In 2020, demonstrators protested the death of George Floyd in New York City. Protests erupted in at least 140 cities across the United States, prompting the National Guard to be activated in at least 21 states.

Gabriele Holtermann/ Sipa via AP Images

2 THE FIRST AMENDMENT

Speech and Press Freedoms in Theory and Reality

CHAPTER OUTLINE

Theoretical Foundations and History of the First Amendment
- The Marketplace of Ideas
- The Principle of Self-Governance
- Self-Governance and the Press Clause
- Autonomy and Self-Fulfillment
- Critical Perspectives and the Role of Theory in Law

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LEARNING OBJECTIVES

2.1 Define and Explain the Major Theories of the First Amendment and the Impact of U.S. History on the First Amendment.

2.2 Describe the Impact of Technology on the First Amendment and Legal Doctrine.

2.3 Explain How Courts Evaluate and Interpret First Amendment Claims.

2.4 Identify and Explain How Courts Evaluate First Amendment Claims Regarding Government Restrictions of the Press.

2.5 Explain How the Courts Evaluate the Wording of Statutes Regulating Speech.

2.6 Describe and Define the Boundaries of Political Speech, Government Speech, Compelled Speech, Election Speech and Anonymous Speech.

2.7 Explain and Apply Public Forum Doctrine and the growing interest in Associational Rights.

In January 2021, former President Donald Trump was banned from Twitter, and Republicans across the United States expressed concern that Americans' online speech rights were under attack.[1] At the same time, Democrats argued that Americans were regularly fed a sea of dangerous online mis- and disinformation, leading not only to the Jan. 6, 2021, attack on the U.S. Capitol, but also to lagging vaccination rates in the wake of the COVID-19 pandemic and the rise of the deadly Delta variant.[2] The current landscape of free expression in the United States is one of increasing politicization and polarization, causing scholars and commentators to worry that democracy itself is at risk or already failing.[3]

The entrance of digital media has upended many assumptions about our speech and press freedoms as they previously existed in the offline world. As platforms like Instagram, Facebook, and Twitter increasingly dominate the speech landscape, more questions have arisen about content moderation, the First Amendment-protected practice of corporations deciding whether users are abiding by the platforms' terms of service (TOS). Those TOS often prescribe the acceptable conditions for online speech and the behavior of users. While most users express harmless opinions and musings on life, some posts are more incendiary and violate the TOS. In recent years, platforms have had to decide what to do about online speech that serves up violence, harassment, or mis- and disinformation. In some cases, platforms flag or censor such posts; in other cases, platforms have chosen to "deplatform" users themselves by restricting them from using their service.

Platforms moderate using both human and artificial intelligence, but the practice invariably raises new questions: Should the platforms wield such power in a free society? What responsibility should platforms have to host truthful information, particularly information that serves the public welfare? How transparent should that process be? And, for our purposes, what role does the First Amendment play in these disputes, and is our societal relationship to the principles and history of free expression and speech changing? Scholars across disciplines are taking a closer look at all of these questions.[4]

This chapter begins to explore this shifting landscape by first looking back at the history and theoretical foundations of the First Amendment. It also begins to explore some of the current pressure points as these principles and doctrines face new challenges in the digital age.

THEORETICAL FOUNDATIONS AND HISTORY OF THE FIRST AMENDMENT

The history of the First Amendment and free expression in the United States has always been a history of boundaries. It is also a history of exchange, as some rights expand while others contract, depending on social conditions. In the wake of new social problems and new technologies that challenge free expression or the welfare of the Republic, the law has always tried to balance the interests of speakers against other important societal interests. Often, those values conflict. While Americans frequently invoke the legacy and romance of U.S. free speech practices—"You can't do that! It's my free speech right to say that!"—the law often tells a different story. There have always been narrow "carveouts" to the First Amendment. Indeed, the entire study of media law in this textbook is a study of those carefully constructed exceptions.

It is important to understand that the First Amendment is first and foremost *a protection from government attempts to censor speech*. This legal principle is known as **state action**. The government—whether local, state or federal—must be in some way attempting to violate your First Amendment rights for you to claim them in court. So when private actors—be they your parents or the corporations that run the sites and social media apps you use—regulate your speech, the First Amendment is generally not a shield to those restrictions. If your parents say you cannot speak at the dinner table, you do not have a First Amendment right to challenge them—although you may still argue with them!

As a nation, we often favor and rely on these normative processes of speech and debate to solve our disputes rather than on the law and the First Amendment. This is what democracies and courts prefer, as painful and emotional as those debates sometimes become. Given our recent political divides, however, more of these disputes are landing in court. But the principle of state action remains: There is no First Amendment claim, generally speaking, without evidence of state action.

State action is rooted in the words of the First Amendment, which 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 boundaries of the six freedoms it protects.[5]

It's important for media law students to look to the *actual* words of the First Amendment. 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. Think about it. The first words of the First Amendment are "CONGRESS shall make NO law . . ." This would imply the First Amendment applies ONLY to Congress and that it can't make ANY law. But that is not the case. In 1925, the U.S. Supreme Court said the First Amendment applied to state legislatures as well as to Congress.[6] 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.[7] Again, this textbook is an exploration of all those narrowly tailored exceptions.

Additionally, it's helpful to think of the First Amendment as either a set of five freedoms from government intervention or a series of "negative rights." The First Amendment doesn't

affirmatively state that you have free speech. It simply says you are protected *from* government interference in (or state action against) your speech, press, religious establishment and practice, petition, and assembly. This is part of what makes the current debates about online free expression so interesting and challenging. In many cases today, restrictions on speech are coming from private actors—from platforms like Instagram or from corporations who control citizen employment—and not directly from government (though there may be some indirect connections, which we'll address later).

