Freedom of Speech and Press: Exceptions to the First Amendment

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Summary

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

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

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

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

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Obscenity

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

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2 Supreme Court cases supporting all the prohibitions and restrictions on speech noted in this and the next paragraph are cited in footnotes accompanying the subsequent discussion of these prohibitions and restrictions.
3 For additional information, see CRS Report 95-804, Obscenity and Indecency: Constitutional Principles and Federal Statutes, by Henry Cohen.
4 Roth v. United States, 354 U.S. 476, 483 (1957). However, Justice Douglas, dissenting, wrote: “[T]here is no special historical evidence that literature dealing with sex was intended to be treated in a special manner by those who drafted the First Amendment.” Id. at 514.
5 Id. at 485.
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What is obscenity? It is not synonymous with pornography, as most pornography is not legally obscene; that is, most pornography is protected by the First Amendment. To be obscene, pornography must, at a minimum, “depict or describe patently offensive ‘hard core’ sexual conduct.” The Supreme Court has created a three-part test, known as the Miller test, to determine whether a work is obscene. The Miller test asks:

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

The Supreme Court has clarified that only “the first and second prongs of the Miller test—appeal to prurient interest and patent offensiveness—are issues of fact for the jury to determine applying contemporary community standards.” As for the third prong, “[t]he proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.”

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

Child Pornography

Child pornography is material that visually depicts sexual conduct by children. It is unprotected by the First Amendment even when it is not obscene; that is, child pornography need not meet the Miller test to be banned. Because of the legislative interest in destroying the market for the

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7 Id. at 24 (citation omitted).
8 Pope v. Illinois, 481 U.S. 497, 500 (1987). In Hamling v. United States, 418 U.S. 87, 105 (1974), the Court noted that a “community” was not any “precise geographic area,” and suggested that it might be less than an entire state. In Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 577 (2002), the Supreme Court recognized that “Web publishers currently lack the ability to limit access to their sites on a geographic basis,” and that therefore the use of community standards to define “obscenity” “would effectively force all speakers on the Web to abide by the ‘most puritan’ community’s standards.” Nevertheless, the Court found that use of community standards “does not by itself render” a statute unconstitutional.” Id. at 585 (emphasis in original).
13 For additional information, see CRS Report 95-406, Child Pornography: Constitutional Principles and Federal Statutes, by Henry Cohen.
14 New York v. Ferber, 458 U.S. 747, 764 (1982). The definition of “sexually explicit conduct” in the federal child pornography statute includes “lascivious exhibition of the genitals or pubic area of any person [under 18], and “is not limited to nude exhibitions or exhibitions in which the outlines of those areas [are] discernible through clothing.” 18 U.S.C. §§ 2256(2)(A)(v), 2252 note.
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exploitative use of children, there is no constitutional right to possess child pornography even in the privacy of one’s own home.\textsuperscript{15}

In 1996, Congress enacted the Child Pornography Protection Act (CPPA), which defined “child pornography” to include visual depictions that \textit{appear} to be of a minor, even if no minor is actually used. The Supreme Court, however, declared the CPPA unconstitutional to the extent that it prohibited pictures that are produced without actual minors.\textsuperscript{16} Pornography that uses actual children may be banned because laws against it target “[t]he production of the work, not its content”; the CPPA, by contrast, targeted the content, not the production.\textsuperscript{17} The government “may not prohibit speech because it increases the chance an unlawful act will be committed ‘at some indefinite future time.’”\textsuperscript{18} In 2003, Congress responded by enacting Title V of the PROTECT Act, P.L. 108-21, which prohibits any “digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct.” It also prohibits “a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that ... depicts a minor engaging in sexually explicit conduct,” and is obscene or lacks serious literary, artistic, political, or scientific value.

