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Recommended Citation
David S. Bogen, First Amendment Ancillary Doctrines, 37 Md. L. Rev. 679 (1978)
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FIRST AMENDMENT ANCILLARY DOCTRINES

DAVID S. BOGEN

INTRODUCTION

A basic premise of the American system of government is that society may, through the use of designated procedures such as legislation and constitutional amendment, construct any framework of law that a sufficient number of the political body acting through their representatives desire. In order to effectuate this premise, the first amendment guarantees that the existing government may not prohibit the expression of any idea because it fears that people will try to structure society to legitimize that idea.¹ To guard against governmental action for such an impermissible purpose, the Supreme Court uses two basic modes of analysis — categorization and balancing.² Where "the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message,"³ there is a strong likelihood that the state is acting out of distaste for the ideas expressed. Governmental action to suppress such speech is unconstitutional unless the speech falls

¹ See Bogen, The Supreme Court’s Interpretation of the Guarantee of Freedom of Speech, 35 Md. L. Rev. 555 (1976) [hereinafter cited as Bogen].
² See Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482 (1975) [hereinafter cited as Ely]. But see The Supreme Court, 1975 Term, 90 Harv. L. Rev. 56, 146 n.30 (1976). The Harvard Law Review footnote suggests that references by the Court to sustaining governmental regulations that meet “exacting scrutiny,” despite encroachment on first amendment protections, signal a rejection of the categorization technique. However, in applying “exacting scrutiny” the Court still requires that the governmental interest vindicated be unrelated to the suppression of speech. Categorization itself involves a similar determination. The indication from the Court, then, is simply a recognition of the possibility that certain situations may require further analysis. See the discussion of commercial speech in note 4 infra.
³ Ely, supra note 2, at 1497.
within certain narrowly defined categories where the presumption exists that the state’s interest is a legitimate one.\textsuperscript{4} In contrast, when the harm envisioned by the state would arise “even if the defendant’s conduct had no communicative significance whatever,”\textsuperscript{5} it is less likely that the state is trying to suppress ideas. Thus, the less stringent balancing of interests mode of analysis is applicable. The balancing test focuses upon the significance of the non-speech-related governmental interest the state advances in support of its regulation as compared with the degree to which the regulation impairs expression. Where the governmental interest is slight, it is likely that the interest was advanced as a pretext for inhibiting expression or, at the least, that the decisionmaker failed to consider the value of unimpaired speech in making its determination to regulate. Both categorization and balancing focus on the legitimacy of the state’s goal. If governmental action is to be upheld under these tests, the Court must find that the governmental interest is sufficiently important and sufficiently narrowly defined to justify the incidental suppression of speech.

\textsuperscript{4} See id. See also Bogen, supra note 1. At present, the categories are clear and present danger, obscenity, libel and fighting words. If speech poses a clear and present danger of significant illegal action, it is apparent that the government is concerned with preventing the illegal action itself rather than the dissemination of any idea that might be associated with such action. Fighting words are perceived as verbal brickbats, chosen for their capacity to harm rather than to inform. If speech is obscene, the concern of the state is with the arousal of lust, not with ideas of sex or with the idea that obscene works should be permissible. If speech is libelous, the governmental interest is to prevent negligent or willful harm, not to suppress offensive and untrue statements per se.

Initially, commercial speech was treated as a category of unprotected speech because it was seen as linked to sales transactions that were subject to regulation. See Valentine v. Chrestensen, 316 U.S. 52 (1942). Recently, the Court has acknowledged that, on occasion, states regulate commercial speech in order to suppress ideas or information rather than to protect the consumer from fraud or the public from disturbance in its enjoyment of public places by time, place or manner restrictions. See Linmark Assocs. v. Town of Willingboro, 431 U.S. 85 (1977). As a result, commercial speech is no longer automatically treated as unprotected speech; instead, it is subject to a balancing test that focuses upon the governmental interest served by the regulation. See Bates v. State Bar, 433 U.S. 350 (1977). As the commercial speech cases demonstrate, the Court may be forced to take a further look at the categories of unprotected speech in the rare instance where speech falling into an unprotected category is regulated for reasons other than the ones that led to its categorization. Moreover, the categories of unprotected speech are not necessarily closed: if regulation apparently content-directed may on close investigation be justified by a new governmental interest unrelated to the suppression of speech, the Court would presumably uphold it.

\textsuperscript{5} Ely, supra note 2, at 1497. The concept of “communicative significance” may be elusive. For example, when prior speech is used as evidence that an individual is unfit for public office, the harm that is perceived is not whether a listener believed or acted upon the speech but what the speech reveals about the speaker’s likely future actions. Thus, the harm would arise even if there were no one listening to the speech.
Either before or in conjunction with its use of categorization or balancing analysis, the Court is likely to resort to an array of concepts that result in the invalidation or inapplicability of particular laws while suggesting that the goal of those laws may be reached by a redrafted statute. These concepts include prior restraint, narrow construction of statutes, narrow construction of delegated powers, pre-emption, overbreadth, vagueness and equal protection. They are labelled "ancillary doctrines" because they either depend upon the basic first amendment categorization and balancing analysis in their application or they are techniques to avoid the necessity of interpreting first amendment guarantees. The ancillary doctrines are used in connection with other constitutional guarantees or, in the case of equal protection, are themselves constitutional guarantees. But the ancillary doctrines take on special force when they are applied to problems of free speech.

Where governmental action results in the suppression of expression and that suppression was foreseeable, it is always possible that the suppression was a motivating factor in causing the action to be taken. The basic free speech tests, i.e., categorization and balancing, determine what governmental interests are sufficient to overcome the suspicion that suppression of expression motivated the governmental action. The ancillary doctrines help to ensure that the government was in fact focusing on its legitimate interests when it took action affecting free speech. This article will discuss the Supreme Court's use of the ancillary doctrines to ensure that the

6. Overbreadth has specifically been utilized in due process and equal protection cases such as Roe v. Wade, 410 U.S. 113 (1973), and Shapiro v. Thompson, 394 U.S. 618 (1969), to show that the interest vindicated could be satisfied by a statute that did not adversely affect such a large class.

Vagueness is frequently used to invalidate criminal statutes that fail to give sufficient warning of the precise conduct that is prohibited. See, e.g., International Harvester Co. v. Kentucky, 234 U.S. 216 (1914).

Narrow construction of statutes to avoid constitutional problems has been an integral part of the Court's decisions even before Justice Brandeis' famous concurrence in Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936), where he stated:

When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. *Id.* at 348 (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)). See, e.g., United States v. Delaware & Hudson Co., 213 U.S. 366, 407 (1907).

Narrow construction of delegated powers is just one variety of the *Ashwander* principle. *See Ex parte Endo*, 323 U.S. 283 (1944).

Prior restraint has even been considered with respect to status crimes. *Cf.* Robinson v. California, 370 U.S. 660, 679 (1962) (Harlan, J., concurring) (effect of state court's jury instruction was to authorize criminal punishment for a bare desire to commit a criminal act).
proffered governmental interest was not tainted by the impermissible consideration of suppression of speech.

I. PRIOR RESTRAINT

Excoriations of the evils of prior restraint as a basic violation of free speech dot the pages of our history from Milton's *Areopagitica* through Blackstone's *Commentaries* and Holmes' first consideration of free speech in *Schenk v. United States*. The historic concern over prior restraint of speech arose from systems of censorship that required pre-publication approval of all manuscripts. The evils associated with this type of censorship include the following. First, a larger volume of expression is scrutinized than would be if subsequent restraints were employed. Second, submission to a third party delays the publication of all works, even those that could not possibly be suppressed consistently with the first amendment. Third, the censor has an interest in finding material to be suppressed in order to justify his own existence. Thus, he is likely to attempt to suppress works that would not be prosecuted after publication. Fourth, systems of prior restraint that involve licensing schemes lack the normal procedural guarantees of the criminal process. And finally, suppression before publication may impair the opportunity of the speaker to appeal to present or future generations for reconsideration of the propriety of banning his work. Since prior restraint has a greater effect in hindering or suppressing speech than would subsequent punishment of unprotected speech, it is possible that the government might choose such a procedure for that very reason. Thus, the Court states that there is a presumption against the constitutional validity of prior restraints.

The presumption against the constitutional validity of prior restraints may be overcome, however, by demonstrating a compelling need for prior rather than subsequent restraints. The Court has found sufficient justification in three situations. The first situation is where it is necessary to use a licensing system to allocate the use of

7. "Truth and understanding are not such wares as to be monopolized and traded in by tickets and statutes and standards. We must not think to make a staple commodity of all the knowledge in the land, to mark and license it like our broadcloth and our woolpacks." J. MILTON, AREOPAGITICA 23 (Everyman ed. 1927) (1st ed. London 1644).

8. "The liberty of the press ... consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published." 4 W. BLACKSTONE, COMMENTARIES *151–52.

9. "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose ... ." *Schenck v. United States*, 249 U.S. 47, 51–52 (1919) (Holmes, J.).

public places. Second, films may be required to be submitted to a censorship board under strict procedural protections, because the harm posed by obscene films can be prevented with minimal impact upon protected speech. Third, injunctions against unprotected speech may be issued when the material enjoined is so specifically described that the injunction will not deter protected speech, and the unprotected speech should clearly be punishable in subsequent proceedings. The latter two situations involve a determination by the Court that the impact on protected speech is so slight and so different from the evils that were imbedded in traditional forms of prior censorship that it is clear the government's choice of prior rather than subsequent restraints was mandated by its consideration of the harm done by the unprotected speech and not by its desire to suppress free speech. The remainder of this section will discuss in greater detail the three exceptions to the constitutional prohibition against prior restraint of speech.

An orderly procedure for allocation of the use of public places is essential to avoid the disruption that simultaneous competing uses would cause. Speech is enhanced, not restricted, by measures that enable the authorities to plan for public safety and public services and prevent the chaos of conflicting uses. In principle, a permit system for the use of public places facilitates free speech and easily overcomes the historic presumption against prior restraints.

In practice, however, a permit system for the use of public places affords the government great opportunities for abuse, i.e., to prohibit or make difficult the expression of ideas that the licensor dislikes. To guard against such abuse, the Court, in a series of decisions beginning with Lovell v. City of Griffin,11 has required that the licensor's discretion be limited by criteria that are unrelated to the suppression of speech. "[T]he lack of standards in the license-issuing 'practice' renders that 'practice' a prior restraint in contravention of the Fourteenth Amendment . . . ."12 Even if the speech itself is punishable, it cannot be subjected to a standardless permit requirement. "It is sufficient to say that [a state] cannot vest restraining control over the right to speak . . . [particular]

11. 303 U.S. 444 (1938). Lovell also raised issues as to the weight of competing state interests. This article discusses only the use of a permit system and does not deal with laws that would prohibit all speech uses in public places, for they are subject to a balancing test.

12. Niemotko v. Maryland, 340 U.S. 268, 273 (1951). The Court's reference to the fourteenth amendment, of course, is to the doctrine that the fourteenth amendment applies to the states the proscriptions that the first amendment applies against Congress.
subjects in an administrative official where there are no appropriate standards to guide his action.”

Statutory criteria that use such generalities as “effect upon the general welfare” are not “appropriate standards” since they permit the licensor to determine that ideas he dislikes are harmful to the public.\textsuperscript{13} A state court, however, may construe a permit statute that on its face has no criteria or only vague generalities to require compliance with appropriate standards. After such a construction of the statute is made, the permit requirement will be upheld by the Court as constitutional. The Court has also held that such a permit requirement may constitutionally apply to activities that occurred prior to the state court’s interpretation when the statute has been administered “in the fair and non-discriminatory manner which the state court has construed it to require.”\textsuperscript{15} Even if the statute was administered in a discriminatory manner and a permit was denied for improper reasons, the state may require the applicant to appeal the denial of a permit to the state courts before engaging in the prohibited speech when it is clear that the denial violated state law and the procedures for review are sufficiently expeditious.\textsuperscript{16}

In \textit{Shuttlesworth v. City of Birmingham},\textsuperscript{17} the Court invalidated a conviction for demonstrating without a permit despite a subsequent construction of the statute by the Supreme Court of Alabama that made the statute constitutionally acceptable. When Reverend Shuttlesworth inquired about a permit, the relevant statute appeared

\textsuperscript{13} Kunz v. New York, 340 U.S. 290, 295 (1951). In Niemotko v. Maryland, 340 U.S. 268 (1951), the Court suggested that the refusal to grant the permit was unjustified by any legitimate criteria, but in \textit{Kunz} the speaker, in the past, had ridiculed other religions in such violent terms that Justice Jackson was willing to label them “fighting words.” 340 U.S. at 298–99 (Jackson, J., dissenting). The majority, however, refused to commit itself on whether the proposed speech would be punishable, relying on the absence of standards in the permit-issuing process to invalidate the conviction for speech without a permit. \textit{Id.} at 294–95.


\textsuperscript{15} Cox v. New Hampshire, 312 U.S. 569, 577 (1941) (The state court interpreted the statute when the case was before it on appeal).

\textsuperscript{16} \textit{See} Poulos v. New Hampshire, 345 U.S. 395, 408–09 (1953). \textit{Poulos} involved a different clause of a section identical to the one construed in \textit{Cox v. New Hampshire}, 312 U.S. 569 (1941). Thus, although the state court had not construed the clause in question, its decision in \textit{Cox} made it clear that it would construe the clause in such a way as to limit the grounds for denying a permit to those that accord with constitutional guarantees. Justice Frankfurter’s concurrence in \textit{Poulos} emphasized the expeditious nature of review in New Hampshire. \textit{See} 345 U.S. at 419–20. The Court, in \textit{Shuttlesworth v. City of Birmingham}, 394 U.S. 147, 155 n.4 (1969), noted Frankfurter’s concurrence in \textit{Poulos}, which emphasized the expeditious nature of review in New Hampshire, and also noted \textit{Freedman v. Maryland}, 380 U.S. 51 (1965), which enumerates the procedures required for prior restraint of obscenity, discussed at text accompanying notes 19 to 33 \textit{infra}.

\textsuperscript{17} 394 U.S. 147 (1969).
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to invest the local authorities with virtually unlimited discretion and there were no state decisions to indicate that their authority was limited. The local authorities in fact administered the statute to deny permits to groups they disliked. If a later saving construction could validate a conviction for marching without a permit, there would be a significant likelihood that the later construction was adopted specifically for the purpose of upholding the conviction of particular individuals whose views were unpopular. The invalidation of Reverend Shuttlesworth's conviction served to ensure that state court statutory construction will not be influenced by such an impermissible purpose.

