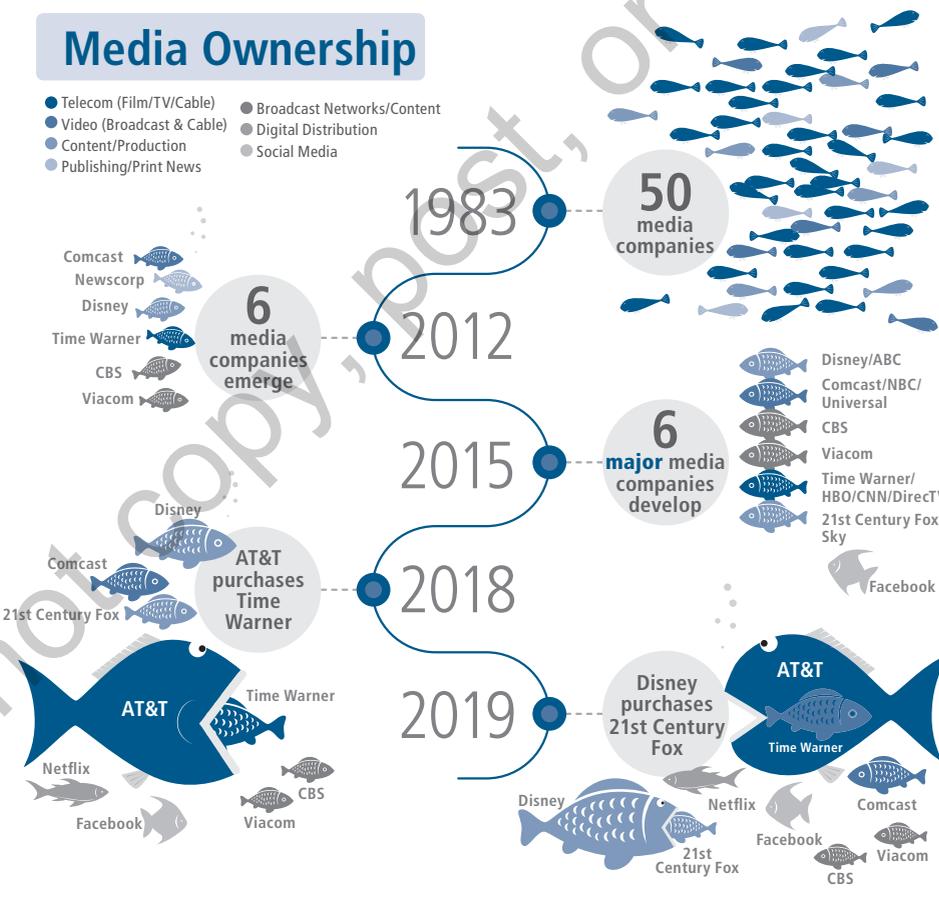
One complexity is that “emoji usually have dialects.”<sup>viii</sup> A crown in a text about Shakespeare’s *Hamlet*, for example, may be purely representational. That same crown in a discussion of

prostitution likely signifies that the “pimp is the king,” according to the testimony of one sex-trafficking expert. Emoji also appear differently on different platforms, and different people may view the same emoji differently.

Appearing most frequently in cases involving sex crimes, emoji recently have been evidence in relation to threats, to a defendant’s state of mind and to contract deliberations to shed light on intent. As emoji become an increasingly central part of text communications, courts will need to wrestle with how and whether they are protected speech that discloses otherwise hidden feelings and intentions.

But modern media blur or erase those distinctions. With all established news media and even online news losing audiences and the digital market gobbling up revenue,<sup>21</sup> the nature of U.S. media is changing even before you consider that six companies control the bulk of communications (cell, cable, films, news) across the United States.<sup>22</sup> Traditional media owners merge and consolidate holdings to prevent technology firms from taking over the market. But fewer owners controlling more diverse media present challenges to the Court’s carefully drawn distinctions and the assumption that competition ensures an open marketplace of ideas.<sup>23</sup> When those below 30 often get their news from late-night comedians like Jimmy Fallon, Seth Meyers, Trevor Noah and Jimmy Kimmel, the courts are asked to reconsider what constitutes news and “the press” and how to determine its constitutional value.

**FIGURE 2.2 ■ Media Ownership**



## HOW THE FIRST AMENDMENT IS UNDERSTOOD

The mixed legacy of British common law and the fast-changing nature of communications create obstacles to a consistent, stable interpretation of the Constitution. Textualists assert that the First Amendment's own words are the most concrete and unwavering explanation of its meaning, but the text says nothing about whether court orders requiring WikiLeaks to disclose the source of its access to confidential government documents would “abridge” the freedom of “the press” or whether Facebook “likes” are a protected part of First Amendment “freedom of speech.”<sup>24</sup>

Some justices look to history, seeking the **original intent** of the framers of the Constitution, to help them determine whether occupying the streets of Ferguson, Mo., or wearing bandanas and carrying AR-15 rifles at a Texas protest are protected speech.<sup>25</sup> Unfortunately, the authors of the First Amendment left scant records to indicate what they meant by “the freedom of speech, or of the press.”

Other justices view the Constitution as a living document and argue that the ambiguity of constitutional language is its greatest strength. To them, a clear understanding of what the words of the First Amendment meant in 1791 would rarely be relevant today. Others argue that such a malleable understanding of the Constitution gives the U.S. Supreme Court too much power and poses a threat to legal predictability.

Even parts of the First Amendment that seem clear sometimes become muddy. On its face, the First Amendment limits government—“Congress shall make no law . . .” It prevents government abridging “the freedom” of expression of private individuals and organizations. It does not speak to the ability of private companies to limit speech freedoms or the ability of government to control the content of official government speech. In general, private actors cannot violate the constitutional rights of others because the Constitution requires “state action.”

Generally, the Supreme Court avoids broad statements about the First Amendment and determines what the First Amendment means within the particular context of each specific case.

To reach decisions, the Supreme Court often weighs the constitutional interests on one side of a case against the competing interests on the other side. When courts make decisions by weighing the specific facts on each side of the case, their reasoning is called **ad hoc balancing**. No clear rule dictates the weight of interests in ad hoc balancing. Instead, judges determine which side has greater constitutional merit.

Courts also use categories of speech to reach some First Amendment decisions. The Supreme Court has defined several speech categories, such as political speech and commercial speech, to guide the appropriate First Amendment application. Simply put, the Court's categories give some kinds of speech a lot of protection; some, less; others, none at all. When speech falls into one of these categories, the courts do not balance the value of the speech against society's interests. Using the categorical approach, the courts' central question is whether a specific act of expression falls within a fully protected, less protected or unprotected class.

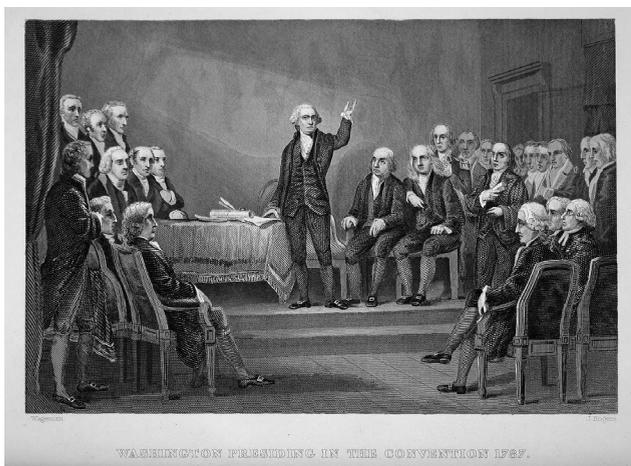
Decades ago in *Chaplinsky v. New Hampshire*,<sup>26</sup> the Court first noted that “certain well-defined and narrowly limited classes of speech . . . are no essential part of any exposition

### original intent

The perceived intent of the framers of the Constitution that guides some First Amendment application and interpretation.

### ad hoc balancing

Making decisions according to the specific facts of the case under review rather than more general principles.



George Washington presiding over debate at the Constitutional Convention in 1787.

#### categoryical balancing

Legal reasoning that weighs different broad categories, such as political speech, against other interests, such as privacy, to create general rules that may be applied in later cases with similar facts.

of ideas, and are of such slight social value as a step to truth” that government may prevent and punish this speech without violating the First Amendment. In *Chaplinsky*, the Court did not fully develop the different “narrow” categories of speech, but subsequent rulings make clear that political speech enjoys full constitutional protection, while fighting words and obscenity are unprotected categories. The First Amendment also does not prohibit laws that punish blackmail, extortion, perjury, false advertising and disruptive speech in the public school classroom, for example.

When the category of speech is less clearly defined, the courts generally balance the nature of the speech against any competing societal values using what is called **categoryical balancing**. For example, pornography is not a legal category of speech. To determine whether certain pornographic images deserve constitutional protection, courts must balance the right to freedom of sexual expression against the harms it causes in the specific circumstances of the case.<sup>27</sup> Judges do this on a case-by-case basis.

The U.S. Supreme Court used balancing in *Lane v. Franks* to rule that the First Amendment protects the right of public employees to testify in court on matters of public concern.<sup>28</sup> Weighing the interest of a government agency to control the speech of its employees against the right of the person to testify in court, the Court first clarified the boundary between government and private speech. “When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes”<sup>29</sup> but are speaking for the government, the Court wrote. The First Amendment protection for government employee speech depends on that distinction as well as on the public value of the speech. In *Lane*, the value of public testimony about government corruption outweighed the government interest in stopping it.

The Supreme Court sidestepped an opportunity to decide the amount of First Amendment protection given to false speech when it considered whether a federal law that made it a crime to lie about being awarded U.S. military honors violated the Constitution.<sup>30</sup> In its decision in *United States v. Alvarez* striking down the Stolen Valor Act, only four justices held that the First Amendment absolutely protects false statements. Reasoning for this plurality, Justice Anthony Kennedy argued that speech may be excluded from First Amendment protection only in the rare and extreme circumstances of the “historic categories” that pose a grave and imminent threat. False claims about military awards do not. Congress later amended the Stolen Valor Act to make it illegal to profit from such lies.<sup>31</sup>

The Ninth Circuit Court of Appeals later distinguished between false action and lies to rule that the First Amendment did not prevent government from punishing the wearing of unearned military medals.<sup>32</sup> The First Amendment protected only false claims of military honors.

Similarly, the Sixth Circuit Court of Appeals found an Ohio law prohibiting “false statements” during a political campaign unconstitutional.<sup>33</sup> The court reasoned that “the First Amendment protects the ‘civic duty’ to engage in public debate, with a preference for counteracting lies with more accurate information, rather than by restricting lies.” The First Amendment directs government not to restrict speech, and as the Supreme Court established, the “fixed star in our constitutional constellation” is that the government may not “prescribe what shall be orthodox in politics.”<sup>34</sup>

## WHY WE VALUE THE FIRST AMENDMENT

The Supreme Court has interpreted the First Amendment as an instrument to achieve specific social functions or advance certain fundamental values. Speech deserves protection because it aids the search for truth, advances self-governance, provides a check on government abuse of power and offers a safety valve for social discontent.<sup>35</sup> Some scholars argue that the most significant value of the First Amendment is to improve the ability of minorities to be heard<sup>36</sup> or to encourage the development of a tolerant society.<sup>37</sup> The U.S. Supreme Court applied this view of the freedoms of speech and press as instruments to advance societal objectives<sup>38</sup> when it upheld broadcast regulation as a constitutional means to increase the diversity of ideas reaching U.S. voters.

