Freedom of expression,
a comparative law perspective

The United States

STUDY

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Abstract

This study forms part of a wider-ranging project, which seeks to lay the groundwork for comparisons between legal frameworks governing freedom of expression in different legal systems.

The following pages will analyse, with reference to the United States of America and the subject at hand, the legislation in force, the most relevant case law, and the concept of freedom of expression with its current and prospective limits, ending with some conclusions and possible solutions for future challenges.

The legislative foundation for freedom of expression law in the United States is grounded in the First Amendment to the Constitution. Based on this text, the Supreme Court has created the freedom of expression doctrinal framework by which lower courts and other branches of government are bound. Unlike other jurisdictions, the United States grants broad freedom of expression protections based largely on the idea that "good" speech will prevail over "bad" speech in the open market.

AUTHOR

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List of abbreviations

2d	Second
3d	Third
A.B.A.	American Bar Association
ACLU	American Civil Liberties Union
All.	Alliance
Amend.	Amendment
&	And
Ariz.	Arizona
Art.	Article
Assoc(s).	Associate(s)
Ass'n	Association
Bd.	Board
Cal.	California
Cal. Civ. Proc. Code	California Civil Procedure Code
Cent.	Central
C.F.R.	Code of Federal Regulations
Cl.	Clause
Co.	Company
Comm.	Committee, Communication(s)
Commc'n	Communication
Comm'n	Commission
Cmty.	Community
Cong. Research Serv.	Congressional Research Service
Corp.	Corporation
Ct.	Court
Dist.	District
Ed.	Edition, editor
Eds.	Editors
Educ.	Education
Elec.	Electric
Entm't	Entertainment

Et Al.	And others, a phrase indicating that there are more than two authors or editors of the referenced work.
Ex. Rel.	Ex relatione. An abbreviation used for "on the relation of," "on behalf of," and similar procedural phrases.
F.2d	Federal Reporter Second, the second series of published decisions of the U.S. Courts of Appeals compiled by a private publisher.
FCC	U.S. Federal Communications Commission
FCPA	Foreign Corrupt Practices Act
FEC	Federal Election Commission
Fed.	Federal
Found.	Foundation
Geo. L.J.	Georgetown Law Journal
Hum.	Human
Id.	*Idem*, used to refer to the immediately preceding authority cited.
Ill.	Illinois
Inc.	Incorporated
Indep.	Independent
Indus.	Industrial
Info.	Information
Inst.	Institute
Intell.	Intellectual
Int'l	International
J.L. & Pol'y	Journal of Law and Policy
Mag.	Magazine
Merch.	Merchant
Mich.	Michigan
Mich. St. L. Rev.	Michigan State Law Review
N.Y.	New York
Nat'l	National
No.	Number
Org.	Organization
Prop.	Property
Pub.	Public
§	Section

S. Ct.	Supreme Court; also, West's Supreme Court Reporter, a private publication of Supreme Court Opinions and orders that is cited if an opinion is not yet in United States Reports.
Sch.	School
Sec.	Section
Serv.	Service
SLAPP	Strategic Lawsuit Against Public Participation
U.S. or US	United States; also, United States Reports, which is the official compilation of U.S. Supreme Court opinions and orders
U.S.C.	United States Code, the official compilation of federal laws of a permanent and general nature, which comprises 52 subject titles.
U.S. Const.	United States Constitution. Cited by Amendment (amend.), Article (art.), Section (§ or sec.), and Clause (cl.).
V.	Versus
Va.	Virginia
Wash. Post.	Washington Post
W. Va.	West Virginia

Executive summary

Freedom of expression law in the United States finds its origins in the precolonial period during a time of discord in England between the oppressive state and the emerging philosophies of John Locke and John Milton. The American colonists organized a revolution to overthrow the oppressive English state to establish a republic where, much like Locke and Milton envisioned, freedom of speech would be protected from government intrusion. The guarantee of freedom of speech was enshrined in the very first amendment to the Constitution. Despite some early doctrinal failures by prominent leaders, the Supreme Court eventually developed a freedom of speech doctrine that affords expressive freedoms to all citizens regardless of the content of their message.

These protected expressive freedoms were eventually applied to the states through the Due Process Clause of the Fourteenth Amendment, meaning that states became subject to the same speech regulation restrictions as the federal government. Due to the constitutional nature of freedom of speech law in the United States, legislatures do not pass broad legislation related to freedom of speech, instead passing laws that either relate to a specific speech issue such as fraud and crime solicitation, or addressing an independent issue that may also incidentally affect speech. Likewise, regulations promulgated by the Federal Communications Commission are subject to the framework established by the Supreme Court and mostly relate to rules surrounding specific policy areas, such as telephone communication and emergency telecommunications infrastructure.

Meaningful interpretation of the Freedom of Speech Clause of the First Amendment did not occur until the early twentieth century. Based on several eloquent dissents written by Justice Holmes, the Supreme Court in later years ultimately adopted a "marketplace of ideas" theory approach to most freedom of expression issues, while reserving government regulation for the most undesirable forms of speech, including obscenity, child pornography, and treason. The Court has granted the most protection to political forms of speech, i.e., speech relating to a political message. Other protected forms of speech, albiet less protected than political speech, include pure speech, symbolic speech, and commercial speech. Still, the Court has created numerous categories of speech that do not receive any First Amendment protection.

Despite the longevity of American freedom of speech doctrine, courts will continue to face challenges in resolving novel issues and fact patterns, along with legitimacy concerns in justifying the application of previous precedent because much of the rationale surrounding existing free speech doctrine remains normative. Some scholars argue that using originalism to interpret the First Amendment and construct constitutional law presents a possible solution. Under such a framework, the meaning of the constitutional text is derived from the original public meaning at ratification given the plain meaning of the words and the context. The scholars argue that using such an approach is superior to an ad hoc balancing of legal interests because it substantially reduces the amount of personal and political biases judges are able to infuse into their decisions and thereby constrain their ability to "make up" constitutional law.

However, other scholars argue that some of the language of the Constitution was written ambiguously, especially controversial provisions, in an effort to leave enough room for argumentation so that both sides could garner support for the provisions. As the theory goes, this is the natural result of attempted compromise in legal writing in a climate of partisan politics. An approach that rejects the premise that judges are bound by the original meaning of the text may rely on a variety of other factors to interpret and construct legal meaning, including cost/benefit analysis, precedent, and historical practice.

Section I of this Report provides a brief historical overview of the origins and colonial developments that shaped the ideology behind the First Amendment, the Amendment's ratification process, early violations of the Amendment, and the Amendment's modern interepretation. Section II presents the legislation that regulates freedom of expression in the United States. Section III outlines the most relevant United States case law on freedom of expression, separated by categories of protected and unprotected speech. Section IV further describes the concept of freedom of expression in the United States along with the right's current and possible future limitations. Section V discusses the current situation of freedom of expression in the United States and possible approaches to future challenges, as well as providing concluding remarks.

I. Introduction: Brief historical account

Freedom of expression law in the United States was developed and continues to be developed by the Supreme Court's interpretation of the Freedom of Speech Clause in the First Amendment to the Constitution. Thus the freedom of speech doctrine created by the Supreme Court defines what qualifies as "speech" for First Amendment protection, and the extent of the protection that the First Amendment affords to certain types of speech.

The ideology of the First Amendment first formed before the American Revolution by the collision between England's oppressive speech laws and the emergence of philosophers such as John Locke and John Milton who advocated for greater expressive liberty. During the colonial period, the American colonists grew increasingly discontent with the government's punishment of speech that criticized the government.

The Framers set to resolve these freedom of expression issues by passing a Bill of Rights, the first provision of which forbade the federal government from abrigding the freedom of speech. While the actions of the early leaders of the Republic overtly violated the First Amendment, the interpretation of the Amendment by the Supreme Court in subsequent decades condemned these early practices and fostered case law that now grants exponentially more protection.

I.1. Origins

The origins of the First Amendment date past the Amendment's inception and ratification to mainland England prior to the colonization of the Americas.[1] Even before movable type enabled mass communication, England discouraged expressive liberty by creating seditious libel laws.[2] Under these laws, the mere criticism of the state, regardless of truthfulness, was sufficient ground for liability.[3] In fact, truthful criticisms were actually punished more harshly than false criticism under the idea that the truth may actually do more harm than false information.[4]

After the advent of the printing press, England began licensing printing presses in an effort to control the spread of information that criticized the state.[5] The Crown had to authorize printing licenses, publications were subject to review and censorship, and harsh penalties were given for criticizing the state.[6]

Such state actions were eventually challenged by emerging philosophies and theories, including that of natural law.[7] John Locke advocated for natural law and argued that freedom

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1 *See* RUSSELL L. WEAVER, UNDERSTANDING THE FIRST AMENDMENT 5 (6th ed., 2017).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

of expression is essential for the discovery of truth, and that in order for a state to retain legitimacy, it must have consent from the governed.[8]

John Milton also argued that the free competition of ideas serves as the best avenue for the discernment of truth.[9] In a pamphlet addressed to the English Parliament in 1644, Milton said:

> Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties...though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the worse, in a free and open encounter?[10]

Thus, within this clash of ideologies the backdrop for the First Amendment was developed. Eventually, the Supreme Court would use reasoning similar to that of Milton in creating First Amendment doctrine.[11] Indeed, in his dissent in *Abrams v. United States*, Justice Holmes remarked:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[12]

Thus the "market place of ideas" metaphor was born. Like John Milton, Justice Holmes argued that all speech should be given the opportunity to be voiced freely in our society, and that competition in the market of ideas will reveal the truth. This "experiment" has continued to be used by the Supreme Court in resolving freedom of speech cases, subject to certain exceptions, such as speech that threatens life or liberty.[13]

I.2. Colonial developments

The colonists in colonial America continued to struggle with freedom of expression issues. Even though the English licensing laws were no longer in force, the government continued to prohibit speech that critized the state through seditious libel laws.[14]

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8 *Id.*

9 *Id.*

10 JOHN MILTON, AREOPAGITICA 49, 50 (George H. Sabine ed., 1951).

11 *See* WEAVER, *supra* note 1.

12 *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

13 *See* RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH 15, 21 (Richard Delgado & Jean Stefancic eds., 2006).

14 WEAVER, *supra* note 1, at 6.

The trial of John Peter Zenger in 1735 was a critical juncture in the development of freedom of expression in colonial America and later the United States.[15] Zenger published materials that criticized the royal governor of New York and prompted citizens to demand a change in administration.[16] At trial, all the government had to prove in order to obtain a conviction was that Zenger actually published the materials.[17] Despite the government successfully doing so, the jury defied the government and returned a verdict in favor of Zenger.[18] This trial illustrated the public's growing distaste for the suppression of expression and encouraged other publishers to produce material that advanced the revolutionary cause.[19]

I.3. Ratification of the First Amendment

The original Constitution did not contain any enumeration of rights or liberties because it was assumed that these rights and liberties were self-evident.[20] The Framers did not give the federal government the power to regulate expression, but many disagreed with this approach, and demanded an explicit statement of rights.[21]

George Mason believed that a federal bill of rights was required in order to protect the people and the states from intrusions on fundamental liberties—among them the freedom of speech, press, and religion—by the federal government.[22] James Madison, on the other hand, opposed the idea of a bill of rights because he feared that listing certain rights would imply that other rights not listed were not valued.[23]

Eventually, a compromise was reached wherein the states that objected to the Constitution without an explicit statement of rights would ratify such a constitution only if the first Congress would adopt a Bill of Rights through the amendment process.[24] The very first guarantee that appears in this statement of rights is the right to freedom of speech.[25] At first, this guarantee only applied to the federal government; but eventually the freedom of speech guarantee was incorporated to the states in 1925 through the Due Process Clause of the Fourteenth Amendment.[26]

I.4. Early violations of the First Amendment

Early in the Republic's development, the government blantantly violated the First Amendment by enacting laws that made certain types of government criticism illegal.[27] This

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15 *See id.* at 7.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 341-42 (2009).

