PUBLIC EVANGELISM UNDER THE FIRST AMENDMENT

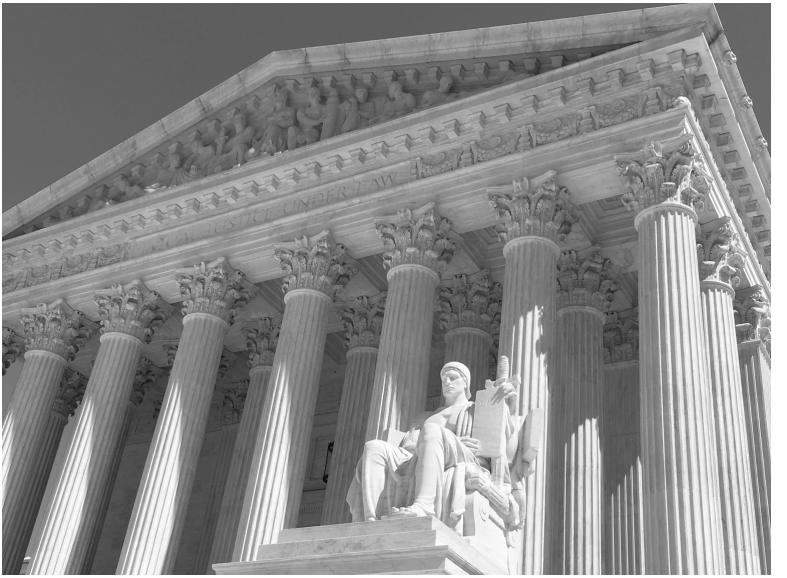
Fourth Edition

Richard “Jake” Jackson

Public Evangelism
Under the First Amendment

First Printing, 2010
Second Printing, 2012
Third Printing, 2016
Fourth Printing, 2020

The Supreme Court Building
Washington, D.C.



Acknowledgements

First and foremost I thank my God for creating me, and for forgiving all of my sin through the blood of Jesus Christ, and for allowing me to serve Him. There is nothing I have that I did not receive from His gracious hand.

Much valuable help with research and editing was provided by Joseph S. Jackson (*University of Florida College of Law, faculty*) and Samuel D. Jackson (*Fordham Law School, J.D.2014*), for which I am very grateful.

I am also grateful to the many people who have provided generous support and encouragement for the completion of this work and for the distribution of these materials without charge to those whom it is intended to help.

For it is God which worketh in you both to will and to do of his good pleasure (Philippians 2:13).

For more information contact:
Attorney Jake Jackson
Gospel Advocates, Inc.
P.O. Box 2337
DeLand, FL 32721
(386) 804-1020
JacksonLaw1111@gmail.com
GospelAdvocates.com

The Liberty Bell
Philadelphia, PA

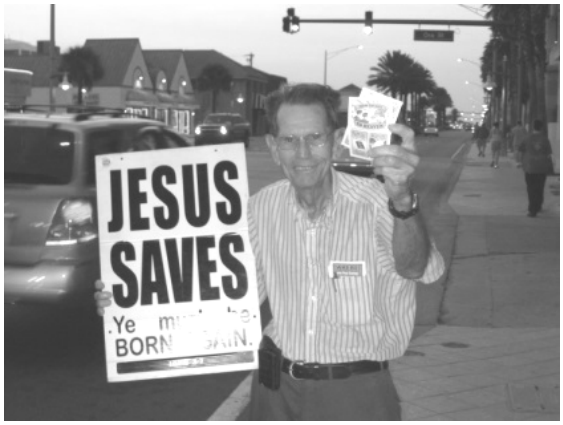
Table of Contents

THE FIRST AMENDMENT TO THE
CONSTITUTION OF THE UNITED STATES:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof: or abridging the freedom of speech, or of the press: or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

CONSTITUTIONAL RIGHT OF FREE SPEECH

The right to freedom of speech is guaranteed by the First Amendment to the U.S. Constitution, which protects against encroachments upon expressive activity by the federal government. The Fourteenth Amendment to the U.S. Constitution extends the applicability of the First Amendment to protect against actions by the States and their political subdivisions.[1] The First Amendment "prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech."[2] Although the right of free speech is not absolute,[3] it is zealously protected by the courts as one of our most basic and fundamental rights.[4]



PROTECTED SPEECH

To determine the validity of a governmental restriction upon freedom of expression, the U. S. Supreme Court has held that it is necessary to determine whether the intended expression is "protected speech" under the First Amendment.[5] The Court has held that the First Amendment protects public preaching,[6] display of signs and banners,[7] and distribution of religious literature.[8] This protection of the right to free expression applies even if the speech is rude and offensive;[9] or is critical of other religions.[10]

When speech is protected under the First Amendment, it "cannot be restricted simply because it is upsetting or arouses contempt. '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 finds the idea itself offensive or disagreeable.'"[11]

Speech may not be restricted based on "disorderly conduct" or "breach of the peace" concepts unless the speech itself poses a clear and present danger of inciting an immediate breach of the peace, such as a call for imminent violent action,[12] or "fighting words" which are likely to provoke an imminent violent response,[13] or falsely shouting of "fire" in a crowded theatre.[14] "The government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'"[15]

UNPROTECTED SPEECH

The Supreme Court has determined only a few "well defined and narrowly limited classes of speech" which are not protected under the First Amendment, including obscenity, defamation, fraud, incitement to violence, and speech which is integral to criminal conduct.[16] The Supreme Court has explicitly declined to carve out any new categories of unprotected speech.[17]

In U.S. v. Stevens,[18] the defendant was prosecuted for selling videos of pit bulls engaging in dogfights and attacking other animals, under a federal law which made it illegal to create, sell or possess certain depictions of illegal animal cruelty for commercial gain. The government argued that depictions of illegal cruelty to animals should be added to the list of categories of unprotected speech, suggesting that the Court employ the following test: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." The Supreme Court found the government's suggestion "startling and dangerous,"[19] and the Court refused to carve out any novel exception to the First Amendment's protection for a category of speech on the basis of an analysis of the value of the speech versus its costs to society.[20]

In Brown v. Entertainment Merchants Assn.,[21] a California law making it illegal to sell violent video games to minors was held unconstitutional. The Supreme Court found that the state of California was attempting "to create a wholly new category of content-based regulation that is permissible only for speech directed at children," and the Court concluded: "That is unprecedented and mistaken."[22] The Court reiterated its holding in Stevens that only categories of speech which by long tradition have been unprotected are outside the scope of First Amendment protection, and "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated."[23]

In U.S. v. Eichman,[24] the Supreme Court struck down a federal law prohibiting burning the American flag. The Court rejected the government's claim that "flag burning as a mode of expression … does not enjoy the full protection of the First Amendment."[25]

In U.S. v. Alvarez,[26] the Stolen Valor Act, which made it a federal crime to falsely claim receipt of military decorations or medals, was held unconstitutional. The Supreme Court rejected the argument that "false statements" were categorically excluded from the protection of the First Amendment. "Absent from those

few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements."[27]

"HATE SPEECH"

In recent years many politicians and political commentators have implied or, in some cases, have outright claimed that the Constitutional right of free speech does not extend to "Hate Speech." In 2015 a proposed Resolution was introduced in Congress which "denounces in the strongest terms the increase of hate speech, intimidation, violence, vandalism, arson, and other hate crimes targeted against mosques, Muslims, or those perceived to be Muslim;" thus implying that "hate speech" is a crime.[28] On April 21, 2017 Howard Dean, the Chairman of the Democratic National Committee and former Governor of Vermont, posted the following statement on Twitter: "Hate speech is not protected by the first amendment."[29] That statement is incorrect. There is no exception for "Hate Speech" under the First Amendment. In fact, there is no Constitutional concept of "Hate Speech."

What is commonly called "Hate Speech" is included within the protections of the First Amendment.[30] Speech that is offensive does not receive less protection under the First Amendment than speech which is popular. "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[31]

In Matal v. Tam[32], an Asian-American band called "The Slants" applied for federal trademark registration of their name. They were denied under the "disparagement clause" of the federal trademark law which prohibited registration of trademarks that may "disparage ... or bring ... into contemp[t] or disrepute" any persons.[33] The Supreme Court held that the disparagement clause "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[34]

"The government may not discriminate against speech based on the ideas or opinions it conveys."[35] This is "a core postulate of free speech law."[36] "Just as 'no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,' it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive."[37]

The Supreme Court has stated that "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."[38] "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[39]

"HECKLER'S VETO"

A "Heckler's Veto" exists where "the speaker is silenced due to an anticipated disorderly or violent reaction of the audience."[40] "A review of Supreme Court precedent firmly establishes that the First Amendment does not countenance a heckler's veto."[41] As a general rule, the anticipated illegal or improper reactions of the intended audience will not justify restrictions on protected speech.[42]

The Supreme Court has stated, "Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence."[43] The Court has affirmed that "constitutional rights may not be denied simply because of hostility to their assertion or exercise."[44]

In Terminiello v. City of Chicago,[45] a priest named Terminiello had been convicted of disorderly conduct for making a speech criticizing various racial and political groups and condemning the conduct of a large crowd of angry protestors who began throwing rocks and bottles at the police who were guarding the door to the auditorium where Terminiello was speaking. The U.S. Supreme Court reversed Terminiello's conviction of disorderly conduct and stated the following:

> The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in De Jonge v. Oregon, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
>
> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.[46]

In Forsyth County v. Nationalist Movement,[47] the Supreme Court struck down an ordinance which allowed a county official to set permit fees based on anticipated costs of police protection and administrative time (taking into account the anticipated reactions of a hostile crowd) for a permit for a demonstration on public property. The Court stated, "Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."[48]

In Tinker v. Des Moines Independent Community School District,[49] a group of high school students were suspended for wearing black armbands to school in protest of the war in Viet Nam. In striking down the school policy, the Supreme Court stated, "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."[50]

A "heckler's veto" can also exist where a regulation allows the opponent of a message to take action (without threat of violence or public disruption) to cause the speaker to be silenced.[51]

"FIGHTING WORDS"

The courts have held that the First Amendment does *not* protect the use of "fighting words." The Supreme Court has defined "fighting words" as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[52] Statements which are offensive and disrespectful are

protected by the Constitution unless they are "so inherently inflammatory as to come within that small class of 'fighting words' which are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.'"[53]

In Gilles v. Davis,[54] a "campus evangelist" named Gilles was arrested for disorderly conduct and several other charges while preaching on a college campus. During his "preaching," Gilles singled out individuals and called them names. In particular, Gilles taunted a woman who identified herself as a Christian and a lesbian, calling her "Christian lesbo," "lesbian for Jesus," "do you lay down with dogs," "are you a bestiality lover."[55] Eventually the criminal charges were dismissed, and Gilles filed suit against the arresting officer and other officials of the university. The Circuit Court held that Gilles' epithets directed at the woman who identified herself as a Christian and a lesbian were "especially abusive and constituted fighting words," and that the defendants in the lawsuit were entitled to summary judgment.[56] Other derogatory comments made by Gilles, such as "by definition, there are thousands of fornicators on this campus," "drunkards are everywhere on this campus," were not fighting words because they were not "personally directed at a particular member of the audience."[57] Some personal insults directed to particular individuals, such as "cigarette breath," "devil," "communist," could be "reasonably viewed as unpleasant but petty, and not sufficiently provocative to constitute fighting words."[58]

In Mikhail v. City of Lake Worth,[59] a preacher was threatened with arrest after "pointing at specific people, loudly calling people 'sinners, 'whores' and 'prostitutes.'"[60] Several young women ran to a police officer and stated that their boyfriends were going to attack the preacher. The officer observed a large crowd gathered around the preacher who was insulting people, and when one of the boyfriends whom the preacher was addressing got up from his seat the officer ordered the preacher to stop because he believed violence was imminent. The District Court found that the preacher's personal insults were fighting words, and denied the

preacher's motion for a preliminary injunction prohibiting the enforcement of the city's breach of peace ordinance against him. The Court rejected the preacher's claim that he "used the terms 'sinners,' 'whores' and 'prostitutes,' generally and in the context of his appeal to his audience to accept his religious message. Instead, the Court credits Officer Raskin's testimony that these terms were directed at individuals and were not placed in a religious context."[61]

EXAMPLE: A preacher in a public park proclaims, "Jesus Christ is the way, the truth and the life; no one else can forgive your sins. The Pope cannot save you, Billy Graham cannot save you, Mohammed cannot save you, and you cannot save yourself: only Jesus saves." If someone is offended and complains to the police, ***it would violate the preacher's right to free speech if the police officer ordered him to stop preaching because he has received complaints.*** *Even if a group of Muslims gather and become angry, the preacher has a right to continue preaching, and he can preach that Islam is a false religion because it is contrary to the Bible. However, if the preacher points at one of the Muslims and calls him a "wicked, murderous, God-denying infidel," the police may be justified in ordering the preacher to leave because his personal insults directed at an individual probably constitute "fighting words" likely to provoke violence.*

FORUM ANALYSIS

The U.S. Supreme Court has held that the standard that applies when evaluating First Amendment protection of speech on public property depends on the character of that property. In Perry Education Assn. v. Perry Local Educators' Assn.,[62] the Supreme Court described three categories of public property: a **Traditional Public Forum** (such as public parks, streets and sidewalks); a **Limited Public Forum** (also sometimes called a **Designated Public Forum**)[63] (such as a "Free Speech Area" on a college campus which has been opened to use by the public); and a **Nonpublic Forum** (such as government offices which have not been designated by the government as a place for public discourse).