In recent years, theories of the Constitution as purely a limit on government power—not as a provider of personal liberties—have challenged the notion that an unregulated marketplace of ideas achieves truth or good democratic outcomes.<sup>39</sup> Some believe this theory aids understanding of First Amendment protections for political lies, “socially worthless untruths” and new technological forms of “cheap and abundant robotic speech” (e.g., Siri).<sup>40</sup> If the Constitution is solely a check on government, it has no proactive role in addressing imbalances of power between collective speakers (social media, communications conglomerates, the internet) who may overwhelm the marketplace of ideas and the sole individual. A hands-off approach to liars and animatronic speakers is justified by the notions that all “truths” are partial, the identity of speakers does not determine the value of their speech and government may not establish preferred orthodoxies.<sup>41</sup>

Those who value free speech in and of itself—as an end rather than a means—see free speech as a natural right. For them, the Constitution protects freedom of speech because speech is fundamental to individual natural liberty, essential to what it means to be human.<sup>42</sup> Such views often rely on framers’ understanding of broad human liberties that rarely outweighed the public good.<sup>43</sup> Laws could limit basic human rights to advance collective welfare.

These two perspectives on free speech help courts determine what types of speech deserve to be protected or punished. Neither does a very good job, however. Neither provides strict guidelines or clear lines (what the law calls bright-line distinctions) to delineate protected speech. For instance, the functional approach fails to establish a clear boundary between speech that helps democratic self-governance and speech that does not. When is a march and rally in Washington, D.C., protected political expression? If speech is protected because it is the essence of being human, where are its logical boundaries? Does the Constitution protect my right to express myself by shooting guns in the middle of the city?

## REAL WORLD LAW

### SOME CORE VALUES OF FREE SPEECH

Experts disagree on the meaning and value(s) served by the First Amendment.<sup>ix</sup> Some of the frequently identified core values of free speech are as follows:

- *Human liberty.* The freedom of speech is a fundamental, inalienable natural right.<sup>x</sup>
- *Self-governance.* The freedom to discuss political candidates and issues is essential to “democratic self-determination.”<sup>xi</sup>
- *Restraint on government power.* Free speech is a “check” on government overreach and an “invaluable bulwark against tyranny.”<sup>xii</sup>
- *Attainment of truth.* Free speech is vital to the “marketplace of ideas,” to the discovery of truth and to challenging orthodoxies.<sup>xiii</sup>
- *Safety valve.* Free speech in “the worst of times” is a mechanism for “letting off steam” that reduces violence and helps maintain social stability.<sup>xiv</sup>
- *Its own end.* Free speech, like clean air or beauty, is an end in and of itself.<sup>xv</sup>

Two apparently contradictory landmark Supreme Court rulings on a public right of access to the media demonstrate the dilemmas presented by value-based decision making. In the first of these, *Red Lion Broadcasting Co. v. Federal Communications Commission*, the Court ruled years ago that regulations requiring broadcasters to seek out and broadcast competing views on controversial public issues were constitutional.<sup>44</sup> Broadcasters had said FCC rules requiring them to notify and provide free broadcast time for political candidates to reply to on-air attacks violated their First Amendment right to choose what they aired. The Court disagreed and said,

The right of free speech of a broadcaster . . . or any other individual does not embrace a right to snuff out the free speech of others. . . . [The broadcaster] has no constitutional right to . . . monopolize a radio frequency to the exclusion of his fellow citizens.<sup>45</sup>

Here the Court held that diverse speech over the public airwaves was of paramount value to listeners. Five years later, with three new members, the Supreme Court ruled in *Miami Herald Publishing Co. v. Tornillo* that the First Amendment protected the autonomy of the printed press and barred government from requiring newspapers to provide free reply space to political candidates attacked in the paper. The Court said that “compelling editors or publishers to publish that which ‘reason tells them should not be published’” is unconstitutional.<sup>46</sup> Although newspapers are a platform for public debate, “press responsibility is not mandated by the Constitution, and like many other virtues it cannot be legislated.”<sup>47</sup> The Court reasoned:

A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as

to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press.<sup>48</sup>

## HOW GOVERNMENT RESTRAINS FIRST AMENDMENT FREEDOMS

The U.S. Supreme Court has established one bedrock principle: Freedom of speech and of the press cannot coexist with prior restraint. Prior restraints stop speech before it is spoken and halt presses before they print. They are the essence of censorship. But in today’s world of Instagram and Snapchat, how should government step in to avoid the harms speech may cause?

The Court’s modern understanding of prior restraint originated in 1931.<sup>49</sup> In *Near v. Minnesota*, the Court said that prior restraint, especially any outright ban on expression, is the least tolerable form of government intervention in the speech marketplace.<sup>50</sup> The case began after the publisher of a Minneapolis newspaper printed charges that city officials allowed Jewish gangsters to run gambling, bootlegging and racketeering businesses across the city. When the publisher could not show that the attacks were true and published with good intent, the court shut down the paper under a state public nuisance law that punished publication of “scandalous or defamatory material.”

On review, the Supreme Court ruled that the permanent ban on future issues of the newspaper was unconstitutional. The Court said the First Amendment stands as a nearly absolute barrier to classic prior restraints. Government prohibitions before publication are unacceptable unless the government can show that the action is essential to avoid a very narrow list of harms, such as the disclosure of military movements.

In *Near*, the Supreme Court held that the First Amendment placed a heavy, but not absolute, burden on government prior restraints. While the “liberty of speech, and of the press, is not an absolute right, . . . [t]he fact that the liberty . . . may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity from previous restraint in dealing with official misconduct.”<sup>51</sup> The Court said prior restraints may be permissible but only in “exceptional cases. When a nation is at war . . . [n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location

### POINTS OF LAW

#### SUPREME COURT’S DOCTRINE IN *NEAR V. MINNESOTA*

In its 1931 decision in *Near v. Minnesota*, the U.S. Supreme Court established that government

- may not censor or prohibit a publication in advance
- except when a communication is obscene, incites violence or reveals military secrets
- *and* the government makes a specific showing that a prior restraint is justified.

In all other cases, government may punish communications only after the fact.<sup>xvi</sup>



Dr. Daniel Ellsberg (left), the U.S. Defense Department consultant who leaked the Pentagon Papers, speaks to reporters after his 1971 arraignment on charges of illegal possession of the classified documents.

#### **injunction**

A court order prohibiting a person or organization from doing some specified act.

administration asked for a court **injunction** to stop the publication about the so-called Pentagon Papers report on the status of the war. The government said publication threatened national security and the safety of U.S. troops. The district court agreed and enjoined publication.

Many compared the WikiLeaks posting of more than 90,000 classified U.S. military documents on the war in Afghanistan to the publication of the Pentagon Papers during the Vietnam War.<sup>54</sup> Both leaks hinged on media providing greater transparency and credibility to information about an ongoing and controversial war involving U.S. troops.<sup>55</sup> However, the Pentagon Papers documents were at least three years old and were released as U.S. troops began to withdraw from Vietnam; some WikiLeaks material was only a few weeks old and appeared as the war in Afghanistan was ramping up.<sup>56</sup>

Acting with unusual speed in the case of the Pentagon Papers, the Supreme Court said the injunction violated the Constitution because the government had not shown that the ban was essential to prevent a real and immediate risk of harm to a compelling government interest. The Court said, “[A]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”<sup>57</sup> The Court decision left open the possibility that prior restraints might be constitutional if the government could meet this very rigorous test.

Five years later, in *Nebraska Press Association v. Stuart*, the Court said prior restraints are generally unconstitutional because they pose too great a risk that government will censor ideas it disfavors and distort the marketplace of ideas.<sup>58</sup> The Court said that if “a threat of criminal or civil sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it.” Prohibited prior restraints have three elements: (1) government oversight over whole categories of speech, content or publications; (2) government determination of acceptable content; and (3) government power to stop content before it reaches the public.

The First Amendment poses its greatest obstacle to direct prior restraints on the news media because every moment of a ban on reporting causes direct harm to the First Amendment rights of both the media and the public.<sup>59</sup> Yet news organizations report that policies imposed on government agencies, the “management” of reporters through government public relations offices

of troops.” It said that the government also could prevent the publication of obscenity, incitements to violence or overthrow of government and “words that may have all the effect of force.”<sup>52</sup>

In 1971, the U.S. Supreme Court ruled in *New York Times Co. v. United States* (excerpted at the end of this chapter) that a court order preventing publication of news stories based on leaked Pentagon reports was an unconstitutional prior restraint.<sup>53</sup> The New York Times had begun a series of news stories based on a top-secret Department of Defense study of the then-going U.S. involvement in Vietnam. The Nixon

and calls by government officials to punish or remove journalists all have the effect of prior restraint.<sup>60</sup> The government says it has the power to control the flow of information from its employees and to classify information.

Today, apparent prior restraints arise in the form of court orders that stop speech or publication. For example, the Supreme Court long ago said a state court injunction preventing the scheduled broadcast of an investigative news report was unconstitutional; indefinite delay of news was unacceptable under the First Amendment.<sup>61</sup> As another court noted, “News delayed is news denied.”<sup>62</sup> The Supreme Court decision involved CBS News’ intended broadcast of undercover footage of a South Dakota meatpacking plant. Although the broadcast relied on “calculated misdeeds” and might cause significant harm to the meatpacking company, the Court ruled that the “most extraordinary remedy” of an injunction was unwarranted because it was not essential.

The speed and breadth of online dissemination sometimes leads courts to impose injunctions. When a county sheriff pressured credit card companies to refuse their services to Backpage.com, the company sued.<sup>63</sup> Backpage argued that the sheriff’s attempt to strangle website revenue because he disliked its adult advertising section violated the site’s freedom of speech. The appeals court said the attempt to prevent publication of adult ads was intimidation, a threat and a prior restraint that either threatened to harm or actually harmed the plaintiff’s speech. “[A] public official . . . who tries to shut down an avenue of expression of ideas and opinions through actual or threatened imposition of government power or sanction is violating the First Amendment.”<sup>64</sup> The court ordered the sheriff to stop any attempts to silence Backpage advertising.