Content-Based Restrictions

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

\begin{quote}
The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.... The question in every case is whether the words used ... create a clear and present danger.\textsuperscript{19}
\end{quote}

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

In cases of content-based restrictions of speech other than advocacy or threats, the Supreme Court generally applies “strict scrutiny,” which means that it will uphold a content-based restriction

\textsuperscript{15} Osborne v. Ohio, 495 U.S. 103 (1990).
\textsuperscript{17} Id. at 249; see also, id. at 242.
\textsuperscript{18} Id. at 253.
\textsuperscript{19} Schenck v. United States, 249 U.S. 47, 52 (1919).
\textsuperscript{21} Watts v. United States, 394 U.S. 705, 708 (1969). See also, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Planned Parenthood v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (en banc), \textit{cert. denied}, 539 U.S. 958 (2003) (the “Nuremberg Files” case); Virginia v. Black, 538 U.S. 343, 360 (2003) (“Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”).
only if it is necessary “to promote a compelling interest,” and is “the least restrictive means to further the articulated interest.”

Thus, it is ordinarily unconstitutional for a state to proscribe a newspaper from publishing the name of a rape victim, lawfully obtained. This is because there ordinarily is no compelling governmental interest in protecting a rape victim’s privacy. By contrast, “[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.” Similarly, the government may proscribe “‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” Here the Court was referring to utterances that constitute “epithets or personal abuse” that “are no essential part of any exposition of ideas,” as opposed to, for example, flag burning, which is discussed below, under “Symbolic Speech.”

Non-Content-Based Restrictions

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

Two types of speech restrictions that receive this “intermediate” scrutiny are (1) time, place, or manner restrictions, and (2) incidental restrictions, which are restrictions aimed at conduct other than speech, but that incidentally restrict speech. This report includes separate sections on these two types of restrictions. In addition, restrictions on commercial speech, though content-based, are subject to similar intermediate scrutiny; this report also includes a separate section on commercial speech. Finally, bans on nude dancing and zoning restrictions on pornographic

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

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

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


26 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Campus “hate speech” prohibitions at public colleges (the First Amendment does not apply to private colleges) are apparently unconstitutional, even as applied to fighting words, if they cover only certain types of hate speech, such as speech based on racial hatred. This conclusion is based on the cross-burning case, R.A.V. v. City of St. Paul, infra note 138.
theaters and bookstores, although discriminating on the basis of the content of speech, receive intermediate scrutiny because, according to the Supreme Court, they are aimed at combating “secondary effects,” such as crime, and not at the content of speech.27

**Prior Restraint**

There are two ways in which the government may attempt to restrict speech. The more common way is to make a particular category of speech, such as obscenity or defamation, subject to criminal prosecution or civil suit, and then, if someone engages in the proscribed category of speech, to hold a trial and impose sanctions if appropriate. The second way is by prior restraint, which may occur in two ways. First, a statute may require that a person submit the speech that he wishes to disseminate—a movie, for example—to a governmental body for a license to disseminate it—e.g., to show the movie. Second, a court may issue a temporary restraining order or an injunction against engaging in particular speech—publishing the Pentagon Papers, for example.

With respect to both these types of prior restraint, the Supreme Court has written that “[a]ny system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity.”28 Prior restraints, it has held,

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

The Supreme Court has written that “[t]he special vice of a prior restraint is that communication will be suppressed ... before an adequate determination that it is unprotected by the First Amendment.”30 The prohibition on prior restraint, thus, is essentially a limitation on restraints until a final judicial determination that the restricted speech is not protected by the First Amendment. It is a limitation, for example, against temporary restraining orders and preliminary injunctions pending final judgment, not against permanent injunctions after a final judgment is made that the restricted speech is not protected by the First Amendment.31

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27 For additional information on this subject, see CRS Report 95-804, Obscenity and Indecency: Constitutional Principles and Federal Statutes, by Henry Cohen.


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

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

In the case of a statute that imposes prior restraint, “a prescreening arrangement can pass constitutional muster if it includes adequate procedural safeguards.”32 These procedural safeguards, the Court wrote, include that “the burden of proving that the film is unprotected expression must rest on the censor,” and “that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film.”33 In the case of time, place, or manner restrictions (and presumably other forms of speech that do not receive full First Amendment protection), lesser procedural safeguards are adequate.34

Prior restraints are permitted in some circumstances. The Supreme Court has written, in dictum, “that traditional prior restraint doctrine may not apply to [commercial speech],”35 and the Court has not ruled whether it does. “The vast majority of [federal] circuits ... do not apply the doctrine of prior restraint to commercial speech.”36 “Some circuits [however] have explicitly indicated that the requirement of procedural safeguards in the context of a prior restraint indeed applies to commercial speech.”37

