Censorship. That word has a lot of emotional impact today, just as it has throughout American history. But its meaning has shifted over the years. Today, censorship in a legal sense usually means prior restraint of communications by an agency of government, not subsequent punishment for disseminating an unlawful form of communication. As Chapter Two explains, the First Amendment is not absolute: the courts have allowed a variety of limitations on freedom of expression. But most of those limitations would be classified as subsequent punishments, not prior restraints. For example, lawsuits that charge someone with libel or invasion of privacy involve the threat of subsequent punishments, not prior restraints. The media are free to disseminate defamatory communications or communications that invade someone’s privacy, but they must be prepared to face the legal consequences--afterward.

However, there are some occasions when prior restraints are permitted--times when an agency of government actually engages in some form of prior censorship. And prior restraints are usually considered a far greater threat to freedom than subsequent punishments. If the media are free to publish controversial or unpopular facts and opinions without government interference beyond the threat of punishment afterward, at least a few courageous publishers and broadcasters (or bloggers) will take the risk and make the questionable material public. If the material turns out to be of social importance, the publisher may still be punished, but at least the people will have the information and a public dialogue can begin. However, if government authorities can prevent the publication from ever occurring, the public may never know about important facts or ideas, and the democratic process may be thwarted. A democratic society cannot long survive if prior censorship by government is commonplace.

Only a few forms of prior restraint are permitted in America today; many communications that are highly offensive to someone (or perhaps to almost everyone) are protected by the First Amendment and may not be censored. Nevertheless, there are times when prior censorship does occur, or is attempted, at least. The result may be a major controversy--and perhaps a landmark court decision. For example, sometimes government officials attempt to censor the news media to prevent the dissemination of information that they see as a threat to national security. And sometimes unpopular groups are denied the right to demonstrate or distribute literature in public places such as city sidewalks or parks. Another form of prior restraint involves laws that have been enacted to forbid "hate speech" that
expresses hostility on the basis of ethnicity, religion, gender or sexual orientation. Also, discriminatory taxation of the mass media can be a form of government censorship. And there are other examples of prior restraints: government censorship of controversial films, bureaucratic attempts to regulate stock market newsletters, and rules that forbid the media to publish confidential information such as the names of juvenile offenders or rape victims. In all of these diverse situations, there is one common element: a government agency or official is attempting to censor some kind of communication that is considered unacceptable—and that action raises First Amendment questions. In this chapter, we look at these and a few other forms of prior restraint.

NEAR V. MINNESOTA

A good place to begin any discussion of prior restraints is a landmark Supreme Court decision about 75 years ago—a case that resolved some of the most basic issues in this field of law. In the 1931 case of Near v. Minnesota ex rel. Olson (283 U.S. 697), the U.S. Supreme Court made it clear that prior restraints are generally improper in America. The case resulted from a Minnesota state law that allowed government officials to treat a "malicious, scandalous and defamatory newspaper" as a public nuisance and forbid its publication. Under this law, a county attorney brought suit to shut down The Saturday Press, a small weekly newspaper produced by Howard Guilford and J. M. Near.

Guilford and Near had published several articles critical of certain public officials over a period of two months. In their attacks, they charged that a gangster controlled gambling, bootlegging and racketeering in Minneapolis. They claimed law enforcement agencies did little to stop this corruption. In particular, they accused the police chief of gross neglect of duty, illicit relations with gangsters and participating in corruption.

A trial court ruled the paper a public nuisance under the Minnesota law and banned its further publication. The Minnesota Supreme Court affirmed the ruling, and Near appealed to the U.S. Supreme Court, contending that his First and Fourteenth Amendment rights had been violated.

In a decision that made constitutional history, the Supreme Court overturned the lower courts and allowed Near to continue publishing. In a narrow 5-4 decision, the high court traced the history of prior restraints and concluded that a newspaper may not be censored before publication except under very exceptional circumstances. Chief Justice Charles Evans Hughes wrote:

The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional rights. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions.
In reaching this conclusion, the court cited James Madison's interpretation of the First Amendment as well as the views of William Blackstone, a highly respected British jurist of the eighteenth century. Blackstone argued against prior restraints but in favor of punishments afterward for those whose publications turn out to be unlawful.

The Supreme Court also pointed to the Schenck v. U.S. case (discussed in Chapter Two) as an example of an exceptional circumstance in which prior restraint might be proper. Chief Justice Hughes said that, in addition to prior censorship in the interest of national security, prior restraints might be proper to control obscenity and incitement to acts of violence. The court said, "the constitutional guaranty of free speech does not protect a man from an injunction against uttering words that may have all the effect of force."

In the decades since the landmark Near v. Minnesota decision, the closeness of the Supreme Court's vote against prior restraints has often been overlooked. The dissenters in Near, who needed just one more Supreme Court justice on their side to prevail, would have allowed prior restraints under many more circumstances. In fact, their reading of history led them to believe that the only form of prior restraint the First Amendment was actually intended to prohibit was licensing of the press by the executive branch of government.

Despite the closeness of the decision, the Near v. Minnesota case established a pattern that the Supreme Court has followed ever since. The Court has often invalidated prior restraints on the media, declaring that prior censorship would be possible under the right conditions but usually failing to find those conditions.

**NATIONAL SECURITY AND THE "PENTAGON PAPERS"**

One of the most controversial forms of prior restraint has involved government efforts to censor the news media to prevent potential breaches of national security. In 1971 the Supreme Court decided a very significant case involving censorship in the name of national security, a case that pitted then-President Richard Nixon against two of the nation's leading newspapers, the New York Times and the Washington Post. The case came to be known as the "Pentagon Papers" case, although its official name is New York Times v. U.S. (403 U.S. 713). For the first time in American history, the federal government was seeking to censor major newspapers to prevent them from publishing secret documents that would allegedly endanger national security.

A secret Defense Department study of American policy during the war in Vietnam was surreptitiously photocopied and portions of it were given to several newspapers. It revealed questionable decisions by four presidents (Truman, Eisenhower, Kennedy and Johnson) that led the country into the Vietnam War. Although the "Pentagon Papers" only covered the period through 1968, and thus did not cover Nixon's presidency (Nixon took office in 1969), the Times' and Post's editors knew Nixon would be outraged if these secret documents were published. Nonetheless, after consulting with several First Amendment lawyers, the Times and Post went ahead.
When the first installment of a planned series based on the "Pentagon Papers" appeared in each newspaper, the Nixon administration demanded that the *Times* and *Post* halt all further stories on the subject. When they refused, the Justice Department secured a temporary order from a federal district judge forbidding the *Times* to publish any more articles on the "Pentagon Papers." The judge then changed his mind and vacated the order, but a federal appellate court reinstated it. The case was immediately appealed to the U.S. Supreme Court. Meanwhile, another federal appellate court refused to stop the *Post* from publishing more stories about the "Pentagon Papers."

In view of the flagrant prior censorship inherent in the order against the *Times*, the U.S. Supreme Court justices decided the case only two weeks after the controversy arose, working during what might otherwise have been their summer recess. The Nixon administration argued that publication of the "Pentagon Papers" would endanger national security and damage U.S. foreign relations.

The newspapers replied that this was a clear-cut First Amendment issue involving information of great importance to the American people. Further, the newspapers contended that the entire classification system under which these documents were declared secret should be revised. The system existed only by presidential order; it was not established by an act of Congress. And at least one Pentagon official had conceded in Congressional testimony that only a few of the millions of classified documents actually dealt with bona fide military secrets or other material affecting national security.

The Supreme Court voted 6-3 to set aside the prior restraint and allow the publication of articles based on the "Pentagon Papers." Journalists proclaimed the victory as if it were the outcome of the Super Bowl. *Newsweek*, for instance, put "Victory for the Press" in bold yellow type on its cover. Inside, the magazine said this: "Few clearer gauges of the sanctity of the First Amendment freedoms, few plainer demonstrations of the openness of American society, could be imagined than the High Court’s ruling in favor of the press."

Unfortunately, it wasn’t that clear cut.

In a brief opinion, the court had simply said the government had failed to prove that the articles would endanger national security sufficiently to justify prior restraint of the nation’s press. In the majority were Justices Black, Brennan, Douglas, Marshall, Stewart and White. The minority consisted of Justices Harlan and Blackmun and Chief Justice Burger.

In addition to the brief opinion by the court, the nine justices wrote their own separate opinions explaining their views. When legal scholars began analyzing those opinions, they realized the decision was no decisive victory for the press.

Only two of the justices (Black and Douglas) took the absolutist position that prior restraints such as the government sought would never be constitutionally permissible. Justice Marshall said the courts should not do by injunction what Congress had refused to do by statutory law (i.e., authorize prior censorship). Justice Brennan said the government simply hadn’t satisfied the very heavy burden of proof necessary to justify prior censorship in this particular case.

However, the other five made it clear they either favored censorship in this case or would at least condone criminal sanctions against the nation’s leading
newspapers after publication of the documents. At least two justices (Harlan and Blackmun) favored prior restraint in this case, while Chief Justice Burger voted to forbid publication at least until the lower courts had more time to consider the matter, although he didn't really address the substantive issue of prior restraint. Justice White, in an opinion joined by Justice Stewart, said the government had not justified prior censorship but also suggested (as did Burger) that the editors could face criminal prosecution after publication for revealing the secret documents.

Thus, the "Pentagon Papers" case was not a clear-cut victory for freedom of expression, but at least the nation's press was allowed to publish stories based on the documents. No journalist was ever prosecuted in connection with the "Pentagon Papers," although the government unsuccessfully prosecuted Dr. Daniel Ellsberg, the social scientist who copied the documents in the first place.

The United States government has also criminally prosecuted those who revealed classified information on other occasions. For instance, in U.S. v. Morison (844 F.2d 1057), a widely noted 1988 decision, the U.S. Court of Appeals upheld Stanley Morison's conviction for giving secret information about U.S. military hardware to Jane's Defence Weekly, a respected British publication that reports on military technology worldwide. The court rejected Morison's argument that he should have a First Amendment right to give military information to a recognized publisher of such information.

The question of prior restraint in the interest of national security also arose in a controversial 1979 case, U.S. v. The Progressive (467 F. Supp. 990). Unfortunately, this case was never given full consideration even by a court of appeals, let alone by the Supreme Court, so it has limited value as a legal precedent. Nevertheless, it did dramatize the conflict between freedom of the press and the need for national security.

The Progressive, a liberal magazine, was planning to publish an article entitled, "The H-bomb Secret: How We Got It, Why We're Telling It." The author, Howard Morland, had assembled an apparently accurate description of a hydrogen bomb through library research. The magazine sent the article to the federal government prior to publication with a letter requesting that its technical accuracy be verified. The U.S. Department of Energy responded by declaring that publication of the article would violate the secrecy provisions of the 1954 Atomic Energy Act. The U.S. Justice Department sought a court order prohibiting publication.

Federal Judge Robert Warren issued an order forbidding the magazine to publish the article. He said the article could "accelerate the membership of a candidate nation in the thermonuclear club." He distinguished this case from the "Pentagon Papers" case in that he said the H-bomb article posed a current threat to national security. Also, he ruled, a specific statute prohibited publication of this article, whereas there was no statutory authorization to censor the "Pentagon Papers." Ultimately, though, he offered a pragmatic rationale for censorship:

Faced with a stark choice between upholding the right to continued life and the right to freedom of the press, most jurists would have no difficulty in opting for the chance to continue to breathe and function as they work to achieve perfect freedom of expression.
Doubting that the issue was quite that black and white, The Progressive appealed Warren's ruling. However, before a federal appellate court could decide the case, articles describing an H-bomb in similar detail appeared in other publications, rendering the case moot. Once the information was published elsewhere, the government dropped its attempt to censor the magazine article.

Therefore, the Progressive case left many important issues unresolved. One of the most troubling is that the information for the article was gleaned from non-classified sources, yet when it was put into an article questioning the classification system, the U.S. government tried to censor it. Also, Judge Warren's abandonment of the First Amendment invited appellate review. In reviewing Warren's order, a higher court might have clarified the extent to which the national security classification system overrides the First Amendment.

Censoring Present and Former Government Employees

Should government employees have the same First Amendment rights as other citizens? What about employees of agencies such as the Central Intelligence Agency (CIA), who have access to government secrets and are required to sign an agreement that they will not disclose these secrets? What about other government employees--people who have no particular access to government secrets?

A major challenge to the national security classification system came from two former employees of the Central Intelligence Agency, both of whom published books on their CIA experiences. In both instances, the agency attempted to censor the ex-employees' writings under a provision of their employment contracts that prohibited them from publishing information they gained as CIA agents without the agency's prior approval. Both employees contended these contract provisions violated their First Amendment rights.

The first case, U.S. v. Marchetti (466 F.2d 1309, 1972) arose after Victor L. Marchetti left the CIA and published both a book and a magazine article critical of CIA activities. When the agency learned he was about to publish still another book, it got a court order temporarily halting the project. After a secret trial (much of the testimony was classified), the court ordered Marchetti to submit everything he might write about the CIA to the agency for approval. Marchetti appealed that decision, but it was largely affirmed by the U.S. Court of Appeals.

However, the appellate court said the CIA could only censor classified information, and after further legal maneuvering a district court allowed the agency to censor only 27 of 166 passages in the new book that the agency wanted to suppress.

Although the U.S. Supreme Court refused to review the Marchetti case, in 1980 the court did rule on a similar case, Snepp v. U.S., (444 U.S. 507). Former CIA agent Frank Snepp resigned in 1976 and wrote a book alleging CIA ineptness in Vietnam. He did not submit it for prior CIA approval, as required by his employment contract. After its publication, the U.S. government filed a breach of contract suit against Snepp. Snepp contended the contract violated his First and Fifth Amendment rights.

A trial court ordered Snepp to turn over all his profits from the book to the government and submit any future manuscripts about the CIA to the agency for
prior approval. An appellate court reversed that ruling in part, prompting the 
Supreme Court to hear the case.

The Supreme Court reinstated the trial court's order against Snepp without 
even hearing full arguments from both sides: the court never let Snepp present his 
case. But the high court upheld the validity of the contract, ignoring the prior 
censorship implications of such contracts. The court said: "He (Snepp) deliberative-
ly and surreptitiously violated his obligation to submit all material for prepublish-
ation review. Thus, he exposed the classified information with which he had been 
entrusted to the risk of disclosure."

The Snepp case, then, was decided as it was because of the provisions of 
Snepp's CIA employment contract and would not be applicable to persons who had 
not signed such contracts. However, thousands of present and former CIA em-
ployees are subject to such contracts--and the CIA has now reviewed and censored 
many other manuscripts written by former employees. Moreover, many journalists 
began to wonder what would happen if the government decided to impose similar 
restrictions on the free expression rights of other government employees. They 
didn't have to wonder for long.

In 1983, President Ronald Reagan issued a presidential directive requiring 
more than 100,000 government employees to sign agreements consenting to 
"prepublication review" of their writings by government censors--for the rest of 
their lives. The order applied to high-level employees of the Defense, State and 
Justice Departments, among others. The directive produced immediate protests 
from civil libertarians, the mass media and members of Congress. Congress event-
ually passed legislation to delay implementation of the plan, and Reagan later 
dropped the proposal.

Another controversy over restrictions on the free speech rights of government 
employees arose in 1989 when Congress amended the Ethics in Government Act to 
bar not only members of Congress but virtually all federal workers from receiving 
"honoraria"--payments for writing articles or giving speeches--even if the subject 
has little to do with their official duties.

