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Freedom of Speech: An Overview

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Freedom of Speech: An Overview

SUMMARY

The First Amendment to the U.S. Constitution protects "the freedom of speech," but that protection is not absolute. The Free Speech Clause principally constrains government regulation of private speech. Speech restrictions imposed by private entities, and government limits on its own speech, usually do not implicate the First Amendment. Even when the government is regulating private speech, a court reviewing a First Amendment challenge may decide that the regulation is consistent with the First Amendment if it is supported by a sufficient governmental interest and an appropriately tailored approach.

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There is no one-size-fits-all test for deciding whether a speech regulation complies with the First Amendment. The analysis requires parsing out the appropriate legal standards from Supreme Court precedent and often involves applying those standards to new contexts and mediums of expression. Accordingly, when a litigant raises a First Amendment claim or defense in court, much of free speech analysis is directed at determining the appropriate legal standards to apply to the challenged law or government action. That analysis often coalesces around common questions, including the following:

- Is the government regulating speech or non-expressive conduct?
- Is the speech at issue protected or unprotected? Commercial or noncommercial?
- Is the speech regulation content based or content neutral?

Modern First Amendment jurisprudence has gravitated toward the application of tiers of judicial scrutiny ranging from rational basis review (the minimum standard of constitutionality) to strict scrutiny (a difficult standard for the government to satisfy). Typically, laws that regulate speech based on its content (i.e., its subject matter, topic, or viewpoint) receive strict scrutiny, except for regulations of commercial speech (e.g., product advertisements), which typically receive intermediate scrutiny. Laws that regulate speech in a content-neutral way, including some restrictions on the time, place, or manner of speech, usually receive a form of intermediate scrutiny.

The context in which the government regulates speech is also important. For example, the Supreme Court has developed specific tests or frameworks for evaluating the constitutionality of restrictions on student speech in schools, disciplinary actions against public employees for their speech, and policies limiting who can speak about what on government property. The type of free speech challenge (e.g., facial or as-applied) might also dictate the appropriate analytical framework.

Thus, a large part of evaluating a federal statute or bill for compliance with the Free Speech Clause involves determining the appropriate legal standards, which depend on the type of legal challenge or claim, the nature and context of the speech regulation, how that regulation operates, and the degree of protection for the speech at issue. Application of First Amendment scrutiny varies according to the test applied but usually involves considering the strength of the government's asserted interests and whether the regulation of speech is sufficiently tailored to those interests.

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The First Amendment protects "the freedom of speech," but that protection is not absolute.[1] Modern First Amendment jurisprudence draws on more than 80 years of case law developed by the Supreme Court,[2] with hundreds of decisions shaping the presumptions, exceptions, and legal tests that courts apply in free speech challenges today.[3] This report is designed to assist Members of Congress and congressional staff in identifying whether a particular policy proposal, bill, or law may implicate the Free Speech Clause of the First Amendment and what legal standards a court might apply in evaluating that legislative approach.

The report begins by discussing the types of laws that generally implicate the Free Speech Clause of the First Amendment. It then discusses two of the most commonly employed levels of First Amendment scrutiny: strict and intermediate scrutiny. These levels of scrutiny are tests that courts may use in deciding whether a law or government action affecting speech rights comports with the Free Speech Clause. The next section of the report discusses the differences between facial and as-applied challenges and describes the more specific claims of overbreadth, vagueness, and prior restraint that litigants might raise through such challenges. This section includes a flow chart (**Figure 1**) that illustrates the analytical steps a court might follow to determine what level of scrutiny to apply in deciding the constitutionality of a particular application of a challenged law. The report then presents special contexts for which the Supreme Court has developed legal standards that might differ from the traditional levels of scrutiny. The report concludes by describing other First Amendment rights related to the freedom of speech.

Laws Implicating Free Speech Protections

The Free Speech Clause generally constrains only government action (also called "state action").[4] A government action restricting speech may take the form of a federal, state, or local law. It can also comprise a less formal rule or policy from a public institution or a discrete government action, such as a prosecution or other enforcement action.[5] The Free Speech Clause applies not only to laws that restrict speech, but also to laws that compel speech by requiring private persons to convey a particular message.[6] In addition to such direct regulations of speech, laws that burden speech or condition government funding or benefits on undertaking or forgoing speech activity may also implicate the First Amendment.[7]

[1] U.S. CONST. amend. I.

[2] *See, e.g.*, 303 Creative LLC v. Elenis, 600 U.S. 570, 584–87 (2023) (applying free speech principles from *West Virginia v. Barnette*) (citing W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).

[3] *See generally* Cong. Rsch. Serv., *First Amendment: Free Speech Clause*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/amendment-1/ (last visited Mar. 26, 2024) (table of contents for collection of First Amendment essays).

[4] Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. 802, 804 (2019); *see* Cong. Rsch. Serv., *State Action Doctrine and Free Speech*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-2-4/ALDE_00013541/ (last visited Mar. 26, 2024).

[5] *See, e.g.*, Cohen v. California, 403 U.S. 15, 26 (1971) (reversing the conviction of an individual prosecuted for wearing, in a courthouse, a jacket with a slogan critical of the selective service draft); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393 (1993) (holding that a public school unconstitutionally applied a rule prohibiting the use of school facilities for religious purposes).

[6] *E.g.*, Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018); Wooley v. Maynard, 430 U.S. 705, 714 (1977).

[7] Cong. Rsch. Serv., *Overview of Unconstitutional Conditions Doctrine*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-13-1/ALDE_00000771/ (last visited Mar. 26, 2024).

As the First Amendment principally limits the government's ability to regulate private speech, it generally does not constrain the government when the government is speaking for itself.[8] Likewise, private action is not usually subject to First Amendment constraints.[9] The line between government action and private action can be "difficult to draw" in some cases, such as when a public official blocks a follower on social media.[10] The First Amendment also prohibits the government from coercing private actors to take actions that suppress other private entities' speech.[11]

Determining whether a particular law or government action comports with the First Amendment is often a multistep analysis. As a threshold matter, a court reviewing a free speech challenge may consider whether the government is in fact regulating "speech."[12] The First Amendment concept of *speech* includes the written and spoken word and other forms of expression in various mediums (e.g., photographs, videos).[13] The actions of creating or disseminating speech are also forms of speech.[14] So too are editorial functions—the decisions that go into "select[ing] and shap[ing] other parties' expression" into one's "own curated speech product[]."[15] Beyond physical material that conveys a message, the concept of speech encompasses certain expressive conduct—that is, conduct "sufficiently imbued with elements of communication" to implicate the First Amendment (e.g., burning a flag in political protest).[16] Although "a narrow, succinctly articulable message is not a condition of constitutional protection,"[17] a court is more likely to consider conduct to be sufficiently communicative (and thus within the First Amendment's ambit) if the actor intends to "convey a particularized message" and that message would likely be understood by those who view it.[18]

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[8] *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015) (explaining that "government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas").

[9] *See Manhattan Cmty. Access Corp.*, 587 U.S. at 809 (stating the "few limited circumstances" in which "a private entity can qualify as a state actor" for First Amendment purposes).

[10] Lindke v. Freed, 601 U.S. 187, 191, 195, 197 (2024) (explaining that "the First Amendment binds only the government," but because the Facebook account holder in the case was a public official, the courts had to decide whether he acted in his official or private capacity when he blocked a private citizen from his Facebook page and deleted the citizen's comments).

[11] *See* Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175, 198 (2024) (holding that the National Rifle Association (NRA) plausibly alleged in its complaint that a state official "violated the First Amendment by coercing [state]-regulated entities to terminate their business relationships with the NRA in order to punish or suppress the NRA's advocacy").

[12] *E.g.*, Universal City Studios, Inc. v. Corley, 273 F.3d 429, 445–46 (2d Cir. 2001) (analyzing whether computer code is speech).

[13] *See* Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 790 (2011) (reasoning that "[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world)," which "suffices to confer First Amendment protection").

[14] *See* Bartnicki v. Vopper, 532 U.S. 514, 526 (2001) (holding that the disclosure and publication of information are forms of speech).

[15] Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2393 (2024).

[16] Texas v. Johnson, 491 U.S. 397, 404–06 (1989) (quoting Spence v. Washington, 418 U.S. 405, 410–411 (1974) (per curiam)).

[17] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995).

[18] *Johnson*, 491 U.S. at 404 (internal quotation marks and citation omitted); *see* Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 66 (2006) (reasoning that the "expressive component of a law school's actions" in excluding military recruiters "was not created by the conduct itself but by the speech that accompanie[d] it," and that the need for "such explanatory speech" was "strong evidence that the conduct at issue" was "not so inherently expressive that it warrant[ed] protection" under prior First Amendment cases).