Furthermore, “only content-based injunctions are subject to prior restraint analysis.”38 In addition, prior restraint is generally permitted, even in the form of preliminary injunctions, in intellectual property cases, such as those for infringements of copyright or trademark.39

Commercial Speech

“The Constitution ... affords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”40 Commercial speech is “speech that proposes a commercial transaction.”41 That books and films are published and sold for profit does not make them commercial speech; that is, it does not “prevent them from being a form of expression

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33 Freedman, supra footnote 28, 380 U.S. at 58, 59.
35 Central Hudson, supra footnote 32, 447 U.S. at 571 n.13.
37 New York Magazine v. Metropolitan Transportation Authority, 136 F.3d 123, 131 (2d Cir. 1998), cert. denied, 525 U.S. 824 (1998); citing as examples, Desert Outdoor Adver. v. City of Moreno Valley, 103 F.3d 814, 818 (9th Cir. 1996); In re Search of Kitty’s East, 905 F.2d 1367, 1371-72 & n.4 (10th Cir. 1990).
38 DVD Copy Control Association, Inc. v. Bunner, 75 P.3d 1, 17 (Cal. 2003) (a “prior restraint is a content-based restriction on speech prior to its occurrence” (italics in original)). For the test regarding content-neutral injunctions, see the section on “Time, Place, and Manner Restrictions,” below.
39 Bosley, supra footnote 36, at 930; Lemley and Volokh, supra footnote 31 (arguing that intellectual property should have the same First Amendment protection from preliminary injunctions as other speech).
41 Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 482 (1989) (emphasis in original). In Nike, Inc. v. Kasky, 45 P.3d 243 (2002), cert. dismissed, 539 U.S. 654 (2003), Nike was sued for unfair and deceptive practices for allegedly false statements it made concerning the working conditions under which its products were manufactured. The California Supreme Court ruled that the suit could proceed, and the Supreme Court granted certioriati, but then dismissed it as improvidently granted, with a concurring and two dissenting opinions. The issue left undecided was whether Nike’s statements, though they concerned a matter of public debate and appeared in press releases and letters rather than in advertisements for its products, should be deemed “‘commercial speech’ because they might affect consumers’ opinions about the business as a good corporate citizen and thereby affect their purchasing decisions.” Id. at 657 (Stevens, J., concurring). Nike subsequently settled the case.
whose liberty is safeguarded [to the maximum extent] by the First Amendment.” Commercial speech, however, may be banned if it is false or misleading, or if it advertises an illegal product or service. Even if fits in none of these categories, the government may regulate it more than it may regulate fully protected speech. In addition, the government may generally require disclosures to be included in commercial speech; see the section on “Compelled Speech,” below.

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

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

The Supreme Court has applied the Central Hudson test in all the commercial speech cases it has decided since Central Hudson, and we discuss the 10 most recent below, in chronological order. In nine of these cases, the Court struck down the challenged speech restriction; it has not upheld a commercial speech restriction since 1993. In its most recent commercial speech case, Thompson v. Western States Medical Center, the Court noted that “several Members of the Court have expressed doubts about the Central Hudson analysis and whether it should apply in particular cases.” These justices believe that the test does not provide adequate protection to commercial speech, but the Court has found it unnecessary to consider whether to abandon the test, because it has been striking down the statutes in question anyway.

In Cincinnati v. Discovery Network, Inc., the Court struck down a Cincinnati regulation that banned newsracks on public property if they distributed commercial publications, but not if they distributed news publications. As for the first two prongs of the Central Hudson test, the Court

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44 See, Edge Broadcasting, supra footnote 40, 509 U.S. at 427.
45 Id. at 430.
46 Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 480 (1989).
47 We do not include among the 10 the three cases (discussed below, at the end of the section on “Compelled Speech”) involving assessments for government-compelled advertisements, because the Court did not apply the Central Hudson test in these cases.
found that the commercial publications at issue were not unlawful or misleading, and that the asserted governmental interest in safety and esthetics was substantial. As for the third and fourth prongs, although banning commercial newsracks presumably advances the asserted governmental interests, the distinction between commercial and noncommercial speech “bears no relationship whatsoever to the particular interests that the city has asserted.” The city, therefore, did not establish “the ‘fit’ between its goals and its chosen means that is required by our opinion in Fox.”

