

# Property and Speech

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## I. INTRODUCTION

This Article analyzes the impact of the First Amendment's guarantee of freedom of speech on the use, enjoyment and control of property. The Article analyzes this impact with reference to "The First Amendment as Sword" and "The First Amendment as Shield."

In "The First Amendment as Sword," the Article discusses how the First Amendment has been asserted to interfere with a property owner's use or control of tangible property and to limit the protection of an owner's property interests. The following areas will be covered: (1) Picketing and Protests; (2) Boycotts; (3) Governmental Economic Regulation; (4) Home Solicitation; (5) "Fair Use" and Copyright Protection; and (6) Access to Public Property.

In "The First Amendment as Shield," the Article discusses how the First Amendment has been asserted to invalidate or limit otherwise permissible government regulation of property ownership or use by enterprises engaged in the "business of expression." The following areas will be covered: (1) Regulation of Sexually-Oriented Entertainment; (2) Licensing of the Business of Expression; (3) Billboard and Sign Regulation; (4) Illegal Conduct and the Business of Expression; (5) Regulation of Newspapers and Publishers; and (6) Regulation of Broadcasting, Cable and the Internet.

The Article concludes, not surprisingly, that the First Amendment's guarantee of freedom of expression has a very significant impact on the use, enjoyment and control of property. The First Amendment operates as a sword to enable persons engaged in expressive activity to interfere with an owner's use or control of

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tangible property and to avoid liability for interference with an owner's property interests. The First Amendment also operates as a shield to invalidate or limit otherwise permissible regulation of property use and business operations by enterprises engaged in the "business of expression."

This result should not be surprising in light of the function of the First Amendment in the American constitutional system. The Supreme Court has interpreted the First Amendment's guarantee of freedom of expression very expansively, and the constitutional protection afforded to freedom of expression is perhaps the strongest afforded to any individual right under the Constitution. It is also fair to say that the constitutional protection afforded to freedom of expression in the United States is seemingly unparalleled by other constitutional systems, and that, as a constitutional matter, the value of freedom of expression prevails over other democratic values, such as equality and privacy.<sup>1</sup>

The strong constitutional protection afforded to freedom of expression is reflected in what this Article calls "the law of the First Amendment."<sup>2</sup> The "law of the First Amendment" consists, in large part, of concepts, principles and specific doctrines that the Supreme Court has developed over the years in the process of deciding First Amendment cases. These concepts, principles, and doctrines are supplemented by a residual balancing approach, which, to a degree, consists of subsidiary doctrines that have resulted from the Court's precedents dealing with particular kinds of interferences with freedom of expression. The components of the "law of the First

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1. Similarly, the First Amendment provides greater protection to freedom of expression than is generally provided under international human rights norms. For example, Article 20 of the International Covenant on Civil and Political Rights requires that "[a]ny propaganda for war" and "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" be "prohibited by law." See International Covenant of Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), ¶20, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Mar. 23, 1976). Because "war propaganda" and "hate speech" are, in most circumstances, protected by the First Amendment, when the Senate ratified the ICCPR, the resolution of ratification contained a reservation to the effect that "Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States." 138 CONG. REC. § 4781-01 (1992).

2. See generally Robert A. Sedler, *The First Amendment in Litigation: The "Law of the First Amendment,"* 48 WASH. & LEE L. REV. 457 (1991).

Amendment,” then, are concepts, principles, specific doctrines, and what may be called “balancing/subsidiary doctrines.”

In practice, the constitutional protection of freedom of expression is very much a matter of identification and application. In many cases, once the appropriate concept, principle, specific doctrine or “balancing/subsidiary” doctrine has been identified and applied, the parameters for the resolution of the First Amendment issue are established and the result is often fairly clear. To this extent, the “law of the First Amendment” may be considered settled. While a large number of First Amendment cases arise in practice and some come before the Supreme Court every term, these cases will be resolved under the “law of the First Amendment.”<sup>3</sup>

The development of the “law of the First Amendment” and its application to questions of property and speech has continued on the same course throughout the years of the Rehnquist Court. It is this Article’s submission that, in the area of the First Amendment, the so-called “liberal-conservative” divisions that may appear in other areas are generally absent. The Court as an institution has demonstrated a strong commitment to the constitutional protection of freedom of expression. The differences that may appear among members of the Court in First Amendment cases are generally non-ideological, and usually involve simply a disagreement over the application of the “law of the First Amendment” to specific situations. With this introduction, the Article now turns to “The First Amendment as Sword” and “The First Amendment as Shield.”

## II. THE FIRST AMENDMENT AS SWORD

Here we will discuss how the First Amendment has been asserted by those engaged in expressive activities to interfere with a property owner’s use or control of tangible property and to limit the protection of the owner’s property interests.

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3. For an update of the “Law of the First Amendment,” see Robert A. Sedler, *The Settled Nature of American Constitutional Law*, 48 WAYNE L. REV. (SPECIAL ISSUE) 173, 283–325 (2002).

### A. Picketing and Protests

It has long been recognized that picketing is a form of protected speech under the First Amendment.<sup>4</sup> Public streets and sidewalks in front of a home or place of business are public forums. The First Amendment guarantees access to a public forum for purposes of expression, and a state can regulate such access only by content-neutral and reasonable time, place and manner limitations.<sup>5</sup> In order for a particular regulation to be sustained as a reasonable time, place and manner regulation, it must serve a significant governmental interest and it must leave open ample alternative channels of communication.<sup>6</sup> This means that, as a general proposition, protestors have a First Amendment right to interfere with a person's use and enjoyment of property by picketing and protesting in front of his or her home or business. Early cases involved protests against racial discrimination, such as picketing in front of the home of a city mayor to protest school segregation,<sup>7</sup> and distribution of leaflets accusing a real estate broker of engaging in "blockbusting."<sup>8</sup> More recent cases involved protests against abortion, such as picketing in front of the home of a doctor who performs abortions<sup>9</sup> or protesting in front of

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4. *Thornhill v. Alabama*, 310 U.S. 88 (1940). The early cases involved picketing in connection with a labor dispute, and the scope of permissible labor picketing is governed by federal and state labor relations law.

5. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

6. *See Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).

7. *See Gregory v. City of Chicago*, 394 U.S. 111 (1969).

8. *See Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

9. *See Frisby v. Schultz*, 487 U.S. 474 (1988). In *Frisby*, in response to picketing by anti-abortion protestors in front of the home of a doctor who performed abortions, a city enacted an ordinance that, by its terms, prohibited "engag[ing] in picketing before or about the residence or dwelling of any individual." *Id.* at 474. The Court gave the law a narrow construction, so as to be limited to "focused picketing" directed at a particular residence. *Id.* As narrowed, the law did not reach walking through residential neighborhoods or even walking a route in front of an entire block of houses. Thus, the law advanced the asserted interest in promoting residential privacy without substantially interfering with the protestors' ability to convey their message to the general public and to the doctor who was the target of their protest, and therefore could be upheld as a reasonable time, place and manner limitation.