Few would question the wisdom of telling federal officials they cannot be paid 
for giving talks about job-related subjects to special interest groups that they regu-
late. But the federal regulations written to implement the law did not stop there. 
One Internal Revenue Service worker pointed out that she had been supplementing 
her $22,000 annual salary by earning about $3,000 a year as a free-lance writer. 
Her articles were about camping and the outdoors, a subject that had nothing to do 
with her job, but the new rules prohibited her from being paid for her writing. 
Other workers who wrote or gave talks about subjects such as African-American 
history, the Quaker religion and dance performances also objected to the rules. 
Several lawsuits were filed by government workers who had been paid for writing 
or speaking about subjects unrelated to their work, contending that they should 
have the same right as other citizens to be paid for writing and speaking.

In 1995, the Supreme Court ruled on this question in U.S. v. National Treasury 
Employees Union (513 U.S. 454). The court said the ban on federal employees 
receiving pay for writing articles or giving speeches was excessively broad and a 
violation of the First Amendment. The court's 6-3 majority held that Congress had
gone too far by banning payments for speeches and articles not only by senior government officials but also by rank and file employees of the executive branch. The court ruled that lower level employees (those below federal grade GS-16) could not be barred from accepting payments for speeches and articles. Writing for the majority, Justice John Paul Stevens agreed that there is a legitimate basis for the ban on senior government officials being paid for speaking and writing about policy issues that relate to their official duties, but he said lower level government employees should have the same First Amendment rights as other citizens, including the right to be paid for their articles and speeches. The high court overturned the ban entirely as it applied to lower level government employees, although Justice Stevens said Congress might be able to rewrite the ban so that it would be valid if it applied only to speeches and articles directly relating to an employee’s official duties.

Meanwhile, in 1993 Congress expanded the free expression rights of federal workers in another way by amending the Hatch Act, which had prohibited most partisan political activities by federal employees for more than 50 years. Under the 1993 amendments, most federal workers may now work in political campaigns, do political fund-raising and hold positions in political parties—as long as they do it on their own time. Federal workers are still barred from holding partisan elective offices, however. About 85,000 workers in sensitive federal jobs, such as many law enforcement and national security-related positions, are not covered by the 1993 Hatch Act amendments. They are still barred from partisan political activities, even on their own time.

A related question that often arises among journalists and public relations practitioners is whether government employees can be forbidden to talk to a reporter without first seeking approval of a public affairs officer or other government officials. The Second Circuit U.S. Court of Appeals held that such a requirement violates the First Amendment in Harman v. City of New York (140 F.3d 111), a 1998 decision.

In this case, a radio station interviewed a child-welfare worker about the death of a young child. When the interview was aired, the employee was suspended for speaking to the media without first getting approval from New York’s Media Relations Office as required by city policy. The worker then sued, and the appellate court held that the city could not justify such censorship of government workers. Even though the city contended that the policy did not really prevent city employees from speaking to the media, the court rejected the policy because it allowed city officials to delay an employee until his/her comments were no longer newsworthy. Also, the policy was overly broad, the court held.

**CENSORING "HATE SPEECH"**

One of the most troubling First Amendment issues involves restrictions on what is called "hate speech." During the late 1980s and 1990s, several hundred colleges adopted rules forbidding hostile remarks aimed at persons of any racial or ethnic group, gender or sexual orientation. These rules are intended to foster a
campus environment that is not perceived as hostile by members of any group. But because many of these rules were written so broadly that they could be used to prohibit the expression of unfashionable viewpoints on social issues, critics of these rules charged that they really enforced "politically correct" speech. Meanwhile, more than 40 states adopted laws criminalizing "hate speech" in various forms. Like many of the campus speech rules, some of these laws banned the expression of ideas, as opposed to forbidding violent acts.

Because these rules and laws are intended to punish those who express bigoted ideas, they have staunch defenders, including many civil libertarians. But do they really square with the First Amendment? Their defenders say that they do, and they cite the Fighting Words Doctrine expounded by the U.S. Supreme Court in a famous case more than 60 years ago: Chaplinsky v. New Hampshire (315 U.S. 568, 1942). In that case, the high court upheld the criminal conviction of a man who used words likely to produce an immediate violent response--a breach of the peace. Thus, speech likely to cause a fight, such as calling someone a "damned fascist" during the heyday of Hitlerism (as happened in Chaplinsky), may be prohibited, the court ruled. Like calling someone a fascist then, "hate speech" can be banned today under the fighting words rationale, the defenders of these laws and rules say.

However, in 1992 the Supreme Court revisited this controversial issue--and ruled that "hate speech" cannot be banned on the basis of its content--although violent action can, of course, be prohibited. Ruling in the case of R.A.V. v. St. Paul (505 U.S. 377), the high court overturned a St. Paul, Minn. ordinance intended to punish those who burn crosses, display swastikas or express racial or religious hatred in other ways. The case involved a Caucasian youth who burned a homemade cross in the front yard of an African-American family's home. He could have been prosecuted for a variety of other offenses, including arson and trespassing, but city officials chose to prosecute him under the "hate speech" law. Because he was a juvenile, "R.A.V." was originally identified only by his initials. Later he was widely identified in the media as Robert A. Viktora.

In ruling against the St. Paul law, Justice Antonin Scalia said:

Let there be no mistake about our belief that burning a cross in someone's yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.

In an opinion that was a wide-ranging defense of the First Amendment right to express unpopular and offensive ideas, Scalia said that governments may not punish those who "communicate messages of racial, gender or religious intolerance" merely because those ideas are offensive and emotionally painful to those in the targeted group.

The Supreme Court was unanimous in overturning the St. Paul "hate speech" ordinance, but the justices disagreed about the legal rationale for doing so. Four justices (Byron White, Harry Blackmun, Sandra Day O'Connor and John Paul Stevens) argued that the ordinance was unconstitutional only because it was overly broad--not limited to expressions that could lead to violence under the Fighting Words Doctrine.
The other five joined in a majority opinion taking a much broader view of the First Amendment rights of those who engage in "hate speech." They said that any law is unconstitutional if it singles out expressions of "bias-motivated hatred" for special punishment. While the majority did not specifically overruled Chaplinsky v. New Hampshire, they made it clear that the Fighting Words Doctrine cannot ordinarily be used to suppress the expression of racial, religious or gender-based hostilities. That kind of viewpoint discrimination violates the First Amendment, they said.

The R.A.V. v. St. Paul decision stirred a new national controversy about the meaning of the First Amendment--and it created deep rifts among traditional allies. The St. Paul youth was represented by the American Civil Liberties Union, which argued that St. Paul's "hate speech" law violates the First Amendment. But other traditionally liberal, pro-civil-liberties groups such as People for the American Way criticized the Supreme Court ruling.

The St. Paul ruling raised serious doubts about the constitutionality of many other "hate speech" laws as well as many of the campus speech codes adopted in recent years. However, this was by no means the first time the courts had held that "hate speech" is protected by the First Amendment. Several universities' speech codes had been overturned by lower courts prior to the Supreme Court's ruling in the St. Paul case.

The Supreme Court's 1992 decision on "hate speech" was reminiscent of Brandenburg v. Ohio (395 U.S. 444), the court's 1969 decision upholding the First Amendment rights of a Ku Klux Klan member. As Chapter Two explains, that case represented an expansion of the scope of the First Amendment in that the court upheld the Klansman's right to make an offensive (and bigoted) speech at a Klan rally, as long as the speech did not create an imminent danger of violent action.

On the other hand, when an act of violence is motivated by hatred based on race, religion, national origin, gender or sexual orientation, the First Amendment does not protect the violent act. Indeed, a state may impose harsher penalties for violent acts motivated by hatred than it would otherwise for the same violent acts. The Supreme Court so held in a unanimous 1993 decision, Wisconsin v. Mitchell, (508 U.S. 476). The case arose when several African-American youths watched the movie, "Mississippi Burning," and then attacked a white youth. After seeing the movie, Todd Mitchell, then 19, asked his friends, "Do you feel all hyped up to move on some white people?" Then Mitchell saw a 14-year-old youth across the street and said, "There goes a white boy. Go get him." The victim spent several days in a coma, but survived. Mitchell was convicted of aggravated battery, and his sentence was increased under a state hate-crime law.

Writing for a unanimous court, Chief Justice William Rehnquist said, "A physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment."

In so ruling, the court upheld the law in Wisconsin--and similar laws in many other states--that treat hate crimes as more serious offenses than crimes in which hate cannot be proven to be the motivation. In 2000, the Supreme Court added a proviso to this: if there is a sentence enhancement for a hate crime (i.e., a crime is punished more severely if motivated by hate), that extra sentence must be imposed
by the jury—not added later by the judge (Apprendi v. New Jersey, 530 U.S. 466).

In 2003, the Supreme Court once again addressed the conflict between the First Amendment and legislative attempts to curb expressions of hate such as cross burning.

The court again said cross burning is protected by the First Amendment—but not when the act is an attempt to intimidate someone rather than an expression of symbolic speech. In Virginia v. Black (538 U.S. 343, 2003), the court reviewed Virginia’s across-the-board ban on cross burning. The court upheld its use to prosecute those who burn a cross on a neighbor’s property with the intent to intimidate those who live there—or the intent to intimidate anyone else. But a majority of the court also held that burning a cross in an open field at a political rally is protected by the First Amendment as symbolic speech unless the specific intent to intimidate can be proven.

Writing for the court, Justice Sandra Day O’Connor said that the Ku Klux Klan’s history of using burning crosses to intimidate African Americans, Jews and others justified Virginia’s law against cross burning that is intended to intimidate someone. "Threats of violence are outside the First Amendment," she wrote, adding, "The burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm." She said this history justifies Virginia’s decision (and that of many other states) to ban cross-burning as a "signal of impending violence."

However, the court overturned the conviction of the lead defendant in the case, Barry Elton Black, a Klansman who led a rally in an open field at a farm in Virginia. The court held that there was insufficient proof that this political rally, which featured a verbal attack on "the blacks and Mexicans" by one speaker and an attack on former President Bill Clinton and his wife, Hillary Rodham Clinton, by another, was specifically intended to intimidate anyone. Instead, the court saw it as a form of protected symbolic speech. The rally concluded with the singing of a hymn, "Amazing Grace," and the symbolic burning of a 30-foot cross.

On the other hand, the court also said two other defendants who had burned a cross in an African-American neighbor’s yard could be prosecuted for that.

Justice O’Connor reconciled the new case with R.A.V. v. St. Paul by interpreting that decision narrowly to protect only symbolic speech but not cross-burning that is intended to intimidate someone.

"A ban on cross-burning carried out with the intent to intimidate is fully consistent with our holding in R.A.V. and is proscribable under the First Amendment," she explained.

The 2003 decision led several justices to issue separate concurring or dissenting opinions. Perhaps most notable was Justice Clarence Thomas’ opinion. Thomas, the high court’s only African-American justice, said he would uphold the Virginia law and other anti-cross-burning laws in full. During earlier oral arguments in this case, Thomas had called cross-burning "a symbol of a reign of terror." In his separate opinion when the case was decided, he said cross-burning should never be regarded as symbolic speech protected by the First Amendment.

"Just as one cannot burn down someone’s house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and
intimidate to make their point," he wrote.

On the other hand, Justices David H. Souter, Ruth Bader Ginsburg and Anthony M. Kennedy said they believe there is a First Amendment right to engage in cross burning as symbolic speech. They said they would not uphold any law forbidding it. In an opinion joined by Ginsburg and Kennedy, Souter said any ban on cross burning is a "content-based" ban on a symbolic message and could not survive First Amendment scrutiny.

One irony in Virginia v. Black is that Virginia rewrote its cross-burning law after a lower court invalidated the version of the law under review by the Supreme Court. The new law requires proof of specific intent to intimidate and would probably be upheld in full under the Supreme Court majority's rationale.

Some years earlier the Supreme Court ruled that still another form of inflammatory and offensive speech is protected by the First Amendment in Cohen v. California (403 U.S. 15, 1971). In that case, Paul R. Cohen was criminally prosecuted for appearing in a Los Angeles courthouse wearing a leather jacket emblazoned with the motto, "Fuck the Draft." At the time, several people who had demonstrated against the Vietnam-era military draft were standing trial. The Supreme Court ultimately held that this was a constitutionally protected expression of opinion, despite the offensiveness of the word. Writing for the court, Justice John Marshall Harlan said:

While the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Perhaps the main point of all of these cases is that the First Amendment protects the expression of opinions in many forms, however unenlightened or vulgar the speaker's ideas (or choice of words or symbols) may seem to be. However, the First Amendment does not protect unlawful conduct such as acts of intimidation, violence, arson or trespass.

By the mid-2000s, the controversy over hate speech and campus speech codes appeared to be subsiding a little. A number of colleges eliminated or revised their speech codes after several courts overturned such codes on First Amendment grounds. In one case that attracted national attention, Stanford University, a private institution, did not appeal a trial judge's ruling against its speech code. The judge held that the code violated a California state law under which the free speech guarantees of the First Amendment were extended even to private colleges.

In 2001, the third circuit U.S. Court of Appeals issued a sweeping ruling against a school district's anti-harassment policy, which prohibited many kinds of "verbal, written or physical conduct" that might create an "intimidating, hostile or offensive environment" based on anyone's race, religion, gender, sexual orientation or disability, among other things. Two Christian students and their guardian challenged the policy, arguing that it prevented them from expressing their religious
belief that homosexuality is a sin. In *Saxe v. State College Area School District* (240 F.3d 200), the court said the policy violated the free-speech rights of students. The court said the school district had failed to explain how the banned expression would "disrupt school operations or interfere with the rights of others," the showing required to justify a denial of students' rights under the landmark student First Amendment case, *Tinker v. Community School District* (393 U.S. 503), which is discussed in Chapter 14.

**Flag Burning and the First Amendment**

While the constitutional ramifications of laws forbidding "hate speech" were being debated at colleges, in the media and in the nation's courtrooms, there has also been much debate concerning a related free-expression issue: flag desecration. Americans have been bitterly divided over two Supreme Court decisions holding that flag-burning is a protected form of expression. Like cross-burning, the act of burning the American flag stirs strong feelings in many people--and they find it hard to see the value of permitting this kind of symbolic "speech."

When this issue gained national attention, it became clear that many Americans believed the American flag was a national symbol that deserved special protection. A political protester should never be allowed to desecrate the flag as a form of symbolic free speech, many believed. But like Ku Klux Klan members, those who desecrate the flag were given First Amendment protection by the Supreme Court. The court, like most civil libertarians, concluded that there is a higher principle involved in these cases, and that a truly democratic society must extend free expression rights even to those whose ideas or political activities are reprehensible to most people.

In 1989 and 1990, the Supreme Court handed down two separate decisions on flag-burning as a form of symbolic speech protected by the First Amendment. In the 1989 case, *Texas v. Johnson* (491 U.S. 397), the court declared that a man named Gregory Johnson could not be punished for burning an American flag during the 1984 Republican National Convention to protest then-President Reagan's policies. In a decision that produced strong dissenting opinions by four justices, the majority ruled that flag desecration is a protected form of symbolic speech, particularly when it occurs in a clearly political context (as it did in this case).

Like the Ku Klux Klan decision of 1969 and the "hate speech" decision in 1992, the flag desecration ruling brought vehement objections from many people. President George H.W. Bush, for example, called for a constitutional amendment to overturn the *Johnson* ruling and restore flag desecration as a crime.

On the other hand, many civil libertarians feared that such a constitutional amendment would end up including restrictions on other First Amendment freedoms such as the right to express controversial views on racial issues and the right of consenting adults to possess erotic but non-obscene literature.

After a major public debate over this question, Congress enacted the Flag Protection Act of 1989, a federal law that carried penalties of up to a year in jail and a $1,000 fine for flag desecration. President Bush allowed this act to go into
effect without his signature, declaring that he still favored a constitutional amendment instead of a statutory law that could be overturned by the courts.