The line between non-expressive conduct and speech—though sometimes blurry—can determine whether and to what degree a court scrutinizes a law or government action for consistency with the First Amendment. A law that primarily restricts non-expressive conduct may not trigger First Amendment scrutiny at all.[19] In such circumstances, a court may determine whether the law has a "rational basis,"[20] or it may hold that there is no First Amendment violation without invoking that standard.[21] By comparison, a law that regulates pure speech or "inherently expressive" conduct is likely to receive First Amendment scrutiny.[22] Between these two poles are more subtle regulations of speech, such as laws that restrict conduct with expressive and non-expressive elements,[23] actions in which the government applies a conduct-focused law to restrict or punish speech because of its message,[24] or laws that have the "inevitable effect" of disproportionately burdening certain speakers.[25] The Supreme Court has also recognized the possibility that a law can "impose[] a significant burden on expressive activity" even if it does not expressly prohibit speech.[26] This concept of *chilling* speech refers to the idea that even though individuals might want to engage in constitutionally protected speech, a law that is vague, overbroad, or creates significant barriers to speech could cause them to "curtail their expression."[27]

After deciding that a case likely involves speech, the next question a court might consider is whether the First Amendment protects the particular type of speech at issue. Courts often refer to speech as "protected" or "unprotected," but the label is not always determinative of the constitutionality of the challenged law or government action.[28] Most private speech is protected in the sense that government regulation of that speech would at least raise a constitutional question and likely warrant First Amendment scrutiny if challenged in court. The Supreme Court has, however, recognized certain historically rooted "unprotected" categories of speech, such as

[19] *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011) (explaining that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech"); *cf.* United States v. Hansen, 599 U.S. 762, 782 (2023) (construing a statutory provision to encompass "a great deal of nonexpressive conduct—which does not implicate the First Amendment at all").

[20] *See* City of Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 496 (1986) (explaining that "the rule of rationality" generally "sustain[s] legislation against other constitutional challenges" that do not involve "colorable" First Amendment arguments). *Cf.* Wisconsin v. Mitchell, 508 U.S. 476, 488 (1993) (concluding, after determining that a penalty enhancement for bias-motivated crimes regulated non-expressive conduct, that the state had "an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases").

[21] *See, e.g.*, Arcara v. Cloud Books, Inc., 478 U.S. 697, 707 (1986) (holding that "the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books").

[22] Rumsfeld v. Forum for Acad. & Institutional Rts., Inc., 547 U.S. 47, 66 (2006).

[23] *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) (stating that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms"); *Arcara*, 478 U.S. at 703 ("We have applied *O'Brien* to other cases involving governmental regulation of conduct that has an expressive element.").

[24] *E.g.*, Holder v. Humanitarian L. Project, 561 U.S. 1, 28 (2010) ("The law here may be described as directed at conduct . . . but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message.").

[25] *Arcara*, 478 U.S. at 704, 707 (stating that the Court has "applied First Amendment scrutiny to some statutes which, although directed at activity with no expressive component, impose a disproportionate burden upon those engaged in protected First Amendment activities" (citing Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983))).

[26] United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 468 (1995).

[27] *Id.* at 469.

[28] *See* CRS In Focus IF11072, *The First Amendment: Categories of Speech*, by Victoria L. Killion (2024).

defamation or fraud.[29] The government usually can penalize such unprotected speech consistent with the First Amendment. Laws aimed at these narrow categories of speech might trigger First Amendment scrutiny, however, if they reach protected speech or draw impermissible content-based distinctions.[30] For example, in *R.A.V. v. City of St. Paul*, the Supreme Court struck down a local law construed to prohibit "fighting words," an unprotected category of speech, because the law reached only those fighting words "that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'"[31] The Court reasoned that singling out fighting words based on the ideas they communicate violated a fundamental precept that the government cannot restrict speech because it disagrees with the message conveyed.[32]

Even if a law or government action reaches protected speech, there is no one-size-fits-all test that courts apply in all contexts to analyze whether the law or action is constitutional. The Supreme Court has adopted several "means-end" tests (called *levels of scrutiny*),[33] as well as additional legal standards to govern particular claims and scenarios. Accordingly, after deciding that a case involves protected speech, the next step in a First Amendment analysis is often to determine which level of scrutiny or legal standard applies. The answer to that question can depend on the kind of protected speech being regulated and additional factors, such as where the speech occurs and the way the law operates. For example, commercial speech, while protected, typically receives a lower level of scrutiny than other forms of protected speech.[34]

Related CRS Products

Cong. Rsch. Serv., *State Action Doctrine and Free Speech*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-2-4/ALDE_00013541/ (last visited Mar. 26, 2024).

Cong. Rsch. Serv., *Overview of Compelled Speech*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-12-1/ALDE_00000769/ (last visited Mar. 26, 2024).

CRS In Focus IF11072, *The First Amendment: Categories of Speech*, by Victoria L. Killion (2024).

CRS Legal Sidebar LSB11186, *Government Coercion of Private Speech: National Rifle Association (NRA) v. Vullo*, by Whitney K. Novak (2024).

Levels of Scrutiny and Key Concepts

Most often, a court adjudicating a free speech challenge will analyze the constitutionality of a law or government action by applying a level of scrutiny derived from the Supreme Court's First Amendment precedents. The two most common levels of scrutiny in free speech analysis are *strict* and *intermediate* scrutiny.[35] Strict scrutiny generally applies to laws that regulate speech on the basis of its content or message.[36] It is a "demanding standard" that the government is rarely

[29] United States v. Stevens, 559 U.S. 460, 468–70 (2010).

[30] *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 246–56 (2002) (holding unconstitutional a law that criminalized speech beyond the unprotected categories of "obscenity" and "child pornography").

[31] R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).

[32] *Id.*

[33] Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2386 (2021).

[34] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980).

[35] *See* State v. Katz, 179 N.E.3d 431, 454 (Ind. 2022) ("Under the First Amendment, regulations of protected speech receive either intermediate or strict scrutiny, depending on whether the restriction is content neutral, or content based.").

[36] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

able to meet.[37] Intermediate scrutiny has several different formulations but generally applies to content-neutral laws and commercial speech restrictions.[38] Intermediate scrutiny too presents a high bar for the government, but regulations of speech are more likely to survive intermediate than strict scrutiny. To varying degrees, each level of scrutiny requires the government to prove that it has a sufficiently important interest in regulating the speech at issue and that the law directly advances and is narrowly tailored to that interest.

While laws that fail strict or intermediate scrutiny often do so on lack-of-tailoring grounds, the government sometimes fails to show that its interests are "real" and "not merely conjectural."[39] For example, it may be insufficient for the government to cite an interest that is significant in the abstract if the government lacks evidence of a concrete harm threatening that interest.[40] For "prophylactic" speech restrictions in particular, the government must "demonstrate that it is regulating speech in order to address what is in fact a serious problem and that the preventative measure it proposes will contribute in a material way to solving that problem."[41]

For more information on the levels of scrutiny and other key First Amendment concepts, readers of this report's HTML and PDF formats can click on a term or phrase in the text box titled "Free Speech Terminology" to navigate to a discussion of that concept.

Free Speech Terminology

(In HTML and PDF formats, readers can click on a term below for more information.)

- chilling effect
- commercial speech
- compelling governmental interest
- content based
- content neutral
- designated public forum
- intermediate scrutiny
- limited public forum
- narrow tailoring
- nonpublic forum
- overbreadth
- prior restraint
- speech
- strict scrutiny
- substantial or important governmental interest
- time, place, or manner regulation
- traditional public forum
- vagueness

Strict Scrutiny

Strict scrutiny generally applies to *content-based* laws—laws that regulate speech on the basis of its subject matter, topic, or substantive message.[42] A law can be content based on its face or in its design or purpose.[43] The Supreme Court considers viewpoint discrimination—distinctions based

[37] Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 799 (2011). *Cf.* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444–45 (2015) (describing the case as "one of the rare cases in which a speech restriction withstands strict scrutiny").

[38] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 561 (1980).

[39] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (plurality op.).

[40] *See Brown*, 564 U.S. at 799 (stating that the government "must specifically identify an 'actual problem' in need of solving"); *e.g.*, Ibanez v. Fla. Dep't of Bus. & Pro. Regul., Bd. of Acct., 512 U.S. 136, 146 (1994) (reasoning that a state board's failure "to point to any harm that is potentially real, not purely hypothetical" rendered its disciplinary action against an attorney for allegedly deceptive advertising "unjustified").

[41] Edenfield v. Fane, 507 U.S. 761, 776 (1993).

[42] City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 71 (2022); Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

[43] Cong. Rsch. Serv., *Overview of Content-Based and Content-Neutral Regulation of Speech*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-3-1/ALDE_00013695/ (last visited Mar. 26, 2024).

on a "specific motivating ideology," opinion, or perspective—to be "an egregious form of content discrimination."[44] For this reason, courts sometimes invalidate viewpoint-based laws summarily, without undertaking a strict scrutiny analysis.[45]

Under strict scrutiny, the government must prove that its law is narrowly tailored to advance a compelling governmental interest and that the law is the least restrictive means of serving that interest.[46] While not an exhaustive list, the Supreme Court has identified the following interests as *compelling*, at least in certain contexts:

- "national security";[47]
- "public confidence in judicial integrity";[48]
- "protecting the physical and psychological well-being of minors";[49]
- "ensur[ing] the basic human rights of members of groups that have historically been subjected to discrimination";[50]
- "eradicating discrimination against [a state's] female citizens";[51] and
- "depriving criminals of the profits of their crimes, and in using these funds to compensate victims."[52]

Both strict and intermediate scrutiny require *narrow tailoring*,[53] meaning that the government must "pursue its legitimate interests through 'means that are neither seriously underinclusive nor seriously overinclusive.'"[54] The precise degree of tailoring required under each standard differs. Under strict scrutiny, the challenged law or action must be the "least restrictive means" of satisfying the government's compelling interest. In other words, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."[55]

Intermediate Scrutiny

Intermediate scrutiny typically applies to content-neutral laws and commercial speech restrictions, albeit following different lines of Supreme Court precedent.[56] A law is *content*

[44] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

[45] *E.g.*, Iancu v. Brunetti, 139 S. Ct. 2294, 2302 (2019) (holding that a bar on registering "immoral or scandalous" trademarks was viewpoint based and thus invalid).