In *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 776 (1994), the Court held an injunction creating a 300-foot buffer zone around the homes of persons who worked in an abortion clinic to be violative of the First Amendment. The Court noted that the zone surrounding the residences was much larger than that approved in *Frisby*, and that a limitation on the time and

abortion clinics. In these cases, the First Amendment issue was whether a particular restriction on the protests could be upheld as a reasonable time, place and manner limitation. The Court held unconstitutional an injunction ordering anti-abortion protestors to refrain from attempting to “counsel women entering abortion clinics who indicated that they did not wish to be ‘counseled.’”<sup>10</sup> It upheld provisions of an injunction establishing a thirty-six-foot buffer zone around the entrances to an abortion clinic, but struck down provisions prohibiting anti-abortion protestors from making uninvited approaches to women seeking to enter the clinic and from displaying “observable images” of aborted fetuses and the like.<sup>11</sup> In its latest pronouncement on the subject, the Court upheld a state law prohibiting anti-abortion protestors within 100 feet of an abortion clinic from coming within eight feet of a person going to the clinic without that person’s consent to persuade her not to have an abortion.<sup>12</sup>

It should be emphasized that interference by picketing and protests with the use and enjoyment of property is possible only because the picketing and protests take place on adjacent public streets and sidewalks. Because the adjacent public streets and sidewalks constitute a public forum for First Amendment purposes, the picketers and protestors have a right of access therein, and the state can restrict the picketing and protests only by reasonable time, place and manner limitations. However, the picketing and protests would lose their First Amendment protection if they carried over onto privately owned property because the protestors would then be engaging in an illegal trespass, and conduct that is otherwise illegal does not become any less so when it is carried on for purposes of expression.<sup>13</sup>

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duration of picketing and on the number of pickets outside a smaller zone would advance the asserted interest in protecting residential privacy. *Id.* at 775.

10. *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997).

11. *Madsen*, 512 U.S. 753.

12. *Hill v. Colorado*, 530 U.S. 703 (2000).

13. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

### B. Boycotts

The First Amendment's guarantee of freedom of association protects the right to organize boycotts of businesses and products to advance political objectives.<sup>14</sup> A boycott directly interferes with property rights by urging people to refrain from dealing with businesses that are the target of the boycott and to refrain from purchasing the boycotted products. State tort laws impose liability for wrongful interference with business interests, but those engaged in boycotts to achieve political objectives have successfully asserted the First Amendment as a bar to the imposition of liability under these laws. The leading case on this issue is *NAACP v. Claiborne Hardware Co.*<sup>15</sup> In 1966, African-American residents of a Mississippi city, led by the NAACP, organized a boycott of white-owned businesses in the city as a means of pressuring the businesses to hire African-American employees and the city and county governments to take actions such as desegregating the public schools and public facilities, hiring African-American police officers, making improvements in African-American residential areas, selecting African-Americans for jury duty, and ending the abusive treatment of African-Americans by police officers and government officials.<sup>16</sup> Although some incidents of violence took place in connection with the boycott, the boycott was, for the most part, peaceful, and it took the form of speeches and non-violent picketing urging African-American residents not to patronize the boycotted businesses.<sup>17</sup> The state supreme court imposed liability against the NAACP for all losses to the businesses caused by the boycott and enjoined the boycott's continuation.<sup>18</sup>

The United States Supreme Court reversed.<sup>19</sup> It held that the First Amendment precluded the state from imposing liability for the boycott, except as to specific harm proven to have been caused by

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14. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

15. *Id.*

16. *Id.* at 898–900.

17. *Id.* at 903.

18. *Id.* at 894–96.

19. *Id.* at 934.

acts of violence.<sup>20</sup> The Court noted that “[t]he black citizens named as defendants in this action banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect,”<sup>21</sup> and that, “the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.”<sup>22</sup> The First Amendment’s guarantee of freedom of association, said the Court, protects “the right of the people to make their voices heard on public issues,”<sup>23</sup> and “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.”<sup>24</sup> The Court concluded that “[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.”<sup>25</sup>

The effect of *Claiborne Hardware* was to fully legitimize and protect the use of the boycott to achieve political objectives despite its interference with the property rights of the targets of the boycott. This means that the Southern Baptist Convention can organize a boycott of Walt Disney theme parks to protest the company’s policy of providing benefits to same-sex partners of employees.<sup>26</sup> This also means that groups can organize boycotts against the sponsors of television programs that feature sex and violence, or against the products of American companies that are produced abroad under substandard labor conditions.

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20. *Id.* at 933–34.

21. *Id.* at 907.

22. *Id.* (quoting *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981)).

23. *Id.* at 908.

24. *Id.* (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)).

25. *Id.* at 914.

26. The boycott began in 1997 and was joined by other conservative Christian groups. See Lori Sharn, *Southern Baptists May Boycott Disney*, USA TODAY, June 16, 1997, at 9A. It ended in 2005, with the Southern Baptist Convention saying that “[t]he boycott has communicated effectively our displeasure concerning products and policies that violate moral righteousness and traditional family values.” *Baptists End Disney Boycott*, N.Y. TIMES, June 23, 2005, at A17. Disney did not change its policy, and the boycott did not appear to have a significant financial impact on Disney’s operations.

### C. Governmental Economic Regulation

The First Amendment also has some impact on governmental economic regulation, in that regulatory statutes have been construed by the Court to not reach certain expressive activities. While Congress may prohibit secondary boycotts by labor unions as part of its “striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife,”<sup>27</sup> this prohibition has been construed to not prohibit the picketing of a secondary employer that is confined to persuading customers to cease buying the product of the primary employer.<sup>28</sup> Similarly, under the Noerr-Pennington doctrine,<sup>29</sup> there is immunity from antitrust liability for concerted efforts to restrain or monopolize trade by utilizing the First Amendment’s right of petition for redress of grievances. In *Noerr*, an association of railroads engaged a public relations firm to conduct a publicity campaign against the trucking industry, which, according to the antitrust complaint of the truckers, was “designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers.”<sup>30</sup> The truckers alleged that the sole motive for the campaign “was the desire on the part of the railroads to injure the

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27. *Claiborne Hardware*, 458 U.S. at 912 (quoting *NLRB v. Retail Store Employees Union*, 447 U.S. 607, 617–18 (1980) (Blackmun, J., concurring in part and concurring in the result)).

28. *NLRB v. Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58 (1964). It should also be noted that section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4) (2000), does not by its terms prohibit “publicity, other than picketing, for the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer.” *But see Retail Store*, 447 U.S. at 617–18 (Blackmun, J., concurring in part and concurring in the result). In *Retail Store*, the Court held that the prohibition on secondary boycotts does extend to a union’s picketing of title companies that sold the insurance policies of the insurance underwriter with whom the union had a labor dispute. *Id.* The Court concluded that because the title companies derived much of their revenue from the sale of the underwriter’s policies, the effect of the picketing could amount to a boycott of the title companies themselves. *Id.*

29. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

30. *Noerr Motor*, 365 U.S. at 129.

truckers and eventually to destroy them as competitors in the long-distance freight business.”<sup>31</sup> The complaint also alleged specific instances in which the railroads attempted to influence legislation by means of their publicity campaign, for example, that they persuaded the Governor of Pennsylvania to veto a law that would have permitted truckers to carry heavier loads over Pennsylvania roads.<sup>32</sup>

The Supreme Court held that the Sherman Act did not apply to the activities of the railroads.<sup>33</sup> The Court noted that the Sherman Act does not apply to state action, and therefore it also should not prohibit “two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.”<sup>34</sup> The Court went on to discuss the importance of the constitutional right to petition, stating that “[i]n a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.”<sup>35</sup>

Concluding that “[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms,” the Court held that the Sherman Act did not apply to the activities of the railroads, insofar as they comprised the “mere solicitation of governmental action with respect to the passage and enforcement of laws.”<sup>36</sup> Moreover, it did not matter that the sole purpose for the railroad’s exercise of the right of petition was to destroy the truckers as competitors for the long-distance freight business, or that the railroads made it appear that its propaganda was being circulated by independent groups. The Court noted:

Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of

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31. *Id.*

32. *Id.* at 129–30.

