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ARTICLES

THE FIRST AMENDMENT IN LITIGATION: THE "LAW OF THE FIRST AMENDMENT"

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INTRODUCTION

The purpose of this article is to analyze the First Amendment as it appears to judges and lawyers in the context of actual litigation and to explicate the meaning of the "law of the First Amendment." I am a professor of Constitutional Law and have litigated a number of First Amendment cases over the years.[1] My litigation experience has carried over into my teaching of the First Amendment and has led me to conclude that lawyers and academic commentators tend to approach the First Amendment with fundamentally different perspectives. This difference in perspective is much more than a difference between "doctrine" and "theory" or a difference between "what the Constitution means" and "what the Constitution should mean." It goes to the difference between how an academic commentator may approach the First Amendment for purposes of academic commentary and how litigating lawyers and judges, including the Justices of the Supreme Court, do in fact analyze a First Amendment issue in the context of actual litigation.

The academic commentator is subject to no constraints whatsoever in establishing the analytical framework for academic commentary. The academic commentator is free to posit a grand theory about the meaning of the First Amendment and to analyze the Supreme Court's First Amendment

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* Professor of Law, Wayne State University. A.B., 1956, J.D., 1959, University of Pittsburgh. Much of the work on this article was done in preparation for and during the week that I spent as Distinguished Professor in Residence at the Frances Lewis Law Center of Washington and Lee University in October, 1990. I am especially grateful to my longtime friend and colleague, Professor Doug Rendleman, the Director of the Law Center, for arranging this visit. While at the Law Center, I spent considerable time discussing the thesis and substance of this article with Professor Lewis H. LaRue, and I gained very valuable insights from that discussion. Finally, I profited very much from the intellectual exchanges I enjoyed with other members of the Law Faculty during my visit and from a presentation I made on this subject at a Faculty Colloquium.

1. Two recent First Amendment cases I have litigated that have resulted in reported decisions are Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989) (university's "racist speech" policy violates First Amendment), and Lueth v. St. Clair County Community College, 732 F. Supp. 1410 (E.D. Mich. 1990) (action of community college officials in prohibiting publication of advertisement in student-run newspaper violated First Amendment rights of student editor-in-chief). Neither case was appealed.

decisions with reference to the commentator's grand theory. Or in a more modest enterprise, the academic commentator may develop a thesis about the meaning of the First Amendment with respect to a particular kind of expression and try to support the thesis by invoking a number of conceptual, doctrinal, and policy considerations.

In actual First Amendment litigation, however, both grand theory and theses about the meaning of the First Amendment with respect to a particular kind of expression are almost always irrelevant. Rather, in actual litigation, the analytical framework for the resolution of the First Amendment issue is what I call the "*law of the First Amendment.*" The "law of the First Amendment" is that body of concepts, principles, specific doctrines, and "balancing/subsidiary doctrine" that has emerged from the collectivity of the Supreme Court's decisions in First Amendment cases. In this writing I will explain the structure of the "law of the First Amendment," discuss its essential components, and demonstrate how the "law of the First Amendment" controls the results in actual First Amendment litigation, or at least sets the parameters for the resolution of the First Amendment question at issue.

In academic discussions about the First Amendment, it has become commonplace to lament the failure of the Supreme Court to develop any general theory of the First Amendment. Rather, it is said that the Court "has sought to develop principles on a case-by-case basis and has produced a complex and conflicting body of constitutional precedent."[2] However, while the Supreme Court's First Amendment decisions in their collectivity may seem complex and confusing when viewed from an academic perspective because of the absence of a unifying general theory, the "law of the First Amendment" that has emerged from these decisions is neither complex nor conflicting. The "law of the First Amendment" also has resulted in a very high degree of constitutional protection for freedom of expression in this nation.[3]

THE "LAW OF THE FIRST AMENDMENT"

The "law of the First Amendment" consists in large part of *concepts, principles and specific doctrines* that the Court has developed over the years

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2. W. LOCKHART, Y. KAMISAR, J. CHOPER & S. SHIFFRIN, CONSTITUTIONAL LAW 630 (6th ed. 1986).

3. This is perhaps the strongest protection afforded to any individual right in our constitutional system, and in practice a First Amendment challenge is the one that is most likely to be successful. For example, while a public school board or university can refuse to renew the contract of a nontenured teacher on seemingly "arbitrary" grounds, it cannot do so on the ground that the teacher has engaged in activity that is protected by the First Amendment, such as criticizing American foreign policy. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972). Likewise, governmental regulation of economic activity, which is virtually immune from constitutional challenge under the due process or equal protection clause, *see, e.g.*, Williams v. Lee Optical, 348 U.S. 483 (1955), becomes subject to serious constitutional challenge and possible invalidation when the regulation reaches advertising, because advertising is speech for First Amendment purposes and brings into play the commercial speech doctrine. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

in the process of resolving First Amendment cases. These concepts, principles and specific doctrines are supplemented by a residually applicable balancing approach, which to a degree consists of a number of subsidiary doctrines. In the context of actual First Amendment litigation, First Amendment analysis is very much a matter of *identification* and *application*. In many cases, once the Court identifies and applies the appropriate concept, principle or specific doctrine, the parameters for the resolution of the constitutional question at issue have been established and the result is often fairly clear.

The matter of identification and application of the appropriate concept, principle, or specific doctrine is illustrated most clearly by a case such as *Boos v. Barry*.[4] One challenged provision of the District of Columbia Code prohibited the display of any sign within 500 feet of a foreign embassy that tends to bring the foreign government into "public odium" or "public disrepute." The other challenged provision, as construed, prohibited the congregation of three or more persons within 500 feet of a foreign embassy when the police reasonably believe that a threat to the security or peace of the embassy is present. Although both provisions regulate expression within 500 feet of a foreign embassy, they differ in their terms, and it is this difference in terms that triggers different parts of the "law of the First Amendment."

The "display clause" proscribes speech because of its *content*: it only prohibits displays that are critical of the foreign government but not displays that are favorable to the foreign government. This being so, the display clause triggers the First Amendment principle of content neutrality—here that aspect of the principle that precludes the government from differentiating between types of expression based on the particular viewpoint that is being expressed. Since the display clause violated this aspect of the principle of content neutrality—to which the Court has never recognized any exceptions—it was held unconstitutional.

The "congregation clause," however, is viewpoint neutral. It comes into play not because of the particular viewpoint expressed, but because of the threat the particular congregation of persons is deemed to pose to the security or peace of the embassy. This being so, it triggers the specific doctrine of reasonable, time, place and manner regulation: a reasonable and content-neutral regulation of expression in terms of time, place and manner is not an abridgment of freedom of speech under the First Amendment. Under that doctrine, the only question to be decided is whether the particular regulation is "reasonable,"[5] and in that case the Court held that the regulation was "reasonable on its face."[6]

These concepts, principles, and specific doctrines are supplemented by a residually applicable "balancing approach." It is sometimes said that

4. 485 U.S. 312 (1988).

5. For a discussion of the factors that determine "reasonableness," see *infra* notes 92-96 and accompanying text.

6. The regulation could be found to be unconstitutional as applied in a particular case.

when governmental regulation is directed at the noncommunicative impact of expression, as opposed to the specific message or viewpoint expressed, the Court follows an *ad hoc* balancing approach that balances the interest in freedom of expression against other societal interests as those interests appear in the context of particular limitations on expression.[7] However, as an explanation of how First Amendment analysis operates in actual litigation, the "balancing approach" explanation, even as to regulation directed at the noncommunicative impact of expression, is somewhat misleading.

In the first place, as I have said, the result in a First Amendment case is often controlled by the application of the appropriate concept, principle, or specific doctrine. When this is so, no balancing takes place, and the application of the concept, principle, or specific doctrine either renders the particular limitation on expression unconstitutional or at least sets the parameters for the resolution of the constitutional question at issue. To take two examples, an injunction against publication brings into play the prior restraint doctrine, which renders the injunction unconstitutional in all but extraordinary circumstances.[8] Similarly, governmental restriction of expression that takes place on or seeks access to publicly-owned property is governed by the "public forum" doctrine, under which, as we will see, the permissible scope of restriction of expression on public property depends on whether the property in question constitutes a public forum.[9]

Second, the Court's application of the "balancing approach" over the years has resulted in some specific doctrines that reflect balancing considerations. These doctrines now control when applicable and make any further balancing in a particular case unnecessary. Examples of specific doctrines that reflect balancing considerations include: the "clear and present danger" doctrine, which applies to governmental efforts to sanction advocacy of unlawful action;[10] the "commercial speech" doctrine, which determines the constitutionality of governmental regulation of what is characterized as "commercial speech;"[11] and the "symbolic speech" doctrine, which applies

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7. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 789-94 (2d ed. 1989). As Professor Tribe puts it, "[t]he 'balance' between the values of freedom of expression and the government's regulatory interests is struck on a case-by-case basis, guided by whatever unifying principles may be articulated." *Id.* at 792.

8. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971) (The "Pentagon Papers" Case). In that case the government claimed that public disclosure of the information sought to be enjoined would be harmful to national security, but the Court refused to recognize a national security exception to the prior restraint doctrine. The government could not sustain its "heavy burden" to justify the issuance of an injunction against the particular publication. See also Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), where the Court invalidated as an impermissible prior restraint a gag order on the press designed to prevent "prejudicial pretrial publicity" in a mass murder case.

9. *See infra* notes 84-94 and accompanying text (discussing "public forum" doctrine).

10. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969). The balance is struck against expression only at the point where the advocacy "is likely to incite or produce imminent lawless action."

11. Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557 (1980). In

to acts of expression combining both speech and nonspeech elements, such as burning a draft card or wearing a black armband to school in protest of the Vietnam War.[12]

Third, even when there is no controlling principle or specific doctrine, the application of the "balancing approach" is qualified by the Court's precedents dealing with a particular kind of restriction or interference with expression. To this extent, the Court is applying "subsidiary doctrine" to determine the constitutionality of the particular restriction or interference in issue rather than engaging in a general "balancing approach." Thus, the Court has developed "subsidiary doctrine" to deal with matters such as governmentally-mandated disclosure of beliefs or associations,[13] the free speech and association rights of public employees,[14] access to governmentally-controlled information,[15] the right to refrain from speaking,[16] restrictions on freedom of expression relating to the administration of justice,[17] and limitations on political expenditures.[18] Precisely because the Court has developed "subsidiary doctrine" to deal with a large number of matters, in only a limited number of cases today will the Court have to fall back on general balancing to resolve the First Amendment issue before it.[19]

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the balancing equation, it must be determined whether or not the asserted governmental interest is substantial, whether the regulation directly advances the asserted governmental interest, and whether the regulation is not more extensive than is necessary to serve that interest.

12. Under the "symbolic speech" doctrine, the restriction on expression may be justified if: (1) the restriction is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. United States v. O'Brien, 391 U.S. 367 (1968). Applying the "symbolic speech" doctrine, the Court upheld a Congressional ban on draft card burning in *O'Brien*, but the Court held that a public high school could not prohibit a student from wearing a black armband to school to protest the Vietnam War in Tinker v. Des Moines School District, 393 U.S. 733 (1969).

13. *See, e.g.*, Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); Shelton v. Tucker, 364 U.S. 479 (1960).

14. *See, e.g.*, Rutan v. Republican Party, 110 S. Ct. 2729 (1990); Rankin v. McPherson, 483 U.S. 378 (1987); Connick v. Myers, 461 U.S. 138 (1983); Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976); Pickering v. Board of Educ., 391 U.S. 563 (1968).

15. *See, e.g.*, Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Houchins v. KQED, Inc., 438 U.S. 1 (1978); Pell v. Procunier, 417 U.S. 817 (1974).

16. *See, e.g.*, Keller v. State Bar, 110 S. Ct. 2228 (1990); Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1 (1986); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Wooley v. Maynard, 430 U.S. 705 (1977).

17. *See, e.g.*, Butterworth v. Smith, 110 S. Ct. 1376 (1990); Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

18. *See, e.g.*, Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990); Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238 (1986); Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197 (1982); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978); Buckley v. Valeo, 424 U.S. 1 (1976).

19. For some examples of general balancing cases, see *infra* note 139.

The components of the "law of the First Amendment," then, are concepts, principles, specific doctrines, and what may be called "balancing/subsidiary doctrines." It must be emphasized that in many cases the result will be controlled, or at least the parameters for the resolution of the constitutional question will be defined, by the identification and application of the appropriate concept, principle, or specific doctrine. It is only where this is not so that the component of "balancing/subsidiary doctrine" comes into play, and here there will almost always be applicable "subsidiary doctrine" to define the scope of the constitutional analysis.

Once it is understood how the "law of the First Amendment" operates in the context of actual litigation, it should also be clear that most First Amendment issues are not analytically difficult to resolve. The "law of the First Amendment," if not consistent as measured against some general theory of the First Amendment, is *coherent* in the sense that it is understandable and provides a fair degree of predictability in practice.[20] A lawyer litigating a First Amendment case or advising a client on a First Amendment issue can usually make a fairly accurate prediction as to whether or not a particular law or governmental action will be sustained against First Amendment challenge.

Concepts, Principles, and Specific Doctrines

Let us now turn to the matter of concepts, principles, and specific doctrines. The content and line of growth of the "law of the First Amendment" has been strongly influenced by the context in which it has developed. The "law of the First Amendment" has been evolving for some seventy years, and the primary context in which it developed for many of those years was in response to governmental repression of dissent and the expression of unpopular ideas.[21] As the Court extended protection to freedom

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20. I am indebted to Professor Lewis H. LaRue of the Washington and Lee Law School for providing this insight into the difference between consistency and coherence during the discussions we had when I was visiting at the Law Center.

21. The development of the modern "law of the First Amendment" is generally considered to have begun with First Amendment challenges to espionage and sedition prosecutions during World War I and the "red scare" that followed. As indicated by cases such as Schenck v. United States, 249 U.S. 47 (1919), Gitlow v. New York, 268 U.S. 652 (1925), and Whitney v. California, 274 U.S. 357 (1927), these challenges were generally unsuccessful. While the First Amendment was recognized doctrinally as a basis for challenging these laws, the Court applied the "clear and present danger" test and came down on the side of upholding the challenged law or governmental action in issue. In the 1930s, the Court began to sustain First Amendment challenges under this test, in effect protecting the harmless speech of the socialists, communists, and anarchists, which consisted of criticism of the government in Marxist terms and discussion of abstract Marxist doctrine, including violent overthrow of the government. *See, e.g.*, Herndon v. Lowry, 301 U.S. 242 (1937); De Jonge v. Oregon, 299 U.S. 353 (1937). By the time of the cold war period, the "clear and present danger" test had been firmly established as the doctrinal basis for dealing with First Amendment protection of advocacy of illegal action and other expression directed toward dissent and social change efforts, and in

of expression in this context, it has promulgated concepts, principles, and specific doctrines designed to ensure that dissent may occur and unpopular ideas may be expressed. These concepts, principles and specific doctrines apply across the board to any interference with freedom of expression and are the principal vehicles by which the very strong protection of freedom of expression is achieved in actual First Amendment litigation.

The "Chilling Effect" Concept

Perhaps the most fundamental and pervasive concept in the "law of the First Amendment" is that of *chilling effect*. Indeed, at this point in time it is the only clear First Amendment concept that I have been able to identify. The "chilling effect" concept is the basis of the "void on its face" doctrine, which will be discussed in more detail below. It is also the basis of the "narrow specificity" principle. As the Court has stated, "Because First Amendment freedoms need breathing space to survive, government may regulate in this area only with narrow specificity."[22] Thus, any regulation of expression is subject to challenge on the ground that it "sweeps more broadly than is necessary to advance the legitimate governmental interests at stake."[23]

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practice it provided a degree of protection for this kind of expression.

There was some regression during the cold war period, when the Court interpreted the "clear and present danger" test rather loosely in order to sustain the constitutionality of laws directed against the Communist Party, which was widely believed to be controlled by the Soviet Union and a part of an international conspiracy directed toward bringing about violent revolution in the United States. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951). However, in a series of decisions beginning with Yates v. United States, 354 U.S. 298 (1957), and culminating in Brandenburg v. Ohio, 395 U.S. 444 (1969), the Court began a process that effectively overruled *Dennis* and that, by a combination of statutory interpretation and constitutional holdings, rendered nugatory virtually all of the anticommunist legislation enacted during the cold war period. Under the reformulated "clear and present danger" test, advocacy of illegal action is constitutionally protected until it becomes "likely to incite or produce imminent lawless action," which effectively protects virtually any expression directed toward dissent and social change. *See, e.g.*, Communist Party v. Whitcomb, 414 U.S. 441 (1974); Hess v. Indiana, 414 U.S. 105 (1973).

