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THE FIRST AMENDMENT

Cases and Theory

Second Edition

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Amendment, the values that underlie protection of expression, and certain doctrinal themes that consistently emerge in the Court's decisions. These overviews involve foundational issues that emerge in later chapters as well.

A. THE HISTORY OF FREE EXPRESSION IN ENGLAND AND THE EARLY YEARS OF THE REPUBLIC

Consider the following hypothetical:

> You are a librarian at the local community library. Yesterday you received a national security letter, an administrative subpoena issued by the FBI, seeking to gather information about the library activities of one of your patrons that the FBI believes is "relevant to a foreign counter-intelligence investigation." Under federal law, you are required to turn over the information to the FBI. Furthermore, you are prohibited from challenging the subpoena or from disclosing to any other person that you have received it. *See* The USA Patriot Act § 505, Pub. L. No. 107-56, 115 Stat. 272 (2001).

As you read the history below, consider how it bears on the above hypothetical. To what extent does the First Amendment prohibit or allow national security letters? How do the struggles over English licensing and the law of seditious libel in England and the early Republic reflect on the subpoena issue?

1. England

Prior to and including the late eighteenth century, English officials attempted to suppress "dangerous" or "offensive" speech, ostensibly for the preservation of the country or the welfare of its citizens. For example, libels of private persons were frequently punished as breaches of the peace. *See* 4 William Blackstone, *Commentaries on the Laws of England* *150. In addition, the Crown and Parliament also attempted to punish expression criticizing government officials, government policies, and religion. *See* Leonard W. Levy, *Emergence of a Free Press* 4-8 (1985). *See also* Fredrick Seaton Siebert, *Freedom of the Press in England 1476-1776* (1952); Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 Stan. L. Rev. 661 (1985).

Two forms of regulation emerged as most effective — licensing and prosecutions for seditious libel.

a. Licensing

The fifteenth century invention of the printing press saw an increase in the distribution of written literature and a concomitant rise in the Crown's interest in regulating distribution of potentially "dangerous" publications. Medieval laws punishing treason, heresy, libel, and spreading "false news" against the king (Scandalum Magnatum) were already available to suppress pernicious expression. However, such laws allowed only limited and piecemeal regulation and the Crown wanted greater control through a more unified mechanism of regulation. Beginning in the sixteenth century, the Crown claimed the authority

to license printed materials as a matter of royal prerogative (that is, powers vested in the monarch alone). Those wanting to publish printed materials had to submit their work to licensing authorities who could censor portions of it prior to granting a license. Publication without licensors' approval was punishable in the prerogative courts (that is, those associated with the Crown). The Crown's justification for licensing was that "the stability of the government and the peace of the realm demanded strict control" of published materials. Siebert, *supra*, at 22. However, few standards guided censors in their decisions, placing publishers at the mercy of government officials' arbitrary determinations.

Not surprisingly, such licensing laws were controversial. Many English libertarians argued against them, claiming that they were detrimental to personal liberty and good government. Thus, the English Levellers (a radical democratic movement formed during the seventeenth century English civil wars) argued that a free press was "essential unto Freedom . . . for what may not be done to that people who may not speak or write, but at the pleasure of Licensers." "The Humble Petition of Firm and Constant Friends," in *Leveller Manifestoes of the Puritan Revolution* 326, 328 (Don M. Wolfe ed., 1944). Similarly, John Milton argued that laws licensing books would discourage learning, prove fruitless in preventing the spread of "evil," and placed too much faith in the infallibility of licensors. John Milton, "Areopagitica," in *Areopagitica and Of Education* 5, 21 (George H. Sabine ed., 1951).

Licensing laws nonetheless remained the primary mechanism for suppressing printed expression through the seventeenth century although they eventually came under parliamentary authority rather than royal prerogative. In 1694, Parliament did not renew the licensing laws upon their expiration, primarily because they were expensive, imposed an undue burden on printers, were often widely ignored, and were difficult to enforce systematically. In effect, licensing expired for "reasons of expediency rather than of conviction on moral or philosophical grounds" regarding the necessity of a free press. Siebert, *supra*, at 261. For discussions of the English licensing system and related matters, see Levy, *supra*, at 6-7; Siebert, *supra*; Hamburger, *supra*, at 666-690; William T. Mayton, *Toward a Theory of First Amendment Process, Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 Cornell L. Rev. 245, 248 (1982).

b. Seditious Libel

While licensing waned as a mechanism of enforcement in the seventeenth century, other legal instruments of suppression came to the fore. Government officials initially attempted to prosecute speech under the treason laws, which prohibited (1) imagining or compassing (in other words, plotting) the death of the King, (2) making war against the King, or (3) aiding the King's enemies. By the end of the seventeenth century, judges found that writings and printings critical of the Crown could provide the "overt act" necessary for successful treason prosecutions. For example, citizens were tried for publishing materials arguing that the King should be accountable to his subjects.

While government officials initially believed that such "constructive treason" prosecutions allowed suppression of publications critical of the government, few treason trials involved only published materials. Prosecutions were difficult for several reasons. Much anti-government literature was not extreme enough to be

considered treasonable; juries believed the death penalty to be an unduly harsh punishment; and Parliament enacted a law substantially reforming the procedures used at treason trials, thus providing greater protection for those accused of the crime. For discussion, see Siebert, *supra*, at 264-269; Hamburger, *supra*, at 666, 717-723; Mayton, *supra*, at 98-102.

The English government thus turned increasingly to seditious libel prosecutions. Such prosecutions had been available to the government for at least a century as a subset of libel and defamation prosecutions, which had developed to prevent breaches of the peace. In the late sixteenth and early seventeenth centuries, the government pursued seditious libel prosecutions primarily when they involved written defamations of specific government officials (that is, statements that tended to injure a specific official's reputation). Consequently, such prosecutions generally involved identifiable statements about individuals just as libels of private individuals did.

In 1605, Attorney General Edward Coke's prosecution of Lewis Pickering for publishing a defamatory poem about two Archbishops of Canterbury marked a significant moment for the law of libel concerning government officials. In his report of the case, Coke noted that the consequences of libels against a private person versus a government official were quite different:

> If it be against a private man it deserveth a severe punishment, for although the Libel be made against one, yet it inciteth all those of the same family, kindred or society to revenge, and so may be the cause [by consequence of] quarrels and breach of the peace, and may be the cause of shedding of blood and of great inconvenience; if it be against a Magistrate, or other public person, it is a greater offence; for it concerneth not onely the breach of the peace, but also the scandal of the government; for what greater scandal of government can there be than to have corrupt or wicked Magistrates to be appointed and constituted but the King to govern his Subjects under him? And greater imputation to the State cannot be, than to suffer such corrupt men to sit in the sacred seat of Justice, or to have any medling in or concerning the administration of Justice.