33. *Id.* at 145.

34. *Id.* at 136.

35. *Id.* at 137.

36. *Id.* at 138.

political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical.<sup>37</sup>

The Noerr-Pennington doctrine also immunizes concerted action to institute legal and administrative proceedings from antitrust liability.<sup>38</sup> The Court has made it clear that its interpretation of the antitrust laws to provide immunity for the exercise of the right of association and petition was influenced by First Amendment concerns, and, as a result, it has been unnecessary for the Court to decide whether this result is required by the First Amendment itself.<sup>39</sup>

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37. *Id.* at 141.

38. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). The Court stated:

We conclude that it would be destructive of rights of association and petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-à-vis their competitors.

*Id.* at 510–11.

There is a “sham” exception to the Noerr-Pennington doctrine. In *Noerr Motor*, the Court stated that “[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.” *Noerr Motor*, 365 U.S. at 144. In *California Motor Transport*, the Court held that the plaintiff had alleged facts that, if true, would come within the “sham” exception, such as that the defendants acted “to harass and deter [the plaintiffs] in their use of administrative and judicial proceedings, so as to deny them ‘free and unlimited access’ to those tribunals.” *California Motor*, 404 U.S. at 511, 516. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries*, the Court held that, with respect to litigation, the “sham” exception applied only if the litigation was “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits,” and if the baseless lawsuit concealed “an attempt to interfere *directly* with the business relationships of a competitor” through “the use [of] the governmental *process*—as opposed to the *outcome* of that process.” 508 U.S. 49, 60–61 (1993) (citations omitted).

39. In *Claiborne Hardware*, the Court discussed the First Amendment concerns expressed in *Noerr Motor* and noted that, like the railroads in *Noerr Motor*, the organizers of the boycott in *Claiborne Hardware* directly intended that the merchants would sustain economic injury as a result of the boycott. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 913 (1982). It then pointed out that, unlike the railroads in *Noerr Motor*, the purpose of the boycott in *Claiborne Hardware* was not to destroy legitimate competition, but to “vindicate rights of equality and freedom that lie at the heart of the Fourteenth Amendment itself.” *Id.* In *FTC v. Superior Court Trial*

### D. Home Solicitation

The First Amendment cannot, however, be used as a sword to force access to peoples' homes for purposes of expression. In addition to the property right of homeowners to exclude unwelcome entrants, persons also have a First Amendment right not to receive unwanted information in the privacy of their homes.<sup>40</sup> However, so long as the homeowner has not acted affirmatively to exclude the

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*Lawyers Ass'n*, 493 U.S. 411 (1990), the Court held that antitrust immunity did not extend to an agreement among District of Columbia lawyers representing indigent defendants to refuse to accept new appointments unless the District enacted legislation increasing their compensation. The Court held that this was a classic agreement in restraint of trade among competitors, and that, unlike *Noerr Motor*, in which the restraint of trade was the intended consequence of the public action, here the boycott was the means by which the lawyers sought to obtain favorable legislation. *Id.* at 424–25. It also rejected the lawyers' argument, in reliance on *Claiborne Hardware*, that their boycott was protected by the First Amendment. *Id.* at 427 n.10. The *Claiborne Hardware* boycott was designed to advance political objectives for the African-American residents of the city, while the boycott here was designed to obtain financial benefit for the lawyers by a "lessening of competition in the "boycotted market." *Id.* at 427 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508 (1988)). Because the boycott here had the economic objective to benefit the participants in the market, rather than the political objective recognized in *Claiborne Hardware*, the Court held that it was not entitled to First Amendment protection.

40. Thus, a homeowner has the "power to decide 'whether distributors of literature may lawfully call it a home,'" *Martin v. City of Struthers*, 319 U.S. 141, 148 (1943), and Congress may protect homeowner privacy by establishing a "do not receive" list of homeowners who do not want to receive advertisements for "sexually provocative" material and require mailers to remove their names from mailing lists. *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 736 (1970); see also *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004), *cert. denied*, 543 U.S. 812 (2004) (upholding against First Amendment challenge the national "do not call" registry, which allows individuals to register their phone numbers so that most commercial telemarketers are prohibited from calling them). The *Mainstream* court rejected the claim that the law violated First Amendment content neutrality because it did not include charitable and political calls in the registry. *Id.*

Because the media enjoy no greater First Amendment rights than the public at large and cannot claim exemption from laws of general application on the ground that they are engaged in the business of newsgathering, *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), the court held ABC news liable for the torts of breach of loyalty and trespass when two reporters gained access as employees to a food market and videotaped unwholesome food practices. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 510 (4th Cir. 1999). However, ABC could not be held liable for harm caused to the food market by the videotape in the absence of a showing of "malice" under the *New York Times* standard. *Id.* at 523–24.

In *Wilson v. Layne*, 526 U.S. 603, 614 (1999), the Court held that police officers violated the Fourth Amendment right of the person whose home was searched when they brought newspaper reporters with them to videotape and report the event. The Fourth Amendment violation was not obviated by the defendants' invocation of the First Amendment to justify their actions. *Id.* at 612–13.

particular solicitor, or solicitors in general, from approaching the home, the First Amendment can be used to effectively challenge government efforts to restrict or deny such access in the name of protecting homeowner privacy. Indeed, it is precisely because the homeowner has the right to exclude unwelcome entrants that there almost always will be “less intrusive and more effective measures to protect privacy.”<sup>41</sup> These laws sometimes take the form of prohibitions and sometimes of notice or permit requirements, but, beginning with cases brought in the 1940s by Jehovah’s Witnesses, whose religion mandates door-to-door canvassing to preach the gospel,<sup>42</sup> the Court has invariably held that they are unconstitutional as applied to religious, political, and charitable speech and solicitation.<sup>43</sup> An earlier case, decided before the Court held that commercial speech was entitled to First Amendment protection,<sup>44</sup> upheld a ban on commercial solicitation without advance homeowner consent against First Amendment challenge.<sup>45</sup> If such a case arose today, it would be decided in accordance with the commercial speech doctrine, and would likely be invalidated as restricting commercial

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41. *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 639 (1980).