Traditional Public Forum

The Perry Court set forth the following standards for free speech in a **Traditional Public Forum**:

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "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." In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.[64]

Recently, in Packingham v. North Caroloina[65], the Supreme Court implied that the Internet may be treated as a Traditional Public Forum for First Amendment purposes: “While in the past there may have been difficulty in identifying the most important

places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular."[66] In reviewing a state law that prohibited registered sex offenders from accessing commercial social media websites, the Court compared the Internet to "a street or a park" as a "quintessential forum" for the exchange of views.[67]

Limited or Designated Public Forum

The Perry Court explained that when a government establishes a **Limited Public Forum** by designating or allowing property which is not a Traditional Public Forum to be used for expressive activity by the public, the same constitutional protection applies to protected speech in that forum as would apply in a Traditional Public Forum.[68] Although the government is not obligated to retain the open character of a Limited Public Forum indefinitely, as long as it does so the same standard applies.[69] Later cases use the term "**Designated Public Forum**" to refer to government-owned property which the government deliberately designates for unlimited public discourse (synonymous with what the Perry court called a "Limited Public Forum").[70]

Nonpublic Forum

While regulations on speech in a Traditional or a Designated Public Forum are subject to much more vigorous scrutiny by the courts, in a **Nonpublic Forum** the standard of review allows much greater deference to the regulating authority: the restriction on speech or upon access to the forum must only be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[71] The Supreme Court emphasized that "when government property is not dedicated to open communication the government may—without further justification—restrict use to those who participate in the forum's official business."[72]

A regulation restricting speech in a Nonpublic Forum needs to be "reasonable" considering the use of the property: "Implicit in

the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves."[73]

Some later cases have used the term "Limited Public Forum" to refer to government-owned property in which the government allows expression which is limited to use by certain groups or for discussion of certain subjects (a subset of what the Perry Court called a "**Nonpublic Forum**").[74] Examples of this type of Nonpublic Forum include a City Commission chambers, where residents may speak only on agenda topics during a Commission meeting; or a public school or university.

Minnesota Voters Alliance v. Mansky[75] involved a challenge to a state law that prohibited wearing a political badge, political button, or anything bearing political insignia inside a polling place on Election Day. The Supreme Court held that a polling place was a Nonpublic Forum; therefore, the constitutional test was "whether Minnesota's ban on political apparel is 'reasonable in light of the purpose served by the forum': voting."[76]

> "Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas. The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose."[77]

Public Parks, Streets and Sidewalks

As a general rule, a public park, street or sidewalk is a **Traditional Public Forum**. As stated by the U.S. Supreme Court in Hague v. C.I.O.,[78] "[w]herever the title of streets and parks may

rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."[79]

"A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire."[80]

In U.S. v. Grace,[81] the Supreme Court overturned the convictions of protestors who displayed signs and distributed fliers on the sidewalk outside the Supreme Court building. A federal law prohibited such activities in the Supreme Court building "or its grounds" which included the sidewalk around the perimeter. The Court held that although the Supreme Court building and grounds are not a public forum, the sidewalk which forms the perimeter of that property is a Traditional Public Forum.

The property in question does not have to be *owned* by the government to be a Traditional Public Forum for First Amendment purposes. In Marsh v. Alabama,[82] the fact that a private company owned the entire town did not allow that company to impose regulations upon speech in a shopping district that a local government could not constitutionally enforce on public property. The Court stated, "the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation."[83]

In First Unitarian Church of Salt Lake City v. Salt Lake City Corp.,[84] the city's conveyance of a sidewalk to a private entity, reserving an easement for ingress and egress, was ineffective to alter the character of the sidewalk as a Traditional Public Forum. In United Church of Christ v. Gateway Economic Development Corp.,[85] a sidewalk on private property outside a sports complex was a Traditional Public Forum because it looked and functioned as a public sidewalk allowing pedestrian traffic to move along the length of the property; however other common areas outside the arena were not public. In Brindley v. City of Memphis,[86] a privately-owned street providing access to the parking lots of several businesses, including a Planned Parenthood clinic, was held to be a Traditional Public Forum. "If the street looks and functions like a public street, then it is a traditional public forum regardless of who holds title to the street."[87]

In contrast, a sidewalk upon the property of a U.S. Post Office was held to be a Nonpublic Forum in United States v. Kokinda,[88] because the post office itself was a Nonpublic Forum and the portion of sidewalk in question served only to provide access to the post office building from the post office parking lot, and was not connected to the public sidewalk which was by the edge of the postal property parallel to the street. Similarly, the Court has held that restrictions of speech activities on a military base could properly be applied even to those streets and parking lots on the base where civilians had free and unrestricted access.[89]

In A.C.L.U. of Nevada v. City of Las Vegas,[90] a publicly owned pedestrian mall, the "Freemont Street Experience," was held to be a Traditional Public Forum. This five-block section of the downtown area was developed and promoted as a "commercial and entertainment complex." It was closed off to vehicle traffic but continued to function as a pedestrian thoroughfare. Although the city created it to function primarily as a commercial development similar to a privately-owned mall, and with the intention to stimulate commercial activity rather than to promote expression, the Ninth Circuit Court ruled that it was a Traditional Public Forum.

EXAMPLE: A group of Christians go to a privately-owned shopping mall to distribute gospel tracts. They have no right to distribute tracts inside the mall, in the parking lot, nor on the sidewalk around the building between the parking lot and the stores without the permission of the owners. However, if there is a sidewalk along the edge of the property that provides pedestrians access to the adjacent properties, the Christians probably have a right to conduct public ministry there even if that sidewalk is owned by the mall.

SPECIALLY PERMITTED EVENTS IN A TRADITIONAL PUBLIC FORUM

A common source of confusion and conflict arises when a government issues a permit for what is normally a Traditional Public Forum, such as a public park, street or sidewalk, to be used by a public or private entity for a particular event. Both the event organizers and the permitting authorities often have the misconception that the permitted area has become the private property of the permittee for the duration of the permit;[91] or that the permittee has the exclusive right to control what messages are disseminated within the permitted area.[92]

In Parks v. City of Columbus, Ohio,[93] a permit was issued to the Columbus Arts Council for an Art Festival on a portion of a

public street which was closed off to vehicle traffic. The street remained open to pedestrian traffic and the Art Festival was open to the public. The Plaintiff, Mr. Parks, walked into the festival area wearing a sign with a religious message, and distributed gospel tracts and preached to anyone who would listen. He was approached by a police officer who told him that the sponsor of the event did not want him there and the officer instructed Mr. Parks to move beyond the barricades or he would be arrested. The Sixth Circuit Court held that the festival area remained a Traditional Public Forum because it was free and open to the public, and Mr. Parks was seeking general access to the property to reach the attending public. The court distinguished this situation from other cases where a person sought to have his message included in the collective message of the permit holder.[94] The court distinguished Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,[95] in which the U.S. Supreme Court held that requiring a parade organizer to include a contrary message *in its parade* would violate the organizer's freedom of speech, but that any member of the public could express a contrary message upon *public property along the parade route*; and Sistrunk v. City of Strongsville,[96] in which the Sixth Circuit Court held that where a permit was for a specific use involving collective expressive activity *and was limited to members and invitees*, the permittee (a political campaign committee) had a right to exclude signs bearing opposing messages because it had a right to "exercise its free speech rights and autonomy over the content of its own message."[97]

In Gathright v. City of Portland, Oregon,[98] a city ordinance making it "unlawful for any person unreasonably to interfere with a permittee's use of a Park" authorized a permit holder sponsoring an event in a public park "to evict any member of the public who espouses a message contrary to what the permit holder wants as part of its event," and the police would enforce the permittee's order requiring the unwelcome party to leave.[99] The Ninth Circuit Court held the city's policy was unconstitutional, and noted that "First Amendment jurisprudence is clear that the way to oppose

offensive speech is by more speech, not censorship, enforced silence or eviction from legitimately occupied public space."[100]

In Startzell v. City of Philadelphia,[101] the Third Circuit Court held that even where the permitted event ("OutFest") was intended to espouse a particular message (affirmation of gay, lesbian, bisexual and transgender lifestyles), if the event was a private-sponsored event "in a public forum that was free and open to the general public" the event sponsor did not have a right under Hurley to exclude members of the public (preachers) who wished to express a contrary view.[102] "Appellants were dissenting speakers on the Philadelphia streets and sidewalks where OutFest took place. There was no danger of confusion that Appellants' speech would be confused with the message intended by Philly Pride. Thus, Appellants were not infringing on Philly Pride's fundamental right under the First Amendment to have "the autonomy to choose the content of [its] own message."[103] In Startzell, the police forced the "OutFest" organizers to allow the preachers into the permitted area to exercise their right to preach, display signs and distribute literature. However, the preachers disrupted the event program by attempting to drown out the platform speakers and music using bullhorns, and by blocking access to certain areas within the event, and refused to obey police orders to move.[104] The Third Circuit Court held that the police restrictions, and ultimate arrest, of the preachers did not violate the preachers' First Amendment rights. The police actions were not based on the content of the preachers' message, but on their conduct.[105]

In Wickersham v. City of Columbia,[106] the sponsor of an air show, which promoted a particular patriotic message and was free and open to the public, prohibited anyone attending from soliciting, petitioning, leafleting, political campaigning, or displaying "unauthorized" signs. An individual who was prevented from distributing anti-war fliers and an individual who was prevented from collecting signatures on a petition filed suit for an injunction. The Eight Circuit Court upheld an injunction

requiring the air show sponsor and the city to allow members of the public to express contrary views within the permitted area.

In World Wide Street Preachers' Fellowship v. Reed,[107] a permit was issued to an organization for an outdoor festival, PrideFest, in a public park. Part of the permitted area was fenced in and there were two gates where an admission fee was charged. The remainder of the permitted portion of the park was unfenced and required no admission fee. One preacher positioned himself in the unfenced portion of the permitted area right by the gate, and expressed to the police officers there his desire to speak to the people approaching the gate to enter the festival. The police told him that the permit holders could exclude anyone they chose, and that the police would enforce their decision. The preacher was told that he could not remain in the permitted area, but that he could go across the street or to the far edge of the park. Other individuals were ordered by a police officer to keep back fifty feet from the permitted area. The District Court held that both the actions of the city's agents in preventing plaintiffs from preaching in the permitted but unfenced portion of the park, and the enforcement of a fifty-foot buffer zone around the fenced permitted area, violated plaintiffs' First Amendment rights.