23 ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT 8 (2007).

24 WEAVER, *supra* note 1, at 7-8.

25 U.S. CONST. amend I.

26 *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

27 *See* WEAVER, *supra* note 1, at 9.

was spurred by an intense political conflict that existed between the Federalists led by John Adams, and the Jeffersonians led by Thomas Jefferson.[28]

The Federalists enacted the Alien and Sedition Act, which made it illegal to "write, print, utter, or publish any false, scandalous and malicious writing or writings against the government of the United States..."[29] Truth was a valid defense, but the Act was used to punish those who spoke out against the government.[30] The Act was eventually repealed by Congress and was never subject to judicial review.[31]

However, in *New York Times Co. v. Sullivan*, the Supreme Court commented on the constitutionality of this Act, stating:

> Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional...Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating: "I discharged every person under punishment or prosecution under the sedition law because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." The invalidity of the Act has also been assumed by Justices of this Court. These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.[32]

I.5. Modern interpretation

Meaningful interpretation of the First Amendment did not occur until the second decade of the twentieth century.[33] During this time, the Supreme Court began to hear cases involving individuals who dissented against United States participation in World War I.[34] Dissenting opinions by Justices Holmes and Brandeis provided the doctrinal foundation for the "market place of ideas" approach to constitutional freedom of speech interpretation that granted greater protection to expressive liberty.[35]

Some Supreme Court justices, however, have disagreed with the interpretation of the First Amendment espoused by the majority of the Court. Justice Black and Justice Douglas advocated for the "absolutist" position.[36] Under this view, the First Amendment is interpreted

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28 *Id.*

29 *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

30 WEAVER, *supra* note 1, at 9.

31 *Id.*

32 *Sullivan*, 376 U.S. at 276.

33 *See* WEAVER, *supra* note 1, at 10.

34 *See id.*

35 *See id.*

36 ERIC BARENDT, FREEDOM OF SPEECH 49 (2d ed., 2005).

literally to mean that Congress is prohibited from enacting *any* law that abridges the freedom of speech.[37]

In defending this position and attacking the "balancing of interests" approach adopted by a majority of the Court, Justice Black wrote:

> [T]he First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field. The history of the First Amendment is too well known to require repeating here except to say that it certainly cannot be denied that the very object of adopting the First Amendment, as well as the other provisions of the Bill of Rights, was to put the freedoms protected there completely out of the area of any congressional control that may be attempted through the exercise of precisely those powers that are now being used to "balance" the Bill of Rights out of existence.[38]

The fact that other guarantees in the Bill of Rights have qualifying language, as opposed to the First Amendment, which does not, further supports Justice Black's position. For example, the Fourth Amendment only protects against "*unreasonable* searches and seizures"[39] (emphasis added); the Takings Clause of the Fifth Amendment only requires "*just* compensation"[40] (emphasis added); and the Eight Amendment only prohibits "*excessive* bail."[41]

Despite Justice Black's reasoning, the Court has maintained that the First Amendment cannot be read literally and as a result balancing in certain circumstances is required.[42]

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37 *See id.*

38 *Konigsberg v. State Bar of California*, 366 U.S. 36, 56 (1961) (Black, J., dissenting).

39 U.S. CONST. amend IV.

40 U.S. CONST. amend V.

41 U.S. CONST. amend VIII.

42 *See* WEAVER, *supra* note 1, at 13.

II. Legislation concerning freedom of expression

In the United States, no comprehensive statutes or regulations regulating freedom of expression exist. Instead, the First Amendment to the United States Constitution solely governs the rights of citizens to freely express and voice their ideas and opinions. Congress and state legislatures pass statutes that deal with specific issues that may also incidentally affect expression/speech. This effect may then be evaluated by courts under the freedom of expression standards set by the Supreme Court, the highest federal court in the United States, which also holds the power of judicial review: the power to declare an executive or legislative act unconstitutional.[43]

II.1. The US Constitution

The guarantee of freedom of expression in the United States is contained in the very first sentence of the Bill of Rights.[44]

The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[45]

Interpreting the language of this amendment literally, it prohibits Congress from making *any* law that abridges the freedom of speech/expression. The Supreme Court, however, has created freedom of speech doctrine in the United States through the balancing of various rights and interests without guidance from the First Amendment text.[46]

The Bill of Rights, and consequently the First Amendment, does not itself apply to the states; it only applies to the federal government.[47] However, the Supreme Court began to apply the Bill of Rights to the states on a case-by-case basis.[48] Under the process of "selective incorporation," the Supreme Court incorporates certain parts of constitutional amendments to the states on a case-by-case basis instead of incorporating an entire amendment, or even all of the Bill of Rights, all at once.[49] Such incorporation to the states occurs through the application of the Due Process Clause of the Fourteenth Amendment.[50]

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43 ABOUT THE SUPREME COURT, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about (last visited July 1, 2019).

44 *See* U.S. CONST. amend I.

45 *Id.*

46 BARENDT, *supra* note 36, at 50.

47 *See Barron v. City of Baltimore*, 32 U.S. 243, 250-51 (1833).

48 *Bill of Rights in Action*, CONST. RIGHTS FOUND. (Spring 1991), https://www.crf-usa.org/bill-of-rights-in-action/bria-7-4-b-the-14th-amendment-and-the-second-bill-of-rights.

49 *Incorporation Doctrine*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/incorporation_doctrine (last visited July 16, 2019).

50 *See Gitlow v. New York*, 268 U.S. 652, 666 (1925) (applying the freedom of speech and press provisions of the First Amendment to the states through the Due Process Clause of the Fourteenth Amendment).

The Due Process Clause of the Fourteenth Amendment reads, "nor shall any state deprive any person of life, liberty, or property, without due process of law…"[51] Thus, the Clause gives a directive to the states.

The test for selective incorporation, or in other words, the standard that evaluates whether a certain provision in the Bill of Rights applies to the states through the Due Process Clause of the Fourteenth Amendment, was articulated by Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319 (1937). According to this test, due process requires that a right be applied to the states if (1) the absence of the right would subject the defendant to "a hardship so acute and shocking that our polity will not endure it," and (2) if the right qualifies as one of those "'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"[52]

The Supreme Court itself described the process of incorporation in *Duncan v. Louisiana*, 391 U.S. 146 (1968):

> The Fourteenth Amendment denies the States the power to "deprive any person of life, liberty, or property, without due process of law." In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment.[53]

The approach taken by the Supreme Court stands in contrast to the "total incorporation" approach advocated by Justice Black.[54] Under this approach, the Fourteenth Amendment absorbs all of the Bill of Rights, but *only* those rights found within the Bill of Rights.[55] Justice Black wrote that based on the historical events surrounding the Fourteenth Amendment and the original meaning of the text, "one of the chief objects" of the first section of the Fourteenth Amendment "was to make the Bill of Rights applicable to the states."[56]

Arguing in favour of a total incorporation approach, Justice Black wrote:

> It must be conceded, of course, that the natural-law-due-process formula, which the Court today reaffirms, has been interpreted to limit substantially this Court's power to prevent state violations of the individual civil liberties guaranteed by the Bill of Rights.16 But this formula also has been used in the past and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy an morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government.[57]

Justice Black also identified the flaws within the selective incorporation approach, and consequently the flaws in not following the original meaning of the Fourteenth Amendment text:

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51 U.S. CONST. amend XIV, § 1.

52 *See Palko v. Connecticut*, 302 U.S. 319, 328 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969) (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)).

53 *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968).

54 JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 52 (6th ed., 2017).

55 *Id.*

56 *Adamson v. California*, 332 U.S. 46, 71-72 (1947), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964). (Black, J., dissenting).

57 *Id.* at 90.

> But the "fundamental fairness" test is one on a par with that of shocking the conscience of the Court. Each of such tests depends entirely on the particular judge's idea of ethics and morals instead of requiring him to depend on the boundaries fixed by the written words of the Constitution. Nothing in the history of the phrase 'due process of law' suggests that constitutional controls are to depend on any particular judge's sense of values.[58]

According to Justice Black's interpretation of the Fourteenth Amendment, there exist no greater privileges than those afforded by the Bill of Rights.[59] Excluding the Bill of Rights from the meaning of the Fourteenth Amendment would render the text of the Amendment meaningless.[60]

An incorporationist (total incorporation) approach is limited to the guarantees of the Bill of Rights, whereas a fundamental-rights theorist (partial/selective incorporation) approach could enforce a right not explicitly found within the Bill of Rights, such as privacy.[61]

II.2. Statutes

The statutes discussed in this section are some of the major United States statutes that regulate a specific issue, but also incidentally happen to affect expressive freedoms. The federal statutes discussed below cover fraudulenty representing receipt of military awards, solicitations to commit crimes of violence, bribery of foreign officials, the political speech of federal employees, the pledge of allegiance to the flag, the means by which communications are regulated, equal access in public schools, and delivering defense information to foreign governments. The last statute mentioned is a California state statute prohibiting meritless lawsuits intended to chill speech that speaks out against public issues.

II.2.1. Stolen Valor Act of 2013

This federal statute prohibits fraudulently representing receipt of military decorations or medals.[62] Specifically, section 704(b) states, "Whoever, with intent to obtain money, property, or other tangible benefit, fraudulently holds oneself out to be a recipient of a decoration or medal described in subsection (c)(2) or (d) shall be fined under this title, imprisoned not more than one year, or both."[63] Among the medals covered by this statute are the Congressional Medal of Honor, Navy Cross, and Purple Heart.[64]

II.2.2. 18 U.S.C. § 373. Solicitation to commit a crime of violence

This federal statute outlaws soliciting another person to commit a felony that has as an element the attempted, threatened, or actual use of physical force against a person or property.[65] Whoever with such intent to induce another to commit such a felony shall be punished by imprisonment not greater than half the maximum term of imprisonment or fined

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58 *Duncan*, 391 U.S. at 168-69 (Black J., dissenting).

59 *Id.* at 167.

60 *See id.*

61 DRESSLER & THOMAS, *supra* note 54, at 61.

62 18 U.S.C. § 704(b) (2018).

63 *Id.*

64 *Id.* §§ 704(c)(2)-(d)(1).

65 18 U.S.C. § 373(a) (2018).

not greater than half the maximum fine given for the crime solicited, or both.[66] If the crime solicited is punishable by life imprisonment or death, then the solicitor shall be imprisoned for a term not greater than twenty years.[67]

II.2.3. Foreign Corrupt Practices Act

Among the many actions the Foreign Corrupt Practices Act (FCPA) regulates, it prohibits any issuer of securities that has a certain registered class of securities to corruptly make a payment to any foreign official to influence this official to make an act or decision in his official capacity, to secure an improper advantage, or to induce such an official to assist the issuer in obtaining or retaining business.[68]

The same restrictions apply to domestic concerns and any person other than an issuer or domestic concern.[69]

II.2.4. Hatch Act Reform Amendments of 1993

The Hatch Act of 1939 prohibited federal, District of Columbia, and certain state and local government employees from participating in partisan political activity.[70] The Hatch Act Reform Amendments of 1993 substantially changed the original Hatch Act.