Case de Libellis Famosis, 5 Coke 125a, 125a (1605). The case also established that criminal libels such as the one involved need not be false in order to be punished nor did the victim need to be alive for the government to punish the libel. *Id.* at 125a-125b. These latter requirements pertained to private libels as well as to libels against government officials. Although the Pickering case was prosecuted as a straightforward libel, the case's central propositions (dispensing with truth as a defense and establishing that libel against government officials caused greater mischief than private libels) were important building blocks in the transformation of seditious libel as a crime.

During the seventeenth and early eighteenth centuries, prosecutions of seditious libel eventually changed, especially as the licensing system died out. Government officials urged that any writing critical of government, not just writing aimed at defaming specific officials, qualified as seditious libel. Eventually, the courts recognized officials' claims. In Queen v. Tutchin, the publisher of a periodical, *The Observator*, was prosecuted for writing and publishing general charges that national leaders took bribes of French gold and that military officials were corrupt. In response to defendant's argument that libel required statements about a particular person, Lord Holt declared that it would be "a very strange doctrine: to say it is not a libel reflecting on the government[.] [E]ndeavouring to possess the people that the government is maladministered

by corrupt persons . . . is certainly a reflection on the government." Queen v. Tutchin, 90 Eng. Rep. 1133 (Q.B. 1704). Lord Holt enlarged the definition of seditious libel, permanently bringing it out from under the auspices of traditional libel and making it a separate crime. His justification echoed Coke's reasons for distinguishing between private libels and libels of specific government officials:

> If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist; for it is very necessary for all governments that the people should have a good opinion of it. And nothing can be worse to any government than to endeavour to procure animosities as to the management of it. This has been always looked upon as a crime, and no government can be safe without it be punished.

Id.

As with earlier versions of seditious libel, judges found the truth of the published matter immaterial to the charge of seditious libel. In addition, they implied the knowledge and malice required for the crime from the statement's defamatory content. In other words, the courts assumed the defendants had the necessary bad intent simply from the fact that the statement was defamatory; no other proof of intent was required. Some publishers attempted to evade the law's requirements by publishing satires or ironical statements that did not explicitly criticize government officials. But the courts made clear that such writings could be punished as seditious libel. *See* Queen v. Dr. Brown, 88 Eng. Rep. 911 (Q.B. 1706). However, they had to be judged as libelous by a jury rather than a judge since the writing was not clearly malicious.

Detractors argued that the law of seditious libel gave judges too much leeway to find writings dangerous that were no more than simple criticism of the government, if that. For example, John Trenchard and Thomas Gordon, writing under the pseudonym "Cato," argued that "[w]hen words used in their true and proper sense, and understood in their literal and natural meaning, import nothing that is criminal; then to strain their genuine signification to make them intend sedition (which possibly the author might intend too) is such a stretch of discretionary power, as must subvert all the principles of free government, and overturn every species of liberty." Cato, "Second Discourse Upon Libels," 3 *Cato's Letters* No. 101. Part of the English Radical Whig tradition that argued for greater government accountability to the people, Trenchard and Gordon acknowledged that "men ought to speak well of their governors . . . while their governors deserve to be well spoken of; but [for officials] to do public mischief, without hearing of it, is only the prerogative and felicity of tyranny. . . . The administration of government is nothing else, but the attendance of trustees of the people upon the interest and affairs of the people. . . . Only the wicked governors of men dread what is said of them." Cato, "Of Freedom of Speech: That the Same Is Inseparable from Publick Liberty," in 1 *Cato's Letters* No. 15.

Despite criticism of seditious libel law, it eventually became settled practice. In 1769, Blackstone summarized the state of freedom of the press in England:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. . . . To subject the press to the

> restrictive power of a licenser, as was formerly done . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty.

Blackstone, *supra*, at *151-152. Accordingly, although licensing schemes were considered antithetical to free expression, laws imposing subsequent punishment, such as seditious libel laws, were not. As Blackstone noted, the former schemes were commonly called prior or previous restraints because they called for official approval of speech prior to its occurrence.

2. *The Early American Republic*

a. Generally

There is some debate as to whether Blackstone's view prevailed in the colonies when the First Amendment was adopted. Licensing, as in England, was considered an impingement on free expression. The law of seditious libel, however, was another matter. Like much of English common law, the law of seditious libel passed over to the colonies, although it is unclear what overall effect the law had in the years prior to the adoption of the First Amendment. There were few seditious libel prosecutions in eighteenth century America. The most famous of these — the prosecution of John Peter Zenger for publishing remarks critical of the Governor General of New York in 1735 — was an important milestone in such prosecutions. Zenger's counsel argued, against all existing precedent at the time, that Zenger should not be convicted because his publications were based in fact. Although truth had never been a defense to libel and Zenger's publication was a classic example of words often punished as seditious libel, the jury returned a "not guilty" verdict. The *Zenger* verdict did not make new law, but it signaled the depth of popular opposition to use of seditious libel laws to punish criticism of the government. Accordingly, such prosecutions were rare. A more effective punishment was the use by popularly elected assemblies of "breaches of parliamentary privilege" (essentially, the power to find people in contempt) for statements critical of the legislature and the government generally. Even that tool, however, became ineffective due to popular opposition. *See generally* Levy, *supra*, at 16-61; David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. Rev. 455, 509-515 (1983).

Thus, the law allowed substantial punishment of seditious libel but its practical effect is unclear. During the eighteenth century, newspapers and publications frequently printed material critical of the government with few repercussions. Nevertheless, colonists were not always principled in their willingness to extend protection to speech they disliked, especially as the rift between England and the colonies grew. Speech criticizing the royalist government was widely tolerated while loyalist speech was not. *See* Levy, *supra*, at 173-183; Anderson, *supra*, at 495; Mayton, *supra*, at 511-512; David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 Stan. L. Rev. 795, 842 (1985); Richard Buel, "Freedom of the Press in

Revolutionary America: The Evolution of Libertarianism, 1760-1820," in *The Press and the American Revolution* 59, 71-72, 74-75 (Bernard Bailyn & John Hench eds., 1980).

b. The Adoption of the First Amendment

First Amendment scholars debate whether the Framers of the First Amendment intended to adopt the Blackstonian view regarding freedom of expression. Zechariah Chafee expressed the standard libertarian sentiment that the framers intended to do more than prohibit licensing schemes. Chafee argued that since licensing schemes had expired in England in 1695 and in the colonies by 1725, there was no need to adopt a constitutional amendment to prevent them. Rather, Chafee contended that the framers "intended to wipe out the common law of sedition, and make further prosecutions for criticism of government, without any incitement to law-breaking, forever impossible in the United States of America." Zechariah Chafee, *Freedom of Speech in War Time*, 32 Harv. L. Rev. 932, 947 (1919).