POINTS OF LAW: THE NEGATIVE RIGHTS OF THE FIRST AMENDMENT

Unlike other western democracies, the United States frames its free expression rights as freedom from the government ("negative rights") rather than statements of citizen rights ("positive rights"). The First Amendment lists five freedoms from government intervention (six if you count the exercise and establishment of religion separately). The speech and press provisions are known as the "free expression clause" and are the main focus of this textbook. The five freedoms are as follows:

- Speech
- Press
- Religion (establishment and exercise)
- Petition
- Assembly

The emphasis on government involvement in citizen speech rights is a direct result of our early colonial experience. 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.

The Marketplace of Ideas

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 also wrote that censors invariably fail at their task, and that once disclosed, evils and falsehoods are nearly impossible to control. 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?[8]

Milton's concept of the "marketplace of ideas" grew in popularity and was advanced by 18th century enlightenment philosopher John Stuart Mill. In his treatise *On Liberty*, Mill argued against censorship and for the free flow of ideas. Mill believed that the competition of ideas was what would lead to separating falsehoods from fact.[9] He argued it was necessary that falsehoods be allowed to roam in the marketplace of ideas, if not just for the competition but also because falsehoods *sometimes* became truths. Under marketplace theory, we must actually know falsehoods to have a basis for comparison and the determination of truth.[10]

The marketplace of ideas remains a guiding principle in nearly all First Amendment decisions to this day. It has been understood as the freedom needed for ideas to be exchanged, free from government interference, in order for the best and most productive ideas to emerge. In *Abrams v. United States*, Justice Oliver Wendell Holmes wrote a dissenting opinion that has been often quoted since: ". . . the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[11] It is often the reason that courts seek to keep the speech landscape as open as possible with minimal interference from government.

As a theory for free expression and the First Amendment, however, the marketplace of ideas rests on several assumptions receiving more attention, including notions of equal access to the marketplace. In recent years, theories of the U.S. 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.[12] Marketplace theory can be used justify First Amendment protections for political lies, "socially worthless untruths" or mis- and disinformation, and new technological forms of "cheap and abundant robotic speech" (e.g., Siri).[13] Marketplace proponents have historically argued that such low-value speech will eventually be corrected by the marketplace, which is preferable to interference from the courts or the government.

But some critics of marketplace theory argue if the U.S. Constitution is solely a check on government, it has no proactive role in addressing imbalances of power among collective speakers (social media, major media corporations, the internet) who may overwhelm and dangerously mislead society. A hands-off approach to liars and deliberate disinformation 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.[14] These are important and ongoing discussions at a time in which disinformation has threatened public health and led to violence against the state.

The Principle of Self-Governance

In 1694, the British Parliament failed to renew the Licensing Act, which required texts be reviewed before publication, and this 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 **seditious libel** made it illegal to publish anything harmful to the reputation of a colonial governor. At that time, 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.

The Founders' experiences with regulations by the British Crown, including a series of Stamp Acts that created new taxes on newspapers, ultimately led to the drafting and passage of the First Amendment in the Bill of Rights. The Founders relied heavily on the importance of self-governance for the new nation. In England, sovereignty rested with the king. In contrast, James Madison wrote that "In the United States the case is altogether different. The People, not the Government, possess the absolute sovereignty."[15] Madison saw "free communication among the people" as a critical part of that self-governance, the "only effectual guardian of every other right."[16]

Proponents of self-governance theory see the right of free expression under the First Amendment as flowing from the government's grant of that right. 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.[17] 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.

Alexander Meiklejohn, an early 20th-century philosopher and educator, is often identified as one of the leading proponents of self-governance theory. He argued that the First Amendment was the key to democratic rule; unless self-governing citizens had access to information and opinions about issues about which they must decide, democracy could not flourish. In this sense, citizen participation in political issues was critical. He famously wrote:

> "The First Amendment, then, is not the guardian of unregulated talkativeness. It does not require that, on every occasion, every citizen shall take part in public debate. Nor can it give assurance that everyone shall have opportunity to do so. . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said."[18]

Self-Governance and the Press Clause

British legal scholar Sir William Blackstone described the prevailing understanding of a free press under common law in the mid-18th century.[19] 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.[20]

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.[21] With growing independence, however, 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 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 of 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 and self-governance. 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.[22] Also unclear is the Framers' intent for the press clause as part of the First Amendment, although scholars point out that press rights were included in many state constitutions prior to the passage of the Bill of Rights. Most of these statements affirm the idea that the press received important protection independent of other expressive rights and emphasized that the right was to limit targeted government restrictions of the press.[23]

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.[24] 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.[25]

The press, then and now, plays a unique role in the execution of self-governance. In the 1970s, Professor Vincent Blasi proposed his "checking value" theory of the First Amendment, the idea that a critical purpose of free expression is to serve as a "check" on government power. Blasi argued that the colonial pamphleteers, the earliest members of the U.S. press, "organized much of their political thought around the need they perceived to check the abuse of governmental power."[26] The press, under this extension of self-governance theory, plays an important role in holding government officials accountable to the people and serves as the "**Fourth Estate**." In this way, the press is seen as an unofficial fourth branch of government, serving as part of the checks and balances system of representative government in the U.S.

Autonomy and Self-Fulfillment

By the late 1600s, English philosopher and political theorist John Locke argued that government censorship was an improper exercise of power.[27] 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 a 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.