22. NAACP v. Button, 371 U.S. 415, 433 (1963).

23. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479 (1960). In that case, the Court invalidated a requirement that teachers list all of the organizations to which they had belonged or contributed during the preceding five years. Absolute prohibitions affecting expressive activity will frequently run afoul of this principle. *See, e.g.*, Butterworth v. Smith, 110 S. Ct. 1376 (1990) (ban on witnesses' disclosing testimony before grand jury after grand jury's term is over); Florida Star v. B.J.F, 109 S. Ct. 2603 (1989) (ban on publication of name of victim of sexual offense); Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987) (ban of all "First Amendment activities" at public airport); United States v. Grace, 461 U.S. 171 (1983) (law prohibiting all leafleting and picketing on sidewalk adjoining Supreme Court); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (routine exclusion of press and public during testimony of minor victim of sex offense); Schad v. Burrough of Mt. Ephraim, 452 U.S. 61 (1981) (prohibition of all live entertainment in city's small commercial zone); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (law giving trial judge power to close criminal trial upon unopposed request of defendant); Martin v. City of Struthers, 319

The "chilling effect" concept is also the basis of the "New York Times" rule,[24] which imposes the stringent requirement of "knowing falsity or reckless disregard for truth" in a defamation action brought by a public official or public figure.[25] A concern for a chilling effect on the dissemination of constitutionally protected pornography resulting from the states' efforts to suppress constitutionally unprotected obscenity [26] imposes significant process-type restrictions on those efforts.[27] Finally, the possibility of a serious chilling effect on expression is an analytical basis for invalidating any kind of regulation of expression, such as a law requiring a newspaper to give a right of reply to a political candidate it has attacked in print.[28]

As stated above, the "chilling effect" concept is the basis of the "void on its face" doctrine, which is extremely important in practice. Under the "void on its face" doctrine, in order to prevent a chilling effect on expression resulting from the existence and threatened enforcement of overbroad and vague laws regulating or concerning expression, such laws may be challenged on their face for substantial overbreadth or vagueness without regard to whether the activity of the party challenging the law is itself constitutionally protected.[29] This doctrine is extremely important in

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U.S. 141 (1943) (absolute ban on knocking on door or ringing doorbell of resident in order to deliver handbills); Schneider v. New Jersey, 308 U.S. 147 (1939) (absolute ban on distribution of leaflets on public streets or other public places).

24. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

25. The "New York Times" rule also imposes limitations on defamation actions brought by private figure plaintiffs when a newspaper "publishes speech of public concern," *see* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), and the rule applies as well to invasion of privacy and emotional distress actions, *see* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988); Time, Inc. v. Hill, 385 U.S. 374 (1967).

26. All pornography—the depiction or description of sexual activity—is protected under the First Amendment unless it amounts to obscenity under the test of Miller v. California, 413 U.S. 15 (1973).

27. The principal process-type restriction is that the state cannot prohibit or otherwise sanction the dissemination of any allegedly obscene material until there has been a prior judicial determination of obscenity in an adversary proceeding, which the state must initiate. *See, e.g.*, Blount v. Rizzi, 400 U.S. 410 (1971); Freedman v. Maryland, 380 U.S. 51 (1965).

28. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); *see also* Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) (official designation of books as "objectionable" by governmental agency, circulation of list of books to police, and threat to recommend prosecution against distributors is administrative prior restraint in violation of First Amendment); Lamont v. Postmaster-General, 381 U.S. 301 (1965) (federal law permitting mail delivery of communist political propaganda only if addressee specifically requests delivery in writing violates First Amendment because of possible chilling effect on willing recipients).

29. Analytically, a law is overbroad when it includes within its terms constitutionally protected expression, and a law is vague when the terms could reasonably be construed to include within the law's prohibitions constitutionally protected expression. A law can be overbroad without being vague, such as a law prohibiting all peaceful picketing. *See* Thornhill v. Alabama, 310 U.S. 88 (1940). Usually, however, overbreadth and vagueness merge, and the Court has stated that it has "traditionally viewed vagueness and overbreadth as logically related and similar doctrines." Kolender v. Lawson, 461 U.S. 352, 358 n.8 (1983). In practice, the challenge ordinarily is that the law, on its face, is substantially vague and overbroad, in

practice, not only because the law can be invalidated without regard to whether the activity of the party challenging the law is itself constitutionally protected, but also because the constitutional analysis does not go beyond the *terms* of the law itself. Moreover, once a law is invalidated on its face, it is as if it literally has been excised from the statute books—it cannot be enforced against any person in any circumstances. As Justice White, who is no great fan of the "void on its face" doctrine, stated, it is "strong medicine" and should be applied "sparingly and only as a last resort."[30]

In practice, however, the "void on its face" doctrine, while perhaps applied sparingly and only as a last resort to laws that have as their primary purpose the regulation of conduct and have only an incidental effect on expression,[31] is readily applied to invalidate laws that by their terms are directed against expressive activity. Thus, in *City of Houston v. Hill*,[32] the Court invalidated on its face a Houston ordinance making it unlawful for a person to "in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty."[33] Other examples of regulations of expression found to be void on their face include regulations forbidding the use of "opprobrious words or abusive language tending to cause a breach of the peace,"[34] forbidding individuals to "assemble . . . on . . . the sidewal[k] . . . and . . . conduct themselves in a manner annoying to persons passing by,"[35] and forbidding anyone "wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty."[36]

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violation of the First Amendment.

While the "void on its face" doctrine is sometimes explained as an exception to the rule against third party standing, I believe that it is more properly explained in substantive terms. A party has a substantive First Amendment right, grounded in a concern for preventing a chilling effect on the exercise of freedom of expression, not to be subject to sanction under a law that is void on its face. Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 CALIF. L. REV. 1308, 1326-27 (1982).

30. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

31. An example of a law that primarily seeks to regulate conduct is a law prohibiting the dissemination of child pornography, to which the "void on its face" doctrine was held inapplicable. *See* New York v. Ferber, 458 U.S. 747 (1982). In cases where the law contains a severability clause and the severable part of the law could operate independently, the Court will not invalidate the law in its entirety but will only strike down the facially invalid part of the law. *See, e.g.*, Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985).

32. 482 U.S. 451 (1987).

33. City of Houston v. Hill, 482 U.S. 451, 455 (1987). The ordinance was overbroad because it forbade persons from criticizing and insulting police officers, which is constitutionally protected expression. The overbreadth here was "real and substantial in relation to the law's plainly legitimate sweep." *Id.* at 460-65.

34. Gooding v. Wilson, 405 U.S. 518, 518-19 (1972).

35. Coates v. City of Cincinnati, 402 U.S. 611, 611 (1971).

36. Lewis v. New Orleans, 415 U.S. 130, 132 (1974). In that case the Louisiana Supreme Court tried to "rewrite" the statute to limit it to constitutionally unprotected "fighting words," *see* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), but the effort failed since the language of the statute "plainly has a broader meaning than the constitutional definition of 'fighting words,'" and so remained "susceptible of application to protected speech." *Lewis*, 415 U.S. at 132-34.

The "void on its face" doctrine is also invoked to invalidate both oath requirements containing language that requires or could be construed to require the declarant to refrain from engaging in protected expression or association[37] and laws proscribing sexual expression that go beyond legally unprotected obscenity.[38] A variation of the "void on its face" doctrine applies to laws licensing expression.[39] A law licensing expression must be content neutral and must contain narrow, objective and definite standards which control the discretion of the licensing official.[40] When the law fails to contain these standards, it is invalidated on its face, and a party subject to the law is not required to apply for a license as a condition for challenging its constitutionality.[41]

First Amendment Principles

Perhaps the most important First Amendment principle in terms of its applicability in First Amendment litigation is the principle of content neutrality. Under this principle, the government may not proscribe any expression because of its *content*, and an otherwise valid regulation violates the First Amendment if it differentiates between types of expression based on content. Analytically, there are two aspects to the principle of content neutrality: viewpoint neutrality and category neutrality. Under the viewpoint neutrality aspect of the principle, the government cannot regulate expression in such a way as to favor one viewpoint over another. As noted in *Boos*

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37. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967); Baggett v. Bullit, 377 U.S. 360 (1964); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961).

38. *See, e.g.*, Sable Communications v. Federal Communications Comm'n, 492 U.S. 115 (1989) (Congressional ban on "indecent" interstate commercial telephone messages); American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986) (ordinance defining pornography as "graphic sexually explicit subordination of women," without any reference to "prurient interest," "offensiveness," "community standards," or "serious literary, artistic, political or scientific value").

39. Analytically, these laws constitute a prior restraint, and the Court often refers to them as such. However, because licensing is involved, the Court has dealt with these laws specifically rather than as a part of the prior restraint doctrine, and the Court's treatment of these laws analytically is best characterized as a variation of the "void on its face" doctrine.

40. *See, e.g.*, City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988).