Predictably, the new law was challenged in court as soon as it went into effect. Recognizing the importance of this question, the Supreme Court agreed to hear this new case on an expedited schedule. In 1990--just a year after its first decision on this issue--the court declared the new flag protection law to be unconstitutional.

Ruling in the case of *U.S. v. Eichman* (496 U.S. 310), the same 5-4 majority reaffirmed its earlier holding that flag desecration is a form of symbolic political speech protected by the First Amendment. Justice William Brennan, who authored the majority opinion, said, "(T)he bedrock principle underlying the First Amendment... is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

During oral arguments on the *Eichman* case, Justice Anthony Kennedy (a conservative jurist who joined the majority in voting to extend First Amendment protection to flag-burners) pointed out that flag desecration had become an internationally recognized form of political protest. He observed that the national flag was desecrated by protesters in almost every Eastern European country during the 1989 upheavals that led to the collapse of communist governments throughout that region.

While the four dissenting justices again advanced legal arguments to explain why they felt that the First Amendment should *not* protect those who desecrate the flag--as they did a year earlier--in the later decision they also took the unusual step of criticizing public officials who exploited the popular emotions on this issue for their own partisan gain. Writing for the four dissenters, Justice John Paul Stevens said the integrity of the flag is tarnished "by those leaders who seem to advocate compulsory worship of the flag even by individuals it offends, or who seem to manipulate the symbol of national purpose into a pretext for partisan disputes about meaner ends."

Nevertheless, the *Eichman* decision triggered a new campaign for a constitutional amendment that would modify the First Amendment to exclude flag desecration from its scope. Congress took up the issue immediately. But this time, much of the debate centered on the question of whether it was wise to amend the First Amendment for the first time in American history. In June of 1990, only days after the *Eichman* ruling, the proposed anti-flag-burning amendment was killed when the House of Representatives failed to give it the two-thirds majority required for constitutional amendments. As the debate reached its conclusion, many members of Congress argued that the flag is a symbol of American freedom--including even the freedom to burn the flag itself as a political protest.

More recently, new proposals for a flag protection amendment cleared the House several times but failed to gain a two-thirds majority in the Senate. The House approved a flag protection amendment again in June, 2005, this time by a 286-130 vote. This time, the amendment appeared to have a good chance of winning a two-thirds majority in the Senate as well.

Because the legislatures of all 50 states have already endorsed such a constitutional amendment, it could well be ratified by the necessary three-fourths (38) of the states if it clears both houses of Congress.
The most recent version of the proposed constitutional amendment says only this: *The Congress shall have power to prohibit the physical desecration of the flag of the United States.*

Perhaps voicing a widely held sentiment in Congress, House Judiciary Committee Chairman Henry Hyde, R-Ill., said at one point that a flag protection constitutional amendment should be seen in the larger sense as 'an effort by mainstream Americans to reassert community standards. It is a popular protest against the vulgarization of our society.'

Does the *St. Paul* decision—upholding the First Amendment rights of people who may be racial or religious bigots—and the *Johnson* and *Eichman* rulings—which upheld the First Amendment rights of flag-burners—mean that the First Amendment never allows speech or symbolic speech to be made a crime unless there is a call for action that may actually lead to unlawful acts or may intimidate someone? Generally, the answer has been yes—even if the speech is highly offensive. But if unlawful acts of violence do occur, the violent acts are not protected by the First Amendment, as the Supreme Court pointed out in *Wisconsin v. Mitchell.*

In addition, the Supreme Court has also ruled that in some circumstances speech itself may be censored. For example, the high court has often ruled that the First Amendment does not protect speech or writings that are legally obscene. The problem in that area, of course, is deciding whether a particular work is obscene or merely pornographic but not legally obscene. That task has fallen to the Supreme Court, which has sometimes had to decide on a case-by-case basis whether specific films, books, images or performances are obscene. Chapter 10 discusses the problems of obscenity, pornography and the First Amendment. Another category of speech that has not always been given full First Amendment protection is *commercial speech* (including commercial advertising), although that appears to be changing now (see Chapter 13). In addition, broadcasting does not enjoy the same First Amendment protection as other mass media. The courts have sometimes upheld government controls on broadcast content when similar controls would be unconstitutional if applied to other media (see Chapter 11).

**CONTROLS ON LITERATURE DISTRIBUTION**

If the First Amendment does not permit the direct censorship of such offensive forms of expression as "hate speech" or flag burning, are there other ways governments can control those who want to engage in these forms of expression? Could a local government simply refuse to let a group like the Ku Klux Klan or the American Nazi Party hold rallies or distribute literature on public property? What about other groups whose views are controversial, such as Operation Rescue, an anti-abortion group known for large and sometimes confrontational demonstrations?

Over the years, there have been hundreds of court decisions about questions such as these. The basic answer is that federal, state and local governments may adopt *content-neutral* time, place and manner restrictions on First Amendment activities—but groups wishing to express controversial views cannot be censored through the use of laws governing public assemblies or literature distribution. For
example, a government agency may require that all groups obtain a permit before holding a parade on the public streets or a large rally in a public park. And the permit could impose reasonable time limits or noise limits for such events. Similarly, a government agency may set reasonable limits on the places where groups hand out their literature or collect signatures on petitions. However, no government may issue permits for rallies, parades and literature distribution to groups with which it agrees, while denying permits to groups with which it disagrees unless there is a compelling state interest that justifies such a content-based restriction on First Amendment activities. The Supreme Court has repeatedly ruled on cases involving these issues, holding that governments may not arbitrarily deny controversial or unpopular groups the right to distribute literature or hold rallies or demonstrations in a public forum—a public place where First Amendment activities are regularly permitted.

**Jehovah's Witness Cases**

The Supreme Court first ruled on the constitutionality of restrictions on literature distribution in cases involving the proselytizing activities of the Jehovah's Witness movement. Since this religious group engages in door-to-door and street-corner soliciting that is unpopular with many Americans, its efforts led to restrictive ordinances in a number of cities by the late 1930s. The Witnesses challenged these limits on their First Amendment rights in a series of lawsuits, several of which reached the U.S. Supreme Court and established new free-expression safeguards that benefitted not only Jehovah's Witnesses but also the advocates of many other religious and political causes. In 2002, the Supreme Court revisited these issues again in still another Jehovah's Witness case, illustrating the timelessness of these issues.

The first of these Jehovah's Witness cases was *Lovell v. City of Griffin* (303 U.S. 444), decided in 1938. Alma Lovell, a Witness, circulated pamphlets in Griffin, Ga., without the city manager's permission, something a local law required. She was fined $50, but she took her case all the way to the Supreme Court and won.

The Supreme Court found the ordinance invalid, saying it "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." The city claimed the First Amendment applied only to newspapers and magazines and not to Lovell's pamphlets. The Supreme Court disagreed: "the liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty."

Moreover, the court emphasized that the First Amendment protects the right to distribute literature as well as the right to publish it.

Elsewhere, a number of communities attempted to curb Jehovah's Witnesses by using anti-littering ordinances against them. Several of these laws were considered by the Supreme Court in a 1939 case, *Schneider v. State of New Jersey* (308 U.S. 147).

The court said a city indeed has the right to prevent littering, but it must do so by punishing the person who actually does the littering, not by punishing someone
who hands literature to willing recipients. The person handing out a pamphlet cannot be punished even if the recipient later throws it away, the high court said.

In *Schneider*, the Supreme Court also invalidated a city ordinance that required anyone seeking to distribute literature door to door to get police permission first.

The court said giving the police discretion to decide which ideas may and may not be advanced by neighborhood canvassing is a violation of the First Amendment. The court said a city may limit the hours of door-to-door soliciting, but requiring a permit in advance is unconstitutional when the permit system gives the police discretion to approve permits for causes they like and deny permits to unpopular causes.

In 1942, the Supreme Court first approved and then invalidated another city ordinance that had been used against a Jehovah’s Witness, this one simply requiring a $10 "book agent" license for all solicitors. In this case (*Jones v. Opelika*, 316 U.S. 584), the high court initially upheld the license requirement. But some 11 months later, the court vacated its decision and adopted what had been a dissenting opinion as the majority view. The court’s final decision was based on the fact that the ordinance gave city officials discretion to grant or revoke these licenses without explaining why the action was taken.

To the amazement of many, 60 years later the same kind of questions were addressed again in still another Supreme Court decision involving Jehovah’s Witnesses, *Watchtower Bible and Tract Society v. Village of Stratton* (536 U.S. 150). Stratton, a small town in Ohio, adopted an ordinance that made it a misdemeanor for door-to-door "canvassers" to promote "any cause" without first obtaining a permit from the mayor’s office. The ordinance also made it a misdemeanor for anyone to go to a private home where a "no solicitors" sign was posted--a provision the Jehovah’s Witnesses did not challenge.

After lower courts largely upheld the Stratton ordinance, the Supreme Court overturned its permit requirement on an 8-1 vote. Writing for the court, Justice John Paul Stevens said extending such a permit requirement to religious and political advocates and other non-commercial canvassers violates the First Amendment. The court did not rule out permit systems that apply only to commercial solicitors.

Stevens said the Stratton ordinance is overbroad and "offensive--not only to the values protected by the First Amendment, but to the very notion of a free society." He condemned laws that require citizens, "in the context of everyday public discourse," to first inform the government of their desire to speak "and then obtain a permit to do so."

Stevens emphasized the right, first recognized by the Supreme Court long after the earlier Jehovah’s Witness cases, of religious and political advocates to engage in anonymous speech. Any permit system for these canvassers necessarily violates that constitutional right and also precludes spontaneous acts such as going across the street to talk to a neighbor about a cause. Stevens said some citizens might "prefer silence to speech licensed by a petty official."

Responding to the town’s argument that the ordinance was needed to preserve residents’ privacy and protect them from crime, Stevens noted that criminals would not be likely to obtain permits before going to someone’s door and said that a "no soliciting" sign is a suitable protection for those who do not want to be disturbed.
Only Chief Justice William H. Rehnquist dissented in the Stratton case. He said "(the majority) renders local governments largely impotent to address the very real threat that canvassers pose." And he predicted that the decision might actually lead to less door-to-door communication by forcing more residents to put up "no soliciting" signs.

As a result of these and other Jehovah’s Witness cases, it is now a settled principle of constitutional law that government authorities may not arbitrarily grant solicitation permits to those advocating popular ideas while denying permits to advocates of unpopular ideas. Even a content-neutral permit system that merely controls the time, place and manner of free expression raises constitutional questions because it precludes anonymous religious or political speech and forces those who want to engage in this kind of activity to ask a government for prior permission.

However, these cases all involved the acts of government agencies that attempted to control the dissemination of ideas in public forums or by door-to-door canvassing. Is the rule different if the activity is to occur in a company-owned town or a private shopping center?

**Private Property and Literature Distribution**

The Supreme Court first addressed the question of literature distribution on private property in a 1946 case, Marsh v. Alabama (326 U.S. 501). The case arose in Chickasaw, Alabama, a company town owned by Gulf Shipbuilding. The distribution of literature without permission of the town’s authorities was forbidden.

The case arose when a Jehovah’s Witness tried to pass out tracts there. She was told that permission was required before solicitation was allowed, and that she would not be given permission. She was ordered to leave, and when she refused she was prosecuted for trespassing.

Even though the entire town was privately owned, the high court stood by its earlier decisions in the Marsh case. Noting that for all practical purposes this company town was a city, the court applied the same rules to it as had been applied to other cities. The court pointed out that the town was in fact open to the public and was immediately adjacent to a four-lane public highway. Even though the streets were privately owned, the public used them as if they were public streets. The court said:

Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.

More than 20 years later, the Supreme Court applied the same kind of logic to a private shopping center in Amalgamated Food Employees Local 590 v. Logan Valley Plaza (391 U.S. 308, 1968). This case involved union picketing, which had been forbidden on shopping center premises. The union challenged this rule and won.
Chapter Three

The Supreme Court compared the private shopping center to the private town in *Marsh*, and said the same right to distribute literature existed here. However, the court said a factor in its decision was that the case involved a labor dispute to which a merchant in the shopping center was a party. The court did not say whether the First Amendment would have applied if there had not been a close relationship between the picketing and a merchant in the shopping center.

That question was addressed by the Supreme Court in 1972 in *Lloyd Corp. v. Tanner* (407 U.S. 551). In that case there was no relationship between the material being distributed and any merchant in a shopping center. This decision allowed a large shopping center in Portland, Oregon, to ban anti-Vietnam War protesters who wanted to pass out literature.

In the years between the *Logan Valley* and *Lloyd* decisions, four Supreme Court justices appointed by Richard Nixon had replaced key members of the liberal Warren court, and those four justices helped create a new majority that backed away from the court’s previous rulings about literature distribution on private property. The court said there was no constitutional right to distribute literature in this case, particularly because there was no relationship between the literature and the business being conducted at the shopping center. However, the majority opinion did not specifically say it was overruling the *Logan Valley* decision.

In 1976 the Supreme Court came full circle, expressly reversing the *Logan Valley* decision as it decided another shopping center case, *Hudgens v. NLRB* (424 U.S. 507). This case involved warehouse employees of the Butler Shoe Company who were on strike. When they picketed a Butler store in an Atlanta shopping center, the center’s management ordered them out of the mall. The National Labor Relations Board held this to be an unfair labor practice, and the shopping center owner appealed.

The *Hudgens* majority made it clear that there is no longer any constitutional right to distribute literature at a private shopping center, even if the literature specifically involves a labor dispute with a merchant doing business there. The court said that, if First and Fourteenth Amendment rights are involved, the content of the material should be irrelevant; it shouldn’t matter whether the literature has anything to do with the business being conducted at the shopping center or not. Whatever the subject matter of the literature, there is no constitutional right to distribute it at a private shopping center, the *Hudgens* majority ruled. However, this would not prevent the NLRB from ordering an employer to allow picketing on another legal basis; the court merely ruled out any such right under the federal Constitution. The NLRB, for example, could rule that to deny picketing rights was an unfair labor practice, in violation of federal labor laws.

There were those who thought *Hudgens* settled the matter of literature distribution at private shopping centers, but they were wrong. In 1980, the Supreme Court made another sharp turn in its circuitous route through this area of law in the case of *Pruneyard Shopping Center v. Robins* (447 U.S. 74).

This case presented the conservative majority on the Supreme Court with a classic confrontation between private property rights and states’ rights, two causes that have sometimes been rallying cries of conservatives. At a shopping center near San Jose, California, a group of high school students tried to distribute literature
opposing a United Nations resolution against "Zionism." They were refused permission, and they sued in California’s state courts. The state Supreme Court said that the California Constitution provides a broader guarantee of free expression than the federal Constitution. The California court said there is a right to distribute literature in private shopping centers in California, even if no such right is guaranteed by the federal Constitution.

The center's owners appealed to the U.S. Supreme Court, contending that this California Supreme Court ruling denied them their property rights and due process rights under the federal Constitution. The respondents replied, of course, in states' rights terms, asserting the right of a state to afford its citizens more free speech rights than the federal Constitution mandates.

In a 7-1 opinion, Justice William Rehnquist chose states' rights over property rights, ruling that the California Supreme Court decision violated no federal right of the shopping center owners that was as important as a state's right to define freedom for its citizens. Rehnquist said the U.S. Supreme Court's earlier rulings on access to shopping centers were not intended to "limit the authority of the state to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."

In short, the Supreme Court affirmed California's right to create broader rights than the federal Constitution requires. The effect of the *Pruneyard* decision is to leave it up to other state legislatures and courts to decide whether to grant literature distribution rights in private places similar to those recognized in California.