Students often readily identify with the idea of free expression as flowing from within and from the identities they craft for themselves on campus. Law professor C. Edwin Baker developed a "liberty theory" of free speech arguing that "the First Amendment protects a broad realm of nonviolent, noncoercive, expressive activity," serving two primary values, self-fulfillment and self-realization.[28] Baker wrote:

> "The liberty model holds that the free speech clause protects not a marketplace, but rather an arena of individual liberty from certain types of government restrictions. Speech or self-expressive conduct is protected not as a means to achieve a collective good but because of its value to the individual."[29]

Another legal scholar, Thomas Emerson, proposed that individual protections for free expression can actually benefit the larger society by offering it a type of "safety valve."

> The argument that the process of open discussion, far from causing society to fly apart, stimulates forces that lead to greater cohesion … Stated in narrower and perhaps cruder terms, the position is that allowing dissidents to expound their views enables them to 'let off steam.' The classic example is the Hyde Park (London) meeting where any person is permitted to say anything he wishes to whatever audience he can assemble. This results in a release of energy, a lessening of frustration, and a channeling of resistance into courses consistent with law and order. It operates, in short, as a catharsis throughout the body politic.[30]

Critics of autonomy and self-fulfillment as the primary basis for free expression point out that while such arguments have personal appeal—we can all relate to wanting and needing personal freedom of expression to pursue our goals or blow off steam—such personal expression can present problems for social welfare and a democratic state. Probably the best and most recent example is the speech of those associated with the anti-vaccination movement. To the extent that the First Amendment protects the speech of "anxi-vaxxers" and their personal desire to reject modern medicine and vaccines, their speech has also placed society at risk of dangerous infection.[31]

Critical Perspectives and the Role of Theory in Law

In science, theories are designed to predict reactions under certain conditions. Within the law, theories play a different but related role. Legal theories in a democracy are used to justify judicial decision making and doctrine related to human behavior that serves (or doesn't serve) democracy. When judges make decisions in First Amendment cases, they are aided by precedent but also by these theories of free expression. From that combination of precedent and theory, judges arrive at **legal doctrine**, a rule or set of rules or principles that are followed within a particular legal field. The marketplace of ideas, self-governance and autonomy/self-fulfillment reflect some of the more popular theories mentioned in First Amendment case law. These discussions, often found in **dicta**, form the background against which precedent and legal doctrine are developed and later followed in subsequent cases. Dicta include parts of a decision that are not part of the law but often influence and contextualize legal doctrine.

Some legal scholars are critical of this paradigm because it often relies on jurists with longstanding power and influence to establish which theories and doctrine are the ones that help establish new precedent. Critical race theory, a perspective most notably advanced by law professor Kimberlé Crenshaw and discussed primarily in law schools, has received renewed attention and debate in recent years. Crenshaw and others argue that such choices are inherently political and serve status quo perspectives, keeping longstanding power structures in place. Critical race theory (CRT) especially challenges "the ways in which race and racial power are constructed and represented in American legal culture and more generally in American society as a whole."[32] CRT has received increasing attention with the passage of at least 18 state anti-CRT laws or executive orders banning discussion about the theory in public schools.[33] Opponents and scholars have argued that CRT has never been taught in public schools and that these new statutes ban virtually any discussion about how racism has impacted the country. Critics say the new laws violate the First Amendment by silencing discussion about the nation's history.[34]

Legal scholars who study the First Amendment from this perspective argue that a strict adherence to marketplace theory, for instance, allows hate speech to flourish and creates a marketplace of intimidation and trauma in its wake.[35] First Amendment case law does not rely on this perspective. Marketplace theory is particularly prominent in First Amendment legal doctrine, and opponents of CRT argue that carving out exceptions for hate speech in

the United States would not only be extremely difficult, but would also censor the sources of hate that need to be seen to be addressed.[36] CRT proponents counter that the rise of domestic terrorists and white supremacists in the United States is in part due to the structures that have fueled it, such as unbridled protections for hate speech.[37] Hate speech is addressed in fuller detail in Chapter 3.

INTERNATIONAL LAW

ARTICLE 19, INTERNATIONAL FREE EXPRESSION AND THE PANDEMIC

Passed by the United Nations in 1948, the Universal Declaration of Human Rights (UDHR) established that fundamental human rights be universally protected for the first time. Article 19 of the UDHR serves as the bedrock for free expression rights worldwide. It states,

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[38]

Articles 20 and 21 protect the freedom of assembly and the right to "take part in the government of his country."

One barometer of international internet freedom is the Google transparency report. In 2019, the report listed the United States as third most restrictive in online censorship among the leading 20 industrialized nations.[39] Article19.org, a group devoted to measuring free expression worldwide, produces a yearly report on government censorship. Its 2021 report revealed that rather than focusing on controlling COVID-19, many governments used the pandemic as an excuse to suppress critical information, implement states of emergency without proper limits, and place unreasonable and unnecessary restrictions on the media. The group wrote that "by presenting a false choice between human rights and public health, governments have used a cunning tactic to shut down public discussion and scrutiny of their decisions."[40]

TECHNOLOGY AND THE FIRST AMENDMENT

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. New media—motion pictures, radio, television, telephone, cable, the internet, Alexa—provide new types, reach, modes and uses of communication. As consumers of media also become producers of that content, the lines

between press and speech, between information and entertainment, also blur, creating complications for the marketplace of ideas and the principles of self-governance and self-fulfillment, as well as for the law.