Justice Harlan concurred on the grounds that "neither the city nor the State provided sufficiently expedited procedures for the consideration of parade permits . . . ."18 In demonstrations for particular causes, the timing of the protest may be crucial. Thus, discriminatory administration coupled with slow review procedures could destroy the effect of the speech. Harlan was anxious to channel the permit decision into the courts, assuming that a swift judicial decision would not significantly impede the exercise of speech. The majority, however, appeared to be reluctant to force an individual, denied a permit on an unconstitutional basis, to take further steps that have no assurance of success.

The concern Justice Harlan showed for swift procedure is a central feature of the Court's treatment of the second area in which prior restraint of speech has been deemed permissible — state censorship boards for films. The Court has emphasized that the basic vices of systems of prior restraint lie in their effect on speech that cannot be constitutionally suppressed and not in their prevention of utterances that are subject to punishment.19 Thus, if the material to be published is known and judges determine that it is

18. Id. at 164. Harlan does not suggest particular time limits, but he does point out that "timing is of the essence in politics. . . . [W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." Id. at 163. Thus, the time frame for a permit system for use of public forums may need to be more compressed than that established for films.

Last year, the Court reiterated its insistence on prompt review procedures from permit denials in National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977). The Court held that the state must stay any injunction against demonstrating if it did not provide immediate appellate review. Id. at 44. Justice Rehnquist, joined by Chief Justice Burger and Justice Stewart, dissented on the grounds that the state court's denial of a stay was not a final judgment or decree and therefore the Supreme Court could not properly hear the case. Rehnquist indicated that the original injunction may have been unconstitutionally overbroad, and did not comment on the right of the National Socialist Party to demonstrate in the face of an injunction where the appeal process would be time consuming. Id. at 44-45.

within the definition of obscenity or libel or otherwise unprotected speech, its publication may be enjoined. If a state attempted to establish a censorship scheme to review books and magazines, the historic parallel to traditional censorship would be overwhelming and the Court would surely strike it down. Films are distinguishable from printed matter on at least three grounds. First, "[f]or good or ill, a book has a continuing life. It is passed hand to hand...." In Kaplan v. California, the Court used this as a factor in subjecting obscene books to censorship, but it also serves to protect the ideas and values contained in the book. If publication is essential before a book can be proceeded against, it will have an opportunity to affect the community that determines its status. Additionally, purchasers of books usually bring them home. Since the private possession of obscene material cannot be constitutionally prohibited, obscene material in the form of books can be preserved and given a chance to resurface in a more receptive climate. The film, however, is more evanescent; it is shown in a theater to a small group and they cannot transmit it to others. If the distributor and the theater owner have their copies of a film seized after its showing, the film will be effectively destroyed. Thus, requiring a single showing of a film before it may be censored does not enhance its protection either in the present or at some later date.

Second, the adage that a picture is worth a thousand words is particularly applicable to obscenity. Obscenity has been defined, in part, as works that "depict or describe sexual conduct." Films and photographs are particularly effective to show acts. Words may be used to conjure images in the reader's mind and thus may fall within the definition of obscenity, but pictures eliminate this intervening step. Additionally, words are the tools of abstract analysis and are thus more likely to be used to convey ideas. The determination that a particular book "predominately appeals to the prurient interest" is

20. For a discussion of unprotected speech, see Bogen, supra note 1, at 573–615.
likely to be more difficult and subtle than a similar determination made with regard to a picture. As the Court has stated:

Because of a profound commitment to protecting communication of ideas, any restraint on expression by way of the printed word or in speech stimulates a traditional and emotional response, unlike the response to obscene pictures of flagrant human conduct. A book seems to have a different and preferred place in our hierarchy of values, and so it should be.\(^26\)

Third, the most significant harm resulting from a system of prior restraint is its capacity to hinder or delay protected expression. The number of publications, combined with the greater difficulty in determining their predominant effect, would result in lengthier delays for printed matter than for films reviewed by a censor board. Further, while some films are topical, in view of the time involved in the making, distribution and booking of films, a slight delay in their showing is likely to have little effect on their timeliness. Thus, where the delay is brief, it is unlikely the impact of a system of prior restraint on such works was intended to discourage their production or in fact operates to do so. The differences in the methods of distribution, the greater likelihood and effect of obscenity in pictorial representation and the greater impact of delay inherent in a reviewing board for printed matter may only be quantitative and not qualitative. As long, however, as literature is free from prior restraint, these distinctions and the availability of the written mode of communicating ideas are likely to persuade the Court that prior restraints are invoked for films for reasons other than hindering or suppressing free expression. Even with films, however, intermediate or preliminary restraints by nonjudicial bodies may have the effect of suppressing protected speech dealing with sexual or political matters. To the extent that such temporary suppression is not absolutely essential to the effective suppression of unprotected matter, the Court will strike down such prior restraints.\(^27\)

Recently, the Court discussed the limitations placed upon prior restraint of speech in *Southeastern Promotions, Ltd. v. Conrad*,\(^28\) wherein it struck down the actions of city officials who refused to allow the play *Hair* to be performed in a municipal auditorium.

The presumption against prior restraints is heavier — and the degree of protection broader — than that against limits on

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expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.\(^{29}\)

The Court refused to pass on whether the production of *Hair* could constitutionally be restrained, saying only that the procedures invoked in the particular case were inadequate.

We held in *Freedman*, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.\(^ {30}\)

The rationale for these procedural safeguards was clearly set forth by the Court:

An administrative board assigned to screening stage productions — and keeping off the stage anything not deemed culturally uplifting or healthful — may well be less responsive than a court, an independent branch of government, to constitutionally protected interests in free expression. And if judicial review is made unduly onerous, by reason of delay or otherwise, the board's determination in practice may be final.\(^ {31}\)

The dissenters agreed with the procedural requirements imposed on all systems of prior restraint as enumerated by the majority but did not agree that the issue of prior restraint was properly before the

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29. *Id.* at 558–59.
30. *Id.* at 560.
31. *Id.* at 560–61.
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Court\(^{32}\) or that the denial of the use of an auditorium was a prior restraint.\(^{33}\)

The third and final form of permissible prior restraint is the injunction or court order prohibiting speech. If the speech is subject to subsequent punishment, the need for some type of prior restraint against it may be questioned. However, the procedural differences between injunctions followed by contempt proceedings and criminal prosecutions for violations of a statute,\(^{34}\) combined with the "quality of direct, personal command of the injunction,"\(^{35}\) render the injunction a more effective method of dealing with undesirable speech than subsequent punishment. This is true despite the fact that these same factors may serve to suppress even arguably protected speech.

Although an injunction to enjoin the publication of specific obscene material is constitutionally permissible, a general injunction against publishing obscene or libelous works is unconstitutional. To the extent the exact language of the speech is unknown, it is impossible to be certain whether such speech will be defined as "protected" or "unprotected." Thus, in Near v. Minnesota,\(^ {36}\) an order

\(^{32}\) Justice White, joined by Chief Justice Burger, dissented on the grounds that the complaint merely sought a declaration that Hair did not violate relevant ordinances and statutes together with an injunction requiring authorities to make the municipal facilities available for the show. The dissenters argued that no issue of prior restraint was raised by these pleadings. Further, they said that since a state court had in fact passed on the obscenity of the play, the Supreme Court should also rule on it and uphold the judicial finding that the play violates Tennessee statutes. Id. at 564-69. Justice Douglas concurred on the ground that the play was constitutionally protected because all forms of speech, including obscenity, are constitutionally protected and, thus, procedural deficiencies are irrelevant to a decision. Id. at 563-64.

\(^{33}\) Justice Rehnquist, in dissent, argued that the public auditorium was not a public forum and that the limits placed on its use by the city were appropriate. Id. at 570-74.

\(^{34}\) The crucial difference may lie in the lack of a jury when the initial determination is made. Injunctions are issued by judges in equity proceedings without the aid of a jury, whereas a defendant in a criminal prosecution has a constitutional right to trial by jury. Additionally, after an injunction has been granted the sole issue at a contempt proceeding is whether the injunction has been complied with and not whether the injunction itself was constitutionally valid. Walker v. City of Birmingham, 388 U.S. 307 (1967). Thus, even though a jury may be present at a contempt proceeding, the sole issue it must decide is whether the injunction has been complied with. See The Supreme Court, 1970 Term, 85 Harv. L. Rev. 38, 208-09 (1971).

\(^{35}\) See Kalven, Jr., The Supreme Court, 1970 Term — Foreword: Even When a Nation is at War, 85 Harv. L. Rev. 3, 34 n.156 (1971).

\(^{36}\) 283 U.S. 697 (1931). See also City of Madison v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976), wherein the Court stated, with reference to an order of the Commission prohibiting public employees from speaking at meetings of the Board of Education on collective bargaining agreements, that "[t]he challenged portion of the order is designed to govern speech and conduct in the future, not to punish past conduct and as such it is the essence of prior restraint." Id. at 177.
to abate publication of libelous utterances was struck down since it would deter protected as well as unprotected speech.

When the Court first began to consider whether commercial speech was totally unprotected or was subject to a balancing test, concern was expressed over the evils of prior restraint in the form of an injunction with respect to such speech. In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, the Court upheld, as applied to sex segregated want-ad columns, a Pittsburgh city ordinance that forbade discrimination in hiring or aiding such discrimination. The Court found that the want-ad columns were unprotected commercial speech. The dissenters, particularly Chief Justice Burger, complained that the order constituted an unlawful prior restraint. Burger feared that publishers might not know which particular ads could be placed in sex segregated columns. The majority replied to this concern by indicating that the paper could rely on the representations of the advertiser. More importantly, the majority held the doctrine of prior restraint was inapplicable because the continuing course of conduct by advertisers gives the Court sufficient precision in determining what is to be enjoined, thereby ensuring that only commercial speech is affected by the order and that no other speech would be deterred. While the column headings might relate to any number of different ads, the order was against specific column headings and the forbidden content of the headings was known.

The preceding discussion has demonstrated the ancillary nature of the doctrine of prior restraint. The basic test for determining the constitutionality of a permit system for the use of public places is a balancing of interests. But unfettered discretion in the permit-giver is not necessary to accomplish the legitimate aims of allocating competing uses of public places; therefore, such a permit system is struck down in the "name of prior restraint." For film censorship boards, the basic test as to whether speech is punishable or restrainable is that of categorization, i.e., whether the speech constitutes obscenity. However, the additional procedural guarantees provided by the doctrine of prior restraint ensure that protected speech will be affected as little as possible, compatible with the proscription for unprotected speech.

In the cases discussed, the speech itself was thought to present the harm that the government could protect against — conflicting

38. See *id.* at 396–97 (Burger, C.J., dissenting).
39. *Id.* at 390 n.14.
40. *Id.* at 390.
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use, offensive lust arousal, illegal hiring practices — and the doctrine of prior restraint was applied to ensure that the procedures for preventing those harms did no greater damage to speech than necessary. Governments are also concerned with speech that may cause the listener to act in a harmful way.

Some variation of the clear and present danger test is normally applied to speech leading others to act in determining whether such speech may be prohibited or punished. If the test is applied after the speech has occurred, the Court has the advantage of knowing the consequences of that speech. Further, the speech will have had an opportunity to influence the public so that the jury at trial may sub silentio weigh the value of that speech against any demonstrable harm. When an attempt is made to enjoin speech that may lead others to act, the exact language sought to be enjoined is often not known, so it is difficult to ascertain the seriousness of the danger. Therefore, before the Court will condone the imposition of a prior restraint against speech that may cause others to act in a harmful way, it will demand that a higher degree of danger be present than that required in the case of subsequent restraints. This additional demand compensates for the speculative nature of the prediction that a clear and present danger will result. Thus, in New York Times Co. v. United States, Justice Brennan’s concurring opinion required “proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea” before the issuance of a restraining order could be justified. And Justice Stewart, joined by Justice White, demanded a showing that publication “will surely result in direct, immediate, and irreparable damage to our Nation or its people” before an injunction, not specifically provided for by Congressional action, should be granted. Justices Black and Douglas were unwilling to allow any prior restraint. The dissenters, Burger, Harlan and Blackmun, focused on the haste of the decision and the right of the executive to keep its internal

41. The ability of the jury to free a sympathetic defendant despite his flagrant violation of a law forbidding his speech is embedded in our history. See The Trial of Mr. John Peter Zenger (1735), reprinted in 17 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 675 (T. B. Howell, compiler, 1813) (account of Mr. Zenger, who published this selection from his own trial).
42. 403 U.S. 713 (1971) [hereinafter cited as Pentagon Papers].
43. Id. at 726-27.
44. Id. at 730.
45. Id. at 714-24.
communications confidential. Justice Harlan's dissent argued that when such internal matters touched foreign affairs, the executive was the proper body for determining the need for secrecy and could properly secure an injunction against the publication of specific known material improperly divulged.\footnote{46} By referring to the manner in which the material was obtained, the dissent could regard its position as bearing more upon acts than ideas per se.\footnote{47}

Recently, the Court decided a case that posed almost all of the dangers that justify concern over prior restraints. In \textit{Nebraska Press Association v. Stuart},\footnote{48} the Court reversed a Nebraska court order that prohibited the reporting, prior to the impaneling of a jury, of (a) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers or any other third parties except members of the press, and (b) other facts "strongly implicative" of the accused.\footnote{49} The Nebraska court justified the issuance of this order on the grounds that it was necessary to ensure that the accused would be accorded a fair trial.\footnote{50}

The test traditionally used to determine whether speech impermissibly interferes with the administration of criminal justice has been whether the speech presents a "clear and present danger."\footnote{51} The danger feared is that jurors will read or hear certain material and be influenced to act improperly. A juror cannot reasonably be punished for his or her psychological inability to avoid considering what he or she has read or heard, so it is necessary to punish the speaker. However, in view of the possibility that the government may be interested in suppressing information about the trial in order to protect itself from criticism, only a clear and present danger to the conduct of the trial will justify suppression of the speech. Chief Justice Burger, writing for the Court in \textit{Nebraska Press Association}, used a variation of the clear and pres-

\footnote{46. Id. at 756-58 (Harlan, J., Burger, C.J. & Blackmun, J., dissenting).}
\footnote{47. Chief Justice Burger's separate dissenting opinion in \textit{Pentagon Papers}, 403 U.S. at 752, states that he is not prepared to reach the merits, but the rest of his opinion emphasizes "unauthorized possession" of "purloined documents", and he analogizes the government's action here to that of the Court attempting to keep its deliberations secret. \textit{Id.} at 752 n.3. This emphasis on the unauthorized possession of the documents is missing from Harlan's dissent, in which Chief Justice Burger and Justice Blackmun joined, but it is not inconsistent with that dissent. A doctrine of executive control over the release of internally prepared information explains the apparent inconsistency between Burger's views on prior restraint in \textit{Organization for a Better Austin v. Keefe}, 402 U.S. 415 (1971), and his dissent in \textit{Pentagon Papers}.}
\footnote{48. 427 U.S. 539 (1976).}
\footnote{49. Id. at 545.}
\footnote{50. Id.}
\footnote{51. \textit{E.g.}, \textit{Wood v. Georgia}, 370 U.S. 375 (1962). See \textit{Bogen}, \textit{supra} note 1, at 571 n.58.}
ent danger test as stated by Judge Learned Hand and affirmed on appeal in Dennis v. United States — whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

The application of this test is quite different, however, when the attempt to suppress speech endangering a fair trial is made by a prior restraint rather than a subsequent one. There are a number of reasons for more stringent review of prior as opposed to subsequent restraints. First, a prior restraint deprives the court of the advantage of observing the consequences of the speech. For example, in Nebraska Press Association, if the press had reported the defendant's confession, and the defendant was found innocent by the jury, the publication of the confession would not appear to have posed a clear and present danger to the administration of justice in that case. Of course, a guilty finding would not conclusively prove the jurors were improperly influenced, so some degree of speculation is inherent in the situation. The speculative nature of the harm was emphasized by Chief Justice Burger who noted that the trial judge's "conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, dealing as he was with factors unknown and unknowable."