42. See *Watchtower Bible and Tract Soc’y v. Village of Stratton*, 536 U.S. 150, 161 (2002).

43. The most recent case was *Watchtower Bible*, in which the Court invalidated an ordinance requiring individuals to obtain a permit (given to all who requested it) prior to engaging in door-to-door advocacy and to display on demand the permit containing the individual’s name. *Id.* The Court held that the law was not narrowly tailored to advancing the asserted interests in protecting homeowner privacy and preventing fraud. *Id.* at 168; see also *Citizens for a Better Env’t*, 444 U.S. 620 (considering solicitation permits that were required for charitable organizations and given only to those that used at least 75% of their receipts for charitable purposes); *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610 (1976) (considering an identification permit for canvassing or soliciting from house to house); *City of Struthers*, 319 U.S. 141 (considering a ban on door-to-door distribution of handbills, circulars or other advertisements); *Schneider v. State*, 308 U.S. 147 (1939) (considering a permit requirement for canvassing, soliciting or distributing circulars from house to house).

While a restriction on hours of solicitation could be sustained as a reasonable time, place and manner limitation, courts have generally held that the particular restriction does not satisfy this test. See, e.g., *N.J. Citizen Action v. Edison Twp.*, 797 F.2d 1250 (3d Cir. 1986); *City of Waukega v. Illinois Pub. Action Council*, 796 F.2d 1547 (7th Cir. 1986), *aff’d*, 479 U.S. 1048 (1987); *ACORN v. City of Frontenac*, 714 F.2d 813 (8th Cir. 1983).

44. The inclusion of commercial speech within the protection of the First Amendment was first recognized in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

45. *Breard v. Alexandria*, 341 U.S. 622 (1951).

speech more extensively than necessary to advance the asserted interest in protecting homeowner privacy.<sup>46</sup>

### E. “Fair Use” and Copyright Protection

First Amendment considerations are incorporated into federal copyright law, and to this extent the First Amendment limits the copyright owner’s ability to use and control his or her copyright. The incorporation of First Amendment considerations into copyright law is accomplished by provisions of the Copyright Act that prevent the copyrighting of ideas or facts<sup>47</sup> and that provide the “fair use” defense, which enables copyrighted works to be reproduced “for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research.”<sup>48</sup> The Court also noted that the Framers intended copyright to be an engine of free expression in that, by establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas, and that to allow an owner to copyright a work protects the owner’s right to refrain from speaking.<sup>49</sup> Thus, the Court took the position that, in the context of copyright protection, First Amendment concerns are adequately addressed by the built-in safeguards of the Copyright Act.<sup>50</sup> Further, the Court has not seen it necessary to go beyond the built-in safeguards, such as by recognizing a “public figure exception to copyright protection”<sup>51</sup> or by holding that the First

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46. See *Project 80’s, Inc. v. City of Pocatello*, 876 F.2d 711 (9th Cir. 1988) (applying the commercial speech doctrine to invalidate a ban on door-to-door commercial solicitation).

47. 17 U.S.C. § 102(b) (2000); see *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556–57 (1985).

48. 17 U.S.C. § 107 (2000); see *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003); *Harper & Row*, 471 U.S. at 549–55. The fair use exception has been broadly interpreted, as illustrated by *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001), in which the court applied the exception to hold that the copyright of *GONE WITH THE WIND* was not infringed by *THE WIND DONE GONE*, which effectively rewrote the book in the form of a parody designed to “rebut and destroy the perspective, judgments, and mythology” of *GONE WITH THE WIND*. *Id.* at 1270.

49. See *Harper & Row*, 471 U.S. at 558–60.

50. *Eldred*, 537 U.S. at 221.

51. See *Harper & Row*, 471 U.S. at 560 (stating that “we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright”).

Amendment prevents Congress from extending twenty more years of protection to existing copyrights.<sup>52</sup>

### *F. Access to Public Property*

“The First Amendment as Sword” is the basis for finding a right of access to public property that is not a public forum for purposes of expression.<sup>53</sup> Under the Court’s public forum doctrine, when public property is a traditional<sup>54</sup> or designated public forum,<sup>55</sup> the public has a right of access to that forum, and its use of the forum can be regulated only by reasonable and content-neutral time, place and manner regulations.<sup>56</sup> Most public property, however, is not a public forum, and the government frequently wishes to restrict access to that property by persons seeking to use it for purposes of expression. The Court held that the First Amendment provides some protection for expression that takes place on or seeks access to government property that is not a public forum.<sup>57</sup> The constitutionality of restrictions on the use or access to such property is determined by a general reasonableness test, which recognizes the government’s entitlement to “reserve the forum for its intended purposes, communicative or otherwise.”<sup>58</sup> This means that, although the government cannot impose viewpoint-based restrictions on access to government

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52. See *Eldred*, 537 U.S. at 199–217 (dismissing arguments that Congress does not have the power to extend copyright protection by twenty years).

53. What this means is that the First Amendment is relied on to challenge laws or governmental actions that deny or restrict access to such property. See, e.g., *Bd. of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (holding unconstitutional an absolute ban against “all First Amendment activities” at an airport terminal without regard to whether the terminal constituted a public forum).

54. Public streets and parks are a traditional public forum. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939).

55. A designated public forum is one that has been established by the government for purposes of expression, but the government may take away that designation. The designated public forum may be created for a limited purpose, such as for use by certain groups. See *Widmar v. Vincent*, 454 U.S. 263, 268–70 (1981); *City of Madison v. Wis. Employment Relations Comm’n*, 429 U.S. 167, 174–77 (1976).

56. See *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648–50 (1981).

57. See *supra* note 53.

58. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

property,<sup>59</sup> it can impose category-based restrictions so long as they are reasonably related to the purpose for which the property is being used.<sup>60</sup> Applying this standard, the Court held that a school district may limit access to the interschool mail system to the exclusive bargaining representative of its teachers,<sup>61</sup> that the military may exclude all partisan political activity from military bases,<sup>62</sup> and that the federal government may exclude legal defense and political advocacy groups from a charity drive aimed at federal employees and conducted in a federal workplace during working hours.<sup>63</sup>

Once we move beyond these category-based restrictions on access to certain kinds of government property, the government must justify further restrictions as necessary to reserve the property for its intended purposes, and therefore must demonstrate that the particular expressive activity seeking access to the property is “basically incompatible with the normal activity of a particular place at a particular time.”<sup>64</sup> This means that, except for permissible category-based restrictions, the government may not declare the non-public forum entirely “off limits” to expression, but may impose reasonable restrictions related to preventing interference with the “normal activity of a particular place at a particular time.”<sup>65</sup> For example, a state could prohibit making a speech in the reading room of a public library, but could not prohibit a silent vigil in which persons sat on

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59. There are two aspects to the very important First Amendment principle of content neutrality: viewpoint neutrality and category neutrality. Under the viewpoint neutrality aspect, the government cannot regulate expression in such a way as to favor one viewpoint over another. Under the category neutrality aspect, the government cannot regulate in such a way as to differentiate between categories of expression. While the Court has recognized no exceptions whatsoever to the viewpoint neutrality aspect, it has allowed some limited exceptions to the category neutrality aspect. *See Sedler, supra* note 2, at 466–70.

60. *See infra* notes 61–63 (this is the holding of these three cases).

61. *Perry Educ. Ass’n*, 460 U.S. at 46.

62. *Greer v. Spock*, 424 U.S. 828 (1976).