In a case involving an ongoing and increasingly heated dispute between two entertainment firms, a trial court ordered one party accused of cyberstalking to stop all texting and online posting to or about the other and to remove previously posted material. The communications involved one text, two emails and the reposting of several articles.<sup>65</sup> On review, a Florida appeals court declined to reach the First Amendment question but struck down the restraining order it called “a classic example of prior restraint . . . [that] violates the Constitution.”<sup>66</sup>

## POINTS OF LAW

### WHAT IS A PRIOR RESTRAINT?

A prior restraint is good, old, garden-variety censorship. Prior restraint exists when

1. any government body or representative
2. reviews speech or press *prior* to distribution and
3. stops the dissemination of ideas *before* they reach the public.

The Supreme Court has called prior restraint “the most serious and the least tolerable infringement on First Amendment rights.”<sup>xvii</sup>

**laws of general application**

Laws such as tax and equal employment laws that fall within the express power of government. Laws of general application are generally reviewed under minimum scrutiny.

**rational review**

A standard of judicial review that assumes the constitutionality of reasonable legislative or administrative enactments and applies minimum scrutiny to their review.

**content based**

A term used to describe government actions prompted by the ideas, subject matter or position of the message.

**content neutral**

A term used to describe government actions that incidentally and unintentionally affect speech as they advance other important government interests unrelated to the content of speech.

**time/place/manner laws**

A First Amendment concept that laws regulating the conditions of speech are more acceptable than those regulating content; also, the laws that regulate these conditions.

The U.S. Supreme Court has held that a prior restraint on the media can be justified only when there is clear and convincing evidence that the speech will cause great and certain harm that cannot be addressed by less intrusive measures or when the speaker clearly engaged in criminal activity to obtain the information being banned.<sup>67</sup> The ban on prior restraints does not prohibit laws that silence discussion of particular topics, such as threats to national security. Judges' orders prohibiting trial participants from discussing ongoing trials also generally are acceptable. Laws that limit use of copyrighted material are mandated by the Constitution, and laws that criminalize obscenity are accepted. Police also may legally prevent the speech involved when individuals conspire to commit a crime or to incite violence.

## HOW THE SUPREME COURT REVIEWS LAWS AFFECTING FIRST AMENDMENT RIGHTS

The U.S. Supreme Court does not view all government actions that appear to restrain freedom of speech in advance as prior restraints. The Court decides the constitutionality of laws by drawing a number of distinctions. It first determines whether a law involves speech at all. Minimum-wage regulations and laws that prevent monopolies fall within the power of Congress to regulate commerce.<sup>68</sup> The Court generally presumes that these **laws of general application** are constitutional. The Supreme Court reviews challenges to such laws under its least rigorous or minimum review, called **rational review**. Under rational review, a law is constitutional if government can show it serves a rational purpose. Laws reviewed under minimum scrutiny must be reasonable and serve a legitimate government purpose to be constitutional.

When government actions do affect the freedom of speech and press protected by the First Amendment, the Supreme Court first determines whether the law targets the ideas expressed or aims at some goal unrelated to the content of the message. The Court calls the first type of law **content based** and the second **content neutral**. Content-based laws regulate what is being said; they single out certain messages or types of speech for particular treatment. Laws that prohibit the "desecration" of the U.S. flag are content based.<sup>69</sup> Content-neutral laws restrict where, when and how ideas are expressed. Also called **time/place/manner laws**, content-neutral restrictions often advance public interests unrelated to speech.

### Content-Based Laws

The U.S. Supreme Court generally presumes content-based laws are unconstitutional. Like prior restraints, laws that punish expression of specific ideas after the fact pose a serious threat of government censorship. To stop government infringement on disfavored ideas, the Supreme Court applies its most rigorous test to determine whether content-based laws are constitutional. The toughest standard of review, **strict scrutiny**, finds laws that apply different treatment to different types of speech unconstitutional unless they use (1) the least restrictive means (2) to advance a compelling government interest.

Laws employ the least restrictive means only if they are extremely narrowly tailored to their goals and affect the smallest possible amount of protected speech. The Supreme Court generally finds that a law is least restrictive if the government has no other reasonable method

to achieve its goals that would be less harmful to free speech rights. To pass strict scrutiny, laws also must directly advance a compelling or paramount government interest. The Court has said a **compelling interest** is an interest of the highest order that relates to core constitutional concerns or the most significant functions of government. Compelling government interests include national security, the electoral process and public health and safety.

In *Simon & Schuster v. Crime Victims Board*, for example, the Supreme Court struck down a New York law that required convicted criminals to turn over the profits of publications that made even passing reference to their crimes.<sup>70</sup> The state said the money would compensate crime victims, increase victim compensation and decrease the “fruits” of crime. Simon & Schuster had published a true-crime autobiography of a Mafia figure and challenged the law on the grounds that it targeted specific content for punishment by the government. The Supreme Court found the law content-based law and said it advanced a compelling government interest, but it also punished writings that deserved full First Amendment protection.<sup>71</sup> The law was unconstitutional because it did not use the least restrictive means to achieve its goal.

### Content-Neutral Laws

Laws that impose speech restrictions to advance legitimate government interests without targeting particular viewpoints or content generally are constitutional. Many laws that limit noise in school zones are content neutral and constitutional.<sup>72</sup> The Supreme Court applies **intermediate scrutiny** to such laws and finds them constitutional if they restrict speech as little as necessary to advance an important government interest unrelated to speech. Content-neutral laws generally regulate the non-speech elements of messages, such as the location, time of day or volume. If content-neutral laws advance a legitimate government goal and do not favor particular views, the Court generally finds them constitutional even if they reduce the method, location or quantity of speech.

The U.S. Supreme Court established its foundational First Amendment test for content-neutral laws in its review of the conviction of David Paul O’Brien for burning his draft card during an anti-Vietnam War protest. O’Brien violated a federal law that made it a crime to knowingly destroy a draft card. The government said the law aided the functioning of the draft and the U.S. military and protected the national security.<sup>73</sup> O’Brien argued that the law was unconstitutional on its face (see Chapter 1) and infringed his freedom of speech.

In *United States v. O’Brien*, the Supreme Court disagreed and upheld O’Brien’s conviction.<sup>74</sup> Looking at the actual words of the law—a type of review called statutory construction (see Chapter 1)—the Supreme Court said the statute served a compelling government interest in ensuring the operation of the military draft and caused only minimal harm to O’Brien’s speech. The law was content neutral because it did not target disfavored viewpoints and was

## POINTS OF LAW

### STRICT SCRUTINY

The U.S. Supreme Court has said content-based laws are constitutional only if they pass strict scrutiny. To pass strict scrutiny, a law must

1. be necessary and
2. employ the least restrictive means
3. to advance a compelling government interest.

Strict scrutiny is the most rigorous test used by the courts to determine whether a law is constitutional. Few laws pass this test.

#### strict scrutiny

A court test for determining the constitutionality of laws aimed at speech content, under which the government must show it is using the least restrictive means available to directly advance its compelling interest.

#### compelling interest

A government interest of the highest order, an interest the government is required to protect.

#### intermediate scrutiny

A standard applied by the courts to review laws that implicate but do not directly regulate core constitutional values; also called heightened review.



Betmann/Getty Images

David P. O'Brien (second from left), 19, was among several young men on the courthouse steps in Boston in 1967 burning their draft cards in protest to the Vietnam War.

### symbolic expression

Action that warrants some First Amendment protection because its primary purpose is to express ideas.

### O'Brien test

A three-part test used to determine whether a content-neutral law is constitutional.

### important government interest

An interest of the government that is substantial or significant (i.e., more than merely convenient or reasonable) but not compelling.

narrowly tailored because it left O'Brien free to express his opposition to the draft in other ways. Finally, the Court said the government could constitutionally place a small burden on **symbolic expression**—the combination of speech and action represented by draft-card burning.

The decision produced a new three-part test for incidental regulations of speech, known as the **O'Brien test**. Under the *O'Brien* test, courts find a law content neutral and constitutional if the law (1) is unrelated to the suppression of speech, (2) advances an important government interest, and (3) is narrowly tailored to achieve that interest while only incidentally restrict-

ing protected speech. If the Court finds a law is not directed at the content of speech and does not target ideas disfavored by government, it generally passes the first prong. Then the Court must find the law serves an **important government interest**. A government interest is important when it is weighty or significant, more than merely convenient or reasonable. Laws intended to serve government goals unrelated to content tend to meet this standard.

The third part of the *O'Brien* test, sometimes called the narrow-tailoring standard, requires a law to “fit” its purpose. A law “fits” when it advances the government interest without imposing an unnecessary burden on speech.<sup>75</sup> The calculation is not precise. Narrowly tailored laws must be clear and not give officials unlimited discretion.<sup>76</sup> They need not be the best fit, however. Historically, most laws reviewed under *O'Brien* intermediate scrutiny have been upheld.

The Court applied the *O'Brien* test to uphold a regulation requiring New York City employees to control the volume and sound mix of performers in Central Park.<sup>77</sup> Performers said the rule unconstitutionally allowed the city to control their expression even when it served no important government interest. The Court, however, said the city's complete control of sound was a narrowly tailored means for the city to protect nearby (wealthy) residents from disturbance. *Ward v. Rock Against Racism* established that *O'Brien* requires only a loose fit. A law is narrow tailored if the government interest would suffer without a law that serves the interest reasonably well.

In *Hill v. Colorado*, the Court held that a state law creating moving, non-protest zones around people entering abortion clinics was a valid, narrowly tailored, content-neutral restriction that directly advanced the government's important interest in protecting the public from harassment.<sup>78</sup> But in 2014 in *McCullen v. Coakley*, the Court held that a fixed, 35-foot buffer zone around clinics was an unconstitutional prior restraint.<sup>79</sup> The Supreme Court said the fixed zone imposed a serious burden on individuals seeking to “counsel” women because it was not narrowly tailored to promote “public safety, patient access to health care, and unobstructed use of public sidewalks and roadways.” The difference rested on the Court's conclusion that permanent buffer zones made it “substantially more difficult” to engage in one-on-one conversations.

Courts prior to 2015 generally reviewed statutes that regulated signs to protect community safety and aesthetics under *O'Brien* and found them content neutral and constitutional.<sup>80</sup> In *Reed v. Town of Gilbert*, the U.S. Supreme Court changed this when it unanimously struck down a sign ordinance that established nearly two dozen categories of signs (e.g., church, temporary directional, political), each with its own restrictions.<sup>81</sup> In *Reed*, the Court said the law was content based on its face because it “applie[d] to particular speech because of the topic discussed or the idea or message expressed.”<sup>82</sup> Regulations that “draw distinctions based on the message . . . [or that] defin[e] regulated speech by particular subject matter . . . [or] by its function or purpose . . . are subject to strict scrutiny.”<sup>83</sup>

The Court held that laws that make content distinctions, regardless of the law’s purpose, are always content based.<sup>84</sup> A law that differentiates between different types of messages cannot be viewed as content neutral even if it serves an important purpose unrelated to speech content. The purpose of the law becomes relevant only after a court decides that the law does *not* make content distinctions, the *Reed* Court said. The Supreme Court then applied strict scrutiny, its most rigorous review, and found the town of Gilbert’s sign law unconstitutional.