Second, a prior restraint prevents the speech from influencing the public. If the speech is permitted to reach the public, a jury could weigh the value of the speech against the harm that might arise from the speech and determine that the value of the speech outweighs any demonstrable harm. This is in part the concern that Justice Brennan voiced in his concurrence when he stated, "'the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism . . . .'"

Third, the terms of a prior restraint order may forbid or deter expression that poses no serious danger. The provision in the Nebraska order forbidding reporting of facts "strongly implicative" of the accused was subject to this criticism. Thus, the Court found that in addition to other defects in the order, this particular provision was too vague to be enforceable.

Fourth, the dynamics of any system of prior restraint may lead to excesses. The Court has attempted to guard against administra-

53. 427 U.S. at 562.
54. Id. at 563.
55. Id. at 589–90 (quoting T. Emerson, The System of Freedom of Expression 506 (1970)).
56. Id. at 568.
tive schemes\textsuperscript{57} of prior censorship but, as Justice Brennan points out, the system in the \textit{Nebraska Press Association} case posed similar dangers.

In order to minimize pretrial publicity against his clients and pre-empt ineffective-assistance-of-counsel claims, counsel for defendants might routinely seek such restrictive orders. Prosecutors would often acquiesce in such motions to avoid jeopardizing a conviction on appeal. And although judges could readily reject many such claims as frivolous, there would be a significant danger that judges would nevertheless be predisposed to grant the motions, both to ease their task of ensuring fair proceedings and to insulate their conduct in the criminal proceeding from reversal.\textsuperscript{58}

Finally, a prior restraint on speech has the immediate impact of preventing the speech from occurring, whereas "[a] criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted."\textsuperscript{59} As occurred in \textit{Nebraska Press Association}, a prior restraint may suppress speech at the very time when public interest is at its peak and the likelihood of public criticism of institutional performance is greatest. The suppression of speech that results from a prior restraint, even when the restraint is subsequently ruled improper, may render the speech less effective.

For these reasons, the concurring Justices Brennan, Stewart and Marshall would confine prior restraints to the recognized exceptions "in which the 'speech' involved is not encompassed within the meaning of the First Amendment"\textsuperscript{60} and possibly to those situations in which there is a showing that publication "'will surely result in direct, immediate, and irreparable damage to our Nation or its people'"\textsuperscript{61} or "'proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea . . . .'"\textsuperscript{62} Even in these situations, careful procedural safeguards must be adhered to so that

\textsuperscript{57} For a discussion of permit systems for public assemblies and films, see notes 11 to 27 and accompanying text supra.

\textsuperscript{58} 427 U.S. at 607-08 (Brennan, J., concurring).

\textsuperscript{59} Id. at 559.

\textsuperscript{60} Id. at 590.

\textsuperscript{61} Id. at 593 (quoting \textit{Pentagon Papers}, 403 U.S. at 730 (Stewart, J., concurring) (emphasis supplied in \textit{Nebraska case})).

\textsuperscript{62} Id. (quoting \textit{Pentagon Papers}, 403 U.S. at 726-27 (Brennan, J., concurring) (emphasis supplied in \textit{Nebraska case}).
protected speech is not unnecessarily suppressed, even temporarily. 63 Justices White and Stevens, in their separate concurrences, stated that they were not yet ready to join Justice Brennan in establishing an absolute rule governing prior restraints. However, they did intimate that if they were forced to face the issue squarely at some later date, they may adopt the Brennan formula. 64

Chief Justice Burger, writing for the majority, draws back from such an absolute rule. "However difficult it may be, we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint. 65 But the majority opinion may not be as far from the Brennan concurrence as the language of the opinions suggests. Justice Brennan apparently believed that the majority had taken an ad hoc balancing approach to determine whether the state's justification for prior restraint overcame the presumption against prior restraints. Yet the case before the Court was not one where balancing would be appropriate even if subsequent restraints were involved. 66 If the speech possessed the requisite certainty that it would destroy a fair trial and no adequate alternatives to protect the trial existed, the Court might find that the words "'have all the effect of force.'" 67 The concurrence of Justice Brennan attempts to show that sufficient alternatives to prior restraint exist so that direct, immediate and irreparable harm would never be present, while Chief Justice Burger merely leaves open the unlikely possibility that such harm could be proven. Burger does not suggest that prior restraints could be applied to speech that could not be subsequently punished or for which subsequent punishment would be an adequate protection of the legitimate governmental interest involved.

63. Id. at 591 (Brennan, J., concurring). Although Brennan's requirement of adequate and timely procedures to ensure that protected speech is not restrained was mentioned only with regard to the prior restraint of speech that is not encompassed within the meaning of the first amendment, it seems certain that those same requirements would be required with regard to the prior restraint of publications that might endanger the national security. For a discussion of those requirements, see text at notes 28 to 33 supra.

64. Id. at 570-71 (White, J., concurring); id. at 617 (Stevens, J., concurring).

65. Id. at 569-70. In 1977 the Court again struck down an injunction by a trial court against publication of a matter concerning the trial. In Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (per curiam), the lower court had enjoined the publication of the name and picture of a juvenile involved in a detention hearing. The unanimous opinion of the Supreme Court was based primarily on Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). It reversed the decision below because the juvenile had, in effect, a public hearing.

66. The issue was the impact of publicity on the defendant's right to a fair trial; therefore, the clear and present danger test was the appropriate standard.

67. 427 U.S. at 590 (quoting Near v. Minnesota, 283 U.S. 697, 716 (1931)).
II. AVOIDANCE OF CONSTITUTIONAL DECISIONS

The doctrine of prior restraint is the leading example of "first amendment 'due process'." The doctrine focuses on procedures that affect speech — such as censorship boards and the issuance of licenses — and may invalidate those procedures as unconstitutional without determining the constitutionality of other substantive measures that punish the same speech. However, the Court can guard against unwarranted infringement upon free speech without declaring that a constitutional violation has occurred. It does this by interpreting a statute or regulation so as to avoid a confrontation with the constitution. Interpretation of law to avoid conflict with basic principles has a long history in other countries. In the United States, the Supreme Court has utilized this precept of statutory construction in its protection of first amendment guarantees by construing statutes to be inapplicable to the expression of ideas and by finding that officials have not been delegated the authority to act in a manner that would suppress speech.

A. Narrow Construction of Statutes

When a federal statute is susceptible to more than one construction, the Court, on numerous occasions, has rejected any construction that would result in interference with free speech and adopted a construction that avoids such interference. For example, the National Labor Relations Act declares that it shall be an unfair labor practice for a labor organization or its agents to threaten, coerce, or restrain any person engaged in commerce where the object of such action is to force that person to cease doing business with another. There is an exemption in the statute for publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such

68. See Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518, 518-19 (1970). Monaghan discusses other procedural concerns, in addition to prior restraint, particularly requirements for prompt judicial review, see id. at 532-51, and the abstention doctrine, see id. at 543-49. This article, like Monaghan's, does not attempt to review every conceivable context in which the legitimacy of the procedures used by the government should be affected by the first amendment, but only to suggest by a discussion of the leading area the relevance of the first amendment to the procedures used.


One might infer from this proviso exempting consumer publicity other than picketing from the reach of the statute that the statute prohibits all consumer picketing designed to force one employer to stop dealing with another. But when such picketing is aimed at only one of many products sold by the employer whose location is picketed, the picketing may fail to have any coercive effect. If the statute were interpreted to prevent this type of picketing, it would raise serious problems under the first amendment.\textsuperscript{72}

In \textit{NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760},\textsuperscript{73} the Court held that the ban on secondary picketing found in the National Labor Relations Act did not apply to picketing that requested consumers not to buy apples in a particular grocery store.\textsuperscript{74} As the dissenters demonstrated, an examination of the language and history of the specific clauses in question suggests that such picketing was prohibited.\textsuperscript{75} Yet the majority's concern over first amendment guarantees\textsuperscript{76} caused the Court to avoid the


\textsuperscript{72} Such picketing would not suggest opposition to consumer entrance into the store. Once inside the store, consumers are free to purchase the picketed product without interference from the picketers. Refusal to purchase the picketed product, therefore, would be based on the consumers' agreement with the non-coercive request of the picketers. \textit{See} \textit{Note}, \textit{Political Boycott Activity and the First Amendment}, 91 \textit{HARV. L. REV.} 659, 682 n.128, 683 (1978). Justice Black viewed such picketing as covered by the National Labor Relations Act, but protected by the first amendment. \textit{See NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760}, 377 U.S. 58, 76-80 (1964) (Black, J., concurring).

\textsuperscript{73} 377 U.S. 58 (1964).

\textsuperscript{74} \textit{Id.} at 63.

\textsuperscript{75} \textit{Id.} at 82-92 (Harlan & Stewart, JJ., dissenting). Justices Harlan and Stewart would have upheld the ban on all consumer picketing at secondary stores because picketing has effects beyond simple communication. Even under the circumstances of this case, Harlan said: "Because of the very nature of picketing there may be numbers of persons who will refuse to buy at all from a picketed store, either out of economic or social conviction or because they prefer to shop where they need not brave a picket line." \textit{Id.} at 82-83.

\textsuperscript{76} Justice Black, concurring, agreed with the dissent that the picketing was forbidden by the Act, but concluded that such a prohibition would violate the first amendment. \textit{Id.} at 76.
prohibition by narrowly construing the statute. As the majority stated:

Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable. . . . We have recognized this congressional practice and have not ascribed to Congress a purpose to outlaw peaceful picketing unless "there is the clearest indication in the legislative history," that Congress intended to do so as regards the particular ends of the picketing under review. Both the congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment.

Another case in which the Court narrowly construed a statute to avoid a confrontation with first amendment guarantees is Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. In that case, the railroad conference had engaged in a massive publicity campaign to procure legislation to improve their competitive position against the trucking industry. The truckers brought suit, claiming that the actions of the conference constituted a conspiracy to restrain trade and monopolize the long-distance freight business in violation of the Sherman Act. The Supreme Court held that the Act did not apply to associations in their efforts to influence the passage of legislation or the enforcement of laws: "Such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."

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picketers to tell a part of the public their side of a labor controversy, a subject the free discussion of which is protected by the First Amendment.

Id. at 79.

77. Id. at 62–63.

78. Id. (emphasis added).


80. Id. at 138. Another example of statutory interpretation to avoid constitutional problems is Yates v. United States, 354 U.S. 298 (1957). The Court, in an opinion written by Justice Harlan, held that the Smith Act, 18 U.S.C. § 2385 (1952) (amended 1956 & 1962), prohibited advocacy directed at promoting unlawful action but not advocacy of abstract doctrine. 354 U.S. at 318–19. The Court stated, "[w]e need not, however, decide the issue before us in terms of constitutional compulsion, for our first duty is to construe this statute. In doing so, we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked . . . ." Id. at 319. Four years later, the Court determined that the clause in the Smith Act that prohibited knowing membership in an organization that advocates the overthrow of
Recently, in *Buckley v. Valeo*,\(^8\) the Court once again engaged in narrow construction of a statute in order to avoid a conflict with the first amendment. In *Buckley*, the Federal Election Campaign Act of 1971 limited the amount of contributions and expenditures that individuals and groups could make in federal elections, and required disclosure of such sums. The definition of both “contributions” and “expenditures” included things of value “made for the purpose of influencing” the nomination or election of any person to federal office. A general discussion of issues on which candidates have taken a stand may influence an election, but it would be particularly difficult to draw the line on when discussion of issues is for the purpose of influencing the election of specific persons. A broad reading of the language of the statute would prevent persons from avoiding the impact of the disclosure and limitation provisions of the law by concealing their support of a candidate in a forceful discussion of issues on which the candidate’s stand is widely known. It would also prevent expenditures to urge or discuss ideas about issues, thereby presenting a serious conflict with the first amendment. The Court concluded:

To insure that the reach of § 434(e) [the disclosure requirement]\(^8\) is not impermissibly broad, we construe “expenditure” for purposes of that section . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.\(^3\)

Additionally, such a construction would raise serious problems of vagueness, as will be discussed in Section V.\(^4\) Thus, the per curiam opinion of the Court stated, “[w]here the constitutional requirement

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\(^8\) See pp. 714-26 *infra*.
of definiteness is at stake, we have the further obligation to construe the statute, if that can be done consistent with the legislature's purpose, to avoid the shoals of vagueness." 85

Last year, in United States v. Ramsey, 86 the Court had an opportunity to narrowly construe a statute in order to avoid a potential conflict with the first amendment, but declined to do so. The Court was confronted with a statute that granted officers or persons authorized to board or search vessels the authority to "search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law . . . ." 87 Justice Stevens, joined by Justices Brennan and Marshall in dissent, maintained that the word "envelope" in the statute should be narrowly construed so as to refer to bulky packages only; not to letters. 88 Justice Stevens emphasized that the opening of private letters without notice to either the sender or the addressee "is abhorrent to the tradition of privacy and freedom to communicate protected by the Bill of Rights." 89 Thus,

[When action taken by an inferior governmental agency was accomplished by procedures which raise serious constitutional questions, an initial inquiry will be made to determine whether or not "the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use." 90

Justice Stevens argued, from the legislative history of the statute in question, that no such specific determination as to letters was made and, therefore, the statute should not be interpreted to reach letters. 91

The majority, however, believed that any effect that searches authorized by the statute might have on speech would come from the possibility that correspondence would be seen. 92 Postal regulations "flatly prohibit, under all circumstances, the reading of correspondence absent a search warrant . . . ." 93 Under these circumstances, the Court found no significant effect on free speech and therefore did

85. 424 U.S. at 77-78.
88. 431 U.S. at 628-30 (Stevens, J., dissenting).
89. Id. at 626 (Stevens, J., dissenting).
90. Id. at 632 (Stevens, J., dissenting) (quoting Hannah v. Larche, 363 U.S. 420, 430 (1960)).
91. See id. at 627, 630.
92. See id. at 623-24.
93. Id. at 623.
not feel compelled to construe the statute so as to avoid constitutional issues.\footnote{Id. at 624.}

\section*{B. \textit{Narrow Construction of Delegated Powers}}

Closely related to the principle of narrowly construing statutes is the principle of narrowly construing congressionally delegated powers. By narrowly construing congressionally delegated powers the Court may determine that a particular administrative action was not authorized by Congress, thereby mooting the question of whether such action was in contravention of first amendment guarantees. The Court utilizes this principle of narrow construction not only where Congress has expressly forbidden the administrative action in question or such action is clearly not in furtherance of the legislation cited as authority, but also in situations where the administrative action would be consistent with a broad delegation of power.