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.[41] 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.[42] 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 keystrokes 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.[43]

The nature of U.S. media keeps changing. Six companies now control the bulk of communications (cell, cable, films, news) across the United States.[44] These include Comcast, News Corp, Disney, Time Warner, CBS, and Viacom. Some of these companies create content, some distribute it, and some do both, making the lines ever more blurred. This arrangement has concerned scholars and policymakers who worry that too much power in too few hands creates an environment for easy censorship and threatens access to diverse voices and content—as well as democracy itself.[45] Others contend that the internet has improved access for marginalized communities and voices, offering new ways for diverse voices to be heard.[46]

Amid this change, new companies are gaining ground and altering the very nature of the U.S. media market. For example, Netflix buys content from traditional media, but it now also creates and sells its own content. In 2021, Amazon announced plans to buy movie giant MGM. Some media providers, like AT&T, who made plans to buy and feature content, have changed their plans. 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.[47]

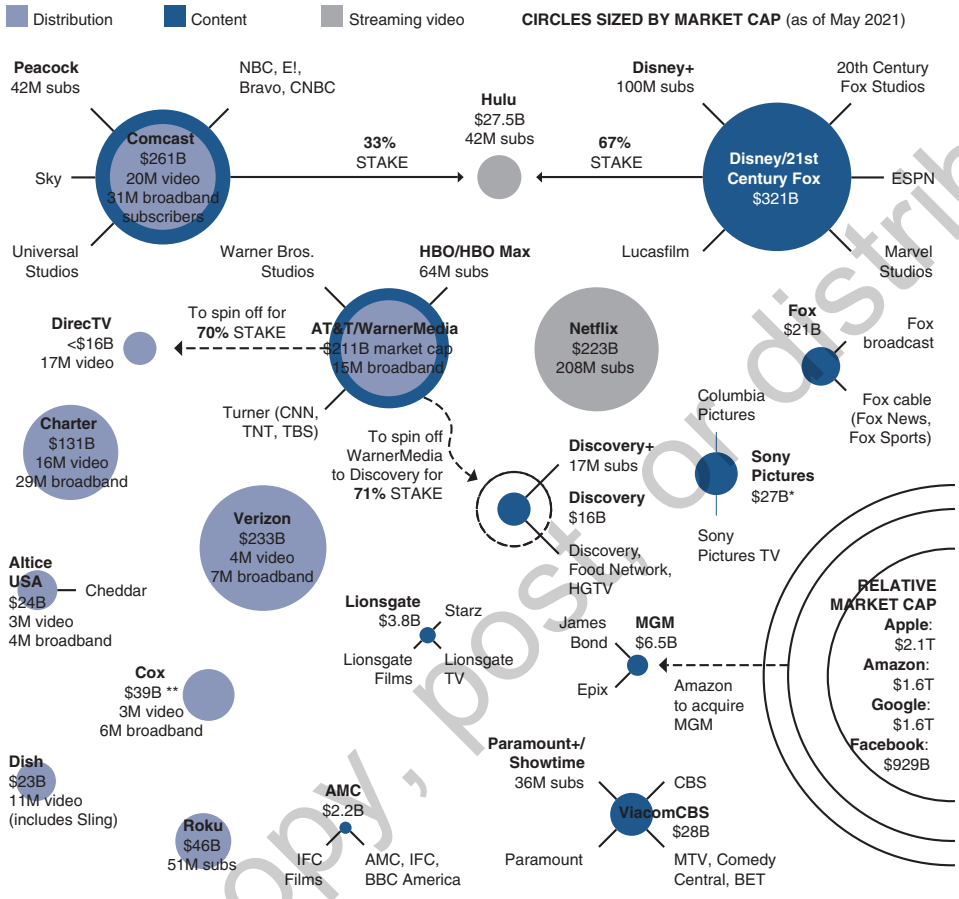
But some scholars have suggested that the threat to the marketplace of ideas today is less about ownership control than it is about increasing "noise" in that marketplace. Siva Vaidhyanathan, a media studies scholar from the University of Virginia, says media consolidation is better told as a tale of three layers.[48] At the ground level are the cable and telecommunication companies like Comcast, AT&T, T-Mobile and Verizon, controlling the media pipelines and flooding our lives with data and content. At the second layer, the Google–Facebook duopoly represents "two of the most valuable companies in the world and the masters of our attention."[49] Nearly every other media company depends on Google and Facebook and platforms like them to be seen and monetized through tracking, a fact that gives these platforms extraordinary control over not just entertainment, but also state messaging in the case of some authoritarian governments around the world. At the third level are the content providers, who must pay close attention to the second level in order to sustain their business models. This includes the work of traditional news media, who now rely on social media for their content to be seen and for their livelihood. This has created an environment ripe for "clickbait," content often designed less to inform and more to make users want to click, a phenomenon that seemingly works against principles of the marketplace of ideas and democratic governance.

Some members of Congress are seeking to create more competition in the marketplace by introducing bills to break up the monopolistic hold of the second layer, the platforms, with antitrust law proposals. As of 2021, these bills were still pending. (See more on this in Chapter 9.) In the meantime, the second layer wields enormous power, by controlling not only what content is seen but by default, what content is monetized. They dominate rather than distribute, leaving a media landscape of both "concentration and cacophony."[50]

For its part, the U.S. Supreme Court has struggled to decide whether and how the First Amendment protects new media.[51] 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."[52] The Court accepted regulatory differences "justified by some special characteristic of the press"[53] or by specific distinctions among the media. Government could regulate broadcasters differently from newspapers because broadcasters act as trustees of scarce public airwaves.[54] 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.[55]