Some said the *Reed* holding marked an “important change in First Amendment doctrine,” shifted the nature of content-neutral review and “imperil[ed] hundreds, even perhaps thousands, of local, state and federal laws that make subject matter or viewpoint distinctions.”<sup>85</sup> In the year following the decision, four U.S. circuit courts of appeal struck down laws that likely would have survived pre-*Reed* intermediate scrutiny.<sup>86</sup> A representative decision of the U.S. Appeals Court for the Seventh Circuit concluded that, under *Reed*, “[a]ny law distinguishing one kind of speech from another by reference to [the] meaning [of the speech] now requires a compelling justification” rather than merely the important government interest required for content-neutral restrictions to be found constitutional under *O'Brien*.<sup>87</sup>

## SPEAKING POLITICS

Political speech lies at the “core of what the First Amendment is designed to protect.”<sup>88</sup> The U.S. Supreme Court has said political speech involves any “communication concerning political change.”<sup>89</sup> This encompasses ballots and voting, electioneering speeches and lobbying,

### POINTS OF LAW

#### *O'BRIEN* INTERMEDIATE SCRUTINY

The Supreme Court generally applies some form of intermediate scrutiny to content-neutral laws that incidentally affect the freedom of speech. A law is constitutional under *O'Brien* intermediate scrutiny if it falls within the power of government and

1. advances an important government interest
2. that is unrelated to suppression of speech and
3. is narrowly tailored to only incidentally restrict First Amendment freedoms.<sup>xviii</sup>

### POINTS OF LAW

#### INTERMEDIATE SCRUTINY AFTER *REED V. TOWN OF GILBERT*

Following the Supreme Court’s ruling in *Reed v. Town of Gilbert*, courts should follow this two-step process to determine whether to apply intermediate scrutiny to laws affecting speech.<sup>xix</sup> Intermediate scrutiny should be applied only if

1. the law does not distinguish between categories or types of speech and
2. the law’s purpose is not related to the viewpoint or content of the speech.

campaign spending and yard signs, political advertisements, cartoons and blogs, petitions and buttons and maybe even protests. Believing that political speech is integral to democratic government, the Court generally has used strict scrutiny to review laws that seem to infringe on political speech.<sup>90</sup>

In 2018, the Supreme Court ruled that a Minnesota state ban on wearing political insignia or slogans inside a polling place on Election Day violated the First Amendment.<sup>91</sup> The Court struck down the law as poorly tailored to fit the “special purpose” of the polling place as “an island of calm.” The Court accepted that government could exclude “some forms of advocacy” from the polls but said the loosely drafted Minnesota statute presented “riddles” that encouraged “haphazard interpretations.”

“[I]f a State wishes to set its polling places apart as areas free of partisan discord, it must employ a more discernible approach than the one Minnesota has offered here,” the Court concluded.<sup>92</sup> After the ruling, laws in 10 states restricted what you could wear when you went to vote.<sup>93</sup>

Another lawsuit began when an anti-abortion group planned a billboard campaign claiming that a candidate for the U.S. House of Representatives backed taxpayer-funded abortion because he supported the Affordable Care Act. The candidate sought a court order to block the ads as false, and the anti-abortion group challenged the constitutionality of the state law prohibiting lies in campaign ads. The Sixth Circuit Court of Appeals allowed the candidate to sue for defamation,<sup>94</sup> but he could not prove the defamatory statement was made with knowledge that it was false or reckless disregard for its truth, which is required for public officials to win a libel suit (see Chapter 4).

On remand from the Supreme Court,<sup>95</sup> the Sixth Circuit Court found the law unconstitutional because its content-based restriction on core political speech was not narrowly tailored to advance the state’s compelling interest in preserving the integrity of its elections.<sup>96</sup> Some say the decision could affect similar laws in 15 states.<sup>97</sup>

Despite the Supreme Court’s position that political speech deserves the highest level of constitutional protection, news organizations and government may punish employees whose political expression violates their policies. In an older ruling, the Washington State Supreme Court held that the First Amendment protection of editorial autonomy allows newspapers in Washington to prohibit reporters from engaging in political activity.<sup>98</sup>

## SPEAKING FOR AND AS THE GOVERNMENT

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Courts have attempted to distinguish the ability of government to control the speech of its employees from the freedom of individuals who work in government to engage in protected speech outside of their employment. Government employees do not lose their personal freedom of speech when they accept government work,<sup>99</sup> but the government has the authority to classify sensitive materials and control their distribution, especially in the name of national security. The government also may impose codes of silence and control the content of employee speech and work products to advance governmental interests.<sup>100</sup>

The U.S. Supreme Court has held that government control of employee speech extends only to speech directly related to government employment.<sup>101</sup> The Court struck down the portion of a federal law requiring nongovernmental organizations to disseminate specific messages as a condition of receiving federal funding.<sup>102</sup> The Court said the law unconstitutionally sought “to leverage funding to regulate speech outside the contours of the program itself.”<sup>103</sup>

In *Garcetti v. Ceballos*, the Supreme Court clarified the distinction between speech *as* a government employee and independent speech *of* a government employee.<sup>104</sup> The Court said the First Amendment did not prohibit government from limiting or punishing an employee’s inappropriate work-related expression. The case involved a county attorney’s transfer and denial of promotion after he reported alleged inaccuracies in a sheriff’s affidavit. The attorney said the actions unconstitutionally punished his protected speech; the government countered that the attorney’s report was punishable employee speech. In a 5–4 ruling, the Supreme Court agreed with the government and said the government has authority “over what [expression] the employer itself has commissioned or created.”<sup>105</sup>

Then, in 2016, the Supreme Court ruled that the First Amendment prevented a city police department from demoting an employee in order to stop the employee’s “overt involvement” in a political campaign.<sup>106</sup> After a police officer reported seeing a detective picking up a campaign sign for a mayoral candidate opposing the chief of police, the chief demoted the detective. The Supreme Court said the purpose of obtaining the political sign was immaterial to its decision. It ruled that the police department’s intention to punish protected individual, political activity was sufficient to demonstrate that it had violated the First Amendment.

In another case involving a complaint of attempted retaliatory firing by a city council, the Supreme Court denied that the action violated the Constitution and described the employee’s claim as “an ordinary workplace grievance.” The unanimous Court held that the right of employees to petition for redress must be balanced “against the government’s interest . . . in the effective and efficient management of its internal affairs.”<sup>107</sup> The government’s need to manage its affairs “requires proper restraints on the invocation of rights by employees.”<sup>108</sup>

In one of several recent decisions involving mandatory union payments by public employees, the Supreme Court said that the state of Illinois could not require workers hired by Medicaid clients and funded through that federal program to pay union dues if they chose not to join the union.<sup>109</sup> The Court reasoned that these health care workers were not full-fledged government employees. Two years later, with only eight members sitting on the Court, the justices split evenly on whether government agencies could compel their own employees to contribute to unions that used the funding to support political or ideological causes the employees disfavored.<sup>110</sup>

In 2017, the Supreme Court made clear that courts should use “great caution before extending government-speech precedents . . . [because] private speech could be passed off as government speech [and] silence[d] simply [by] affixing a government seal of approval.”<sup>111</sup> The following year, the Second Circuit Court of Appeals rejected the argument that simply granting a vendor permit to an Italian-food truck, Wandering Dago, turned the vendor’s speech

into government speech. The appeals court held that the Constitution prevented the state from refusing to grant a permit to the vendor simply because it found the name to be an offensive, ethnic slur.<sup>112</sup>

Many of these rulings turn on somewhat obscure distinctions between the government's own speech and efforts to regulate private speech. In *Walker v. Texas Division, Sons of Confederate Veterans*, the Supreme Court waded directly into this “muddy” and “befuddling area of the law”<sup>113</sup> to establish “the outer bounds of the government-speech doctrine.”<sup>114</sup> The case involved a Texas Department of Motor Vehicles denial of a specialty license plate bearing the image of a Confederate battle flag. The department refused to permit the plate because it was an “offensive” symbol of “hate.”<sup>115</sup> The Court majority in *Walker* upheld the state's authority to control the content of the “quasi-government” speech on license plates because it bore a clear link to the government. Government, like private citizens, has the right to be free from association with unwanted messages.

The *Walker* majority relied on the Supreme Court's reasoning in *Pleasant Grove v. Summum*, which held that government could select the monuments it displays in its parks.<sup>116</sup> A religious group raised a First Amendment challenge to a city's decision not to post the group's “Seven Aphorisms” on a permanent monument.<sup>117</sup> In reviewing the case, the Supreme Court first said that various limitations inherent to public displays make it impractical for government to accommodate all speakers. The Court concluded “that the City's decision to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech . . . not subject to the Free Speech Clause.”<sup>118</sup> The selected speakers effectively extended government speech and were subject to government control of content.

Writing in dissent in *Walker*, Justice Samuel Alito said the plates, designed and paid for by private individuals, represented private speech.<sup>119</sup> Along with the three other conservative justices then on the Supreme Court, he acknowledged that government had a small part in the speech but expressed doubt that vanity messages on license plates were government speech at all because they played no role in governmental functions or policies.

In 2019, *Manhattan Community Access Corp. v. Halleck* asked the U.S. Supreme Court to decide whether a municipally created and licensed company with some government-appointed directors violated the Constitution when it rejected programming for its public access channels that it deemed offensive.<sup>120</sup> The Second Circuit Court of Appeals had ruled that cable operator was a state actor and “the electronic version of the public square”<sup>121</sup> that violated the First Amendment when it refused to broadcast a film criticizing Manhattan Community Access Corp.<sup>122</sup>

The Supreme Court disagreed.<sup>123</sup> Writing for the majority in a sharply divided 5-4 decision, Justice Brett Kavanaugh concluded that the First Amendment did not apply; the cable company was not a state actor because it did not perform “a function traditionally exclusively performed by the state.”<sup>124</sup> Providing a forum for speech is not an exclusive governmental function, and “a private entity who opens its property for speech by others is not transformed by that fact alone into a state actor,” the Court concluded.<sup>125</sup>

The majority and dissent agreed that New York state law extensively regulates cable operators, limiting their “editorial discretion and in effect requir[ing them] to operate almost like a

common carrier.<sup>126</sup> Still, the majority said this did not make the cable company a state actor subject to the First Amendment.<sup>127</sup> Justice Sotomayor disagreed sharply and said the state essentially appointed the cable company as its “agent” to provide the public forum.<sup>128</sup> She and three others said the Court’s ruling “risks sowing confusion among the lower courts about how and when government outsourcing will render any abuses that follow beyond the reach of the Constitution.”<sup>129</sup>

Some said the Court’s decision affirmed the foundational concept that “private firms [are] not bound by the First Amendment.”<sup>130</sup> Others said it reinforced fears about the impact of newly appointed Supreme Court justices on civil liberties.<sup>131</sup> One legal expert said the Court had given Facebook “carte blanche to allow hate speech or [to] delete hate speech.”<sup>132</sup>

## REQUIRING SPEECH

The U.S. Supreme Court has said, “The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind.”<sup>133</sup> Accordingly, government may not force citizens to express ideas with which they disagree.