In \textit{Kent v. Dulles},\footnote{357 U.S. 116 (1958).} regulations of the Secretary of State forbade the issuance of a passport to Communists. Congress had authorized the Secretary of State to grant and issue passports under such rules as the President shall designate and prescribe. The Court held that such authorization was insufficient for the promulgation of the rules involved in that case.\footnote{The Secretary of State was authorized to grant and issue passports under a 1926 statute. Prior to 1926, administrative practice had usually limited the issuance of passports in only two situations, neither related to the political beliefs of the applicant. From this, the Court determined that Congress did not intend to grant the Secretary of State unlimited discretion in deciding who should be issued a passport. \textit{Id.} at 129-30.}

Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. \ldots{} We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen.\footnote{Id. at 129. Although the Court focused on the right to travel as the constitutional right jeopardized by the regulations issued by the Secretary of State, it was clearly influenced by the effect that the statute and the regulations had on free speech. As the Court stated, “We deal with beliefs, with associations, with ideological matters.” \textit{Id.} at 130. Several years after the \textit{Kent} decision, the Court invalidated a statute that specifically prohibited the application for a passport by a Communist. \textit{Aptheker v. Secretary of State}, 378 U.S. 500 (1964). In \textit{Aptheker}, the Court stated that freedom of travel is a constitutional liberty closely akin to rights of free speech and association, \textit{id.} at 517, and applied standards of review utilized in first amendment cases. The Court stated that “the proper approach” for review came from NAACP v.}
The Court recognized that the function of narrowly construing a congressional delegation of power is the familiar one of avoiding constitutional questions by statutory construction.

We would be faced with important constitutional questions were we to hold that Congress by § 1185 and § 211a had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement.98

The Court utilized the principle of narrow construction again in Schneider v. Smith.99 Congress enacted the Magnuson Act which authorized the President to issue rules and regulations to safeguard all vessels in the territories or waters subject to the jurisdiction of the United States against injury from sabotage or other subversive activity when the President determined that the security of the United States was endangered by reason of such activity.100 Pursuant to the Act, the President issued regulations that gave the Commandant of the Coast Guard the authority to withhold the validation of permits to work on United States merchant vessels "unless he is satisfied that 'the character and habits of life of [a seaman] are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States.'"101 The Commandant required applications for permits to include a questionnaire regarding the applicant's associations with listed organizations. The appellant stated that he had never advocated the overthrow of the Government by unconstitutional means, but refused to go into detail about membership in the listed organizations. The Court held that the broad inquiry into associations with organizations listed on the application form was not authorized by the statute.

When we read that delegation with an eye to First Amendment problems, we hesitate to conclude that Congress told the

Button, 371 U.S. 415 (1963) and Thornhill v. Alabama, 310 U.S. 88 (1940), both of which utilized the first amendment to invalidate governmental action. See 378 U.S. at 516-17. In Zemel v. Rusk, 381 U.S. 1 (1965), the Court upheld administrative decisions by the Secretary of State that declared U.S. passports invalid for travel to Cuba. In determining that the Secretary's decisions were consonant with the authority delegated to him by statute, the Court noted that Kent and Aptheker involved free speech claims — claims that did not exist in Zemel. See id. at 16.

98. 357 U.S. at 130.
100. Id. at 18.
101. Id. at 19 (quoting Navigation and Navigable Waters, 33 C.F.R. §§ 6.10-1, -3 (1968)).
Executive to ferret out the ideological strays in the maritime industry. The words it used — “to safeguard . . . from sabotage or other subversive acts” — refer to actions, not to ideas or beliefs. We would have to stretch those words beyond their normal meaning to give them the meaning the Solicitor General urges. Rumely [United States v. Rumely, 345 U.S. 41 (1953)], and its allied cases, teach just the opposite — that statutory words are to be read narrowly so as to avoid questions concerning the “associational freedom” that Shelton v. Tucker [364 U.S. 479 (1960)] protected and concerning other rights within the purview of the First Amendment.102

At least one function of the doctrines of narrow construction of statutes and narrow construction of congressionally delegated powers so as to avoid constitutional issues is to ensure that Congress is fully aware of the implications of its actions in curtailing speech. The doctrine seeks to require Congress to make a considered decision that the exigencies of the potential danger require such a law. While the Court may be willing to uphold a law that suppresses speech because the law is aimed at protecting a legitimate governmental interest unrelated to such suppression, the Court must be assured that the government does indeed have such an interest.

III. PRE-EMPTION

Another ancillary doctrine used by the Court to strike down legislation impairing speech without directly referring to the first amendment is pre-emption, i.e., the doctrine that federal legislation in an area, or the “federal nature” of the area itself, bars state action in that area. The Court’s use of the pre-emption doctrine is epitomized in Pennsylvania v. Nelson,103 wherein the defendant was convicted under a state sedition act of knowing advocacy of the overthrow of the government of the United States by force and violence. The Supreme Court held that the enactment of the Federal Smith Act104 superseded all state laws on sedition against the federal government although the federal statute did not expressly so state. The Court argued that the pervasiveness of the federal legislation indicated that no scope of action was left to the state, that the nature of the problem was one in which the federal interest was dominant and that the enforcement of the state law could conflict with the administration of the federal program.

102. 390 U.S. at 26–27.
The first amendment overtones of the pre-emption doctrine surfaced again in *Old Dominion Branch No. 496 v. Austin*. 105 *Austin* involved statements in a newsletter, published by a federal public employee union, naming persons who had not joined the union and calling such persons "scabs" and then referring to scabs in scathing terms. Certain of the named individuals sued for libel under state law. States may define for themselves the appropriate standard of liability for defamation of a private individual, as long as they do not impose liability without fault. 106 The Court, however, held that statements made in the course of a labor dispute were governed by a federal policy that established union elections in the postal service and sought to foster free debate and discussion during those elections. 107 Thus, the Court held that state libel law could only apply to statements made with "'knowledge that [the statements were] false or with reckless disregard of whether [such statements were] false or not'" 108 and reversed the judgments. 109 Justice Douglas concurred on the basis that state libel laws are unconstitutional. 110 Justice Powell, joined by Chief Justice Burger and Justice Rehnquist in dissent, argued that there was no pre-emption because no real labor dispute existed in the case. 111

By using the doctrine of pre-emption, the Court may sometimes avoid facing first amendment constitutional problems by asserting that congressional action bars or partially bars state action in a particular area. Such a decision permits Congress, through legislation, to expressly allow state action in that area, but again it forces Congress to reflect on the need for such legislation in view of its impact on speech.

107. 418 U.S. at 273–75.
108. *Id.* at 281 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)).
109. In support of its position, the Court cited *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53 (1966), wherein it was held that libel actions under state law were preempted by federal labor laws (the NLRA) to the extent that the state sought to make actionable those defamatory statements made during the course of labor disputes that were published without knowledge of the falsity of such statements or without reckless disregard for the truth of such statements. See *id.* at 64–65. In *Austin*, the relevant federal law was Executive Order No. 11491 rather than the NLRA. Nevertheless, the Court concluded that the same federal policies were applicable and extended the *Linn* rationale to cover federal employees. See 418 U.S. at 273–79.
110. *See id.* at 289–91. Justice Douglas also offered a narrower basis for decision: "the pre-emptive effect of federal labor regulation is such that States are prohibited from interfering with those federally regulated relations by arming disputants in labor controversies with an arsenal of defamation laws." *Id.* at 288.
111. *Id.* at 294–95.
IV. OVERBREADTH

Constitutional confrontation may not always be avoided. In some instances, state courts have already construed a state statute in a way that makes conflict with first amendment principles inevitable. In other instances, there is no coherent alternative interpretation which in a single case would avoid constitutional problems. The Court may then be faced with a statute that might properly apply to a variety of situations constitutionally subject to regulation, but which also restricts speech clearly protected by the first amendment. In such a situation, the Court may hold that a particular application is unconstitutional, but preserve the statute for use against unprotected conduct. In the alternative, the Court may invalidate the entire statute on the ground of "overbreadth."

If the Court chooses to consider the overbreadth of a statute, it will evaluate the law on its face rather than as it is applied in the case before it. Thus, application of overbreadth is an exception to traditional rules of standing which ordinarily permit a litigant to be heard only when he asserts that a statute violated his own rights. Under overbreadth analysis a defendant may challenge the facial validity of a statute even though his own conduct could be constitutionally proscribed by a more narrowly drawn statute. In essence the defendant is asserting the rights of hypothetical defendants whose constitutionally protected expression would be punished under the statute. The rationale supporting this extension of standing is the Court's determination "that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes."

Overbreadth is here referred to as an "ancillary" doctrine of the first amendment because it is applied only when a court finds that at least some particular applications of a statute are unconstitutional under other first amendment tests. A law that is overbroad, like any other law improperly regulating speech, deters the expression of

116. Id.
ideas. The overbroad law, however, also functions to regulate conduct that a state may legitimately control. The particular problem with the overbroad law is that there is no way in a single case to sustain the law for its legitimate applications, while at the same time preventing it from unconstitutionally restricting expression. The overbroad statute represents two sets of competing interests; the public's interest in regulating improper conduct juxtaposed against the public's interest in free expression. If a court declares that a law is fatally overbroad, it has decided that the public's interest in free expression must prevail.

One area where resolution of these conflicting interests clearly favors speech and thus one where overbreadth analysis is particularly appropriate, involves statutes creating schemes imposing civil disabilities—such as denial of public employment or a professional license—on the basis of specified kinds of speech or associational activity. The purpose of civil disability schemes is to protect the public by preventing one whose background or beliefs indicate the possibility of misbehavior from obtaining a position of significance within the community. Such schemes often create a strong chilling effect on speech when the set of disfavored beliefs or behaviors is broader than is necessary to protect the public.

Case-by-case adjudication of the constitutionality of these schemes would be inappropriate for several reasons. First, the legislature's purpose in enacting civil disability statutes is to create a system of automatic disqualification which eliminates the process of case-by-case adjudication. An attempt to save the statute by holding only particular applications unconstitutional would frustrate its design. Overbreadth invalidation that remits the whole matter for the consideration of the lawmaking body is more appropriate. Second, overbreadth invalidation of such broad laws does not leave the government powerless to protect itself. Unlike the invalidation of criminal statutes that would result in freeing many who are properly subject to criminal penalty, with no possibility of ever punishing them because of ex post facto problems, the elimination of overbroad schemes for screening employees or professionals does not prevent immediate ad hoc screening. If someone failed to get a job because of the overbroad rule, the enactment of valid qualifying standards may still keep him from such a position.

117. See Overbreadth Doctrine, supra note 113, at 880-82.

118. See Konigsberg v. State Bar, 353 U.S. 252 (1957) (an applicant could not be denied admission on the grounds stated) and Konigsberg v. State Bar, 366 U.S. 36 (1961) (affirming the denial of bar admission to the same man on grounds that failure to answer questions obstructed investigation into his qualifications).
behavior remains satisfied, it is not surprising that much of the law on overbreadth was developed in the course of evaluating laws of this type. In these cases the crucial question is whether the broad sweep of the statute is necessary to protect the legitimate interests of the government. If it is, then all applications of the statute are legitimate and the law will be upheld. If the law affects speech not indicative of future misbehavior, it is overbroad. Ultimately, when it evaluates the alleged overbreadth of civil disability schemes, the Court must determine when broad regulation is justified. The Court makes this determination through the use of the balancing test.119

119. Extended discussion of this point will be deferred for treatment in a subsequent article on the Court's use of balancing analysis in the first amendment context. Briefly, at one extreme, a law forbidding particular positions to all who disagree with any government policy might have an incremental effect in keeping from such employment persons who would deliberately frustrate governmental operations. That incremental effect, however, would be quite small and utterly insignificant when weighed against the impact such a law would have upon free speech. Patently, a law of this kind would be designed to suppress speech that expresses disagreement with government policy rather than to protect the efficiency of governmental operations. Every member of the Court would likely join in striking down such a law. At the other extreme, a law forbidding particular positions to those who admit they would use their position to destroy the government would clearly protect legitimate governmental interests. Its purpose would be to deal with threatened conduct and not to suppress ideas. Such a law would be sustained unanimously.

Most laws, however, fall somewhere between these extremes. When the Justices evaluate civil disability schemes that are not clearly designed to suppress speech or to prevent destruction of the government, they might well reach different conclusions as to the law's constitutionality. These different results would reflect varied conceptions of the significance of the danger faced and the degree of incremental protection that the challenged law affords. Moreover, some Justices may, as a general rule, be more deferential to the legislature than are others. But the application of the balancing test and the doctrine of overbreadth in civil disability cases ordinarily reflects these differences in appreciation of the underlying facts rather than a disagreement over the principle involved.