41. *See id.* at 755-59. As the Court stated, "[O]ur cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *Id.* at 755-56. For other cases invalidating licensing laws on their face, see Hynes v. Mayor, 425 U.S. 610 (1976); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Lovell v. City of Griffin, 303 U.S. 444 (1938). Laws requiring licensing of charitable solicitors must also contain certain procedural requirements regarding issuance of a license and review of license denial, and the failure of the law to contain these requirements renders the law void on its face. *See, e.g.*, Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988); *see also* Fort Worth/Pub. Broadcasting Sys., Inc. v. City of Dallas, 110 S. Ct. 596 (1990) (allowing facial challenge to law licensing adult entertainment businesses, which included bookstores and theaters).

v. Barry,[42] the "display clause" in the District of Columbia regulation was invalid because it only prohibited displays that were critical of the foreign government. Displays that were favorable to the foreign government were not prohibited, so the law in effect ordained an officially approved viewpoint about the foreign government whose embassy was being picketed. This aspect of the principle of content neutrality was also violated by a federal law that allowed the wearing of U.S. military uniforms in a portrayal only if that portrayal does not "tend to discredit the military."[43]

Another example of the application of the viewpoint neutrality aspect of the principle of content neutrality is found in the invalidation of the "civil rights antipornography" law that defined proscribed pornography as the "graphic sexually explicit subordination of women."[44] In addition to rendering the law void on its face for overbreadth, that definition violated the principle of content neutrality because it favored one view of the role of men and women in sexual encounters over another. Sexually explicit portrayals treating women in the approved way were lawful, but equally explicit portrayals treating women as submissive in sexual relations or enjoying humiliation were unlawful. Under the principle of content neutrality, the state may not mandate an officially approved view of equality in sexual encounters.[45]

The requirement of viewpoint neutrality was also the basis for the Court's invalidation of state and federal bans on flag desecration.[46] The majority and the dissent in the two cases addressing this issue differed with respect to whether the requirement of viewpoint neutrality was implicated by the bans. The majority took the position that the asserted governmental interest in preserving the flag as a "symbol of nationhood and national unity" did implicate this requirement. It emphasized that the government authorized burning as a proper means of disposing of a torn or soiled flag, so the thrust of the ban was directed toward the "content of the message"

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42. 485 U.S. 312 (1988); *see also supra* notes 4-6 and accompanying text (discussing *Boos*).

43. *See* Schacht v. United States, 398 U.S. 58 (1970).

44. American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

45. As the Seventh Circuit stated in *American Booksellers Association*:

> Under the ordinance graphic sexually explicit speech is "pornography" or not depending on the perspective the author adopts. Speech that "subordinates" women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in "positions of servility or submission or display" is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an "approved" view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.

Id. at 328.

46. *See, e.g.*, United States v. Eichman, 110 S. Ct. 2404 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

conveyed by the burning.[47] Thus, the law implicated the requirement of viewpoint neutrality, and the majority was not willing to create an exception to this requirement even for the American flag.[48] The dissenting Justices, by contrast, took the position that the defendant's flag burning did not involve the expression of ideas, and that it was the "use of this particular symbol, and not the idea that he sought to convey by it" which was being proscribed.[49] These cases illustrate a disagreement on the Court about the applicability of the principle of content neutrality to the challenged laws in issue. Because the majority found the principle applicable, the challenged laws violated the First Amendment.[50] And as these cases also indicate, the Court has recognized no exception whatsoever to the requirement of viewpoint neutrality.

The second aspect of the principle of content neutrality is that of category neutrality. Under this aspect of the principle, the government generally cannot regulate in such a way as to differentiate between categories of expression. When it does so, the principle of content neutrality comes to the fore, and an otherwise valid regulation will be found to violate the First Amendment. This aspect of the principle of content neutrality is illustrated by *Police Department v. Mosley*.[51] The ordinance involved in that case banned all picketing within 150 feet of a school building while the school was in session, which ordinarily could be sustained as a reasonable time, place and manner limitation.[52] However, the city made an apparently politically necessary exception for picketing in connection with a labor dispute. This exception triggered the application of the principle of content neutrality, and, as the Court noted, "The central problem with Chicago's ordinance is that it described permissible picketing in terms of the subject matter," and drew an "impermissible distinction between labor picketing and other peaceful picketing."[53] The Court concluded:

> There is an "equality of status in the field of ideas." Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum

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47. *Johnson*, 491 U.S. at 412; *Eichman*, 110 S. Ct. at 2409.

48. *Johnson*, 491 U.S. at 416-18.

49. *Id.* at 432 (Rehnquist, C.J., dissenting).

50. Dean Ely has argued, quite convincingly in my view, that the asserted interest in protecting the physical integrity of the flag necessarily violates the requirement of viewpoint neutrality, because it promotes the idea of patriotism and therefore favors patriotism over "antipatriotism." Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

51. 408 U.S. 92 (1972).

52. *Cf.* Grayned v. City of Rockford, 408 U.S. 104 (1972) ("noise or diversion on grounds of school building while school is in session which tends to disturb the peace or good order of such school session"); *see also* Cox v. Louisiana, 379 U.S. 559 (1965) ("picketing in front of a courthouse with the intent of interfering with, obstructing, or impeding the administration of justice").

53. Police Department v. Mosley, 408 U.S. 92, 96 (1972).

> may not be based on content alone, and may not be justified by reference to content alone.[54]

The requirement of category neutrality is built into the doctrine applicable to governmental licensing of expression, which was discussed earlier. The licensing criteria cannot distinguish between categories of expression. For example, a parade permit law cannot constitutionally distinguish between viewpoints, nor can it distinguish between parades based on the subject matter of the parade. If a city allows an organization to sponsor a Thanksgiving Day parade, then it cannot refuse to allow another organization to have a rally protesting abortion. Another example of the application of requirement of category neutrality is the Court's invalidation of a law prohibiting drive-in theaters from showing films containing nudity when the screen is visible from a public place; the law violated the requirement of category neutrality because it singled out one kind of offensive film for differential treatment.[55] Still another example is the Court's invalidation of a provision of the federal counterfeiting law prohibiting any photographic reproduction of currency while allowing an exception for "philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums."[56] A final example is the Court's invalidation of state sales tax schemes that exempt certain categories of publications from the general sales tax, such as a tax on the cost of paper and ink products consumed in publication, with an exemption of the first $100,000 worth of paper and ink consumed in one calendar year,[57] or a tax on general interest magazines but not on religious, professional, trade, and sports journals.[58]

The Court has recognized two limited exceptions to the requirement of category neutrality in governmental regulation, both involving the regulation of particular "lower level" speech. First, to deal with the secondary consequences resulting from the concentration of businesses purveying sexually explicit materials, a city can enact zoning regulations requiring such businesses to spread out.[59] Second, because commercial speech receives less

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54. *Id.* at 96. To the same effect, see Carey v. Brown, 447 U.S. 455 (1980).

55. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

56. Regan v. Time, Inc., 468 U.S. 641, 644 (1984).

57. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).

58. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987).

59. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). The *Young* Court emphasized that while the regulation was on the basis of the category of the speech involved, it was "unaffected by whatever social, political, or philosophical message the film may be intended to communicate," and that the law placed no limit on the number of such theaters that could be operated in the city. *Young*, 427 U.S. at 70. As the Court concluded:

> Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, even though the determination of whether a particular film fits that characterization turns on the nature of its content, we

constitutional protection than noncommercial speech, a billboard regulation does not violate the First Amendment when it exempts some commercial billboards from the regulation, although it does violate the First Amendment when it exempts some noncommercial billboards from the regulation.[60]

As the above discussion demonstrates, the principle of content neutrality is very powerful, and once it is found to be applicable to a challenge to a particular restriction of expression, it controls the outcome of that challenge.[61] The Court has not recognized any exceptions to the requirement of viewpoint neutrality and only limited exceptions to the requirement of category neutrality. The First Amendment does indeed require "equality of status in the field of ideas," and the principle of content neutrality is the doctrinal vehicle by which such "equality of status" is achieved.

Another important First Amendment principle is the principle of protection of offensive speech. The principle of protection of offensive speech forecloses any justification for a restriction on expression on the ground that the expression is offensive. As the Supreme Court stated in *Texas v. Johnson*,[62] "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society itself finds the idea itself offensive or disagreeable."[63] In

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conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures.

Id. at 71-72.

60. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). As the *Metromedia* Court stated, "Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests." *Id.* at 514. See also Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), where a plurality held that a city could make category distinctions in advertising on its public transit system and allow only commercial advertising but not "political" or "public issue" advertising. The *Lehman* plurality emphasized the city's discretion in deciding the categories of advertising that it would allow on its public transit system and that, in order to increase revenues, it could favor "long-term" over "short-term" advertising.

As to access to public property that is not a traditional or designated public forum, since the government may reserve the forum for its intended purposes, communicative or otherwise, it may impose category-type regulations appropriate to the particular property. A school district, therefore, may limit access to the interschool mail system to the exclusive bargaining representative of the school district's teachers, *see* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), the military may exclude partisan political activity from a military base, *see* Greer v. Spock, 424 U.S. 828 (1976), and the federal government may exclude legal defense and political advocacy groups from a charity drive aimed at federal employees and conducted in the federal workplace during working hours under governmental regulation, *see* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985). *See infra* notes 88-90 and accompanying text.