Now, employees[71] may actively participate in political campagins, except such employees are not allowed to use their official authority or influence to interfere with or affect the result of an election, knowingly solicit or accept political contributions, or run as a candidate to a partisan political office.[72] Furthermore, an employee may not engage in political activity while the employee is on duty or in any room or building where the official duties of an employee are carried out.[73]

II.2.5. 4 U.S.C. § 4. Pledge of allegiance to the flag; manner of delivery

The pledge of allegiance to the flag is written out in this statute. The pledge reads, "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all."[74] The pledge should be said while standing and facing the flag with the right hand over the heart.[75]

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66 *Id.*

67 *Id.*

68 15 U.S.C. § 78dd-1 (2018).

69 *See* § 78dd-2 (defining domestic concern as "any individual who is a citizen, national, or resident of the United States," and " any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.")

70 *See* 5 U.S.C. §§ 7321-26 (2018).

71 5 U.S.C. § 7322(1) (2018) (defining employee as "any individual, other than the President and the Vice President, employed or holding office in (A) an Executive agency other than the Government Accountability Office; or (B) a position within the competitive service which is not in an Executive agency").

72 *Id.* § 7323(a)(1)-(3).

73 *Id.* § 7324(a)(1)-(2).

74 4 U.S.C. § 4 (2018).

75 *Id.*

II.2.6. Communications Act of 1934/Telecommunications Act of 1996

The Federal Communications Commission (FCC) was created to execute and enforce the provisions of Chapter 5 of Title 47 of the United States Code.[76] Congress also set out the purposes for which the FCC was created:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy.[77]

The FCC consists of five commissioners appointed by the President and confirmed by the Senate, with one of these commissioners serving as chairman.[78] Each commissioner is appointed to a five-year term.[79] The Commission is appropriated $333,118,000 for fiscal year 2019 and $339,610,000 for fiscal year 2020 to carry out its functions.[80]

The Commission is also required to forbear from applying any regulation or chapter provisions to a telecommunications carrier or service if enforcing the regulation is not necessary to ensure that the regulations are just and reasonable, is not necessary for the protection of consumers, and if such forbearance is consistent with the public interest. The Commission must also consider if forbearance will enhance competition.[81]

II.2.7. Equal Access Act

The Equal Access Act forbids public secondary schools that receive federal financial aid and have a limited open forum "to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings."[82] A public secondary school has a limited public forum "whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time."[83]

A school is considered to offer a "fair opportunity" when the meeting is voluntary and initiated by students, no sponsorhip of the meeting by the school or government exists, agents of the school or government who are present at religious meetings only do so in a nonparticipatory manner, the meeting does not interfere with the school's educational activities, and nonschool persons do not control or attend student group activities.[84]

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[76] 47 U.S.C. § 151 (2018).

[77] *Id.*

[78] *Id.* § 154(a).

[79] *Id.* § 154(c)(1)(A).

[80] *Id.* § 156(a).

[81] *Id.* § 160(a)-(b).

[82] 20 U.S.C. § 4071(a) (2018).

[83] *Id.* § 4071(b).

[84] *Id.* § 4071(c).

II.2.8. 18 U.S.C. § 794. Gathering or delivering defense information to aid foreign government

This federal statute sets out the punishment for a person who directly or indirectly communicates or delivers, or attempts to communicate or deliver, information pertaining to the national defense, with the intent or reason to believe that such information will injure the United States or aid foreign nations.[85]

Subsection (b) prescribes punishment by death or life imprisonment for, in a time of war, communicating to the enemy information relating to the movement, condition, numbers, or disposition of armed forces or the plans of military operations.[86]

II.2.9. California Anti-SLAPP Statute

Anti-SLAPP statutes are state statutes designed to afford a remedy for SLAPP lawsuits.[87] "SLAPP" is an acronym for "strategic lawsuits against public participation."[88] Such lawsuits are used to silence and harass those who exercise their freedom of speech rights by communicating with the government or speaking out on public interest issues.[89] Those who file SLAPP lawsuits aim to force the opposing party to spend money defending a baseless suit and thus drain the opposing party's financial resources.[90] By doing so, SLAPP lawsuit filers hope the opposing party will give in due to the financial pressures and agree to be silenced.[91]

California's anti-SLAPP statute begins by stating:

> The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.[92]

The defendant is provided a special motion to strike for a cause of action arising from the defendant's furtherance of the right of free speech or petition in connection with a public issue.[93] The plaintiff is then afforded the opportunity to establish that there is a probability that he or she will prevail on the claim.[94] A defendant who prevails on his or her motion to strike is entitled to recover his or her attorney's fees and costs.[95]

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85 18 U.S.C. § 794(a) (2018).

86 *Id.* § 794(b).

87 *Anti-SLAPP Laws*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, https://www.rcfp.org/resources/anti-slapp-laws/ (last visited July 18, 2019).

88 *Id.*

89 *What is a SLAPP?*, PUB. PARTICIPATION PROJECT FIGHTING FOR FREE SPEECH, https://anti-slapp.org/what-is-a-slapp (last visited July 18, 2019).

90 *Id.*

91 *Anti-SLAPP Laws*, *supra* note 87.

92 CAL. CIV. PROC. CODE § 425.16(a) (West 2015).

93 *See Id.* § 425.16(b)(1).

94 *Id.*

95 *Id.* § 425.16(c)(1).

II.3. Regulations

The regulations described below are promulgated by the FCC pursuant to their authority established under the Communications Act of 1934/Telecommunications Act of 1996. They include regulations of telephone initiation and communication and regulations governing procedures specific to wartime and emergencies.

II.3.1. 47 CFR § 64.1200 Delivery restrictions

This regulation prohibits persons or entities from initiating a telephone call using a prerecorded or artificial voice, or an automatic telephone dialing system, except in cases of emergencies or with the prior consent of the called party, to any emergency telephone line, or to a telephone line of a guest room or patient room in a hospital.[96]

Initiating a telephone call to a residential line using a prerecorded or artificial voice without the prior consent of the called party is prohibited unless the call is made for emergency purposes, is not made for a commercial purpose, is made for a commercial purpose but does not include an advertisement or constitute telemarketing, is made on behalf of a tax-exempt non-profit organization, or delivers a "health care" message on behalf of a "covered entity."[97] Telephone solicitations to a residential telephone subscriber between the hours of 9 p.m. and 8 a.m. are also forbidden.[98]

II.3.2. 47 CFR § 202 National Security and Emergency Preparedness Planning and Execution

These regulations govern policies specific to a wartime emergency, or a non-wartime emergency or natural disaster, promulgated in order to maintain a communications network during such emergencies.[99] They mandate that telecommunications resources will be available for the government to use during emergencies to establish safety and public welfare.[100] The Secretary of Defense reserves control over aviation radio services and radio services aboard vessels in the Maritime Service during a national emergency.[101] Moreover, those facilities not owned by the federal government will be subject to FCC guidance and direction, or subject to local plans if the facility is not subject to FCC jurisdiction.[102]

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96 47 C.F.R. § 64.1200(a)(1)(i)-(ii) (2018).

97 *Id.* § 64.1200(a)(3).

98 *Id.* § 64.1200(c)(1).

99 *Id.* § 202.0(a)-(b).

100 *Id.* § 202.1(a).

101 *Id.* § 202.2(d)(3).

102 *Id.* § 202.2(d)(2).

III. The most relevant US case law

In developing its freedom of expression doctrine, the Supreme Court has differentiated between the different types of speech in establishing what standards and how much protection each category of speech is afforded.[103] Categories of protected speech include pure speech, symbolic speech, political speech, and commercial speech. Unprotected speech itself can be split into multiple subcategories.

As noted by one author, "[f]ree speech law in the United States is much more complex than it is in other countries."[104] One reason for this is the complex doctrine and differing legal standards the Supreme Court has developed for different types of speech and speech restrictions.[105] Secondly, the United States has confronted freedom of expression issues for almost a hundred years, whereas European courts have only grappled with these issues for forty to fifty years.[106] Thus, while the text of the Constitution and various statutes and regulations may seem straightforward, the constitutional law governing these decisions, as developed case-by-case by the Supreme Court, remains incredibly complex.

III.1. Pure speech

In evaluating whether a statute or regulation violates the Free Speech Clause of the First Amendment, courts first consider whether the law actually governs or regulates a category of speech.[107]

III.1.1. Time, place, and manner restrictions

Subject to some exceptions, legislators and regulators are prohibited from placing content-based restrictions on speech.[108] In other words, Congress or agencies cannot regulate speech because of the content of that speech or the speaker's point of view.[109]

The government can, however, introduce time, place, and manner restrictions on speech as long as these restrictions are not placed because of the content of the speech or the speaker's viewpoint.[110] Moreover, time, place, and manner restrictions must generally be content-neutral, narrowly tailored to serve a significant government interest, and leave open ample other channels of communication.[111]

The standards by which these time, place, and manner restrictions are evaluated may nonetheless differ depending on whether the restriction is content-neutral or content-based, and whether the restriction occurs in a traditional public forum, designated public forum, or

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[103] *See* Victoria L. Killion, Cong. Research Serv., *The First Amendment: Categories of Speech* (2019), https://crsreports.congress.gov/product/pdf/IF/IF11072.

[104] BARENDT, *supra* note 36, at 55.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] U.S. DEP'T OF STATE, BUREAU OF INT'L INFO. PROGRAMS, FREEDOM OF EXPRESSION IN THE UNITED STATES (2013), https://photos.state.gov/libraries/amgov/133183/english/1304_FreedomofExpression_UnitedStates_EnglishDigital.pdf.

[109] Killion, *supra* note 103.

[110] U.S. DEP'T OF STATE, BUREAU OF INT'L INFO. PROGRAMS, *supra* note 108.

[111] *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983).

nonpublic forum. Content-neutral and content-based restrictions must satisfy different tiers of scrutiny.

A restriction is content-based if, "on its face," it makes distinctions between the "communicative content" of a speaker's message,[112] or if it requires "enforcement authorities" to "examine the content of the message that is conveyed to determine whether' a violation has occurred."[113] Content-based restrictions are subject to strict scrutiny "regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech."[114]

If a statute is content-neutral, meaning the statute applies to all forms of expression regardless of the type or substance of the expression,[115] then it is subject to intermediate scrutiny.[116] In order to survive intermediate scrutiny, the law must be "narrowly tailored to serve a significant governmental interest."[117] In order for the content-neutral time, place, or manner law regulating expression to be narrowly tailored it must not "burden substantially more speech than is necessary to further the government's legitimate interests."[118]

For traditional public forums (parks, streets, sidewalks), the government is permitted to place reasonable time, place, and manner restrictions on speech.[119] However, content-based restrictions on speech within this forum must satisfy strict scrutiny.[120] In order to pass strict scrutiny, "the restriction must be narrowly tailored to serve a compelling government interest."[121] Viewpoint restrictions within this forum are prohibited.[122] Otherwise, content-neutral restrictions within this forum must satisfy intermediate scrutiny.[123]

The government must meet a higher standard to place content-based restrictions on speech within traditional public forums because public streets and parks,

> have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in

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[112] EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS 359 (Robert C. Clark et al. eds., 6th ed. 2016). *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

[113] *McCullen v. Coakley*, 573 U.S. 464, 479 (2014); VOLOKH, *supra* note 112.

[114] *Reed*, 135 S. Ct. at 2228.