Legal historian Leonard Levy, however, substantially challenged Chafee's assumptions. He concluded from historical evidence that although the "Declaration of Independence severed the political connection with England[,] . . . the American states continued the English common-law system except as explicitly rejected by statute. If the revolution produced any radical libertarians on the meaning of freedom of speech and press, they were not at the Constitutional Convention or the First Congress, which drafted the Bill of Rights." Levy, *supra*, at xv. Thus, Levy concluded that the Framers' conception of freedom of expression meant to leave the law of seditious libel intact. There is much to support Levy's hypothesis. As noted above, seditious libel laws did exist and the Framers tolerated some seditious libel prosecutions. Furthermore, they never intended to abolish such prosecutions in the states. Although James Madison, the primary architect of the First Amendment, also proposed a press clause explicitly applicable to the states, the First Congress rejected Madison's attempts to protect free expression from state restrictions. Instead, the First Amendment explicitly applies only to Congress. *See* Anderson, *supra*, at 476-478, 483.[1]

Although most scholars agree that seditious libel played a greater role in the colonies and the framing of the First Amendment than Professor Chafee acknowledges, not everyone agrees with Professor Levy. Several commentators argue that Levy's thesis misses important historical subtleties regarding the Constitution and the First Amendment. Professor David Rabban, for example, has noted that numerous prominent colonial theorists adopted the English Radical Whig theory that the government is the servant of the people but extended it to include legislative as well as executive subordination to popular will. Many theorists expressly linked free expression to popular sovereignty and effective government. They further understood the necessity of reforming, if not totally eliminating, seditious libel prosecutions to conform to notions of popular sovereignty. Thus, they argued that the common law of seditious libel should require a showing of malicious intent, that truth be a defense, and that juries rather than judges be allowed to decide whether publications were seditious.

1. Eventually, the Supreme Court read the First Amendment's freedom of speech as among the liberties protected by the Fourteenth Amendment's Due Process Clause applicable to the states. *See* Gitlow v. New York, 268 U.S. 652 (1925).

Without such changes, they believed seditious libel prosecutions interfered with popular sovereignty because officials continued to punish mere criticism of government conduct rather than truly dangerous speech. *See generally* Rabban, *supra*; Mayton, *supra*; Anderson, *supra*.

3. *The Sedition Act of 1798*

Enacted less than a decade after the adoption of the First Amendment, the Sedition Act of 1798 produced the first significant controversy regarding the scope of First Amendment protection. The Act was adopted amid growing hostilities toward ideas generated by the French Revolution, which sparked a bitter political divide between the Federalist and Republican parties. The Federalists believed in a strong central government whose purpose was to preserve security and property rights. They had little faith in the "common man's" ability to govern, believing that citizens could voice their opinions through elections but that elected officials were better suited to the responsibility of governing. Republicans, on the other hand, were strong believers in popular government and valued liberty over security. They argued for decentralized authority over decision-making and a government directly responsive to its citizens. Federalists viewed the ideas generated by the French Revolution as a threat to the nation's security; Republicans viewed it as a continuation of American ideals of liberty and democracy.

Federalists, who were then in power, argued that France would imminently attack the United States and that it was necessary to prepare for war. Republicans refused to cooperate. In congressional debates and partisan newspapers accusations flew between the two parties. Federalists accused Republicans of disloyalty and argued that hostile foreign forces were sowing the seeds of subversion within the country. Republicans accused the Federalists of exaggerating the danger to further their political ends. To silence critics and ensure a united front at home, Federalist politicians pushed the Sedition Act of 1798, Act of July 14, 1798, 1 Stat. 596, through Congress. The Sedition Act prohibited

> writing, printing, publishing or uttering, any false, scandalous, and malicious . . . writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame [them]; or to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any [lawful] act of the President of the United States.

Paying heed to earlier criticism of the law of seditious libel, the Act provided that truth *was* a defense to a charge of seditious libel, that malicious intent *was* a required element of the crime, and that *juries*, rather than judges, were to decide whether a writing was defamatory.

Republicans opposed the Act, arguing that it violated the First Amendment. Echoing Radical Whig theory, they argued that the people, as absolute sovereigns over the government, had a right to criticize their elected officials. The Sedition Act, they feared, would be used to suppress information critical to public decision-making and good government. This was true even with the improvements (adding truth as a defense, and so forth) because it was simply

too easy for government officials to find that an opinion criticizing the government was not true and therefore could be punished. Thus, the indeterminacy of such laws would lead to self-censorship or too much discretion in government officials to act in their self-interest. Federalists, in contrast, justified the law as necessary to preserving the nation. Although they acknowledged that the government was based upon notions of popular sovereignty, they maintained that in order to govern effectively elected officials must be protected from criticism. Some argued that there was even greater reason to protect government officials from criticism in a popular government than in a monarchy because "[t]o mislead the judgment of the people, where they have no power may produce no mischief [but to] mislead the judgment of the people where they have *all* the power . . . must produce the greatest possible mischief." Richard Buel, *Securing the Revolution* 256 (1972). They further argued that the technical improvements in the law provided sufficient protection for speech.

In fact, the Act was vigorously prosecuted only against Republican newspapers and other Republican supporters. In 1799, Federalist officials began an organized campaign to prosecute the leaders of all prominent Republican newspapers (timing that coincided with national elections). From 1798 through 1801, at least 25 Republicans were prosecuted under the Act. Prosecutions were based on criticism such as that found in a handbill distributed by Anthony Haswell in support of Matthew Lyon, a Republican already convicted under the Act. Lyon, Haswell wrote, was held "by the oppressive hand of usurped power in a loathsome prison, suffering all the indignities which can be heaped upon him by a hard-hearted savage, who has, to the disgrace of Federalism, been elevated to a station where he can satiate his barbarity on the misery of his victims." *See* Geoffrey R. Stone, *Perilous Times, Free Speech in Wartime* 63 (2004). As was the case in many such prosecutions, the judge directed the jury to enter a guilty verdict, and truth, much as the Republicans feared, provided very little defense for such a nebulous statement. Thus, the technical improvements to the Sedition Act provided little in the way of protection for speech critical of the government.

The Supreme Court never directly ruled on the constitutionality of the Sedition Act but several Justices upheld its constitutionality while riding circuit in the lower courts. Most scholars agree that the unpopularity of the Act was, at least in part, responsible for the Federalist defeat in the 1800 elections. The Act expired in 1801, and President Thomas Jefferson eventually pardoned persons convicted under it (although, ironically, he tolerated common law and state law seditious libel prosecutions of his critics). For more in-depth discussion of the history of the Sedition Act, see Levy, *supra*, at 242-349; Stone, *supra*, at 15-78; Mayton, *supra*, at 112, 121-130; Rabban, *supra*, at 841-854; James Morton Smith, *Freedom's Fetters: The Alien & Sedition Laws & American Civil Liberties* (1956).