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

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

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

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

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49 Id. at 424 (emphasis in original).
50 Id. at 428.
53 *Edenfield,* supra footnote 51, 507 U.S. at 775.
54 Id. at 770-771.
55 *Edge Broadcasting,* supra footnote 40, 509 U.S. at 421.
the public, such as her business cards and stationery.\textsuperscript{56} The Court wrote that it “cannot imagine how consumers can be misled by her truthful representation” that she was a CPA.\textsuperscript{57}

In \textit{Rubin v. Coors Brewing Co.}, the Court struck down a federal statute, 27 U.S.C. § 205(e), that prohibits beer labels from displaying alcohol content unless state law requires such disclosure.\textsuperscript{58} The Court found sufficiently substantial to satisfy the second prong of the \textit{Central Hudson} test the government’s interest in curbing “strength wars” by beer brewers who might seek to compete for customers on the basis of alcohol content. However, it concluded that the ban “cannot directly and materially advance” this “interest because of the overall irrationality of the Government’s regulatory scheme.”\textsuperscript{59} This irrationality is evidenced by the fact that the ban does not apply to beer advertisements, and by the fact that the statute \textit{requires} the disclosure of alcohol content on the labels of wines and spirits.

In \textit{Florida Bar v. Went For It, Inc.}, the Court upheld a rule of the Florida Bar that prohibited personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster.\textsuperscript{60} The Bar argued “that it has a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers,”\textsuperscript{61} and the Court found that “[t]he anecdotal record mustered by the Bar” to demonstrate that its rule would advance this interest in a direct and material way was “noteworthy for its breadth and detail”;\textsuperscript{62} it was not “mere speculation and conjecture.”\textsuperscript{63} Therefore, the rule passed what the Court called the second prong of the \textit{Central Hudson} test.\textsuperscript{64} As for the final prong, the Court found the Bar’s rule to be “reasonably well tailored to its stated objective.”\textsuperscript{65} In a subsequent case, the Court wrote that, in \textit{Florida Bar v. Went For It, Inc.}, it had “upheld a 30-day prohibition against a certain form of legal solicitation largely because it left so many channels of communication open to Florida lawyers.”\textsuperscript{66}

\textsuperscript{56} 512 U.S. 136 (1994). Curiously, the Court in \textit{Ibanez} writes that “only false, deceptive, or misleading commercial speech may be banned” (id. at 142), despite its decisions upholding bans of truthful commercial speech in \textit{Edge Broadcasting}, supra footnote 40, and other cases. Perhaps the Court meant that only false, deceptive, or misleading commercial speech may be banned without consideration of the second, third, and fourth prongs of the \textit{Central Hudson} test.

\textsuperscript{57} Id. at 144.

\textsuperscript{58} 514 U.S. 476 (1995).

\textsuperscript{59} Id. at 488.

\textsuperscript{60} 515 U.S. 618 (1995).

\textsuperscript{61} Id. at 624.

\textsuperscript{62} Id. at 627.

\textsuperscript{63} Id. at 626.

\textsuperscript{64} The Court referred to the \textit{Central Hudson} test as having three parts, and referred to its second, third, and fourth prongs, as, respectively, its first, second, and third. The Court did not, however, alter the substance of the test. In \textit{44 Liquormart, Inc. v. Rhode Island}, 517 U.S. 484, 529 (1996) (O’Connor, J., concurring), the justices returned to the traditional numbering.

\textsuperscript{65} Id. at 633. In \textit{Shapero v. Kentucky Bar Association}, 486 U.S. 466 (1988), the Court had previously held that a state may not place a “ban on all direct-mail solicitations, whatever the time frame and whoever the recipient.” \textit{Florida Bar}, 515 U.S. at 629 (emphasis in original). The Court has also held that a nonprofit organization’s solicitation by letter of prospective clients is a protected form of political expression (\textit{In re Primus}, 436 U.S. 412 (1978)), and that a state may prohibit lawyers from soliciting prospective clients in person (\textit{Ohralik v. Ohio State Bar Association}, 436 U.S. 447 (1978)). The Aviation Disaster Family Assistance Act of 1996, 49 U.S.C. § 1136(g)(2), prohibits unsolicited communications concerning a potential action for personal injury or wrongful death before the 30th day following an accident involving an air carrier providing interstate or foreign air transportation.