[115] David L. Hudson Jr., *Content Neutral*, FIRST AMEND. ENCYCLOPEDIA, https://mtsu.edu/first-amendment/article/937/content-neutral (last visited July 8, 2019).

[116] *McCullen*, 573 U.S. at 464.

[117] *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989).

[118] *McCullen*, 573 U.S. at 486 (citing *Ward*, 491 U.S. at 799).

[119] *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009).

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *McCullen*, 573 U.S. at 486.

> consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.[124]

Designated public forums operate under the same standards as traditional public forums.[125] Designated public forums are those spaces that the government has intentionally opened up for use in the same way as a traditional public forum.[126]

In nonpublic forums, spaces that are not traditional or designated public forums, the government has more flexibility to enact rules that restrict speech. The government "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[127]

III.1.2. Other pure speech doctrine

Other major pure speech areas in which the Supreme Court has created doctrine, standards, and rules include video games, false statements, social protests and civil liability, and parody.

Sale of Violent Video Games to Minors

Brown v. Entertainment Merchants Association (2011)

This case involved a California state statute that prohibited selling or renting violent video games to minors.[128] Games fell into the "violent" category if they involved killing, injuring, or sexually assaulting an image of a human being.[129] The Supreme Court concluded that this statute violated the First Amendment.[130]

The Court found that video games are a type of expression and as a result qualify for First Amendment protection.[131] Furthermore, because the statute imposes content-based discrimination on expression, it must satisfy strict scrutiny (must have a *compelling* government interest and be narrowly tailored).[132] California failed to meet this standard because it could not show a "direct causal link between violent video games and harm to minors."[133] Instead, the only justification California provided was a correlation between violent video games and "miniscule" violent effects.[134] Moreover, the Court noted that violence is not obscenity.[135]

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[124] *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 515-16 (1939).

[125] *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018).

[126] *Summum*, 555 U.S. at 469.

[127] *Perry Educ.*, 460 U.S. at 46.

[128] *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 789 (2011).

[129] *Id.*

[130] *Id.* at 805.

[131] *See Id.* at 790.

[132] *Id.* at 799.

[133] *Id.*

[134] *Id.* at 800.

[135] *Id.* at 793.

False Statements

United States v. Alvarez (2012)

The *Alvarez* case concerned Xavier Alvarez who lied about being in the military at a public Three Valley Water District Board meeting and claimed to have won the Congressional Medal of Honor.[136] By doing so, he violated a federal criminal statute, the Stolen Valor Act of 2005.[137]

The Court ruled that there is no "general exception to the First Amendment for false statements."[138] In other words, lying is (generally) not a category of unprotected speech, and as a result receives First Amendment protection. The Stolen Valor Act of 2005 "targets falsity and nothing more" and therefore is not similar to more specific unprotected false speech such as perjury and false representation.[139]

Allowing the government to declare this type of false speech a criminal offense would enable it to assemble a list of categories and make it a criminal offense to lie within these categories.[140] This places no limiting principle on governmental power.[141] The Court stated that

> a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.[142]

The preferred response to Mr. Alvarez's actions is not government regulation, the Court said, but counterspeech.[143]

Social Protests and Civil Liability

Snyder v. Phelps (2011)

This case dealt with a protest organized by the Westboro Baptist Church at the funeral of Albert's Snyder's son, who died serving in Iraq.[144] This church, led by Fred Phelps, often protests at military funerals because of their belief that God hates the United States for tolerating homosexuality in the public and in the military.[145] The church notified the authorities of their intent to protest and complied with all police instructions, picketing approximately 1,000 feet from church where the funeral was being held.[146]

The Westboro protestors protested for about 30 minutes and did not yell, use profanity, or use any violence.[147] At the same time, they held signs that contained hateful and disparaging

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136 *United States v. Alvarez*, 567 U.S. 709, 713 (2012).

137 *Id.*

138 *Id.* at 718.

139 *See id.* at 719-21.

140 *Id.* at 723.

141 *Id.*

142 *Id.*

143 *Id.* at 726.

144 *Snyder v. Phelps*, 562 U.S. 443, 448 (2011).

145 *Id.*

146 *Id.* at 448-49.

147 *Id.* at 449.

messages about homosexuals and United States military members.[148] Albert Snyder sued for intentional infliction of emotional distress, alleging that while he could not see what was written on the signs during the funeral, the protest caused him emotional anguish that resulted in severe depression and worsened his pre-existing health conditions.[149]

The issue before the Court was whether "the First Amendment shields the church members from tort liability for their speech in this case."[150] The Court held that yes, Westboro is shielded from tort liability for its protest.[151]

The Court reasoned that because Westboro's speech in this case was public, and because it related to issues in society at large, it is entitled to "special protection" under the First Amendment, as opposed to if the speech was directed specifically at Mr. Snyder.[152] Determining whether speech is public or private is done by examining the "content, form, and context" of the speech.[153] The language of the signs in this case was general and hyperbolic, and so constituted public rather than private speech.[154] Be this as it may, public speech is still "subject to reasonable time, place, or manner restrictions."[155] Westboro here followed all police instructions.[156]

The Court also emphasized a core First Amendment principle that "speech cannot be restricted simply because it is upsetting or arouses contempt."[157]

Parody

Hustler Magazine v. Falwell (1988)

Larry Flynt published an ad parody about Jerry Falwell, a nationally known minister, which featured a fake, intended to be humorous, "interview" in which Falwell reveals that he lost his virginity to his mother in an outhouse.[158] At the bottom of the page, the ad contained the disclaimer "ad parody—not to be taken seriously."[159] Jerry Falwell sued to recover damages for intentional infliction of emotional distress, libel, and invasion of privacy.[160]

The unanimous Court wrote that the ability to criticize public figures is one of the rights of American citizenship.[161] Thus, the First Amendment requires that in order for public figures and officials to be able to recover for intentional infliction of emotional distress, they need to

148 *Id.* at 448.

149 *Id.* at 449-50.

150 *Id.* at 447.

151 *Id.* at 461.

152 *See id.* at 458.

153 *Id.* at 454.

154 *See id.* at 451-58.

155 *Id.* at 456 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

156 *Id.* at 449.

157 *Id.* At 458.

158 *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 47-48 (1988).

159 *Id.* at 48.

160 *Id.* at 48-49.

161 *Id.* at 51 (quoting *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944)).

show a "false statement of fact which was made with "actual malice," *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true."[162]

Since Falwell was clearly a public figure under First Amendment law, and because the ad parody "was not reasonably believable," Falwell did not meet this standard and so could not recover damages.[163] The Court stressed that an alternate holding would subject political cartoonists and satirists to damages without any showing of false defamation.[164]

III.2. Symbolic speech

Symbolic speech is a recognized form of expression protected by the First Amendment.[165] Symbolic speech includes nonwritten and nonverbal forms of communication like burning draft cards, flag burning, and wearing armbands.[166]

United States v. O'Brien (1968)

On March 31, 1966, during the Vietnam War, David O'Brien, along with three companions, burned their Selective Service registration certificates (draft cards) in front of the South Boston Courthouse.[167] Mr. O'Brien stated that he burned the draft card publicly to persuade others to adopt his antiwar beliefs.[168]

Nonetheless, Mr. O'Brien's actions violated the 1965 amendments to the Selective Service Act of 1948, which criminalized knowingly mutilating a draft card.[169] Mr. O'Brien argued that this provision abridged his First Amendment right to freedom of speech.[170]

The Supreme Court held that a sufficient government interest existed to justify Mr. O'Brien's conviction because the government had a substantial interest in issuing Selective Service certificates, the amendments to the Selective Service Act was a narrow means of protecting this interest, and Mr. O'Brien's actions frustrated the government's interest.[171]

The Court developed a test for when government regulation can be imposed on conduct that contains both speech and nonspeech elements (i.e., symbolic speech).[172] Such a government regulation is sufficiently justified when (1) it is within the government's constitutional powers, (2) it furthers an important or substantial government interest, (3) the government's interest is unrelated to the suppression of free expression, and (4) if the incidental restriction on speech is not greater than what is essential to further that government interest.[173]

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[162] *Id.* at 56.

[163] *See id.* at 57.

[164] *Id.* at 53.

[165] Ronald Kahn, *Symbolic Speech*, FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1022/symbolic-speech (last visited July 9, 2019).

[166] *Id.*

[167] *United States v. O'Brien*, 391 U.S. 367, 369 (1968).

[168] *O'Brien*, 391 U.S. at 370.

[169] *See id.*

[170] *Id.*

[171] *Id.* at 382.

[172] *See id.* at 376.

[173] *Id.* at 377.

In this case, Congress had the power to issue draft cards based on its constitutional power to raise and support armies and the necessary and proper clause.[174] The Court held that these draft cards furthered substantial government interests, which include proof of registration, form of communication, address changes, and preventing fraud, which are unrelated to the suppression of expression.[175] The incidental restriction on speech by the Selective Service Act is not greater than the essential furtherance of the government's interest.[176]

Texas v. Johnson (1989)

Gregory Lee Johnson participated in a political demonstration outside the Republican National Convention.[177] During this demonstration, Mr. Johnson was handed an American flag and proceeded to pour kerosene on the flag and set it on fire.[178] He was charged with the desecration of a venerated object under the Texas criminal code.[179] The Supreme Court granted certiorari to determine if his conviction violated the First Amendment.[180]

The Court held that Mr. Johnson's conviction did violate the First Amendment, finding that Mr. Johnson's actions were expressive conduct protected by the First Amendment.[181] The government provided two interests in upholding Mr. Johnson's conviction: preventing breaches of the peace and preserving the flag's symbolic value.[182] According to the Court, the first interest does not apply because no peace was breached,[183] while the second interest amounts to the suppression of expression, and thus the *O'Brien* test does not apply.[184]

The Court again reiterated two common themes throughout its freedom of expression jurisprudence. One, "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable,"[185] and two, that the best way to combat this type of undesirable speech is by counterspeech, not government regulation.[186]

Tinker v. Des Moines (1969)

This case involved students of Des Moines schools who wanted to protest the Vietnam War by wearing black armbands to school.[187] Aware of this plan, the principals of the relevant schools instituted a policy whereby every student that wore such an armband in school would be

174 *Id.*

175 *See id.* at 378-80.

176 *See id.* at 382.

177 *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

178 *Id.*

179 *Id.*

180 *Id.*

181 *See id.* at 399, 406.

182 *Id.* at 400.

183 *Id.* at 408.

184 *Id.* at 410.

185 *Id.* at 414.

186 *See id.* at 420.

187 *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

suspended.[188] The students attended school with the armbands, were suspended, and through their fathers filed a suit seeking an injunction and nominal damages.[189]

The Supreme Court held that wearing the armbands to express a certain viewpoint constitutes symbolic speech under the First Amendment.[190] The Court also recognized that neither "students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[191] Furthermore, the schools sought to ban a form of "silent, passive expression of opinion,"[192] or more specifically, a particular form of expression.[193]

In order for the state to have the authority to suppress a particular form of expression, "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."[194] Here, there existed no such finding.[195]

III.3. Political speech

Political speech has been granted the most protection under the First Amendment.[196] Political speech doctrine has been created from cases involving refusing to salute the American flag in schools, campaign finance, and wearing profanity on clothing in protest.

West Virginia State Board of Education v. Barnette (1943)

The West Virginia State Board of Education created a rule requiring students and teachers to salute the flag as part of the school's regular program of activities.[197] The Board required a "stiff-arm' salute, the saluter to keep the right hand raised with palm turned up while the following is repeated: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all.'"[198] Failure to follow this instruction was considered insubordination and resulted in expulsion.[199] At the same time, the expelled student was considered unlawfully absent and thus a delinquent, while the parents were liable for prosecution because of the chid's "unlawful absence."[200]

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188 *Id.*

189 *Id.*

190 *Id.* at 736.