[46] United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000).

[47] Haig v. Agee, 453 U.S. 280, 307 (1981).

[48] Williams-Yulee v. Fla. Bar, 575 U.S. 433, 447 (2015).

[49] Sable Commc'ns of Cal., Inc. v. FCC., 492 U.S. 115, 126 (1989).

[50] R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992).

[51] Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

[52] Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 119 (1991).

[53] The concept of narrow tailoring is also used in other forms of constitutional analysis. *See* CRS Podcast WPD00074, *"Narrow Tailoring" and Race-Conscious Government Action,* by Sanchitha Jayaram and April J. Anderson.

[54] Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 805 (2011). A narrowly tailored law "should indicate that its proponent 'carefully calculated the costs and benefits associated with the burden on speech imposed by its prohibition.'" Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 188 (1999) (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993)).

[55] United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000).

[56] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994); Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995).

neutral if it "serves purposes unrelated to the content of expression"[57] and does not, on its face, regulate speech on the basis of its subject matter, topic, or viewpoint.[58]

The Supreme Court has established an intermediate scrutiny standard for content-neutral *time, place, or manner* regulations.[59] Specifically, the Court has held that "[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions,"[60] such as a regulation to control the volume of music played at a bandshell in a public park.[61] Time, place, or manner restrictions "are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[62]

A similar test set out in *United States v. O'Brien* is used to evaluate restrictions on certain types of expressive conduct, such as "when 'speech' and 'nonspeech' elements are combined in the same course of conduct."[63]

Intermediate scrutiny is also the standard applied to commercial speech restrictions. *Commercial speech* is (1) speech that "does no more than propose a commercial transaction" (e.g., an advertisement for a product or service);[64] or (2) "expression related solely to the economic interests of the speaker and its audience."[65] To sustain a restriction on lawful, nonmisleading commercial speech, the government must meet the standard set out in *Central Hudson Gas and Electric Corp. v. Public Service Commission*.[66] Specifically, the government must show that its law "directly advances" a "substantial" governmental interest and is narrowly tailored—that is, "not more extensive than necessary"—to serve that interest.[67]

Examples of *substantial* or *important* governmental interests include

- protecting the public from deceptive and misleading trade practices;[68]
- "maintaining standards of ethical conduct in the licensed professions";[69]
- "energy conservation";[70]
- preventing "quid pro quo" corruption or its appearance in election campaigns;[71] and

[57] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[58] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

[59] *Ward*, 491 U.S. at 798–99.

[60] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

[61] *Ward*, 491 U.S. at 784, 791.

[62] *Id.*

[63] United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

[64] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).

[65] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980).

[66] *Id.* at 566.

[67] *Id.*

[68] Friedman v. Rogers, 440 U.S. 1, 15 (1979).

[69] Edenfield v. Fane, 507 U.S. 761, 770 (1993).

[70] *Cent. Hudson*, 447 U.S. at 568.

[71] McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 199, 207 (2014) (plurality op.) (citing Buckley v. Valeo, 424 U.S. 1, 66–67 (1976) (per curiam)).

- "promoting fair competition in the market for television programming."[72]

The tailoring requirement for intermediate scrutiny is less rigorous than for strict scrutiny. Under intermediate scrutiny, a law "need not be the least restrictive or least intrusive means" of advancing the government's interest.[73] Nevertheless, the government "still 'may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'"[74] Narrow tailoring for commercial speech restrictions, for example, requires "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served."[75]

Table 1 summarizes the strict and intermediate scrutiny standards.

Table 1. Strict Versus Intermediate Scrutiny

	Strict Scrutiny	Intermediate Scrutiny
When it typically applies	Content-based laws	Commercial speech restrictions and some commercial disclosure requirements[76] Content-neutral laws (e.g., time, place, or manner restrictions)[77] Laws that regulate a course of conduct with speech and nonspeech elements[78]
Strength of government interest required	Compelling	Important or substantial
Level of tailoring required	Narrow tailoring: least restrictive means	Narrow tailoring: not substantially broader than necessary Leaves open ample alternative channels for communication of the message (for time, place, or manner regulations)

Source: CRS.

[72] Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997).

[73] Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

[74] McCullen v. Coakley, 573 U.S. 464, 486 (2014) (quoting *Ward*, 491 U.S. at 799).

[75] Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (internal quotation marks and citations omitted). Although intermediate scrutiny does not require that the law be the least restrictive means of achieving the government's interest, "if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 418 n.13 (1993).

[76] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

[77] *Ward*, 491 U.S. 781.

[78] United States v. O'Brien, 391 U.S. 367 (1968).

Other Tests for Determining Compliance with the Free Speech Clause

Strict and intermediate scrutiny are not the only tests used in free speech cases. The Supreme Court has developed additional tests for specific contexts and to account for different types of regulations. For example, another form of scrutiny called *exacting* scrutiny is often used to evaluate campaign finance disclosure requirements.[79]

Although most regulations of commercial speech are subject to intermediate scrutiny, there are exceptions. Certain commercial disclosure requirements are subject to a less-stringent standard of review under *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.[80] Application of *Zauderer* requires, at a minimum, that the disclosure involves "purely factual and uncontroversial information" about the regulated entity's own products or services.[81] If these criteria are met,[82] then the disclosure requirements need only be "reasonably related" to preventing consumer deception (or, in some jurisdictions, another sufficient government interest) and not "unjustified or unduly burdensome."[83] Additionally, the government generally can restrict commercial speech that concerns illegal activity or that is inherently misleading without having to satisfy either intermediate scrutiny or *Zauderer* review.[84] By comparison, the Supreme Court has suggested that a law that singles out particular commercial speech and speakers for disfavored treatment may warrant "heightened judicial scrutiny" based on the broader principle that the government cannot restrict speech because of disagreement with the message it conveys.[85]

The Supreme Court has also developed specific legal standards for particular forums or circumstances. These standards are discussed in the "Special Contexts" section of this report.

[79] CRS Report R45320, *Campaign Finance Law: An Analysis of Key Issues, Recent Developments, and Constitutional Considerations for Legislation*, by L. Paige Whitaker (2023) ("Constitutionality of Disclosure Requirements").

[80] 471 U.S. 626, 651 (1985); *see also* CRS Report R45700, *Assessing Commercial Disclosure Requirements under the First Amendment*, by Valerie C. Brannon (2019).

[81] *Zauderer*, 471 U.S. at 651; *see* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 769 (2018) (declining to apply *Zauderer* because the challenged notice requirement for licensed clinics "in no way relate[d] to the services that licensed clinics provide").

[82] Some lower courts have expressed uncertainty as to whether compelled commercial disclosures that do not qualify for *Zauderer* review should receive strict or intermediate scrutiny. Brannon, *Assessing Commercial Disclosure Requirements under the First Amendment*, *supra* note 80.

[83] *Zauderer*, 471 U.S. at 651. Some lower courts have recognized interests other than preventing consumer deception for purposes of applying *Zauderer* review. Brannon, *Assessing Commercial Disclosure Requirements under the First Amendment*, *supra* note 80.

[84] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563–64 (1980) (explaining that the "government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity" (internal citations omitted)).

[85] Sorrell v. IMS Health Inc., 564 U.S. 552, 565 (2011). The Court in *Sorrell* did not explain whether "heightened" scrutiny meant strict scrutiny or a more rigorous form of intermediate scrutiny than *Central Hudson*.

Related CRS Products

CRS In Focus IF12308, *Free Speech: When and Why Content-Based Laws Are Presumptively Unconstitutional*, by Victoria L. Killion (2023).

CRS In Focus IF12388, *First Amendment Limitations on Disclosure Requirements*, by Valerie C. Brannon et al. (2023).

CRS Report R45700, *Assessing Commercial Disclosure Requirements under the First Amendment*, by Valerie C. Brannon (2019).

Types of Free Speech Challenges

First Amendment challenges can take multiple forms. A party can challenge a law's validity on its face (facial challenge) or as applied to their speech activity (as-applied challenge).[86] As-applied cases are more common because "courts usually handle constitutional claims case by case, not en masse."[87] Both facial and as-applied challenges can be based on different theories of constitutional invalidity. For example, the Supreme Court has recognized a type of facial free speech challenge based on a statute's overbreadth—essentially, that a law aimed at non-expressive conduct or unprotected speech reaches too much protected speech when compared to its permissible scope. Additionally or alternatively, a litigant might argue that a speech restriction is unconstitutionally vague or imposes an impermissible prior restraint on speech. Each type of challenge carries its own legal standards, as discussed below.

The proponents and timing of free speech challenges can vary too. Defendants have raised the First Amendment as a defense in response to civil litigation, criminal prosecutions, or administrative enforcement actions. Plaintiffs have raised free speech challenges in the pre-enforcement context, on the basis that the threat of enforcement chills the exercise of their or others' free speech rights.[88] Plaintiffs have also sought monetary damages from the government for interference with their free speech rights, such as through a claim for First Amendment retaliation.[89] The timing of a free speech challenge can raise questions of justiciability—that is, the court's authority to hear the dispute—which are beyond the scope of this report but are addressed in other CRS products.[90] For simplicity, this section of the report uses the term "claim" to encompass the various forms of First Amendment challenges.

[86] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366 (2010) (challenging campaign finance disclaimer and disclosure requirements as applied to a movie about a candidate and advertisements for that movie).

[87] Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2397 (2024).