This relationship between the doctrine of overbreadth and the balancing analysis is illustrated in other areas as well. See, for example, Chief Justice Burger's dissent in Buckley v. Valeo, 424 U.S. 1 (1976). The Election Practices Act required political committees to record the names of all persons making political contributions of $10 or more and required persons contributing over $100 to report their contributions to the Federal Election Commission. Chief Justice Burger condemned these low dollar thresholds. He believed that the governmental interest in the disclosure of such small gifts was insufficient to overcome the first amendment interests at stake.

To argue that a 1976 contribution of $10 or $100 entails a risk of corruption or its appearance is simply too extravagant to be maintained. No public right to know justifies the compelled disclosure of such contributions, at the risk of discouraging them. There is, in short, no relation whatever between the means used and the legitimate goal of ventilating possible undue influence. Congress has used a shotgun to kill wrens as well as hawks.

Id. at 239.

While the majority referred to the challenge to the dollar thresholds as an overbreadth attack, its argument, as well as the Chief Justice's, was couched in
Application of the overbreadth doctrine is more problematic when a statute prescribes a criminal penalty. In these instances, the conflict between acceptable applications of the law and its unacceptable chilling effect on speech is most stark. Clearly, the state has a need to prevent outrageous behavior which it properly defines as criminal. Yet, when a statute enacted to control criminal conduct is subsequently held fatally overbroad, the state would be forced to free everyone imprisoned under it. Moreover, *ex post facto* concerns would prevent the prosecution of persons whose acts occurred prior to the adoption of a valid statute. Nevertheless, the Court has used overbreadth to invalidate criminal statutes which act to proscribe conduct a state has a clear interest in regulating.

In *Coates v. City of Cincinnati*,120 the Court reversed convictions under an ordinance making it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ."121 Justice Stewart, speaking for five members of the Court, considered it immaterial that the record contained insufficient information to determine whether Coates' conduct was within the power of a state to punish. He held that the statute on its face was both vague and overbroad.

The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be "annoying" to some people. . . . We need not lament that we do not have before us the details of the conduct found to be annoying. It is the ordinance on its face that sets the standard of conduct and warns against transgression. The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech.122

balancing terms. The majority agreed that "the $10 and $100 thresholds are indeed low," but stated that "we cannot require Congress to establish that it has chosen the highest reasonable threshold." *Id.* at 83. The majority noted that dollar lines are inherently arbitrary and that there was no suggestion the low threshold was intended to curtail contributions. Further, the majority pointed out the $100 limit does serve informational purposes and aids in enforcement of other provisions of law that limit aggregate sums. Where disclosure would result in subjecting contributors to threats and harassment, the Court left open the possibility of individual exemptions to the law.

120. 402 U.S. 611 (1971).
121. *Id.* at 611 (quoting CINCINNATI, OHIO, CODE OF ORDINANCES § 901-16 (1956)).
122. 402 U.S. at 615-16.
A strong minority of four Justices dissented, stating inter alia that the Cincinnati statute did not purport to bar or regulate speech as such. They noted that it prohibited persons from "'conduct[ing]' themselves in a manner annoying to others." The dissent argued that the overbreadth doctrine should be applied only to a statute which, on its face, regulates pure speech. Because the Cincinnati statute regulated conduct as well as speech, they felt it could only be judged in the context of a particular application. Since the record was insufficient to determine its constitutionality as applied, they would have affirmed the decision of the Supreme Court of Ohio.

Three of the Coates dissenters, Justice White, the Chief Justice, and Justice Blackmun, were joined by new members of the Court, Justices Powell and Rehnquist, in Broadrick v. Oklahoma, a decision which adopted the speech-conduct distinction of the Coates dissent and which has been said to have taken much of the force out of overbreadth protection. The Broadrick majority upheld an Oklahoma statute which restricted the political activities of state civil servants, against an overbreadth challenge. The statute forbade state employees from 1) engaging in fund raising for any political purpose, 2) acquiring membership in any national, state, or local committee of a political party or club, 3) being a candidate for any public office, and 4) participating "in the management or affairs of any political party or in any political campaign." The Court's spokesman, Justice White, drew heavily from his dissent in Coates, saying:

[T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct — even if expressive — falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct . . . . To put the matter

123. Id. at 616 (Burger, C.J., White & Brennan, JJ., dissenting) and id. at 617 (Black, J., dissenting). The Chief Justice and Mr. Justice Blackmun joined in Justice White's dissent while Justice Black wrote a separate opinion.
124. Id. at 620 (White, J., dissenting).
127. The challenge was made to § 818 of Oklahoma's Merit System of Personnel Administration Act, OKLA. STAT. ANN. tit. 74, §§ 801-39 (West 1965).
128. OKLA. STAT. ANN. tit. 74, § 818 (West 1965).
another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.129

Because the statute regulated "a substantial spectrum of conduct that is . . . manifestly subject to state regulation,"130 Justice White believed the law was "not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied."131

Four Justices of the Coates majority dissented in Broaddrick.132 Justice Brennan, speaking also for Justices Stewart and Marshall, complained that Broaddrick overruled Coates: "Coates stood, until today, for the proposition that where a statute is 'unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct,' . . . it must be held invalid on its face whether or not the person raising the question could have been prosecuted under a properly narrowed statute."133 But Justice Brennan acknowledged that the Court has never held a statute facially overbroad simply because it was possible to conceive of a single impermissible application. He believed that in this sense a requirement of substantial overbreadth has always been implicit in the doctrine.134 Perhaps, as Justice Brennan indicated in his final paragraph, the different views on the Court regarding the requisite "substantiality" of facial overbreadth may merely be differences of degree:

If the requirement of "substantial" overbreadth is construed to mean only that facial review is inappropriate where the likelihood of an impermissible application of the statute is too small to generate a "chilling effect" on protected speech or

129. 413 U.S. at 615.
130. Id. at 616.
131. Id. at 615-16 (footnotes omitted). Justice White also believed that overbreadth scrutiny has been less rigidly applied "in the context of statutes regulating conduct in the shadow of the First Amendment . . . in a neutral, non-censorial manner." Id. at 614. Because he viewed the Oklahoma statute as regulating "political activity in an even-handed and neutral manner," id. at 616, overbreadth analysis would be doubly inappropriate.
132. Id. at 618 (Douglas, J., dissenting) and id. at 621 (Brennan, Stewart & Marshall, JJ., dissenting). In his dissent, Justice Douglas argued that the state could not deprive a state employee of his right to "speak, write, assemble, or petition once the office is closed and the employee is home on his own." Id. at 618 (Douglas, J., dissenting).
133. Id. at 632 (Brennan, J., dissenting) (footnote and citation omitted).
134. Id. at 630.
conduct, then the impact is likely to be small. On the other hand, if today's decision necessitates the drawing of artificial distinctions between protected speech and protected conduct, and if the "chill" on protected conduct is rarely, if ever, found sufficient to require the facial invalidation of an overbroad statute, then the effect would be very grave indeed.135

Indeed, Justice White himself suggested that the Court disagreed only as to whether the Oklahoma statute was in fact substantially overbroad.136

Moreover, it would be incorrect to view the majority's distinction between "protected speech" and "protected conduct" too rigidly. The distinction simply suggests that a statute intended to regulate some improper conduct, which incidentally restricts some expressive conduct, is more likely to be addressing non-speech governmental interests than is a statute directed at expression itself. The language, history, and application of the statute may show otherwise, however, and in that case, the majority surely will be willing to strike down the statute for overbreadth.137

Although the doctrine of overbreadth remains alive, even after Broadrick,138 several recent decisions of the Burger Court indicate a reluctance to apply it. In Parker v. Levy,139 Howard Levy, an army physician, was convicted by a general court-martial for violating certain articles of the Uniform Code of Military Justice which prohibited willful disobedience of a lawful command of a superior

135. Id. at 632-33. Both the majority and the dissent appear to draw heavily from Overbreadth Doctrine, supra note 113. The criteria of "substantial" overbreadth is discussed there in terms similar to those used by Justice White. See Overbreadth Doctrine, supra note 113, at 918.
136. 413 U.S. at 616 n.14.
137. As a leading student note in the area states:

When the great preponderance of applications involve activities bearing no first amendment interests at all, the legislature has presumably been successful in addressing a social harm which in the main is only fortuitously related to expressive activities. The burden on expressive conduct, and a fortiori the burden on privileged conduct, is incidental. Lawmaking machinery not aimed at first amendment activities may not normally be animated by the need to focus with the precision uniquely necessary in this area. The task of reshaping overbroad statutes is unavoidably shared by . . . courts in these circumstances.

Overbreadth Doctrine, supra note 113, at 860-61 (footnotes omitted). It follows, therefore, that when it can be shown that the effect on expressive conduct is deliberate rather than incidental, the statute should be struck down.

138. See, e.g., Lewis v. City of New Orleans, 415 U.S. 130 (1974). In Lewis the Court held overbroad a state statute making it a crime to curse, revile, or use obscene or opprobrious language toward or with reference to any policeman performing his duty. Because the statute purported to regulate pure speech, a majority of the Court felt overbreadth invalidation appropriate.
commissioned officer;140 "conduct unbecoming an officer and a
gentleman;"141 and "all disorders and neglects to the prejudice of
good order and discipline in the armed forces."142 Justice Rehnquist,
speaking for five members of the Court, rejected Dr. Levy's
contention that the articles were unconstitutionally vague and
overbroad.143

Justice Rehnquist stressed that "the different character of the
military community and of the military mission" required a different
application of first amendment principles in the military context.144
While he did not preclude the possibility of overbreadth challenge in
this area, Justice Rehnquist indicated that the rationale for
overbreadth adjudication "must be accorded a good deal less weight"
in such cases.145 Moreover, in this case Justice Rehnquist pointed out
that the challenged articles, on their face, prohibited a wide range of
conduct which could be regulated without infringing upon first
amendment freedoms. In light of their broad scope of legitimate
application, the fact that some constitutionally protected expression
might be included within the statutes' prohibition was insufficient to
require overbreadth invalidation.146

In Bates v. State Bar147 the Court suggested another limitation
on the application of overbreadth analysis. In that case, the Court
held that Arizona's near-total ban on attorney advertising violated
the first amendment rights of two members of the state bar who were
censored for purchasing a newspaper advertisement soliciting
patrons for their legal clinic. Justice Blackmun's majority opinion
stated that it was inappropriate to apply overbreadth "to profes-
sional advertising, a context where it is not necessary to further its
intended objective."148

The justification for the application of overbreadth analysis
applies weakly, if at all, in the ordinary commercial context. . . .
Since advertising is linked to commercial well-being, it seems
unlikely that such speech is particularly susceptible to being
crushed by overbroad regulation. . . . Moreover, concerns for

version at 10 U.S.C. § 890 (1976)).
version at 10 U.S.C. § 933 (1976)).
version at 10 U.S.C. § 934 (1976)).
143. 417 U.S. at 752–62.
144. Id. at 758.
145. Id. at 760.
146. Id. at 760–61.
148. Id. at 381.
uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected.¹⁴⁹

Statutes regulating commercial speech generally reflect a policy to protect the public from misleading and deceptive advertising.¹⁵⁰ While the particular statute may be overbroad because it reaches advertisements that are truthful and informative, the seller of goods or services who makes factual misstatements or deliberately misleads the public should know he is engaging in unprotected speech and is violating the legitimate policy which the state expressed through its statute. When he is scrupulously truthful, however, he may be assured of constitutional protection and the profit motive can be counted on to overcome any residual chill from the overbroad statute.

Essentially, in determining whether to permit an overbreadth challenge to a statute, the Court is concerned with whether the unconstitutional reach of the statute suggests that the entire regulation was motivated by a desire to suppress information and ideas. If there is "substantial" overbreadth, it is likely that the interest the state sought to foster was not an interest which it constitutionally could pursue. It would thus be wrong to convict a person for violating a law which is not an expression of a constitutionally legitimate policy. Further, it may be unclear exactly what the state would require if it had pursued only its legitimate interest. For example, a state may have a legitimate interest in maintaining quiet near a hospital, but if the statutes refer only to disorderly conduct, no one can know whether a properly drawn statute would limit demonstrations to fifty feet from the hospital, or two hundred feet from it. Thus substantial overbreadth raises due process as well as first amendment problems.¹⁵¹ On the other hand, if there are only a few isolated examples or situations in which the statute would interfere with protected expression, drafting difficulties may account for the reach. An invalidation of a specific

¹⁴⁹. Id. at 380–81.
¹⁵⁰. See generally, Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising by the F.T.C., 90 HARV. L. REV. 661 (1977). Despite the extension of constitutional protection to commercial speech, these statutes are not significantly threatened since they focus on transactions which themselves may be directly regulated. See note 4 supra.
¹⁵¹. The absence of fair warning in statutes is a basic fifth and fourteenth amendment violation. Lanzetta v. New Jersey, 360 U.S. 451 (1939); International Harvester v. Kentucky, 234 U.S. 216 (1914).
application will be a sufficient prophylactic to assure that the statute does not accomplish any peripheral improper goal while enabling the legitimate state interest to be effectuated. Additionally, the legitimate goal will be plain and give fair warning to those engaged in unprotected activity.

Despite general agreement as to overbreadth theory, attitudinal differences among the members of the Court remain significant. The present majority often is willing to deny challenges alleging facial unconstitutionality and permit statutes to stand so they may continue to be applied to protect and regulate valid governmental interests. A minority of the Court, however, would emphasize the potential chill to protected expression accompanying overbroad laws. Accordingly, they would rather invalidate the entire law than attempt to protect speech on a case-by-case basis. Both sides may, in the future, be able to agree that "substantial" overbreadth is necessary for facial invalidation, but the majority will require more in the way of likely impermissible applications of the statutes before finding that the overbreadth is in fact substantial.

V. VAGUENESS

As developed by the case law dealing with free speech, the doctrines of overbreadth and void for vagueness are closely allied. Conceptually, however, there is a difference between the two doctrines: an overbroad statute clearly forbids conduct that is constitutionally protected while a statute that is void for vagueness is merely unclear as to whether protected conduct is proscribed. Functionally, however, this difference has little effect: both overbroad and vague statutes operate to deter constitutionally protected conduct. Even more importantly, the Court employs the vagueness and overbreadth doctrines to achieve the same goal: requiring the legislature to define statutorily proscribed conduct with sufficient specificity to ensure that only valid state interests are vindicated and free speech is not impaired unnecessarily.