191 *Id.* at 506.

192 *Id.* at 508.

193 *See id.* at 509.

194 *Id.*

195 *Id.*

196 Ellada Gamreklidze, *Political Speech Protection and the Supreme Court of the United States*, NAT'L COMM. ASS'N (Oct. 1, 2015), https://www.natcom.org/communication-currents/political-speech-protection-and-supreme-court-united-states.

197 *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 626 (1943).

198 *Id.* at 628-29.

199 *Id.* at 629.

200 *Id.*

The plaintiffs, Jehovah's Witnesses, consider it a violation of their beliefs to salute the flag.[201] Thus, Jehovah's Witnesses children refused to salute the flag and were expelled from school, with their parents then subjected to prosecution for causing delinquency.[202]

The Supreme Court held that requiring students to salute the flag and recite the pledge of allegiance violates the First Amendment.[203] Thus, it overruled its decision in *Minersville School District v. Gobitis* (1940), which held that schools could require students to salute the flag and recite the Pledge of Allegiance.[204] The Court stated:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[205]

Buckley v. Valeo (1976)

In 1974, Congress attempted to execute significant reforms to federal campaign contributions and spending.[206] Congress passed major amendments to the Federal Election Campaign Act of 1971, which included limitations on individual contributions to candidates, limits on campaign spending, and the requirement of public disclosure of contributions and expenditures above certain threshold levels.[207]

The plaintiffs who filed the lawsuit included several candidates for federal office, including the presidency and Senate.[208] They argued that the major amendments to the Act were unconstitutional under the First Amendment and sought an injunction against the Act's enforcement.[209]

In an opinion that was, by some measures, the longest ever written by the Supreme Court,[210] the Court upheld and struck down various separate provisions of the Act. The provisions the Court upheld include limitations on financial contributions to political candidates,[211] limitations on volunteers' incidental expenses,[212] and the disclosure provisions.[213] The

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201 *Id.*

202 *Id.* at 630.

203 *Id.* at 642.

204 *See Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 599-600 (1940), *overruled by W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624 (1943).

205 *Barnette*, 319 U.S. at 642.

206 *See Buckley v. Valeo*, 424 U.S. 1, 7 (1976), *superseded by Bipartisan Campaign Reform Act of 2002*, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in Citizens United v. Federal Election Comm'n,* 558 U.S. 310 (2010).

207 *Id.*

208 *Id.* at 8.

209 *Id.* at 8-9.

210 MICHAEL DIMINO, BRADLEY SMITH & MICHAEL SOLIMINE, VOTING RIGHTS AND ELECTION LAW 796-97 (2010).

211 *Buckley*, 424 U.S. at 29.

212 *Id.* at 36.

213 *Id.* at 84. The disclosure provisions apply differently to individuals and groups who are not candidates or political committees, however. *Id.* at 80. The disclosure requirements apply to individuals and groups who are not candidates or political committies only in the following circumstances: "(1) when they make contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other

provisions the Court struck down include limitations on expenditures by candidates from personal or family resources,[214] limitations on overall campaign expenditures,[215] and limitations on expenditures "relative to a clearly identified candidate."[216]

The *Buckley* case "remains the touchstone of campaign-finance law" in the United States.[217]

Citizens United v. Federal Election Commission (2010)

Citizens United, a nonprofit corporation, released a film called *Hillary: The Movie*, and having already released the film in theaters and on DVD, wished to release it through video-on-demand through digital cable.[218] However, Citizens United feared it might break federal law by releasing the film through video-on-demand, along with advertisements for the film, within 30 days of the 2008 primary elections.[219] This is because federal law prohibited corporations from using general treasury funds to make independent expenditures that advocate for a candidate's election or defeat within thirty days of a primary election and within sixty days of a general election.[220]

Citizens United sued the Federal Election Commission (FEC) asking for both a declaratory judgment and injuctive relief.[221]

The Court ruled that "political speech does not lose First Amendment protection 'simply because its source is a corporation.'"[222] The political speech of associations or corporations cannot be treated differently than the political speech of natural persons because corporations contribute to First Amendmet protected ideas and debate in the same way that individuals do.[223]

Thus, the Court overruled *Austin v. Michigan Chamber of Commerce*, which upheld a law that prohibited corporations from using general funds to make independent expenditures in support of certain candidates in elections.[224] The majority of the Court clearly articulated, "Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."[225]

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than a candidate or political committee, and (2) when they make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.*

214 *Id.* at 52.

215 *Id.* at 58.

216 *Id.* at 51.

217 DIMINO ET AL., *supra* note 210, at 797.

218 *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 319 (2010).

219 *Id.* at 321.

220 *See id.* at 320-21.

221 *Id.* at 321.

222 *Id.* at 342.

223 *Id.* 343.

224 *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 655 (1990), *overruled by Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

225 *Citizens United*, 558 U.S. at 365.

Political spending has therefore become a form of speech protected by the First Amendment.[226] Even though corporations may not directly donate to campaigns, they may still use their funds to support or hinder election candidates.[227]

Cohen v. California (1971)

Paul Cohen wore a jacket bearing the plainly visible words "Fuck the Draft" to the Los Angeles County Courthouse in an effort to notify the public of his stance on the Vietnam War and the draft.[228] Even though Mr. Cohen did not engage in any acts of violence or make any loud noise, he was found to have violated the provision of the California penal code that prohibited "maliciously and willfully disturb(ing) the peace or quiet of any neighborhood or person by offensive conduct," on the basis that his behavior could reasonably have caused others to commit a violent act against Mr. Cohen or his jacket.[229]

First, the Supreme Court noted that the lettering on Mr. Cohen's jacket was neither obscenity nor fighting words, noting: "It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket."[230]

Next, in response to the argument that Mr. Cohen's "distasteful mode of expression" was thrust upon innocent viewers, the Court retorted, "we are often "captives" outside the sanctuary of the home and subject to objectionable speech."[231] Therefore, the Court wrote that, in order for the government to be able to ban certain types of speech solely to protect others from hearing this speech, the government must show that "substantial privacy interests are being invaded in an essentially intolerable manner."[232]

Again, the majority repeated one of the biggest themes of the Court's freedom of expression doctrine:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[233]

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[226] *Citizens United v. Federal Election Commission*, SCOTUSBLOG (last visited July 10, 2019), https://www.scotusblog.com/case-files/cases/citizens-united-v-federal-election-commission/.

[227] *Id.*

[228] *Cohen v. California*, 403 U.S. 15, 16 (1971).

[229] *Id.* at 17.

[230] *Id.* at 20.

[231] *Id.* at 21 (quoting *Rowan v. U.S. Post Office Dep't.*, 397 U.S. 728, 738 (1970)).

[232] *Id.*

[233] *Id.* at 24.

Finally, the majority clarified that "one man's vulgarity is another's lyric," insisting that government officials are incapable of making this distinction, and this is why the Constitution leaves such matters of "taste and style" to the individual.[234]

Thus, the Court held that states may not make the public display of single four-letter expletives a criminal offense under the First and Fourteenth Amendments.[235]

III.4. Commercial speech

Commercial speech is a protected category of speech under the First Amendment.[236] However, it does not receive as much First Amendment protection as other categories of speech, such as political speech.[237] This section discusses the recognition of First Amendment protection for commerical speech, the constitutionality of attorney-service advertising, and the extent to which comercial speech can be regulated under the First Amendment.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. (1976)

A Virginia statute provided that if a licensed pharmacist advertised prescription drug prices this would constitute unprofessional conduct.[238] The plaintiffs sued, arguing that this statute violated the First and Fourteenth Amendments.[239]

The Court stated that speech that does "no more than propose a commercial transaction"[240] does not lack First Amendment protection.[241] Indeed, just because an advertiser's interest in speech is a purely economic one does not disqualify him from First Amendment protection.[242] Furthermore, society has a strong interest in the free flow of commercial information.[243]

Thus, the Supreme Court conceded that commercial speech is protected by the First Amendment, but qualified that certain forms of commercial speech regulation are permissible.[244]

Bates v. State Bar of Arizona (1977)

The Supreme Court of Arizona, regulating the Arizona bar, created a rule that restricted advertising by attorneys.[245] The issue before the Court was whether this rule violated the First

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234 *Id.* at 25.

235 *Id.* at 26.

236 David Schultz, *Commercial Speech*, FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/900/commercial-speech (last visited July 11, 2019).

237 *Id.*

238 *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 749-50 (1976).

239 *Id.* at 749.

240 *Id.* at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)).

241 *See id.*

242 *Id.*

243 *Id.* at 764.

244 *Id.* At 770.

245 *Bates v. State Bar of Ariz.*, 433 U.S. 350, 353 (1977).

Amendment.[246] More specifically, it considered whether attorneys may constitutionally advertise prices for routine services.[247]

The Court held that yes, attorneys may constitutionally advertise prices for routine services,[248] but again qualified its holding by adding that attorney advertising may still be regulated in certain ways, such as, for example, restraining false or deceptive advertising.[249]

Central Hudson Gas and Electric Corporation v. Public Service Commission of New York (1980)

The New York Public Service Commission completely prohibited utility companies from publishing advertising promoting increased energy use.[250] Central Hudson challenged this order in court, arguing that the Commission had restricted its commercial speech in violation of the First Amendment.[251]

The question before the Court was "whether a regulation of the Public Service Commission of the State of New York violates the First and Fourteenth Amendments because it completely bans promotional advertising by an electrical utility."[252] The Court answered in the affirmative.[253]

More significantly, however, the Court established a test for determining when commercial speech regulation runs afoul of the First Amendment.[254] First, courts must determine whether the commercial speech is protected by the First Amendment by examining whether the speech concerns lawful activity and truthful information.[255] Second, courts must consider what the government asserts to be a substantial interest.[256] The third inquiry rests on whether the regulation directly advances the government's interest.[257] Lastly, the regulation must not be more extensive than is necessary to serve the government's interest.[258]

In applying this test to the facts of this case, the Court determined that the regulation here *is* more extensive than is necessary to serve the government's interest because the order covers all promotional advertising and the Commission failed to show that a more limited restriction would not serve the state's interests.[259]

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246 *Id.*

247 *Id.* at 367-68.

248 *See id.* at 382.

249 *See id.* at 383.

250 *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 559 (1980).

251 *Id.* at 560.

252 *Id.* at 558.

253 *See id.* at 572.

254 *See id.* at 566.

255 *See id.*

256 *Id.*

257 *Id.*

258 *Id.*

259 *Id.* at 569-70.

III.5. Unprotected speech

As has been noted and shown, the Supreme Court has adopted a "marketplalce of ideas" metaphor approach to its freedom of expression reasoning.[260] The Supreme Court has been reluctant to undergo the same ad hoc balancing seen in France and Germany due to the fear that the freedom of speech would be given too little weight.[261] Nonetheless, the use of this reasoning has not been absolute. For example, obscene materials and child pornography are given no First Amendment protection, even though under a true "marketplace of ideas" model these materials would be protected.[262]

The approach used to justify these and other exceptions to the speech covered by the First Amendment conform more with the Meiklejohn theory of the First Amendment, which advocates for ensuring everything worth saying gets said, not necessarily requiring the airing of all opinions.[263] Under such an approach, the government could regulate speech in such a way as to "level the playing field" by limiting the use of wealth to advance an idea or political candidate, and to ensure the voices of minorities are heard.[264]

Justice Brandeis aritculated such a position in his concurrence in *Whitney v. California* (1927):

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[265]

This section discusses some of the categories of speech which the Supreme Court has articulated do not warrant First Amendment protection. They include obscenity, fighting words, defamation, child pornography, pro-drug speech at schools, incitement to imminent lawless action, true threats, solicitation to commit crimes, treason, speech integral to criminal conduct, and fraud.