More than 75 years ago, the Supreme Court issued a foundational ruling when students who were Jehovah’s Witnesses challenged the then-mandatory flag salute and Pledge of Allegiance in schools as a violation of their religious beliefs. The Supreme Court agreed.<sup>134</sup> Despite the important role of public schools in teaching students civic values and responsibilities,<sup>135</sup> schools may not indoctrinate students into particular ideologies, the Court said.<sup>136</sup> “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>137</sup>

Forty years later, the Court extended that freedom to license plates. A married couple, also Jehovah’s Witnesses, challenged a New Hampshire law requiring all license plates to bear the state slogan, “Live Free or Die.” In violation of state law, the couple covered up the slogan because they found it “morally, ethically, religiously and politically abhorrent.” The Supreme Court struck down the law, saying it required citizens to promote the state’s ideological message on their own property. Individuals have a constitutional right “to refrain from speaking” and “not to be coerced by the state into advertising a slogan” that violates their beliefs.<sup>138</sup>

In 2018, the Supreme Court said the First Amendment prevented the state of California from forcing state-licensed “crisis pregnancy centers” to notify clients that public family-planning services were available.<sup>139</sup> The Court rejected the notion that noncommercial professional speech was a discrete category with its own First Amendment rules and declined to consider the case under its compelled speech or government-speech precedents. Instead, it found that the law would fail both strict and intermediate scrutiny because its numerous exemptions failed to fit the state’s asserted interest in informing low-income women about state-supported services. The challenged law mandated that licensed centers inform patients of some state-sponsored services, including contraception and abortion, and required unlicensed centers to disclose their lack of licensing.

That same year, the Supreme Court's narrow ruling in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* found that Colorado violated the First Amendment rights of a baker when it found him guilty of violating the state's anti-discrimination law by refusing to bake a wedding cake for a same-sex couple.<sup>140</sup> The case pitted the government's desire to prevent discrimination against the First Amendment's mandate that government not require individuals to express ideas to which they object. The Court found that the state's punishment of the baker was unconstitutional because it did not treat the baker's sincere religious concerns—core elements of his freedoms of speech and association—with the neutrality and care they were due. Instead, the state's hostility to the baker's beliefs violated the “fixed star” of the Constitution that government may not take sides in matters of religion.<sup>141</sup>

## POLITICAL CAMPAIGNING AND FINANCING ELECTIONS

More than a decade ago, Congress passed the Bipartisan Campaign Reform Act, banning “soft money” contributions to national political parties and imposing limits on the amount and source of funds candidates may accept and spend. The law limited individual spending and prohibited corporate (including nonprofit and union) funding of political messages during a certain period prior to an election. In *Citizens United v. Federal Election Commission*, the Supreme Court found the law's well-established restrictions on corporate and union election spending facially unconstitutional.<sup>142</sup> The Court reasoned that the BCRA's requirements that political donors be disclosed adequately addressed the government's concern that unrestricted corporate election spending might lead to political corruption. Direct limits on how corporations and unions could fund campaigns violated the First Amendment. Courts have applied *Citizens United* to strike down numerous restrictions on political spending.<sup>143</sup>

Then in *McCutcheon v. FEC*, the Court struck down another piece of the BCRA, removing the cap on total individual political contributions.<sup>144</sup> The Court said the aggregate limit reduced

### REAL WORLD LAW

#### POST-CITIZENS UNITED: OUTSIDE DONORS SHAPE POLITICAL CAMPAIGNS

Almost two decades after the Supreme Court's landmark decision in *Citizens United v. Federal Election Commission*<sup>xx</sup> deregulated many areas of campaign financing, dozens of scholarly articles each year examine its impact on freedom of speech, elections, corporations, democracy and more.

One report found that the total amount of money in presidential elections increased more than 1,200 percent from \$225 million in 1980 to nearly \$3 billion in 2012.<sup>xxi</sup> Initial increases were fueled by individual donors, but since 2012, “the amount

of outside spending from ideological groups” has topped all other categories. At the same time, candidates and their campaigns are spending less, meaning that outside spending plays an increasing role in elections.

One empirical study found that “removing bans on . . . outside spending increase[d] the electoral success of Republican candidates and [led] to ideologically more conservative state legislatures” but neither increased “ideological polarization” nor decreased attention to “the public good.”<sup>xxii</sup>

an individual's ability to participate in the political process without advancing the government's interest in preventing corruption. "Congress may target only a specific type of corruption—'quid pro quo' corruption," or bribery,<sup>145</sup> Chief Justice John Roberts wrote for the Court.

When the state of Colorado sought to apply state campaign finance disclosure requirements to a film about the impact of political advocacy groups on state politics, the film's producer, Citizens United, sued.<sup>146</sup> Citizens United argued that its film was not

"electioneering communication" under the law and the law violated its First Amendment freedoms. On appeal, the Tenth Circuit Court of Appeals said it could find no legitimate basis to distinguish between the advocacy group's movies on political subjects and "legitimate press functions."<sup>147</sup> The First Amendment, it said, required film producers to be exempt from disclosure requirements.

The Supreme Court also has ruled that government may refuse to assist employee political contributions.<sup>148</sup> The Court employed rational review to uphold an Idaho state ban on the use of government payroll deductions for political contributions. The majority reasoned that the Constitution imposed no affirmative obligation on government to facilitate such political activities and the ban advanced the state's interest in avoiding the appearance of partisan political activity.



Sipa via AP Images

In 2019 hearings before Congress, Rep. Alexandria Ocasio-Cortez, D-N.Y., criticized the nation's "fundamentally broken" campaign finance laws under which, she said, it's "super legal . . . to be a pretty bad guy."

## SPEAKING ANONYMOUSLY

The Supreme Court has said anonymous political speech has an "honorable tradition" that "is a shield from the tyranny of the majority."<sup>149</sup> Finding a state ban on anonymous campaign literature unconstitutional, the Court said the state's interest in preventing fraud and political influence was sufficiently important, but the law was not narrowly tailored. A long line of cases protects anonymous political speech.<sup>150</sup>

In 2010, the Supreme Court suggested that citizens engaged in the political process do not have an absolute right to keep their identities secret.<sup>151</sup> A citizen referendum sought to repeal a Washington state law granting new rights to same-sex domestic partners. The state open records law (see Chapter 7) required release of the names of people who endorsed the referendum, but referendum supporters argued that disclosure violated their First Amendment right to anonymous political speech and increased the threat of reprisals. The Supreme Court applied strict scrutiny and ruled that public disclosure of the petitioners' names was substantially related to the important government interest in preserving the integrity of balloting and elections. On remand, the lower court ruled that the First Amendment did not protect anonymity even when disclosure might facilitate harassment.<sup>152</sup>

The protection sometimes afforded anonymous political speech does not extend generally to a broad right to anonymity. In an illustrative case, the Ninth Circuit Court of Appeals recently denied a request from online review site Glassdoor, Inc. to **quash** a subpoena requiring the company to disclose the identity of people criticizing a government contractor whose business was

**quash**  
To void or nullify a legal procedure or action; a motion often made in response to subpoenas for confidential information

## REAL WORLD LAW

### RIGHT TO SPEAK ANONYMOUSLY LIKELY FAILS TO PROTECT YOUR DATA

Government requests to social media for confidential subscriber information are becoming ubiquitous. Facebook reported a 21 percent increase in worldwide requests for user data—to a total of 78,890—in the first six months of 2017.<sup>xxiii</sup>

In a case involving a private chat app, a federal judge approved a subpoena request filed by victims of the August 2017 car attack at a Charlottesville white-rights protest to disclose the identities of those

using Discord to organize the rally.<sup>xxiv</sup> Violence at the rally caused one death and more than three dozen injuries. The judge said the user identification could be disclosed to the court, though not the public, because the interest in prosecuting criminal conspiracy outweighed any claimed user right to anonymous speech.<sup>xxv</sup> Citing privacy provisions under the Stored Communications Act, the judge denied a subpoena to access the content of users' Discord messages.

under investigation.<sup>153</sup> The government initially sought identifying information on 125 posts but narrowed the request to eight critical reviews. Federal law generally requires online service providers to disclose customer communications and records when the government shows reasonable grounds to believe they are relevant to an ongoing criminal investigation.<sup>154</sup> Here, the circuit court reasoned that citizens, like journalists, do not have a First Amendment right not to testify in a grand jury investigation (see Chapter 8).<sup>155</sup> In contrast, a federal district court in Texas struck down a subpoena seeking subscriber data on five Twitter accounts implicated in alleged cyberharassment.<sup>156</sup>

## ASSEMBLING AND SPEAKING IN PUBLIC AND NONPUBLIC PLACES

### public forum

Government property held for use by the public, usually for purposes of exercising rights of speech and assembly.

People across the United States assemble daily to exchange ideas on public street corners and in town parks, in elementary school cafeterias and university lecture halls. Each of these gatherings occurs in what the U.S. Supreme Court calls a **public forum**. The concept of public forums recognizes the long and central role of public oratory in the United States. The idea is that a lot of government property is essentially held in trust for use by the public; it is the public's space.

An early Supreme Court decision involved a challenge to a city ordinance prohibiting the distribution of pamphlets in city streets and parks. It explained the concept as follows:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.<sup>157</sup>

The people have a First Amendment right to use public forum property to express themselves free from fear of government censorship or punishment.<sup>158</sup> The Court has ruled that the Constitution allows Nazis, Vietnam War protesters, civil rights activists and the homeless to march and assemble in public places.<sup>159</sup>

In 2011 in *Snyder v. Phelps*, the Supreme Court ruled that even “outrageous” speech on a public sidewalk about a public issue cannot be punished.<sup>160</sup> The father of a Marine killed in the Iraq War had sought damages from Westboro Baptist Church members for harm caused by their picketing at his son’s funeral with signs reading “Thank God for dead soldiers” and “Fag troops.” But the Court held that the First Amendment protects public picketing even when the messages “fall short of refined social or political commentary.” The people’s right to speak and assemble in public forums is not absolute; it is balanced against other considerations and must be compatible with the normal activity in that place.

The Supreme Court has established a hierarchy of three types of public forums according to the nature of the place, its primary activities and the history of public access.<sup>161</sup> Lands historically intended for public use—such as parks, streets and sidewalks adjacent to many public buildings—are **traditional public forums**.<sup>162</sup> The public has a general and presumed right to use these places for expression. Thus, in 2013, the Sixth Circuit Court of Appeals struck down Michigan’s 94-year-old ban on “begging in a public place.” The court said begging is a protected form of speech and the state could not ban from a traditional public forum “an entire category of activity that the First Amendment protects.”