In the years since the *Pruneyard* decision, the highest courts in several other states have recognized at least a limited right to engage in various forms of free expression at private shopping malls. These decisions have been based on several different legal grounds, including general free expression provisions in state constitutions and the right to circulate petitions for ballot measures, also recognized in some state constitutions.


In New Jersey, for example, the state Supreme Court ruled in the *Coalition Against War* case that the owners of large regional shopping malls must permit leafletting and similar political speech, subject to reasonable time, place and manner restrictions. In the *Green Party* case, the New Jersey Supreme Court ruled that a mall could not require those who want to do leafletting to obtain a $1 million liability insurance policy. Such insurance is prohibitively expensive if it can be obtained at all, the court noted. Nor can mall managers limit groups that want to do leafletting to just one day a year. Those restrictions are not reasonable, the New
Jersey Supreme Court ruled. However, the court also emphasized that it was authorizing only literature distribution, not bullhorns, megaphones, placards, picket signs, parades or similarly intrusive actions. And the court emphasized that it was authorizing free-expression activities only at large regional malls, not at smaller shopping centers, football stadiums, theaters or other private places that may attract crowds.

The New Jersey cases closely parallel post-Pruneyard decisions of the California courts in allowing leafletting only at large shopping malls. In 1999, for example, a California appellate court held that there is no right to circulate petitions outside a stand-alone store--as opposed to a mall with many stores (Trader Joe's Co. v. Progressive Campaigns Inc. (73 C.A.4th 425). In the early 2000s, several other California courts ruled similarly, upholding bans on free expression on private property surrounding even large stand-alone stores and stores in retail centers lacking central courtyards (see, for instance, Costco Companies v. Gallant, 96 C.A.4th 740, 2002, and Albertson's Inc. v. Young, 107 C.A.4th 106, 2003).

In 2001, the California Supreme Court went a step further, rejecting any right to circulate literature inside a large, gated apartment complex (Golden Gateway Center v. Golden Gateway Tenants Association, 26 C.4th 1013). In this case, the court ruled 4-3 that the California Constitution does not protect free speech on private property unless it is "freely and openly accessible to the public," carving out an exception to the Pruneyard rule for places that are not the functional equivalent of downtown sidewalks--places where there is no state action, the court said. However, Justice Janice Rogers Brown, writing for the majority, said the decision "does not give apartment owners carte blanche to stifle tenant speech." She said tenants may communicate with one another in many ways without leaving unsolicited newsletters at doorways, which is what the tenants association wanted to do.

In Nevada, a major legal controversy has involved literature distribution on the heavily-used sidewalks along the Las Vegas Strip. When the street was widened in the early 1990s, local authorities allowed several large hotels to retain ownership of the new sidewalks as their private property.

Hotel owners then banned leafletting on the new sidewalks for "erotic" entertainment, arguing that as private property, the sidewalks are not a public forum. The county also restricted commercial leafletting along the Strip in general. In 2001, a divided Nevada Supreme Court upheld the right of the casinos to ban leafletting for outcall services and similar businesses. Three justices joined in an opinion saying the sidewalks are not a public forum. Two others said that even if the sidewalks are a public forum, the leafletting in question is not protected by the First Amendment because it represents a commercial message for an apparently illegal activity (S.O.C. v. The Mirage, 23 P.3d 243, 2001).

However, the hotel owners quickly learned that it wouldn't be that easy to control the privatized sidewalks. Two months later the ninth circuit U.S. Court of Appeals held that the sidewalks along the Strip are in fact a public forum to which the First Amendment applies (Venetian Casino Resort v. Local Joint Executive Board of Las Vegas, 257 F.3d 937). In a case involving picketing by a labor union, the federal court rejected The Venetian's attempt to render the sidewalks off limits to free expression. The U.S. Supreme Court declined to hear the hotel's appeal in
2002, leaving the ninth circuit decision as a binding precedent and protecting the right to engage in traditional First Amendment activities such as union picketing along the Strip.

A similar case arose a few miles away in downtown Las Vegas when the city closed five blocks of Fremont Street, creating a pedestrian mall on which all forms of solicitation and leafletting were banned. In 2003 the ninth circuit held that the downtown mall was still a traditional public forum where any government restriction on free expression would have to be justified under a rigorous strict-scrutiny test (City of Las Vegas v. ACLU, 333 F.3d 1092). In 2004, the Supreme Court declined to hear an appeal of that decision, too.

For a time the police and casino security personnel ignored these court decisions, prompting new threats of litigation by the American Civil Liberties Union. In late 2004 local officials, casinos owners and civil libertarians reached an agreement that would allow many forms of free expression on Las Vegas Strip sidewalks, including the privatized ones in front of leading hotels on the Strip.

Another controversy concerning privatized, once-public sidewalks arose in Salt Lake City. In 2002, the 10th circuit U.S. Court of Appeals held that the sidewalks along a recently-closed portion of Main Street in Salt Lake between the Mormon Temple Square and the church’s administrative complex are still a public forum.

Ruling in First Unitarian Church et al. v. Salt Lake City Corp. (308 F.3d 1114), the court held that the Church of Jesus Christ of Latter-day Saints could not ban expressive activities on the sidewalks even though the city sold the street to the church. After buying that block of Main Street, the church converted it into an "ecclesiastical park" with extensive landscaping. However, the city retained a pedestrian easement to assure that the sidewalks would remain open to the public. The church left the sidewalks open but banned traditional free expression activities such as leafletting, soliciting, picketing and demonstrating for various causes.

The ban was challenged by several local organizations, backed by the ACLU. They argued that a city cannot terminate the public-forum status of downtown sidewalks by selling the street and sidewalks to a church. The court agreed, concluding that the area within the public sidewalk easement retained its status as a free-speech zone. "The city cannot create a 'First Amendment-free zone.' Their attempt to do so must fail," the court held.

Later the city and the church reached an agreement under which the city abandoned the public sidewalk easement, allowing the church to control or forbid expressive activities there, while the city received two acres of land elsewhere in return. That raised new questions about the right of a city to relinquish free expression rights on what was once a major public street.

Still another aspect of the problem of First Amendment rights on private property led to an important Supreme Court decision in 1994: the question of local ordinances that forbid property owners to place signs containing political messages on their own property. In City of Ladue v. Gilleo (512 U.S. 43), the Supreme Court overturned an ordinance in Ladue, Mo. (an upscale suburb of St. Louis) that barred almost all signs in the front yards of private homes.

The case arose when a Ladue woman, Margaret Gilleo, put up a sign in her yard protesting the Persian Gulf War in 1990. It was stolen, so she put up another
sign. Someone knocked that sign down, and she reported this vandalism to police. She was then told her signs were illegal and she sued, alleging that the city was violating her First Amendment rights. After a lower court ordered the city not to enforce its sign ordinance, Gilleeo placed a sheet of paper in a window that read, "For Peace in the Gulf." That, too, was probably a violation of Ladue’s rules, but it didn’t matter: the Supreme Court ruled that the town’s strict sign ordinance was unconstitutional. The court said this ban on almost all yard signs precluded an entire category of speech, thereby violating the First Amendment. The court conceded that Ladue could ban most commercial signs in front yards (but not "for sale" signs: see Chapter 13 for a discussion of that issue). However, this ordinance went too far by censoring all political and religious messages that might be conveyed in yard signs.

PRIOR RESTRANTS AND ABORTION PROTESTS

Between the 1980s and the mid-2000s, the controversy over abortion led to new conflicts concerning the scope and meaning of the First Amendment. Congress, the courts and state and local governments have all become involved in the emotion-charged debate not only about abortion itself but also about the methods used by demonstrators who oppose abortions. There are several related questions involved. Under what circumstances may demonstrations near medical clinics be restricted? When may demonstrations that target the homes of doctors and other clinic workers be restricted? When does the First Amendment protect the fiery rhetoric of abortion foes? And may the federal anti-racketeering law be used against a group that espouses a cause such as the idea that abortion is morally wrong?

The Supreme Court first addressed the question of whether a town may ban demonstrations near the homes of doctors and other abortion clinic workers in a 1988 case, Frisby v. Schultz (487 U.S. 474). In this case the town of Brookfield, Wisconsin, a small suburb of Milwaukee, banned demonstrations near private homes after anti-abortion protesters picketed several times in front of a doctor’s home. Sandra Schultz and other anti-abortion demonstrators sued Russell Frisby and other town officials, charging that the ordinance violated their First Amendment rights.

The court affirmed Brookfield’s right to ban targeted picketing at a specific private home. In essence, the majority held that while residential streets in general are a public forum, the space in front of a specific home is not. That means a city must allow protesters to walk down residential streets carrying signs, but if they stop and linger too long near one particular residence, that conduct is not protected by the First Amendment. If a local government wishes to do so, then, it may forbid targeted picketing at someone’s home.

The court based its decision largely on the idea that a person is entitled to a certain amount of privacy and freedom from harassment in his or her own home. Writing for the court, Justice Sandra Day O’Connor said:
The First Amendment permits the government to prohibit offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech.... The target of the focused picketing banned by the Brookfield ordinance is just such a ‘captive.’ The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech.

In the years since the *Frisby v. Schultz* case was decided by the Supreme Court, the controversy over abortion demonstrations has become even more heated. Some anti-abortion groups have launched major campaigns targeting the homes of doctors and others who work at clinics that perform abortions. By 2005, many cities had adopted restrictions on picketing individual homes patterned after the Brookfield ordinance, and the courts, including the Supreme Court, ruled on anti-abortion protest questions in many new cases.

During the 1990s many cities and states--and eventually Congress--passed laws to curtail demonstrations not only near clinic workers' homes but also near clinics where abortions are performed. In 1994, Congress enacted the Freedom of Access to Clinic Entrances (FACE) Act, which prohibits protesters from blocking access to abortion clinics or intimidating patients and employees. First offenses carry fines of up to six months in prison and $10,000 fines. Those convicted of repeated violations of the law could face life imprisonment and fines of up to $250,000.

Almost as soon as the new federal law went into effect, anti-abortion demonstrators challenged it in court. Among other things, they contended that it unduly restricts their First Amendment freedoms and violates the ban on cruel and unusual punishments in the Eighth Amendment by imposing such severe sentences on persons who are doing nothing more than civil rights and antiwar demonstrators did in the 1960s: engaging in civil disobedience as an act of conscience. In 1995, all of those arguments were rejected in two federal appellate court decisions, *Woodall v. Reno* (47 F.3d 656) and *American Life League v. Reno* (47 F.3d 642). Deciding the two cases simultaneously, the fourth circuit U.S. Court of Appeals ruled that the FACE Act does not violate the First Amendment because it targets only unprotected acts such as obstructing doorways, not activities protected by the First Amendment such as peaceful picketing.

**Censoring "The Nuremberg Files"**

The FACE Act was also the basis for a controversial appellate court decision in 2002 that upheld part of a large monetary judgment against anti-abortion activists and also affirmed a judge's order censoring a website that allegedly advocated violence against abortion clinic workers.

Ruling in *Planned Parenthood of the Columbia/Willamette v. American Coalition of Life Activists* (290 F.3d 1058), the ninth circuit U.S. Court of Appeals ruled on a 6-5 vote that the judgment did not violate the First Amendment rights of anti-abortion activists. The case involved a website named "The Nuremberg Files" that called abortion doctors "baby butchers" and included names, home addresses and
license plate numbers as well as names of spouses and children of some doctors who performed abortions. If such a doctor was killed, as three who were depicted in "wanted" posters on the website had been, the site showed a line drawn through the doctor's name.

When a group of abortion providers sued under the FACE Act, a federal jury awarded $107 million in actual and punitive damages. Over the objections of five dissenter, the six-judge majority on the U.S. Court of Appeals upheld the actual damages but ordered the trial court to reconsider the amount of the punitive damages. The majority also upheld an injunction by the trial judge ordering some of the "wanted" posters taken down, an order that was undisputedly a prior restraint of communications on a controversial public issue.

Eleven judges participated in the decision instead of the usual panel of three because the court was reconsidering the case en banc. Earlier, a three-judge panel of the Ninth Circuit had upheld the website and posters as protected speech in a ruling that was set aside by the en banc decision.

The majority ruled that the language of the website constituted "true threats" to health care workers even though there were no explicit threats on the site. Writing for the majority, Judge Pamela Rymer said a true threat is one "where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, (and) is unprotected by the First Amendment."

"It is not necessary that the defendant intend to, or be able to carry out his threat; the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat," Rymer wrote.

In three separate opinions, the five dissenters said the majority was weakening the First Amendment by its dismissal of the free expression rights of abortion foes. Judge Alex Kozinski, joined by four judges, wrote: "While today it is abortion protesters who are singled out for punitive treatment, the precedent set by this court... will haunt dissidents of all political stripes for many years to come."

In another dissenting opinion, Judge Marsha Berzon said the abortion foes who faced this large monetary penalty "have not murdered anyone." She added, "neither their advocacy of doing so nor the posters and website they published crossed the line into unprotected speech.... If we are not willing to provide stringent First Amendment protection and a fair trial to those with whom we as a society disagree as well as those with whom we agree...the First Amendment would become a dead letter."

**Supreme Court Rulings on Abortion Protests**

Prior to the "Nuremberg Files" decision, the activities of abortion protesters near clinics led to three U.S. Supreme Court decisions, all of which required the court to balance the rights of protesters against those of clinic patrons and staff. The Supreme Court handed down a fourth decision on the rights of abortion protesters in 2003.

In a 1994 case, the Supreme Court upheld a Florida court's injunction ordering demonstrators to stay 36 feet away from the entrances to an abortion clinic (*Madsen v. Women's Health Center*, 512 U.S. 753). In that case, the Supreme
Court's 6-3 majority, in an opinion by Chief Justice William Rehnquist, said the 36-foot buffer zone was not an undue restriction on demonstrators' First Amendment rights.

However, in 

Madsen

the Supreme Court overturned several other parts of the Florida court order, including a provision that barred demonstrators from approaching patients anywhere within 300 feet of the clinic. The court also overturned a portion of the Florida order that banned demonstrations within 300 feet of the residences of clinic workers. Rehnquist said that was too broad a restriction on the First Amendment rights of anti-abortion demonstrators, although a smaller buffer zone around workers' homes, coupled with limits on the time and duration of residential demonstrations, might be acceptable. The Supreme Court also overturned a portion of the Florida court order that prohibited demonstrators from displaying "images observable" by patients in the clinic. Rehnquist said the complete ban on signs was overly broad, although a ban on signs carrying threats might be acceptable. On the other hand, Rehnquist's opinion upheld a part of the Florida order that banned excessive noise during abortion protests.

In 1997, the Supreme Court went further to protect the First Amendment rights of anti-abortion demonstrators, overturning a New York judge's order that required them to stay 15 feet away from clinic patrons and workers. Ruling in 

Schenck v. Pro-Choice Network

(519 U.S. 357), an 8-1 majority of the court held that demonstrators have a right to approach patrons on public sidewalks. The court overruled the judge's order establishing a 15-foot "floating bubble" around patrons that abortion foes could not enter. But the court upheld another part of the judge's order that created a 15-foot no-demonstration zone around clinic entrances.

Again writing for the court, Chief Justice Rehnquist emphasized that picketing, leafletting and even loud protesting are "classic forms of speech that lie at the heart of the First Amendment." Rehnquist noted that sidewalk protesters have no right to grab, push or stand in the way of persons going to abortion clinics, but he also said the New York judge's ban on approaching patrons or workers was overly broad.

"We strike down the floating buffer zones around people entering and leaving clinics because they burden more speech than is necessary" to protect the free flow of traffic and public safety, the chief justice explained.