By the 1990s, however, the court understood that the internet was fast becoming the cornerstone of the American news and entertainment landscape. In 1997, the U.S. Supreme Court ruled in *Reno v. ACLU* that the internet deserved the same high level of First Amendment protection awarded to newspapers. Nearly 20 years later in *North Carolina v. Packingham*, the Court wrote that "websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice be heard."[56] Quoting the earlier *Reno* case, the Court wrote that the internet allows users to "become a town crier with a voice that resonates farther than it could from any soapbox."[57]

FIGURE 2.1 ■ Media Ownership



Molla, F. & Kafka, P. (2021, May 27). *Here's Who Owns Everything in Big Media Today*. Vox. https://www.vox.com/2018/1/23/16905844/media-landscape-verizon-amazon-comcast-disney-fox-relationships-chart

HOW COURTS INTERPRET THE FIRST AMENDMENT

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 Constitution is more than 230 years old. It obviously 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."[58]

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.[59] 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. At the time the Constitution was written, for example, women did not have the right to vote and African Americans were considered to be 3/5 of a person. For these justices, the Constitution is an evolving document. 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.

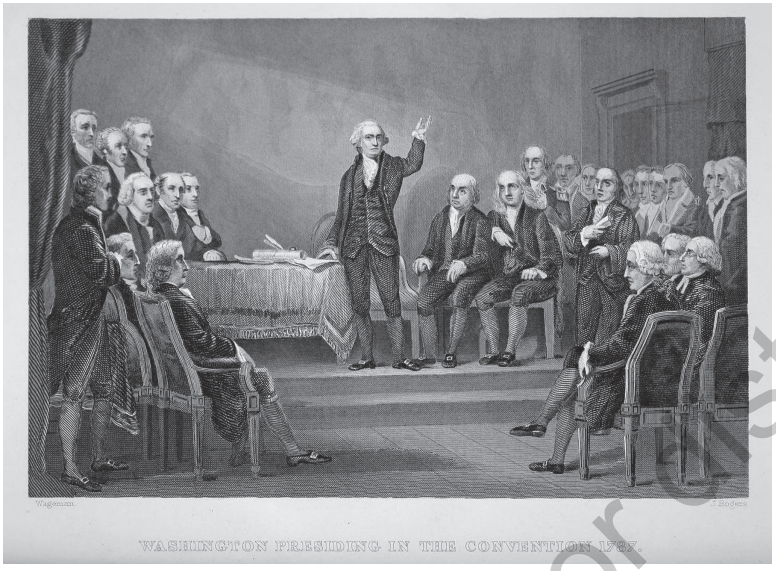
To reach decisions, the U.S. Supreme Court often weighs the constitutional interests on one side of a case against the competing interests on the other side. When courts make decisions by weighing the specific facts on each side of the case, their reasoning is called **ad hoc balancing**. No clear rule 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 this 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*,[60] the Court first noted that "certain well-defined and narrowly limited classes of speech . . . are no essential part of any exposition of ideas, and are of such slight social value as a step to truth" that government may prevent 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. These exceptions are covered in more detail in subsequent chapters.

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 **categorical 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.[61] 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.[62] 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"[63] but are speaking for



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

Everett Collection Inc/Alamy Stock Photo

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.[64] In its decision in *United States v. Alvarez* striking down the Stolen Valor Act, which is excerpted in Chapter 1, 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.[65]

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.[66] 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.[67] 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."[68]

WHEN 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.[69] 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.[70] 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.

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

- prior restraints on publication are unconstitutional
- EXCEPT when a communication is
  - obscene,
  - incites violence and the overthrow of government,
  - 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.[71]

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."[72] 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 of troops." It said that the government also could prevent the publication of obscenity, incitements to violence and overthrow of government and "words that may have all the effect of force."[73]

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.[74] The New York Times had begun a series of news stories based on a top-secret Department of Defense study of the then-ongoing U.S. involvement in Vietnam. The Nixon administration asked for a court **injunction** to stop the publication of 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.

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.

Associated Press

Many compared the WikiLeaks posting of more than 90,000 classified U.S. military documents on the war in Afghanistan in 2010 to the publication of the Pentagon Papers during the Vietnam War.[75] Both leaks hinged on media providing greater transparency and credibility to information about an ongoing and controversial war involving U.S. troops.[76] 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.[77] Former U.S. army analyst Chelsea Manning served six years in military custody for her role in leaking hundreds of thousands of documents and cables to Wikileaks. Wikileaks Founder Julian Assange has been charged under the Espionage Act. In late 2021, the United Kingdom's High Court ruled that Assange could be extradited to the U.S. to face the charges.

Acting with unusual speed in the case of the Pentagon Papers, the U.S. Supreme Court said the injunction violated the Constitution because the government had not shown that the ban was essential to prevent "direct, immediate and irreparable damage to our Nation or its people."[78] The Court said, "[A]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity"[79] 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.[80] 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.[81] Yet news organizations report that policies imposed on government agencies, the "management" of reporters through government public relations offices and calls by government officials to punish or remove journalists all have the effect of prior restraint.[82] The government says it has the power to control the flow of information from its employees and to classify information.

Prior restraints usually 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.[83] As another court noted, "News delayed is news denied."[84] 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.

In 2020, the Trump administration tried to stop the publication of a memoir by John Bolton, Trump's former national security adviser, titled "The Room Where it Happened."[85] The book details Bolton's 17 months as Trump's national security adviser. In it, Bolton called Trump incompetent and unfit for office. The Trump administration not only sought to stop the publication of the book, but it also looked to extend its injunction against the publisher and any downstream bookseller, claiming that Bolton did not obtain the proper security clearance for such a book. A federal judge ruled that the publication could proceed, writing that it was too late to stop the book, given that thousands of copies had already been distributed around the globe.[86] The judge left open the possibility that Bolton could be held responsible for violating the established rules of pre-publication clearance for those with access to classified information. The Justice Department closed its investigation into the book in 2021.[87]

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."[88]

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.[89] 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.