153. See, e.g., id. at 621 (Brennan, Stewart & Marshall, JJ., dissenting).
154. That is, the Court speaks of them as separate doctrines although the distinction may not exist in some instances. See Amsterdam, The Void for Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960); Overbreadth Doctrine, supra note 113.
In *Grayned v. City of Rockford*, the Supreme Court stated that "vague laws offend several important values," and enumerated those values as well as the vices inherent in a vague statute:

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

In the context of the first amendment, the problem of vagueness has most frequently arisen in loyalty oath cases. A vague loyalty oath is particularly chilling to the scrupulous oath taker in the exercise of his first amendment rights; thus, the Court has found it relatively easy to demand that any vagueness be eliminated before an individual is required to take a loyalty oath.

In *Cramp v. Board of Public Instruction of Orange County*, the Court struck down a requirement that every Florida state employee swear in writing that he had never lent his "aid, support,

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156. *Id.* at 108.
157. *Id.* at 108-09. These same defects are endemic to overbroad statutes as well, for such statutes do not draw a line between protected conduct unconstitutionally prohibited and unprotected conduct that may constitutionally be forbidden. See *Overbreadth Doctrine*, supra note 113 at 871-75. Thus, before such a statute is subjected to judicial scrutiny, individuals will not know whether their conduct is properly prohibited. As a result of this close relationship between the doctrines of overbreadth and vagueness, many Supreme Court decisions do not clearly distinguish between them.

The problems posed by a vague statute may often be more easily cured by judicial interpretation than those of an overbroad statute. Yet, as with overbroad statutes, state courts often refuse to take advantage of an opportunity to cure a vague statute by judicial interpretation. Additionally, a statute may be so vague that no single decision can cure it. In such circumstances, the rationale for the facial invalidation of an overbroad statute applies to a vague statute also.

advice, counsel or influence to the Communist Party. 159 The Court pointed out that the language of the oath might apply to anyone “who had ever supported any cause with contemporaneous knowledge that the Communist Party also supported it.” 160 The Court admitted it would be “fanciful” to suppose that such a person who took the oath would be prosecuted, but noted that the language was so ambiguous that similar protected activity might indeed be covered. 161 The Court, quoting from an earlier opinion, stated: “[a] statute which on its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity [of free political discussion] is repugnant to the guarantee of liberty contained in the Fourteenth Amendment.” 162

In Baggett v. Bullitt, 163 a divided Court invalidated a Washington State loyalty oath that required teachers to swear they had not committed an act or aided in the commission of an act intended to overthrow or alter, or to assist in the overthrow or alteration of the constitutional form of government by revolution, force or violence. The Court assumed that any knowing assistance to the Communist Party might violate this oath despite the actor’s innocent motives. 164 Indeed, the majority appeared to suggest the oath might reasonably be interpreted to include the remote assistance of teaching Communist Party members traditional curriculum subjects (e.g., reading) that might improve their skills and thus make their future activities more effective. 165 Justices Clark and Harlan, dissenting, argued that assisting in the commission of an act to overthrow the government could not reasonably be interpreted in so broad a fashion. 166 The Court, however, felt that the Washington oath suffered from infirmities similar to those it had found in Cramp, stating that, in both cases, it was dealing with:

indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic First Amendment freedoms. The

159. Id. at 279. In a prior case, the Florida Supreme Court had interpreted the oath to require state employees to swear they had never knowingly lent their “aid, support, advice, counsel or influence to the Communist Party.” State v. Diez, 97 So. 2d 105, 110 (Fla. 1951). The Supreme Court determined the constitutionality of the oath as interpreted by the Florida Supreme Court. 368 U.S. at 285.
160. Id. at 286.
161. Id.
162. Id. at 288 (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).
164. Id. at 367–68.
165. Id. The Court even raised the possibility that analyzing and criticizing a manuscript submitted for publication by a Communist scholar would violate the oath. Id. at 369.
166. Id. at 382–83 (Clark & Harlan, JJ., dissenting).
uncertain meanings of the oaths require the oath-taker — teachers and public servants — to “steer far wider of the unlawful zone,” . . . than if the boundaries of the forbidden areas were clearly marked. . . . Free speech may not be so inhibited.”

In *Keyishian v. Board of Regents*, the Court utilized the doctrine of vagueness to strike down an employment requirement closely analogous to a loyalty oath. A state statute made the utterance of any “seditious” word or doing of any “seditious” act grounds for dismissal from the public school system. The Court held that the statute was unconstitutionally vague. Even if the statute were confined to the utterance of “the doctrine” that organized government should be overthrown by force or violence, it was impermissibly vague. As the Court stated:

The teacher cannot know the extent, if any, to which a ‘seditious’ utterance must transcend mere statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine. The crucial consideration is that no teacher can know just where the line is drawn between ‘seditious’ and nonseditious utterances and acts.

In holding that the statute was unconstitutionally vague, the Court emphasized that:

“[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms,” . . . “[f]or standards of permissible statutory vagueness are strict in the area of free expression . . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”

167. Id. at 372 (footnotes and citations omitted).
169. Essentially the same law had been upheld in *Adler v. Board of Educ.*, 342 U.S. 485 (1952), although, as the *Keyishian* court pointed out, the law had not been attacked as unconstitutionally vague in the earlier case. 385 U.S. at 594–95.
170. Id. at 599.
171. Id. at 603–04 (quoting NAACP v. Button, 371 U.S. 415, 432–33, 438 (1963)).

The Court, utilizing the doctrine of “overbreadth,” also struck down requirements that barred employment of members of the Communist Party even though membership might be without specific intent to further the unlawful aims of the party. 385 U.S. at 609–10. The dissenters, Justice Clark joined by Justices Harlan, Stewart and White, argued that the language of the state statute was similar to that of the federal Smith Act upheld in *Dennis v. United States*, 341 U.S. 494 (1951), and thus would apparently not include mere abstract advocacy divorced from advocacy of
And in *Whitehill v. Elkins*, the Court struck down a loyalty oath that required teachers to swear, "I am not engaged in one way or another in the attempt to overthrow the government... by force or violence." The Court determined that the oath was to be read in conjunction with the Maryland Ober Act, which defined a subversive as one,

"who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization, as more fully defined in this article."

The Court pointed out that alteration of the Constitution by peaceful revolution, as well as innocent membership in a violent group, is activity that is protected by the first amendment. Although Maryland case law indicated that if a Maryland court were squarely presented with the issue, it would not include such activity within the purview of either the Ober Act or the loyalty oath, the Court determined that at the time of its decision the clauses in question "are still befogged," and, therefore, the taking of the oath could not constitutionally be required.

action. 385 U.S. at 627–28 (Clark, J., dissenting). However, the dissenters failed to note that the narrow construction given the Federal Smith Act by the Court in *Yates v. United States*, 354 U.S. 298 (1957) would not bind state courts in their interpretation of state statutes.

173. Id. at 55–56.
174. Id. at 56–57 (emphasis supplied by Court) (quoting MD. ANN. CODE art. 85A, § 13 (1957)).
175. Id. at 58, 61.
176. Id. at 61.
177. Although the majority states that the Maryland oath is "overbroad," the context of this statement demonstrates the confusion between vagueness and overbreadth. The Court states: "[t]he lines between permissible and impermissible conduct are quite indistinct. Precision and clarity are not present." *Id.* at 61–62. This is language of vagueness, not overbreadth. Yet the very next sentence of the Court's opinion is: "Rather we find an overbreadth that makes possible oppressive or capricious application as regimes change." *Id.* at 62. In this context, the overbreadth refers to a possible interpretation of the oath and not to its only reasonable interpretation. That is, the vagueness of the statute could lead to an application consistent with its language that would be clearly overbroad.
ANCILLARY DOCTRINES

The frustrated dissenters, Justices Harlan, Stewart and White, argued that the required oath was unobjectionable and that no explicit language tied the loyalty oath to any other act. They maintained "[t]he only thing that does shine through the opinion of the majority is that its members do not like loyalty oaths."¹⁷⁸

Although the Court scrutinizes state loyalty oaths to ensure that such oaths are not so vague as to chill scrupulous oath takers in the exercise of their first amendment rights, the Court has not struck down all loyalty oaths as unconstitutionally vague. In Knight v. Board of Regents,¹⁷⁹ the Court affirmed, per curiam, a district court decision that upheld an oath that required the taker to swear to "support the Constitution[s] of the United States . . . and . . . New York."¹⁸⁰ A similar oath was upheld in Connell v. Higginbotham,¹⁸¹ although a second part of the oath was invalidated.¹⁸² The type of oath validated by the Court in Knight and Connell is taken to be a promise as to future action;¹⁸³ not a matter of belief. Requiring an oath in a different form from that approved in Knight and Connell has disturbed many of the Justices because the function of such other oaths is questionable. If a loyalty oath refers to an individual's past acts, the acts themselves are the disqualification from employment and the oath is irrelevant. If a loyalty oath refers to individual beliefs, it is interfering with free speech. Loyalty oaths that refer to individual beliefs are of doubtful utility anyway since a potential saboteur is unlikely to refuse to take such an oath. The oath instead, as seen by the character of the plaintiffs in the cases discussed above, may merely discourage scrupulous peaceful dissenters from fully exercising their first amendment rights. Thus, the slightest imprecision in a loyalty oath, resulting in the possibility that it may apply to constitutionally protected activity, may curtail that activity without advancing any legitimate governmental interest. Since one form of loyalty oath is successful in doing

¹⁷⁸. Id. at 63 (Harlan, Stewart & White, JJ., dissenting).
¹⁸⁰. Knight v. Board of Regents, 269 F. Supp. 339, 340 (S.D.N.Y. 1967) (quoting N.Y. EDUC. LAW § 3002 (McKinney 1953) (current version at N.Y. EDUC. LAW § 3002 (McKinney 1970)). The district court determined that the oath did no more than require "that the subscriber affirm that he will support the constitutions of the United States and the State of New York and that he will be a dedicated teacher." Id. at 341.
¹⁸¹. 403 U.S. 207 (1971). The portion of the oath that was upheld required the taker to swear to "support the Constitution of the United States and of the State of Florida." Id. at 208 (quoting FLA. STAT. § 876.05 (1965)).
¹⁸². The Court invalidated the part of the oath that required the taker to swear "[n]ot [to] believe in the overthrow of the Government of the United States or of the State of Florida by force or violence." Id. at 208 (quoting FLA. STAT. § 876.05 (1965)).
all that a loyalty oath should do, any other form is looked at with extreme suspicion. Although the Court scrutinizes with extreme suspicion any loyalty oath that deviates from the form approved in Knight and Connell, a majority of the Court now appears to be willing to accept greater variations from the magic language used in those cases. In Cole v. Richardson, the Court accepted a suggestion from the State that the additional language of an oath, promising to “oppose the overthrow of the government of the United States . . . or of this Commonwealth by force, violence or by any illegal or unconstitutional method,” was synonymous with the promise to uphold and defend the federal and state constitutions. While the dissenters — Justices Douglas, Brennan and Marshall — find a promise to oppose illegal action vague, the majority opinion states: “The purpose of the oath is clear on its face. We cannot presume that the Massachusetts Legislature intended by its use of such general terms as ‘uphold,’ ‘defend,’ and ‘oppose’ to impose obligations of specific, positive action on oath takers.” Thus, the Court still assures itself that the legislative aim was a legitimate one, unrelated to expression, while giving greater latitude to the legislature in choosing words that express that aim. As Justices Stewart and White pointed out in a concurring opinion: “if ‘uphold’ and ‘defend’ are not words that suffer from vagueness and overbreadth, then surely neither is the word ‘oppose’ in the second part of the oath.”

As is true regarding the doctrine of overbreadth, the differences between the members of the Court with regard to loyalty oaths and the doctrine of vagueness are not differences of basic principle, but rather are differences of application. Some of the Justices are more willing to find clarity because they feel legislatures should have latitude in performing admittedly appropriate legislative functions. Other Justices are more likely to discover ambiguities because of greater concern for the most timorous and scrupulous of the prospective oath takers.

Although the doctrine of vagueness has most frequently been applied in loyalty oath cases, the doctrine also has been utilized in other cases touching on the first amendment. In *Smith v. Goguen*, the defendant was convicted under the contempt provision of the Massachusetts flag-misuse statute, which, in part, punished any person who publicly treated "contemptuously the flag of the United States." The defendant had worn a small cloth version of the United States flag sewn to the seat of his trousers. In reversing the defendant's conviction, the Court stated:

Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts. The statutory language at issue here...has such scope, ... and at the relevant time was without the benefit of judicial clarification.

Justice White, concurring, found the statute was not impermissibly vague, but rather, clearly punished Goguen for being contemptuous of the flag. Thus, the statute obviously violates the first amendment as it punishes Goguen for expressing his ideas.

Justices Blackmun, Burger and Rehnquist dissented on the ground that the statute, as interpreted by the Massachusetts Supreme Judicial Court, reached only "harming the physical integrity of the flag" and not any other negative expressions about the flag, so that it was sufficiently specific and directed towards a non-speech interest to be permissible. One may infer that the dissenters believed Goguen knew that his act violated the statute and was not protected; thus the vices of vagueness did not apply to him.

In *Goguen*, the majority's stated concern, that "contemptuous" treatment is too vague, is a reflection of the fear that the statute will

193. Id. at 573 (footnotes and citations omitted).
194. Id. at 584–86 (White, J., concurring).
195. Id. at 588–90 (White, J., concurring).
196. Id. at 591 (Blackmun, J. & Burger, C.J., dissenting); id. at 596 (Rehnquist, J. & Burger, C.J., dissenting).
197. Cf. *Parker v. Levy*, 417 U.S. 733 (1974), discussed earlier with regard to the doctrine of overbreadth. See notes 139 to 145 and accompanying text supra (the most significant claim raised in *Parker* was that certain parts of the Uniform Code of Military Justice were unconstitutionally vague; the Court replied to this claim by stating that Levy had fair warning as to the illegal and unprotected nature of his statements).
be used to punish those opposed to the government. The dissent emphasized the governmental interest in protecting the flag. Both, however, agreed that punishment for stating contempt of the flag is unconstitutional. The split on the Court, therefore, turns on the Justices' individual perceptions as to whether the statute aims primarily at punishing contempt or protecting the physical integrity of the flag.