4. From the Sedition Act to World War I

The expiration of the Sedition Act did not resolve the dispute over whether the Framers meant to adopt the Blackstonian view or a more speech-protective view of the First Amendment. Although many came to understand the Sedition Act as a misguided exercise of power, government officials resuscitated the crime of seditious libel with some regularity. During the Civil War, for example, although no federal sedition statute was enacted, military officials issued orders prohibiting speech that expressed sympathy for the enemy, criticized the Army, or

"tended to bring the war policy of the Administration into disrepute." Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 Wm. & Mary B. Rt. J. 105, 119-120 (1998). Citizens and politicians were arrested for anti-war sentiments under the orders. *Id.*; *see also* Stone, *supra*, at 94-126.

The Supreme Court resolved few free speech issues during the Civil War, but disputes over the meaning of the First Amendment were evident in Patterson v. Colorado, 205 U.S. 454, 462 (1907). *Patterson* involved contempt prosecutions of the owner and publisher of two newspapers in Colorado that featured a series of editorials criticizing recent Colorado Supreme Court rulings as politically motivated. The Attorney General of Colorado instituted criminal contempt proceedings in the state supreme court on the basis that the editorials "were designed, intended, and calculated to hold up to public opprobrium and to incite public contempt for this court and certain of the justices thereof, and for the purpose of leading the people of this state to distrust the fairness and impartiality of the decisions of this court." People v. New Times Pblq. co, 35 Colo. 253, 276 (1906). Patterson (the owner) was found guilty of contempt and appealed to the United States Supreme Court.

A few points in the Court's majority opinion, written by Justice Holmes, are notable. First, Justice Holmes refused to decide whether the "freedom of speech" was "protected from abridgments on the part not only of the United States, but also of the states," an issue that was finally decided in favor of speakers decades later. *See supra* footnote 1. Second, the majority noted that even if the First Amendment restrained states, it did not prevent Patterson's contempt conviction because

> the main purpose of such constitutional provisions is "to prevent all such *previous restraints* upon publications as had been practised by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all.
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> . . . [T]he rule applied to criminal libels applies yet more clearly to contempts. A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. . . . The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. . . . [I]f a court regards [a] publication concerning a matter of law pending before it, as tending toward . . . interference, it may punish it. . . .

205 U.S. at 458-463.

Justice Harlan dissented. He first noted that "when the 14th Amendment prohibited the states from impairing or abridging the privileges of citizens of the United States, it necessarily prohibited the states from impairing or abridging the constitutional rights of such citizens to free speech and a free press." *Id.* at 558. Justice Harlan further rejected the majority's argument that the main purpose of the First Amendment was to protect against prior restraints. "I cannot assent to that view," Justice Harlan wrote, "if it be meant that the legislature may impair or abridge the rights of a free press and of free speech whenever it thinks that the public welfare requires that to be done. The public welfare cannot override constitutional privileges, and if the rights of free speech and of a free press are, in their essence, attributes of national citizenship, as I think they are, then neither Congress nor any state, since the adoption of the 14th

Amendment, can, by legislative enactments or by judicial action, impair or abridge them." *Id.* at 559.

The prosecution of speakers critical of the war effort during World War I forced the Court to revisit whether the First Amendment protected speech from statutes imposing criminal punishment. In Schenck v. United States, 249 U.S. 47 (1919), *infra* p. 32 Justice Holmes this time found that the First Amendment was not simply limited to preventing prior restraints. As Chapter 2 illustrates in greater detail, deriving a judicial standard with which to judge the constitutionality of criminal statutes is still far from easy.

B. FIRST AMENDMENT VALUES

Colonial defenders of free expression posited many theories supporting the broad protection of free speech. Thomas Jefferson argued that free debate would lead to truth: "[T]ruth is great and will prevail if left to herself[;] . . . she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate." Thomas Jefferson, "A Bill for Establishing Religious Freedoms," in 2 *The Papers of Thomas Jefferson* 545, 546 (Julian P. Boyd ed., 1950). James Madison argued that freedom of the press was necessary in a democratic government where officials were servants of the people who were the ultimate sovereigns. James Madison, "Report Accompanying the Virginia Resolution," reprinted in 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 569-570 (J. Elliott ed., 1836). The Continental Congress approved a declaration in 1774 stating that

> [t]he importance of [freedom of the press] consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, in its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs.

Address to the Inhabitants of Quebec (1774). To what extent do these justifications, which focus on the value of free expression, combine with historical events to argue for or against protecting expression? To what extent do they stand alone as justifications for protecting free expression?

Modern theorists have taken up these themes as well. As you read the following excerpts on modern free speech values, consider whether or how they are related to statements made contemporaneous with the adoption of the First Amendment. Does any theory satisfactorily explain why we (or you) believe free expression should be protected? In this section, there are brief references to Supreme Court cases insofar as they relate to these theoretical justifications for protecting speech. The Court has never relied on a single unified principle to justify its free speech jurisprudence; rather it has relied on many different theoretical justifications. Should we search for a single overarching principle that justifies protection of expression?

Recall also the national security letter hypothetical above. To what extent does theory shed light on whether such subpoenas are consistent with the First Amendment? Do any of the following philosophical accounts of free speech explain why such subpoenas should or should not be used?

1. *Truth and the Marketplace of Ideas*

John Stuart Mill first elaborated on the search for truth rationale in *On Liberty*:

> [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error. . . .
>
> First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility.
>
> Second, though the silenced opinion be an error, it may and very commonly does, contain a portion of the truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.
>
> Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of prejudice, with little comprehension or feeling of its rational grounds. And not only this but, fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma being a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience.

John Stuart Mill, *On Liberty* 87, 118 (David Bromwich & George Kale eds., 2003).

Justice Holmes picked up this thread in his dissenting opinion in Abrams v. United States, 250 U.S. 616 (1919), arguing that

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.

Id. at 630.

NOTES AND QUESTIONS

1. How do Holmes's theory and Mills's vision of the truth differ, and why might it matter for First Amendment purposes? For discussion, see Kent Greenawalt, *Free Speech Justifications*, 89 Colum. L. Rev. 119 (1989); G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 Cal. L. Rev. 391, 439 (1992).
2. Does such a thing as objective "truth" exist? What does the controversy over the Sedition Act of 1798 suggest about the difficulty of ascertaining objective truth and using it as a basis for protecting speech? On the other hand, what good does it serve to protect patently false speech like statements "The Holocaust did not occur" or "The earth is flat"?
3. Does speech always appeal to our rational capacities in a way that allows for deliberation regarding true and false, good and bad, etc.? How does a negative answer affect this theory? *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964 (1978); T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. Pitt. L. Rev. 519 (1979); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431.