The teaching of all of these cases is that when there is a permitted event in a Traditional Public Forum and free access is allowed to the public to attend the event, the event area remains a Traditional Public Forum where members of the public have a right to express their views. "The city streets are a traditional public forum, and their character as a public forum is retained even though they are used for a public festival sponsored by a private entity."[108] However, members of the public do not have a right to express their views in a manner that disrupts the event or prevents the permit holder from presenting its own message. On the other hand, where the event is open only to invited guests or to paying customers and not to the general public, the courts have allowed the permit holders to exclude individuals attempting to express a message contrary to the message promoted by the permittee.

EXAMPLE: A church group goes to an outdoor art festival to hold scripture signs, preach, and pass out gospel tracts. The art festival sponsor has obtained a permit from the city allowing it the use of a public park and surrounding streets for the festival. The art festival is free and open to the public, and there is a free flow of pedestrians in and out of the event area. The event sponsor calls the police requesting that the church group be ordered to leave. ***The event area is still a Traditional Public Forum and the church group has the right to be there and convey its message.*** *However, if members of the church group preach or sing so close to the stage that entertainment or speeches sponsored by the art festival cannot be heard, then the police may properly order the church group to move.*

EXAMPLE: A church group goes to a county park to distribute gospel tracts. A portion of the park with a pavilion and ball field have been rented by a private group for a family reunion. The public has not been invited to the family reunion. ***The church group may distribute tracts in the park, but if the renters ask them to stay out of the portion of the park being used for the reunion, the church group probably does not have a right to distribute its literature in the rented portion of the park.***

CONTENT-BASED RESTRICTIONS ON SPEECH

The requirements necessary to justify a restriction on speech in a Traditional Public Forum depends on whether the challenged restriction is **content-based** or **content-neutral**. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."[109]

Determining Whether the Restriction is Content-Based

There are two different ways that a restriction on speech can be determined to be content-based. First, the regulation may expressly ("on its face") draw distinctions "based on the message a speaker conveys."[110] If the law defines the speech being regulated either by the "particular subject matter" of the speech or by the "function or purpose" of the speech, then the law is **content-**

based on its face because the distinctions between regulated and unregulated speech are "based on the message a speaker conveys."[111] For example, in Reed v. Town of Gilbert, Arizona, a sign ordinance which divided signs into three different categories ("Temporary Directional Signs," "Political Signs," and "Ideological Signs") and then imposed different restrictions upon each category of signs was held to be content-based on its face.[112]

Second, even if the regulation appears to be facially content-neutral, it may still be determined to be **content-based if the government's *purposes* or *justifications* for the regulations** are based on the content of the regulated speech.[113] In evaluating a regulation that appears content-neutral on its face, the "principal inquiry in determining content neutrality… is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.'"[114]

The U.S. Supreme Court has acknowledged that determining "whether a particular regulation is content-based or content-neutral is not always a simple task."[115] In McCullen v. Coakley,[116] the Supreme Court was split 5 to 4 on the question of whether a statute which made it a crime to knowingly stand on a public way or sidewalk within 35 feet of an entrance or driveway to any abortion clinic was content-based or content-neutral. Although the majority held that the law was content-neutral, four of the Justices were persuaded that it was content-based because it provided exemptions for employees and agents of the clinics,[117] and three of them believed there was sufficient evidence that the legislature's primary purpose was to restrict speech that opposes abortion, and so the law should be deemed to be content-based for that reason.[118]

In Bourgeois v. Peters,[119] the Eleventh Circuit Court held that a city policy requiring everyone wishing to participate in an annual protest against the School of the Americas (SOA) outside Fort Benning to submit to a magnetometer search at a checkpoint was a content-based regulation which violated the First Amendment. The court rejected the argument that because everyone attending would be searched in the same manner, the regulation must be content-neutral: "the fact that all the protestors were searched does not suggest that the decision to search them was content-neutral; it suggests only that the city treated each SOA protestor equally vis-à-vis the other SOA protestors."[120] Since the city did not require similar magnetometer searches of other groups at other protests or events, there was an implication that the decision to search the SOA protestors was "precisely because of the message they were sending."[121]

The Eleventh Circuit Court held a city sign ordinance to be a content-based regulation of speech in Solantic, LLC v. City of Neptune Beach,[122] because although the restrictions primarily controlled the physical attributes and placement of the signs, the ordinance exempted several categories of signs based on their content, such as holiday yard displays, political yard signs, and flags and insignia of government and religious organizations. The court concluded that "because some types of signs are extensively regulated while others are exempt from regulation based on the nature of the messages they seek to convey, the sign code is undeniably a content-based restriction on speech."[123]

In Burk v. Augusta-Richmond County,[124] an ordinance which required a permit for groups of five or more people to engage in a "public demonstration or protest," which the ordinance defined as "support for, or protest of, any person, issue, political or other cause or action," was held to be a content-based regulation because it targeted political speech but not other categories of speech.[125]

"Strict Scrutiny" Review

For a **content-based** restriction to be constitutional, it must pass "strict scrutiny:" it must be shown that it is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[126] This is a very difficult standard to achieve. "Content-based regulations are presumptively invalid."[127] To satisfy the requirement that the restriction is "narrowly drawn," it must be shown that the restriction is the "least restrictive means" of achieving the government's compelling interest.[128] "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."[129]

In reviewing a California law that imposed restrictions upon violent video games, the Supreme Court stated that because that law "imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. The State must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard. 'It is rare that a regulation restricting speech because of its content will ever be permissible.'"[130] The Court held that California's law failed to pass both aspects of the strict scrutiny review: First, the State failed to show that its attempt to censor Constitutionally protected speech was "justified by that high degree of necessity we have described as a compelling state interest."[131] Second, the restrictions were not narrowly tailored to achieve the State's purposes. To be narrowly tailored, a restriction on speech must not be "seriously underinclusive or seriously overinclusive" in pursuing the State's objectives.[132]

One of the reasons that a Heckler's Veto violates the First Amendment is that it is a content-based restriction on speech: "Listeners' reaction to speech is not a content-neutral basis for regulation."[133]

In Burson v. Freeman,[134] the Supreme Court upheld a law which prohibited display or distribution of campaign materials within 100 feet of the entrance to a polling place. Although this was a content-based regulation of speech (since it restricted political speech but not other categories of speech), the Court found that it was narrowly tailored and necessary to serve the state's compelling interests in "protecting voters from confusion and undue influence" and in "ensuring that an individual's right to vote is not undermined by fraud in the election process."[135] The Court acknowledged that it is a "rare case" in which a content-based restriction on speech in a Traditional Public Forum will pass the strict scrutiny test and be upheld, but held that this was such a case, emphasizing that the free speech rights asserted in this case conflicted with "another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud."[136]

Viewpoint Discrimination

A particularly egregious form of content discrimination occurs when a government regulation restricts speech based upon the views expressed by the speaker. "When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[137]

"In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those **based on viewpoint** are **prohibited**."[138] The government "ordinarily may not exclude speech or speakers from the forum on the basis of viewpoint."[139]

The Supreme Court has stated that when government creates a limited public forum for private speech, "some content- and

speaker-based restrictions may be allowed. However, even in such cases, what we have termed '**viewpoint discrimination**' is **forbidden**."[140] "But while many cases turn on which type of 'forum' is implicated, the important point here is that **viewpoint discrimination** is **impermissible** in them all."[141]

In Tinker v. Des Moines Independent Community School District,[142] the Supreme Court held that a school policy which prohibited wearing of black armbands by students in school to express their opposition to the Viet Nam war, but which did not restrict the wearing of other symbols of political or controversial significance, was unconstitutional. The Court held that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."[143]

In R.A.V. v. City of St. Paul,[144] the Supreme Court struck down an ordinance which provided: "Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor." This ordinance was content-based because it did not prohibit all fighting words but only fighting words "on the basis of race, color, creed, religion or gender."[145] The Court held that the ordinance "goes even beyond mere content discrimination, to actual viewpoint discrimination" because it had the effect of prohibiting abusive language on the part of those promoting racial bigotry while allowing the same abusive language on the part of those promoting tolerance and equality.[146] Even though "fighting words" are not accorded the same constitutional protection as other speech, the Court found that the content-based discrimination against fighting words in connection with "specified disfavored topics" was not justified. "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored

subjects."[147] The government may not restrict speech "based on hostility—or favoritism—towards the underlying message expressed."[148]

EXAMPLE: A street preacher stands on a sidewalk holding a scripture sign, shouting "Jesus saves! Ye must be born again!" Across the street is a teenager holding a car wash sign shouting "Car wash, five dollars! Support the high school band!" A police officer approaches the preacher and says he is not allowed to preach there or he will be arrested for disturbing the peace, but the officer allows the car wash promotion to continue. ***The officer is attempting to enforce a content-based policy, which is almost certainly unconstitutional.*** *(If the officer had prohibited both speakers from presenting their messages, the policy may be content-neutral but may still have been an unconstitutional restraint upon speech.)*

CONTENT-NEUTRAL RESTRICTIONS ON SPEECH

For a content-neutral restriction to be constitutional, it must pass "**intermediate scrutiny**:" it must be shown that it is a reasonable regulation of the time, place, or manner of expression which is narrowly tailored to serve a significant government interest, and it leaves open ample alternative channels of communication.[149] To be content-neutral, the regulation must not only avoid discrimination against a particular viewpoint, but must also avoid discrimination against an entire topic or category of speech.[150]

Significant Government Interest

When balancing the government's reasons for regulating speech against the citizen's fundamental right of free speech, the court must examine whether the regulation furthers a **significant government interest**. The Supreme Court has held that the government may not prohibit distribution of literature on the premise that such prohibition is necessary to control litter or to prevent fraudulent solicitation. In Schneider v. New Jersey, the

Court said that "the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it."[151] In Watchtower Bible & Tract Society of N.Y. v. Stratton,[152] the Supreme Court held that the government's purported interests in preventing fraud or crime and in protecting residents' privacy did not justify an ordinance prohibiting door-to-door canvassing without a permit. On the other hand, the Supreme Court has recognized a significant government interest in abating excessive noise, [153] maintaining public safety and order,[154] and promoting the free flow of traffic on streets and sidewalks.[155]

Reasonable

In Grayned v. City of Rockford,[156] the Supreme Court upheld an ordinance which prohibited any person, while on grounds adjacent to a school building in which class is in session, from making any noise or diversion which tends to disturb the peace or good order of the school. The Court gave the following explanation of how to determine the **reasonableness** of a content-neutral time, place and manner regulation:

> The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' Although a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest. Access to the 'streets, sidewalks, parks, and other similar public places … for the purpose of exercising (First Amendment rights) cannot constitutionally be denied broadly …' Free expression 'must not, in the guise of regulation, be abridged or denied.' [157]

The Court held that the City of Rockford's ordinance was reasonable because it "punishes only conduct which disrupts or is

about to disrupt normal school activities. … Peaceful picketing which does not interfere with the ordinary functioning of the school is permitted. … The antinoise ordinance imposes no such restriction on expressive activity before or after the school session, while the student/faculty 'audience' enters and leaves the school."[158]

In Clark v Community For Creative Non-Violence,[159] the Supreme Court upheld a regulation prohibiting camping on federal park property, which prevented Plaintiffs from creating "tent cities" to bring attention to the plight of the homeless. The Court determined that this was an appropriate content-neutral time, place and manner restriction. "[T]he regulation narrowly focuses on the Government's substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence. To permit camping—using these areas as living accommodations—would be totally inimical to these purposes…"[160]

In Ward v. Rock Against Racism,[161] the Supreme Court upheld a regulation which provided that all performances using amplification at a bandshell in Central Park were required to use equipment and sound technicians provided by the City. One effect of the regulation was that the producers of the performances would not have complete control over the sound production of their performances. The concert producer argued that the regulation was invalid because a less intrusive means of controlling excessive volume could have been enacted. The Court rejected that argument and reaffirmed the rule "that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so."[162] The Court concluded that the "city's sound-amplification guideline is narrowly tailored to serve the substantial and content-neutral governmental interests of avoiding excessive sound volume and providing sufficient amplification within the bandshell concert ground, and the guideline leaves open ample channels of

communication. Accordingly, it is valid under the First Amendment as a reasonable regulation of the place and manner of expression."[163]