61. Recall that the question that divided the Court in the flag desecration cases was the application of the principle to the challenged restrictions in question. Where the terms of a flag desecration law expressly violate the principle of content neutrality, such as a law prohibiting "casting contempt" on the flag, the law clearly is unconstitutional. *See* Smith v. Gougen, 415 U.S. 566 (1974).

62. 491 U.S. 397 (1989).

63. Texas v. Johnson, 491 U.S. 397, 414 (1989).

that case, the Court refused to recognize an exception to this principle "even where our flag has been involved."[64] The principle of protection of offensive speech also applies to commercial speech, so the government cannot prohibit product advertising, such as an advertisement for contraceptives, on the ground that such advertising would be offensive to many persons.[65] Nor may the government prohibit the expression of an idea in a particular manner that is highly offensive, such as by the use of an "unseemly expletive."[66]

Under this principle, then, the government cannot prohibit the expression of an idea on the ground that the idea itself or the manner in which the idea is expressed is highly offensive to many people. Thus, any time the government tries to justify a restriction on the ground of offensiveness, the justification is necessarily improper. A public university, for example, cannot constitutionally justify a ban on racist speech on the ground that it expresses a highly offensive idea or that it is very offensive to the victim groups,[67] nor can a city with a large Jewish population, including many holocaust survivors, ban a march by self-styled "Nazis" with Nazi uniforms and swastikas.[68]

A principle that is applicable to interference with expression on the part of public universities or public school systems is the principle of heightened protection to expression in the academic context. This principle emerged from the constitutional challenges to governmental efforts in the 1950s and 1960s to impose a political orthodoxy on university campuses and in the public schools. As the Court in a number of cases invalidated legislative inquiries into the beliefs and associations of teachers and loyalty oath requirements for public employees, it emphasized the importance of free inquiry in the academic context. For example, Chief Justice Warren stated in *Sweezy v. New Hampshire*:[69]

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64. *Id.*

65. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).

66. *See* Cohen v. California, 403 U.S. 15 (1971) (public display of jacket with message, "Fuck the draft").

67. Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989). It is likewise immaterial that the racist speech may cause discrete harm to members of the victim groups. The harm is caused only because the idea itself or the manner in which it is expressed is offensive to the members of the victim groups, so the principle of protection of offensive speech applies and is dispositive.

68. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

In the same vein, the government cannot restrict speech on the ground that its purported offensiveness to the audience toward which it is directed creates a danger of violent reaction against the speaker from the hostile audience. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229 (1963); Terminiello v. Chicago, 337 U.S. 1 (1949). The assumption in *Edwards* that the police have a constitutionally imposed duty to protect the speaker from the hostile audience effectively overrules the earlier case of Feiner v. New York, 340 U.S. 315 (1951), where the Court apparently assumed that the police could restrain the speaker instead of protecting the speaker from the hostile audience. *See also* Gregory v. City of Chicago, 394 U.S. 111 (1969).

69. 354 U.S. 234 (1957).

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[70]

It is on the basis of this language in the Court's opinions and its actions in protecting freedom of academic inquiry against governmental interference that we can find a principle of heightened protection to expression in the academic context.

This principle was also involved in cases arising in the late 1960s and early 1970s when public universities tried to sanction or restrict "anti-establishment" student speech and association on campus. The Court held that a public university could not refuse to grant official recognition to a student group, in this instance the local chapter of the Students for a Democratic Society, because of disagreement with the group's philosophy or because of an unsubstantiated fear that the group would be a "disruptive influence."[71] The Court also held that a public university could not constitutionally expel a student for distributing on campus a newspaper which contained both a cartoon depicting a policeman raping the Statue of Liberty and the Goddess of Justice and an article with the headline, "M____ F____ Acquitted," which discussed the trial and acquittal on an assault charge of a New York City youth who was a member of an organization known as "Up Against the Wall, M____ F____."[72] The university's justification that the expulsion was necessary to uphold its interest in maintaining "conventions of decency" on campus was summarily rejected, and the Court observed that "[t]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the

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70. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion). Likewise, as Justice Brennan stated in *Keyishian v. Board of Regents*:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

358 U.S. 589, 603 (1967).

71. Healy v. James, 408 U.S. 169, 180 (1972). The Court, citing *Keyishian*, observed that "the college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom." *Id.* at 180-81.

72. Papish v. Board of Curators, 410 U.S. 667, 667-68 (1973).

name alone of 'conventions of decency.'"[73] The principle of heightened protection to expression in the academic context, interacting with the principles of content neutrality and protection of offensive speech, operate, as I have demonstrated elsewhere, to impose an almost insurmountable constitutional hurdle to a public university's efforts to ban racist speech on campus.[74]

Specific Doctrines

The third component of the "law of the First Amendment" consists of a number of specific doctrines that have emerged from the Court's First Amendment decisions over the years. I have previously discussed at length the "void on its face" doctrine, because it is extremely important in practice.[75] The other specific doctrines that I have thus far identified include the doctrine of reasonable time, place and manner regulation,[76] the prior restraint doctrine,[77] the "public forum" doctrine,[78] the "clear and present danger" doctrine,[79] the "commercial speech" doctrine, [80] the "symbolic speech" doctrine,[81] and the "New York Times" rule.[82] Although other specific doctrines may be identified, the doctrines I have identified sufficiently illustrate the point that once a specific doctrine is found to be applicable, that doctrine controls the analysis of the First Amendment question at issue.

I now turn to the "public forum" doctrine and the doctrine of reasonable time, place and manner regulation. These doctrines determine the

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73. *Id.* at 670. The expulsion, therefore, also violated the principle of protection of offensive speech. The university's attempt to justify its action as a reasonable time, place and manner limitation was also rejected since the undisputed facts showed that the student was "dismissed because of the disapproved *content* of the newspaper rather than the time, place or manner of its distribution." *Id.* In this regard, the expulsion also violated the principle of content neutrality.

During this time, a number of lower court decisions invalidated the efforts of public universities to ban controversial speakers on campus. *See, e.g.*, Molpus v. Fortune, 432 F.2d 916 (5th Cir. 1970); Pickings v. Bruce, 430 F.2d 595 (8th Cir. 1970); Stacy v. Williams, 306 F. Supp. 963 (N.D. Miss. 1969) (three-judge panel presiding). As a general proposition, a public university's policy on outside speakers must be limited to imposing reasonable and content-neutral time, place and manner restrictions and, perhaps, to preventing a speech that after proper inquiry is determined to create a clear and present danger of unlawful action. As a result of these decisions, it is highly unlikely that any public university today would try to prevent the appearance of a controversial outside speaker on campus.

74. *See generally* Sedler, *Racist Speech on Campus and the First Amendment: The View from Without and Within* (forthcoming).

75. *See supra* notes 29-41 and accompanying text.

76. See the discussion of the application of this doctrine in *Boos v. Barry*, *supra* notes 5-6 and accompanying text.

77. *See supra* note 8 and accompanying text.

78. *See supra* note 9 and accompanying text.

79. *See supra* note 10 and accompanying text.

80. *See supra* note 11 and accompanying text.

81. *See supra* note 12 and accompanying text.

82. *See supra* notes 24-25 and accompanying text.

constitutional permissibility of governmental restriction of expression that takes place on or seeks access to publicly owned property. The doctrines interact with each other because the permissible scope of restriction of expression on public property depends on whether or not the public property in question constitutes a public forum.[83] The reasonable time, place and manner regulation doctrine is directly applicable only when the governmental property in question constitutes a public forum under the "public forum" doctrine.

In practice, these doctrines provide the government's most effective line of defense against a First Amendment challenge. Under the "public forum" doctrine, if the property in question is not a public forum, the government has considerable power to restrict expression with respect to that property. Even if the property is a public forum, when the challenged law can be brought within the ambit of the reasonable time, place and manner regulation doctrine, the law stands a very good chance of being sustained. This is because the focus of the constitutional inquiry is on the "reasonableness" of the particular restriction in relation to the nature of the expression and the particular property involved. The Court also occasionally has gone to great lengths to find that a particular restriction constitutes a reasonable time, place and manner regulation.

The "public forum" doctrine distinguishes between public forums and all other governmental property that is capable of being used for expressive activity. With respect to governmental property that is not a public forum, the government may "reserve the [property] for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[84] Precisely because the property is not a public forum, the focus is on how particular expression would affect the purpose for which the property is being used, and the government may prohibit expressive activity that would be inconsistent with the property's intended use. The Court has upheld, for example, a ban on the deposit of unstamped mailable matter in a United States-approved letterbox because the ban is designed to ensure that only material on which postage has been paid can be deposited in letterboxes.[85] The Court likewise has upheld a city's ban on the posting of signs on public property.[86] However, a complete ban on all

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83. *See* United States v. Kokinda, 110 S. Ct. 3115, 3119-20 (1990) (plurality opinion) (discussing government control of public property).