2. *Self-Governance*

Alexander Meiklejohn is the most famous modern proponent of the self-governance rationale:

> We Americans . . . believe in self-government. . . . When self-governing men demand freedom of speech they are not saying that every individual has an unalienable right to speak whenever, wherever, however, he chooses. . . . [T]he vital point . . . is that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another. . . . [T]hough citizens may, on other grounds, be barred from speaking, they may not be barred because their views are thought to be false or dangerous. No plan of action shall be outlawed because someone in control thinks it unwise, unfair, un-American. . . . And the reason for this equality of status in the field of ideas lies deep in the very foundations of the self-governing process. When men govern themselves, it is they — and no one else — who must pass judgment upon unwisdom and unfairness and danger. . . . Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far as the result must be ill-considered, ill-balanced planning for the general good. *It is the mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* The principle of the freedom of speech springs from the necessities of the program of self-government.

Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 15-16, 24-27 (1948) (emphasis in original).

The Supreme Court has emphasized the self-governance rationale in various cases. In reversing a conviction for violating a statute prohibiting the display of a red flag as a symbol of opposition to organized government, the Court in Stromberg v. California, 283 U.S. 359, 369 (1931), stated that

> [t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be

> obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.

In reversing a libel verdict brought against the *New York Times* by an Alabama municipal official, the Court in New York Times v. Sullivan, 376 U.S. 254, 270 (1964), relied on "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

NOTES AND QUESTIONS

1. Does Meiklejohn's theory imply that only speech pertaining to public issues or public functions is protected by the First Amendment?
   a. Zechariah Chafee criticized Meiklejohn's theory as too narrow. Pointing to the Framers' interest in religious, scientific, poetic, artistic, and dramatic expression, he argued that the Framers did not "intend[] the Amendment to apply only to discussion of matters connected with the process of self-government" or to "link the Amendment with 'universal suffrage'" as Meiklejohn insisted. Zechariah Chafee, *Book Review*, 62 Harv. L. Rev. 891, 896 (1949).
   b. Meiklejohn later wrote that his concept of self-governance was broader than that characterized by Chafee.

> [V]oting is merely the external expression of a wide and diverse number of activities by means of which citizens attempt to meet the responsibilities of making judgments, which that freedom to govern lays upon them. That freedom implies and requires what we call "the dignity of the individual." Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express. . . .

Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245, 255-257.

   c. If the self-governance rationale encompasses any expression that potentially touches on the governing process, how does that distinguish speech from other human activities that "also form personality [and] teach and create attitudes?" Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 27 (1971).
2. Perhaps the self-governance rationale is somewhat different from Meiklejohn's conception. Consider the following:

> The central premise of the checking value [of free speech] is that the abuse of official power is an especially serious evil [due to government's special] capacity to employ legitimized violence. . . . The government's monopoly of legitimized violence means [that the] check on government must come from the power of public opinion. . . . Thus, the checking value grows out of democratic theory, but it is the democratic theory of John Locke, not Alexander Meiklejohn. Under [this] view of democracy, the role of the ordinary citizen is not so much to contribute on a continuing basis to the formation of public

> policy as to retain a veto power to be employed when the decisions of officials pass certain bounds.

Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. B. Found. Research J. 521, 527-542. Does Blasi's thesis more or less satisfactorily support a self-governance rationale than Meiklejohn's?

3. *Autonomy/Self-Fulfillment*

Recall the Continental Congress's "Address to the Inhabitants of Quebec," *supra*, and its reference to the "advancement of truth, science, morality, and arts in general." Such non-political justifications for protecting speech were rare in colonial times as free expression was discussed primarily in political terms. Some Justices, however, have occasionally invoked individual-centered or autonomy-centered rationales to justify protection of speech. Most famously, Justice Brandeis opined that "[t]hose who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. . . . They believed liberty to be the secret of happiness and courage to be the secret of liberty." Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

Autonomy, however, is a notoriously malleable concept. It can take on vastly different meanings depending on one's views. David Richards argues that

> the significance of free expression rests on the central human capacity to create and express symbolic systems, such as speech, writing, pictures, and music. Freedom of expression permits and encourages the exercise of these [capacities]. In so doing, it nurtures and sustains the self-respect of the mature person. . . . The value of free expression, in this view, rests on its deep relation to self-respect arising from autonomous self-determination without which the life of the spirit is meager and slavish.

David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. Pa. L. Rev. 45, 62 (1974). Martin Redish, on the other hand, argues that

> the constitutional guarantee of free speech ultimately serves only one true value, which I have labeled "individual self-realization[.]" . . . [Self-realization] can be interpreted to refer either to development of the individual's powers and abilities—an individual "realizes" his or her full potential—or to the individual's control of his or her own destiny through making life-affecting decisions—an individual "realizes" the goals in life that he or she has set. . . .
>
> That the first amendment serves only one ultimate value, however, does not mean that the majority of values thought by others to be fostered by free speech—the "political process," "checking," and "marketplace-of-ideas" values—are invalid. . . . [T]hese other values, though perfectly legitimate, are in reality subvalues of self-realization. To the extent that they are legitimate, each can be explained by—and only by—reference to the primary value: individual self-realization.

Martin H. Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 593-594 (1982). Finally, Christina Wells claims that

> [a]utonomy . . . is not about atomistic individuals but about social creatures entitled to respect for their dignity. . . . [A system of free expression based upon such

> autonomy] would not focus on the rights of the speaker qua speaker but on the integrity of our thought processes as individuals and members of the community. Our thought processes are integral to our capacity for deliberation and self-governance. Ensuring their integrity is thus a necessary aspect of any system of laws built upon [this conception] of autonomy. Given that we develop our thought processes by communicating with others, and thereby our capacity for self-governance, protecting public expression is especially important. . . .
>
> A system of free expression based on [this conception of autonomy], however, would not merely concern itself with protection against government suppression. Because the State's purpose is to preserve the dignity of its citizen, such a system would also ensure that citizens use speech consistently with autonomy. The State can and should regulate speech, that by attempting to override the thought processes of other individuals, disrespects their rational capacities. Such speech does not facilitate, but rather detracts from, the public exercise of reason and is therefore the proper subject of the State's coercive powers.

Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 Harv. C.R.-C.L. L. Rev. 159, 161, 169-170 (1997).

NOTES AND QUESTIONS

1. Do these individual authors locate the autonomy rationale in the speaker or in the listener? Does it make a difference from a First Amendment perspective if we think of the right as a "speaker's" right or a "listener's" right?
2. When invoking autonomy, the Supreme Court has not been consistent in locating free speech rights as a speaker's or listener's right, sometimes doing one and sometimes the other. For example, in striking down a contempt finding as applied to a newspaper's criticism of judicial conduct in pending legal proceedings, the Court in Bridges v. California, 314 U.S. 252, 270 (1941), stated that "it is a prized American privilege to speak one's mind." In finding unconstitutional a Massachusetts law prohibiting corporations from spending money to influence votes on public issues, however, the Court in First National Bank v. Bellotti, 435 U.S. 765, 791 n.31 (1981), stated that "[t]he First Amendment rejects the highly paternalistic approach of statutes . . . which restrict what people may hear."