III.5.1. Obscenity

Miller v. California (1973)

The Court first noted that "obscenity is not within the area of constitutionally protected speech or press" in *Roth v. United States*.[266] In *Miller v. California*, the Court further articulated the

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[260] *See* KROTOSZYNSKI, JR., *supra* note 13, at 21.

[261] BARENDT, *supra* note 36, at 54.

[262] KROTOSZYNSKI, JR., *supra* note 13, at 23.

[263] *Id.* at 15, 23.

[264] *Id.* at 16.

[265] *Whitney v. California*, 274 U.S. 357, 375 (1927), *overruled in part by Brandenburg v. Ohio,* 395 U.S. 44 (1969) (per curiam) (Brandeis, J., concurring).

[266] *Roth v. United States*, 354 U.S. 476, 485 (1957).

obscenity standard. *Miller* concerned one Marvin Miller, who advertised the sale of illustrated books with "adult" material.[267] Mr. Miller sent five unsolicited advertising brochures that contained pictures and drawings of explicit sexual content "with genitals often prominently displayed" to a restaurant, and these brochures were later opened by the manager of this restaurant and his mother.[268] Mr. Miller was convicted of violating California's criminal obscenity statute by knowingly distributing obscene material.[269]

The Court developed a three-pronged test for determining whether material is considered obscene. In making this determination, the trier of fact must examine (1) "whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest"[270] (prurient interest meaning relating to sex),[271] (2) "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law,"[272] and (3) "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[273]

Each of these prongs must be met in order for material to be considered "obscene" and thus receive no First Amendment protection.[274]

III.5.2. Fighting words

Chaplinksy v. New Hampshire (1942)

The defendant, Walter Chaplinksy, was a Jehovah's Witness and was distributing literature relating to his religion on the streets. A restless crowd began to gather around Mr. Chaplinksy because he denounced all other religion as a racket.[275] A disturbance occurred and a police officer escorted Mr. Chaplinksy to the police station.[276] On the way to the station, Mr. Chaplinsky encountered Marshal Bowering and proceeded to call Marshal Bowering a "racketeer" and a "fascist," which violated a New Hampshire statute prohibiting addressing others in public places with offensive language and names.[277]

Mr. Chaplinksy challenged the New Hampshire statute as violating his right to freedom of speech, but the Court rejected his argument.[278] The Court maintained that "fighting words" are not protected by the First Amendment.[279] Fighting words are words,

> which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part

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267 *Miller v. California*, 413 U.S. 15, 17 (1973).

268 *Id.* at 18.

269 *Id.* at 16-18.

270 *Id.* at 24.

271 *See id.* at 23-24.

272 *Id.* at 24.

273 *Id.*

274 *See id.*

275 *Chaplinksy v. New Hampshire*, 315 U.S. 568, 569-70 (1942).

276 *Id.* at 570.

277 *Id.* at 569-70.

278 *Id.* at 571, 574.

279 *Id.* at 572.

> of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[280]

In deciding whether certain words are fighting words, "[t]he test is what men of common intelligence would understand would be words likely to cause an average addressee to fight."[281]

III.5.3. Defamation (including libel and slander)

New York Times Co. v. Sullivan (1964)

The New York Times Company printed statements in an advertisement about how Alabama police were conducting a "wave of terror" in confronting African American protestors and Dr. Martin Luther King Jr.[282] While the advertisement did not mention Mr. Sullivan directly, Mr. Sullivan was the Montgomery Commissioner who supervised the police department, and he claimed that by mentioning the "police" the advertisement would be read as imputing to him.[283]

Several of the statements made in the advertisement did not accurately portrary what occurred.[284] The trial judge instructed the jury that the advertisement statements were "libelous per se" and as a result in order to receive damage awards Mr. Sullivan only had to prove that the the New York Times Company published the advertisement and the statements concerned Mr. Sullivan.[285] The jury awarded Mr. Sullivan $500,000 in damages and the New York Times appealed this judgment.[286]

The Supreme Court reversed the judgment, writing that "the evidence presented in this case is constitutionally insufficient to support the judgment for [Mr. Sullivan]."[287] The Court stressed the principle that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[288] In order for this to occur, there must exist "breathing space" for speech.[289]

In order to be able to recover damages for libel/defamation, a public figure must prove that "the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[290]

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[280] *Id.*

[281] *Id.* at 573.

[282] *See Sullivan*, 376 U.S. at 256-57.

[283] *Id.* at 258.

[284] *Id.*

[285] *Id.* at 262.

[286] *See id.* at 256.

[287] *Id.* at 264.

[288] *Id.* at 270.

[289] *See id.* at 270-72.

[290] *Id.* at 280.

III.5.4. Child Pornography

New York v. Ferber(1982)

A New York statute prohibited knowingly promoting sexual performance by children under 16 years of age by distributing material that contains such performance.[291] The statute did not require that the material be considered "legally obscene." Paul Ferber was found distributing child pornographic material.[292] The issue before the Court was whether this New York statute was constitutional.[293]

The Court found that child pornography is unprotected by the First Amendment, as long as the state statute adequately defines the conduct prohibited.[294] To determine whether material qualifies as child pornography, the trier of fact does not need to prove "that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole."[295]

III.5.5. Pro-drug speech at schools

Morse v. Frederick (2007)

While in *Tinker v. Des Moines* the Court said that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[296] in *Bethel School District #403 v. Fraser* it clarified that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[297]

A further case, *Morse v. Frederick*, concerned a principal, Deborah Morse, who suspended a student, Joseph Frederick, for refusing to take down a banner at a school-sanctioned event that read "BONG HiTS 4 JESUS," believing that this banner encouraged illegal drug use.[298] Mr. Frederick sued, arguing that the school violated his First Amendment rights.[299]

The Court first maintained that Frederick's speech fell under the umbrella of school speech because he was at a school-sanctioned event.[300] Moreover, the Court interpreted the message on the banner to be "pro-drug."[301] The Court held that a principal may restrict student speech that is reasonably viewed as promoting illegal drug use at a school event under the First Amendment.[302]

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[291] *New York v. Ferber*, 458 U.S. 747, 749 (1982).

[292] *Id.* at 751-52.

[293] *Id.* at 749.

[294] *Id.* at 764.

[295] *Id.*

[296] *Tinker*, 393 U.S. at 506.

[297] *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

[298] *Morse v. Frederick*, 551 U.S. 393, 396-98 (2007).

[299] *Id.* at 399.

[300] *Id.* at 400.

[301] *Id.* at 402.

[302] *Id.* at 403.

III.5.6. Incitement to imminent lawless action

Brandenburg v. Ohio (1969)

Clarence Brandenburg was a member of the Ku Klux Klan and invited some members of the media to attend a Klan meeting and film the events.[303] Parts of the film were broadcast on television, including a speech given by Mr. Brandenburg, dressed in full Klan regalia, who said: "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[304] Mr. Brandenburg was convicted of violating Ohio's Criminal Syndicalism statute.[305]

The Court ruled that the Ohio statute cannot be sustained.[306] The imminent lawless action standard was established, with the Court writing that government may only criminalize speech "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[307] Thus, Mr. Brandenburg's speech was protected by the First Amendment.

III.5.7. True threats

Virginia v. Black (2003)

Barry Black led a Klu Klux Klan rally in Virginia.[308] During this rally, the Klan members set a 25-30 foot cross on fire.[309] The sheriff, who was observing the rally from the side of the road, arrested Mr. Black for violating a Virginia statute that prohibited burning a cross with an intent to intimidate.[310]

First, the Court noted that "true threats" are not protected by the First Amendment.[311] "True threats" include those statements "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[312] Moreover, the "speaker need not actually intend to carry out the threat."[313]

The Court ruled that Mr. Black's conviction could not stand because the jury was given the instruction that the burning of the cross by itself was enough to establish the required intent.[314]

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303 *Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969) (per curiam).

304 *Id.* at 446.

305 *Id.* at 444.

306 *Id.* at 448.

307 *Id.* at 447.

308 *Virginia v. Black*, 538 U.S. 343, 348 (2003).

309 *Id.* at 349.

310 *Id.*

311 *Id.* at 359 (citing *Watts v. United States*, 394 U.S. 705, 709 (1969) (per curiam)).

312 *Id.*

313 *Id.* at 60.

314 *See id.* at 367.

III.5.8. Solicitations to commit crimes

United States v. Williams (2008)

Michael Williams, in an online chat room, offered to send an undercover Secret Service agent pornographic images of a child.[315] He was eventually charged with one count of pandering child pornography and one count of possessing child pornography.[316]

The Court noted that offering to engage in illegal transactions is not speech protected by the First Amendment.[317] The Court further held that offering to provide or request child pornography is not speech protected by the First Amendment.[318]

III.5.9. Treason

This section examines cases not necessarily related to treason per se, but to speech that either hinders United States war efforts or advocates for the overthrow of the government.

Schenk v. United States (1919)

Charles Schenk, the general secretary of the Socialist Party, was indicted for attempting to cause insubordination in the military by distributing certain documents to men who had been called-up for military service.[319] Mr. Schenk's actions were found to have violated the Espionage Act of 1917.[320]

At the Supreme Court, Justice Holmes, writing for the majority, stressed the context under which Mr. Schenk undertook his actions: "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done."[321] Thus, the context in which the speech takes place is important in determining whether it receives first Amendment protection. For example, "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[322]

Justice Holmes therefore developed a standard under which to evaluate whether context lends (or does not lend) First Amendment protection to speech: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger."[323]

A time of war is one such circumstance in which speech that otherwise might be protected does not receive First Amendment protection: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be

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315 *United States v. Williams*, 553 U.S. 285, 291 (2008).

316 *Id.* at 292.

317 *Id.* at 297 (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973)).

318 *Id.* at 299.

319 *Schenk v. United States*, 249 U.S. 47, 48-49 (1919).

320 *Id.* at 48.

321 *Id.* at 52.

322 *Id.*

323 *Id.*

endured so long as men fight and that no Court could regard them as protected by any constitutional right."[324]

Abrams v. United States (1919)

Jacob Abrams, along with four of his comrades, were convicted of consipiring to violate the Espionage Act for distributing leaflets in New York City that denounced President Wilson's decision to send troops to Russia during World War I.[325] The defendants were charged with curtailing the production of materials necessary for the war effort and encouraging resistance to United States participation in the war.[326]

The majority wrote: "Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce."[327] The majority maintained that even if the primary intent of the defendants was to support the Russian Revolution, the "manifest purpose" of the leaflets was to hinder the United States' war effort by encouraging a strike and halting the production of materials necessary for the war effort.[328] Moreover, these leaflets were distributed in the most important port city in the country, from which large amounts of soldiers and war supplies were being transported overseas.[329] Therefore, the "plain purpose" of the leaflets was to cause a general strike and hinder the war effort in the United States.[330]

Justice Holmes, who authored the opinion in *Schenk v. United States* (1919), dissented in this case. Justice Holmes admitted that "war opens dangers that do not exist at other times."[331] However, Justice Holmes continued:

> But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms.[332]

Instead of punishing speech that Justice Holmes believed did not present a danger of immediate evil, Justice Holmes advocated for a system wherein all speech would be allowed to compete in the "free trade in ideas," and thus allow the best speech to win within this environment.[333]

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[324] *Id.*

[325] *Abrams v. United States*, 250 U.S. 616, 617-19 (1919).