63. *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788 (1985).

64. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

65. *Id.* at 116, 118. In *Adderley v. Florida*, 385 U.S. 39 (1966), the Court held that the state could bar demonstrations in front of a jail and strongly indicated that the state could declare the jail off-limits for all expression. *Id.* at 47–48. In *Grayned*, the Court noted that the holding in *Adderley* was that “demonstrators could be barred from jailhouse grounds not ordinarily open to the public, at least where the demonstration obstructed the jail driveway and interfered with the functioning of the jail.” 408 U.S. at 121 n.49.

the floor of the reading room to protest the government's policies.<sup>66</sup> Likewise, a city could prohibit a demonstration on school grounds while school is in session, but not after the school day has ended.<sup>67</sup> On the other hand, the Court held that a city may prohibit the posting of signs on city property, such as utility poles and lamp posts, to prevent "visual clutter,"<sup>68</sup> and that the military may generally prohibit protest activity at military bases.<sup>69</sup>

An expressive activity is most likely to be permissible in a non-public forum that is physically open, such as an airport terminal. The Court held unconstitutional an absolute ban against "all First Amendment activities" at an airport terminal<sup>70</sup> and a ban on the distribution of literature in an airport terminal,<sup>71</sup> but upheld a ban on the solicitation and receipt of funds in the terminal.<sup>72</sup>

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66. See *Brown v. Louisiana*, 383 U.S. 131, 147–49 (1966) (holding that the government could not prohibit a silent "sit-in" at a public library to protest its policy of racial segregation).

67. In *Grayned*, the Court upheld an anti-noise ordinance that applied only while school was in session and that prohibited the "making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session." 408 U.S. at 108.

68. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 816–17 (1984). The Court has held that the Postal Service may prohibit the deposit of unstamped materials in letterboxes to ensure that only material on which postage has been paid can be deposited in letterboxes. *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 126–28 (1981).

69. *United States v. Albertini*, 472 U.S. 675, 685 (1985).

70. *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 570, 577 (1987).

71. See *infra* note 72 and accompanying text.

72. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683–85 (1992). Where the non-public forum is physically open, such as an airport terminal, the Court's application of the general reasonableness test to the non-public forum does not differ significantly from its application of the reasonable time, place, and manner doctrine to the public forum. In this case, four Justices held that the interior area of an airport terminal outside of the passenger security zones was a public forum for purposes of the public forum doctrine, and that neither the ban on distribution of literature nor the ban on solicitation and receipt of funds could be sustained as a reasonable time, place and manner regulation. *Id.* at 693, 704 (Kennedy, J., concurring). Justice O'Connor, whose vote provided the fifth vote on all of the issues in the case, held that the interior area of an airport terminal did not constitute a public forum, and, applying the general reasonableness test, concluded that the ban on distribution was not reasonable, but that the ban on solicitation and receipt of funds was. *Id.* at 685–87, 689, 690 (O'Connor, J., concurring). Justice Kennedy, one of the four Justices who held that the interior area of the airport terminal outside of the passenger security zones was a public forum, upheld the ban on solicitation and receipt as a reasonable time, place and manner limitation. *Id.* at 704 (Kennedy, J., concurring).

Similarly, in *United States v. Kokinda*, 497 U.S. 720 (1990), the Court upheld the Postal Service's ban on solicitation on postal premises, as applied to a sidewalk near the entrance of a postal building. *Id.* at 733, 735, 737. Four Justices held that the postal sidewalk was not a public

The Court, applying a general reasonableness test, has held that, in certain circumstances, the First Amendment protects the right of access to government property that is not a public forum for purposes of expression. Unlike private property owners, the government does not have full control over its own property, and can only impose reasonable restrictions on access of expressive activity to a non-public forum.

This portion of the Article has discussed the operation of “The First Amendment as Sword.” It demonstrates how the First Amendment has been asserted to interfere with a property owner’s use or control of tangible property and to limit the protection of an owner’s property interest. The fact that the First Amendment can be used to significantly interfere with property rights in this manner illustrates the strong constitutional protection afforded to freedom of expression in the American constitutional system.

### III. THE FIRST AMENDMENT AS SHIELD

We will now discuss how the First Amendment has been asserted to invalidate or limit otherwise permissible governmental regulation of property ownership or use by enterprises engaged in the “business of expression.” The use of the “First Amendment as Shield” arises primarily when the government enacts laws that specifically regulate enterprises engaged in the business of expression or the expressive activity carried on by those businesses. For the most part, enterprises engaged in the business of expression cannot claim exemption from neutral and generally applicable laws, e.g., a theater owner could not assert a First Amendment right to build a theater in an area zoned as residential. However, the use of the “First Amendment as Shield” may also arise when neutral and generally applicable laws are directly applied to expressive activity in such a way as to interfere with the activity itself, e.g., the application of a public nudity law to prohibit players from appearing nude in theatrical productions.

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forum, and that the ban on solicitation could be sustained under the general reasonableness test. *Id.* at 737. A fifth Justice held that the postal sidewalk was a public forum, but concluded that the ban on solicitation could be sustained as a reasonable time, place and manner limitation. *Id.* at 737–38 (Kennedy, J., concurring).

### *A. Regulation of Sexually-Oriented Entertainment*

There are a number of cases involving the constitutional permissibility of governmental efforts to regulate sexually-oriented entertainment. This should not be surprising. The commercial sex industry consists of many businesses featuring sexually-oriented entertainment—"adult bookstores," "adult theaters," "strip clubs," and the like, and other businesses such as massage parlors, "escort services," and street prostitution. But while there are few legal restraints on the government's ability to prohibit or extensively regulate other parts of the commercial sex industry, the First Amendment comes into play when the government acts against the "sexually-oriented entertainment" part of the industry. Apart from anything else, the First Amendment means that the government cannot absolutely prohibit "sexually-oriented entertainment," "nude dancing," or other forms of expression conveying a message of sexuality.<sup>73</sup> As a constitutional matter, the government can only regulate "sexually-oriented entertainment," and it must do so within the constraints of the First Amendment. At the same time, the Court has held that the First Amendment permits the government to deal with the undesirable secondary effects associated with sexually-oriented entertainment, so that a state may treat sexually-oriented entertainment differently than other types of entertainment by imposing regulations directed toward its undesirable secondary effects.<sup>74</sup>

The Court has held that, because of the undesirable secondary effects associated with the operation of sexually-oriented entertainment businesses, such as neighborhood deterioration and an increased risk of crime, municipalities may enact special zoning regulations for sexually-oriented entertainment. These regulations

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73. See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–68 (1991) (holding that nude erotic dancing, including striptease dancing, is expressive conduct within the protection of the First Amendment, although only at the outer limits); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (holding that a ban on all live entertainment inside an area zoned commercial violates the First Amendment).