Narrowly Tailored

In McCullen v. Coakley,[164] an absolute prohibition of speech or assembly within a 35-foot buffer zone around any entrance, exit or driveway of an abortion clinic was held not to be **narrowly tailored** to the government's asserted interests of safety and access of patients to the clinics. "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier. A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency."[165] The Court gave this description of the rationale for the requirement that a restriction on speech must be narrowly tailored to the government's purpose: "The tailoring requirement does not simply guard against an impermissible desire to censor. The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.'"[166]

Ample Alternative Channels

One of the "intermediate scrutiny" requirements for a content-neutral regulation is that it must leave open **ample alternative channels of communication**.[167] In Amnesty International, USA v. Battle,[168] protestors' rights were violated by a cordon of police officers which prevented their message from reaching their intended audience. The police effectively created a buffer zone of 50 to 75 yards between the Amnesty International protestors and other members of the public, which prevented the public from

seeing and hearing the protestors and prevented the protestors from distributing their literature to the public. The Eleventh Circuit Court stated that inherent in the right to free speech is the right to be heard. "This right is obvious from the grant of the freedom of speech itself; the right to demonstrate would be meaningless if governments were entitled to isolate a demonstration so completely that no one could see or hear it."[169]

A 75-yard security zone imposed by the Coast Guard, which prevented the "Peace Navy" protestors from conveying their message to visitors at San Francisco's "Fleet Week" event, was held unconstitutional in Bay Area Peace Navy v. U.S.,[170] The Ninth Circuit Court found that the restriction rendered the protestors' demonstration "completely ineffective."[171] In determining that the regulation did not leave open ample alternative channels of communication, the court stated that "[a]n alternative is not ample if the speaker is not permitted to reach the intended audience."[172]

EXAMPLE: The President of the United States will make a speech in a local convention center, which is not a Traditional Public Forum, but the sidewalk around the convention center is a Traditional Public Forum. Christian witnesses intend to hold signs with gospel messages outside the convention center. The Secret Service and local law enforcement have designated specified areas of the sidewalk to be available for protest or other free expression, and other areas of the sidewalk are off limits. ***These restrictions may be valid for reasons of security and traffic control.*** *However, if the areas designated for free expression are so remote that the Christians' signs will not be seen by those who gather to attend the speech, the restrictions may be unconstitutional.*

"CAPTIVE AUDIENCE" FREEDOM *FROM* SPEECH?

When examining the government interests that have been asserted to justify restrictions upon speech, some courts and commentators have explored whether there is a right of unwilling audiences to be free from unwanted communication.[173] The

Supreme Court has recognized the interests of individuals to avoid unwelcome speech in their own homes in Rowan v. Post Office Dept.,[174] (upholding federal statute requiring mailers to comply with residents' requests to remove their names from mailing lists), and in Frisby v. Schultz,[175] (upholding an ordinance which prohibited picketing which targeted an individual's residence).[176] However, outside the confines of one's own home the general rule is that it is up to the offended listener to avoid or ignore communications which he finds to be obnoxious.[177]

In Cohen v. California,[178] the Supreme Court reversed the conviction of a man who was arrested in a courthouse for disturbing the peace because he wore a jacket embroidered with an offensive message containing a four-letter curse word in a courthouse. The Court rejected the argument that since Cohen's "distasteful mode of expression was thrust upon unwilling or unsuspecting viewers," that the State's action was justified "in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest."[179] The Court recognized that in the public arena we are often subjected to objectionable speech; but the ability of the government "to shut off discourse solely to protect others from hearing it is … dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."[180] "In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home."[181]

In Erznoznik v. City of Jacksonville, Florida,[182] the Court struck down an ordinance which prohibited drive-in theaters from displaying nudity if the movie screens could be viewed from public streets. "The ordinance seeks only to keep these films from

being seen from public streets and places where the offended viewer readily can avert his eyes. In short, the screen of a drive-in theater is not 'so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.' Thus, we conclude that the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content."[183]

In McCullen v. Coakley,[184] the Supreme Court clearly indicated that protecting unwilling listeners from unwelcome speech is not a sufficient interest to justify restrictions on speech in a traditional public forum:

> It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment's purpose "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail," this aspect of traditional public fora is a virtue, not a vice.[185]

In his concurring opinion, joined by two other Justices, Justice Scalia wrote: "Protecting people from speech they do not want to hear is not a function that the First Amendment allows the government to undertake in the public streets and sidewalks."[186] Justice Scalia wrote that the "unavoidable implication" of the holding is that "protection against unwelcome speech cannot justify restrictions on the use of public streets and sidewalks."[187]

The constitutionality of a restriction on speech designed to "protect" people in a Traditional Public Forum "from efforts by fellow citizens to communicate with them" was squarely presented in Berger v. City of Seattle.[188] A public park Rule prohibited "speech activities" within 30 feet of a "captive audience" – defined as any person or group of persons "waiting in line," "attending …

any … event," or "seated … where foods or beverages are consumed." (City employees and licensed concessionaires were exempt from this Rule.)[189] The Ninth Circuit Court stated that this "captive audience" Rule strikes "at the very core of the precepts underlying the protection of speech" in a Traditional Public Forum.[190] The court concluded that "public park-goers, in general, are not a protectable captive audience for constitutional purposes."[191] After reviewing the relevant Supreme Court cases, including Cohen, Erznoznik, and Hill, the Berger court concluded that "[t]he unique privacy and self-determination interests involved in protecting medical facilities and residences simply do not exist for those waiting in line or having lunch outdoors in a public park."[192]

In Snyder v. Phelps,[193] the father of a U.S. Marine who was killed in Iraq sued Westboro Baptist Church and some of its members for various civil claims in connection with a protest conducted on public property about 1000 feet from his son's funeral. The father claimed that he was a "captive audience" at his son's funeral and therefore the church and its members should not be immune under the First Amendment from liability for their intrusive and hurtful message.[194] The Court rejected the father's argument and held as follows:

> In most circumstances, "the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather,... the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes." … As a general matter, we have applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech. For example, we have upheld a statute allowing a homeowner to restrict the delivery of offensive mail to his home, and an ordinance prohibiting picketing "before or about" any individual's residence.
>
> Here, Westboro stayed well away from the memorial service. Snyder could see no more than the tops of the signs when driving to the funeral. And there is no indication that the picketing

> in any way interfered with the funeral service itself. We decline to expand the captive audience doctrine to the circumstances presented here.[195]

EXAMPLE: An evangelist preaches the gospel on a downtown sidewalk. A complaint is made to the police. An officer responds and orders the preacher to stop preaching because he "must respect the rights of others to not be forced to hear" his message, and the officer threatens to arrest the preacher for disorderly conduct. ***The fact that someone complained about the preaching does not make continuing to preach disorderly conduct.*** *The officer should have told the complaining party that the preacher is not violating the law and he has the right to preach in public. However, if the preacher is harassing and following and badgering an individual who has asked to be left alone and who is trying to get away from the preacher, the officer can probably intervene without violating the constitution.*

PRIOR RESTRAINT UPON SPEECH

When an official or agency of the government determines whether or not speech will be allowed in a public place, or otherwise imposes burdens or restrictions upon speech before that speech can be expressed publicly, there has been a "prior restraint" upon that speech.[196] While a prior restraint upon speech is not automatically unconstitutional, the Supreme Court has held that "[a]ny system of prior restraint, however, 'comes to this Court bearing a heavy presumption against its constitutional validity.'"[197]

The protection of speech from *prior* restraints is greater than the protection of speech from criminal laws which penalize the speaker *after* his message is expressed because "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand."[198]

In Lakewood v. Plain Dealer Pub. Co.,[199] the Supreme Court stated, "even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not condition that speech on obtaining a license or permit

from a government official in that official's boundless discretion."[200] In Lovell v. Griffin[201] and in Cantwell v. Connecticut,[202] the Supreme Court struck down ordinances that required a permit to distribute literature. In Hague v. C.I.O.,[203] the Supreme Court struck down an ordinance which required a license for a public assembly in public places. In Saia v. People of State of New York,[204] the Supreme Court struck down an ordinance which required a permit from the Chief of Police in order to use a sound amplification device.

The Supreme Court has identified several constitutional values which are threatened by the requirement to obtain a permit before one is allowed to convey one's views. In addition to the possibility of government censorship of disfavored views, a permit requirement may: 1) influence a speaker to censor himself or refrain from speaking altogether; 2) interfere with the traditional right to express views anonymously; and 3) impede spontaneous speech.[205]

The Supreme Court has held that certain procedural safeguards must be in place when a permitting scheme imposes prior restraint on protected speech.[206] One required procedural safeguard is that there be some provision for spontaneous speech to be allowed, because for some messages "timing is of the essence… and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all."[207] Another safeguard required by the courts is that a permitting ordinance must include adequate time limits for the permitting authority to grant or deny the requested permit.[208] In addition, where the prior restraint is based on considerations of the content of the speech, there must be a procedure for prompt judicial review in the event the permit is denied or unduly burdened.[209]

In Cox v. State of New Hampshire,[210] the Supreme Court upheld a statute requiring a permit and license fee for parades and processions upon a public street, because the government has the right to control its streets for the safety and convenience of the public. "As regulation of the use of the streets for parades and

processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places."[211] The Court noted that the statute had been narrowly construed by the State courts, emphasizing that "the licensing board was not vested with arbitrary power or an unfettered discretion; that its discretion must be exercised with 'uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination'; that a 'systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways, is the statutory mandate'."[212]

Sometimes a prior restraint upon speech is imposed by a court in the form of an injunction. The Supreme Court has held that in cases where a content-neutral injunction burdening speech is challenged, the standard intermediate scrutiny test is not sufficiently stringent, and the court must determine "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."[213]

EXAMPLE: A church group seeks to use a city-owned bandshell for an evangelistic event in a public park. A local ordinance requires an application for a permit to schedule the use of the bandshell facility. Permits are routinely issued on a non-discriminatory basis to any groups desiring to use the facility. ***The permit requirement is probably a valid regulation to provide for the orderly use of a limited public facility.*** *Different groups desiring to use the bandshell cannot make practical use of the facility at the same time. Although this permit requirement has an effect on speech, it is primarily a regulation on the use of a public facility.*

EXAMPLE: A church group seeks to hold signs with Bible verses at a downtown intersection. A local ordinance requires an application for a permit for anyone seeking to display any kind of sign on a public sidewalk. ***The permit requirement is probably unconstitutional.*** *The church's use of the sidewalk to display its signs does not prevent others*

from using the sidewalk at the same time. This permit requirement is a direct restraint upon speech.