Government may set up rules, hours and policies to facilitate use of traditional public forums. Rules that close public parks after dark or require permits for gatherings are constitutional if they are fairly applied and content neutral, meaning they are tailored to their purpose and do not discriminate because of the content of the group’s ideas or politics. Appeals courts have found restrictions on rallies on a town lawn<sup>163</sup> and disorderly gatherings in public places<sup>164</sup> unconstitutional because they prohibited more protected speech than necessary to serve the town objectives. Government must demonstrate a compelling interest to ban all expressive activities or assembly in a traditional public forum.

The Supreme Court has held that government may ban public picketing and protests from traditional public forums to protect core privacy, safety or health interests. The Court upheld a ban on targeted picketing outside a doctor’s residence and no-protest buffer zones outside abortion clinics.<sup>165</sup>

The primary purpose of public schools and university classrooms, high school newspapers and fairgrounds is not to serve public assembly or speech. Yet they may provide ideal settings for public expression. When government chooses to allow public use of these spaces, it creates **designated public forums**,<sup>166</sup> and government may limit their public use.

The government may restrict the times and manners of public use of a designated public forum to ensure that public assemblies do not conflict with the property’s primary function. Government may impose well-tailored, reasonable, content-neutral licensing and usage regulations. In general, the Supreme Court reviews regulations of designated, or limited, public forums under intermediate scrutiny, balancing the citizen right of free expression against the primary function of the facility. When the government facility is operating as a public forum, government officials do not have unfettered discretion over its use and may not make content-based discriminations among users.<sup>167</sup> Public access cannot be denied entirely without a compelling reason.

Two decades after the Fourth Circuit Court of Appeals described interactive, online services as “a forum for a true diversity of political discourse, unique opportunities for cultural development and myriad avenues for intellectual activity,”<sup>168</sup> the U.S. Supreme Court in 2017 adopted

#### **traditional public forum**

Lands designed for public use and historically used for public gathering, discussion and association (e.g., public streets, sidewalks and parks). Free speech is protected in these areas.

#### **designated public forum**

Government spaces or buildings that are available for public use (within limits).

## REAL WORLD LAW

### CONTROLLING SPACE TO LIMIT PROTEST?

In 2018, the National Park Service proposed new rules that would limit significantly gatherings around the White House and the National Mall, limit the number of people who could gather without a permit and prohibit demonstrations around most memorials “to preserve an atmosphere of contemplation.”<sup>xxvi</sup> One change would reduce the area for public demonstrations adjacent to the White House by 80 percent and “would all but prohibit civic gatherings” there.<sup>xxvii</sup> Another would require

demonstrators to pay for permits to “cover some of the costs” of administration, which the park service previously funded.

The park service said the rules had not been updated in more than a decade and needed revision to reduce complexity and address increased public demonstrations in Washington, D.C. The number of applications for protest permits decreased 31 percent between 2010 and 2017, according to an American Civil Liberties Union study.

language that evoked public forum analysis.<sup>169</sup> “While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace . . . and social media in particular,” the Court said.<sup>170</sup> Early in 2019, the Fourth Circuit Court of Appeals picked up the language to rule that a Virginia official violated the First Amendment by banning a constituent from the official’s Facebook page.<sup>171</sup> Describing online social media as essential platforms for speech and press freedoms, the appeals court held that the Constitution prevented government from blocking access to an official’s Facebook page.

In 2018, a federal district court in New York had reached the same result in response to President Donald Trump blocking a user’s access to his Twitter account because he disfavored the user’s political views.<sup>172</sup> The court said the president’s action, through an intermediary, constituted viewpoint-based government regulation of political speech in violation of the First Amendment.<sup>173</sup> But a federal district court in Kentucky ruled that public forum analysis did not apply to the governor’s Facebook and Twitter accounts.<sup>174</sup>

Some government property simply is not available for public use. **Nonpublic forums** exist where public access, assembly and speech would conflict with the proper functioning of the government service and where there is no history of public access. Courts generally defer to the government to determine when government property is off limits. In nonpublic forums, government behaves more like a private property owner and controls the space to achieve government objectives. Military bases, prisons, post office walkways, utility poles, airport terminals and private mailboxes are all nonpublic forums.<sup>165</sup> Government may exclude the entire public or certain speakers or messages from nonpublic forums on the basis of a reasonable or rational, viewpoint-neutral interest.<sup>176</sup>

### Private Property as a Public Forum

Public forums, sometimes, though rarely, exist on private property. When private property replaces or functions as a traditional public space, it may be treated as a public forum. The law in this area is unclear. However, when the open area of an enclosed shopping mall or a large private parking lot is used widely for public assembly and expression, the Supreme Court has

**nonpublic forum**  
Government-held property that is not available for public speech and assembly purposes.

## POINTS OF LAW

### WHERE CAN I SPEAK?

The Supreme Court has designated three types of public property as held in trust for the public to provide “the liberty to discuss *publicly* and truthfully all matters of public concern without prior restraint or fear of subsequent punishment.”<sup>xxviii</sup> The Court’s public forum doctrine establishes the following:<sup>xxix</sup>

- *Traditional public forums* include areas historically used and created for public use or expressive activity.
- *Limited/designated public forums* exist when government permits public use under specific conditions of spaces with other primary purposes, such as school buildings.
- *Nonpublic forums* arise when government property has a primary purpose that is incompatible with public use (e.g., inside the Pentagon or a prison).

said the private property owner sometimes may be required to allow public gatherings and free expression.<sup>177</sup>

### Funding as Forum

Sometimes government funds that subsidize expression create something like a public forum. If government funding supports broad speech and associational activities, the government generally may not discriminate on the basis of the ideas expressed.<sup>178</sup> Government spending may not, for example, disfavor large newspapers, general interest magazines or commercial publications.<sup>179</sup> Government allocation of benefits and costs must be content neutral and evenhanded. When a program provided free legal services to welfare recipients, for example, the Supreme Court held that it could not refuse services to people challenging existing welfare laws.<sup>180</sup>

Many government funding programs have the express purpose of discriminating among applicants according to the ideas they express. The National Endowment for the Arts, for example, funds artists based on the value and quality of submitted artistic proposals. NEA grants are designed to advance the NEA’s objectives, not to create a public forum for art. Accordingly, the NEA may choose not to fund art it disfavors or finds indecent or offensive.<sup>181</sup> The same is true of book purchases for public school libraries. School libraries are not public forums for all printed materials; they provide curriculum- and age-appropriate materials to school students. Therefore, library choices based on the school-age appropriateness of books do not violate the Constitution.<sup>182</sup>

### ASSOCIATING FREELY

Sometimes viewed as a “derivative” right “associated” with free speech,<sup>183</sup> the right to freedom of association has developed somewhat separately from freedom of speech precedents. Several U.S. Supreme Court rulings established that government generally cannot force private

organizations to include individuals or to support messages with which they disagree.<sup>184</sup> In one famous case, organizers of the large, annual St. Patrick's Day parade in Boston refused to allow an LGBTQ alliance to participate. The alliance sued, arguing that its exclusion from the parade violated its freedom of speech. The trial court agreed. Because the parade had no expressive purpose, the court said, forced inclusion of alliance members in the event would cause no harm to the parade organizer's First Amendment rights.

A unanimous Supreme Court reversed. The Court said it was unnecessary to the alliance's message that it participate in the organizer's event. The alliance could reach the desired audience in a number of ways that would not infringe on the organizer's freedom of association and speech. The Court said, "Whatever the reason [for excluding the group], it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power of control."<sup>185</sup> An LGBTQ alliance participated in Boston's St. Patrick's Day parade for the first time in 2015.<sup>186</sup>

## EMERGING LAW

A pair of recent Supreme Court cases presenting challenges to the constitutionality of state electoral redistricting put freedom of association center stage. In 2018, the Supreme Court decided both *Abbott v. Perez* and *Gill v. Whitford*, which respectively challenged Texas and Wisconsin electoral redistricting as a violation of freedom of voter association and the 14th Amendment right to equal protection.<sup>187</sup> In both cases, challengers said the new districting, which created an "efficiency gap" in favor of Republican voters, was unconstitutional because it diluted the power of an individual Democratic voter.<sup>188</sup>

Reviewing statewide evidence against the equal protection challenge, the Supreme Court in *Abbott* upheld the Texas redistricting because the plaintiffs had failed to show the individual voter harm or clear discriminatory legislative intent needed to support a voter dilution challenge. In *Gill*, the Court remanded the challenge to Wisconsin's redistricting for more detailed fact finding.<sup>189</sup> Both majority **dicta** and a four-justice dissent encouraged a fuller presentation of the First Amendment issues.

Writing for the dissent, Justice Elena Kagan said the existing statewide evidence might be sufficient for a freedom of association challenge because a statewide "gerrymander weakens [the Democratic party's] capacity to perform all its functions . . . [and] has burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects."<sup>190</sup> The Court seems poised to examine voters' right to freedom of association in this case or perhaps one of the challenges to state redistricting from Florida, North Carolina and Utah moving through the courts.<sup>191</sup>

In 2019, the U.S. Court of Appeals for the Third Circuit ruled that a Delaware constitutional requirement that judicial appointments maintain a political balance between the two major parties violated a judicial candidate's right to freedom of association.<sup>192</sup> Because open judicial seats were identified as either Democrat or Republican, a political independent was effectively blocked from pursuing a judicial appointment.<sup>193</sup> The court's ruling in favor of the would-be judge split from decades-old rulings in the Sixth and Seventh Circuits that found the First Amendment did not prevent governors from making politically based judicial appointments.<sup>194</sup>

**dicta**  
Statements in a court opinion that are not central or essential to its reasoning or holding.

## CASES FOR STUDY

For study resources and a case archive, go to [edge.sagepub.com/medialaw7e](http://edge.sagepub.com/medialaw7e).

The first of this chapter's two case excerpts examines the First Amendment protection from prior restraints on the press. In *New York Times Co. v. United States*, the U.S. Supreme Court provided expedited review of a federal injunction against war reporting by The Times and The Washington Post based on leaked classified documents. The Court's careful delineation of the government's limited ability to exercise prior restraint on speech underscored the importance of the separation of powers and reaffirmed that the government has very limited authority over the press. The second excerpt, *Reed v. Town of Gilbert*, presents the Supreme Court's 2015 decision articulating what some believe is a new understanding of which laws are reviewed under strict scrutiny because they are defined as content based. Although the justices reach a unanimous decision, they do not all endorse the majority's definition of content-based laws or its automatic application of strict scrutiny to such laws.

### Thinking About It

The two case excerpts explore two fundamental approaches to understanding the First Amendment. One Supreme Court decision establishes the extent and limits of the First Amendment's protection from government prior restraint on the press. The other redefines the basic distinction between laws that regulate on the basis of content and those that do not. As you read these case excerpts, keep the following questions in mind:

- What justification does the Court offer in *New York Times Co. v. United States* for the First Amendment's nearly absolute ban on prior restraints?
- In *Reed v. Town of Gilbert*, why do the justices disagree on the definition of content neutrality?
- What do the two decisions indicate about the power of the First Amendment to limit government regulations of "the press" and of the people's right to speak through signs?
- Does the Court use the same level of scrutiny in both cases? How do you know?