74. As a result, restrictions on sexually-oriented entertainment are evaluated under the intermediate standard of scrutiny applicable to time, place and manner limitations and the symbolic speech doctrine of *United States v. O'Brien*, 391 U.S. 367 (1968).

typically require that sexually-oriented businesses be located at some distance from each other and from schools, churches, and residential neighborhoods. These regulations are permissible under the First Amendment so long as they serve a substantial governmental interest, such as preventing neighborhood deterioration, and provide for ample alternative avenues of communication.<sup>75</sup>

The Court's decisions in cases involving special zoning regulations for sexually-oriented businesses have shaped the development of the constitutional doctrine applicable to all regulations of sexually-oriented businesses. The key elements in determining the constitutional permissibility of such regulations are: (1) undesirable secondary effects; and (2) ample alternative avenues of communication.<sup>76</sup>

The Court has given the government broad latitude in finding undesirable secondary effects to justify a particular regulation, such as a requirement that female dancers wear "pasties" and "G-strings"<sup>77</sup> or a prohibition against locating more than one sexually oriented business in the same building.<sup>78</sup> At the same time, in every case in which the Court upheld a regulation of sexually-oriented entertainment, it held that the regulation provided ample alternative avenues of communication and, as in the "pasties" and "G-strings" cases, that the regulation did not interfere with the message of sexuality conveyed by the nearly-nude dancers. The point is that while the government can regulate sexually-oriented entertainment to advance its asserted interest in preventing undesirable secondary effects, the First Amendment protects the message of erotica conveyed by sexually-oriented entertainment and ensures that such entertainment will continue to take place.<sup>79</sup>

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75. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976).

76. See *Young*, 427 U.S. 50 (setting forth these elements).

77. *City of Erie*, 529 U.S. 277; *Barnes*, 501 U.S. 560. In the context of undesirable secondary effects associated with completely nude dancing, the cities asserted an increase in crime, prostitution, sexual activity, and sexually transmitted diseases. See, e.g., *City of Erie*, 529 U.S. at 297–98.

78. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425 (2002). The Court also held that the city could reasonably rely on a 1977 study showing that a ban on the concentration of sexually-oriented businesses in a particular neighborhood would reduce crime. *Id.* at 436.

79. The subtext of the litigation with regard to the regulation of sexually-oriented

### *B. Licensing of the Business of Expression*

Any system of governmental licensing of expression analytically involves a prior restraint, and the Court has dealt with such licensing by imposing specific requirements.<sup>80</sup> As a general proposition, any law licensing expression must be content-neutral and must contain narrow, objective and definite standards that control the discretion of the licensing official.<sup>81</sup> If the law fails to contain such standards, it is invalidated “on its face,” and a party subject to the law is not required to apply for a license as a condition to challenging its

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entertainment is the economic impact of the regulation. The owners of businesses featuring sexually-oriented entertainment are in the “business of expression” to make money, in the same manner as newspapers or television stations. The goal of the government regulators is to impair the economic viability of the sexually-oriented businesses in the hope that they will close down. So, special zoning for sexually-oriented entertainment is likely to attempt to minimize the desirable locations available for sexually-oriented entertainment.

The government may impose a host of other restrictions that affect the economic viability of sexually-oriented entertainment, but that do not violate the First Amendment because they do not interfere with the expression of sexuality. In analyzing restrictions on nude dancing that have been upheld by lower federal courts and that are consistent with applicable Supreme Court doctrine, I concluded:

What has emerged from the extensive litigation over governmental regulation of nude dancing is that the Supreme Court and lower court decisions have effectively separated the communicative erotic message conveyed by nude dancing from the undesirable secondary effects associated with the operation of adult entertainment establishments featuring nude dancing. They have separated this communicative message, protected by the First Amendment, from the commercial sex industry, of which nude dancing is a part. The states may not prohibit nude dancing in adult entertainment establishments. However, they may regulate it extensively in order to combat undesirable secondary effects. They may require that the dancers wear a minimal amount of clothing, represented by a ‘g-strings’ and ‘pasties’ requirement, but they may not otherwise prevent the dancers from appearing nude. They may prohibit nude dancing in adult entertainment establishments that serve alcohol, but must permit nude dancing in adult entertainment establishments that do not. They may prohibit any sexual contact between the dancers and their customers and may require that there be a buffer zone between them, but subject to these restrictions, the dancers must be able to perform table dances. In the final analysis, the First Amendment protects the core message of sexuality and eroticism conveyed by nude dancing, and thus advances the underlying purpose of this fundamental constitutional guarantee.

Robert A. Sedler, *Nude Dancing*, in PROTECTING FREE SPEECH AND EXPRESSION: THE FIRST AMENDMENT AND LAND USE LAW 195, 206 (Daniel R. Mandelker & Rebecca L. Rubin eds., 2001).

80. See *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

81. See *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 757–59 (1988).

constitutionality.<sup>82</sup> In addition, the Court has held that the First Amendment imposes procedural requirements on the operation of licensing systems, which are designed to ensure that expression will not be delayed or “chilled” due to the licensing requirement. These procedural requirements were first imposed by *Freedman v. Maryland*,<sup>83</sup> in the context of challenges to state systems of motion picture censorship. The Court held that the following three safeguards are necessary to ensure expeditious decision-making by the censorship board: (1) Any restraint can be imposed prior to judicial review only for a specified brief period of time in which the status quo must be maintained; (2) Expeditious judicial review of that decision must be available; and (3) The censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.<sup>84</sup>

In *FW/PBS, Inc. v. City of Dallas*,<sup>85</sup> the Court held that the first two *Freedman* requirements applied to a city’s licensing of sexually-oriented businesses, but that the third did not. Justice O’Connor’s plurality opinion, which represents the holding of the Court on this issue,<sup>86</sup> noted that the first two requirements were essential to protect First Amendment interests in the licensing context “because undue

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82. See *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610 (1976); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Lovell*, 303 U.S. 444. The First Amendment requirements are the same for parade permits and other laws that in effect require a license for access to public property.

83. 380 U.S. 51 (1965).

84. *Id.* at 58–59. The *Freedman* standards apply to customs seizures of allegedly obscene materials, *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971), and to pretrial seizures of allegedly obscene materials in RICO prosecutions, *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989).

See *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781 (1988) (holding that North Carolina’s licensing scheme violated the First Amendment because it required that fundraisers obtain a license before soliciting but did not require that the licensing official either issue the license within a specified brief period of time or go to court).

85. 493 U.S. 215, 217–18 (1990).

86. This was the position of a three-Justice plurality in an opinion authored by Justice O’Connor. Three other Justices took the position that all three *Freedman* requirements should apply, while three Justices took the position that the *Freedman* requirements did not apply to the licensing of sexually-oriented businesses. The O’Connor plurality opinion constitutes the holding of the Court as the narrowest ground of agreement among the Justices who concurred in the judgment. *Marks v. United States*, 430 U.S. 188, 193 (1977) (stating that the narrowest ground of agreement among the Justices who concurred in the judgment is the holding of a case).

delay results in the unconstitutional suppression of protected speech.”<sup>87</sup> However, the opinion went on to draw a distinction between a censorship scheme, in which the censor makes judgments about expressive material, and a licensing scheme, in which the city only reviews the general qualifications of each applicant and in which the applicant has every incentive to pursue a license denial with the courts.<sup>88</sup> In any event, as a result of *FW/PBS*, it is now settled that the first two *Freedman* requirements, but not the third, apply to the licensing of sexually-oriented businesses.<sup>89</sup>

It is clear that the First Amendment provides a high degree of protection to those engaged in the business of expression when the state requires that they obtain a license to do so. The licensing law must be content-neutral and must contain narrow, objective and definite standards that control the discretion of the licensing official.<sup>90</sup> In addition, the First Amendment imposes procedural requirements on the operation of licensing systems, which are designed to ensure that expression will not be delayed due to the licensing scheme. In recent years, the licensing of expression has been, for the most part, directed against sexually-oriented entertainment businesses, and the operators of these businesses have been able to use the First Amendment to limit the impact of these licensing laws.