UNBRIDLED DISCRETION OF PUBLIC OFFICIAL TO BURDEN SPEECH

Another ground upon which the courts have invalidated restrictions upon speech is that too much discretion is allowed to a police officer or other public official in determining what speech is allowed and what is prohibited. As stated by the Supreme Court in Thomas v. Chicago Park District:[214] "Of course even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content. We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review."[215]

In Saia v. People of State of New York,[216] the Supreme Court struck down an ordinance which forbade the use of a loud-speaker in a public place except with the permission of the chief of police. The ordinance did not provide any criteria upon which the grant or denial of a permit would be based. The Court stated, "[a]ny abuses which loud-speakers create can be controlled by narrowly drawn statutes. When a city allows an official to ban them in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas."[217]

In Lakewood v. Plain Dealer Pub. Co.,[218] the Supreme Court held that an ordinance which granted the mayor sole discretion whether to permit the use of newsstands for the distribution of newspapers was unconstitutional. The Court stated that "in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship."[219] In its

discussion of the reasons that the courts allow a facial challenge to the ordinance by an affected party who has not applied for and been denied a permit, the Lakewood Court explained:

> "[T]he absence of express standards makes it difficult to distinguish, "as applied," between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.[220]

In Burk v. Augusta-Richmond County,[221] a permit ordinance for public demonstrations which required the applicant to provide an indemnification agreement "in a form satisfactory to" the city attorney as a prerequisite for a permit was held to be unconstitutional because it granted excessive discretion to a permitting official. The Circuit Court stated, "the indemnification provision in the Augusta-Richmond Ordinance fails to provide adequate standards. It requires an indemnification agreement 'in a form satisfactory to the attorney for Augusta, Georgia,' …and gives no guidance regarding what should be considered 'satisfactory.' Thus, the requirement is standardless and leaves acceptance or rejection of indemnification agreements 'to the whim of the administrator.'"[222]

EXAMPLE: A preacher proclaims the gospel of Jesus Christ on a public sidewalk. Upon receiving a complaint, a police officer investigates and determines that, in the officer's opinion, the preacher is too loud. A local ordinance provides that upon investigating a complaint of a disturbance, police officers are empowered to take any action necessary to restore peace and order. The ordinance does not include objective standards for enforcement. The officer orders the preacher to stop preaching. ***The ordinance is unconstitutional because it provides broad discretion to the officer without prescribing limits to the officer's authority.***

VAGUENESS

Courts have held that a restriction upon speech is unconstitutional if the regulation is too vague. In Grayned v. City of Rockford,[223] the Supreme Court explained the concept of unconstitutionally vague regulations:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. 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.'[224]

The Grayned Court found that an ordinance prohibiting any noise outside a school building "which disturbs or tends to disturb the peace or good order" of the school[225] was not impermissibly vague, although this was a "close" question.[226] The Court stated that, "[w]ere we left with just the words of the ordinance, we might be troubled by the imprecision of the phrase 'tends to disturb.'"[227] However, since the Supreme Court of Illinois had construed similar language in an ordinance prohibiting "a 'diversion tending to disturb the peace,'" as permitting a conviction "only where there was 'imminent threat of violence,'" the Grayned Court determined it was proper to construe the challenged noise ordinance as prohibiting "only actual or imminent interference with the 'peace or good order' of the school."[228]

In Edwards v. South Carolina,[229] a group of 187 civil rights protestors were arrested for the commonlaw crime of breach of the peace during a protest upon the South Carolina State House grounds, an area of two city blocks open to the public. The protestors walked through the grounds, many carrying signs, and a crowd of 200 to 300 onlookers gathered.[230] The police told the protestors that "they would be arrested if they did not disperse within 15 minutes. Instead of dispersing, the petitioners engaged in what the City Manager described as 'boisterous,' 'loud,' and 'flamboyant' conduct, which, as his later testimony made clear, consisted of listening to a 'religious harangue' by one of their leaders, and loudly singing 'The Star Spangled Banner' and other patriotic and religious songs, while stamping their feet and clapping their hands. After 15 minutes had passed, the police arrested the petitioners and marched them off to jail."[231] The U.S. Supreme Court overturned the protestors' convictions. "These petitioners were convicted of an offense so generalized as to be, in the words of the South Carolina Supreme Court, 'not susceptible of exact definition.' And they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection."[232] A law which is "so vague and indefinite" that it permits the government to punish the exercise of fundamental First Amendment rights is "repugnant to the guaranty of liberty" contained in our Constitution.[233]

EXAMPLE: A preacher is arrested in a public park for violating an ordinance that prohibits anyone from making "any unnecessary noise which is likely to annoy another person," because the preacher proclaimed that "there is not a just man upon earth, that doeth good, and sinneth not." ***The ordinance is unconstitutionally vague, because the speaker cannot reasonably predict what speech will be deemed "unnecessary" and "likely to annoy" another person.***

OVERBREADTH

A government restriction upon speech is unconstitutional if it is held to be overbroad. Often a regulation that is challenged for vagueness is also challenged for overbreadth, but these are two distinct concepts. "A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct."[234] The question is "whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments."[235] "According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech."[236] In Grayned v. City of Rockford,[237] the challenged noise ordinance was limited to prohibit certain types of activities at specific times and at specific places and that would have tended to disrupt the function of the schools. The Court concluded that the ordinance was not overbroad on its face.[238]

In Cox v Louisiana,[239] B. Elton Cox, a civil rights leader, was arrested and convicted of disturbing the peace in connection with a protest in which Cox urged a group of college students to sit in at segregated lunch counters in Baton Rouge, Louisiana. The Supreme Court struck down Louisiana's disturbing the peace statute, which provided that it was a crime to congregate with others "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned," if the offending party refuses to move on after having been ordered to do so by a law enforcement officer.[240] The Louisiana Supreme Court had "defined the term 'breach of the peace' as 'to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet.'"[241] The U. S. Supreme Court found that under that definition the Louisiana statute "would allow persons to be punished merely for peacefully expressing unpopular views."[242] The Court concluded that "the statute is unconstitutional in that it sweeps within its broad scope activities that are constitutionally protected free speech and assembly."[243]

In Board of Airport Commissioners of City of Los Angeles v. Jews For Jesus,[244] the Supreme Court struck down a regulation that banned all "First Amendment activities" at the Los Angeles airport. "Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face 'because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.' A statute may be invalidated on its face, however, only if the overbreadth is 'substantial.'"[245] The regulation at issue in that case was so broad that it purported to create "a virtual 'First Amendment Free Zone'" at the airport.[246]

\EXAMPLE: A county park regulation provides for a "Free Speech Zone" in a portion of the park where individuals or groups may make speeches, distribute literature, solicit signatures on petitions, and approach others to attempt to proselytize or persuade them; and prohibits such activities in all other areas of the park. This regulation is probably unconstitutionally overbroad because it essentially turns the rest of the park into a "No Free Speech Zone." However, if certain speech activities are truly incompatible with the primary purposes of certain areas of the park, the county may be able to validly prohibit those speech activities from those areas.[247]

EQUAL PROTECTION & SELECTIVE ENFORCEMENT

Government restrictions upon speech are sometimes challenged as violating the guarantee equal protection of the laws contained in the Fifth and Fourteenth Amendments to the U. S. Constitution.[248] "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."[249]

Where a government regulation impinges upon a fundamental right, such as freedom of speech, the Court will apply "strict scrutiny" when examining whether that regulation violates Equal Protection: "When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized."[250] In such cases, "it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest."[251]

But even if a law does not violate Equal Protection on its face, discriminatory enforcement of that law may violate Equal Protection. In Niemotko v. Maryland,[252] a group of Jehovah's Witnesses were arrested for disorderly conduct for conducting "Bible talks" in a city park without a permit. The Court found that "the use of the park was denied because of the City Council's dislike for or disagreement with the Witnesses or their views."[253] The Court held that the "completely arbitrary and discriminatory refusal to grant the permits was a denial of equal protection."[254]

In Police Dept. of the City of Chicago v. Mosley,[255] a disorderly conduct ordinance that prohibited picketing or demonstrating on a public way within 150 feet of a school, but exempted "the peaceful picketing of any school involved in a labor dispute," violated the Equal Protection clause. The Supreme Court stated, "under the *Equal Protection Clause*, not to mention the *First Amendment* itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities."[256]

To establish a claim of discriminatory enforcement that violates Equal Protection, a claimant must prove both that the system of enforcement "had a discriminatory effect and that it

was motivated by a discriminatory purpose."[257] To show that the decision-maker who instituted or enforced a discriminatory policy had a discriminatory purpose, the claimant must show that the decision-maker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[258]

In those situations in which it can be shown that a law discriminates based on the content of the speech, or that the law was enforced in a discriminatory manner based on the content of the speech, that law (or the discriminatory enforcement of it) may be challenged under the First Amendment as an impermissible content-based or viewpoint-based restriction of speech.[259]

EXAMPLE: A preacher preaches on a public sidewalk in a nightclub district where loud music is projected from several bars. A police officer orders the preacher to stop preaching, claiming that he is violating a local noise ordinance which prohibits unreasonably loud noise, but the officer takes no action to enforce the ordinance against the bars. Although the noise ordinance as written does not violate the Equal Protection Clause, the officer's selective enforcement of the ordinance may violate the preacher's right to equal protection.

UNCONSTITUTIONAL CONDITION

A regulation restricting or burdening speech may also be invalid as an "unconstitutional condition." An unconstitutional condition occurs when "the government conditions receipt of a benefit or privilege on the relinquishment of a constitutional right."[260] In Bourgeois v. Peters, the court held that the magnetometer search of protestors was an unconstitutional condition: "This case presents an especially malignant unconstitutional condition because citizens are being required to surrender a constitutional right—freedom from unreasonable searches and seizures—not merely to receive a discretionary benefit but to exercise two other fundamental rights—freedom of speech and assembly."[261] The court explained:

> [T]he very purpose of the unconstitutional conditions doctrine is to prevent the Government from subtly pressuring citizens, whether purposely or inadvertently, into surrendering their rights. Similarly, the existence of other vehicles through which protestors could voice their disagreement with the SOA (e.g., letters to Congress) does not in any way alleviate the unconstitutional conditions problem. "The applicability of the unconstitutional conditions doctrine does not turn on whether conferral of the discretionary benefit is conditioned upon completely foregoing the right to engage in expression or instead upon foregoing the right to engage in that expression in certain places or manners or at certain times."[262]

NOISE ORDINANCES

All of the foregoing principles apply to noise ordinances. Courts are wary of the use of noise regulations to suppress speech. "In this case a permit is denied because some persons were said to have found the sound annoying. In the next one a permit may be denied because some people find the ideas annoying. Annoyance at ideas can be cloaked in annoyance at sound."[263]

The right of free speech includes the right to use amplification.[264] The government may place reasonable restrictions on the use of amplification, including requiring permits, regulating volume, or designating times and places where amplification is not allowed.[265] Any such restrictions must be

reasonable and must be narrowly tailored to achieve a significant government interest.[266] Ordinances which effectively imposed a total ban on amplification have been held unconstitutional.[267] Permit requirements raise issues of prior restraint, and will be held unconstitutional if sufficient guidelines are not included to limit the permitting authority's discretion.[268]

Generally the courts have recognized that the government has a significant interest in abating excessive noise.[269] Typically a noise ordinance which seeks to control the volume of sounds at certain times and locations will be deemed to be a content-neutral time, place or manner restriction.[270] However, where the ordinance prohibits noises described as "annoying" and "unnecessary," some courts have held that the ordinance is not content-neutral because it invites consideration of the content of the speech.[271] In addition, if the noise ordinance makes exceptions based on the identity of the person producing the sound or based on the type of message being conveyed, it may be deemed content-based.[272]

Whether a particular noise ordinance is narrowly tailored to achieve the government's interest, or whether it is impermissibly vague or overbroad, are often difficult and complicated questions, and a survey of cases reveals inconsistent results.[273]

Noise ordinances often use adjectives such as "loud," "disturbing," "annoying," "unnecessary," "unusual," or "unreasonable" to describe the noise that is to be prohibited. Each of these terms, standing alone or in combination with each other, can be viewed as vague and subjective, and many courts have held that such terms will render an ordinance unconstitutionally vague or overbroad.[274] However, a court reviewing a noise ordinance may determine that other language in the ordinance provides clarity and definiteness to these terms, or the court may construe the ordinance in a limiting fashion so that these terms will be held to have a sufficiently narrow and objective meaning.[275]

In Kovacs v. Cooper,[276] the Supreme Court upheld a ban on sound trucks "amplified to a loud and raucous volume" from the public streets. The defendant who was convicted under that ordinance argued that the phrase "loud and raucous" was "so vague, obscure and indefinite as to be unenforceable."[277] The Supreme Court held that although the words "loud and raucous" are "abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden."[278]

The phrase "tends to disturb the peace or good order" of a school session in the Rockford, Illinois noise ordinance was presented to the Supreme Court in Grayned v. City of Rockford.[279] Upon finding that based on Illinois court decisions it was appropriate to construe the phrase "tends to disturb" so that it proscribed "only actual or imminent interference with the 'peace or good order' of the school,"[280] the Court held that the ordinance thus construed was not impermissibly vague. The Court did not specifically state whether the phrase "tends to disturb" would be valid or invalid in a noise ordinance without the limiting construction given to that phrase in this case, but the Court did indicate that it was a "close" question in this case.[281]

A noise ordinance which restricts volume based on objective criteria such as decibel measurements or wattage levels of amplification will generally be accepted as not impermissibly vague.[282] However, if the decibel or wattage level provided in the ordinance is unduly restrictive, the ordinance may be held unconstitutional as overbroad, unreasonable or not narrowly tailored to achieve the government's purpose.[283] In addition, if the ordinance fails to provide sufficient guidelines for measuring decibel levels for enforcement, the ordinance may be struck down as vague or overbroad.[284]

CONCLUSION

The right to preach, display religious signs or banners, distribute religious literature, or have conversations on religious topics in public parks and sidewalks is a fundamental right protected by the First Amendment. This liberty is not absolute, but any attempted regulation or restriction burdening protected speech must pass several constitutional tests. If the regulation is based on the content of the speech, it will not be upheld unless it is necessary to serve a compelling government interest and it is narrowly drawn to achieve that purpose. If the regulation is content-neutral, it must govern only the time, place or manner of the speech and must be narrowly tailored to serve a significant government interest, and it must leave open ample alternative channels of communication.