### *New York Times Co. v. United States*

SUPREME COURT OF THE UNITED STATES

403 U.S. 713 (1971)

#### PER CURIAM OPINION:

We granted certiorari in these cases in which the United States seeks to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy."

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." The [lower

courts] held that the Government had not met that burden. We agree.

The judgment of the Court of Appeals for the District of Columbia Circuit is therefore affirmed. The order of the Court of Appeals or the Second Circuit is reversed, and the case is remanded with directions to enter a judgment affirming the judgment of the District Court for the Southern District of New York. The stays entered June 25, 1971, by the Court are vacated. The judgments shall issue forthwith.

So ordered.

**JUSTICE HUGO BLACK,  
with whom JUSTICE WILLIAM  
DOUGLAS joined, concurring:**

I adhere to the view that the Government's case against the Washington Post should have been dismissed, and that the injunction against the New York Times should have been vacated without oral argument when the cases were first presented to this Court. I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment. . . .

In the First Amendment, the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam War, the newspapers nobly did precisely that which the Founders hoped and trusted they would do. . . .

The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged. . . .

**JUSTICE WILLIAM DOUGLAS,  
with whom JUSTICE HUGO  
BLACK joined, concurring:**

. . . It should be noted at the outset that the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." That leaves, in my view, no room for governmental restraint on the press. . . .

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be. The present cases will, I think, go down in history as the most dramatic illustration of that principle. . . .

Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be "uninhibited, robust, and wide-open" debate. . . .

**JUSTICE WILLIAM  
BRENNAN, concurring:**

. . . The error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise. The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result. Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation "is at war," during which times "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the dates of transports or the number and location of troops." Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available

armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature. “[T]he chief purpose of [the First Amendment’s] guaranty [is] to prevent previous restraints upon publication.” Thus, only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. . . . Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue. . . .

**JUSTICE POTTER STEWART, with whom JUSTICE BYRON WHITE joined, concurring:**

. . . If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then, under the Constitution, the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is an awesome responsibility, requiring judgment and wisdom of a high order. I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained. . . .

**JUSTICE BYRON WHITE, with whom JUSTICE POTTER STEWART joined, concurring:**

I concur in today’s judgments, but only because of the concededly extraordinary protection against prior

restraints enjoyed by the press under our constitutional system. I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations. . . . But I nevertheless agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these. . . .

**CHIEF JUSTICE WARREN BURGER, dissenting:**

. . . As I see it, we have been forced to deal with litigation concerning rights of great magnitude without an adequate record, and surely without time for adequate treatment either in the prior proceedings or in this Court. . . .

I agree generally with Mr. Justice Harlan and Mr. Justice Blackmun, but I am not prepared to reach the merits.

**JUSTICE JOHN HARLAN, with whom CHIEF JUSTICE WARREN BURGER and JUSTICE HARRY BLACKMUN join, dissenting:**

. . . The power to evaluate the “pernicious influence” of premature disclosure is not, however, lodged in the Executive alone. I agree that, in performance of its duty to protect the values of the First Amendment against political pressures, the judiciary must review the initial Executive determination to the point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the President’s foreign relations power. . . . Moreover, the judiciary may properly insist that the determination that disclosure of the subject matter would irreparably impair the national security be made by the head of the Executive Department concerned. . . .

But, in my judgment, the judiciary may not properly go beyond these two inquiries and re-determine for itself the probable impact of disclosure on the national security. . . .

**JUSTICE HARRY BLACKMUN, dissenting:**

. . . The First Amendment, after all, is only one part of an entire Constitution. . . . Each provision of the

Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. First Amendment absolutism has never commanded a majority of this Court. What is needed here

is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent. Such standards are not yet developed.

***Reed v. Town of Gilbert***  
**SUPREME COURT OF THE UNITED STATES**  
**135 S. Ct. 2218 (2015)**

**JUSTICE CLARENCE THOMAS**  
**delivered the Court's opinion:**

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

The Sign Code prohibits the display of outdoor signs anywhere within the Town without a permit, but it then exempts 23 categories of signs from that requirement. These exemptions include everything from bazaar signs to flying banners. Three categories of exempt signs are particularly relevant here.

The first is "Ideological Sign[s]." This category includes any "sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency." Of the three categories discussed here, the Code treats ideological signs most favorably, allowing them to be up to 20 square feet in area and to be placed in all "zoning districts" without time limits.

The second category is "Political Sign[s]." This includes any "temporary sign designed to influence the outcome of an election called by a public body." The Code treats these signs less favorably than ideological signs. The Code allows the placement of political signs

up to 16 square feet on residential property and up to 32 square feet on nonresidential property, undeveloped municipal property, and "rights-of-way." These signs may be displayed up to 60 days before a primary election and up to 15 days following a general election.

The third category is "Temporary Directional Signs Relating to a Qualifying Event." This includes any "Temporary Sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.'" A "qualifying event" is defined as any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." The Code treats temporary directional signs even less favorably than political signs. Temporary directional signs may be no larger than six square feet. They may be placed on private property or on a public right-of-way, but no more than four signs may be placed on a single property at any time. And, they may be displayed no more than 12 hours before the "qualifying event" and no more than 1 hour afterward.

Petitioners Good News Community Church (Church) and its pastor, Clyde Reed, wish to advertise the time and location of their Sunday church services. The Church is a small, cash-strapped entity that owns no building, so it holds its services at elementary schools or other locations in or near the Town. In order to inform the public about its services, which are held in a variety of different locations, the Church began placing 15 to 20 temporary signs around the Town, frequently in the public right-of-way abutting the street. The signs typically displayed the Church's name, along with the time and location of the upcoming service. Church members would post the signs early in the day on Saturday and then remove them around midday on Sunday. The display of these signs requires little

money and manpower, and thus has proved to be an economical and effective way for the Church to let the community know where its services are being held each week.

This practice caught the attention of the Town's Sign Code compliance manager, who twice cited the Church for violating the Code. The first citation noted that the Church exceeded the time limits for displaying its temporary directional signs. The second citation referred to the same problem, along with the Church's failure to include the date of the event on the signs. Town officials even confiscated one of the Church's signs, which Reed had to retrieve from the municipal offices.

Reed contacted the Sign Code Compliance Department in an attempt to reach an accommodation. His efforts proved unsuccessful. The Town's Code compliance manager informed the Church that there would be "no leniency under the Code" and promised to punish any future violations.

Shortly thereafter, petitioners filed a complaint . . . arguing that the Sign Code abridged their freedom of speech in violation of the First and Fourteenth Amendments. The District Court denied the petitioners' motion for a preliminary injunction. The Court of Appeals for the Ninth Circuit affirmed, holding that the Sign Code's provision regulating temporary directional signs did not regulate speech on the basis of content. . . . It then remanded for the District Court to determine in the first instance whether the Sign Code's distinctions among temporary directional signs, political signs, and ideological signs nevertheless constituted a content-based regulation of speech.

On remand, the District Court granted summary judgment in favor of the Town. The Court of Appeals again affirmed, holding that the Code's sign categories were content neutral. The court concluded that "the distinctions between Temporary Directional Signs, Ideological Signs, and Political Signs . . . are based on objective factors relevant to Gilbert's creation of the specific exemption from the permit requirement and do not otherwise consider the substance of the sign." . . . [T]he Court of Appeals concluded that the Sign Code is content neutral. As the court explained, "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed" and its "interests in regulat[ing] temporary signs are unrelated to the content of the sign." Accordingly, the court believed that the

Code was "content-neutral as that term [has been] defined by the Supreme Court." In light of that determination, it applied a lower level of scrutiny to the Sign Code and concluded that the law did not violate the First Amendment.

We granted certiorari, and now reverse.

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

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

Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be "justified without reference to the content of the regulated speech," or that were adopted by the government "because of disagreement with the message [the speech] conveys." Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

The Town's Sign Code is content based on its face. It defines "Temporary Directional Signs" on the basis of whether a sign conveys the message of directing the public to church or some other "qualifying event." It defines "Political Signs" on the basis of whether a sign's message is "designed to influence the outcome of an election." And it defines "Ideological Signs" on the basis of whether a sign "communicat[es]

a message or ideas” that do not fit within the Code’s other categories. It then subjects each of these categories to different restrictions.

The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. . . . [T]he Church’s signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government’s justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

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

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

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

That is why we have repeatedly considered whether a law is content neutral on its face before turning to the law’s justification or purpose. Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law

are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.

The Court of Appeals and the United States misunderstand our decision in *Ward v. Rock Against Racism*. [It] had nothing to say about facially content-based restrictions because it involved a facially content-neutral ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city. In that context, we looked to governmental motive, including whether the government had regulated speech “because of disagreement” with its message, and whether the regulation was “justified without reference to the content of the speech.” But *Ward*’s framework “applies only if a statute is content neutral.” Its rules thus operate “to protect speech,” not “to restrict it.”

The First Amendment requires no less. Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute. . . . That is why the First Amendment expressly targets the operation of the laws—i.e., the “abridg[ement] of speech”—rather than merely the motives of those who enacted them. “The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.”

For instance, . . . one could easily imagine a Sign Code compliance manager who disliked the Church’s substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services. Accordingly, we have repeatedly “rejected the argument that ‘discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.’”

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

The Town seizes on this reasoning, insisting that “content based” is a term of art that “should be applied flexibly” with the goal of protecting “viewpoints and ideas from government censorship or favoritism.” In the Town’s view, a sign regulation that “does not

“censor or favor particular viewpoints or ideas” cannot be content based. The Sign Code allegedly passes this test because its treatment of temporary directional signs does not raise any concerns that the government is “endorsing or suppressing ‘ideas or viewpoints,’” and the provisions for political signs and ideological signs “are neutral as to particular ideas or viewpoints” within those categories.

This analysis conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints—or the regulation of speech based on “the specific motivating ideology or the opinion or perspective of the speaker”—is a “more blatant” and “egregious form of content discrimination.” But it is well established that “[t]he First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.”

Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed. The Town’s Sign Code likewise singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter. Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals. That is a paradigmatic example of content-based discrimination.

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

To start, the Sign Code’s distinctions are not speaker based. The restrictions for political, ideological, and temporary event signs apply equally no matter who sponsors them. If a local business, for example, sought to put up signs advertising the Church’s meetings, those signs would be subject to the same limitations as such signs placed by the Church. And if Reed had decided to display signs

in support of a particular candidate, he could have made those signs far larger—and kept them up for far longer—than signs inviting people to attend his church services. If the Code’s distinctions were truly speaker based, both types of signs would receive the same treatment.

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

Nor do the Sign Code’s distinctions hinge on “whether and when an event is occurring.” The Code does not permit citizens to post signs on any topic whatsoever within a set period leading up to an election, for example. . . .

And, just as with speaker-based laws, the fact that a distinction is event based does not render it content neutral. . . . A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea. Here, the Code singles out signs bearing a particular message: the time and location of a specific event. This type of ordinance may seem like a perfectly rational way to regulate signs, but a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem “entirely reasonable” will sometimes be “struck down because of their content-based nature.”