4. Dissent

In the years surrounding the American Revolution, "dissent" played a large role in furthering revolutionary ideals. Dissenting churches (i.e., those that broke with the Church of England) circulated religious literature with revolutionary themes while preachers gave revolutionary sermons. See Patricia U. Bonomi, "Religious Dissent and the Case for American Exceptionalism" at 31-55 in *Religion in a Revolutionary Age* (Ronald Hoffman & Peter J. Albert eds., 1994). Thomas Paine's *Common Sense*, which argued for freedom from British rule in language infused with dissenting Protestant beliefs, was the best-selling book of its kind at the time.

Professor Steven Shiffrin is the strongest proponent of the notion that "the value of dissent should be given greater prominence in free speech and press

law." Steven H. Shiffrin, *The First Amendment, Democracy, and Romance* 100-101 (1990). According to Professor Shiffrin, "dissent and the threat of dissent make hierarchy less oppressive. Dissent communicates the fears, hopes, and aspirations of the less powerful to those in power. It sometimes chills the abuse of power; it sometimes paves the way for change by those in power or of those in power." *Id.* at 96. Such speech also fosters community engagement rather than atomistic individualism because "[d]issenters seek converts and colleagues." *Id.* at 91-93. Finally Shiffrin argues that dissent fosters the emergence of truth even though "[d]issenters are often wrong." Nevertheless, because truth does not necessarily prevail in the marketplace of ideas, dissent is necessary to create "a robust, burgeoning marketplace." *Id.* at 95-96.

NOTES AND QUESTIONS

1. What, exactly, is the meaning of the term "dissent"? Does it encompass the right to engage in "speech that criticizes existing customs, habits, traditions, institutions, or authorities"? Steven H. Shiffrin, *Dissent, Injustice, and the Meanings of America* xi (1999). Or is dissent only speech that is the "popularly disdained view"? *Id.* at 77. Or must dissent be "part of a social practice that challenges unjust hierarchies with the prospect of promoting progressive change"? *Id.* at 42. Are these definitions consistent? *See* Lawrence B. Solum, *The Value of Dissent*, 85 Cornell L. Rev. 859, 862-863 (2000).
2. Do the values of dissent identified above separate it from other theories of the First Amendment?

5. *Anti-Theory*

Is there any such thing as a neutral, theoretical principle underlying the First Amendment, or are all such principles really politics in disguise? Consider the following excerpt:

> [I]f you have *any* answer to the question ["What is the First Amendment for?"], *any* answer at all, you are necessarily implicated in a regime of censorship. . . . [W]hen you say the First Amendment is for something—perhaps for giving truth the chance to emerge, or for providing the minds of citizens with the materials necessary for growth or self-realization, or for keeping the marketplace of ideas open in a democratic society—it becomes not only possible but inevitable that at some point you will ask of some instance of speech whether it in fact serves its high purpose or whether it does the opposite, retarding the search for truth, stunting the growth of mature judgment, fouling the marketplace. . . .
>
> Although free-speech values supposedly stand alone and are said to be independent of circumstance and political pressure, they only become thick enough to provide a direction for decisionmaking when definitions and distinctions borrowed from particular circumstances (and borrowed selectively in relation to some substantive agenda) are presupposed as to their content. You must determine what you mean by "expression" or what is and is not a "free flow" or what does and does not constitute "self-realization" in relation to what notion of the self before any of these so-called principles will have any bite. And since these are not determinations those principles can make for themselves, when they do have bite, when invoking them actually gets you somewhere, it will be because

inside them is the outside—substantive values, preferred outcomes, politics—from which they are rhetorically distinguished.

Stanley Fish, "The Dance of Theory," in *Eternally Vigilant: Free Speech in the Modern Era* 199, 223 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (emphasis in original). Is Professor Fish saying that theoretical justifications for protecting speech are unhelpful, or is he simply saying that they are not—in and of themselves—"neutral"? How would recognition of their "non-neutrality" potentially advance discussion regarding the goals of the First Amendment?

C. IMPLEMENTING THE FREEDOM OF SPEECH

The previous readings involved the text, historical groundings, and philosophical discussion of the values supporting the First Amendment. To what extent do those inform a doctrine *implementing* the First Amendment? This book will discuss in some detail the Supreme Court's complex and evolving rules involving free expression. This chapter, however, provides a brief overview of the overarching legal themes that have dominated the Court's attention—speech vs. conduct, content discrimination, access to public property, prior restraints, vague and overly broad laws, and problems associated with facial and as-applied challenges. As you read through the book, you will see references to these themes. To what extent are they independently important concepts? To what extent do they relate to one another and overlap?

When reading through the next several subsections, consider the following two laws enacted by the City of Los Angeles regarding its airport, which is built on city-owned property. How does each of the laws implicate the legal doctrines set forth below?

Law 1: No person or entity shall engage in religious advocacy while present in the Central Terminal Area at Los Angeles International Airport.

Law 2: The Central Terminal Area at Los Angeles International Airport is not open for First Amendment activities by any individual or entity.

1. Speech vs. Conduct

The text of the First Amendment forbids the government from "abridg[ing]" the "freedom of speech," but what exactly do those terms mean? Does the First Amendment apply only to speech in the literal sense, or does it extend to expressive conduct? At what point does speech become so like conduct that the First Amendment no longer protects it? Is a distinction between speech and conduct appropriate for triggering First Amendment scrutiny?

Professor Thomas Emerson noted the importance of answering these questions in constructing a definition of "freedom of expression":

> The first task is to formulate in detail the distinction between "expression" and "action." . . . [T]he whole theory and practice of freedom of expression—the realization of any of the values it attempts to secure—rests upon this distinction.

> Hence the starting point for any legal doctrine must be to fix this line of demarcation.

Thomas I. Emerson, *Toward a General Theory of the First Amendment* 60 (1966). Unfortunately, the Court's jurisprudence regarding when conduct is sufficiently expressive to trigger First Amendment scrutiny is thin at best. Furthermore, it is often not clear as a practical matter where the line is between speech and action. As Professor Emerson noted, that line "at many points . . . becomes obscure. Expression often takes place in a context of action, or is closely linked with it, or is equivalent in its impact." *Id.*

Despite this lack of clarity, the speech/conduct distinction permeates much of the discussion surrounding the First Amendment. Chapter 5 takes up in depth the thorny question of when conduct amounts to expression within the Court's jurisprudence. But the speech/conduct distinction also permeates the discussion of whether speech has passed the bounds of expression and into the realm of unprotected conduct. *See, e.g.*, Roth v. United States, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting) (discussing speech that is "so closely brigaded with illegal action as to be an inseparable part of it"). Many of the cases in Chapters 2 and 3 involving advocacy of illegal activity, fighting words, and speech that causes a hostile audience response raise such issues. Here, as with cases involving expressive conduct, the Court and scholars refer to unprotected speech as "conduct," but it is more often a shorthand way of saying "unprotected" or "low value" than it is an attempt to distinguish conduct from literal speech.