In 44 Liquormart, Inc. v. Rhode Island, the Court struck down a state statute that prohibited disclosure of retail prices in advertisements for alcoholic beverages.\textsuperscript{67} In the process, it increased the protection that the \textit{Central Hudson} test guarantees to commercial speech by making clear that a total prohibition on “the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process” will be subject to a stricter review by the courts than a regulation designed “to protect consumers from misleading, deceptive, or aggressive sales practices.”\textsuperscript{68}

The Court added: “The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.”\textsuperscript{69} It concluded “that the price advertising ban cannot survive the more stringent constitutional review that \textit{Central Hudson} itself concluded was appropriate for the complete suppression of truthful, nonmisleading commercial speech.”\textsuperscript{70}

In \textit{Greater New Orleans Broadcasting Association, Inc. v. United States},\textsuperscript{71} the Court applied the \textit{Central Hudson} test to strike down, as applied to advertisements of private casino gambling that are broadcast by radio or television stations located in Louisiana, where such gambling is legal, the same federal statute it had upheld in \textit{United States v. Edge Broadcasting Co.},\textsuperscript{72} as applied to broadcast advertising of Virginia’s lottery by a radio station located in North Carolina, where no such lottery was authorized. The Court emphasized the interrelatedness of the four parts of the \textit{Central Hudson} test; e.g., though the government has a substantial interest in reducing the social costs of gambling, the fact that the Congress has simultaneously encouraged gambling, because of its economic benefits, makes it more difficult for the government to demonstrate that its restriction on commercial speech materially advances its asserted interest and constitutes a reasonable “fit.” In this case, “[t]he operation of [18 U.S.C.] § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it.... [T]he regulation distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all.”\textsuperscript{73}

In \textit{Lorillard Tobacco Co. v. Reilly}, the Supreme Court applied the \textit{Central Hudson} test to strike down most of the Massachusetts Attorney General’s regulations governing the advertising and sale of cigarettes, smokeless tobacco, and cigars.\textsuperscript{74} The Court first found the “outdoor and point-of-sale advertising regulations targeting cigarettes” to be preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1341.\textsuperscript{75} By its terms, however, this statute’s preemption provision applies only to cigarettes, so the Court considered the smokeless tobacco

\textsuperscript{67} Id.
\textsuperscript{68} Id. at 501. The nine justices were unanimous in striking down the law, which prohibited advertising the price of alcoholic beverages, but only parts of Justice Stevens’ opinion for the Court were joined by a majority of justices. The quotations above, for example, are from Part IV of the Court’s opinion, which was joined by only Justices Kennedy and Ginsburg besides Justice Stevens.
\textsuperscript{69} Id. at 503.
\textsuperscript{70} Id. at 508, citing \textit{Central Hudson}, supra footnote 32, 447 U.S. at 566, n.9.
\textsuperscript{71} 527 U.S. 173 (1999).
\textsuperscript{72} \textit{Edge Broadcasting}, supra footnote 40, footnote 55.
\textsuperscript{73} 527 U.S. at 190, 195.
\textsuperscript{74} 533 U.S. 525 (2001).
\textsuperscript{75} Id. at 551.
and cigar petitioners’ First Amendment challenges to the outdoor and point-of-sale advertising regulations. Further, the cigarette petitioners did not raise a preemption challenge to Massachusetts’ sales practices regulations (regulations, described below, other than outdoor and point-of-sale advertising regulations), so the Court considered the cigarette as well as the smokeless tobacco and cigar petitioners’ claim that these regulations violate the First Amendment.

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

The Court found “that the point-of-sale advertising regulations fail both the third and fourth steps of the Central Hudson analysis.” The prohibition on advertising “placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of” any school or playground did not advance the goal of preventing minors from using tobacco products because “[n]ot all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings.”