In addition, a restriction on speech may not be a prior restraint based on the content of the speech nor based on anticipated audience reaction to the content of the speech. A restriction on speech must have sufficient objective criteria so that application or enforcement may not be left to the unbridled discretion of a police officer or other public official. A regulation must not be so vague that a person of ordinary intelligence would not know what is and what is not prohibited. It must not be so broad that it prohibits a substantial amount of protected speech. It must not give effect to a governmental purpose to discriminate against an identifiable group. And it must not condition the exercise of the right to free speech upon the relinquishment of a constitutional right.

These constitutional restrictions upon the power of government to abridge protected speech apply even where a permit has been issued to a private entity to hold a public event in a Tradition Public Forum. If the event is free and open to the public, any member of the public may enter without forfeiting his right to freedom of expression. However, a member of the public may not disrupt the event nor interfere with the event organizer's right to express its own message.

Some restrictions upon speech may be justified for the peace and order of society, but government censorship of ideas strikes at the very core of our civil liberties. Our constitution does not allow our government to stifle expression of ideas because they are unpopular, offensive, controversial or unsettling. The First Amendment demands that, as a free society, we must tolerate the expression of competing and controversial views in the public arena.

***

Endnotes

[1] Thornhill v. Alabama, 310 U.S. 88, 95 (1940).

[2] Manhattan Cmty. Access Corp. v. Halleck, 139 S.Ct. 1921, 1928 (2019).

[3] Konigsberg v. State Bar of California, 366 U.S. 36, 49 (1961).

[4] Marsh v. Alabama, 326 U.S. 501 (1946); Terminiello v. City of Chicago, 337 U.S. 1 (1949).

[5] U.S. v Williams, 553 U.S. 285 (2008).

[6] Kunz v. People of State of New York, 340 U.S. 290 (1951).

[7] U.S. v. Grace, 461 U.S. 171 (1983).

[8] Lovell v. Griffin, 303 U.S. 444 (1938); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State of New Jersey, 308 U.S. 147 (1939), Murdock v. Pennsylvania, 319 U.S. 105 (1943).

[9] Kunz, 340 U.S. 290 (1951); Gathright v. City of Portland, Oregon, 439 F.3d 573 (9th Cir. 2006).

[10] Cantwell, 310 U.S. 296 (1940); Kunz, 340 U.S. 290 (1951.

[11] Snyder v. Phelps, 562 U.S. 443, 458 (2011)(quoting Texas v. Johnson, 491 U.S. 397, 414 (1989).

[12] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[13] NAACP v. Clairborne Hardware Co., 458 U.S. 886 (1982). See below discussion and cases cited in section on "Fighting Words."

[14] Schenck v. United States, 249 U.S. 47, 52 (1919).

[15] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253 (2002) *quoting* Hess v. Indiana, 414 U. S. 105, 108 (1973).

[16] U.S. v Stevens, 559 U.S. 460, 468-469 (2010) quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-71 (1942)(citations omitted). The Court cited Roth v. United States, 354 U.S. 476 (1957)(obscenity), Beauharnais v. Illinois, 343 U.S. 250 (1952)(defamation), Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748(1976)(fraud), Brandenburg v. Ohio, 395 U.S. 444 (1969)(incitement), and Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (speech integral to criminal conduct).

[17] In Brown v. Ent, Merch. Assn., 564 U.S. 768 (2011) the Supreme Court stated, "'Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.' But without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription,"

a legislature may not determine a new class of speech to be beyond the scope of First Amendment protection. 564 U.S. at 792 (2011) (quoting U.S. v. Stevens, 559 U.S. 460 (2010))(citations omitted).

[18] 559 U.S. 460 (2010).

[19] Id. at 470.

[20] Id. The Court explained: "The *First Amendment's* guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The *First Amendment* itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it."

[21] 564 U.S.786 (2011).

[22] Id at 794.

[23] Id at 791.

[24] 496 U.S. 310 (1990).

[25] Id. at 315.

[26] 567 U.S. 709 (2012).

[27] Id at 718.

[28] H. Res. 569 introduced in the 114th Congress on December 17, 2015.

[29] Washington Post opinion article by contributor Eugene Volokh, April 21, 2017 https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/21/no-gov-dean-there-is-no-hate-speech-exception-to-the-first-amendment/

[30] On the other hand, "Fighting Words" are not protected by the First Amendment. See below discussion and cases cited in section on Fighting Words.

[31] Matal v. Tam, 528 U.S. ___, 137, S.Ct. 1744, 1764 (2017)(quoting U.S. v Schwimmer, 279 U.S. 644, 655(1929), Holmes, J., dissenting).

[32] 528 U.S. ___, 137, S.Ct. 1744 (2017).

[33] Id. at 1751.

[34] Id.

[35] Iancu v. Brunetti, 139 S.Ct. 2294, 2299 (2019) (citation omitted).

[36] Id.

[37] Masterpiece Cakeshop, Ltd. V. Colorado Civil Rights Com'n, 138 S.Ct. 1719, 1731(2018)(citations omitted).

[38] FCC v. Pacifica Foundation, 438 U. S. 726, 745 (1978).

[39] Street v. New York, 394 U.S. 576, 592 (1969).

[40] Rosenbaum v. City of San Francisco, 484 F.3d 1142, 1158 (9th Cir. 2007); Startzell v. Philadelphia, 533 F.3d 183, 200 (3d Cir. 2008).

[41] Bible Believers v. Wayne County, 805 F.3d 228 (6th Cir. 2015).

[42] Terminiello v. City of Chicago, 337 U.S. 1 (1949); Gregory v. City of Chicago, 394 U.S. 111 (1969).

[43] Brown v. State of Louisiana, 383 U.S. at 133 footnote 1 (citations omitted).

[44] Cox v. Louisiana, 379 U.S. 536, 551 (1965) (quoting Watson v. City of Memphis, 373 U.S. 526, 535 (1963))

[45] 337 U.S. 1 (1949).

[46] Id. at 4-5 (citations omitted).

[47] 505 U.S. 123 (1992).

[48] Id. at 134-135 (footnote and citations omitted).

[49] 393 U.S. 503 (1969).

[50] Id at 508-09 (citation omitted).

[51] *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 880 (1997) (Portion of the Communications Decency Act that prohibited knowingly transmitting indecent materials over the internet to minors was struck down as allowing a "heckler's veto" because any opponent of indecent speech could log on and inform the participants that a minor was now present, and thereby censor the online discussion.

[52] Cohen v. California, 403 U.S. 15, 20 (1971) (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

[53] Street v. New York, 394 U.S. 576, 592 (1969)(quoting Chaplinsky).

[54] 427 F.3d 197 (3d Cir. 2005).

[55] Id. at 205.

[56] Id.

[57] Id.

[58] Id.

[59] 2009 U.S. Dist. LEXIS 59919 (S.D. FL 2009).

[60] Id. at 3. *See also* Bethel v. City of Mobile, Ala, 2011 WL 1298130 (S. D. Ala April 5, 2011)(unpublished) *aff'd*, 2011 U.S. App. LEXIS 24042 (11th Cir. Ala. Dec. 2, 2011)(Preacher repeatedly called a 13 year-old girl a "whore" and a "slut" in the presence of the girl's mother at a Mardi Gras celebration. The District Court found that this verbal confrontation at least arguably constituted "fighting words," so that arresting Police Officer was entitled to qualified immunity for arresting the preacher for disorderly conduct.)

[61] Id. at 17.

[62] 460 U.S. 37 (1983).

[63] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788 (1985); Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings College of the Law v. Martinez, 561 U.S. 661 (2010); Minnesota Voters Alliance v. Mansky, 138 S.Ct. 1876 (2018); American Freedom Defense Initiative v. King County, 194 S.Ct. 1022 (2016) Thomas, J. *dissenting from denial of cert.*

[64] Perry, 460 U.S. at 45 (citations omitted).

[65] 582 U.S. ___, 137 S.Ct. 1730 (2017).

[66] Id at 1735 (2017)(citation omitted).

[67] Id. It is important to note that: (a) the Court did not expressly hold that the Internet is a Traditional Public Forum; (b) the government does not *own* the Internet; and (c) at issue in this case was the government's *restrictions upon access* to the Internet. Different considerations would apply to restrictions upon speech imposed by a private entity for its own website. "[W]hen a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor. The private entity may thus exercise editorial discretion over the speech and speakers in the forum." Manhattan Cmty. Access Corp. v. Halleck, 139 S.Ct. at 1930.

[68] Perry, 460 U.S. at 45.

[69] Id at 46.

[70] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788 (1985); Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings College of the Law v. Martinez, 561 U.S. 661 (2010); Minnesota Voters Alliance v. Mansky, 138 S.Ct. 1876 (2018); American Freedom Defense Initiative v. King County, 194 S.Ct. 1022 (2016) Thomas, J. *dissenting from denial of cert.*

[71] Perry, 460 U.S. at 46 (citing U.S. Postal Serv. v. Greenburgh Civic Ass'n, 453 U.S. 114 at 131, n.7 (1981)).

[72] Id at 53 (footnote omitted).

[73] Id at 49 (footnote omitted).

[74] Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings College of the Law v. Martinez, 561 U.S. 661 (2010)(Public university law school limited its Registered Student Organizations to those which would adhere to the school's nondiscrimination policy. Court held that the school's RSO program was a "limited public forum" [i.e. a nonpublic forum] and applied the following test: "Any access barrier must be reasonable and viewpoint neutral." Id at 679 (citations omitted).

[75] 138 S.Ct. 1876 (2018).

[76] Id at 1886 (citation omitted).(The Court concluded that the ban on political apparel, without adequate definition of what was included in the term "political," was not reasonable.)

[77] Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 811 (1985).

[78] 307 U.S. 496 (1939).

[79] Id at 515.

[80] Packingham v. North Carolina, 582 U.S. ___, 137 S.Ct. 1730, 1735 (2017)(citation omitted).

[81] 461 U.S. 171 (1983).

[82] 326 U.S. 501 (1946).

[83] Id. at 503.

[84] 308 F.3d 1114 (10th Cir. 2002).

[85] 383 F.3d 449 (6th Cir. 2004).

[86] 934 F.2d 461 (6th Cir. 2019).

[87] Id at 468 (citations omitted).

[88] 497 U.S. 720 (1990).

[89] Greer v. Spock, 424 U.S. 828 (1976).

[90] 333 F.3d 1092 (9th Cir. 2003).

[91] Parks v. City of Columbus, Ohio, 395 F.3d 643 (6th Cir. 2005).

[92] Startzell v. City of Philadelphia, 533 F.3d 183 (3d Cir.2008); Dietrich v. John Ascuaga's Nugget, 548 F.3d 892 (9th Cir. 2008).