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87. *FW/PBS, Inc.*, 493 U.S. at 228.

88. *Id.* at 229–30.

89. In *City of Littleton v. Z.J. Gifts D-4, Inc.*, 541 U.S. 774 (2004), the Court held that when a licensing of sexually-oriented business ordinance had neutral and objective standards, set forth time limits typically amounting to forty days in which city officials had to make the licensing decision, and provided that the final decision could be appealed to the state courts in accordance with the state rules of civil procedure, it was not necessary that the ordinance itself ensure a “prompt judicial decision.” *Id.* at 780–81. Rather, the Court would assume that the state’s ordinary judicial review procedures, which included provisions for accelerated action, would avoid delay-induced harm to First Amendment interests. *Id.* at 782.

In *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001), the Court indicated that the requirement of prompt judicial review might not be necessary to protect the First Amendment rights of a party seeking to renew a license to operate a sexually-oriented business. *Id.* at 285–86. Rather, the First Amendment issue in this situation would depend on the availability of a stay during the process of judicial review. *Id.* at 285.

90. See *Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750 (1988).

### C. Billboard and Sign Regulation

There have been two cases before the Supreme Court involving the First Amendment rights of homeowners to display signs in front of their homes, and in both cases the Court upheld these First Amendment rights. In *Linmark Associates, Inc. v. Township of Willingboro*,<sup>91</sup> the Court held that a city ordinance that prohibited “for sale” signs in front of homes violated the First Amendment. The city’s stated purpose for the ordinance was to prevent “white flight” by homeowners from a racially integrated community.<sup>92</sup> Applying the commercial speech doctrine, the Court held that the asserted interest was constitutionally improper because it was based on the content of the information and proceeded on the premise that the state could deny individuals access to truthful information because of how they might make use of it.<sup>93</sup>

In *City of Ladue v. Gilleo*,<sup>94</sup> a city ordinance prohibited homeowners from displaying any signs on their property, except for residence identification signs, “for sale” signs, and signs warning of safety hazards. The ordinance also permitted commercial signs in commercially or industrially zoned districts.<sup>95</sup> The effect of the ordinance was to prohibit most signs on a homeowner’s property, to allow some signs, but not others, based on their content, and to treat commercial speech more favorably than non-commercial speech.<sup>96</sup>

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91. 431 U.S. 85, 97 (1977).

92. *Id.* at 88.

93. *Id.* at 96–97. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the seminal case extending First Amendment protection to commercial speech, the Court held unconstitutional a ban on advertising the prices of prescription drugs, noting that the state’s justification for the ban “rests in large measure on the advantages of [its citizens] being kept in ignorance.” *Id.* at 769–70. The Court further stated that “[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.” *Id.* at 770. The Court repeated this language in *Willingboro*. 431 U.S. at 97.

The Court in *Willingboro* indicated that the state could impose reasonable and content neutral time, place and manner limitations on the use of signs to advance aesthetic interests, such as regulating the size and number of the signs. *Id.* at 97–98. Lower federal courts have upheld some of these restrictions. *See, e.g.*, *Am. Legion Post 7 v. City of Durham*, 239 F.3d 601 (4th Cir. 2001); *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976).

94. 512 U.S. 43, 45 (1994).

95. *Id.* at 46.

96. *Id.* at 45–47, 54.

While the lower court based its decision on the content discrimination rationale, the Supreme Court went further and held that the city's near total prohibition of residential signs was unconstitutional.<sup>97</sup> The effect of the decision was to recognize a homeowner's First Amendment right to display commercial or non-commercial signs on his or her property, subject only to the government's ability to impose reasonable time, place and manner limitations on the display.<sup>98</sup>

Billboard regulation came before the Court in *Metromedia, Inc. v. City of San Diego*,<sup>99</sup> in the form of an ordinance that prohibited all billboards, except for on-site commercial billboards designating the business' name or advertising its products or services and some non-commercial billboards, such as government signs, religious symbols, and temporary political campaign signs. The city asserted an interest in promoting traffic safety by preventing distraction of motorists and in advancing aesthetics by improving the appearance of the city.<sup>100</sup> The Court was highly fragmented, but two holdings emerged from the decision. First, the Court held that the city could ban all commercial billboards, and could also distinguish between categories of commercial speech by making an exception for on-site commercial billboards.<sup>101</sup> Second, the Court held that the ban on billboards was

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97. *Id.* at 54. The Court referred to residential signs as "a venerable means of communication that is both unique and important." *Id.* The Court went on to note:

Signs that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community. Often placed on lawns or in windows, residential signs play an important part in particular campaigns, during which they are displayed to signal the resident's support for political candidates, parties, or causes. They may not afford the same opportunities for conveying complex ideas as do other media, but residential signs have long been an important and distinct medium of expression.

*Id.* at 54-55.

98. Cities have tried to limit the display of political signs to a stated period before and to require removal in a stated period after an election. Lower federal courts and state courts have consistently held these durational limits on political signs to be violative of the First Amendment. *See, e.g.,* *Whitton v. City of Gladstone*, 54 F.3d 1400 (8th Cir. 1995); *Collier v. City of Tacoma*, 854 P.2d 1046 (Wash. 1993).

99. 453 U.S. 490, 490 (1981).

100. *Id.*

101. *Id.* at 513. The four-Justice plurality opinion of Justices White, Stewart, Marshall, and Powell took this position, *id.* at 513, and Justice Stevens agreed with this position as well, *id.* at 541-42 (Stevens, J., dissenting in part). Justice Rehnquist and Chief Justice Burger would have

unconstitutional as applied to non-commercial speech.<sup>102</sup> Four Justices found this provision unconstitutional because it allowed commercial billboards in certain locations in which non-commercial billboards were not, thus favoring commercial speech over non-commercial speech, and because it allowed some non-commercial billboards, but not others, thereby violating content neutrality.<sup>103</sup> In addition to the two Justices who found the entire ban unconstitutional, there were six votes for holding the ban unconstitutional as applied to non-commercial billboards.<sup>104</sup> As a result of *Metromedia*, a state can ban all or some commercial billboards. Left unanswered is the question, unlikely to arise in practice, of whether a state can ban all billboards, both non-commercial and commercial, with no exceptions.