Yale professor Jack Balkin has argued that prior restraints look different in the digital age. Today, prior restraints are imposed by what Balkin calls the "infrastructure of free expression"—that is, the digital pipelines and platforms that host and control such expression. Rather than stopping speakers or publishers, the government today can attempt to regulate speech through control over digital networks, search engines, payment systems, and advertisers creating a type of digital prior restraint, mostly through the use of subpoenas and warrants for information. (See Chapter 9 for more about these topics.)[90]

People in favor of and against a mask mandate for Cobb County schools gather and protest ahead of the school board meeting in August 2021 in Marietta, Ga. (Ben Gray/Atlanta Journal-Constitution via AP)

REAL WORLD LAW

DO MASK MANDATES DURING A PANDEMIC VIOLATE THE FIRST AMENDMENT?

The short answer is "no."

In 2020 and 2021, a handful of plaintiffs across the United States claimed their civil liberties were threatened when several states began to impose mask mandates during the COVID-19 pandemic.[91] Under the Tenth Amendment, power that isn't assigned to the federal government is reserved to the states. Because mask mandates aren't anywhere in the federal codes, states can impose mask requirements. These cases were dismissed by the courts, however, governors in Texas and Florida have issued executive orders banning local mask mandates, and those orders have been the subject of ongoing court challenges at the time of publication.

Constitutional rights are also subject to the government's authority to protect the health, safety and welfare of the community.[92] In 1905, the U.S. Supreme Court upheld a smallpox vaccination requirement in Cambridge, Mass. In *Jacobson v. Massachusetts*, the Court ruled that the requirement was constitutional. The court wrote that it was "the inherent right of every freeman to care for his own body and health in such way as to him seems best," but the court added, "[t]here are manifold restraints to which every person is necessarily subject for the common good. On any other basis, organized society could not exist with safety to its members."[93]

In July 2020, a court in Palm Beach, Florida, refused to block a mask mandate ordered by the county. Citing the *Jacobson* case, State circuit court judge John S. Kastrenakes wrote "the right to be free from governmental intrusion does not automatically or completely

shield an individual's conduct from regulation."[94] In another case in 2020, Minnesota federal district court judge Patrick J. Schlitz said such claims were "meritless" because they do "not implicate the First Amendment at all" and even if they did, the Minnesota order requiring masks would "easily pass muster under *U.S. v. O'Brien*" and the *Jacobson* case. Schlitz wrote that mask wearing was not "inherently expressive," and even if it was, the order was unrelated to the suppression of speech.[95]

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.[96] 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.[97] 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 regulation of 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.[98] 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.[99] The law was unconstitutional because it did not use the least restrictive means to achieve its goal.

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.

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.[100] 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.[101] 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.[102] 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 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 or substantial government interest, and (3) is narrowly tailored to achieve that interest while only incidentally restricting 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 or substantial 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, such as regulating the sizes of commercial or political signs in a municipality or requiring notice to a town for an annual parade.

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.[103] The calculation is not precise. Narrowly tailored laws must be clear and not give officials unlimited discretion.[104] They need not be the best fit, however. Historically, most laws reviewed under *O'Brien* intermediate scrutiny have been upheld.

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.

Bettmann/Getty Images

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.[105] 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.[106] But in 2014 in *McCullen v. Coakley*, the Court held that a fixed, 35-foot buffer zone around clinics was an unconstitutional prior restraint.[107] 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.[108] 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.[109] 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."[110] 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."[111]

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 or substantial government interest
2. that is unrelated to suppression of speech and
3. is narrowly tailored to only incidentally restrict First Amendment freedoms.[112]

The Court held that laws that make content distinctions, regardless of the law's purpose, are always content based.[113] 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."[114] 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.[115] 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*.[116] However, some researchers found that though *Reed* has been "consequential," it is has not had changed the doctrine in this area as much as feared. Indeed, that same study concluded that many circuit courts have worked to narrow *Reed's* interpretation.[117]

The Court itself cautioned against reading *Reed* too narrowly in a 2022 decision, *City of Austin v. Reagan National Advertising*.[118] In that case, the city of Austin had an ordinance that allowed "on premises" signs (signs connected to a physical advertiser location) but restricted "off premises" signs (signs without a physical advertiser location). Owners of pre-existing off-premises signs were also prohibited from converting them to digital signs. When Austin denied Reagan National's application to convert signs to digital advertising, the advertising company sued saying the regulation violated the First Amendment. The U.S. Supreme Court reversed the Fifth Circuit, which ruled that under *Reed*, the regulation was unconstitutional. In a 6–3 decision, Justice Sotomayor, writing for the Court, said the Austin ordinance does not "single out any topic or subject matter for differential treatment," like in *Reed*.[119] Because the city's distinction rests only on location, rather than on content, Sotomayor concluded, it is not subject to strict scrutiny. The Court remanded the case back to the lower courts for reconsideration and a fuller determination of whether the regulation meets the intermediate scrutiny test.

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.[120] 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.

PROTECTIONS AND BOUNDARIES FOR DIFFERENT CATEGORIES OF SPEECH

Despite its overall aversion for content-based restrictions on speech, the Court itself has, over time, created a hierarchy of speech categories that range from high-value speech, such as political speech, to low-value speech, such as indecent speech. Both levels of speech are protected by the First Amendment to a greater or lesser degree, but it is clear from a century of case law that some kinds of speech receive more protections from the Court than others. This section will cover high-value political speech and some of its offshoots. Chapter 3 covers some lower-value speech categories such as indecency, and Chapter 12 covers commercial speech, a speech category given an intermediate level of protection by the Court.