[93] 395 F.3d 643 (6th Cir. 2005).

[94] Id at 651-652.

[95] 515 U.S. 557 (1995).

[96] 99 F.3d 194 (6th Cir. 1996).

[97] Parks, 395 F. 3d at 651 (quoting Sistrunk, 99 F. 3d at 200.)

[98] 439 F.3d 573 (9th Cir. 2006).

[99] Id. at 575.

[100] Id. at 578.

[101] 533 F.3d 183 (3d Cir. 2008).

[102] Id. at 194.

[103] Id. at 196 (citation omitted, quoting Hurley, 515 U.S. at 573).

[104] Id. at 199.

[105] Id.

[106] 481 F.3d 591 (8th Cir. 2007).

[107] 430 F. Supp. 2d 411 (M.D. Pa. 2006).

[108] Teesdale v. City of Chicago, 690 F.3d 829, 834 (7th Cir. 2012).

[109] Reed v. Town of Gilbert, Ariz., 135 S.Ct. 2218 (2015)(citations omitted).

[110] Reed, 135 S.Ct. at 2227 (citation omitted).

[111] Id.

[112] Id.

[113] Id at 2228.

[114] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)(citations omitted, quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

[115] Turner Broadcasting System, Inc. v. Fed. Communications Comm'n., 512 U.S. 622, 642 (1994). At issue was a federal law which required cable operators to carry the signals of a specified number of local broadcast television stations. The Court found that the law was content-neutral.

[116] 573 U.S. 464 (2014).

[117] Id at 497 (Scalia, J concurring, joined by Kennedy and Thomas) and at 510 (Alito, J concurring).

[118] Id at 502 (Scalia, J concurring, joined by Kennedy and Thomas).

[119] 387 F.3d 1303, (11th Cir. 2004).

[120] Id. at 1320.

[121] Id.

[122] 410 F.3d 1250 (11th Cir. 2005).

[123] Id at 1266 (footnote omitted).

[124] 365 F.3d 1247 (11th Cir. 2004).

[125] Id. at 1251.

[126] Perry, 460 U.S. at 45 (emphasis added).

[127] R.A.V. v. City of St Paul, 505 U.S. 377, 382 (1992) (citations omitted).

[128] U.S. v. Playboy Entertainment Group, 529 U.S. 803, 813 (2000).

[129] Id. (citing Reno v. American Civil Liberties Union, 521 U.S. 844, 874 (1997)).

[130] Brown v. Ent. Merch. Assn., 564 U.S. at 799 (citations omitted).

[131] Id at 804. The State's evidence failed to establish that violent video games cause harm to children. Id at 799.

[132] Id at 805. The Court held that the law was ***underinclusive*** with respect to the State's goal of protecting children from harm because it excluded other forms of violent entertainment besides video games, and because it gave a parent or aunt or uncle of the child authority to override the State's prohibition. Id at 803. The Court held it was also ***overinclusive*** because with respect to the State's goal of aiding "parental authority," the effect of the law was only to aid the authority of those parents who agree with the State's view on restricting such content: "While some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want." Id at 804 (emphasis in original).

[133] Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992) (citations omitted).

[134] 504 U.S. 191 (1992).

[135] Id. at 199.

[136] Id.

[137] Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829, (1995)(citations omitted).

[138] Minn. Voters Alliance v. Mansky, 138 S.Ct. at 1885 (citing Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009)(emphasis added)).

[139] Manhattan Cmty. Access Corp. v. Halleck, 139 S.Ct. at 1930.

[140] Matal v. Tam, 137 S.Ct. at 1763 (citations omitted)(emphasis added).

[141] Manhattan Cmty. Access Corp. v. Halleck, 139 S.Ct. at 1936 (Sotomayor, J. dissenting, citing Good News Club v. Milford Central School, 533 U.S. 98, 106, (2001)(emphasis added)).

[142] 393 U.S. 503 (1969).

[143] Id at 511.

[144] 505 U.S. 377, (1992).

[145] Id, at 391.

[146] Id.

[147] Id.

[148] Id at 386.

[149] Perry, 460 U.S. at 45 (emphasis added); Ward v. Rock Against Racism, 491 U. S. 781 (1989).

[150] Consol. Edison Co. of New York v Pub. Serv. Comm'n, 447 U.S. 530 (1980) (striking down policy which prohibited inserting into monthly utility bills flyers discussing "controversial issues of public policy"); Widmar v. Vincent, 454 U.S. 263 (1981) (striking down a university policy that denied "equal access"

to school facilities for religious groups); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995)(holding that a university may not withhold benefits from a Christian student organization because of the organization's promotion of religious beliefs); Adler v. Duval County School Board, 250 F.3d 1330 (11th Cir. 2001), *cert. denied*, 534 U.S. 1065 (2001) (upholding policy permitting student-initiated prayer at a graduation ceremony).

[151] 308 U.S. at 162.

[152] 536 U.S. 150 (2002).

[153] Ward v. Rock Against Racism, 491 U.S. 791 (1989).

[154] McCullen v. Coakley, 573 U.S. at 486.

[155] Id.

[156] 408 U.S. 104 (1972).

[157] Id. at 116-117 (footnotes and citation omitted).

[158] Id. at 119-120.

[159] 468 U.S. 288 (1984).

[160] Id. at 296.

[161] 491 U.S. 781 (1989).

[162] Id. at 798 (footnote omitted).

[163] Id. at 803.

[164] 573 U.S. 464 (2014).

[165] Id at 495.

[166] Id.

[167] Perry, 460 U.S. at 45.

[168] 559 F.3d 1170 (11th Cir. 2009).

[169] Id. at 1183.

[170] 914 F.2d 1224 (9th Cir. 1990).

[171] Id. at 1229.

[172] Id. (internal quotation marks omitted). Likewise, in U.S. v. Baugh, 187 F.3d 1037, 1044 (9th Cir. 1999), the Ninth Circuit Court held that by restricting protestors to a "First Amendment area" which was 150 to 175 yards away from the Visitors Center where the protestors' intended audience was located, the city had failed to allow ample alternative means of communication to the protestors.

[173] Haiman, Speech v. Privacy: Is There A Right Not To Be Spoken To?, 67 Nw. U. L. Rev. (1972); Hill v. Colorado, 530 U.S. 703 (2000)(Upholding a statute which prohibited any person within 100 feet of a health care facility

entrance from approaching within 8 feet of another person, without that person's consent, in order to distribute literature, display a sign, or engage in oral protest, education or counseling with that person. Although the Court specifically declined to address whether anyone has a "right" to avoid unpopular speech in a public forum, the Court recognized that in circumstances where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure," an unwilling listener has a legitimate "interest" in avoiding unwelcome speech. Id at 718. The Court described the overly intrusive manner of the unwelcome speech as "the harassment, the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching that can accompany an unwelcome approach within eight feet of a patient by a person wishing to argue vociferously face-to-face and perhaps thrust an undesired handbill upon her. Id at 724.)

[174] 397 U.S. 728, 738 (1970)

[175] 487 U.S. 474 (1988)

[176] (In contrast, in Carey v. Brown, 447 U.S. 455 (1980) the Supreme Court struck down an ordinance that banned all picketing, other than labor picketing, in residential neighborhoods.)

[177] Cohen v. California, 403 U.S. 15 (1971); Erznoznik v. City of Jacksonville, Florida, 422 U.S. 205 (1975). *See* Hill v. Colorado, 530 U.S. at 725-753, Scalia, J dissenting: "As the universally understood state of First Amendment law is described in a leading treatise: "Outside the home, the burden is generally on the observer or listener to avert his eyes or plug his ears against the verbal assaults, lurid advertisements, tawdry books and magazines, and other 'offensive' intrusions which increasingly attend urban life." L. Tribe, American Constitutional Law §12-19, p. 948 (2d ed. 1988)."

[178] 403 U.S. 15 (1971).

[179] Id. at 21.

[180] Id.

[181] Id. at 21-22 (citation omitted).

[182] 422 U.S. 205 (1975).

[183] Id at 212 (citation and footnote omitted).

[184] 573 U.S. 464 (2014).

[185] Id at 476 (quoting FCC v. League of Women Voters of Cal., 468 U. S. 364, 377 (1984)).

[186] Id 505 (Scalia, J concurring).

[187] Id. (Scalia, J concurring).

[188] 569 F.3d 1029, 1053 (9th Cir. 2009).

[189] Id. at 1053.

[190] Id.

[191] Id. at 1054.

[192] Id. at 1054. (The Berger court distinguished Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), which upheld content-based restrictions on advertising posters in public street cars where passengers are a "captive audience." The Berger court emphasized that in Lehman the Supreme Court determined "that a public street car is not a 'First Amendment forum' like a 'park,' 'where First Amendment values inalterably prevail.' 569 F.3d at 1054 (quoting Lehman, 418 U.S. at 302-04).)

[193] 562 U.S. 443 (2011).

[194] Id. at 459.

[195] Id. at 459-460 (citations omitted).

[196] Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147 (1969).

[197] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975)(citations omitted).

[198] Id. at 559.

[199] 486 U.S. 750 (1988).

[200] Id at 764.

[201] 303 U.S. 444 (1938).

[202] 310 U.S. 296 (1940).

[203] 307 U.S. 496 (1939).

[204] 334 U.S. 558 (1948).

[205] Watchtower Bible And Tract Soc'y of N.Y. v. Stratton, 536 U.S. 150 (2002).

[206] Freedman v. Maryland, 380 U.S. 51 (1965); Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992).

[207] Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147, 163 (1969)(concurring opinion). *See also* Church of the American Knights of the Ku Klux Klan v. City of Gary, Indiana, 334 F.3d 676 (7th Cir. 2003).

[208] FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 226-29, (1990)(O'Connor, J., plurality opinion)(overruled in part on other grounds by City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774 (2004); Solantic, LLC, v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005); U.S. v. Fransden, 212 F.3d 1231 (11th Cir. 2000).

[209] Freedman v. Maryland, 380 U.S. 51 (1965); Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992).

[210] 312 U.S. 569 (1941).

[211] Id. at 574.

[212] Id. at 576. *See also* Thomas v. Chicago Park Dist., 534 U.S. 316 (2002), (ordinance requiring a permit prior to staging large events in a public park was not an impermissible prior restraint upon speech, but was merely exercise of traditional authority to "coordinate multiple uses of limited space" and for other regulatory purposes that had nothing to do with expressive activity). *But see* Forsyth County v Nationalist Movement, limiting Cox and invalidating an ordinance where the amount of the permit fee was subject to a discretionary determination by the city official.

[213] Madsen v. Women's Health Cent., Inc., 512 U.S. 753, 765 (1994); Schenck v. Pro-Choice Network Western New York, 519 U.S. 357 (1997).

[214] 534 U.S. 316 (2002).

[215] Id at 323 (citations omitted).

[216] 334 U.S. 558 (1948).

[217] Id. at 562.

[218] 486 U.S. 750 (1988).

[219] Id. at 757.

[220] Id. at 758 (citations omitted).

[221] 365 F.3d 1247 (11th Cir. 2004).

[222] Id. at 1256 (citations omitted).

[223] 408 U.S. 104 (1972).

[224] Id. at 108-109 (footnotes omitted).

[225] Id at 108.

[226] Id. at 109.

[227] Id. at 111.

[228] Id. at 111-112 (footnotes omitted).

[229] 372 U.S. 229 (1963).

[230] Id. at 231.

[231] Id. at 233.(footnotes omitted).

[232] Id. at 237.

[233] Id. at 238.

[234] Grayned, 408 U.S. at 114 (footnote omitted).

[235] Id at 115.

[236] U.S. v. Williams, 553 U.S. at 292.

[237] 408 U.S. 104 (1972).

[238] Id. at 121.

[239] 379 U.S. 536 (1965).

[240] Id. at 551.

[241] Id.(citation omitted).

[242] Id.

[243] Id. at 552.

[244] 482 U.S. 569 (1987).

[245] Id. at 574 (citations omitted).

[246] Id.