In ruling on all of these specific restrictions on demonstrations, the Supreme Court held that they were content neutral (that is, they would apply to everyone, regardless of the issue addressed by demonstrators). Therefore, the restrictions were valid unless they imposed a greater burden on First Amendment freedoms than was necessary to serve a significant government interest. The court's majority concluded that there was a significant government interest in protecting the safety of clinic workers and patients, and in assuring that they could enter and leave the clinic freely. The court held that small buffer zones around clinic entrances are sufficient to accomplish those goals, and that larger buffer zones or floating buffer zones around clinic patrons or workers create an undue burden on free expression.

Lower federal courts applied these principles similarly in several cases decided after Schenck v. Pro-Choice Network. For example, in 1997 a federal appellate
court overturned several provisions of a Phoenix, Ariz. city ordinance in Sabelko v. City of Phoenix (120 F.3d 161), including a requirement that protesters step back eight feet from clinic patients and workers even when they were much farther than 15 feet from a clinic entrance. The same court ruled similarly in overturning a Santa Barbara, Calif. ordinance that established an eight-foot floating buffer zone around clinic workers and patients (Edwards v. City of Santa Barbara, 150 F.3d 1213, cert. den. 526 U.S. 1004, 1999).

In 2000, however, the Supreme Court upheld a Colorado state law that included an eight-foot floating buffer zone. Ruling in Hill v. Colorado (530 U.S. 703), the court's 6-3 majority said the Colorado law was narrowly tailored enough to pass constitutional muster. The law established a 100-foot zone around every health care facility's entrance. Inside that perimeter, no one could distribute leaflets, display signs or engage in sidewalk counseling within eight feet of another person unless that person consented to being approached. Displaying signs within the perimeter, but not within eight feet of any person, was legal.

After first ruling that the Colorado law is content neutral, the court held that it is a valid time, place and manner regulation of speech. The court noted that protest signs can be read, and normal conversations can occur, at a distance of eight feet. The court called that distance a "normal conversational distance." The court said the ban on approaching people does not prevent leafletting because a protester can stand in one place and hand out leaflets as people approach the person doing the leafletting.

"This statute simply empowers private citizens entering a health care facility with the ability to prevent a speaker, who is within eight feet and advancing, from communicating a message they do not wish to hear," Justice John Paul Stevens wrote for the court.

In short, the majority in Hill said this floating buffer zone is sufficiently different from the one overturned in Schenck to be constitutional.

In 2003, the Supreme Court ruled, in Scheidler v. National Organization for Women (537 U.S. 393), that the federal Racketeer Influenced and Corrupt Organizations (RICO) Act cannot ordinarily be used by abortion providers to win treble damages and nationwide injunctions against abortion foes.

Those who demonstrate near clinics that perform abortions can still be sued under the Freedom of Access to Clinic Entrances (FACE) Act. However, that law lacks a treble damage provision and requires abortion foes to be sued state by state.

The high court ruled by an 8-1 vote that abortion protesters, even if they block clinic entrances with the ultimate goal of shutting down a clinic, are not normally guilty of the kind of "predicate offense" such as extortion that is required to bring a case under RICO. The decision effectively ends nearly 20 years of litigation by NOW and other abortion backers against the Pro-Life Action League and Operation Rescue, two anti-abortion groups, under RICO.

Several other groups that have demonstrated for various causes, including People for the Ethical Treatment of Animals (PETA), supported the anti-abortion groups, fearing that they, too, could be sued under the treble damages provisions of RICO.

Chief Justice William H. Rehnquist wrote the court’s majority opinion, saying
that the holding should not affect the usefulness of RICO as a weapon to fight organized crime. In a concurring opinion, Justice Ruth Bader Ginsburg, joined by Stephen G. Breyer, said RICO could have also been used against civil rights demonstrators during the 1960s under the broad reading of RICO urged by abortion supporters.

Some years earlier, the Supreme Court ruled on another right-to-demonstrate question: the right to picket near a foreign government’s embassy in Washington, D.C. In *Boos v. Barry* (485 U.S. 312, 1988), the court overturned some of the provisions of a Washington, D.C. local ordinance aimed at preventing embarrassing demonstrations outside foreign embassies.

The court held that Congress, in passing local ordinances to govern Washington, could not forbid picket signs that might say embarrassing things. Writing for the majority, Justice Sandra Day O’Connor said, "The display clause of (the ordinance) is unconstitutional on its face. It is a content-based restriction on political speech in a political forum, and it is not narrowly tailored to serve a compelling state interest."

However, the high court affirmed another part of the ordinance: a provision requiring protesters to stay 500 feet away from the embassy that is the target of the picketing if police believe the protesters pose a threat to the security of the embassy.

**OTHER PICKETING AND RELATED ISSUES**

If picketing in front of a private home can be banned to avoid disrupting the lives of the occupants, is it possible to ban other First Amendment activities that might be disruptive, inconvenient or embarrassing to an unwilling audience? The U.S. Supreme Court has addressed that kind of question several times.

In 1971 the Supreme Court was confronted with such a prior restraint issue in the case of *Organization for a Better Austin v. Keefe* (402 U.S. 415). Jerome Keefe was a real estate broker who allegedly engaged in "blockbusting" tactics in the community of Austin, near Chicago, Ill. That is, he was accused of attempting to panic white residents into selling at low prices to escape an influx of blacks that he claimed were moving into their neighborhoods. The Organization for a Better Austin (OBA), trying to halt this white flight, began circulating fliers attacking Keefe for his "panic peddling" tactics. Keefe got a court order that prohibited the OBA from distributing its fliers or picketing. The order was affirmed by an Illinois appellate court, and OBA appealed to the U.S. Supreme Court.

The Supreme Court invalidated the injunction, noting that peaceful pamphleteering is protected by the First Amendment, and its prohibition is a prior restraint. The court said:

Any prior restraint on expression comes to this court with a 'heavy presumption' against its constitutional validity. Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint. He has not met that burden.
The Supreme Court has dealt with somewhat more difficult First Amendment problems in a series of cases involving the Hare Krishna movement, cases reminiscent of the early Jehovah’s Witness cases.

In a 1981 case, Heffron v. International Society for Krishna Consciousness (452 U.S. 640), the court had to decide how much access to a state fair Hare Krishna believers should have.

Like members of the Jehovah’s Witness movement, Hare Krishna adherents believe their faith requires them to distribute literature and solicit donations from the public. Krishna members have attempted to promote their faith and solicit funds in many public places where people gather, often citing the earlier Jehovah’s Witness cases to support their right to do so. The Heffron case arose when Krishna members were refused permission to distribute literature and solicit funds freely at the Minnesota State Fair. They were told they could only do so at a single booth. Under the fair’s rules, booths were available to all groups on a non-discriminatory first-come, first-served basis.

The Krishna movement challenged the rules as a violation of the First Amendment, and the case eventually reached the U.S. Supreme Court. Krishna followers argued that distributing literature and soliciting funds are actually part of the movement’s religious ritual, required of all members. To limit these activities is a violation of the First Amendment as interpreted in the Schneider and Lovell cases (discussed earlier), they contended. Minnesota fair officials conceded that Krishna followers, like Jehovah’s Witnesses or anyone else, have a constitutional right to propagate their views at the state fair. However, they said it was necessary to restrict all such groups to booths to keep the fair orderly.

The Supreme Court majority agreed. The court said it is not a violation of the First Amendment to require Krishna followers to practice their religion at a booth rather than at large throughout the state fair. The majority opinion pointed out that Krishna members remained free to mingle with the crowd and orally present their views, but it upheld the rule limiting solicitations and literature distribution to individual booths at the fair. The court explained that if the Krishnas were allowed to proselytize throughout the fairgrounds, all other groups would have to be given the same privilege.

Access to Public Airports

If religious pamphleteering can be curtailed at government-sponsored events such as a state fair, can it also be restricted at other government-owned facilities where it might be disruptive, such as major airports?

The Supreme Court has addressed that issue in two cases inspired by the activities of Hare Krishna believers. In a 1987 case, Board of Airport Commissioners v. Jews for Jesus (482 U.S. 569), the court overturned a rule adopted by the government agency in charge of Los Angeles International Airport that flatly prohibited all First Amendment activities at this government-owned facility.

After lower courts overruled several earlier attempts by the airport commissioners to ban literature distribution by Hare Krishna believers, the board adopted a complete ban on all First Amendment activities at the airport. Under this rule a
clergyman associated with Jews for Jesus, an evangelical Christian organization, was barred from distributing leaflets there. The Jews for Jesus organization decided to challenge the validity of the ban on First Amendment grounds.

The high court unanimously held that the regulation was so sweeping as to be unconstitutional on its face. Writing for the court, Justice Sandra Day O'Connor said almost any traveler might violate such an all-encompassing ban on First Amendment activities--by doing something as commonplace as talking to a friend or reading a newspaper, for instance. However, the court did not rule out the possibility that more narrowly drawn regulations limiting the time, place and manner of literature distribution might pass constitutional muster. Nonetheless, by 2005--18 years after the Supreme Court ruling--Los Angeles airport authorities still had not managed to draft a soliciting ordinance that would withstand judicial scrutiny. Federal judges repeatedly rejected various ordinances intended to regulate soliciting at Los Angeles International Airport.

In 1992 the Supreme Court ruled on another case resulting from Hare Krishna members' First Amendment activities at airports. This time the court ruled that soliciting donations can be banned, although handing out literature must be permitted at appropriate places in public airports. Ruling in Lee v. International Society for Krishna Consciousness (505 U.S. 830), a 6-3 majority of the court held that Hare Krishna members could be barred from fund-raising at the New York area's public airports. Five of the justices also agreed that unlike city streets and parks, airports are not traditional public forums for First Amendment activities. However, in a separate opinion the court ruled by a 5-4 vote that airports must still be open for First Amendment activities that are less intrusive than soliciting money (for example, handing out free literature).

By holding that distributing literature but not soliciting money at airports is protected by the First Amendment, the court was following the pattern set two years earlier in a case involving U.S. Post Offices: U.S. v. Kokinda (497 U.S. 720, 1990). In that case, the court upheld regulations of the Postal Service that prohibit all soliciting at post offices. The case began when several representatives of the National Democratic Policy Committee were criminally prosecuted for setting up a table to distribute literature and solicit contributions at the Bowie, Md. post office. They argued that their activities should be protected by the First Amendment.

In a 5-4 decision that produced a strongly worded dissent by Justices Brennan, Marshall, Blackmun and Stevens, the court upheld regulations that banned soliciting (but not all First Amendment activities) at post offices. Writing for the court, Justice O'Connor said Postal Service regulations forbidding soliciting were justified because soliciting at post offices had often caused disruptions that interfered with the mail service. Post offices had never been First Amendment forums, she concluded, adding: "Whether or not the Service permits other forms of speech, it is not unreasonable for it to prohibit solicitation on the ground that it inherently disrupts business by impeding the normal flow of traffic."

Justice Anthony Kennedy concurred in the outcome of the case, but on a different rationale. He said post offices may well be public forums, but he also said the ban on soliciting was a reasonable time, place and manner restriction on free expression--and therefore valid. The four dissenting justices said they thought post
offices were public forums and that in their view the ban on soliciting was not a reasonable time, place and manner restriction.

As a result of these cases, fund-raising can be prohibited not just at airports and post offices but also at many other government-owned facilities that are open to the public but are not traditional public forums. However, governments must allow other First Amendment activities such as literature distribution at many of these same places. And there is still a First Amendment right to solicit donations at places that are traditional public forums—subject only to the authorities' right to impose reasonable restrictions on the time, place, and manner of free expression activities.

On the other hand, purely private facilities such as shopping centers are not ordinarily First Amendment forums. First Amendment activities may usually be banned in such places whenever the owners choose to do so. Of course, if the owners wish to allow free expression activities—or if a state chooses to require the owners to allow such activities—they can occur on private property even though the United States Constitution does not guarantee literature distribution rights on private property.

The Supreme Court has ruled on one other aspect of literature distribution rights that should be noted here: the right to distribute unsigned political literature. In an important 1995 case, McIntyre v. Ohio Elections Commission (514 U.S. 334), the high court overturned laws in almost every state that banned the distribution of anonymous political handbills. Based on the idea that anonymous political "hit pieces" are unfair, inaccurate and often libelous, most states have had laws requiring that political literature carry the originator's name and address. But in the 1995 decision, the court held that the concern about possible fraud and libel in unsigned political literature did not justify such a sweeping restriction on First Amendment rights. Ohio's ban on unsigned leaflets applied even to those that were completely truthful, the court noted. Under the McIntyre decision, there is now a constitutional right to distribute unsigned political literature. In 2002, the high court concluded that this right also undergirds the right to do door-to-door non-commercial soliciting without first obtaining a city permit. Any permit requirement compels canvassers to give up their constitutionally protected anonymity, as the court noted in Watchtower Bible and Tract Society v. Village of Stratton, discussed earlier.

Access to Parades, Parks and Organizations

Another issue that has stirred much controversy in recent years has been the question of whether privately sponsored parades and fairs that are held on public property are First Amendment forums open to all viewpoints, or whether the sponsors have a First Amendment right to decide who will participate. A focal point of this debate has been the efforts of homosexual groups to participate in St. Patrick's Day parades. In New York, the Ancient Order of Hibernians, a Roman Catholic fraternal organization, sponsors the nation's oldest formal St. Patrick's Day parade: it was first held in 1762. Based on their religious beliefs, the Hibernians have refused to allow gay and lesbian groups to join the parade, which annually attracts as many as 150,000 participants and two million spectators. In 1993, a
federal judge ruled that the Hibernians have a First Amendment right to exclude groups with which they disagree.

On the other hand, the largest St. Patrick's Day parade in Boston has been sponsored by veterans' groups rather than a religious group, and in 1994 the veterans were ordered by a Massachusetts court to include a gay and lesbian group in the parade under a state law guaranteeing homosexuals equal access to public facilities. The veterans groups decided to cancel the parade instead. In 1995, they replaced the St. Patrick's Day Parade, in which marchers traditionally have carried green banners, with a protest march in which the marchers carried black flags to protest the court order. Meanwhile, the veterans also appealed to higher courts. The Massachusetts Supreme Court upheld the lower court's order, but in 1995 the U.S. Supreme Court disagreed and ruled in favor of the veterans.

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (515 U.S. 557), the Supreme Court ruled unanimously that the veterans groups have a First Amendment right to choose which other groups they will include in their parade. Writing for the court, Justice David Souter said the state could not use its public accommodations law to force a private group to admit anyone with whom it disagreed to a parade.

Souter said that a parade by its nature is an expressive activity, and that its sponsors have the right to decide what their message is to be. Souter noted, "One important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say."

Souter noted the "enlightened purpose" of the public accommodations law (to prevent discrimination against homosexuals), but said the state cannot force a private organization to alter its own message. Souter also noted that individual gays and lesbians are entitled to march in the parade as members of any group that is admitted to the parade, and that the gays and lesbians are certainly free to conduct their own parade on city streets (and presumably, to exclude veterans' groups if they wish).

A related issue has arisen concerning groups such as the Boy Scouts of America, an organization that has traditionally barred homosexuals from being scoutmasters. Do state laws guaranteeing equal access to public facilities or forbidding discrimination against homosexuals by business enterprises apply to private organizations? How can those laws be reconciled with a private organization's First Amendment freedom of association rights? Also, do these laws require the Boy Scouts to admit members who are unwilling to take the Scouts' oath affirming a belief in God?

The U.S. Supreme Court ruled on this issue in a widely anticipated 2000 decision, *Boy Scouts of America v. Dale* (530 U.S. 640). The court's 5-4 majority ruled that the Boy Scouts may exclude gays as troop leaders, declaring that a private organization has the right to set its own moral code and espouse a viewpoint.