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

85. *See* United States Postal Serv. v. Greenburgh Civic Ass'n, 453 U.S. 114 (1981). Although the letterbox is privately owned, the Court held that the letterbox is government property, because, once approved for mail delivery by the United States Postal Service, it "becomes an essential part of the Postal Service's nationwide system for the delivery and receipt of mail." *Id.* at 128.

86. *See* Los Angeles City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984). In that case, the Court indicated that the ban did not affect expression in a public forum, so the ban could be sustained under the general reasonableness test applicable to access to other public

expressive activity on other kinds of public property, such as airports, would be unreasonable and hence unconstitutional.[87]

By the same token, the matter of reserving the property for its intended purposes has enabled the government to limit access for expressive activity on the basis of *category* distinctions relating to the purpose of the property in question. The Court has held, for example, that a school district may limit access to the interschool mail system to the exclusive bargaining representative of its teachers,[88] that the military may exclude all partisan political activity from military bases,[89] and that the federal government may exclude legal defense and political advocacy groups from a charity drive aimed at federal employees and conducted in the federal workplace during working hours under governmental regulation.[90] The government, however,

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property. *Id.* at 813-16. However, the Court's analysis of the constitutionality of the ban used the test of the reasonable time, place and manner regulation doctrine, combined rather inexplicably with the "symbolic speech" doctrine. The Court also noted that in cases "falling between the paradigms of government property interests essentially mirroring analogous private interests and those clearly held in trust, either by tradition or recent convention, for the use of the citizens at large," the analytical line between what is a reasonable time, place and manner limitation and whether the property is in fact a public forum may "blur at the edges." *Id.* at 815 n.32.

87. Thus, in Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987), the Court, without deciding whether the Los Angeles International Airport was a public forum within the meaning of the "public forum" doctrine, held unconstitutional a ban on all First Amendment activities at the airport. Compare Adderley v. Florida, 385 U.S. 39 (1966), where the Court held that demonstrators could be barred from jailhouse grounds not ordinarily open to the public. Although the Court in *Adderley* indicated that an absolute ban on demonstrations on jail property would be permissible on the ground that the "State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated," *id.* at 47, the Court later added the qualification, "at least where the demonstration obstructed the jail driveway and interfered with the functioning of the jail." Grayned v. City of Rockford, 408 U.S. 104, 121 n.49 (1972). The *Adderley* formulation would give the state broad powers to ban all expression on public property that is not a public forum. However, the qualification of *Adderley* in *Grayned* would seem to narrow the circumstances in which such a ban would be found to be reasonable, even with respect to public property such as a jail, which could not conceivably be considered a public forum. See also Brown v. Louisiana, 383 U.S. 131 (1966), where a three-justice plurality took the position that a silent vigil to protest segregation in a public library was protected by the First Amendment. *Brown* was cited approvingly in *Grayned* for the proposition that "[a]lthough a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would." *Grayned*, 408 U.S. at 117.

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

89. *See* Greer v. Spock, 424 U.S. 828 (1976). Compare Flowers v. United States, 407 U.S. 197 (1972), where the Court held that the military commander of an open post could not constitutionally exclude protest activity from streets on the post which were open to the general public and along which there was a constant flow of civilian vehicular and pedestrian traffic. As a general proposition, however, the military has broad authority to exclude protest activity and other forms of expression at a military base. *See, e.g.*, United States v. Albertini, 472 U.S. 675 (1985).

90. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985). The Court split 4-3 in this case, with the majority holding that the exclusion was reasonable because it advanced purportedly neutral governmental interests in avoiding the appearance of political

must maintain strict viewpoint neutrality, even as to property that does not constitute a public forum.[91]

When the public property in question constitutes a public forum under the "public forum" doctrine, the doctrine of reasonable time, place and manner regulation comes into play. A public forum for constitutional purposes includes both traditional public forums, such as the public streets and parks, and designated public forums, which is any public property that the government has opened for use by the public as a place for expressive activity.[92] With respect to both traditional and designated public forums, the government cannot deny access or prohibit expression, but it can impose reasonable and content neutral[93] time, place and manner regulations.[94]

For a law to be sustained as a reasonable time, place and manner limitation, it must: (1) serve a significant governmental interest; and (2) leave open ample alternative channels for communication of the information.[95] In determining whether the regulation meets this standard, it is also necessary to consider the special attributes of the particular forum, "since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved."[96]

The consideration of the special attributes of the particular forum is clearly illustrated by *Heffron v. International Society for Krishna Consciousness*.[97] In that case the Court upheld against First Amendment challenge a rule promulgated by the authority administering the Minnesota State

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favoritism, in avoiding controversy, and in maximizing support of agencies that provide direct aid to the needy.

91. If, for example, the government allowed the President to speak on a military base during a political campaign, it could not refuse to allow a speech by a candidate from the opposite party.

92. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983). The designated public forum may be created for a limited purpose, such as use by certain groups. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 267 (1981) (state university opened facilities for use by student groups); Madison School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 174 (1976) (school board meetings open to public). Whether the designated public forum is limited or unlimited, the same constitutional doctrine applies. Thus, in *Widmar* the university could not exclude a student group wishing to use the facilities for religious worship and discussion, 454 U.S. at 277, and in *Madison* the school board could not deny a nonunion teacher the opportunity to speak on pending labor negotiations at a meeting open to the public, 429 U.S. at 175.

93. If the regulation is not content-neutral, it violates the principle of content-neutrality, and it is irrelevant that it could otherwise be sustained as a reasonable time, place and manner regulation. *See* Chicago Police Dep't v. Mosley, 408 U.S. 92 (1972); *supra* notes 51-54 and accompanying text (discussing *Mosley*).

94. When access requires a governmental license, the licensing law, in addition to satisfying the requirements of a reasonable and content-neutral time, place and manner regulation, must also contain "narrow, objective and definite standards," controlling the discretion of the licensing official. *See supra* notes 39-41 and accompanying text.

95. Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 648-55 (1981).

96. *Id.* at 650-51.

97. 452 U.S. 640 (1981).

Fair which required that the sale of distribution or merchandise, including printed or written material, take place from a booth on the fairgrounds. Any person or group wishing to sell merchandise or materials could rent a booth on a first-come, first-served basis with the rental charge based on the size and location of the booth. The rule applied both to nonprofit and commercial enterprises. In holding that the rule constituted a reasonable time, place and manner regulation, the Court emphasized the state's interest in maintaining crowd movement within the relatively small area of the fairgrounds and noted the existence of crowd control problems there compared with a city street. It also emphasized that the rule did not prohibit the religious organization seeking to sell literature and solicit funds among the crowd from mingling with the crowd and trying to propagate its views.[98] However, if the state had tried to advance the interest in maintaining crowd movement by prohibiting any crowd mingling not involving the exchange of money, or if it had not provided booths for transactions involving the exchange of money, then the rule would not have been found to be reasonable and so would be unconstitutional.

I have previously discussed *Boos v. Barry*,[99] where the Court upheld as a reasonable time, place and manner regulation a provision of the District of Columbia Code that had been construed as prohibiting the congregation of persons within 500 feet of a foreign embassy when such congregation posed a threat to the security or peace of the embassy. Crucial to the Court's holding was the lower court's narrowing construction of the code provision, which, as written, made it an offense simply to refuse to disperse after having been ordered to do so by the police. The lower court held that the provision only applied to a congregation of persons directed at the foreign embassy, and in effect wrote in the term, "only when the police reasonably believe that the congregation poses a threat to the security or peace of the embassy." Construed in this manner, the Court could hold that the provision only regulated the place and manner of certain demonstrations and that the provision only came into play when the particular congregation of persons threatened to disrupt the normal activities of the embassy.[100] An absolute ban on demonstrations in front of an embassy, or a law giving the police unfettered discretion to disperse such a demonstration, of course, could not be sustained as a reasonable time, place and manner regulation.[101]

Judicial rewriting of a law in order to make it a constitutionally permissible reasonable time, place and manner regulation was also involved in *Frisby v. Schultz*.[102] In response to picketing by anti-abortion protestors in front of the home of a physician who performed abortions, the city

98. Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 654-55 (1981).

99. 485 U.S. 312 (1988); *see supra* notes 4-6 and accompanying text (discussing *Boos*).

100. Boos v. Barry, 485 U.S. 312, 330-32 (1988).

101. *Id.* at 483-87.