Recently, in *Hynes v. Mayor of Oradell*,198 the Court utilized the doctrine of vagueness in striking down as unconstitutional a municipal ordinance that stated:

Any person desiring to canvass, solicit or call from house to house in the Borough for a recognized charitable cause, or any person desiring to canvass, solicit or call from house to house for a Federal, State, County or Municipal political campaign or cause, shall be required to notify the Police Department, in writing, for identification only.199

The Court noted that the coverage of the ordinance was unclear because: 1) it failed to define what body's recognition was required in order for a cause to be a "recognized charitable cause;" 2) the meaning of "Federal, State, County or Municipal . . . cause" was uncertain; and, 3) it was difficult to determine what groups were included within the phrase "Borough, Civic Groups and Organizations," which the ordinance also covered.200 Additionally, there was no specification of the steps to be taken to sufficiently comply with the requirement that covered persons or groups "notify the Police Department, in writing, for identification only."201 The New Jersey Supreme Court gave little guidance as to the proper coverage of the ordinance in its opinion upholding the ordinance.

In reversing the Supreme Court of New Jersey, the United States Supreme Court stated:

To the extent that these ambiguities and the failure to explain what 'identification' is required give police the *effective* power to grant or deny permission to canvass for political causes, the ordinance suffers in its practical effect from the vice condemned in *Lovell, Schneider, Cantwell, and Staub.*202

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199. *Id.* at 614 n.2 (quoting Borough of Oradell, N.J., Ordinance 598A, § 1(a) (July 16, 1974)).
200. *Id.* at 621.
201. *Id.*
202. *Id.* at 622.
In essence, the Court held that the ordinance was unconstitutionally vague because "'men of common intelligence must necessarily guess at its meaning.'" Justice Rehnquist dissented, citing the Court's decision in *Broadrick v. Oklahoma* where it held that a prohibition on state classified employees soliciting funds "for any political organization, candidacy or other political purpose" was not impermissibly vague. In *Broadrick*, the Court had emphasized the inherent limitations in language "'with respect to being both specific and manageable brief.'" Rehnquist posited that persons covered by the law could assure themselves of compliance with the law by requesting the police to tell them if the proffered notice was sufficient.

The necessity for requesting the police to respond to the sufficiency of a proffered notice, unencumbered by legislative guidelines, seems to have been particularly troublesome to the majority. The specifics required for adequate notification could easily have been included in the ordinance or a regulation issued by the police department. The failure to provide such specifics apparently served no purpose other than to create the possibility that the police could discriminate on a subjective basis, i.e., dislike for the content of a particular speaker. The ease with which this vagueness could have been cured may be the major factor distinguishing *Hynes* and *Broadrick*.

One of the most intriguing and difficult issues posed by a challenge to a statute on the grounds of vagueness is the standing of the party to raise the issue of vagueness. If a statute could legitimately prohibit various types of conduct but is not clear as to which types of conduct it does prohibit, a defendant may object that the vagueness of the statute did not afford him due warning that his acts violated the statute. If a statute clearly prohibits the defendant's conduct although vague as to its application to other sets of facts, the defendant has had sufficient warning and cannot object that his constitutional right to "notice" has been violated. This principle of the vagueness doctrine is illustrated by *Young v. American Mini Theatres.* In *Young*, Justice Blackmun, in dissent,
argued that a zoning ordinance of Detroit, Michigan that limited the proximity of sexually oriented businesses to each other was unconstitutionally vague under the principles established in *Hynes.* 210 The majority found that the plaintiffs were clearly covered by the ordinance and, therefore, they had no standing to raise the constitutional rights of others as to whom the ordinance may be vague.

It is where vagueness merges with overbreadth that difficult standing problems arise. If it is unclear whether a statute forbids constitutionally protected speech, the statute will discourage people from engaging in that speech. Thus, although the statute does not clearly forbid such protected speech, it has the same effect in that it "chills" the exercise of first amendment rights. This raises the possibility that the statute's vagueness was designed to discourage free speech, and a statute with such an impermissible purpose cannot be applied to anyone. Thus, allowing a person who engages in unprotected conduct to raise the rights of others affected by the statute may be necessary to ensure that the statute does not continue to discourage the speech of persons too cautious to hazard the risks and costs of suit themselves. However, even in such a situation the Court has stated: "Nevertheless, if the statute's deterrent effect on legitimate expression is not 'both real and substantial,' and if the statute is 'readily subject to a narrowing construction by the state courts,' . . . the litigant is not permitted to assert the rights of third parties." 211

Justice Stevens, writing for the plurality, stated "we are not persuaded that the Detroit zoning ordinances will have a significant deterrent effect on the exhibition of films protected by the First Amendment." 212 He noted that the plaintiffs had not challenged the specificity of the definitions of "specified sexual activities" or "specified anatomical areas" but only the lack of clarity as to how much of the described activity is permissible before the exhibition is "characterized by an emphasis" on such matter. 213 "For most films," wrote Justice Stevens, "the question will be readily answerable." 214 This suggests that the deterrent effect on speech is not substantial. He continued: "to the extent that an area of doubt exists, we see no reason why the ordinances are not 'readily subject to a narrowing

210. "I fail to see how a statutory prohibition as difficult to understand and apply as the 1,000 foot rule for 'adult' theatres can survive if the ordinance in *Hynes* could not." *Id.* at 92 (Blackmun, J., dissenting).
211. *Id.* at 60 (citation omitted).
212. *Id.*
213. *Id.* at 58.
214. *Id.* at 61.
construction by the state courts.'” In rejecting the standing of the plaintiffs to raise the problem of the statute's vagueness as it applied to others, Justice Stevens was apparently influenced by the nature of the material.

Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance, and since the limited amount of uncertainty in the ordinances is easily susceptible of a narrowing construction, we think this is an inappropriate case in which the adjudicate to hypothetical claims of persons not before the Court.

Justice Powell's concurrence specifically repudiates any reliance on according different treatment, for first amendment purposes, to nonobscene erotic materials from the treatment accorded other protected forms of communication, but agrees that the challenged statute's vagueness did not significantly deter such speech and could be cured by the state courts.

Justice Stevens' opinion may have been influenced by the commercial nature of the businesses affected. The Detroit ordinance does not limit the production of sexually explicit material although it does affect those who sell such material. Whatever the speech motives of the persons creating sexually oriented materials, the sellers are normally motivated by profit. The Court has found that speech linked to commercial well-being is less likely to be crushed by overbroad regulation. The seller or exhibitor of sexually oriented material who seeks to appeal to the sexual appetite of the public knows that he is covered by the ordinance and can locate his business accordingly. If he wishes to operate at a particular location near another such business, the desire for profit is likely to overcome any doubts as to the applicability of the ordinance.

Justice Blackmun's dissent in Young agrees with the basic standing principles stated by the plurality but disagrees "on the facts" as to the effect of the ordinance on protected expression and also as to whether an adequate narrowing construction can be given.

215. *Id.*

216. *Id.*

217. Justice Powell concurred in the plurality's denial of standing to raise vagueness but said "I do not consider the conclusions in part I of the opinion to depend on distinctions between protected speech." *Id.* at 73 n.1 (Powell, J., concurring).

218. See discussion of *Bates* at notes 147 to 149 and accompanying text *supra*.

219. 427 U.S. at 95 (Blackmun, J., dissenting).
When the Court voids a statute on the grounds of vagueness, it is protecting speech that was unnecessarily threatened by that statute. The legislature, by redrafting the statute in more specific terms, may accomplish the same legitimate purpose it sought to accomplish with the vague statute. But when the defects in the vague statute are not easily curable by a redrafted statute, or, when the invalidation of the statute will cause serious harm, the Court's belief that the legislature was only concerned with effectuating legitimate government interests may cause the Court to uphold the statute despite possible difficulties of interpretation.

VI. EQUAL PROTECTION

Another ancillary doctrine that may serve to vindicate first amendment guarantees is the principle of equal protection — a constitutional principle established by the fourteenth amendment.220 If a statute prohibits a particular type or method of expression in order to accomplish certain goals, but permits another type or method of expression that is equally detrimental to the accomplishment of those same goals, in addition to being susceptible to attack on first amendment grounds, the statute may be attacked on the ground that it constitutes a denial of "equal protection of the laws." When an equal protection claim is closely intertwined with first amendment interests, the crucial question, as in all equal protection cases, is whether there is an appropriate governmental interest suitably furthered by the differential treatment accorded seemingly like expressions.221 If no such interest exists or an appropriate interest does exist but is not suitably furthered by the differential treatment accorded like expressions, the differential treatment will be struck down as violative of the equal protection clause.

An equal protection challenge to governmental regulation that affects speech is the obverse of an overbreadth challenge; yet the Court views both in the same light.222 Overbreadth invalidates

220. Although the fourteenth amendment, and, therefore, the equal protection clause contained therein, apply only to the states, the Supreme Court has stated that the discriminatory effect of a law may be so unjustifiable as to violate due process guaranteed by the fifth amendment. See Bolling v. Sharpe, 347 U.S. 497 (1954). Thus, federal laws that affect speech may be challenged through the due process clause of the fifth amendment on grounds of denial of "equal protection."

221. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

222. The Court stated in Mosley: "The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives." Police Dep't of Chicago v. Mosley, 408 U.S. 92, 101 (1972). It then supported this statement by referring to Shelton v. Tucker, 364 U.S. 479 (1960), which involved overbreadth. "In a variety of contexts we have said that 'even though the
legislation that prohibits, *inter alia*, protected speech; equal protection invalidates legislation that prohibits unprotected speech but excepts other speech that is subject to the same objections.\(^{223}\) In both instances the Court is focusing on the necessity of the particular statute to accomplish legitimate ends. In the case of overbreadth, the means are questioned since the same ends could be accomplished by a more narrowly drawn statute. In the case of equal protection, it is the end that comes into question, for if the end of the legislation governmental interest was in fact the legitimate rather than the impermissible one of restricting the scope of free speech, there would be no exemption from the statute.

In *Tinker v. Des Moines Independent Community School District*,\(^{224}\) the principals of the Des Moines schools adopted a policy that any student wearing an armband to school would be asked to remove it, and any student refusing to do so would be suspended until he or she returned to school without the armband.\(^ {225}\) This policy was adopted after the principals became aware of a plan, on the part of some students, to wear black armbands to school to protest the Vietnam war.\(^ {226}\) Pursuant to the adopted policy, three students were suspended from school for wearing black armbands to protest the war in Vietnam.

In sustaining the student's right to wear the armbands, the Supreme Court stated that the wearing of the armbands was entirely divorced from actual or potential disruptive conduct by those participating in the protest, and, that "[i]t was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment."\(^ {227}\) The Court recognized the need for comprehensive authority of the state and of school officials, consistent with fundamental constitutional safeguards, to prescribe governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." 408 U.S. at 101 n.8 (1972) (quoting *Shelton v. Tucker*, 364 U.S. at 488).

\(^{223}\) On the same day that it invalidated Chicago's ordinance in *Mosley*, the Court upheld an ordinance of Rockford, Illinois that forbade persons adjacent to a school in session from wilfully "making any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The Court upheld the ordinance as a valid exercise of the city's police power and rejected arguments that the ordinance was either vague or overbroad. *Id.* at 108-21. The *Grayned Court* invalidated a companion ordinance that contained a labor picketing exemption similar to the one struck down in *Mosley* on equal protection grounds. *Id.* at 106-07.

\(^{224}\) 393 U.S. 503 (1969).

\(^{225}\) *Id.* at 504.

\(^{226}\) *Id.*

\(^{227}\) *Id.* at 505-06.
and control conduct in the schools. But the Court emphasized that in this case, the wearing of armbands was a silent, passive expression of opinion that did not disrupt school discipline. Thus, the Court stated, "where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."

Without explicitly so stating, the Court intimated the policy of prohibiting students from wearing armbands to school also offended the equal protection clause. Justice Fortas, writing for the majority, stated:

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of symbols did not extend to these. Instead, a particular symbol — black armbands worn to exhibit opposition to this Nation's involvement in Vietnam — was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school work or discipline, is not constitutionally permissible.

In Police Department of the City of Chicago v. Mosley, the Court explicitly used the equal protection clause in striking down a Chicago ordinance that provided: "'A person commits disorderly conduct when he knowingly: . . . (i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building . . . provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute . . . ." The Court held the ordinance violated the equal protection clause because it made an impermissible distinction between labor picketing and other peaceful picketing:

[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum

228. Id. at 507.
229. Id. at 508.
230. Id. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
231. Id. at 510-11.
233. Id. at 92-93 (quoting CHICAGO, ILL., MUNICIPAL CODE ch. 193-1(i) (1968)).
234. Id. at 94.
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to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . [G]overnment must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.235

The Court noted that "[t]his is not to say that all picketing must always be allowed."236 It stated:

"[U]nder an equal protection analysis, there may be sufficient regulatory interests justifying selective exclusions or distinctions among pickets. Conflicting demands in the same place may compel the State to make choices among potential users and uses. And the State may have a legitimate interest in prohibiting some picketing to protect public order.237"

However, the Court emphasized that the justifications for selective exclusions from a public forum must be carefully scrutinized to ensure that the barring of particular speech would be based on factors other than dislike for the specific content of the speech.238

On at least three occasions since Mosley, the Court has rejected claims that a particular statute or regulation that affected speech denied equal protection of the laws. In Columbia Broadcasting System, Inc. v. Democratic National Committee,239 the decision of a significant number of television stations to refuse "political" advertisements was challenged on a variety of grounds, one of those being a denial of equal protection. Many stations refused to accept "political" advertisements because they feared the implications of the fairness doctrine could force them to present opposing views without charge.240 Additionally, they feared that if a large number of

235. Id. at 96.
236. Id. at 98.
237. Id.
238. Id. at 98–99. The Court stated, specifically, that the justifications for selective exclusions must be tailored to serve a substantial governmental interest. Id. at 99.
240. The fairness doctrine was formulated by the Federal Communications Commission pursuant to its power to issue regulations consistent with the "public interest." The doctrine imposes two affirmative responsibilities on broadcasters: 1) coverage of issues of public importance must be adequate, and 2) the coverage must fairly reflect differing viewpoints. Id. at 110–11. In Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), two aspects of the fairness doctrine were challenged in the Court. The first was the requirement that coverage of public issues accurately reflect
political ads had to be accepted, with or without charge, it could result in decreased viewing that would ultimately diminish advertising revenues. The Federal Communications Commission upheld the policy of the stations by ruling that a broadcaster who meets his public obligation to provide full and fair coverage of public issues is not required to accept editorial advertisements. But the United States Court of Appeals for the District of Columbia held that such a refusal was an abridgment of free speech.\textsuperscript{241} The Supreme Court reversed the appeals court and upheld the FCC ruling.