As you read the following chapters, keep in mind the question of whether the distinction between speech and conduct is helpful in determining whether the First Amendment should extend to the expression at issue. Can one come up with a meaningful distinction? Do the terms mean the same thing in different contexts? Is it the distinction between speech and conduct or are there other factors that influence the Court in its decisions? All of these questions are useful reminders of the difficulties associated with free speech law.

2. *Content Discrimination*

According to the Supreme Court, the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Brown v. Entertainment Merchants Ass'n 131 S. Ct. 2729, 2733 (2011). Why is the Court so concerned about government regulation of content? How does regulation of content implicate the various values discussed earlier in this chapter?

Chapters 2 and 3 discuss the Court's doctrine pertaining to content regulation. Initially, the Court used a test determining whether speech posed a "clear and present" danger of harm. Ultimately, however, it settled on a test that distinguished statutes based on whether they explicitly regulate speech because of its content (i.e., content-based laws) or whether they affect speech but do not regulate based on what the speech says (i.e., content-neutral laws). The former are subject to a stringent form of scrutiny called "strict scrutiny" while the latter statutes are subject to less rigorous review called "intermediate scrutiny." Turner Broadcasting v. FCC, 512 U.S. 622 (1994). Of the laws above, which is content-based or content-neutral? Is it clear that content-based laws are

always of greater concern in terms of their impact on public debate or free speech values?

As noted above, the Court allows content discrimination if the speech is deemed to be "unprotected" or "low value." The Court has found only a few categories of speech to be "low value," which it loosely describes as speech that contributes "no essential part of any exposition of ideas." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Thus far, the Court recognizes as "low value" only incitement to violence, threats, fighting words, obscenity, defamation, fraud, child pornography, and speech integral to criminal conduct. *See* United States v. Stevens, 130 S. Ct. 1577, 1584 (2010); *Brown*, 131 S. Ct. at 2729. Nevertheless, arguments over whether regulated speech falls into an existing category or whether one can draw analogies to existing low value speech categories are still quite common because, if successful, they allow states to engage in permissible content discrimination.

Are the laws above problematic because they are content-based? Are they problematic even if content-neutral?

3. *Access to Public Property*

The right to speak has little meaning if individuals or groups do not have access to public property (especially large public spaces such as parks). Originally, the Court was unsympathetic to speakers' desire for access to public property, effectively giving the government the same rights as private property owners to exclude speakers. Ultimately, however, it found that streets, parks, and sidewalks have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. CIO, 307 U.S. 496 (1939). Does that mean that speakers must be allowed unlimited access to such spaces, or does the government have interests in regulating access based on neutral considerations of "time, place, and manner"? Chapter 4 discusses these issues in more detail.

To what extent must government officials make available for expressive purposes other government property such as the Los Angeles Airport in Laws 1 and 2 above? The Court has grappled, not altogether successfully, with the extent to which property other than streets, parks, and sidewalks must be available for expressive purposes. Chapter 4 also discusses this issue in greater depth.

4. *Vague and Overly Broad Laws*

Laws can run afoul of the Constitution not simply because they suppress speech based on content but because they proscribe too much speech or do not give fair notice as to what they attempt to regulate. The Court's doctrines of overbreadth and vagueness are designed to assess whether such laws are consistent with the First Amendment.

a. Overbreadth

Overbreadth doctrine starts from the assumption that government officials may legitimately proscribe some speech—e.g., government officials may

regulate "low value" speech. Nevertheless, the overbreadth doctrine allows courts to strike down laws that are "draft[ed] . . . so broadly that they prohibit, or could prohibit, substantial amounts of constitutionally protected expression." Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 Harv. C.R.-C.L. L. Rev. 31, 40 (2003). Overbreadth doctrine allows a person whose speech could permissibly be regulated to challenge a law as overly broad because the law might chill the speech of third-party non-litigant speakers. *See* Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984); Gooding v. Wilson, 405 U.S. 518 (1972). As the Court has explained:

> Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech — harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending all enforcement of an over inclusive law, reduces these social costs caused by the withholding of protected speech.

Virginia v. Hicks, 539 U.S. 113, 119 (2003).

In cases involving expressive conduct rather than pure speech, the Court requires a showing of "substantial" overbreadth before striking down a law. *Hicks*, 539 U.S. at 123-124. Accordingly, the overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Taxpayers for Vincent*, 466 U.S. at 800. In all overbreadth challenges, the Court has been willing to uphold a law if the state's highest court has construed it narrowly enough so that it does not apply to protected speech. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985).

Are the laws referred to above overly broad?

b. Vagueness

An overly broad law can often also be challenged as vague. Such challenges, although raising similar issues to First Amendment challenges, are actually due process challenges (with special consideration of free speech issues). Vague laws are problematic for several reasons:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut(s) upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of (those) freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.

Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972). The prevention of arbitrary and discriminatory enforcement of laws affecting speech is a consistent

theme in the Court's discussion of the void for vagueness doctrine. *See* United States v. Williams, 535 U.S. 285 (2010); Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010); Smith v. Goguen, 415 U.S. 566 (1974).

As with overbreadth challenges, a state court can narrowly interpret a law to remove the vagueness problem. *See Williams*, 535 U.S. 285. Clear statutory definitions and settled legal meanings also may save an otherwise vague law. *Id.* at 306. Furthermore, a statute is not vague merely because one can envision a close case regarding speech that may fall within its scope. *Id.* at 305-306. "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Id.* at 306.

Unlike overbreadth challenges, an individual engaging in conduct a statute clearly proscribes cannot "complain of the vagueness of the law as applied to the conduct of others." *Humanitarian Law Project*, 130 S. Ct. at 2719. "[A] vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression." *Id.*

Are the two laws above void for vagueness? In what way can one or both of them be subject to arbitrary and discriminatory enforcement?

c. Facial and As-Applied Challenges to Laws

As a procedural matter, individuals or entities wanting to challenge laws as violating the First Amendment have two possible approaches available to them. They can challenge the law as "facially" invalid or they can challenge the law "as applied" to their particular speech.

A party asserting a facial challenge is arguing that the statute could *never* be applied in a valid manner. In the First Amendment context, this argument translates into a claim that the statute creates an unacceptable risk of the suppression of ideas. Thus, "[w]hen asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question." City of Chicago v. Morales, 527 U.S. 41, 55 n.22 (1999); *Taxpayers for Vincent*, 466 U.S. at 789. Parties raising an as-applied challenge to the statute, on the other hand, argue that it is unconstitutional asapplied to the party's own conduct and do not raise an argument for third parties.