102. 487 U.S. 474 (1988).

passed an ordinance that by its terms prohibited "engag[ing] in picketing before or about the residence or dwelling of any individual."[103] The Court found that the ordinance was "subject to a narrowing construction to avoid constitutional difficulties" and that it was limited to "focused picketing" directed at a particular residence.[104] Thus, the ordinance did not reach marching through residential neighborhoods or even walking a route in front of an entire block of houses.[105] The Court then held that the ban on focused picketing was a reasonable time, place and manner regulation. It advanced the significant governmental interest in protecting the residential privacy of the homeowner, who was the captive unwilling recipient of the directed message, and was narrowly tailored to the advancement of that interest because it only reached picketing directed at the household and not the general public.[106] Precisely because the ordinance did not prohibit the "more general dissemination of a message" to the public, it also satisfied the requirement of leaving open ample alternative channels of communication.[107]

This case illustrates the practical operation of the reasonable time, place and manner regulation doctrine and the matter of regulating, not prohibiting. As narrowed, the ordinance would only prevent the picketers from standing in front of the doctor's home and directing their message, "Stop performing abortions," to him at that place. It would not prevent them from marching in the neighborhood or on the block where the doctor's home was located, carrying signs saying, "Your neighbor, Dr. ____, murders innocent babies." As narrowed, it would advance the asserted interest in promoting residential privacy without substantially interfering with the ability of the protestors to convey their message to the general public and to the doctor who was the target of their protest.

In last Term's case of *United States v. Kokinda*,[108] a fragmented Court held that the Postal Service's ban on solicitation on postal premises, as applied to a postal sidewalk, could be sustained as a reasonable time, place and manner regulation.[109] The plurality opinion of Justice O'Connor, joined by Chief Justice Rehnquist and Justices White and Scalia, took the position that the postal sidewalk was not a public forum, so the ban on solicitation had to satisfy only a general test of reasonableness. To maintain this position, the plurality had to distinguish the postal sidewalk from an ordinary public sidewalk, which the plurality did by saying that it was

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103. Frisby v. Schultz, 487 U.S. 474, 477 (1988).

104. *Id.* at 482-83.

105. *Id.* at 483.

106. *Id.* at 483-87.

107. *Id.*

108. 110 S. Ct. 3115 (1990).

109. United States v. Kokinda, 110 S. Ct. 3115, 3120 (1990). Members of a political organization had set up a table on the sidewalk near the entrance of a post office building to solicit contributions, sell books and subscriptions to the organization's newspaper, and distribute literature on a variety of political issues. *Id.* at 3117-18.

"constructed solely to provide for the passage of individuals engaged in postal business."[110] Justice Kennedy disagreed with the plurality's analysis of the public forum question, contending that the postal sidewalk could well be a public forum,[111] but took the position that, in any event, the ban on solicitation was a reasonable time, place and manner regulation because it only prohibited in-person solicitations on postal property for the immediate payment of money.[112] The four dissenting Justices, in an opinion by Justice Brennan, argued that the postal sidewalk was a public forum and that the restriction could not be sustained as a reasonable time, place and manner regulation.[113]

The Court has also upheld as a reasonable time, place and manner regulation: a National Park Service rule prohibiting overnight sleeping in Lafayette Park and the Mall in the District of Columbia, as applied to prohibit "tenting" in connection with a demonstration intended to call attention to the plight of the homeless;[114] a municipal noise regulation requiring that musical performances in a bandshell in a public park use the sound system and sound technician provided by the city;[115] and an "anti-noise" regulation prohibiting the making of any "noise or diversion on school grounds while school is in session which disturbs or tends to disturb the peace or good order of such school session," as applied to a public sidewalk adjacent to the school.[116]

The only recent case in which the Court rejected the government's claim of reasonable time, place and manner regulation is *United States v. Grace*,[117] in which the Court held unconstitutional a law prohibiting all displays and leafleting in the Supreme Court building or on the adjacent grounds, as applied to the sidewalk adjoining the Supreme Court building.[118] The government argued that the Supreme Court building and adjacent grounds did not constitute a public forum, but the Court found it unnecessary to reach

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110. *Id.* at 3120.

111. *Id.* at 3125. Justice Kennedy maintained that "certain objective characteristics of Government property and its customary use by the public" could control the question of whether the property constituted a public forum for purposes of the "public forum" doctrine, and that, in some circumstances, the government "must permit wider access to the forum than it has otherwise intended." *Id.*

112. *Id.* at 3126.

113. *Id.* at 3127 (Brennan, J., dissenting). The dissenting Justices contended that a distinction between solicitation and other expressive activity was based on content and that a complete ban on solicitation could not be justified. *Id.* at 3134-39.

114. *See* Clark v. Community for Creative Nonviolence, 468 U.S. 288 (1984).

115. *See* Ward v. Rock Against Racism, 109 S. Ct. 2746 (1989).

116. *See* Grayned v. Rockford, 408 U.S. 104 (1972).

117. 461 U.S. 171 (1983).

118. United States v. Grace, 461 U.S. 171, 180-82 (1983). The *Grace* Court did not pass on the constitutionality of another portion of the law prohibiting "parading and moving in processions" since the assailants were not charged with a violation of this provision. *Id.* at 175. For the same reason, the Court did not pass on the constitutionality of the law insofar as it applied to the Supreme Court building itself. *Id.* at 175.

that question because the law covered the public sidewalks, and the sidewalks were clearly a public forum.[119] The *Grace* Court noted:

> Traditional public forum property . . . will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression. Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property.[120]

The ban, as applied to the public sidewalks, failed the first element of the reasonable time, place and manner regulation doctrine because none of the asserted justifications for the ban qualified as a significant governmental interest.[121] Thus, the law could not be sustained as a reasonable time, place and manner regulation, so it violated the First Amendment.[122]

As the above cases make clear, the reasonable time, place and manner regulation doctrine can be relied on effectively to sustain regulation not prohibition of expression in the public forum. In every case, the focus is on the reasonableness of the restriction in relation to the nature of the expression and the public property involved. Assuming that the restriction is a narrow one, it will almost always be found to serve a significant governmental interest, and, for the same reason, it will necessarily leave open ample alternative channels for communication of the information. And as previously discussed, the Court is now disposed to rewrite laws in order to enable them to qualify as reasonable time, place and manner regulations. Only in a case like *United States v. Grace*, where the restriction is really based on the purported "sacredness" of the property in question, will the government be unable to justify the restriction as a reasonable time, place and manner regulation.[123]

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119. *Id.* at 179-80.

120. *Id.* at 180.

121. *Id.* at 181-83. The government contended that the ban was necessary to "protect persons and property and to maintain proper order and decorum within the Supreme Court grounds," but the Court held that this justification was insufficient since a total ban on expression on the public sidewalks adjacent to the Court grounds "is no more necessary for the maintenance of peace and tranquility on the public sidewalks surrounding the building than on any other sidewalks in the city." *Id.* at 182. The government also argued that the ban was necessary to prevent the appearance that the Supreme Court was subject to outside influence, but the Court rejected this justification on the ground that there was nothing to indicate to the public that these sidewalks are different from any other sidewalks. *Id.* at 182-83.

122. *Id.* at 183-84. Compare Cox v. Louisiana, 379 U.S. 559, 574 (1965), where the Court upheld as constitutional a ban on picketing "in or near a courthouse with the intent of interfering with, obstructing, or impeding the administration of justice."

123. As noted previously, laws licensing access to a public forum for purposes of expression must regulate only the time, place and manner of such access. *See supra* notes 39-41 and accompanying text.

FIRST AMENDMENT BALANCING: "BALANCING/SUBSIDIARY DOCTRINE"

The fourth component of the "law of the First Amendment" consists of what I have referred to as "balancing/subsidiary doctrines." These "balancing/subsidiary doctrines" have resulted from the Court's precedents dealing with a particular kind of restriction or interference with expression. Precisely because these "balancing/subsidiary doctrines" exist, in only a limited number of cases will the Court have to resort to general balancing to resolve the First Amendment issue before it. Again, it must be remembered that "balancing/subsidiary doctrines" come into play only when the result is not controlled, or the parameters for the resolution of the constitutional question are not defined by the identification and application of an appropriate concept, principle, or specific doctrine.

The application of "balancing/subsidiary doctrines" in practice can be illustrated by a consideration of four First Amendment cases decided by the Court in its last Term. In each of these cases, the Court resolved the First Amendment issue by applying the "balancing/subsidiary doctrine" that it had developed to deal with the particular kind of restriction or interference with expression in issue. In fact, the Court's application of that doctrine actually involved its consideration of relatively few cases that were closest in point.

In *Rutan v. Republican Party*,[124] the Court considered whether the First Amendment precluded the Governor of Illinois from using political considerations when hiring, rehiring, transferring, and promoting state employees. The resolution of this issue required application of the "balancing/subsidiary doctrine" that the Court had developed to deal with the free speech and association rights of public employees.[125] The Court had previously held that the First Amendment gives public employees certain First Amendment rights with respect to adverse personnel actions and, specifically, that it protects them from discharge solely because of their political affiliation.[126] This being so, the issue in *Rutan* was the relatively narrow question whether the same protection extended to personnel actions other than discharge. The Court's division on this question is interesting since four Members of the Court took the position that the earlier cases protecting employees from discharge solely because of their political affiliation were wrongly decided and should be overruled. Only three of them, however, contended that other personnel actions were distinguishable from discharge. Thus, six Members of the Court in effect held that if the First Amendment protected public employees from discharge solely because of their political affiliation, it also protected them from other personnel actions on this basis. My point here is that the result in *Rutan* depended on the Court's application of the "balancing/subsidiary doctrine" dealing with the free speech and association rights of public employees and, specifically, that part of the doctrine holding

124. 110 S. Ct. 2729 (1990).