[88] *E.g.*, Kareem v. Cuyahoga Cnty. Bd. of Elections, No. 23-3330, 2024 U.S. App. LEXIS 6130, at *16 (6th Cir. Mar. 14, 2024).

[89] *E.g.*, Lozman v. City of Riviera Beach, 585 U.S. 87, 91 (2018).

[90] *See* Cong. Rsch. Serv., *Overview of Standing*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-1/ALDE_00012992/ (last visited Mar. 26, 2024); Cong. Rsch. Serv., *Overview of Ripeness Doctrine*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-7-1/ALDE_00001244/ (last visited Mar. 26, 2024); Cong. Rsch. Serv., *Overview of Mootness Doctrine*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-8-1/ALDE_00000722/ (last visited Mar. 26, 2024).

Facial Challenge

A facial challenge occurs when a party claims that a law violates the First Amendment "on its face."[91] The judicial remedy may include a declaration that the law, or a portion of the law, is invalid. The government may not lawfully enforce any provisions that a court has held facially unconstitutional.[92] A court's rejection of a facial challenge does not necessarily preclude other litigants from succeeding on an as-applied challenge.[93]

From the Supreme Court's perspective, "facial challenges are disfavored."[94] First, "'[c]laims of facial invalidity often rest on speculation' about the law's coverage and its future enforcement."[95] Second, "'facial challenges threaten to short circuit the democratic process' by preventing duly enacted laws from being implemented in constitutional ways."[96] For these reasons, the Court considers facial invalidation of a law to be a "last resort" that courts should employ "sparingly."[97] The Court has also "made facial challenges hard to win."[98]

Facial First Amendment challenges can be based on a law's overbreadth, vagueness, or prior restraint of speech (discussed below). The Court has not applied a uniform standard to evaluate such cases, though it clarified the test for a facial overbreadth claim in a 2024 decision.[99] Rather, each of these theories carries its own set of legal tests and presumptions. It can be difficult to tell how these legal standards dovetail with the levels of scrutiny developed to evaluate free speech challenges to content-based or content-neutral laws.[100] In some cases, the Court appeared to combine principles from more than one test,[101] while in other cases, it applied an unmodified strict or intermediate scrutiny standard to decide whether a law facially violated the First Amendment.[102] Accordingly, the precise test used to evaluate a facial free speech challenge may depend on how the litigants and the reviewing court frame the issue.

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[91] *Facial Challenge*, BLACK'S LAW DICTIONARY (11th ed. 2019) (meaning an argument that a statute "always operates unconstitutionally").

[92] In some cases, a court explicitly enjoins government officials from enforcing a facially invalid law. *E.g.*, Jews for Jesus, Inc. v. Board of Airport Comm'rs, 661 F. Supp. 1223, 1226 (C.D. Cal. 1985), *aff'd*, 785 F.2d 791 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987).

[93] *See* Virginia v. Hicks, 539 U.S. 113, 124 (2003) (explaining that applications of the challenged policy "that violate the First Amendment can still be remedied through as-applied litigation" after holding that the policy was not facially invalid).

[94] Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2409 (2024).

[95] *Id.* at 2397 (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008)).

[96] *Id.* (quoting *Wash. State Grange*, 552 U.S. at 451).

[97] Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

[98] *Moody*, 144 S. Ct. at 2397.

[99] *See infra* "Overbreadth Claim."

[100] *See supra* "Levels of Scrutiny and Key Concepts."

[101] For example, in 2021, the Court invalidated a state donor disclosure law on facial overbreadth grounds after applying exacting scrutiny. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021). The Court reasoned that the "lack of tailoring" and the "weakness of the State's interest" were "categorical—present in every case." *Id.* at 2387.

[102] *See, e.g.*, Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2347, 2355 (2020) (plurality op.) (applying strict scrutiny and ultimately severing the invalid portion of a federal statute prohibiting certain robocalls); Sable Commc'ns of California, Inc. v. FCC, 492 U.S. 115, 126–131 (1989) (applying strict scrutiny in a facial challenge to a federal statute prohibiting "indecent" commercial telephone messages).

As-Applied Challenge

A party bringing an as-applied challenge alleges that a law or government action violates the Free Speech Clause as applied to its activity or intended activity, instead of asserting that the law as a whole violates the First Amendment.[103] In an as-applied challenge, a court usually limits its judgment and any remedies to the parties or set of circumstances before the court. Accordingly, a court's disposition might allow the government to continue enforcing the law with respect to other parties or contexts.[104]

Figure 1 illustrates the typical analysis that a court might follow in an as-applied challenge to determine the applicable level of First Amendment scrutiny. A court might also apply the analysis in **Figure 1** in a facial challenge to decide which applications of a law would comply with the Free Speech Clause. As different legal standards might apply in particular contexts, it may be helpful for readers to begin by skimming the "Special Contexts" section of this report to determine whether any of the listed scenarios might apply to one or more of the speech regulations in the legislative proposal under consideration.

While the number and order of steps may vary, a court might begin its analysis by considering whether the case implicates the Free Speech Clause at all, asking whether the law involves non-expressive conduct or speech.[105] At the second step of the inquiry, a court might ask whether the speech at issue is protected or unprotected. In an as-applied challenge, a court might focus on the nature of the challenger's speech or the government's reasons for applying the law to that speech,[106] whereas in a facial challenge, a court might first need to determine the scope of the law in question and then evaluate its various applications.[107] As reflected in the third step of **Figure 1**, a court might then ask whether the law at issue is content based or content neutral.[108]

[103] *As-Applied Challenge*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[104] *See* United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 478 (1995) (explaining that "granting full relief to respondents"—all executive branch employees below a certain grade on the federal pay scale—did not resolve the constitutionality of applying the law to federal employees above that pay grade).

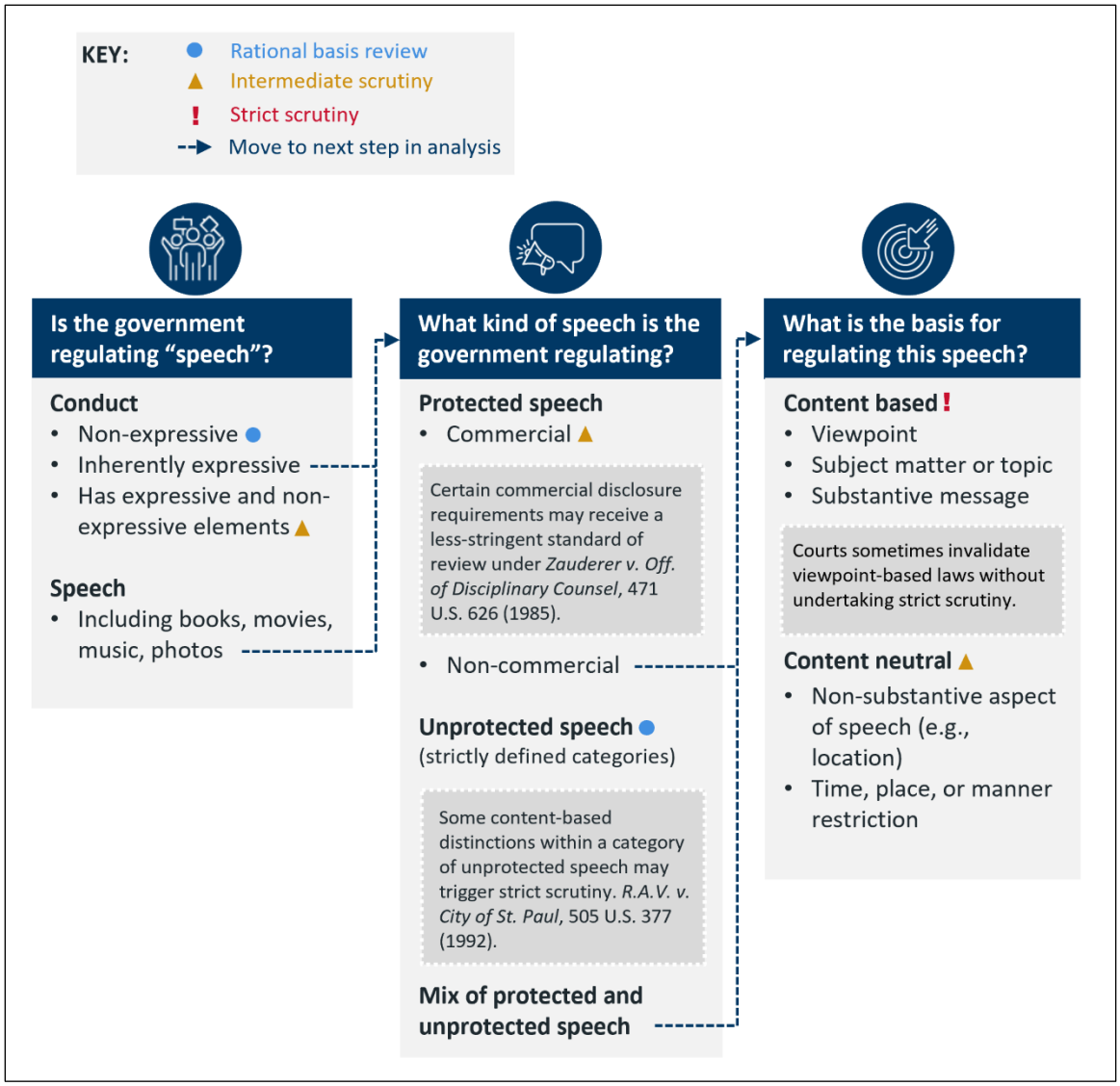
[105] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 420 (1989) (deciding that the defendant's criminal conviction under a flag desecration law implicated the First Amendment because the defendant burned a flag in political protest). *See supra* "Laws Implicating Free Speech Protections."