In so ruling, the high court overturned a New Jersey Supreme Court decision that said the Boy Scouts had to allow gay scoutmasters under that state's law banning discrimination in public accommodations.

Writing for the court, Chief Justice William Rehnquist said the Boy Scouts have a First Amendment right to freedom of association, including the right to
include or exclude persons based on their beliefs or their sexual orientation. Thus, the Scouts could exclude James Dale, a one-time Eagle Scout and assistant scoutmaster who was dismissed after Scout leaders learned he was gay.

"It appears that homosexuality has gained greater societal acceptance. But this is scarcely an argument for denying First Amendment protection to those who refuse to accept those views," Rehnquist wrote.

"Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior," the chief justice also wrote.

The U.S. Supreme Court's Dale decision is consistent with two 1998 California Supreme Court rulings on the same question. The court held in Curran v. Mt. Diablo Council of the Boy Scouts of America (17 C.4th 670) that the Scouts have the right to exclude gays as scoutmasters. In Randall v. Orange County Council of the Boy Scouts of America (17 C.4th 736), the same court upheld the right of the Boy Scouts to exclude those who are unwilling to profess a belief in God.

In 1996, the U.S. Supreme Court addressed another issue that touched upon the constitutional rights of homosexuals and their critics. Although it is not a First Amendment case as such, it should be noted here. In Romer v. Evans, 517 U.S. 620), the high court overturned a Colorado ballot initiative banning state and local laws giving legal protection to the rights of homosexuals. The initiative was approved by a majority of Colorado voters in 1992. In a 6-3 ruling, the court said a state cannot single out a group for "disfavored treatment" based on "animosity." Writing for the majority, Justice Anthony Kennedy said "...Amendment 2 (the ballot initiative) classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do." This decision does not necessarily guarantee homosexuals equal rights in all areas of the law. However, it does mark the first time the Supreme Court has overturned a law intended to legalize discrimination against them.

On the other hand, in 1998 the Supreme Court declined to review a decision of the sixth circuit U.S. Court of Appeals upholding a Cincinnati, Ohio, city charter provision that eliminated special protections for gays and lesbians. The Cincinnati charter provision ruled out "any claim of minority or protected status, quota preference or other preferential treatment" for gays and lesbians (Equality Foundation of Greater Cincinnati v. City of Cincinnati, 128 F.3d 289, cert. den. 525 U.S. 943).

The Supreme Court has also addressed the question of when government regulations concerning the use of a public place such as a park become a form of censorship. In Thomas v. Chicago Park District (534 U.S. 316), the high court in 2002 upheld the reasonableness of Chicago's rules for deciding whether to grant permits to demonstrators seeking to stage an event in a public park.

The court ruled unanimously that the city's 13-point guidelines, which require groups of more than 50 people to prove they have insurance, among other requirements, does not violate the First Amendment because it applies equally to all groups regardless of their viewpoint. Chicago officials defended the policy as necessary to assure fair access to local parks by individuals as well as large groups.

Writing for the court, Justice Antonin Scalia said, "the licensing scheme at
issue here is not subject-matter censorship but content-neutral time, place and manner regulation of the use of a public forum." He added, "the picknicker and soccer player, no less than the political activist or parade marshal, must apply for a permit if the 50-person limit is to be exceeded."

The case was initiated by advocates of legalizing marijuana who frequently applied for permits to demonstrate in Chicago parks, sometimes gaining permission but sometimes being denied a permit.

In the post-Sept. 11, 2001 era, it became common to place American flags and other expressions of patriotism on highway overpasses so they could be seen by motorists passing below. The authorities in many states allowed this practice, with or without regulations governing the placement of flags and signs. But what happens if the authorities then remove signs expressing other viewpoints, such as opposition to the war in Iraq? When California highway authorities removed antiwar signs placed on an overpass by Santa Cruz peace activists, the result was a federal appeals court decision holding that if the authorities allow flags on overpasses, they must also permit antiwar banners unless there is proof that the banners pose a special traffic hazard (Brown v. Calif. Dept. of Transportation, 321 F.3d 1217, 2003). In contrast, a state appellate court a few months earlier rejected an appeal by anti-abortion activists who were ordered to stop waving signs at motorists on a highway overpass near Sacramento (Sanctity of Human Life v. Calif. Highway Patrol, 105 C.A.4th 858, 2003). The court ruled that the sign-waving could distract motorists.

**Newsrack Ordinances**

Another difficult First Amendment issue concerns newsracks on public property. Many states and cities have adopted laws regulating the size and placement of newsstands on sidewalks, for instance. Some have banned newsracks altogether. This has produced a variety of conflicting court rulings. In 1988, the Supreme Court squarely addressed this issue for the first time, and in so doing handed the media a significant victory.

In *City of Lakewood v. Plain Dealer Publishing Co.* (486 U.S. 750), the court voted 4-3 to overturn a Lakewood, Ohio, ordinance that gave the town's mayor broad discretion to grant or deny publishers' requests to place newsstands on public sidewalks. The court ruled that newsracks are a legitimate form of expression in a public forum protected by the First Amendment. As a result, the court ruled that a city may not base decisions to grant or deny newsrack space on the content of the publication.

The case began when the mayor of Lakewood, a suburb of Cleveland, rejected the Cleveland Plain Dealer's request to place newsracks at 18 locations in the town. The newspaper argued that the decision was arbitrary and violated the First Amendment.

Writing for the majority, Justice William Brennan said, "The Constitution requires that the city establish neutral criteria to insure that the licensing decision (i.e., to allow newsracks) is not based on the content or viewpoint of the speech being considered."
Brennan acknowledged that a city could flatly prohibit all newsracks, but he said a city may not ban some while permitting others based on arbitrary decisions about their content. The Supreme Court sent the case back to a lower court to determine if the Lakewood ordinance would be valid if the provisions allowing discrimination based on content are deleted.

Justice Byron White and two others joined in a vigorous dissenting opinion that compared newsracks to soft-drink vending machines and questioned their right to enjoy First Amendment protection. White said the majority's reasoning would, in effect, force many cities to allow private companies to do business on the public sidewalks.

In 1993, the Supreme Court went even further in upholding the right to distribute literature in newsracks on public property. In *Cincinnati v. Discovery Network* (507 U.S. 410), the court said the city of Cincinnati could not flatly ban newsracks for commercial literature while allowing newspaper vending machines. City officials ordered Discovery (the publisher of a free magazine describing adult educational and recreational courses) and the publishers of a free real estate magazine to remove 62 newsracks from city property. Meanwhile, the city allowed more than 2,000 newspaper vending machines to remain on public property.

Voting 6-3, the court rejected the city's contention that the free flyers could be banned because they were merely commercial speech. The court ruled that commercial speech enjoys considerable First Amendment protection, and cannot be banned by a government agency unless the agency has a reasonable basis for doing so. The court rejected Cincinnati's argument that banning the 62 commercial newsracks would enhance the appearance of the city at a time when the city was not acting to remove 2,000 newspaper stands. The commercial speech aspects of this case are discussed in Chapter 13.

Numerous lower courts have addressed these issues. In 2002, for instance, a federal appeals court upheld Honolulu, Hawaii's right to limit the number of newsracks and to award newsrack space by lottery. The court said the city's system was content neutral and a valid time, place and manner restriction--justified by the city's desire to avoid visual clutter while providing alternate channels of communication (*Honolulu Weekly v. Harris*, 298 F.3d 1037).

**DISCRIMINATORY TAXATION AS CENSORSHIP**

One of the oldest forms of government control over the mass media is discriminatory taxation. Authorities in seventeenth- and eighteenth-century England used taxes as a means of controlling the press. One of the major grievances of the colonists before the revolutionary war was the Stamp Act, which singled out newspapers and legal documents for heavy taxation. Taxes may be burdensome for everyone, but if governments can levy high taxes on the news media and exempt other kinds of businesses, governments can force crusading news organizations into bankruptcy—or force them to become docile to avoid punitive taxation.

For many years after independence, attempts to single out newspapers for special taxes were rare in America, but a classic example of such a tax cropped up
in the 1930s. And during the 1980s and 1990s, there were repeated lawsuits charging that various tax schemes singled out the media for unfair treatment in violation of the First Amendment.

In 1936, just five years after its landmark Near v. Minnesota decision, the Supreme Court decided Grosjean v. American Press (297 U.S. 233). This case arose because the state of Louisiana, dominated by Governor Huey "Kingfish" Long's political machine, had imposed a special tax on the gross receipts of the 13 largest papers in the state, 12 of which opposed Long. The tax applied to total advertising receipts of all papers and magazines with a circulation over 20,000 copies per week.

The newspapers challenged the tax and a federal court issued an order barring the tax as a violation of the First Amendment. The Supreme Court heard the case on appeal and unanimously affirmed the lower court.

In an opinion by Justice George Sutherland, the court traced the history of taxes on knowledge in England and America. Sutherland said the First Amendment was intended to prevent prior restraints in the form of discriminatory taxes. He noted that the license tax acted as a prior restraint in two ways. First, it would curtail advertising revenue, and second, it was designed to restrict circulation. The Louisiana tax, Sutherland said, was "not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press."

More recently, the Supreme Court has overturned three other state tax systems that improperly singled out the media for unconstitutional taxation. In 1983, the Supreme Court overturned a Minnesota plan that taxed some—but not all—newspapers.

Minnesota created a "use" tax on the ink and newsprint used by newspapers in 1971. But after some of the smaller papers complained of the economic hardship the tax caused, the legislature rewrote the law to exempt the first $100,000 in newsprint and ink each newspaper purchased annually. Thus, the law in effect exempted small newspapers or, to put it another way, singled out large newspapers for a special tax. By 1974, one newspaper company—the Minneapolis Star and Tribune—was paying about two-thirds of the total amount the state collected from all Minnesota newspapers through this tax. Citing the Grosjean precedent, the Star and Tribune company challenged the constitutionality of the tax.

In Minneapolis Star and Tribune v. Minnesota Commissioner of Revenue (460 U.S. 575, 1983), the Supreme Court voted 8-1 to overturn Minnesota's tax on ink and newsprint. Justice Sandra Day O'Connor, writing for the court, warned that because such a tax "targets a small group of newspapers," it "presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme." Justice William Rehnquist dissented, arguing that the use tax in question was less of a burden than the normal sales tax paid by other businesses. (Minnesota had exempted newspapers from the state sales tax, a practice that was then common in other states as well.) Rehnquist said the state was actually conferring a benefit on the press, something the states may do without violating the First Amendment.

However, the majority's view was that the Minnesota tax was a problem precisely because it singled out certain newspapers for a tax not paid by others. Had Minnesota merely imposed a uniform sales or use tax on all businesses (including
newspaper publishers), there would have been no First Amendment issue.

Also, Justice O'Connor emphasized that this case was not comparable to *Grosjean* in that there was no evidence that Minnesota's discriminatory tax was established to punish large newspapers for their editorial views. But the potential for such abuses was enough to render the tax unconstitutional, O'Connor said.

In 1987 the Supreme Court overturned another state taxation scheme that singled out some media for taxes not paid by others. This case involved an Arkansas sales tax that applied to general interest magazines but not to newspapers or to specialized magazines (e.g., religious, professional, trade and sports publications). In *Arkansas Writers' Project v. Ragland* (481 U.S. 221), the Supreme Court ruled the tax unconstitutional, relying on much the same rationale as in the *Minneapolis Star and Tribune* case.

In fact, the court said the Arkansas tax was even more flagrantly unconstitutional than the one in Minnesota because it required government officials to base a tax break on the content of the media. "...(O)fficial scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press," Justice Thurgood Marshall wrote for the majority.

Marshall was saying, in effect, that any tax giving some media favorable treatment while not extending the benefit across the board is unconstitutional. However, the court did not specifically rule out the possibility that a state could impose a tax on entire categories of media, taxing all newspapers while exempting all magazines, for instance.

The ruling produced a strong dissent from Justices Antonin Scalia and William Rehnquist (who was by then the Chief Justice). Writing the dissenting opinion, Scalia said that instead of promoting press freedom, the ruling would actually undermine other government tax breaks based on content, such as subsidies of public broadcasting, educational publications and the arts in general.

In 1989, the Supreme Court continued in this pattern by overturning a Texas tax system that granted sales tax exemptions to religious books, magazines and newspapers but not to secular publications. In *Texas Monthly v. Bullock* (489 U.S. 1), the majority ruled that the Texas tax scheme was unconstitutional because it violated the First Amendment's requirement of separation of church and state. In effect, the tax break was an unconstitutional state action to subsidize religion, they ruled. In a separate opinion, Justice Byron White said the tax scheme was invalid because it violated the First Amendment's free-press guarantees. Either way, the Texas plan was held to be just as unconstitutional as other methods of taxing some media while exempting others based on their content or size.

On the other hand, in 1991 the Supreme Court again made it clear that the media are subject to the same taxes as other businesses--as long as the tax does not improperly single out the media. Ruling in *Leathers v. Medlock* (499 U.S. 439), the court voted 7-2 to uphold an Arkansas sales tax that applied to cable and satellite television services--as well as to utilities, hotels and a variety of other businesses. Writing for the court, Justice Sandra Day O'Connor said this tax was not like the taxes on the media that the high court had previously overturned. Justice O'Connor wrote:
The (Arkansas) tax does not single out the press and does not therefore threaten to hinder the press as a watchdog of government activity....There is no indication in this case that Arkansas has targeted cable television in a purposeful attempt to interfere with its First Amendment activities.

Justices Thurgood Marshall and Harry Blackmun dissented, arguing that this kind of sales tax could be used to inhibit freedom of expression. They were especially troubled by the fact that the Arkansas tax applied to pay-TV services but not to newspaper and magazine subscriptions. Nonetheless, the court upheld the tax.

The Supreme Court did, however, send the case back to the Arkansas state courts to determine whether cable companies should get a tax refund for a two-year period when the tax applied to cable systems but not to other pay-TV services. (When the tax was first imposed on cable TV, it did not apply to satellite TV, but the Arkansas Legislature changed that to avoid the legal problems inherent in singling out one type of pay-TV service for a tax that did not apply to other pay-TV services).

A week after it upheld the Arkansas cable television tax, the Supreme Court disposed of three other cases involving taxes on the media. The court declined to review state court decisions on media taxes in Tennessee and Iowa. But in the third case, Miami Herald v. Department of Revenue (499 U.S. 972), the high court issued an order directing the Florida Supreme Court to reconsider the validity of a sales tax that applied to magazines but not newspapers. The state court complied with the U.S. Supreme Court's order--and again ruled that the state cannot tax just magazines. Such a tax is improper because it is based on the content, the court ruled in 1992 (Department of Revenue v. Magazine Publishers of America, 604 So.2d 459).

To summarize, these Supreme Court decisions on media taxation basically say that the media may not be taxed in a discriminatory fashion. If some media must pay a tax that does not apply to others based on their content or their size, the tax is unconstitutional. But if the tax applies across the board to similar media--and especially if it applies to other businesses as well--it is valid.

OTHER PRIOR RESTRAINT QUESTIONS

The twentieth century was a time of government regulation, an era when many forms of activity were brought under government supervision for the first time. When the targeted activity involved the communication of ideas or information, however, the regulation has often been challenged as a violation of the First Amendment. This has forced the nation's courts--and ultimately the Supreme Court--to look at the propriety of government control of expressive activities of many kinds. This section summarizes some of the most important of these questions.
Censorship and the Stock Markets

Does the federal government have the right to prohibit the publication of newsletters offering advice to stock market investors by people with questionable backgrounds? Is this kind of prior restraint acceptable despite the First Amendment? Or does the First Amendment protect the right to publish such newsletters, regardless of the publisher’s past misdeeds?