Chief Justice Burger, writing for the majority, argued the refusal of the broadcasters to permit political advertisements was private action, and, thus, could not violate the first amendment which is addressed solely to governmental actions.\textsuperscript{242} Justice Stewart, concurring, stated, "[t]o hold that broadcaster action is governmental action would thus simply strip broadcasters of their own First Amendment rights."\textsuperscript{243} Chief Justice Burger also argued that requiring stations to take such advertisements would enlarge governmental control of the media, resulting in far more serious threats to free speech than the lack of political advertisements.\textsuperscript{244}

In rejecting the respondent's equal protection claim, Chief Justice Burger stated, "there is no 'discrimination' against controversial speech present in this case. The question here is not whether there is to be discussion of controversial issues of public importance on the broadcast media, but rather who shall determine what issues are to be discussed by whom, and when."\textsuperscript{245} Burger also stated that opposing views, even if sponsors are not found and no outside organization has developed a program. The second aspect under scrutiny was the "personal attack rules" providing that where a personal attack has been made on a figure involved in a public issue, the individual attacked must be given an opportunity to respond personally. Justice White, writing for the Court, sustained these regulations:

There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves . . . . It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.

\textit{Id.} at 389–90.


\textsuperscript{242} 412 U.S. at 114–21 (Justices Stewart and Rehnquist concurred in this portion of the opinion).

\textsuperscript{243} \textit{Id.} at 139. Justices Powell and Blackmun found it unnecessary to decide the state action issue, \textit{id.} at 147–48 (Blackmun & Powell, JJ., concurring), while Justice Douglas assumed no governmental action, despite his previous arguments indicating an opposite view, \textit{id.} at 150 (Douglas, J., concurring).

\textsuperscript{244} \textit{Id.} at 120–21.

\textsuperscript{245} \textit{Id.} at 130. Burger concluded that Congress could appropriately leave the decision to private persons. Justices White, Powell and Blackmun joined Burger in
the Court's prior decisions in *Grayned v. City of Rockford*\(^{246}\) and *Police Dep't of Chicago v. Mosley*\(^{247}\) provided little guidance for the case at hand because in neither of those cases "did the forum sought for expression have an affirmative and independent statutory obligation to provide full and fair coverage of public issues, such as Congress has imposed on all broadcast licensees."\(^{248}\)

Justice Brennan, joined by Justice Marshall in dissent, maintained that there is sufficient governmental action in the broadcast industry for the first amendment to apply to the policy adopted by the television stations.\(^{249}\) Additionally, the dissenters felt that the respondent had presented a meritorious equal protection claim.

that conclusion. *Id.* at 146-47 (White, J., concurring). Justice Douglas argued not only that Congress could leave the decision to private persons, but that it was *compelled* by the first amendment to do so. Douglas indicated his disagreement with the *Red Lion* decision, which permitted limited governmental regulation. He stated, "I did not participate in that decision [Red Lion] and, with all respect, would not support it." *Id.* at 154. Regrettfully, Douglas never discusses the effect on the first amendment of the necessity for the government to allocate broadcast frequencies, for he focuses on government action only as it affects existing broadcasters. He could justify this by disputing the scarcity theory since with CATV and UHF there seem to be a sufficient number of frequencies for all despite Justice White's contrary conclusion in *Red Lion*. See generally Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768 (1972).

246. 408 U.S. 104 (1972).
249. *Id.* at 173–81 (Brennan, J., dissenting). Justices Brennan and Marshall observed that the government conferred upon broadcasters the power to prevent access to groups seeking to use a broadcast frequency; therefore, governmental responsibility existed when such broadcasters refused to air political advertisements. *Id.* at 177–78. In contrast to Justice Douglas, the dissenters found no abridgment of free speech in requiring broadcasters to air political advertisements. They stated, "[w]e are concerned here, not with the speech of the broadcasters themselves, but rather, with their 'right' to decide which other individuals will be given an opportunity to speak in a forum that has already been opened to the public." *Id.* at 199–200 (footnote omitted). Acknowledging that implementation of their view would raise problems of favoritism to the wealthy who can afford advertisements, impairment of the fairness doctrine, and enlargement of governmental control over content in the broadcast industry, Justices Brennan and Marshall argued that such problems were speculative and might be met by the FCC and licensees through future regulations. *Id.* at 201-04.

While the majority perceived governmental failure to regulate to be far removed from an intent to suppress free speech, the dissent argued that the government was simply allowing the broadcast industry to suppress free speech itself. Thus, to a large degree, the disagreement between the members of the Court concerned whether the governmental policy promoted or interfered with the interest in promoting freedom of speech. As illustrated by *Columbia Broadcasting System*, when the interest served by a statute (or absence thereof) supposedly is the promotion of free speech, the Court itself will determine whether that interest is in fact promoted. In *Columbia Broadcasting System*, the majority was willing to give the government the benefit of the doubt that free speech was in fact promoted, whereas the dissenters refused to take such a position.
Citing *Mosley* and a number of other related cases as support, Justices Brennan and Marshall concluded:

> It has long been recognized, however, that although access to public forums may be subjected to reasonable "time, place, and manner" regulations, "[s]elective exclusions from a public forum may not be based on content alone . . . ." Here, of course, the differential treatment accorded "commercial" and "controversial" speech clearly violates that principle.  

In *Lehman v. City of Shaker Heights*, the Court again confronted the issue of whether prohibitions solely against "political" advertisements ran afoul of the equal protection clause. The specific issue the Court addressed was whether a city, which operates a public rapid transit system and sells advertising space on its buses, is required by the equal protection clause to accept paid political advertising on behalf of a candidate for political office. In a plurality opinion, the Court held that the city could bar such political advertisements from its buses without running afoul of the equal protection clause.

In holding the ban against political advertisements did not offend the equal protection clause, Justice Blackmun, joined by Chief Justice Burger and Justices White and Rehnquist, stated:

> Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. . . . In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.

The city's decision to bar political advertising from its buses was deemed a reasonable choice designed to "minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a
Justice Douglas concurred on the basis that all the messages posted on the city’s buses are addressed to a captive audience who are utilizing the buses as necessary transportation and that no speaker has a right to force his message on a captive audience. Justice Douglas did not directly confront the legitimacy of distinguishing between political advertising and commercial advertising, but implied that no message that is addressed to a captive audience is permissible.

Justice Brennan, joined by Justices Stewart, Marshall and Powell in dissent, maintained that once the city made the decision to lease advertising space on its buses, it made the buses a public forum to which access cannot be denied on the basis of the content of the advertising.

In view of Douglas’ retirement from the Court and the plurality nature of the Lehman opinion, there is little precedential value to the decision. Nevertheless, it should be noted that in Mosley, the speech most likely to occur at the schools would be critical of school policies; therefore, the reason for prohibiting all picketing except for picketing related to labor disputes may have been to suppress criticism of school policies, i.e., to suppress freedom of expression. The possibility that the purpose of the prohibition against political advertising in Lehman and Columbia Broadcasting System was to suppress criticism of the respective government agencies was extremely unlikely.

The most recent challenge to governmental regulation of speech on equal protection grounds was Young v. American Mini Theatres,
The City of Detroit adopted an ordinance that provided that "an adult theater may not be located within 1,000 feet of any two other 'regulated uses' or within 500 feet of a residential area." The term "regulated uses" included, inter alia, adult bookstores, cabarets, hotels or motels, bars, dance halls and other adult theaters. The operators of two adult motion picture theaters sought a declaratory judgment and an injunction against the enforcement of the ordinance on the basis that the ordinance's classification of theaters on the basis of the content of their exhibitions violated the equal protection clause of the fourteenth amendment.

Justice Stevens, writing for the Court, rejected the petitioner's equal protection claim and upheld the validity of the ordinance. Justice Stevens stated that the essence of the rule that there may be no restriction whatever on protected communication because of its content "is the need for absolute neutrality by the government; its regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator." Stevens concluded that the Detroit ordinance did not violate this obligation of neutrality because:

[A] line may be drawn on the basis of content without violating the government's paramount obligation of neutrality in its regulation of protected communication. For the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate; whether a motion picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same.

Justice Steven's explanation is somewhat disingenuous. It is highly unlikely that sexually explicit films will be used to convey any message condemning sexual explicitness in our society. Such films are virtually certain to urge either explicitly or implicitly a permissive sexual ethic.

Justice Stevens, addressing the petitioners' equal protection claim, maintained that although the first amendment protects

259. Id. at 52 (footnotes omitted).
260. Id. at 52 n.3.
261. Id. at 55.
262. Id. at 67 (footnote omitted).
263. Id. at 70. Prior to this statement, Stevens enumerated several areas in which the Court, in previous cases, had examined the content of speech to determine if it was protected by the first amendment and to determine how much protection the speech merited. See id. at 65-70.
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communication regarding sexual activities from total suppression, a state may, consistent with the first and fourteenth amendments, legitimately use the content of movies as the basis for placing such materials in a different classification from other motion pictures. Justice Stevens stated that the line drawn by the Detroit ordinance was justified by the city's legitimate interest in preserving the character of its neighborhoods and, that this purpose was not related to the suppression of speech.

The City Council's determination was that a concentration of "adult" movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of "offensive" speech.

In other words, even though the content regulation of the ordinance should raise questions of an intent to suppress the particular speech, Detroit made a sufficient showing that the purpose of this legislation was designed to control conduct associated with the concentration of adult theatres and not to limit or discriminate against the speech itself.

Justice Powell, concurring, emphasized the Court's findings that the ordinance was not directed to nor did it have the effect of suppressing speech. "[I]t appears that if a sufficient market exists to support them the number of adult movie theatres in Detroit will remain approximately the same, free to purvey the same message." Justice Powell concluded that:

It is clear both from the chronology and from the facts that Detroit has not embarked on an effort to suppress free expression. . . . The governmental interest prompting the inclusion in the ordinance of adult establishments was wholly unrelated to any suppression of free expression. Nor is there reason to question that the degree of incidental encroachment upon such expression was the minimum necessary to further the purpose of the ordinance.

Although courts must be alert to the possibility of direct rather than incidental effect of zoning on expression, and especially to

264. Id. at 70-71.
265. Id. at 71 n.34.
266. Id. at 77-79 (Powell, J., concurring).
267. Id. at 79.
the possibility of using the power to zone as a pretext for suppressing expression, it is clear that this is not such a case.\textsuperscript{268}

Justice Stewart, joined by Justices Brennan, Marshall and Blackmun in dissent, attacked the majority's reasoning as riding "roughshod over cardinal principles of First Amendment law, which require that time, place, and manner regulations that affect protected expression be content neutral except in the limited context of a captive or juvenile audience."\textsuperscript{269} They viewed the purpose of the ordinance, as asserted by the city, as one of "minimizing the 'undesirable' effects of speech having a particular content."\textsuperscript{270} This purpose, the dissent maintained, was clearly impermissible under prior decisions of the Court.\textsuperscript{271}

The undesirable effects of speech having a particular content in \textit{Young}, however, were not those that flowed from acting on, listening to or legitimating the speech. Instead, the undesirable effects were seen as criminal conduct associated with the operation of concentrations of business establishments selling sexually oriented material. Thus, the Court felt that despite the specification of content in the statute, the end of the statute was legitimate and not an attempt to suppress speech.

\textbf{Summary and Conclusion}

One approach to the guarantee of freedom of speech embodied in the first amendment is to interpret that guarantee as forbidding any governmental action that restricts expression. The major task for the Court under this approach is to determine whether the individual is engaging in speech or conduct. If he is engaging in speech, the government may not restrict him. This objective approach may pose serious problems of consistency for the approach's proponents and problems of efficiency for government operations. For example, a person who solicits another to commit murder for pay has only used words and conveyed ideas. If the person then refuses to pay the murderer after the crime is committed, he may claim that he has not engaged in conduct; only speech. Under the objective approach, either government must leave him alone — a preposterous result — or his words must be defined as conduct rather than speech — a

\textsuperscript{268} Id. at 80–81, 84 (footnote omitted at 81).
\textsuperscript{269} Id. at 85–86 (Stewart, J., dissenting) (footnote omitted).
\textsuperscript{270} Id. at 88.
\textsuperscript{271} Id. at 87–88 (citing Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)). Justice Stewart concluded, "I can only interpret today's decision as an aberration," due to the majority's sympathy with the well-intentioned efforts of Detroit to clean up its streets. 427 U.S. at 85 (Stewart, J., dissenting).
strained definition of speech. This suggests a trap which the Court has studiously avoided.

An alternative approach is to rest decisions on the subjective determination of whether the government enacted a law for the purpose of suppressing speech. This approach is likely to provide little protection for speech. It is improbable that the legislature will specifically state that it is trying to suppress ideas, individual legislators may vote for legislation for reasons that are never stated and, in general, the ascription of a bad purpose to a body composed of numerous people acting from many motives is difficult. In addition, respect for a coequal body has traditionally caused the Court to defer to legislative judgments. In view of the difficulty of proving that the legislature was in fact attempting to suppress speech, any deference to legislative judgment ensures that a first amendment standard which requires a finding of evil intent by the lawmaking body will not be particularly effective in preventing such suppression.

The Court has chosen to interpret the guarantee of freedom of speech to require an objective test focusing on the nature of the state's action rather than that of the speaker. The basic tests are balancing — whether the state interest outweighs the impact on speech — and categorization — whether the speech affected is protected by the first amendment. In upholding government action which promotes interests other than the suppression of speech, the Court allows the government to govern effectively. In order to protect the expression of ideas, however, the Court uses ancillary doctrines to ensure that the government has in fact focused on its legitimate interests. The ancillary doctrines are procedural, interpretive and substantive. The procedural doctrine of prior restraint prevents the government from using procedures which affect protected speech when subsequent punishment of illegal speech would be adequate. The interpretive doctrines of narrow construction and pre-emption force the government to confront the potential for injuring free expression and determine whether such an effect is necessary to accomplish its legitimate ends. Finally, the substantive ancillary doctrines of vagueness, overbreadth and equal protection all strike down laws whose structure indicates the possible intention to injure expression although such injury is not necessary for the legitimate governmental purposes.

In the application of these ancillary doctrines, as well as the basic balancing and categorization tests, the Court is influenced by the degree of likelihood that the enactment of the statute was influenced by a purpose to suppress speech. The Justices have
reached a broad agreement over the nature of the ancillary doctrines, but differ on the factual appraisal of whether the particular law is necessary to protect the legitimate scope of government operations, or cuts too deeply into individual free speech.