[106] *See, e.g.*, Holder v. Humanitarian L. Project, 561 U.S. 1, 28 (2010) (describing the question as "whether the Government may prohibit what plaintiffs want to do"); Spence v. Washington, 418 U.S. 405, 415 (1974) (per curiam) (overturning the defendant's conviction "[g]iven the protected character of his expression and in light of the fact that no interest the State may have . . . was significantly impaired on these facts").

[107] *See infra* "Overbreadth Claim."

[108] *See supra* "Levels of Scrutiny and Key Concepts."

Figure 1. Analytical Steps in a Typical As-Applied Free Speech Challenge



Source: CRS.

Overbreadth Claim

In constitutional law, a facial challenge usually requires the objecting party to show that the law is invalid in all of its applications or "lacks any 'plainly legitimate sweep.'"[109] In free speech cases, however, the Supreme Court has recognized a "less demanding though still rigorous standard" for the objecting party to satisfy in the context of an *overbreadth* claim.[110] An overbreadth claim may arise in situations when a law aimed at non-expressive conduct or unprotected speech nonetheless reaches protected expression.[111] In an exception to judicially recognized limits on standing,[112] a litigant can raise an overbreadth claim even if the government could constitutionally apply the law to the litigant's own speech.[113] This, according to the Supreme Court, is because facial overbreadth challenges are "not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court."[114] If a court holds that a law violates the overbreadth doctrine, that holding normally "suffices to invalidate *all* enforcement of that law"[115]—at least "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression."[116]

To succeed on an overbreadth claim, a litigant must show that the law "prohibits a substantial amount of protected speech" in relation to its "plainly legitimate sweep."[117] The Supreme Court clarified some aspects of this overbreadth test in its 2024 decision in *Moody v. Netchoice, LLC*. That opinion addressed separate challenges to two state social media laws that restricted private online platforms from removing or deprioritizing user content in certain ways.[118] Trade associations representing the interests of some of the regulated companies raised facial First Amendment challenges to the laws. The Supreme Court held that the lower courts failed to apply the correct overbreadth analysis and remanded for further consideration under the appropriate standard.[119] In its opinion, the Supreme Court used two different formulations of the overbreadth test, asking whether the laws would prohibit "a substantial amount of protected speech"[120] and whether "a substantial number of [the laws'] applications are unconstitutional."[121] The Court emphasized that lower courts and litigants may not focus solely on the "heartland applications" of

[109] United States v. Stevens, 559 U.S. 460, 472 (2010) (quoting Washington v. Glucksberg, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring in the judgments)).

[110] Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2397 (2024).

[111] *E.g.*, Gooding v. Wilson, 405 U.S. 518, 522 (1972).

[112] Cong. Rsch. Serv., *Overview of Standing*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-1/ALDE_00012992/ (last visited Mar. 26, 2024) (discussing prudential limits on standing).

[113] Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

[114] Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 958 (1984).

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

[116] *Broadrick*, 413 U.S. at 613.

[117] United States v. Williams, 553 U.S. 285, 292 (2008).

[118] *See* Cong. Rsch. Serv., *Moody v. NetChoice, LLC & NetChoice, LLC v. Paxton: Content Moderation and Free Speech Rights of Online Platforms*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/intro.9-2-16/ALDE_00013903/ (summarizing the Supreme Court's decision in the cases) (last visited Sept. 4, 2024).

[119] Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2399 (2024). The Court also clarified that the First Amendment protects certain editorial and publishing functions reflected in the platforms' content-moderation decisions. *Id.* at 2399–2408. For a summary of the lower courts' analyses, see CRS Legal Sidebar LSB11116, *State Social Media Laws at the Supreme Court*, by Valerie C. Brannon (2024).

[120] *Moody*, 144 S. Ct. at 2409 (quoting United States v. Hansen, 599 U.S. 762, 770 (2023)).

[121] *Id.* at 2397 (quoting Ams. for Prosperity Found. v. Bonta, 594 U.S. 595, 615 (2021)).

a challenged law.[122] Instead, courts must "address the full range of activities the law[] cover[s], and measure the constitutional against the unconstitutional applications."[123]

The *Moody* opinion will likely influence how lower courts conduct an overbreadth analysis in future cases. For example, it might not suffice for a court to find that a law regulates significantly more protected speech than unprotected speech or conduct.[124] Because the government can regulate protected speech under some circumstances, a court might also need to decide whether the particular regulation of protected speech would be constitutional. In practice, the *Moody* decision could mean that a court reviewing an overbreadth challenge must

- determine all the ways in which the challenged law could be applied;[125]
- for each potential application that could reach protected speech, decide what level of scrutiny or specific First Amendment test applies;[126]
- apply that First Amendment standard to determine whether the particular application of the law would be constitutional or unconstitutional;[127] and
- compare all of the results to determine "if the law's unconstitutional applications substantially outweigh its constitutional ones."[128]

The Supreme Court in *Moody* did not identify which party bears the burden of proof at each stage of this process. In past cases, a party raising a facial challenge bore the burden of proving that the law reached a substantial amount of protected speech.[129] The Court in *Moody* appeared to confirm that, generally speaking, the burden to demonstrate overbreadth rests with the challenger.[130] By comparison, the strict and intermediate scrutiny tests require the *government* to prove that the challenged law is narrowly tailored to serve a compelling governmental interest.[131] This tension suggests that some burden-shifting may take place in future overbreadth cases.[132]

While the Supreme Court has cautioned that invalidation of a law for overbreadth is "strong medicine,"[133] it has dispensed this remedy in some cases. For example, in 2010, the Court held

[122] *Id.*

[123] *Id.* at 2397–98.

[124] *Id.* at 2398 (explaining that a court must apply the laws under review "to every covered platform or function" and "decide which of [those] applications violate the First Amendment").

[125] *See id.* ("The first step in the proper facial analysis is to assess the state laws' scope. What activities, by what actors, do the laws prohibit or otherwise regulate?").

[126] On the facts of *Moody*, this meant "asking, as to every covered platform or function, whether there is an intrusion on protected editorial discretion" in order to evaluate the state laws' content-moderation provisions. *Id.*

[127] *Id.* at 2409 ("It must then decide which of the law's applications are constitutionally permissible and which are not . . . .").

[128] *Id.* at 2397.

[129] *E.g.*, United States v. Hansen, 599 U.S. 762, 782 (2023).

[130] *Moody*, 144 S. Ct. at 2409 (explaining that the "need for NetChoice to carry its burden" on the scope of the laws and which of their applications is constitutional and unconstitutional "is the price of its decision to challenge the laws as a whole").

[131] *See* United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.").

[132] Following *Moody*, the Ninth Circuit reviewed a preliminary injunction against a state online privacy law arising from a facial overbreadth challenge. The court concluded that one of the challenged requirements in the law "raise[d] the same First Amendment issues" in each of its applications, thus simplifying the overbreadth analysis. NetChoice, LLC v. Bonta, No. 23-2969, 2024 WL 3838423, at *8 (9th Cir. Aug. 16, 2024). In applying strict scrutiny to that requirement, the court reasoned that "the *State* [was] unlikely to show" that the requirement was "'the least restrictive means' available for advancing" its asserted interest. *Id.* at *13 (emphasis added).

[133] Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

unconstitutional a federal law criminalizing the commercial creation or sale of depictions of animal cruelty after concluding that the "presumptively impermissible applications" of the law "far outnumber[ed] any permissible ones."[134] The Court reasoned that the law could prohibit not only animal fighting videos but also recreational hunting videos.[135] By contrast, in 2023, the Court rejected an overbreadth challenge to a federal statute that made it a crime to "encourage or induce" an immigration law violation.[136] The Court construed the operative language narrowly to apply only to non-expressive conduct and speech integral to criminal conduct (one of the "unprotected" categories of speech).[137] Based on this reading, the Court concluded that the law had "a wide legitimate reach" and that "the ratio of unlawful-to-lawful applications" was "not lopsided enough to justify the 'strong medicine' of facial invalidation for overbreadth."[138]

Vagueness Claim

Vagueness is a type of claim ordinarily raised under the Due Process Clause of the Fifth Amendment (for federal laws) or the Fourteenth Amendment (for state laws), particularly in challenges to criminal laws, convictions, or penalties.[139] *Vagueness* generally refers to uncertainty about who is covered by a law or what standard the government will use to "ascertain guilt."[140] An unconstitutionally vague law violates due process principles because it fails to provide "fair notice" of the conduct prohibited.[141]

Vagueness poses a special problem for laws that regulate speech because vague laws have the potential to chill protected expression.[142] According to the Supreme Court, "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.'"[143] Accordingly, litigants in First Amendment cases sometimes assert vagueness as an additional basis for challenging a speech restriction or penalty.[144] Even if a speech restriction is not void for vagueness as a matter of due process,

[134] United States v. Stevens, 559 U.S. 460, 481 (2010).

[135] *Id.* at 478–79, 482.

[136] United States v. Hansen, 599 U.S. 762, 785 (2023).

[137] *Id.* at 783–84.

[138] *Id.* at 784.

[139] *See* Johnson v. United States, 576 U.S. 591, 595 (2015) ("The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926))).