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

In Thompson v. Western States Medical Center, the Court struck down section 503A of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 353a, which “exempts ‘compounded drugs’ from the Food and Drug Administration’s standard drug approval requirements as long as the providers of those drugs abide by several restrictions, including that they refrain from advertising or promoting particular compounded drugs.” “Drug compounding,” the Court explained, “is a process by which a pharmacist or doctor combines, mixes, or alters ingredients to create a medication tailored to the needs of an individual patient.” The Court found that the speech restriction in this case served “important” governmental interests, but that, “[e]ven assuming” that

76 Id. at 562.
77 Id. at 563.
78 Id. at 566.
79 Id.
80 Id. at 567.
81 Id. at 569.
82 Id.
84 Id. at 360.
85 Id. at 360-361.
it directly advances these interests, it failed the fourth prong of the \textit{Central Hudson} test.\footnote{Id. at 369, 371.} In considering the fourth prong, the Court wrote that “the Government has failed to demonstrate that the speech restrictions are ‘not more extensive than is necessary to serve’” the governmental interests, as “[s]everal non-speech-related means [of serving those interests] might be possible here.”\footnote{Id. at 371, 372.} “If the First Amendment means anything,” the Court added, “it means that regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try.”\footnote{Id. at 373.} The Court noted that it had “rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information.”\footnote{Id. at 374.} In saying that the government failed to demonstrate that the speech restrictions were “not more extensive than is necessary to serve” the governmental interests, the Court was quoting from the fourth prong of the \textit{Central Hudson} test, but nowhere in \textit{Thompson} did it note that it had previously modified the fourth prong to require merely a reasonable “fit” between the legislature’s ends and means, and not use of the least restrictive means to serve the governmental interests. Rather, it wrote: “In previous cases addressing this final prong of the \textit{Central Hudson} test, we have made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.”\footnote{Id. at 371.} Yet the Court did not state that it intended to overrule its reasonable “fit” construction of the fourth prong.

**Defamation**

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

The Supreme Court, however, has granted limited First Amendment protection to defamation. The Court has held that public officials and public figures may not recover damages for defamation unless they prove, with “convincing clarity,” that the defamatory statement was made with “‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”\footnote{New York Times v. Sullivan, 376 U.S. 254, 279-280 (1964); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).} The Court has also held that a private figure who sues a media defendant for defamation may not recover without some showing of fault, although not necessarily of actual malice (unless the relevant state law requires it). However, if a defamatory falsehood involves a matter of public
Concern, then even a private figure must show actual malice in order to recover presumed damages (i.e., not actual financial damages) or punitive damages.\textsuperscript{92}

**Speech Harmful to Children**

Speech that is otherwise fully protected by the First Amendment may be restricted in order to protect children. This is because the Court has “recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.”\textsuperscript{93} However, any restriction must be accomplished “by narrowly drawn regulations without unnecessarily interfering with First Amendment freedoms.” It is not enough to show that the government’s ends are compelling; the means must be carefully tailored to achieved those ends.\textsuperscript{94}

Thus, the government may prohibit the sale to minors of material that it deems “harmful to minors” (“so-called ‘girlie’ magazines”), whether or not they are not obscene as to adults.\textsuperscript{95} It may prohibit the broadcast of “indecent” language on radio and television during hours when children are likely to be in the audience, but it may not ban it around the clock unless it is obscene.\textsuperscript{96} Federal law currently bans indecent broadcasts between 6 a.m. and 10 p.m.\textsuperscript{97} Similarly, Congress...
may not ban dial-a-porn, but it may (as it does at 47 U.S.C. § 223) prohibit it from being made available to minors or to persons who have not previously requested it in writing.\footnote{Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115 (1989); Dial Information Services v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992).}

In \textit{Reno v. American Civil Liberties Union}, the Supreme Court declared unconstitutional two provisions of the Communications Decency Act (CDA) that prohibited indecent communications to minors on the Internet.\footnote{521 U.S. 844 (1997).} The Court held that the CDA’s “burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.” “[T]he governmental interest in protecting children from harmful materials ... does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not ‘reduce[e] the adult population ... to ... only what is fit for children.’”\footnote{Id. at 874-875.}