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

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

Starting with the preservation of aesthetics, temporary directional signs are "no greater an eyesore," than ideological or political ones. Yet the Code allows unlimited proliferation of larger ideological signs while strictly limiting the number, size, and duration of smaller directional ones. The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.

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

In light of this underinclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest. . . .

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

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

sign laws receive strict scrutiny, but there is no evidence that towns in those jurisdictions have suffered catastrophic effects.

We acknowledge that a city might reasonably view the general regulation of signs as necessary because signs "take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." At the same time, the presence of certain signs may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety. A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny. The signs at issue in this case, including political and ideological signs and signs for events, are far removed from those purposes. As discussed above, they are facially content based and are neither justified by traditional safety concerns nor narrowly tailored.

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

It is so ordered.

**JUSTICE SAMUEL ALITO, with whom  
JUSTICE ANTHONY KENNEDY and  
JUSTICE SONIA SOTOMAYOR joined,  
concurring.**

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

As the Court holds, what we have termed "content-based" laws must satisfy strict scrutiny. Content-based laws merit this protection because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint. Limiting speech based on its "topic" or "subject" favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth.

As the Court shows, the regulations at issue in this case are replete with content-based distinctions, and as a result they must satisfy strict scrutiny. This does not mean, however, that municipalities are powerless to enact and enforce reasonable sign regulations. . . .\*

In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

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

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\*Of course, content-neutral restrictions on speech are not necessarily consistent with the First Amendment. Time, place, and manner restrictions "must be narrowly tailored to serve the government's legitimate, content-neutral interests." But they need not meet the high standard imposed on viewpoint- and content-based restrictions.

#### **JUSTICE STEPHEN BREYER, concurring.**

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

To use content discrimination to trigger strict scrutiny sometimes makes perfect sense. There are cases in which the Court has found content discrimination an unconstitutional method for suppressing a viewpoint. And there are cases where the Court has found content discrimination to reveal that rules governing a traditional public forum are, in fact, not a neutral way of fairly managing the forum in the interest of all speakers. In these types of cases, strict scrutiny is often appropriate, and content discrimination has thus served a useful purpose.

But content discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not always trigger strict scrutiny. To say that it is not an automatic "strict scrutiny" trigger is not to argue against that concept's use. I readily concede, for example, that content discrimination, as a conceptual tool, can sometimes reveal weaknesses

in the government's rationale for a rule that limits speech. . . . I also concede that, whenever government disfavors one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas and with an individual's ability to express thoughts and ideas that can help that individual determine the kind of society in which he wishes to live, help shape that society, and help define his place within it.

Nonetheless, in these latter instances to use the presence of content discrimination automatically to trigger strict scrutiny and thereby call into play a strong presumption against constitutionality goes too far. That is because virtually all government activities involve speech, many of which involve the regulation of speech. Regulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity. . . .

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

The better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it a helpful, but not determinative legal tool, in an appropriate case, to determine the strength of a justification. I would use content discrimination as a supplement to a more basic analysis, which, tracking most of our First Amendment cases, asks whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives. Answering this question requires examining the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so. . . .

Here, regulation of signage along the roadside, for purposes of safety and beautification is at issue. There is no traditional public forum nor do I find any general effort to censor a particular viewpoint. Consequently, the specific regulation at issue does not warrant "strict

scrutiny.” Nonetheless, for the reasons that JUSTICE KAGAN sets forth, I believe that the Town of Gilbert’s regulatory rules violate the First Amendment. I consequently concur in the Court’s judgment only.

**JUSTICE ELENA KAGAN, with whom JUSTICE RUTH BADER GINSBURG and JUSTICE STEPHEN BREYER joined, concurring.**

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

Given the Court’s analysis, many sign ordinances of that kind are now in jeopardy. Says the majority: When laws “single[] out specific subject matter,” they are “facially content based”; and when they are facially content based, they are automatically subject to strict scrutiny. And although the majority holds out hope that some sign laws with subject-matter exemptions “might survive” that stringent review, the likelihood is that most will be struck down. After all, it is the “rare case[] in which a speech restriction withstands strict scrutiny.” To clear that high bar, the government must show that a content-based distinction “is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.”

So on the majority’s view, courts would have to determine that a town has a compelling interest in informing passersby where George Washington slept. . . . The consequence—unless courts water down strict scrutiny to something unrecognizable—is that our communities will find themselves in an unenviable bind: They will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks,

or else lift their sign restrictions altogether and resign themselves to the resulting clutter.

Although the majority insists that applying strict scrutiny to all such ordinances is “essential” to protecting First Amendment freedoms, I find it challenging to understand why that is so. This Court’s decisions articulate two important and related reasons for subjecting content-based speech regulations to the most exacting standard of review. The first is “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.” The second is to ensure that the government has not regulated speech “based on hostility—or favoritism—towards the underlying message expressed.” Yet the subject-matter exemptions included in many sign ordinances do not implicate those concerns. . . .

We apply strict scrutiny to facially content-based regulations of speech, in keeping with the rationales just described, when there is any “realistic possibility that official suppression of ideas is afoot.” That is always the case when the regulation facially differentiates on the basis of viewpoint. It is also the case (except in non-public or limited public forums) when a law restricts “discussion of an entire topic” in public debate.

Indeed, the precise reason the majority applies strict scrutiny here is that “the Code singles out signs bearing a particular message: the time and location of a specific event.” We have stated that “[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose ‘which issues are worth discussing or debating.’” And we have recognized that such subject-matter restrictions, even though viewpoint-neutral on their face, may “suggest[] an attempt to give one side of a debatable public question an advantage in expressing its views to the people.” Subject-matter regulation, in other words, may have the intent or effect of favoring some ideas over others. When that is realistically possible—when the restriction “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace”—we insist that the law pass the most demanding constitutional test.

But when that is not realistically possible, we may do well to relax our guard so that “entirely reasonable” laws imperiled by strict scrutiny can survive.

This point is by no means new. . . . Our cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws—including in cases just like this one [when] the law’s enactment and enforcement revealed “not even a hint of bias or

ensorship. . . .” The majority could easily have taken [that] tack here.

The Town of Gilbert’s defense of its sign ordinance—most notably, the law’s distinctions between directional signs and others—does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test. . . . The absence of any sensible basis for [the law’s] distinctions dooms the Town’s ordinance under even the intermediate scrutiny that the Court typically applies to “time, place, or manner” speech regulations.

Accordingly, there is no need to decide in this case whether strict scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption.

I suspect this Court and others will regret the majority’s insistence today on answering that question in the affirmative. . . . Because I see no reason why such an easy case calls for us to cast a constitutional pall on reasonable regulations quite unlike the law before us, I concur only in the judgment.



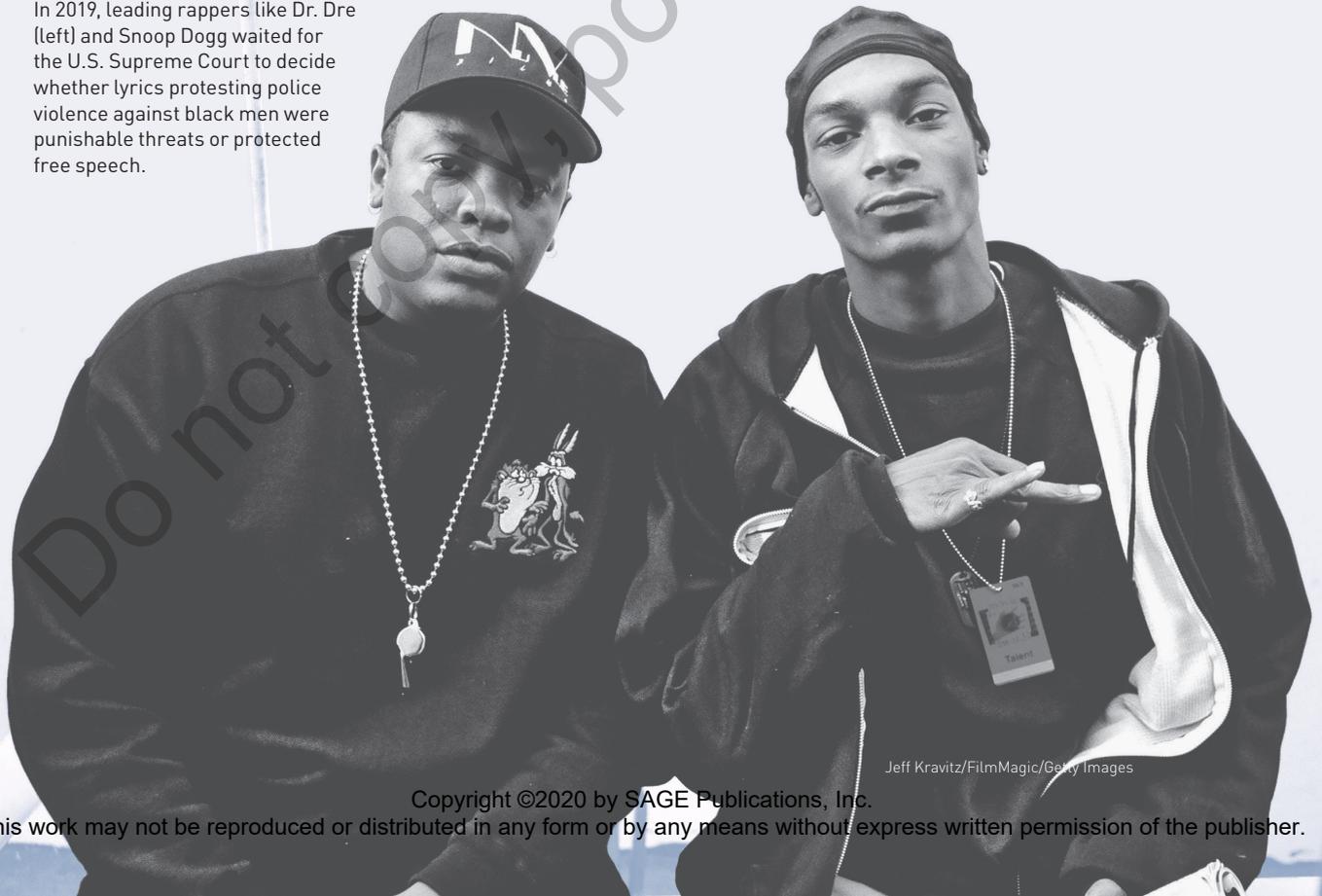
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The character of every act depends upon the circumstance in which it is done. . . .

The question . . . is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

—U.S. Supreme Court Justice Oliver Wendell Holmes<sup>1</sup>

In 2019, leading rappers like Dr. Dre (left) and Snoop Dogg waited for the U.S. Supreme Court to decide whether lyrics protesting police violence against black men were punishable threats or protected free speech.



Jeff Kravitz/FilmMagic/Getty Images

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