[140] Winters v. New York, 333 U.S. 507, 515–16 (1948); *see also Vagueness*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining vagueness in the first instance as "[u]ncertain breadth of meaning; unclarity resulting from abstract expression" and explaining when "vagueness raises due-process concerns").

[141] United States v. Williams, 553 U.S. 285, 304 (2008); *see generally* Cong. Rsch. Serv., *Overview of Void for Vagueness Doctrine*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt5-8-1/ALDE_00013739/ (last visited Mar. 26, 2024); Cong. Rsch. Serv., *Void for Vagueness*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-7-3/ALDE_00000261/ (last visited Mar. 26, 2024).

[142] *See* Cramp v. Bd. of Pub. Instruction of Orange Cnty., 368 U.S. 278, 283 (1961) (describing the "vices inherent in an unconstitutionally vague statute" as "the risk of unfair prosecution and the potential deterrence of constitutionally protected conduct"); FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253–54 (2012) (reasoning that "[w]hen speech is involved, rigorous adherence to [due process] requirements is necessary to ensure that ambiguity does not chill protected speech").

[143] Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964)).

[144] It may be more difficult for a litigant to prevail on a vagueness challenge to a law that is not backed by criminal penalties. *See* Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 498–99 (1982) (explaining that in vagueness challenges generally, the Court has "expressed greater tolerance of enactments with civil rather than criminal (continued...)

ambiguous terms regarding the law's coverage may render the law unconstitutional under applicable First Amendment standards.[145] Thus, vagueness can be a First Amendment defect even if it does not rise to the level of a due process violation.

The Supreme Court has recognized two ways in which a law regulating speech can be unconstitutionally vague: first, if the law "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits"; and second, if the law "authorizes or even encourages arbitrary and discriminatory enforcement."[146] A law is not impermissibly vague just because it lacks "perfect clarity and precise guidance."[147] Nor is a law vague because there is some uncertainty about how it might apply in "[c]lose cases."[148] Instead, a law may be vague if it sets out an "indeterminan[t]" legal standard or one that relies on "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings."[149] For example, in 1971, the Court held that an ordinance making it a crime for people to "assemble" on city sidewalks and "conduct themselves in a manner annoying to persons passing by," was unconstitutionally vague on its face.[150] The Court reasoned that "[c]onduct that annoys some people does not annoy others," so the ordinance essentially supplied "no standard of conduct . . . at all."[151]

A vagueness claim can be styled as either a facial or an as-applied challenge.[152] To succeed on a facial vagueness claim, "the complainant must demonstrate that the law is impermissibly vague in all of its applications."[153] While not completely foreclosing relief under a facial challenge,[154] the Supreme Court has urged lower courts to evaluate vagueness claims on an as-applied basis because "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."[155]

penalties because the consequences of imprecision are qualitatively less severe"). *Cf.* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572, 588–90 (1998) (holding that a law was not facially invalid on vagueness grounds because it required an agency to consider "general standards of decency and respect" when awarding federal grants for the arts).

[145] *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 870 (1997) (reasoning that "[r]egardless of whether" a restriction on "patently offensive" online messages was "so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment"); Minnesota Voters All. v. Mansky, 138 S. Ct. 1876, 1888 (2018) (holding that there was no reasonable basis for the state's exclusion of "political" apparel from polling places because the law did not define the term and the state interpreted the term inconsistently).

[146] Hill v. Colorado, 530 U.S. 703, 732 (2000).

[147] Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989).

[148] United States v. Williams, 553 U.S. 285, 306 (2008).

[149] *Id.*

[150] Coates v. City of Cincinnati, 402 U.S. 611, 614–15 (1971).

[151] *Id.* at 614.

[152] *See, e.g.*, *id.* at 616 (considering a facial challenge to a city ordinance on vagueness grounds); FCC v. Fox Television Stations, Inc., 567 U.S. 239, 258 (2012) (considering whether an agency's broadcast indecency standards were vague as applied to particular broadcasts).

[153] Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 497 (1982).

[154] *See First Amendment—Freedom of Speech—Facial Challenges—Minnesota Voters Alliance v. Mansky*, 132 HARV. L. REV. 337, 346 (2018) (positing that by deciding the *Mansky* case on facial vagueness grounds in 2018, the Court "opened up a potential new line of attack for facial vagueness challenges").

[155] Holder v. Humanitarian L. Project, 561 U.S. 1, 20 (2010); Parker v. Levy, 417 U.S. 733, 755–56 (1974) (reasoning that the appellate court erred by allowing the defendant to challenge the vagueness of certain military articles as "hypothetically applied to the conduct of others, even though he was squarely within their prohibition").

Prior Restraint Claim

Penalties for engaging in speech activity are typically imposed only after the defendant has had a chance to contest the allegations or offer any defenses through a criminal, civil, or administrative process. By comparison, a *prior restraint* on speech occurs when the government "forbid[s] certain communications" before they occur or requires a private person to obtain the government's permission before speaking.[156] In a system of prior restraints, the government might review the intended message for compliance with government-imposed standards and decide whether to allow publication of the speech.[157]

While the First Amendment limits both "previous restraint" and "subsequent punishment" of speech,[158] prior restraints are an "especially condemned" form of speech infringement[159] because they closely resemble the "official censorship" that the Framers of the Bill of Rights sought to prevent.[160] A law that requires a speaker to obtain a license before engaging in speech is a classic example of a prior restraint.[161] According to the Supreme Court, the First Amendment was directed at the "core abuse" of prepublication licensing laws in 16th- and 17th-century England, whereby the government "prescribed what could be printed, who could print, and who could sell."[162] Still, the Supreme Court has recognized that the government has interests in licensing particular businesses or professions for regulatory purposes such as health and safety that are unrelated to the suppression of free speech.[163] Accordingly, not all licensing schemes raise the same level of censorship concerns.[164]

Prior restraints can also take the form of a court order, such as an injunction restricting the publication of specific information or prohibiting private parties from engaging in speech on a particular topic in the future.[165] Additionally, the Supreme Court has recognized that, although not prior restraints "in the strict sense of that term," regulatory schemes that effectively require

[156] Alexander v. United States, 509 U.S. 544, 550 (1993) (quoting MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 4.03, at 4–14 (1984)).

[157] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952).

[158] Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940).

[159] *Joseph Burstyn*, 343 U.S. at 503.

[160] Hill v. Colorado, 530 U.S. 703, 734–35 (2000).

[161] *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–51 (1969) (recalling "the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional").

[162] Thomas v. Chicago Park Dist., 534 U.S. 316, 320 (2002) (quoting Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L.REV. 245, 248 (1982)).

[163] *See Thomas*, 534 U.S. at 323 (reasoning that "[r]egulations of the use of a public forum that ensure the safety and convenience of the people are not 'inconsistent with civil liberties but ... [are] one of the means of safeguarding the good order upon which [civil liberties] ultimately depend'" (quoting Cox v. New Hampshire, 312 U.S. 569, 574 (1941)).

[164] *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 868 (1997) ("[S]ome of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers."); Freedman v. Maryland, 380 U.S. 51, 58 (1965) (setting out "procedural safeguards designed to obviate the dangers of a censorship system" posed by a state motion picture board that prescreened movies before they could be shown in theatres).

[165] *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 764 n.2 (1994) (explaining that prior restraints "often take the form of injunctions" but "[n]ot all injunctions that may incidentally affect expression" are prior restraints within the meaning of the Court's First Amendment cases).

private persons to seek agency advisory opinions before they can speak can raise similar concerns.[166]

Procedurally, a litigant can raise a prior restraint argument in either a facial or an as-applied challenge.[167] If a law is a prior restraint, raising the types of concerns discussed above, a reviewing court might subject the law to strict scrutiny or ask whether it contains certain procedural safeguards.[168] In particular, if a prior restraint involves a content-based restriction on speech or gives a licensing official "unduly broad discretion,"[169] courts might, among other safeguards, require the government to promptly go to court and prove the constitutionality of the restraint.[170] Thus, although prior restraints come with a "heavy presumption" of invalidity,[171] they are not automatically unconstitutional.[172]

Special Contexts

In addition to the legal standards discussed above, the Supreme Court has developed special tests or factors for consideration when the government seeks to regulate speech in particular contexts. While not an exhaustive list, the sections below describe some of the main areas where free speech standards have developed to accommodate a particular context, including links to CRS products that discuss these legal standards in more detail. The special rules or limiting principles associated with "unprotected" categories of speech (e.g., defamation) are beyond the scope of this section.[173]

Campaign Finance

Campaign finance regulations can take multiple forms, including contribution and expenditure limits, source restrictions for contributions, and disclosure and disclaimer requirements.[174] Such regulations implicate political speech and association and have often triggered First Amendment scrutiny when challenged in court.[175] The Supreme Court has applied different levels of scrutiny depending on the type of regulation at issue.[176] For example, limits on independent expenditures in support of a candidate would likely receive strict scrutiny.[177] By limiting the "amount of money a person or group can spend on political communication during a campaign," limits on

[166] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 335 (2010).

[167] *See* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 755–57 (1988) (explaining why only facial challenges can adequately address the harms of self-censorship); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (holding that the government had not met its heavy burden of showing why the court should enjoin the publication of a classified study).

[168] *See Freedman*, 380 U.S. at 58–59 (discussing the "procedural safeguards" required by the Court to help "obviate the dangers of a censorship system").

[169] Thomas v. Chicago Park Dist., 534 U.S. 316, 322–23 (2002) (explaining that *Freedman*'s procedural safeguards are not required for "a content-neutral permit scheme regulating speech in a public forum" but that such a regulation must "contain adequate standards to guide the official's decision and render it subject to effective judicial review").