Political Speech

Political speech lies at the "core of what the First Amendment is designed to protect."[121] The U.S. Supreme Court has said political speech involves any "communication concerning political change."[122] This encompasses ballots and voting, electioneering speeches and lobbying, 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.[123] Many forms of art—including literature, music, dance, film, plays, and visual art—are also at the core of First Amendment protections.

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.[124] 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.[125]

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,[126] 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,[127] 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.[128] Despite the

Sixth Circuit's ruling, today 38 states have laws directly targeting false statements in the context of local and national elections.[129]

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.[130]

Government Speech

When we talk about free expression and the First Amendment, we usually think about the speech of private citizens. Private citizens generally enjoy maximum First Amendment protections. But if you have friends or family members who work for either the state or federal government—for instance, a family member in the military—you likely know that while they retain their First Amendment rights, their ability to speak is more highly regulated because of their important responsibilities. Additionally, the government itself can be a speaker. This section addresses both of these unique situations.

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,[131] 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.[132]

The U.S. Supreme Court has held that government control of employee speech extends only to speech directly related to government employment.[133] The Court struck down the portion of a federal law requiring nongovernmental organizations to disseminate specific messages as a condition of receiving federal funding.[134] The Court said the law unconstitutionally sought "to leverage funding to regulate speech outside the contours of the program itself."[135]

In *Garcetti v. Ceballos*, the Supreme Court clarified the distinction between speech *as* a government employee and independent speech *of* a government employee.[136] 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."[137]

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.[138] 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."[139] The government's need to manage its affairs "requires proper restraints on the invocation of rights by employees."[140]

In a decision 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.[141] 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.[142]

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."[143] 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.[144]

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"[145] to establish "the outer bounds of the government-speech doctrine."[146] 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."[147] 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.[148] 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.[149] 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."[150] 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.[151] 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.[152] The Second Circuit Court of Appeals had ruled that cable operator was a state actor and "the electronic version of the public square"[153] that violated the First Amendment when it refused to broadcast a film criticizing Manhattan Community Access Corp.[154]

The Supreme Court disagreed.[155] 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."[156] 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.[157]

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."[158] Still, the majority said this did not make the cable company a state actor subject to the First Amendment.[159] Justice Sotomayor disagreed sharply and said the state essentially appointed the cable company as its "agent" to provide the public forum.[160] 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."[161]

Some said the Court's decision affirmed the foundational concept that "private firms [are] not bound by the First Amendment."[162] Others said it reinforced fears about the impact of newly appointed Supreme Court justices on civil liberties.[163] One legal expert said the Court had given Facebook "carte blanche to allow hate speech or [to] delete hate speech."[164]

Compelled 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."[165] Accordingly, government may not force citizens to express ideas with which they disagree. This is known in First Amendment law as the **compelled speech** doctrine. The First Amendment not only limits government censorship; it also prevents the government from punishing citizens for refusing to "articulate, advocate, or adhere" to what a government might compel citizens to say or do.[166]

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.[167] Despite the important role of public schools in teaching students civic values and responsibilities,[168] schools

may not indoctrinate students into particular ideologies, the Court said.[169] "No official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."[170]

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.[171]

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.[172] 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.[173] 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.[174]

Election Speech

More than a decade ago, Congress passed the Bipartisan Campaign Reform Act (BCRA), 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.[175] 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.[176]

Then in *McCutcheon v. FEC*, the Court struck down another piece of the BCRA, removing the cap on total individual political contributions.[177] The Court said the aggregate limit reduced 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, [178] Chief Justice John Roberts wrote for the Court.

REAL WORLD LAW

POST–CITIZENS UNITED: OUTSIDE DONORS SHAPE POLITICAL CAMPAIGNS

More than two decades after the Supreme Court's landmark decision in *Citizens United v. Federal Election Commission* [179] 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.[180] That figure increased to $4.1 billion in the 24 months of the 2019-2020 election cycle.[181]

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."[182]

Many scholars and activists continue to write about either overturning *Citizens United* or amending the Constitution to change the balance of power in elections.[183]

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.[184] 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."[185] The First Amendment, it said, required film producers to be exempt from disclosure requirements. (This case is discussed in more detail in Chapter 12.)

The Supreme Court also has ruled that government may refuse to assist employee political contributions.[186] 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.

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

Sipa via AP Images

Anonymous Speech

The Supreme Court has said anonymous political speech has an "honorable tradition" that "is a shield from the tyranny of the majority."[187] In *McIntyre v. Ohio Elections Commission*, a 1995 case involving the distribution of anonymous leaflets, the Court found that anonymous speech was "an aspect of the freedom of speech protected by the First Amendment."[188] In another case involving a state ban on anonymous campaign literature, 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.[189]

In 2010, the Supreme Court suggested that citizens engaged in the political process do not have an absolute right to keep their identities secret.[190] 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.[191]

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 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 under

investigation.[192] 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.[193] 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).[194] In contrast, a federal district court in Texas struck down a subpoena seeking subscriber data on five Twitter accounts implicated in alleged cyber harassment.[195]

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. One company that measures such requests reported that U.S. government requests for anonymous subscriber information to Google increased 510 percent since 2010; Requests to Facebook increased 364 percent since 2013.[196]

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.[197] 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.[198] Citing privacy provisions under the Stored Communications Act, the judge denied a subpoena to access the content of users' Discord messages.