Both the vagueness and overbreadth doctrines give rise to facial attacks. Specifically, "the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial." *Morales*, 527 U.S. at 53. Further, a statute is subject to facial invalidation if "it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *Id.* at 53. Thus, "[w]hen vagueness permeates that text of . . . a law, it is subject to facial attack." *Id.* at 55. Are the two laws above subject to facial attacks on their validity?

If there are some conceivable instances of constitutional application, courts are more likely to entertain an as-applied challenge, but it is not always easy to tell when each challenge should be used. "[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." Citizens United v. FEC, 130 S. Ct. 876, 893 (2009).

5. *Prior Restraint*

Although the Court eventually found that the First Amendment applied to subsequent punishment of speech as well as prior restraints, *see* Schenck v. United States, 249 U.S. 47 (1919), it nevertheless maintains a special antipathy to regulations amounting to prior restraints. Such regulations are the "most serious and least tolerable infringement of First Amendment rights." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). We know that the unfettered licensing schemes of sixteenth and seventeenth century England amounted to prior restraints, *see supra* Part I.A.1, but the Court has extended the concept to other forms of regulation. Thus, "administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur" generally amount to prior restraints. Alexander v. United States, 509 U.S. 544, 550 (1993). Arbitrary decision-making and chilling of protected speech are primary concerns of the prior restraint doctrine. *See* Citizens United v. FEC, 130 S. Ct. 876, 895-96 (2009). Chapter 4, *infra*, discusses these issues in greater depth.

Why are prior restraints of greater concern than a vague or overly broad law that subsequently punishes expression? Aren't such laws also subject to arbitrary application? Don't they also chill speech? *See* Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn. L. Rev. 11, 35-45 (1981); William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions Against Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 Cornell L. Rev. 245, 275 (1982); Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. Rev. 685, 725-730 (1978). Is the Court's special antipathy to prior restraints (over content-based or vague and overly broad laws) necessary?

The Court does not find all administrative and judicial orders to be prior restraints. Thus, it has found constitutional licensing schemes requiring protestors to apply for permits prior to their activities as long as those schemes provide adequate criteria for officials; regulate only time, place, and manner of the protests; and are unrelated to content. *See* Cox v. New Hampshire, 312 U.S. 569 (1941); Thomas v. Chicago Park Dist., 534 U.S. 316 (2002). Similarly, the Court has upheld content-neutral injunctions that regulate only the time, place, and manner of speech rather than suppressing it altogether. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994).

6. *Extra-Doctrinal Influences on the Law*

Given the brevity of the First Amendment, much decision-making regarding its scope and content is left to the courts, and ultimately the Supreme Court, as to whether speech is protected or unprotected. How does the Court make such determinations? What influences its decisions?

On the one hand we know that the Court's jurisprudence protects core political speech and also extends some protection to commercial speech, sexually explicit speech, libel, offensive speech, and advocacy of illegal conduct. Even speech that can be punished, such as threats, incitement, fighting words, and obscenity, must meet carefully laid out judicial standards prior to suppression or punishment. On the other hand, as Professor Frederick Schauer notes, the

Court appears to ignore whole areas of expression or to state, with little or no discussion, that they are outside the purview of the First Amendment:

> The history of the First Amendment is the history of its boundaries. . . . As contemporary debates about the threshold applicability of the First Amendment to topics such as copyright, securities regulation, panhandling, telemarketing, antitrust, and hostile-environment sexual harassment demonstrate, however, questions about the involvement of the First Amendment in the first instance are often far more consequential than are the issues surrounding the strength of protection that the First Amendment affords the speech to which it applies. Once the First Amendment shows up, much of the game is over. But the question whether the First Amendment shows up at all is rarely addressed, and the answer is too often simply assumed. . . .
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> Though many cases involve the First Amendment, many more do not. The acts, behaviors, and restrictions not encompassed by the First Amendment at all—the events that remain wholly untouched by the First Amendment—are the ones that are simply not covered by the First Amendment. It is not that the speech is not protected. Rather, the entire event—an event that often involves "speech" in the ordinary language sense of the word—does not present a First Amendment issue at all, and the government's action is consequently measured against no First Amendment standard whatsoever. The First Amendment just does not show up.
>
> When the First Amendment does show up, the full arsenal of First Amendment rules, principles, standards, distinctions, presumptions, tools, factors, and three-part tests becomes available to determine whether the particular speech will actually wind up being protected. . . . But the fact that the[se] tests . . . are the ones to be applied reflects the coverage of the First Amendment. And because these First Amendment tests impose greater burdens than the negligible scrutiny of rationality review, the First Amendment makes a difference in the categories that it covers even when the particular speech that is a member of some covered category winds up unprotected.
>
> By contrast, no First Amendment-generated level of scrutiny is used to determine whether the content-based advertising restrictions of the Securities Act of 1933 are constitutional, whether corporate executives may be imprisoned under the Sherman Act for exchanging accurate information about proposed prices with their competitors, whether an organized crime leader may be prosecuted for urging that his subordinates murder a mob rival, or whether a chainsaw manufacturer may be held liable in a products liability action for injuries caused by mistakes in the written instructions accompanying the tool. Each of these examples involves some punishment for speech, and each involves liability based both on the content and on the communicative impact of the speech. And yet no First Amendment degree of scrutiny appears. In these and countless other instances, the permissibility of regulation—unlike the control of incitement, libel, and commercial advertising—is not measured against First Amendment-generated standards. . . . [Indeed], an argument from the First Amendment would be seen as an argument from the wrong area of law; and in which, consequently, no First Amendment principle guards, even to a limited extent, against infringement. Questions about the boundaries of the First Amendment are not questions of strength—the degree of protection that the First Amendment offers—but rather are questions of scope—whether the First Amendment applies at all. . . .

Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv. L. Rev. 1765, 1766-71 (2004).

NOTES AND QUESTIONS

1. Is there any plausible explanation for why the Court has chosen to include certain things and not others within the boundaries of the First Amendment? Are the crimes of price fixing or perjury or solicitation of murder (completely outside the boundaries of the First Amendment) so different from fighting words or incitement to riot (which are not)?
2. Schauer argues that "political, social, cultural, historical, psychological, rhetorical, and economic forces" influence "which policy questions surface as constitutional issues and which do not." *Id.* at 1768. What kinds of extra-legal factors might influence free speech cases? As you read the following cases, do you find factors that influence cases better explain the decisions than do doctrine or theory?
3. Is Schauer's argument limited to the "boundaries" of the First Amendment, or do extra-legal factors also affect the Court's resolution of whether speech within the parameters of the First Amendment is protected? Also keep this question in mind as you read the following chapters.