[170] *Freedman*, 380 U.S. at 59.

[171] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

[172] Times Film Corp. v. City of Chicago, 365 U.S. 43, 47 (1961).

[173] *See* CRS In Focus IF11072, *The First Amendment: Categories of Speech*, by Victoria L. Killion (2024).

[174] Whitaker, *Campaign Finance Law*, *supra* note 79.

[175] Cong. Rsch. Serv., *Overview of Campaign Finance*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-11-1/ALDE_00013490/ (last visited Mar. 26, 2024).

[176] *Id.*

[177] Whitaker, *Campaign Finance Law*, *supra* note 79.

independent expenditures can "reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[178] By comparison, disclosure requirements for political committees would likely receive a form of exacting scrutiny because although they "may burden the ability to speak," they "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking."[179]

Compelled Subsidization

When the government is speaking for itself through a regulatory program, it generally can require its citizens to help finance that message without violating the First Amendment.[180] By comparison, the government typically may not require a person to contribute monetarily to a *private* group that engages in expressive activity that conflicts with that person's beliefs.[181] The Supreme Court has opined that compelled subsidies of this nature are "closely related" to compelled speech and compelled association and pose similar First Amendment concerns.[182] For example, in *Janus v. AFSCME, Council 31*, the Supreme Court held that compulsory agency fees collected by public-sector unions violated the First Amendment.[183] The Court declined to decide whether strict scrutiny applied to such arrangements, because it concluded that the law failed an exacting scrutiny standard derived from earlier precedents.[184]

Government Programs or Funding

In general, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."[185] Accordingly, requirements that restrict or compel the speech of government grantees, beneficiaries, or program participants might be challenged as an "unconstitutional condition" on government funding.[186]

Although the Court has not announced a universal standard to apply in all unconstitutional conditions cases, it has identified some overarching principles in the context of government programs and funding arrangements.[187] For instance, the government may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same

[178] Citizens United v. FEC, 558 U.S. 310, 339 (2010) (quoting Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam))).

[179] *Id.* at 366 (internal quotation marks and citations omitted). *See also* Whitaker, *Campaign Finance Law*, *supra* note 79; CRS In Focus IF12388, *First Amendment Limitations on Disclosure Requirements*, by Valerie C. Brannon et al. (2023).

[180] *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005) ("Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech.").

[181] *See* Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 471 (1997) (explaining that the Court previously "recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief'"). *See generally* Cong. Rsch. Serv., *Compelled Subsidization*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-12-3/ALDE_00000770/ (last visited Mar. 26, 2024).

[182] Knox v. Serv. Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 309 (2012).

[183] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478 (2018).

[184] *Id.* at 2465.

[185] Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[186] Cong. Rsch. Serv., *Overview of the Unconstitutional Conditions Doctrine*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-13-1/ALDE_00000771/ (last visited Mar. 26, 2024).

[187] *See generally* Cong. Rsch. Serv., *Conditions on Federal Funding*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-13-4/ALDE_00001276/ (last visited Mar. 26, 2024); Cong. Rsch. Serv., *Selective Funding Arrangements*, https://constitution.congress.gov/browse/essay/amdt1-7-13-6/ALDE_00001278/ (last visited Mar. 26, 2024).

time funding an alternative program"—even if those programs are carried out through speech.[188] Additionally, the government may make content-based (and sometimes viewpoint-based) distinctions within the contours of its own programs.[189] The government may not, however, leverage funding to control private speech outside of its sponsored programs.[190]

Government Property and Public Forums

When it comes to government-owned or government-controlled property, the degree to which the government can regulate speech may depend on the type of forum at issue. A forum can be a physical space or a "metaphysical" one.[191]

The Supreme Court has identified at least three types of forums for purposes of First Amendment analysis.[192] In a *traditional public forum* such as a public street, sidewalk, or park, content-neutral time, place, or manner restrictions must satisfy intermediate scrutiny, whereas content-based restrictions must satisfy strict scrutiny.[193] The same rules apply in a *designated public forum*: a forum the government opens "for use by the public as a place for expressive activity."[194] Thus, traditional standards of First Amendment scrutiny generally apply in public or designated public forums.[195]

By comparison, the government has more leeway to restrict the speakers admitted to, and content presented in, a *nonpublic forum*—property that the government has not intentionally designated as a place for public communication.[196] A restriction on access to a nonpublic forum must be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[197]

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[188] Rust v. Sullivan, 500 U.S. 173, 193 (1991).

[189] *Id.* at 198–99 (upholding regulations prohibiting staff of Title X grantees from abortion referral or counseling, observing that the "employees remain free . . . to pursue abortion-related activities when they are not acting under the auspices of the Title X project").

[190] Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 214–15 (2013) (distinguishing between "conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself"); *see also* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 547 (2001) ("Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.").

[191] Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 830 (1995) (applying limited public forum principles to a student activity fund at a public university); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (holding that a charity drive conducted in the federal workplace and aimed at federal employees was a nonpublic forum).

[192] Bd. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 572 (1987).

[193] Cong. Rsch. Serv., *The Public Forum*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-7-1/ALDE_00013542/ (last visited Mar. 26, 2024). Although less common, a public forum can also be located on private property. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 507 (1946) (treating a sidewalk outside of a post office in a company-owned town as akin to a public sidewalk for First Amendment purposes).

[194] Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

[195] *Id.*

[196] *See id.* at 49 ("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."); Cong. Rsch. Serv., *Public and Nonpublic Forums*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-7-2/ALDE_00013543/ (last visited Mar. 26, 2024).

[197] *Perry Educ. Ass'n*, 460 U.S. at 46.

A possible fourth category is the *limited public forum*. In *Walker v. Texas Division*, the Court suggested that a limited public forum was a distinct category from a designated public or nonpublic forum, stating that a limited public forum is created when the government "has 'reserv[ed a forum] for certain groups or for the discussion of certain topics.'"[198] However, the *Walker* Court did not explain which test applies to limited public forums.[199] In other cases, the Court has used the term in ways synonymous with both designated public forums and nonpublic forums.[200]

Intellectual Property

Intellectual property law routinely involves speech, including copyrighted works and trademarks.[201] While not immune from First Amendment scrutiny,[202] copyright and trademark law also contain unique features that help serve to balance free speech and intellectual property interests. For example, copyright law includes "built-in First Amendment accommodations," such as the statutory "fair use" defense to a copyright infringement claim.[203] That defense protects certain uses of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research."[204] Similarly, when a person uses another's trademark without permission to denote the source of goods or services, the "likelihood-of-confusion inquiry" for evaluating trademark infringement claims typically "does enough work to account for the interest in free expression," without applying a separate First Amendment test.[205]

The presumption of unconstitutionality for content-based laws[206] applies differently in the trademark context. In its 2024 decision in *Vidal v. Elster*, the Supreme Court explained that "[b]ecause of the uniquely content-based nature of trademark regulation and the longstanding coexistence of trademark regulation with the First Amendment, we need not evaluate a solely content-based restriction on trademark registration under heightened scrutiny."[207] As a result, the

[198] Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 215 (2015) (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

[199] *Id.*

[200] *Compare* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 805 (1985) (concluding that a federal charity drive was a nonpublic forum rather than a limited public forum, and therefore not subject to the First Amendment standards for public forums), *with* Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995) (reasoning, with respect to limited public forums, that the "necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics").

[201] Cong. Rsch. Serv., *Copyright and the First Amendment*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C8-3-3/ALDE_00013065/ (last visited Mar. 26, 2024).

[202] *See, e.g.*, Matal v. Tam, 582 U.S. 218, 223 (2017) (holding that a federal trademark statute's bar on registering certain "disparag[ing]" trademarks violated the First Amendment).

[203] Eldred v. Ashcroft, 537 U.S. 186, 219–220 (2003).

[204] 17 U.S.C. § 107.

[205] Jack Daniel's Properties, Inc. v. VIP Prod. LLC, 599 U.S. 140, 159 (2023); *see also* 15 U.S.C. § 1114(1) (imposing trademark infringement liability for certain uses that are "likely to cause confusion").

[206] *See supra* "Strict Scrutiny."

[207] 602 U.S. 286, 300 (2024).

government may deny trademark registration in some circumstances because of a mark's subject matter or topic,[208] though viewpoint-based distinctions are still prohibited.[209]

Prisons

Under the First Amendment, the government generally has more leeway to regulate inmates' speech and access to information within correctional facilities.[210] The Court has recognized this latitude in light of the broader limitation on rights and privileges that incarceration brings and because of the "legitimate policies and goals of the corrections system."[211] Still, an incarcerated individual "retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[212] In *Turner v. Safley*, the Court set out a reasonableness standard of review for a prison regulation that burdens inmates' free speech rights.[213] Such a regulation "is valid if it is reasonably related to legitimate penological interests," with reasonableness assessed by four factors set out in *Turner*.[214]

Public Employment

Under First Amendment case law, the government has greater constitutional authority to regulate the speech of its employees than it does the citizenry in general.[215] A free speech question might arise if a government employer disciplines or fires an employee based on the employee's speech. A reviewing court faced with a First Amendment retaliation claim in such a case would first ask whether the employee's speech was entitled to First Amendment protection by considering whether the employee was speaking "as a citizen" rather than pursuant to the employee's official duties, and on "a matter of legitimate public concern."[216] If the court answers both questions affirmatively, then First Amendment protections apply and the court typically applies a balancing test outlined in *Pickering v. Board of Education* to determine whether the government can restrict the speech.[217] Under this test, the court balances the employee's interests as a citizen against the government's interests as an employer "in promoting the efficiency of the public services it

[208] *Id.* at 310 (upholding a federal prohibition on registering a trademark consisting of a living person's name without that individual's written consent, but stating that the Court was not establishing "a comprehensive framework for judging whether all content-based but viewpoint-neutral trademark restrictions are constitutional").