PROTECTIONS FOR ASSEMBLY AND ASSOCIATION

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.[199]

The people have a First Amendment right to use public forum property to express themselves free from fear of government censorship or punishment.[200] 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.[201]

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.[202] 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.[203] Lands historically intended for public use—such as parks, streets and sidewalks adjacent to many public buildings—are **traditional public forums**.[204] 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."[205]

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[206] and disorderly gatherings in public places[207] 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.[208]

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 or limited public forums**,[209] 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.[210] 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,"[211] the U.S. Supreme Court in 2017 adopted language that evoked public forum analysis.[212] "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.[213] 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.[214]

In 2019, the U.S. Court of Appeals for the Second Circuit ruled that former President Trump violated the First Amendment when he blocked seven followers on Twitter.[215] The Second Circuit ruled that on Twitter, the president acted in a government capacity when he blocked users and that his account constituted a public forum. Blocking such users was a type of viewpoint discrimination, according to the court.[216] Trump's administration appealed the ruling to the U.S. Supreme Court, which vacated the decision because the issues were moot under the new Biden administration.[217] (This case is discussed in more detail in Chapter 9.)

President Donald Trump holds a Bible as he visits outside St. John's Church across Lafayette Park from the White House in June 2020, in Washington. Part of the church was set on fire during protests that month.

AP Photo/Patrick Semansky

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."[218] 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.[219] 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.

After the death of George Floyd in 2020, peaceful demonstrators gathered in Lafayette Square Park across from the White House. The park is managed by the National Park Service. Without provocation, former President Trump and Attorney General William Barr directed federal authorities to fire tear gas, pepper spray, rubber bullets and flash bombs into the crowd. The ACLU filed a lawsuit on behalf of the protestors, alleging the protestors' First and Fourth Amendment rights had been violated. A district court allowed the First Amendment claims to proceed in the case but dismissed claims for monetary compensation and for an order to prevent future attacks.[220]

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.[221] 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.[222]

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 said the private property owner sometimes may be required to allow public gatherings and free expression.[223]

When an online private forum becomes a public forum is an open legal question because of the nature of social media. Social media platforms are run by private companies, and as such,

those companies are legally permitted to dictate the rules for users in their service agreements. While users have First Amendment rights online, First Amendment claims against social media are generally limited because there is no state action. Cases like *Knight v. Trump*, however, are beginning to raise questions about the extent to which social media can retain their status as private forums. (This topic is addressed in more detail in Chapter 9.)

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."[224] The Court's public forum doctrine establishes the following:[225]

- *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).
- *Private forums* are not owned by the government and serve the purposes of private individuals or corporations (e.g., a private home, a company's building, a platform like Instagram). The First Amendment generally does not apply for speakers other than the private owner in such spaces unless the space is used for used widely for public purposes.

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.[226] Government spending may not, for example, disfavor large newspapers, general interest magazines or commercial publications.[227] 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.[228]

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.[229] 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.[230]

Associating Freely

Sometimes viewed as a "derivative" right "associated" with free speech,[231] the right to freedom of association has developed somewhat separately from freedom of speech precedents. Some researchers have viewed cases and scholarship on associational rights as "remarkably thin" and "neglected."[232] 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.[233] 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."[234] An LGBTQ alliance participated in Boston's St. Patrick's Day parade for the first time in 2015.[235]

EMERGING LAW

The nation's growing political divide has highlighted the problems with **gerrymandering**, a practice in which electoral districts are drawn "with the purpose of giving one political group an advantage over another, a practice which often results in districts with bizarre or strange shapes."[236] Several cases have been heard by courts to address, among other constitutional issues, whether the First Amendment is implicated in the practice of gerrymandering.

Several 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 Fourteenth Amendment right to equal protection.[237] 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.[238]

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.[239] 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."[240]

In 2019, the U.S. Supreme Court heard *Rucho v. Common Cause*, a case involving voters and other plaintiffs from North Carolina and Maryland, who filed suits challenging their states' congressional districting maps as unconstitutional partisan gerrymanders. The plaintiffs included First Amendment claims. The Supreme Court ruled that while the district courts had said such claims could proceed, there was no "clear" and "manageable" way of distinguishing permissible from impermissible partisan motivation on the part of the states to influence associational rights of the plaintiffs.[241] The Court struck down these claims. Overall, the court ruled that partisan gerrymandering claims present political questions beyond the reach of the federal courts.

CHAPTER GLOSSARY

ad hoc balancing
categorical balancing
compelled speech
compelling interest
content based
content neutral
defamation
designated or limited public forum
dicta
Fourth Estate
gerrymandering
important government interest
injunction
intermediate scrutiny
laws of general application
legal doctrine
marketplace of ideas
nonpublic forum
O'Brien test
original intent
prior restraint
public forum
quash
rational review
seditious libel
state action
strict scrutiny
symbolic expression
time/place/manner laws
traditional public forum

CASES FOR STUDY

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 antidemocratic, 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] disagree[ment] with the message conveyed," and its justifications for regulating temporary directional signs were "unrelated to the content of the sign." In its brief to this Court, the United States similarly contends that a sign regulation is content neutral—even if it expressly draws distinctions based on the sign's communicative content—if those distinctions can be "'justified without reference to the content of the regulated speech.'"

But this analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is

subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. We have thus made clear that "[i]llicit legislative intent is not the sine qua non of a violation of the First Amendment," and a party opposing the government "need adduce no evidence of an improper censorial motive." Although "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary." In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

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 evenhanded, 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.

**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 censorship. . . ." 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.