That question was raised in a 1985 Supreme Court decision, *Lowe v. Securities and Exchange Commission* (472 U.S. 181). Under the federal Investment Advisers Act, the SEC is empowered to regulate the dissemination of investment advice, even when the advice is in the form of a publication that would seem to be protected by the First Amendment. The act exempts "bona fide" newspapers and magazines.

Christopher Lowe was convicted of mishandling a client’s funds, and the SEC canceled his registration as an investment adviser. However, he continued to publish a financial newsletter. When the SEC tried to stop him from publishing his newsletter, he argued that he had a First Amendment right to publish it.

The Supreme Court ruled that Lowe’s newsletter was in fact a "bona fide" publication and therefore exempt from regulation by the SEC. The high court did not rule on the larger issue of whether the SEC’s registration process violates the First Amendment when it is used to prevent a person from communicating investment advice. But the court did affirm Lowe’s right to publish his newsletter.

Writing for the majority, Justice John Paul Stevens noted that Lowe’s newsletter contained disinterested investment advice intended for numerous readers, not personalized advice for specific individual clients. The court said the SEC could regulate those who give individualized advice, as opposed to publishers who offer their analyses of various investments to a general audience. Lowe’s newsletter was published regularly, and it did not promote any stocks in which Lowe had a financial interest, the court pointed out. Thus, Lowe qualified as a "bona fide" publisher, not as an investment adviser.

In short, the court liberally interpreted the Investment Advisers Act’s exemption for "bona fide" publications, and thereby avoided the First Amendment implications of the act’s restrictions on giving investment advice. The court did not resolve the question of when the right to communicate opinions about the stock market is protected by the First Amendment.

However, a year after it lost the Lowe case at the Supreme Court, the SEC abandoned many of its efforts to regulate publications and broadcasts that give investment advice or discuss economic issues. Nevertheless, the SEC continued to act against financial publications that allegedly published misleading information that might affect the stock market. In 1988, the SEC lost such a case in the U.S. Court of Appeals, *SEC v. Wall Street Publishing Institute Inc.* (851 F.2d 365). That firm, the publisher of Stock Market Magazine, was accused of publishing articles that were little more than corporate "flackery" (as a federal judge put it) -- articles that were written by the companies or their public relations agencies and that were uniformly flattering.

The SEC wanted a court order requiring Stock Market Magazine to disclose the
origin of these articles. The appellate court ruled that neither the SEC nor the courts can delve into the sources or origins of magazine articles without violating the First Amendment. However, the appellate court did send the case back to a trial judge to determine whether some of the articles might have been paid advertising disguised as news. The court said that if the magazine was accepting payment for publishing the articles, the SEC might have the authority to force the magazine to disclose that fact. Accepting payment to publish an article would make the article a form of advertising; it should be identified as such.

In 2002, there was widespread criticism of stock analysts and corporations such as Enron for making false or misleading statements in an attempt to boost stock prices. The New York Stock Exchange and others responded by proposing rules to the SEC intended to pressure journalists to disclose news sources' possible conflicts of interest in stories about stock values. The rules would have prohibited analysts from having subsequent interviews with journalists who failed to include the required disclosures. The proposed rules were criticized by free press advocates as an end run around the First Amendment right of journalists to decide what to publish—and what not to publish. The stock markets and the SEC abandoned the proposal in 2003.

"Political Propaganda" and Foreign Films

Is it a form of censorship for the federal government to force motion picture theaters to label foreign films that the government dislikes as "political propaganda"? How would you feel if you went to see such a film, and there was a large warning notice at the beginning, written by the United States attorney general, calling the film "political propaganda"? Would that affect your attitude toward the film? Would it affect the First Amendment rights of the film's producers if you told your friends not to see the film because of the warning label? Would you think less of the movie exhibitor for showing a film that was "political propaganda"? Is there a stigma attached to those words that might affect the exhibitor's First Amendment rights?

Those were some of the questions the Supreme Court faced in a 1987 case, Meese v. Keene (481 U.S. 465). Under an obscure provision of the Foreign Agents Registration Act of 1938, the Justice Department has the right to require that foreign films be so labeled if the attorney general considers them to be political propaganda.

Attorney General Edwin Meese ordered that the "political propaganda" label be placed on three Canadian films, including an Academy-Award-winning short film entitled, "If You Love This Planet." All three films advocated greater efforts to protect the environment. Two of the films addressed the problem of acid rain—in which pollution from U.S. power plants causes environmental damage in Canada (as well as the United States).

The case began when Barry Keene, the California State Senate majority leader and a Democrat, arranged to show the films and objected to being stigmatized as an exhibitor of foreign "political propaganda." Keene won an order from a lower court removing the warning label.
The Supreme Court, in a 5-3 ruling, overturned the lower court and said the "political propaganda" label does not violate the First Amendment but instead gives the public additional information about the film. Writing for the court, Justice John Paul Stevens said the label "has no pejorative connotation" and is not tantamount to censorship. In effect, Stevens was saying this: when Congress has given the attorney general the authority to label foreign films that the government dislikes as "political propaganda," the labeling is not a form of censorship.

Dissenting, Justice Harry Blackmun, joined by two others, replied that "...it simply strains credulity for the court to assert that propaganda is a neutral classification." They said the term still has negative connotations, just as it did long ago when it was widely associated with the government information practices of Nazi Germany. For the government to be able to so stigmatize films that it dislikes clearly has a chilling effect on First Amendment freedoms, they argued.

Censoring American Films Overseas

There have also been legal battles concerning an issue that is the reverse of the one just discussed. While the U.S. government has labeled foreign films with which it disagrees as "propaganda," the government has also taken steps to prevent American filmmakers from exporting films with which it disagrees. That practice led to a court decision in 1988, and this time the government's film policies were held to violate the First Amendment.

In Bullfrog Films v. Wick (847 F.2d 502), the U.S. Court of Appeals ruled that the U.S. Information Agency may not grant or deny a certification that a film is "educational" based on whether the USIA agrees with the film's content. Under a 1949 international treaty called the Beirut Agreement, "educational, scientific and cultural films" (i.e., documentaries) are exempt from the very high import tariffs levied on foreign commercial movies by many countries. (Entertainment-oriented movies often draw large audiences and generate enough revenue to pay the import tariffs; documentaries usually do not. As a result, it is often economically unfeasible to export a documentary that is not classified as "educational, scientific or cultural" by its country of origin.)

Bullfrog Films produced a series of award-winning documentaries that dealt with such subjects as nuclear war, the Sandinista government of Nicaragua and the use of Agent Orange in Vietnam. The USIA denied them the educational classification, thus effectively making it unfeasible to distribute them abroad. Bullfrog argued that the regulations under which its films were denied the educational classification gave the USIA a free hand to approve films with which it agreed while rejecting films critical of U.S. policy.

The Court of Appeals agreed and ordered the USIA to draft content-neutral regulations to be used in determining which U.S.-made films will be given the overseas tax benefits inherent in being labeled as educational, scientific or cultural.

In 1988, the USIA adopted new rules that still considered the content of films in deciding whether they will be certified for tax-free export. USIA Director Charles Z. Wick announced that if the new rules should be declared unconstitutional by the courts, the USIA would simply withdraw from the Beirut Agreement.
and not certify any U.S. films as educational, scientific or cultural.

**Rock Concerts and the First Amendment**

If motion pictures are protected from direct government censorship by the First Amendment, what about rock concerts? May a city restrict the sound levels at rock concerts in a city park without violating the First Amendment?

In 1989, the Supreme Court ruled on this question in *Ward v. Rock Against Racism* (491 U.S. 781). For a number of years a group called Rock Against Racism sponsored annual concerts at a bandshell in New York City's Central Park. The group provided its own sound equipment and technicians--and drew repeated complaints from other park-goers and nearby residents about the sound level at RAR concerts.

Eventually the city set limits on the sound level and placed monitors beyond the seating area to measure the sound. When the prescribed volume was repeatedly exceeded during a concert sponsored by RAR, city officials ordered the sound turned down. The concert promoters refused to lower the volume and were cited for excessive noise several times as the concert continued. The city finally cut off electric power to the bandshell to halt the concert--and refused to allow RAR to hold future concerts in Central Park. The city also decided to use its own equipment and sound technician so the volume could be controlled at other concerts.

RAR eventually sued the city, contending that the restrictions on the sound level at rock concerts violated the First Amendment. RAR especially objected to the city's decision to use its own sound technician, arguing that this gave government officials excessive control over the content of protected expression.

When the case reached the Supreme Court, the court acknowledged that rock music is a form of expression protected by the First Amendment. However, the court also ruled that the city's limits on sound level were a reasonable time, place and manner restriction, not an abridgement of the First Amendment. The court majority said the city's policy has "no material impact on any performer's ability to exercise complete artistic control over sound quality." The court conceded that the city's use of its own technician to control sound levels was not the least intrusive means of achieving the city's goal (i.e., keeping the volume down). The city could have continued to monitor sound levels, issue citations, and halt concerts if the sound level remained too high. In earlier cases, governments had been required to use the least intrusive means of regulating the time, place and manner of First Amendment activities. However, the court dropped that requirement and said that it is no longer necessary that time, place and manner restrictions on First Amendment freedoms be as non-intrusive as possible.

Dissenting, Justices Marshall, Brennan and Stevens objected to the broad sweep of the court's decision:

No one can doubt that government has a substantial interest in regulating the barrage of excessive sound that can plague urban life. Unfortunately, the majority plays to our shared impatience with loud noise to obscure the
damage that it does to our First Amendment rights. Until today, a key safeguard of free speech has been government’s obligation to adopt the least intrusive restriction necessary to achieve its goals. By abandoning the requirement that time, place and manner regulations must be narrowly tailored, the majority replaces constitutional scrutiny with mandatory deference (to local officials’ decisions).

Justice Marshall protested that giving the city a free hand to set volume limits before a concert was an improper prior restraint. Nevertheless, the court’s decision settled the question of government regulation of sound levels at rock concerts: the sound level may be limited--and government employees may be placed in charge of the equipment to make sure the limits are observed--without that violating the First Amendment. However, that does not mean government officials are free to control other aspects of performances at government-owned amphitheaters and arenas. For example, when officials in Burbank, California, banned all rock concerts while allowing other kinds of performances at a city-owned amphitheater, the U.S. Court of Appeals overturned that action as a First Amendment violation (Cinevision Corp. v. City of Burbank, 745 F.2d 560, 1984).

Censoring Computer Encryption Software

Another prior restraint controversy involves government restrictions on the distribution and especially the export of computer encryption software--software that allows computer messages to be encoded so unauthorized persons cannot read them. The federal government imposed these restrictions out of fear that terrorists or others who might threaten national security could use the encryption technology to engage in secret communications that could not be intercepted and monitored by law enforcement authorities.

Eventually these export restrictions were undermined by two federal appellate court decisions--and dropped by the federal government itself--in a series of legal actions that extended First Amendment protection to computer source code (i.e., the basic computer instructions built into software). Nevertheless, in the aftermath of Sept. 11, 2001, new proposals to restrict encryption technology have been considered by the Justice Department.

In 1999, the ninth circuit U.S. Court of Appeals overturned the original export restrictions in Bernstein v. U.S. Department of Justice (176 F.3d 1132). The court rejected the government’s concerns that the unregulated spread of encoded messages would aid criminals and terrorists, ruling 2-1 that the restrictions constituted an impermissible prior restraint. The court said the regulations gave virtual veto power to federal bureaucrats to prevent the free distribution of computer source code needed by cryptography academicians and scientists to exchange ideas about encryption.

Judge Betty Fletcher wrote that the regulations "strike at the heartland of the First Amendment" because this prior restraint applies "directly to scientific expression, vests boundless discretion in government officials, and lacks adequate procedural safeguards."
Shortly after the original Bernstein decision, the ninth circuit Court of Appeals voted to withdraw the ruling and reconsider the case en banc. But then the federal government itself liberalized the rules concerning the overseas distribution of encryption software. Under the new rules, most limitations on the export of encryption software were dropped altogether, leaving Americans free to export even the most powerful data-scrambling software without an export license. That also left Americans free to post encryption software on the internet--something else the federal government had opposed on the ground that it would make encryption software accessible overseas. After the rules were changed, the ninth circuit sent the Bernstein case back to a trial court to determine if the new regulations still constituted an unconstitutional prior restraint.

Meanwhile, in 2000 another federal appellate court ruled decisively that computer source code, including the code used for encryption, is fully protected by the First Amendment. In Junger v. Daley (209 F.3d 481), the sixth circuit U.S. Court of Appeals upheld law professor Peter Junger's right to place encryption software on his website, even though that would make it readily accessible to internet users overseas. Ironically, the federal government had allowed Junger to export his computer law textbook, which contained the same encryption software. But the government refused to authorize him to put the software on his website.

After affirming that computer code is protected by the First Amendment, the sixth circuit ordered a lower court to decide if Junger had a basis for challenging the liberalized federal rules governing the export of encryption software.

**Seizing Criminals' Royalties**

Is it an unlawful form of censorship for a state to seize profits or royalties a criminal receives for telling or writing about his/her crimes? Many states and the federal government have laws allowing the authorities to take criminals' publishing profits and give them to the victims of their crimes. These laws are often called "Son of Sam" laws because New York's pioneering law of this type was enacted after serial killer David Berkowitz, who called himself by that name, received lucrative offers to tell his story.

The Supreme Court addressed this issue in 1991. The court held that New York's "Son of Sam" law was unconstitutional because it imposed a special financial burden on communications--based on the content of the message. In Simon & Schuster v. New York State Crime Victims Board (502 U.S. 105), the court said New York would have to show a compelling state interest to justify a law that burdened First Amendment activities in this way--and that the state had failed to do so.

Writing for the court, Justice Sandra Day O'Connor said the law was "overinclusive" and therefore unconstitutional because it would apply to many legitimate literary works. Had it been in effect in an earlier era, the law would have allowed the state to seize the profits from works such as Henry David Thoreau's Civil Disobedience, O'Connor wrote. She added that some other laws of this type might be sufficiently different from New York's law to be valid.

Under the New York law, criminals were required to give up the royalties and profits from books, movies and other communications that in any way concerned
their crimes. The money was then placed in a fund to compensate crime victims.

The law was challenged by the publishing house of Simon & Schuster, which paid Henry Hill, a former mafia figure, nearly $100,000 for his story about his life as a mobster who became a government informant. The resulting book, *Wiseguy*, became a best seller and was made into a widely acclaimed movie, "Goodfellas." Simon & Schuster was holding another $27,000 that it owed to him when the Crime Victims Board demanded the money. Instead of complying, the publisher challenged the Son of Sam law—and prevailed when the Supreme Court declared the law to be unconstitutional.

In the years since the *Simon and Schuster* Supreme Court decision, several states have enacted narrower laws to give crime victims any money earned by convicted felons for telling the stories of their crimes. These laws generally apply only to persons actually convicted of a crime and are limited to money earned for a specific, detailed account of the crime.

While some of these laws have survived legal challenges, in 2002 the California Supreme Court overturned such a law in the case of *Keenan v. Superior Court* (27 C. 4th 413). Barry Keenan, who kidnapped Frank Sinatra, Jr., son of the famous vocalist, in 1963, earned a reported $1 million for the movie rights to his story three decades later. The court rejected Sinatra’s attempt to seize Keenan’s earnings under the California "Son of Sam" law, holding that the law was so broad that it could be used to interfere with the right of authors to profit from works that happen to discuss a crime in detail.