[209] *See, e.g.*, Iancu v. Brunetti, 139 S. Ct. 2294, 2302 (2019) (holding that the federal trademark statute's bar on registering "immoral[] or scandalous" trademarks violated the First Amendment as a viewpoint-discriminatory law).

[210] *See generally* Cong. Rsch. Serv., *Prison Free Speech and Government as Prison Administrator*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-8-4/ALDE_00000758/#ALDF_00006648 (last visited Mar. 26, 2024).

[211] Pell v. Procunier, 417 U.S. 817, 822 (1974).

[212] *Id.*

[213] Turner v. Safley, 482 U.S. 78, 89 (1987); *see also* Shaw v. Murphy, 532 U.S. 223, 230 (2001) (stating that "*Turner* provides the test for evaluating prisoners' First Amendment challenges" and holding that *Turner* did not justify "an increase in constitutional protection whenever a prisoner's communication includes legal advice" to another prisoner).

[214] *Turner*, 482 U.S. at 89–91. In the Religious Land Use and Institutionalized Persons Act of 2000, Congress created a private right of action against the government with a more stringent standard of review for regulations burdening the "religious exercise" of certain incarcerated persons. 42 U.S.C. § 2000cc-1(a), 2000cc-2; Warsoldier v. Woodford, 418 F.3d 989, 994 (9th Cir. 2005).

[215] *See generally* Cong. Rsch. Serv., *Pickering Balancing Test for Government Employee Speech*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-9-4/ALDE_00013549/ (last visited Mar. 26, 2024).

[216] Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568, 571 (1968).

[217] *Id.* at 568.

performs through its employees."[218] Different legal standards might apply outside of the context of individual retaliation claims; for example, prophylactic restrictions on public employees' speech or political activities might trigger more stringent scrutiny.[219]

Schools

The First Amendment applies to speech regulations at public schools because state and local governments own or operate these schools and because teachers and students have First Amendment rights.[220] At the same time, public primary and secondary schools (e.g., elementary, middle, and high schools) can restrict student speech in some circumstances "in light of the special characteristics of the school environment."[221] In other words, a "school need not tolerate student speech that is inconsistent with its 'basic educational mission,' . . . even though the government could not censor similar speech outside the school."[222]

The Supreme Court established one of the primary frameworks for evaluating school speech restrictions in *Tinker v. Des Moines Independent Community School District*.[223] In *Tinker*, the Court considered a public high school's policy that prohibited students from wearing black armbands, which at that time signified opposition to U.S. involvement in the Vietnam War.[224] The Court stated that in order for the school "to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[225] The Court held that the policy violated the First Amendment because the school had no evidence that displaying these armbands would cause "substantial disruption of or material interference with school activities."[226]

Tinker's "substantial disruption" standard is not the only basis for upholding regulations restricting student speech.[227] In a 2021 decision, the Court identified "three specific categories of student speech that schools may regulate in certain circumstances" as a result of the Court's post-*Tinker* case law:

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[218] *Id.*; *see also Pickering Balancing Test for Government Employee Speech*, *supra* note 215 (discussing factors that the Court has applied in conducting this balancing test).

[219] *See, e.g.*, United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 467 (1995) (declining to apply *Pickering* balancing to "Congress' wholesale deterrent to a broad category of expression by a massive number of potential speakers"). *See generally* Cong. Rsch. Serv., *Loyalty Oaths*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-9-1/ALDE_00013546/ (last visited Mar. 26, 2024); Cong. Rsch. Serv., *Political Activities and Government Employees*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-9-2/ALDE_00013547/ (last visited Mar. 26, 2024); Cong. Rsch. Serv., *Honoraria and Government Employees*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-9-3/ALDE_00013548/ (last visited Mar. 26, 2024).

[220] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

[221] *Id. See generally* Cong. Rsch. Serv., *School Free Speech and Government as Educator*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-8-3/ALDE_00000757/ (last visited Mar. 26, 2024).

[222] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).

[223] *Tinker*, 393 U.S. at 506; *see also* Morse v. Frederick, 551 U.S. 393, 406 (2007) (concluding that "the rule of *Tinker* is not the only basis for restricting student speech").

[224] *Tinker*, 393 U.S. at 510.

[225] *Id.* at 509.

[226] *Id.* at 514.

[227] *Morse*, 551 U.S. at 406.

> (1) "indecent," "lewd," or "vulgar" speech uttered during a school assembly on school grounds; (2) speech, uttered during a class trip, that promotes "illegal drug use"; and (3) speech that others may reasonably perceive as "bear[ing] the imprimatur of the school," such as that appearing in a school-sponsored newspaper.[228]

Thus, while the Court in *Tinker* found a First Amendment violation, its reasoning paved the way for more deferential treatment of school speech restrictions.

Whether *Tinker* and its progeny govern regulations of speech at public institutions of higher education (i.e., colleges and universities) is somewhat uncertain. On the one hand, the Supreme Court has cited principles from *Tinker* in cases involving public colleges and universities.[229] On the other hand, the Court has recognized the role of these institutions in facilitating free debate, opining that "the college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'"[230] In one opinion, the Court suggested that while *Tinker* might apply to "reasonable rules governing conduct," disciplinary actions against university students based on disfavored speech would be subject to traditional First Amendment scrutiny.[231] According to the Court, "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech."[232]

Zoning of Sexually Oriented Businesses

In the 1980s, the Supreme Court developed the "secondary effects" doctrine in zoning cases involving the location of adult theatres depicting sexually explicit movies.[233] Under this doctrine, if an ordinance is aimed at the "secondary effects" of such businesses on the local community (e.g., crime, property values), rather than suppressing the expression that the businesses purveyed, a court may apply the intermediate scrutiny standard applicable to content-neutral time, place, or manner regulations.[234]

In subsequent decisions, the Court has suggested that the secondary effects doctrine might not apply outside of the zoning context.[235] When the Court decided *Reed v. Town of Gilbert* in 2015, it held that facially content-based laws warrant strict scrutiny "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[236] That case involved a town sign code that restricted the display of signs to

[228] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2045 (2021) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986); *Morse*, 551 U.S. at 409; and Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988)).

[229] *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 268 (1981) (stating that the Court "continue[s] to adhere" to *Tinker*'s recognition that courts must consider speech interests in light of the "special characteristics of the school environment," and reasoning that because a "university's mission is education," the Court has upheld "reasonable regulations compatible with that mission").

[230] Healy v. James, 408 U.S. 169, 180 (1972).

[231] Papish v. Bd. of Curators of Univ. of Missouri, 410 U.S. 667, 671 (1973) (per curiam).

[232] *Id.*

[233] Cong. Rsch. Serv., *Content-Neutral Laws Burdening Speech*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-3-7/ALDE_00013701/ (last visited Mar. 26, 2024).

[234] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–50 (1986).

[235] *See* United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 815 (2000) ("Our zoning cases, on the other hand, are irrelevant to the question here."); Reno v. ACLU, 521 U.S. 844, 867–68 (1997) ("According to the Government, the [statute] is constitutional because it constitutes a sort of 'cyberzoning' on the Internet. But the [statute] applies broadly to the entire universe of cyberspace.").

[236] Reed v. Town of Gilbert, 576 U.S. 155, 165 (2015).

varying degrees based on a sign's topic or message.[237] Despite these developments, as of the date of this report, the Court has not formally overruled its secondary effects cases.

Related First Amendment Rights

Free speech claims are sometimes brought alongside claims that the government violated other rights enshrined in the First Amendment. Those rights are the free exercise of religion (and the bar on government establishment of religion), the freedom of the press, the right to peaceably assemble, and the right to petition the government for a redress of grievances.[238] The Supreme Court has also recognized the right of association as an implicit corollary to the freedom of speech, covering not only expressive association but also certain forms of intimate association.[239] As First Amendment rights can be intertwined in some cases, the Supreme Court has sometimes addressed multiple First Amendment interests through a single legal framework.[240]

Related CRS Products

Cong. Rsch. Serv., *Overview of the Religion Clauses (Establishment and Free Exercise Clause)*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-2-1/ALDE_00013267/ (last visited Mar. 26, 2024).[241]

Cong. Rsch. Serv., *Relationship Between Religion Clauses and Free Speech Clause*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-6/ALDE_00000040/ (last visited Mar. 26, 2024).

Cong. Rsch. Serv., *Overview of Freedom of Association*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-8-1/ALDE_00013139/ (last visited Mar. 26, 2024).

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[237] *Id.* at 159, 171.

[238] U.S. CONST. amend. I.

[239] Cong. Rsch. Serv., *Overview of Freedom of Association*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-8-1/ALDE_00013139/ (last visited Mar. 26, 2024).

[240] *See, e.g.*, Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 680 (2010) (declining to treat the petitioners' "speech and association claims as discrete" or to "engage each line of cases independently," because the petitioners' "expressive-association and free-speech arguments merge").

[241] Each "Overview" essay is followed by a series of essays covering these topics in more detail. The table of contents for the First Amendment essays in the *Constitution Annotated* is available at https://constitution.congress.gov/browse/amendment-1/.

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