[247] *See* Frandsen v. Dept. of Environmental Protection, 829 So.2d 267 (Fla. 1st DCA 2002), *pet. review denied* 845 So.2d 899 (Fla. 2003), *cert. denied* 540 U.S. 948 (2003), upholding a restriction on "free speech activities" including "public speaking, performances, distribution of printed material, displays, and signs" in certain areas of a state park where visitors come to enjoy a "unique recreational experience based on the natural environment," because in those areas such speech activities would undermine the ability of the park visitors to appreciate the sights and sounds of the park's unique environment; The Naturist Soc'y, Inc. v. Fillyaw, 858 F. Supp. 1559 (S.D. Fla. 1994).

[248] Although the Fifth Amendment, unlike the Fourteenth Amendment, does not contain an Equal Protection Clause, the Supreme Court has held that it contains an "Equal Protection component." Wayte v. U.S., 470 U.S. 598, 608 at footnote 9 (1985)(citations omitted).

[249] City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985)(quoting Plyler v. Doe, 457 U.S. 202, 216 (1982).

[250] Carey v. Brown, 447 U.S. 455, 461-62 (1980)(citations omitted).

[251] Plyler v. Doe, 457 U.S. 202, 217 (1982).

[252] 340 U.S. 268 (1951)

[253] Id. at 272.

[254] Id. at 273.

[255] 408 U.S. 92 (1972).

[256] Id. at 96. Mosley was a Traditional Public Forum case. In contrast, courts have held that in a Limited Public Forum it may be permissible for the government to choose what topics will be open for discussion.

[257] Wayte v. U.S., 470 U.S. 598, 608 (1985)(footnote and citations omitted). The Court noted that "[a] showing of discriminatory intent is not necessary when the equal protection claim is based on an overtly discriminatory

classification. See *Strauder v. West Virginia, 100 U.S. 303 (1880)*." Id. at footnote 10.

[258] Id. at 610, quoting Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979)(internal footnotes and citations omitted).

[259] See above discussion and cases cited in section on Content-Based Restrictions On Speech.

[260] Bourgeois v. Peters, 387 F.3d at 1324.

[261] Id.

[262] Id. at 1324-25 (citation omitted).

[263] Saia v. People of State of New York, 334 U.S. 558, 562 (1948).

[264] Id.; Kovacs v. Cooper, 336 U.S. 77 (1949).

[265] Id.; Ward v. Rock Against Racism, 491 U.S. 781 (1989).

[266] Id.

[267] Beckerman v. City of Tupelo, Miss., 664 F.2d 502 (5th Cir. 1981)(a total ban on amplification in areas zoned residential was overbroad); Phillips v. Darby T'p., 305 F.Supp 763 (E.D. Pa. 1969)(regulation which effectively created an absolute ban on the use of sound trucks was overbroad); Duffy v. City of Mobile, 709 So.2d 77 (Al. 1997)(prohibition of amplified sound plainly audible at a distance of 50 feet, without a permit, was overbroad); *but see* Brinkman v. City of Gainesville, 83 Ga. App. 508, 64 S.E.2d 344 (1951)(ordinance prohibiting sound trucks held constitutional).

[268] Saia v. People of State of New York, 334 U.S. 558, 562 (1948). See above discussion and cases cited in sections on *Prior Restraint* and *Unbridled Discretion*.

[269] Ward v. Rock Against Racism, 491 U.S. 781 (1989).

[270] *See* MacWilliam, "Validity of State or Local Enactment Regulating Sound Amplification in Public Area," 122 A.L.R. 5TH 593 (2004); Ludington, "Annotation: Validity, Under Federal Constitution, of Federal, State, or Local Antinoise Laws And Regulations," 36 L. Ed. 2d 1042 (2008).

[271] Dupres v. City of Newport, 978 F. Supp. 429 (D.R.I. 1997); Fratiello v. Mancuso, 653 F. Supp. 775, (D.R.I. 1987).

[272] State v. Catalano, 104 So.3d 1069, 1079 (Fla. 2012)(State law restricting noise from vehicles being operated on streets or highways, but exempting vehicles using soundmaking devices for business or political purposes, was content-based.)

[273] *See* MacWilliam, "Validity of State or Local Enactment Regulating Sound Amplification in Public Area," 122 A.L.R. 5TH 593 (2004); Ludington,

"Annotation: Validity, Under Federal Constitution, of Federal, State, or Local Antinoise Laws And Regulations," 36 L. Ed. 2d 1042 (2008).

[274] *See* Tanner v. City of Virginia Beach, 674 S.E.2d 848 (Va. 2009), cert. denied, 2010 WL 154940 (U.S. 2010)("unreasonably loud, disturbing and unnecessary noise ... or to disturb or annoy the quiet, comfort or repose of reasonable persons" held to be unconstitutionally vague); Thelen v. State, 272 Ga. 81, 526 S.E. 2d 60 (2000)("any loud, unnecessary or unusual sound or noise which either annoys, disturbs, injures, or endangers the comfort, repose, health, peace, or safety of others" held to be unconstitutionally vague); Nichols v. City of Gulfport, 589 So.2d 1280 (Ms. 1991)("unnecessary or unusual noises shall not be made or caused to be made or continued to be made which either annoys, injures or endangers the comfort, repose, health or safety of others" held to be unconstitutionally vague); Hampsmire v. City of Santa Cruz, 899 F. Supp 2d 922, 938 (N.D. Cal. 2012)("not necessary in connection with an activity which is otherwise lawfully conducted" held to be unconstitutionally vague; Phillips v. Folcroft, 305 F. Supp. 766 (E.D. Pa. 1969)(ordinance defining disorderly conduct to include "making of loud and/or unnecessary noises" held to be unconstitutionally vague and overbroad); Dupres v. City of Newport, 978 F. Supp. 429 (D.R.I. 1997)("unreasonably loud, disturbing or unnecessary noise… or which… annoys, disturbs, injures or endangers the comfort, repose, peace or safety of any individual" held to be unconstitutionally vague and overbroad ; *see generally* MacWilliam, *supra*; Ludington, *supra*.

[275] *See* Jim Crockett Promotion, Inc. v. City of Charlotte, 706 F.2d 486 (4th Cir. 1983)(holding that the term "unnecessary" was unconstitutionally vague, but that the remaining terms "unreasonably loud and disturbing" were permissible, construing the term "disturbing" "to mean 'actual or imminent interference with ... peace or good order,'" and not a "subjective standard, prohibiting a volume that *any individual* person 'within the area of audibility,' happens to find *personally* 'disturbing.'" 706 F.2d at 489, footnote 3(citations omitted, emphasis in original); Reeves v. McConn, 631 F.2d 377 (5th Cir.1980)("unreasonably loud, raucous, jarring, disturbing, or a nuisance to persons within the area of audibility" held not unconstitutionally vague, construing "disturbing" to require an objective standard independent of the subjective sensibilities of an individual complainant) 631 F. 2d at 386 (citation omitted); *see generally* MacWilliam, *supra*; Ludington, *supra*.

[276] 336 U.S. 77 (1949).

[277] Id. at 79.

[278] Id. (plurality opinion).

[279] 408 U.S. 104 (1972).

[280] Id. at 111-112 (footnotes omitted).

[281] Id. at 109.

[282] Dupres v. City of Newport, 978 F. Supp. 429 (D.R.I. 1997)(holding that a portion of a noise ordinance based on decibel readings was constitutional, but another portion prohibiting "unreasonably loud, disturbing or unnecessary noise… or which… annoys, disturbs, injures or endangers the comfort, repose, peace or safety of any individual" was unconstitutionally vague and overbroad); *see generally* MacWilliam, *supra*; Ludington, *supra*.

[283] Reeves v. McConn, 631 F.2d 377 (5th Cir.1980)(holding that a wattage-based restriction on amplification may be permissible, but that on the record in that case a 20-watt restriction was overbroad); United States v. Doe, 968 F.2d 86, 90 (D.C. Cir. 1992)(regulation prohibiting noise exceeding 60 decibels at a distance of 50 feet was not narrowly tailored to serve the interest of preventing excessive noise in a park located across from the White House where protest activities are common); Deegan v. City of Ithaca, 444 F. 3d 135 (2d Cir. 2006)(application of noise ordinance to prohibit speech which is audible at a distance of 25 feet not narrowly tailored to serve the city's interest in maintaining a reasonable level of sound in a public park); Lionhart v. Foster, 100 F. Supp. 2d 383 (E.D. La. 1999)(statute creating quiet zones around hospitals and places of worship was overbroad, where statute prohibited noise exceeding 55 decibels measured within 10 feet of the entrance to a hospital or a church during services).

[284] U. S. Labor Party v. Pomerleau, 557 F.2d 410, 413 (4th Cir. 1977) (Noise ordinance restricting amplification was unconstitutionally vague because it lacked adequate enforcement criteria; and it was unconstitutionally overbroad because it prohibited "amplification that creates no more noise than a person speaking slightly louder than normal. The city has no legitimate interest in banning amplified political messages which do not exceed the sounds encountered daily in the most tranquil community." (citations omitted)).

***

THE BIBLE SAYS:

Go ye into all the world, and preach the gospel to every creature (Mark 16:15).

But ye shall receive power, after that the Holy Ghost is come upon you: and ye shall be witnesses unto me both in Jerusalem, and in all Judea, and in Samaria, and unto the uttermost part of the earth (Acts 1:8).

And thou shalt speak my words unto them, whether they will hear, or whether they will forbear: for they are most rebellious (Ezekiel 2:7).

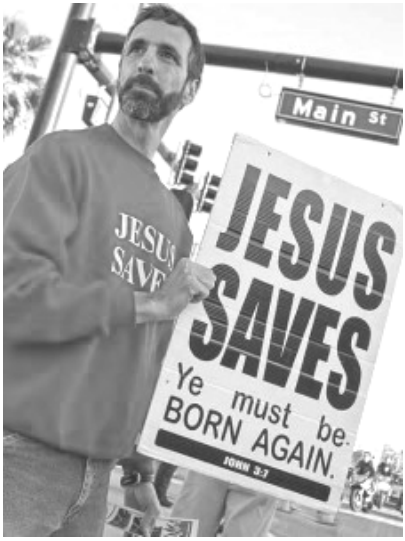
How then shall they call on him in whom they have not believed? and how shall they believe in him of whom they have not heard? and how shall they hear without a preacher? (Romans 10:14).

So then faith cometh by hearing, and hearing by the word of God (Romans 10:17).

For the preaching of the cross is to them that perish foolishness; but unto us which are saved it is the power of God (1 Corinthians 1:18).

For after that in the wisdom of God the world by wisdom knew not God, it pleased God by the foolishness of preaching to save them that believe (1 Corinthians 1:21).

About the Author



Richard "Jake" Jackson has been a practicing attorney in Volusia County, Florida since 1985. He received his law degree from the University of Florida College of Law in 1985. In 1991 Mr. Jackson established his own law office in DeLand, Florida.

Brother Jake trusted Jesus Christ as his Savior in 1986. He attends THE BIBLE Baptist Church of DeLand, Florida and he has participated in public evangelism since 1994. Brother Jake has represented several churches and individuals regarding the right to publicly preach and distribute gospel materials in numerous communities.

Brother Jake has developed a Public Evangelism Training Program to equip and encourage Christians to be effective public witnesses for the Lord Jesus Christ. This free seminar covers the Biblical foundation for public ministry as well as the legal and practical issues that typically arise. **To arrange a free Public Evangelism seminar in your town contact Gospel Advocates.**

Attorney Jake Jackson
Gospel Advocates, Inc.
P.O. Box 2337
DeLand, FL 32721
(386) 804-1020
JacksonLaw1111@gmail.com
GospelAdvocates.com

PUBLIC EVANGELISM UNDER THE FIRST AMENDMENT is written to provide churches and individuals with a comprehensive overview of their First Amendment rights regarding the public proclamation of the Gospel of Jesus Christ. This work will help every Christian witness to avoid legal conflicts or to handle them properly should they arise.

Distributed by Gospel Advocates, Inc.

GospelAdvocates.com