The California legislature responded to the *Keenan* decision by enacting a new law under which victims of violent crimes may sue for damages for up to 10 years after a felon is discharged from parole. Previously, victims could only sue for one year from the time a crime was committed.

The new law was designed to allow victims to sue criminals without violating the First Amendment right of criminals to sell their stories. California Gov. Gray Davis said the new law is "an ingenious way of getting the same result." He added, "(a criminal) can still write a book or produce a movie..., but the financial rewards will end up in the pockets of victims, not in the pockets of criminals."

**Liability for Inspiring Crimes**

Another troubling First Amendment question involves holding the communications media accountable for crimes committed by readers or viewers who were allegedly inspired by a movie, website, television show, book, news story, magazine article or an advertisement. A number of such cases have arisen recently. Although they may involve subsequent punishments rather than prior restraints, the First Amendment issues they raise should be discussed here.

In 1998, the Supreme Court refused to intervene in a case where a book allegedly facilitated a crime: *Rice v. Paladin Enterprises*, (128 F.3d 233, 1997). In this case, the publisher of a book called *Hit Man: A Technical Manual for Independent Contractors* was sued by the families of three people who were killed by a man who followed the detailed instructions in *Hit Man*. The publisher sought to have the lawsuit dismissed on First Amendment grounds, but a federal appellate court held
that this book, with its "extraordinary comprehensiveness, detail and clarity" in
describing how to commit murder, is not exempted from civil lawsuits by the First
Amendment. The court held that a publisher can be sued by those who are injured
(or the families of those who are killed) in this type of situation.

The appellate court called the 130-page book a "step-by-step murder manual, a
training book for assassins." Because it was intended to train potential murderers
and not merely to entertain, it falls outside the scope of the First Amendment, the
appellate court ruled.

When the Supreme Court refused to intervene, the families were free to take
their case against the publisher to trial. This case caused alarm among media
organizations. Publishers, broadcasters and filmmakers, among others, urged the
Supreme Court to hear the case, arguing that the same rationale could be used in
lawsuits alleging that a variety of books, magazines, scientific and military manuals,
movies and other media might have inspired or assisted someone who committed a
crime.

Similar issues were also raised in several other widely publicized recent cases,
including one in which an Oakland, Mich. jury ordered the producers of the Jenny
Jones television talk show to pay almost $30 million in damages to the family of a
man who was killed by another man who had appeared with him on the show. The
victim said (on camera) that he had a homosexual interest in the man who later
shot and killed him. In 2002, a Michigan appellate court overturned the jury ver-
dict, holding that the show's producers "had no duty to anticipate and prevent the
act of murder committed by (a guest) three days after leaving defendants' studio
and hundreds of miles away" (Graves v. Warner Bros., 656 N.W.2d 195).

In 1999, the U.S. Supreme Court declined to intervene in a similar case where
a Louisiana appellate court held that the family of a shooting victim could sue the
producers of the movie, Natural Born Killers, if they could prove that the producers
intended to inspire others to commit violent acts. In Byers v. Edmonson (712 So.2d
681, cert. den. 526 U.S. 1005), the Supreme Court refused to hear an appeal of the
Louisiana court's ruling, which cleared the way for a lawsuit by the family of Patsy
Byers, a convenience store clerk who was seriously wounded by a couple who had
repeatedly watched Natural Born Killers and then went on a crime spree.

The Byers family never proved that filmmaker Oliver Stone and others in-
volved in producing this movie actually intended to inspire violent acts by viewers,
and a Louisiana judge eventually dismissed the case, ruling that Stone and the
movie's distributor were protected by the First Amendment. However, this legal
victory, coming only after lengthy (and costly) litigation, does little to protect the
media from other lawsuits by crime victims or their families when a crime is
committed by someone who watched a movie or television program--or read a
book, a news story or a magazine article--about a similar crime.

Although lawsuits alleging that the media inspired a crime are becoming more
commonplace, this is not a new phenomenon. Nearly a decade before these cases
arose, a family sued Soldier of Fortune magazine and won a large damage award
because the magazine published an advertisement that led to a murder for hire. A
federal appellate court eventually upheld the award and dismissed the magazine's
First Amendment arguments (Braun v. Soldier of Fortune Magazine, 968 F.2d 1110,
In 1985, the magazine carried an ad from an unemployed Vietnam veteran who described himself as a "37-year-old professional mercenary (who) is discrete (sic) and very private. Body guard, courier and other special skills. All jobs considered." He accepted an assignment to kill a man in Atlanta and was later caught and convicted of the crime. The family sued the magazine for wrongful death; a jury awarded the family $4.3 million.

A number of publishers and industry groups joined in a petition to the Supreme Court to review this decision, arguing that it could have a serious chilling effect on First Amendment freedoms. However, the high court declined to hear the case, leaving the judgment intact.

**Censoring Confidential Information**

Another form of prior restraint results from laws and court orders forbidding the media to publish confidential information, often concerning crimes and court proceedings. This creates legal problems that fall into several areas, including fair trial-free press (discussed in Chapter Seven) and the privacy rights of crime victims (discussed in Chapter Five). This chapter discusses a series of Supreme Court decisions concerning the censorship questions inherent in these laws.

One of the most difficult problems in this area involves laws forbidding the media to reveal the names of crime victims, particularly sex crime victims. Although a good case can be made for protecting the privacy of crime victims, the Supreme Court has held that the media have a right to publish their identities if the information was lawfully obtained from court records. The court so ruled in 1975, overturning a Georgia privacy judgment against a broadcaster who published a rape victim's name. In that case (*Cox Broadcasting v. Cohn*, 420 U.S. 469), a television reporter had obtained the victim's name from a court record, and the station later faced a civil invasion of privacy suit for broadcasting it. (No criminal charges were filed against the station, although publishing the name was illegal.) The U.S. Supreme Court said the First and Fourteenth Amendments do not permit either criminal sanctions or civil invasion of privacy lawsuits for the publication of truthful information lawfully obtained from court records. However, the states can keep victims' names secret if they wish.

Two years later the U.S. Supreme Court overturned an Oklahoma court order that banned publication of the name of an 11-year-old boy allegedly involved in a fatal shooting, in *Oklahoma Publishing v. District Court* (430 U.S. 377, 1977).

Reporters attended the boy's initial detention hearing and learned his name there. Local newspapers and broadcasters carried the name, but a judge ordered them not to publish the boy's name or picture again, and the Oklahoma Publishing Company appealed the order to the state Supreme Court, which upheld it. The U.S. Supreme Court reversed, ruling that the order amounted to prior censorship in violation of the First and Fourteenth Amendments. The high court relied on *Cox Broadcasting* as a precedent and said there was no evidence that the press acquired the information unlawfully or even without the state's permission.

In 1979, the Supreme Court overturned a West Virginia law that imposed...
criminal sanctions on newspapers for publishing the names of juvenile offenders. In this case (*Smith v. Daily Mail*, 443 U.S. 97), a newspaper published the name of a youth who killed another student at a junior high school. Reporters learned his name by monitoring police radio broadcasts and talking to eyewitnesses.

The Supreme Court again ruled that the media cannot be punished for publishing truthful information that was lawfully obtained. One aspect of the law that particularly amazed Justice William Rehnquist, who wrote a concurring opinion, was that it prohibited newspaper publication of juvenile names while not outlawing a broadcast of the same information.

The publication of another kind of confidential information produced a 1978 U.S. Supreme Court decision, *Landmark Communications v. Virginia* (435 U.S. 829). The case involved the *Virginian Pilot*’s coverage of the proceedings of a state commission reviewing a judge’s performance in office. The paper published the name of the judge, among other information. Virginia had a law making these proceedings confidential. The paper was criminally prosecuted and fined for publishing this information and the state Supreme Court affirmed the judgment.

The U.S. Supreme Court ruled that the Virginia law violated the First Amendment. The high court said judges have no greater immunity from criticism than other persons or institutions. When a newspaper lawfully obtains information about a proceeding such as the one in question, the paper may not be criminally punished for publishing what it learns.

In 1989, the Supreme Court again addressed this kind of issue in *Florida Star v. B.J.F.* (491 U.S. 524). Under Florida law in effect then the media were forbidden to publish the names of sex crime victims. However, a reporter for the weekly *Florida Star* copied the name of a rape victim from a police report that was posted on the Jacksonville Sheriff’s pressroom wall. The name was published, and the crime victim sued. She won a $97,000 judgment from the newspaper, but the Supreme Court overturned the verdict, ruling that the newspaper could not be penalized for publishing the name when it was lawfully obtained from a police record—even though the police may have violated the Florida law by making the information available to a reporter. However, the court’s 6-3 majority declined to rule that the media are always exempt from liability for publishing information that they lawfully obtain. The court said that *Cox Broadcasting* and the other earlier cases had actually stopped short of ruling out all liability for the truthful publication of lawfully obtained information. But when judicial records are involved, the court seemed to be saying that the media are free to publish whatever information they can lawfully obtain.

An interesting footnote to the *Florida Star* case is that the state law forbidding the mass media to publish the names of sex crime victims was eventually ruled unconstitutional by the Florida Supreme Court. In *Florida v. Globe Communications Corp.* (648 So.2d 110, 1994), the state court ruled that the Florida law was too broad because it banned the publication of victims’ names without any consideration of the circumstances—and also too narrow because it applied only to the mass media. This case arose when the *Globe*, a tabloid newspaper, published the name of the woman who accused William Kennedy Smith, a nephew of former President John F. Kennedy and Sen. Edward Kennedy, of rape. As was true in the *Florida*
Star case, the Globe lawfully obtained the alleged victim's name, and the woman eventually agreed to the release of her name—even appearing on national television after Smith was acquitted of the charge. When the Globe was criminally prosecuted for publishing the name, a trial court, a state appellate court and eventually the Florida Supreme Court all agreed that the state law was unconstitutional.

Less than a year after the Florida Star decision, the Supreme Court ruled on another Florida case involving the right to publish information that was lawfully obtained. In Butterworth v. Smith (494 U.S. 624, 1990), a reporter who had testified before a grand jury wanted to write about the things he told the grand jury—including alleged wrongdoing by a local public official. But under Florida law, it was illegal for a grand jury witness to disclose his/her testimony ever.

In overturning the Florida law, the Supreme Court ruled that it is an unconstitutional prior restraint to prohibit a witness from publicly disclosing his own testimony even after the grand jury investigation ends. Writing for the court, Chief Justice William Rehnquist pointed out that this case did not involve the reporter disclosing anything he learned from a secret grand jury investigation. Instead, it was merely a case of a journalist being forbidden to publish information that was already in his possession before he testified. And that violates the First Amendment, the court held.

One noteworthy limitation on the media's right to publish lawfully obtained information involves the pretrial discovery process when a news organization is involved in a lawsuit. The Supreme Court has held that a judge can forbid a newspaper to publish information it obtains during discovery. In Seattle Times v. Rhinehart (467 U.S. 20, 1984), the high court said the Seattle Times and another paper could be forbidden to publish information they learned while defending a libel suit against a religious group. During discovery, the plaintiff (a minister) was ordered to provide his organization's membership lists, tax returns and other financial information. The Supreme Court upheld the trial judge's order forbidding the newspapers to publish this material. The court said they would be free to publish the same information if they learned of it independently, but when a plaintiff is compelled to hand it over in a libel case, the judge is entitled to require that it remain confidential. Such a court order may be a prior restraint, but the Supreme Court held that it was a legitimate one, despite the First Amendment.

In 1990, a somewhat similar prior restraint situation arose in connection with the drug trafficking trial of former Panamanian dictator Manuel Noriega. Cable News Network obtained tape recordings of some of Noriega's telephone conversations with his lawyers. After CNN broadcast a portion of the tapes, a federal judge ordered CNN not to air any more of them. The Supreme Court rejected an emergency appeal by CNN, leaving the order in effect. The judge eventually set aside the order, ruling that the tapes would not threaten Noriega's right to a fair trial. However, in 1994, the U.S. Attorney's office in Miami filed criminal contempt of court charges against CNN for airing excerpts from the tapes while the order was in effect. As Chapter Seven explains, CNN was convicted of contempt and fined.

The question of judicial censorship arose again in 1995 in a widely noted case involving Business Week magazine. Business Week obtained 300 pages of docu-
ments that Procter & Gamble Co. had filed in a complex lawsuit against Banker's Trust Co. In the lawsuit, P&G alleged that it suffered large losses on its investments because of the misdeeds of Banker's Trust. The documents, like many others filed with the court during the pretrial discovery process, were sealed—not open for public inspection. Business Week obtained them from one of the lawyers involved in the case, but a federal judge ordered Business Week not to publish information from the documents. After a series of legal maneuvers, the magazine was eventually permitted to publish information from the documents. Later, the sixth circuit U.S. Court of Appeals ruled that it was improper for the judge to censor the magazine in the first place. In Procter & Gamble Co. v. Banker's Trust Co. (78 F.3d 219), a 2-1 majority ruled that the judge did not have the very compelling legal reasons needed to justify an act of prior restraint of the press. The majority noted that the documents were nothing more than routine filings in a lawsuit; their publication would not endanger any fundamental government interest. While the appellate court ruling was a victory for freedom of the press, the case also raised new questions about the routine practice of sealing documents filed during lawsuits so they are off limits to the press and public.

Why was this case decided differently than the Seattle Times case, where the Supreme Court upheld a judge's right to order a newspaper not to publish court documents? The Seattle Times was a party to a lawsuit, and the opposing side was compelled by a court order to hand over confidential information. Here Business Week was not a party to the underlying lawsuit and obtained the court documents independently and lawfully. Under those circumstances, there was a far less compelling justification for a judge to impose a prior restraint on the media. The Seattle Times case is a rare exception to the rule that the media may not be forbidden to publish court documents that they lawfully obtain.
A SUMMARY OF PRIOR RESTRAINTS

What Is a Prior Restraint?
A prior restraint is an act of government censorship to prevent facts or ideas that the government considers unacceptable from ever being disseminated. It is a far greater abridgment of freedom of expression than a subsequent punishment system, which allows publication but punishes the publisher afterward for any harm that may result.

Are Prior Restraints Permitted in America?
Under the First Amendment, prior restraints are permitted only under extremely compelling circumstances, with the government agency that seeks to impose such censorship required to carry a very heavy burden of proof to justify it.

When Would a Direct Prior Restraint Be Constitutional?
In the "Pentagon Papers" case, the Supreme Court ruled that prior censorship of the news media would be permissible if the government could prove that irreparable harm to national security would otherwise occur. However, the government was unable to prove national security was sufficiently endangered to justify prior restraint in that case.

Are There Other Rules Concerning Prior Restraints Today?
Governments may lawfully regulate the time, place and manner in which First Amendment activities occur, provided the rules are content neutral. Laws or government actions that unduly restrict literature distribution or other free expression activities on public property may constitute prior restraints; they have often been invalidated by the courts. Private property owners, on the other hand, may usually prohibit First Amendment activities on their property, although some states recognize limited free expression rights at quasi-public places such as large shopping malls. Discriminatory taxes that single out some media for special treatment have also been declared unconstitutional as prior restraints. Government actions that limit the freedom to export motion pictures or that unduly restrict music performances at publicly owned concert facilities have also been overruled as improper prior restraints. Laws forbidding racial and religious "hate speech" also have been overturned on First Amendment grounds.

May the Media Be Forbidden to Identify Crime Victims?
Laws or court orders forbidding the media to publish information they lawfully obtain are usually unconstitutional, even if the information is legally confidential (e.g., some crime victims' names). While the media may not have a right of access to this kind of news, governments cannot ordinarily prevent its publication once the media have it--particularly if it was obtained from a public record.