125. *See supra* note 14.

126. *See, e.g.*, Branti v. Finkel, 431 U.S. 209 (1977); Elrod v. Burns, 427 U.S. 347 (1976).

that the First Amendment protects public employees against adverse personnel actions on the basis of political affiliation.

In *Keller v. State Bar*,[127] the Court considered the constitutionality of a state bar association's use of part of the compulsory dues paid by members to finance political and ideological activities with which members disagreed. The resolution of that question involved the application of the "balancing/subsidiary doctrine" dealing with the right to refrain from speaking.[128] The Court had previously held that one aspect of that right involved the right of dissenting nonunion members required to pay agency shop dues not to have those dues used to support political and ideological causes unrelated to collective bargaining activities.[129] The only issue in *Keller*, therefore, was whether there was a principled basis for distinguishing between the activities of a state bar association and the activities of a labor union with respect to the use of members' dues for political and ideological activities with which the member disagreed, and the Court unanimously held that there was no such basis.[130]

In *Butterworth v. Smith*,[131] the Court unanimously held unconstitutional a Florida rule prohibiting grand jury witnesses from disclosing their testimony before the grand jury even after the grand jury's term was over. Such an absolute prohibition runs counter to the "narrow specificity" principle[132] and would be constitutionally problematical for that reason. In any event, the Court had developed a "balancing/subsidiary doctrine" with respect to restrictions on freedom of expression relating to the administration of justice and had generally found these restrictions to be violative of the First Amendment.[133] It should not be surprising, therefore, that the Florida rule was held unconstitutional as well.

A closer question was presented in *Austin v. Michigan Chamber of Commerce*,[134] but again there was a "balancing/subsidiary doctrine" to establish the parameters for its resolution. The Michigan Chamber of Commerce challenged as violative of the First Amendment the State's application of its campaign finance law, which prohibited the use of general corporate funds for political purposes, to a nonprofit ideological corporation whose members were largely business corporations. Under the "balancing/subsidiary doctrine" applicable to limitations on political expenditures, certain limitations are unconstitutional, especially as they relate to expenditures by individuals and nonprofit corporations.[135] However, the govern-

127. 110 S. Ct. 2228 (1990).

128. *See supra* note 16.

129. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

130. Keller v. State Bar, 110 S. Ct. 2228, 2235-36 (1990).

131. 110 S. Ct. 1376 (1990).

132. *See supra* notes 22-23.

133. *See supra* note 17.

134. 110 S. Ct. 1391 (1990).

135. *See, e.g.*, Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238 (1986); *supra* note 18 and accompanying text (discussing limitations on political expenditures).

ment has greater authority to restrict expenditures by corporations because of the state-conferred corporate structure that facilitates their accumulation of large amounts of wealth.[136] In this case, the majority concluded that the reasons justifying the requirement that corporations not use general corporate funds for political purposes also applied to the Michigan Chamber of Commerce,[137] a point on which the dissenting Justices disagreed. Again, the "balancing/subsidiary doctrine" applicable to limitations on political expenditures determined the parameters for resolution of the constitutional question.

As these cases indicate, in addition to the concepts, principles, and specific doctrines that are often determinative in First Amendment litigation, the Court has a number of "balancing/subsidiary doctrines" with which it can resolve most of the First Amendment issues presented.[138] In only a limited number of cases, therefore, will the Court have to engage in general balancing.[139]

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136. *See, e.g.*, Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197 (1982).

137. Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1398-99 (1990).

138. The Court has also developed a "balancing/subsidiary doctrine" to deal with the constitutional permissibility of restrictions on expression in special environments, such as in public schools, *see, e.g.*, Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Board of Educ. v. Pico, 457 U.S. 853 (1982), and in prisons, *see, e.g.*, Turner v. Safley, 482 U.S. 78 (1987); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977); Pell v. Procunier, 417 U.S. 817 (1974); Procunier v. Martinez, 416 U.S. 396 (1974).

A very clear example of "balancing/subsidiary doctrine" is in the area of governmental broadcasting regulation. Because the government's regulation takes place in connection with its allocation of broadcasting frequencies, it can proceed on the assumption of public ownership of the airwaves and can require that broadcasters operate in the public interest. This means that the government can impose regulations on broadcasters that would be impermissible in other contexts. The FCC thus can require that broadcasters provide for a balanced presentation of viewpoints and for the allocation of a reasonable percentage of broadcast time for the discussion of public issues, as in the now-repealed "fairness doctrine." *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). To impose such a requirement on newspapers, of course, would be unconstitutional because of the chilling effect it could have on expression. *See, e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). The FCC can also impose certain limited restrictions on programming that might be objectionable for children during the time of day when children would be viewing or listening. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978). However, certain broadcasting regulations will be found to violate the First Amendment, such as a complete ban on editorializing by public broadcasting stations that receive grants from the Corporation for Public Broadcasting. *See* FCC v. League of Women Voters, 468 U.S. 364 (1984).

139. One example of general balancing is Harper & Row v. Nation Enters., 471 U.S. 539 (1985), where the Court held that the fair use provisions of the Copyright Act of 1976, 17 U.S.C. § 107, struck the proper balance between the competing interests in the free communication of facts and the protection of the author's creative work. General balancing also occurred in Branzburg v. Hayes, 408 U.S. 655 (1972), where the Court balanced the reporter's need to maintain confidentiality of sources against the grand jury's need to obtain the information that the reporter derived from a confidential source. In the balancing equation in that case, the Court also concluded that the requirement that the reporter testify and reveal

CONCLUSION

In this writing, I have tried to analyze the First Amendment as it looks to lawyers and judges in the context of actual litigation and to explicate the meaning of the "law of the First Amendment." The "law of the First Amendment" is that body of concepts, principles, specific doctrines, and "balancing/subsidiary doctrine" that has emerged from the collectivity of the Supreme Court's decisions over a number of years. And it is the "law of the First Amendment" that is applied by the courts, including the United States Supreme Court, in the process of resolving the First Amendment cases that come before them for decision.

It is true that the Supreme Court has failed to develop any general theory of the First Amendment, and it is unlikely that such a theory will be forthcoming from the Court. For this reason, the Court's First Amendment decisions may seem to the academic commentator to lack consistency. However, as I have demonstrated, the "law of the First Amendment" is *coherent*. It is understandable and provides a fair degree of predictability in practice. In the context of actual litigation, most First Amendment issues are not analytically difficult to resolve. First Amendment litigation in practice generally involves the identification and application of the relevant concepts, principles, specific doctrines, and "balancing/subsidiary doctrines" that make up the "law of the First Amendment." To the litigating lawyer and judge, it is as if the different components and sub-parts of the "law of the First Amendment" are flashed as a menu on a computer screen, and the task of the lawyer or judge is to press the right key, so to speak. This will call up the substance of the applicable part of the "law of the First Amendment" and the relevant cases. The task of the lawyer or judge is then to apply the applicable part of the "law of the First Amendment" and the relevant cases to the particular question presented. Most of the time the result will be fairly clear, or at least the parameters for the resolution of the question will have been established.

I have made no effort in this writing to subject the "law of the First Amendment" to normative scrutiny, and it is not possible to do so without regard to a frame of reference. There can be no doubt that the "law of the First Amendment" has resulted in a very high degree of constitutional protection to freedom of expression. However, it has countenanced restrictions on freedom of expression that a more absolutist view of the nature of this constitutional guarantee would not. At the same time, the "law of the First Amendment" protects much speech that at least some academic

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information from confidential sources would not have a substantial chilling effect on the ability of reporters to make use of confidential sources. As these cases indicate, general balancing is more likely to take place when the case presents a fairly novel question, so that a "balancing/subsidiary doctrine" is not likely to be applicable, and the issue in question does not call forth a First Amendment principle or specific doctrine. Doubtless, there are other cases where the result can be explained in terms of general balancing, but in comparison to the number of First Amendment cases the Court decides, these cases will be limited.

commentators consider harmful, such as pornography and racist speech. Probably very few would agree that it strikes the perfect balance between the interest in freedom of expression and other societal interests.

What cannot be denied, however, is that there is a "law of the First Amendment." It is coherent, and it controls the resolution of First Amendment questions that come before the courts. And, for better or for worse, it has resulted in a very high degree of protection for freedom of expression in this nation.