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

In 1998, Congress enacted the Child Online Protection Act (COPA), P.L. 105-277, title XIV, to replace the CDA. COPA differs from the CDA in two main respects: (1) it prohibits communication to minors only of “material that is harmful to minors,” rather than material that is indecent, and (2) it applies only to communications for commercial purposes on publicly accessible websites. COPA has not taken effect, because a constitutional challenge was brought and the district court, finding a likelihood that the plaintiffs would prevail, issued a preliminary injunction against enforcement of the statute, pending a trial on the merits. The Third Circuit affirmed, but, in 2002, in \textit{Ashcroft v. American Civil Liberties Union}, the Supreme Court held that COPA’s use of community standards to define “material that is harmful to minors” does not by itself render the statute unconstitutional. The Supreme Court, however, did not remove the preliminary injunction against enforcement of the statute, and remanded the case to the Third Circuit to consider whether it is unconstitutional nonetheless. In 2003, the Third Circuit again found the plaintiffs likely to prevail and affirmed the preliminary injunction. In 2004, the Supreme Court affirmed the preliminary injunction because it found that the government had failed to show that filtering prohibited material would not be as effective in accomplishing Congress’s goals. It remanded the case for trial, however, and did not foreclose the district court from concluding otherwise.\footnote{American Civil Liberties Association v. Reno, 31 F. Supp. 2d 473 (E.D. Pa. 1999), aff’d, 217 F.3d 162 (3d Cir. 2000), vacated and remanded sub nom. Ashcroft v. American Civil Liberties Union, 535 U.S. 564 (2002), aff’d on remand, 322 F.3d 240 (3d Cir. 2003), aff’d and remanded, 542 U.S. 656 (2004). See also, footnote 8 of this report.}

In 2007, the district court found COPA unconstitutional and issued

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also in this report under “Radio and Television.”
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a permanent injunction against its enforcement; in 2008, the U.S. Court of appeals affirmed, finding that COPA “does not employ the least restrictive alternative to advance the Government’s compelling interest” and is also vague and overbroad. In 2009, the Supreme Court declined to review the case.

Children’s First Amendment Rights

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

A plurality of the justices found that a school board must be permitted “to establish and apply their curriculum in such a way as to transmit community values,” but that it may not remove school library books in order to deny access to ideas with which it disagrees for political or religious reasons. The Supreme Court has also held that Congress may not prohibit people 17 or younger from making contributions to political candidates and contributions or donations to political parties. Most recently, in Morse v. Frederick, the Court held that a school could punish a pupil for displaying a banner that read, “BONG HTS 4 JESUS,” because these words could reasonably be interpreted as “promoting illegal drug use.” The Court indicated that it might have reached a different result if the banner had addressed the issue of “the criminalization of drug use or possession.” Justice Alito, joined by Justice Kennedy, wrote a concurring opinion stating that they had joined the majority opinion “on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction on speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as ‘the wisdom of the war on drugs or of legalizing marijuana for medicinal use.’” As Morse v. Frederick was a 5-to-4 decision, Justices Alito’s and Kennedy’s votes were necessary for a majority and therefore should be read as limiting the majority opinion with respect to future cases.

107 Board of Education, Island Trees School District v. Pico, 457 U.S. 853, 864 (1982). The Court noted that “nothing in our decision today affects in any way the discretion of a local school board to choose books to add to the libraries of their schools.” Id. at 871.
110 Id. at 2625.
111 Id. at 2636.
Time, Place, and Manner Restrictions

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

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

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

When a court issues an injunction that restricts the time, place, or manner of a particular form of expression, because prior restraint occurs, “a somewhat more stringent application of general First Amendment principles” is required than is required in the case of a generally applicable statute or ordinance that restricts the time, place, or manner of speech. Instead of asking

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113 Id. at 487.
115 Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976); Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986). Although singling out “adult” material might appear to be a content-based distinction, the Court in Renton said that regulations of speech are content-neutral if they “are justified without reference to the content of the regulated speech,” 475 U.S. at 48 (emphasis in original). Zoning restrictions are justified as measures to “prevent crime, protect the city’s retail trade, maintain property values, and generally ‘protect[ ] and preserv[e] the quality of [the city’s] neighborhoods, commercial districts, and the quality of urban life, not to suppress the expression of unpopular views.’” Id.
119 Madsen v. Women’s Health Center, Inc., 512 U.S. 753, 765 (1994). In this case, the Court held that the challenged injunction was content-neutral, even though it was directed at abortion protestors, because its purpose was to protect patients, not to interfere with the protestors’ message.