[326] *Id.* at 617.

[327] *Id.* at 621.

[328] *Id.* at 621-22.

[329] *Id.* at 622.

[330] *Id.* at 623.

[331] *Id.* at 628.

[332] *Id.*

[333] *Id.* at 630.

Gitlow v. New York (1925)

Benjamin Gitlow, a socialist, was convicted of violating a New York criminal anarchy statute by distributing copies of a "Left Wing Manifesto" which allegedly advocated for the overthrow of the United States government.[334] No evidence existed that distributing the manifesto had any effect.[335]

The Court established that the freedom of speech and press, which are protected by the First Amendment, do apply to the states through the Due Process Clause of the Fourteenth Amendment.[336] The Court gave great weight to the state legislature's determination that speech advocating the overthrow of government by violent, unlawful means is so inimical to the general welfare that it may be criminalized.[337] Thus, the New York statute did not violate the First Amendment (or the Due Process Clause of the Fourteenth Amendment).[338]

Justice Holmes again dissented from the decision reached by the majority of the Court. Justice Holmes argued that the "clear and present danger" test should apply.[339] Using this test, no present danger of an attempt to overthrow the government on the part of Mr. Gitlow existed.[340] Justice Holmes then continued to dismantle the majority's reasoning:

> It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

According to Justice Holmes, if Mr. Gitlow had advocated for an *immediate* uprising, then the question would have been different.[341]

Dennis v. United States (1951)

Eugene Dennis and other communist party leaders were indicted for violating the conspiracy provisions of the Smith Act of 1940.[342] The Smith Act criminalized speech that advocated for

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334 *See Gitlow*, 268 U.S. at 654-55.

335 *Id.* at 656.

336 *See id.* at 666 (applying the protection of the freedom of speech and the press to the states because these are "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment").

337 *Id.* at 668.

338 *Id.* at 672.

339 *Id.* at 672-73 (test articulated in *Schenk v. United States*).

340 *Id.* at 673.

341 *Id.*

342 *See Dennis v. United States*, 341 U.S. 494, 495-97 (1951).

the overthrow of the government by force.[343] The issue before the Court was whether the Smith Act violated the First Amendment to the Constitution.[344]

The Court held that the Smith Act did not violate the First Amendment.[345] In attempting to apply the clear and present danger test, the Court first endeavoured to discern the phrase's meaning. By citing Chief Judge Learned Hand's opinion from the lower court, the Court interpreted the test to mean, "whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[346]

In justifying upholding the constitutionality of the Smith Act, the Court emphasized, "if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected."[347] In other words, if the government cannot protect itself, then no government would even exist to protect a citizen's right to freedom of speech. Morever, the majority rejected using "probability of success" as a criterion because of the impossibility of actually measuring this.[348]

III.5.10. Speech integral to criminal conduct

Giboney v. Empire Storage & Ice Co. (1949)

This case concerned members of the Ice and Coal Drivers and Handlers Local Union No. 953 who worked as ice peddlers driving ice door-to-door in Kansas City.[349] The union began an effort to induce all nonunion peddlers to join in an effort to increase wages and better working conditions.[350] Most of these nonunion peddlers, however, refused to join.[351] The union created a plan to make it impossible for nonunion peddlers to buy ice to supply their customers by obtaining agreements with wholesale ice distributors that they would not sell to nonunion peddlers.[352]

All the distributors, except Empire Storage & Ice Company, agreed.[353] In fact, complying with the union's demands would have put Empire in violation of a Missouri statute.[354] Union members began to picket Empire, and as a reuslt, Empire's business was reduced by 85%.[355] Empire sued, seeking an injunction against picketing; the union members responded by asserting their constitutional right to picket.[356]

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343 *See id.* at 496.

344 *Id.* at 495-96.

345 *Id.* at 516.

346 *Id.* at 510 (citing *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950)).

347 *Id.* at 509.

348 *Id.* at 509-10.

349 *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 492 (1949).

350 *Id.*

351 *Id.*

352 *Id.*

353 *Id.*

354 *Id.*

355 *Id.* at 493.

356 *Id.* at 494.

In response to the union's argument, Justice Black, writing for the majority, said, "[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now."[357]

The Court held that Missouri's power to regulate in this field is paramount, and so the rights to freedom of speech and press do not compel a state to apply or not apply its lawfully enacted law.[358] If the union had their way, then the result would be the violation of constitutional state law.

III.5.11. Fraud

Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc. (2003)

The defendants in this case, Telemarketing Associates and Armet, Inc., are for-profit fundraising corporations who were retained by a charitable nonprofit corporation to solicit donations meant to help Vietnam veterans.[359] In soliciting donations, the defendants mislead donors by telling them their donations would go to specific charitable endeavors, 90% of donations going to the veterans, and that donations would not be used for labor expenses because the members are volunteers.[360] In reality, only 10% of the donations given went to VietNow, the nonprofit corporation with which the defendants contracted.[361]

The attorney-general of Illinois charged that the defendants' actions constituted fraud.[362] The defendants maintained that the fraud claims were barred by the First Amendment.[363]

Justice Ginsburg, writing for a unanimous Court, held "States may maintain fraud actions when fundraisers make false or misleading representations designed to deceive donors about how their donations will be used."[364] The failure to disclose this information directly to donors does not establish fraud, but this nondisclosure was accompanied by intentionally misleading statements.[365] The First Amendment thus does not protect the defendants in this case.[366]

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[357] *Id.* at 498.

[358] *See id.* at 504.

[359] *Ill., ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 606-07 (2003).

[360] *Id.* at 608.

[361] *Id.* at 607.

[362] *Id.* at 609.

[363] *Id.*

[364] *Id.* at 624.

[365] *Id.* at 606.

[366] *Id.* at 624.

IV. The concept of freedom of expression and its current and possible future limits

Freedom of expression rights in the United States usually override a plethora of other legal interests due to freedom of expression having become a deep component of American culture. Even when faced with the question of hate speech protection, United States courts have continually defended one's right to speak freely, even if the message contains hateful content. Certain legal concepts within freedom of expression doctrine also come into conflict given the intricate web of case law that has developed since the early twentieth century. These legal concepts include standards evaluating "treasonous" speech and the contrast between general free speech doctrine and speech rights in public schools. Even though the extent of freedom of expression protection has been very strong, challenges relating to hate speech protection and the ability of large online companies to suppress certain types of speech may present possible future limits to freedom of expression rights, or at the very least raise normative questions in the overall freedom of expression debate.

IV.1. Proposed concept

Generally, the United States values freedom of expression rights above other legal interests, such as human dignity, privacy, and equality.[367] The advancement of these obviously important democratic values must be done without abridging the freedom of speech.[368] Indeed, law professor Ronald Krotoszynski, Jr., notes:

> The United States, even if not protecting all expression and applying intermediate scrutiny in some cases, comes closer than other countries to absolute protection. While the constitutional protections of many countries invite the balancing of interests, the Supreme Court has generally refused to engage in any such balancing in its First Amendment cases. As a result, the United States stands apart from much of the rest of the democratic world in such areas as the protection of hate speech and the access children are allowed to have to media that may do them harm.[369]

Freedom of speech in the United States has become a critical "*American* humanistic value," a value deeply engraved in American culture.[370] The gravitas that the concept of "freedom of speech" thus carries justifies its protection over other legitimate legal interests, most notably that of restricting hateful and offensive speech. Hate speech, "speech that maligns a person or group based on race, ethnicity, gender, religion, sexual orientation or disability — receives full First Amendment protection."[371]

According to contemporary United States freedom of expression theory (and under Supreme Court case law), the best way to combat hate speech is with non-hateful counter speech, not government regulation.[372] In fact, the American Civil Liberties Union (ACLU) argues that history teaches us that governments should not be given the power to determine what speech qualifies

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[367] Robert A. Sedler, *An Essay on Freedom of Speech: The United States Versus the Rest of the World*, 2006 MICH. ST. L. REV. 377, 379 (2006).

[368] *Id.*

[369] KROTOSZYNSKI, JR., *supra* note 13, at 9.

[370] Sedler, *supra* note 367, at 378.

[371] U.S. DEP'T OF STATE, BUREAU OF INT'L INFO. PROGRAMS, *supra* note 108.

[372] *E.g.*, *Id.*

as hateful in order to ban it because governments are more likely to use this power to harm minority interests instead of protecting them.[373] The ACLU has argued in favor of protecting the speech rights of groups such as the Ku Klux Klan and the Nazis under the belief that First Amendment rights are "indivisible," that the rights of these groups must be protected otherwise everyone else's liberty will not remain secure.[374] Moreover, some argue that combating hate speech with government regulation produces negative consequences, such as causing the speech to fester in secret and thus pose more danger in the future.[375]

The entirety of freedom of expression law can be summarized by the words of Justice Brennan in *Texas v. Johnson* (1989): "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[376] As compared with other countries, the extent of freedom of expression protection in the United States is quite uniquely American.

IV.2. What legal concepts come into conflict?

IV.2.1. Standards evaluating "treasonous" speech

The legal standards governing "treasonous" speech[377] have not been consistently applied. For example, Justice Holmes articulated the "clear and present danger" test.[378] Under this test, only those words that create a "clear and present" danger within the circumstances they are used are forbidden.[379] However, in a case decided the very same year as *Schenk v. United States* (1919), *Abrams v. United States* (1919), the Supreme Court adopted a different test: the bad tendency test.[380] This test evaluates the *likely* effects of actions/words in determining whether speech should be forbidden as opposed to evaluating whether the words create a clear and present danger. Thus, this test affords less protection.

In *Dennis v. United States* (1951), the Supreme Court adopted yet another formulation in determining the lawfulness of the words Eugene Dennis used: the clear and *probable* danger test.[381] This test takes into account the probability of the "evil" instead of its "clear and present danger," and also does not address the bad tendency test.[382]

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373 *Freedom of Expression*, ACLU, https://www.aclu.org/other/freedom-expression (last visited July 23, 2019).

374 *Id.*

375 U.S. DEP'T OF STATE, BUREAU OF INT'L INFO. PROGRAMS, *supra* note 108.

376 *Johnson*, 491 U.S. at 414.

377 Meaning speech that either hinders United States war efforts or advocates for the overthrow of the government.

378 *Schenk*, 249 U.S. at 52.

379 *See id.*

380 *See Abrams*, 250 U.S. at 621 (writing that, "Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce.").

381 *See Dennis*, 341 U.S. at 510 (interpreting the "clear and present danger" test to mean "'whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'").

382 *See id.*

Finally, in *Brandenburg v. Ohio* (1969), the Supreme Court adopted the "imminent lawless action" test.[383] Under this standard, the government may only criminalize speech "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[384]

The Supreme Court has never explicitly overruled the use of any of these tests in favor of one of them, or another test. What test is used in a certain case may depend on the trend of the federal courts and the specific facts of that case.

IV.2.2. General free speech doctrine vs. speech in public schools

As noted above, in *Morse v. Frederick* (2007), the Supreme Court declared that a student can be suspended for displaying a pro-drug banner at a school event.[385] However, under political speech doctrine, such speech by a citizen in public discourse would likely be protected.[386] To justify this contradiction, the Supreme Court has created a special category of speech for the speech rights of students. Indeed, the Court noted in *Bethel School District No. 403 v. Fraser* (1986) that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[387] Thus, while political and symbolic speech receives enormous protections in the United States, school students do not enjoy this same broad level of protection.

IV.3. Possible future limits

One possible future limit to the large breadth of protection freedom of speech is given in the United States is the movement to limit hate speech around much of the rest of the world.[388] This movement is also garnering strength among certain groups in the United States.[389] However, the arguments against such policy in the United States abound:[390]

> The big problem for proponents of hate-speech laws and codes is that they can never explain where to draw a stable and consistent line between hate speech and vigorous criticism, or who exactly can be trusted to draw it.[391]
>
> It is quite clear that the perceived benefits of censoring psychically harmful hate speech are far outweighed by the costs of such suppression. The plus side, from the perspective of those who seek speech suppression, is quite limited. That is because the new suppression would extend to only a subset of hate speech, since we

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383 *See Brandenburg*, 395 U.S. at 447.

384 *Id.*

385 *See Morse*, 551 U.S. at 403.

386 *See Cohen*, 403 U.S. at 24.

387 *Bethel Sch. Dist. No. 403*, 478 U.S. 675, at 682 (1986).

388 *See* William New, *New EU Directive Limits Hate Speech, Establishes European Content Quotas*, INTELL. PROP. WATCH (June 11, 2018), https://www.ip-watch.org/2018/11/06/new-eu-directive-limits-hate-speech-establishes-european-content-quotas/ (describing a new EU directive that attempts to limit the prevelance of hate speech).

389 *See* David Harsanyi, *Be Worried About the Future of Free Expression*, REASON (July 21, 2017, 12:15 AM), https://reason.com/2017/07/21/be-worried-about-the-future-of-free-expr/ (arguing that greater acceptance of speech restrictions is rising among millennials and Democrats).

390 *See Hate Speech*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (March 28, 2019), https://www.thefire.org/issues/hate-speech/.

391 Jonathan Rauch, *A New Argument for Hate-Speech Laws? Um… No*, VOLOKH CONSPIRACY (Feb. 4, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/04/a-new-argument-for-hate-speech-laws-um-no.

> already punish hate speech that causes specific tangible harms: threats, harassment, incitement, and hate crimes. Of that newly suppressible subset–psychically harmful hate speech–we would only punish yet another subset, consisting of the most blatant expression. In contrast, even advocates of restricting psychically harmful hate speech acknowledge that free speech principles would nonetheless protect more subtle expressions of racism, sexism, and other bias. Yet, it is likely that these more subtle expressions may well be the most damaging precisely because they cannot as easily be dismissed as biased. On the cost side, permitting the government to punish psychically harmful hate speech would undermine equality and exert an incalculable chilling effect on any speech that challenges the prevailing orthodoxy in any community.[392]
>
> The proposed remedies for "hate speech" tend to be administrative. So in practical terms if you demand the policing of speech, what you want is to beef up the university administration. You are accelerating a process, already under way, toward bloating up the administrative apparatus in an increasingly corporatised university. It can't be a good thing to turn the development of a culture of coexistence and decency—which is what you were rightly proposing—to turn it into a police matter. I think that is misguided, however motivated.[393]
>
> Defining hate speech is not just difficult; it's impossible, as evident from the vastly different definitions surveyed by Sellars. This inability to agree on even a basic framework underscores the futility of creating a definition narrow enough to protect free speech yet broad enough to cover any discernible category of expression. Sellars' research encompassing hundreds of irreconcilable definitions has yielded no happy medium, only the realization that the United States already strikes this balance through the narrow categories of speech unprotected by the First Amendment.[394]

Thus the debate over the protections that should be afforded to hate speech under the First Amendment in the United States continue. Were those wishing to ban hate speech to prevail, it would mark a considerable departure from Supreme Court precedent and remove significant First Amendment protections on freedom of speech. Thus far, as outlined above, those advocating for greater freedom of speech rights have prevailed.

Another future challenge for freedom of speech doctrine lies in the online sphere. Under current federal law, the First Amendment only applies to the government, and as a result does not control the actions of private companies.[395] Due to the enormous power and influence private online companies such as Facebook, Twitter, and Youtube have over communication and public content, some have advocated for the application of First Amendment principles and jurisprudence to these private actors.[396]

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[392] Nadine Strossen, *Freedom of Speech and Equality: Do We Have to Choose?*, 25 J.L. & POL'Y 185, 221 (2016).

[393] *Safe Spaces, the Void between, and the Absence of Trust*, OPENDEMOCRACY, https://www.opendemocracy.net/en/safe-spaces-void-between-and-absence-of-trust/ (Jan. 4, 2016).

[394] Zach Greenburg, *Law Review Article "Defining Hate Speech" Attempts the Impossible*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Apr. 4. 2017), https://www.thefire.org/law-review-article-defining-hate-speech-attempts-the-impossible/.

[395] Valerie C. Brannon, Cong. Research Serv., R45650, *Free Speech and the Regulation of Social Media Content* (Mar. 27, 2019), https://crsreports.congress.gov/product/pdf/R/R45650.

[396] *See* David L. Hudson, Jr., *In the Age of Social Media, Expand the Reach of the First Amendment*, 43(4) A.B.A. HUM. RTS MAG., https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/in-the-age-of-socia-media-first-amendment/ (last visited July 24, 2019).

V. Conclusions

Freedom of speech rights, an intrinsic American cultural value, enjoy extensive protection under the doctrinal framework instituted by the Supreme Court. While the Supreme Court has not interpreted the Freedom of Speech Clause literally, it generally has given freedom of speech rights the heaviest of weight in cases involving the balancing of legal interests. Indeed, the United States affords more protection to expression rights than most of the rest of the world. Generally, the government may not restrict speech based on the content of that speech or the speaker's point of view.

As a result, political speech enjoys the broadest of protections under the First Amendment. Likewise, symbolic speech, such as flag-burning, receives considerable First Amendment protection even though such activities may be seen as abhorrent by the public. Freedom of speech protections have als0 been extended to the commercial realm, but at the same time this protection may be limited in case-specific circumtances due to regulatory interests.

Moreover, the Supreme Court has created numerous categories that do not enjoy any First Amendment protection whatsoever. These include obscenity, fighting words, defamation, child pornography, pro-drug speech at schools, incitement to imminent lawless action, solicitations to commit crimes, treason, speech integral to criminal conduct, and fraud. In creating these categories, the Supreme Court has conducted a balancing test in deciding that the non-speech interests related to these categories outweigh that category-specific speech interest.

The "marketplace of ideas" metaphor acts as the foundational theoretical basis and rationale for freedom of speech doctrine in the United States. This model justifies granting broad freedom of expression protections because of the theory that "good" ideas will prevail over "bad" ideas in the open market. In any event, many legal scholars have outlined normative arguments against allowing the government to play a larger role in restricting speech rights, largely based on the authoritative inclinations of governments and the nigh impossibility of defining speech that should be restricted.

Despite the strong precedent surrounding the "marketplace of ideas" rationale, challenges remain in future First Amendment freedom of speech cases. These challenges revolve around the continuing hate speech protection debate and the application of the First Amendment to modern technology and private online communication giants. In solving these challenges, some argue that the courts should focus on the method used to interpret the First Amendment in deciding freedom of speech protections as opposed to case-specific normative policy arguments.

Many legal, political, and public arguments around freedom of speech doctrine involve normative policy arguments in favor of either expanding or restricting freedom of speech rights in certain cases. However, some scholars consider that this approach ignores the premise that the framers and ratifiers have already considered the normative consequences in writing and ratifying the text of the First Amendment.

Furthermore, some scholars argue that the issue with allowing non-elected judges to evaluate normative arguments in interpreting constitutional text is that this allows non-elected judges to eject their own personal political biases into a piece of text that was already written and ratified through a democratic process. Allowing judges to make decisions based off normative

arguments, these scholars argue, essentially allows them to "make up" law based on personal beliefs about morality and politics.[397]

Thus, some consider that a possible solution to future challenges in solving freedom of speech cases is to interpret the meaning of the First Amendment based on the Amendment's original meaning. Under this originalist approach, the meaning of the constitutional text is fixed at the time the text is framed and ratified.[398] This meaning is a function of the plain meaning of the words and the concepts surrounding the words that are implied by context.[399] Thus, the meaning of the constitutional text is determined much like the meaning of a thirteenth-century letter is determined: by examining the meaning of the words within the specific time frame the words were written.[400] This meaning then should constrain judicial constitutional construction.[401]

Scholars who favor originalism further argue that, when judges take office, they must expressly consent to be bound by the text of the Constitution through their oath of office. As a result, they may not interpret the Constitution in a fashion not consistent with its original public meaning or towards some personal desirable end.[402] Using an originalist metholodgy to evaluate future freedom of speech cases, it is argued, will promote consistency, stability, and legitimacy in First Amendment doctrine.[403] Judges would not be deciding cases based on personal normative balancing evaluations, but on the rule of law enacted by the People during framing and ratification.

Under this approach, in determining whether the government may constitutionally create hate speech restrictions, a judge would have to determine whether the public, at the time of ratification, understood the First Amendment to allow the government to create such restrictions. Likewise, in deciding freedom of speech cases involving modern technology, a judge would have to determine the amount of freedom of speech protection the First Amendment afforded at ratification, and analogize to modern technology in order to ensure the same amount of speech protection within the context of modern techonology.

Other scholars have argued against using originalism as a method of constitutional interpretation and construction. Some argue that much of the Constitution's language is ambiguous precisely because it was passed in a climate of partisan politics, urgency, and compromise, all of which, as the theory goes, induce the creation of text that supports multiple positions in an effort to garner support.[404] Thus, it is argued that those provisions that addressed high profile issues for which little agreement existed were unavoidably written in

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397 *See* Lawrence B. Solum, An Inroduction to Originalism and Living Constitutionalism 36 (2018) (unpublished manuscript).

398 *Id.* at 7.

399 *See id.* at 5.

400 *See id* at 34.

401 *Id.* at 8.

402 *See* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 23-25 (2018).

403 *See* Solum, *supra* note 397, at 36-37.

404 *See* Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 590, 590-93 (2008).

ambiguous language to appease support for all sides, which, as argued by some scholars, is especially true of the First and Fourteenth Amendments.[405]

In the context of the First Amendment, an approach that does not hold the original meaning of the text determinative may look to a broad range of factors in evaluating what legal standards should govern freedom of expression, including normative arguments evaluating costs and benefits, historical practice, rules generated by precedent, and even the text itself.[406] Under this approach, judges may use a wide array of factors in determining how to manage possible problems in freedom of expression doctrine, but in doing so may run into the issues described above.

[405] *See id.* at 594-96.

[406] *See* Solum, *supra* note 397, at 23-24.

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This study forms part of a wider-ranging project, which seeks to lay the groundwork for comparisons between legal frameworks governing freedom of expression in different legal systems.

The document analyses, with reference to the United States of America and the subject at hand, the legislation in force, the most relevant case law, and the concept of freedom of expression with its current and prospective limits, ending with some conclusions and possible solutions for future challenges.

The legislative foundation for freedom of expression law in the United States is grounded in the First Amendment to the Constitution. Based on this text, the Supreme Court has created the freedom of expression doctrinal framework by which lower courts and other branches of government are bound. Unlike other jurisdictions, the United States grants broad freedom of expression protections based largely on the idea that "good" speech will prevail over "bad" speech in the open market.

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