Finally, the Supreme Court's decision in *Lorillard Tobacco Co. v. Reilly*,<sup>105</sup> which invalidated location prohibitions and point-of-sale restrictions on tobacco advertising directed at children, is another example of the use of the First Amendment as a shield to protect property rights.<sup>106</sup> In *Lorillard*, the Court invalidated both the location prohibitions and the point-of-sale restrictions under the commercial speech doctrine.<sup>107</sup> It held that the location prohibitions were more extensive than necessary to advance the state's interest in preventing underage tobacco use, and that the on-site advertising regulation did not directly advance the state's asserted interest in preventing underage tobacco use and, further, was more restrictive than necessary to advance this interest.<sup>108</sup> The effect of *Lorillard* was to protect the property interests of tobacco manufacturers and

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upheld the ban in its entirety; this holding was therefore supported by seven Justices. *Id.* at 569–70 (Burger, C.J., dissenting).

102. *Id.* at 521.

103. *Id.* at 513. This was the position of the four-Justice plurality.

104. This was the position of Justices Brennan and Blackmun, who would have found the ban unconstitutional in its entirety. *Id.* at 534 (Brennan, J., concurring in the judgment).

105. 533 U.S. 525 (2001).

106. The First Amendment analysis applied to the ban on smokeless tobacco and cigar advertising. The Court held that the ban on cigarette advertising was preempted by federal law. *Id.* at 550.

107. *Id.* at 565–66.

108. *Id.*

retailers in promoting the sale of tobacco and of billboard owners in obtaining this source of advertising revenue.

*D. Illegal Conduct and the Business of Expression*

It would not be expected that the First Amendment would protect illegal conduct by those engaged in the business of expression, and, as a general rule, it does not. The rationale here is that what is regulated is the illegal conduct, and it is irrelevant that such conduct took place in connection with the business of expression. This being so, it is unnecessary for the government to justify the prohibition under a First Amendment analysis. Thus, a nuisance abatement law providing for the forced closure of a building used for purposes of “lewdness, assignation, or prostitution” may be applied to force the closure of a building used as an adult book store, following a finding that the prohibited activities took place in that building.<sup>109</sup> Similarly, the Racketeer Influenced and Corrupt Organizations Act (RICO)<sup>110</sup> may be applied to forfeit the assets of an owner of stores and theaters dealing in sexually explicit materials upon a conviction for selling obscene materials at several of these stores.<sup>111</sup>

The First Amendment can be used as a shield in this context because it precludes the government, in an effort to prevent illegal conduct, from taking action that would have a chilling effect against constitutionally-protected expression. The government can avoid this problem by focusing its action on the illegal conduct and by separating that conduct from protected expression. Thus, a court can issue an injunction against the dissemination of material determined

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109. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706–07 (1986). Because it is not necessary for the government to justify the prohibition under a First Amendment analysis, it is irrelevant that the closure order may have gone further than was necessary to prevent the illegal conduct. *Id.* On remand, the New York Court of Appeals held that the closure order interfered with the free speech rights of the operator of the bookstore, and, in the absence of a showing that the closure order was no broader than necessary to prevent the illegal conduct from occurring, the order violated the free speech provision of the State Constitution. *People ex rel Arcara v. Cloud Books, Inc.*, 503 N.E.2d 492, 558–59 (N.Y. 1986).

110. 18 U.S.C. § 1962 (2000).

111. *Alexander v. United States*, 509 U.S. 544, 556–58 (1993). Four Justices (Kennedy, Blackmun, Stevens, and Souter) took the position that the First Amendment precluded the forfeiture of books and movies not determined to be obscene. *Id.* at 575–76 (Kennedy, J., dissenting).

to be obscene in an adversarial proceeding. This is because once there has been a judicial determination of obscenity, the material is no longer protected speech and the First Amendment no longer precludes the issuance of an injunction against its dissemination.<sup>112</sup> Likewise, because sex-designated “help-wanted” ads have been held to be a form of illegal sex discrimination, the First Amendment does not preclude an injunction against a newspaper carrying such ads.<sup>113</sup> However, an injunction prohibiting a theater showing obscene films in the future, based on its past showing of obscene films, is an unconstitutional prior restraint.<sup>114</sup> Unless and until there has been a judicial determination that particular films are obscene, the showing of these films is protected by the First Amendment.<sup>115</sup> An injunction prohibiting the showing of obscene films in the future could have a chilling effect on protected expression, in that the theater owner may be deterred from showing certain sexually explicit films for fear that they might subsequently be found to be obscene.<sup>116</sup> For the same reason, a government commission cannot make a list of “objectionable” books and threaten distributors with possible obscenity prosecutions if they continue to distribute these books.<sup>117</sup>

### *E. Regulation of Newspapers and Publishers*

Newspapers and publishers have successfully used the First Amendment as a shield to prevent the government from placing burdens on the operation of their businesses. The Court invalidated, as violative of the First Amendment, a “right to reply” law, which required any newspaper that attacked the personal character or official record of a candidate for public office to provide the candidate with equal space in the newspaper to reply to the attack.<sup>118</sup> The Court reasoned that the “right to reply” requirement could have a

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112. *See Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

113. *See Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376 (1973).

114. *See Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980).

115. *See id.*

116. *See id.*

117. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

118. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256–58 (1974).

chilling effect on a newspaper's discussion of candidates and public issues.<sup>119</sup> The Court also held unconstitutional state efforts to impose special taxes on newspapers, such as a use tax on the cost of paper and ink products consumed in the production of a publication, as well as exemptions limiting the effects of these efforts to only a few newspapers.<sup>120</sup> The Court further held unconstitutional a state's imposition of a sales tax on the sale of magazines, with an exemption only for religious, professional, trade and sports periodicals.<sup>121</sup> Finally, the Court held unconstitutional a state law requiring that the proceeds from a book written by an accused or convicted criminal about a crime be used to compensate the victim, on the grounds that the law did not provide for compensation to the victim from the criminal's other assets.<sup>122</sup> The effect of this law was to discriminate against expression in favor of non-expression, and to provide a disincentive to publishers to publish work with a particular content.<sup>123</sup>

#### *F. Regulation of Broadcasting, Cable and the Internet*

Broadcasters have been unable to assert the First Amendment as a shield against governmental regulation because the Supreme Court has held that governmental regulation of broadcasting can proceed on the assumption of "public ownership of the airwaves" and that the Federal Communications Commission (FCC) can require that broadcasters operate "in the public interest."<sup>124</sup> It was on this basis that the Court upheld against First Amendment challenge the now-repealed "fairness doctrine," which required that broadcasters provide a balanced presentation of viewpoints, allocate a reasonable percentage of broadcast time for public issues, and allow an opportunity to respond to a "personal attack" and to present an editorial endorsement of a political opponent.<sup>125</sup> The Court also held

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119. *Id.* at 257.

120. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591-93 (1983).

121. *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 233-34 (1987).

122. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116-17, 123 (1991).

123. *Id.* at 121-23.

124. *See infra* notes 125-27 and accompanying text.

125. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 400-01 (1969).

that Congress may constitutionally provide that candidates for federal office have a legally enforceable right to purchase a reasonable amount of broadcast time.<sup>126</sup> Further, the Court held that the FCC may impose certain limited restrictions on programming that may be objectionable to children during the time of day when children are likely to be listening.<sup>127</sup> Nonetheless, the First Amendment does apply to governmental regulation of broadcasting, and certain broadcasting regulations may be violative of the First Amendment, such as a complete ban on editorializing by public broadcasting stations that receive grants from the federal government.<sup>128</sup> Given that the FCC is now lessening its control over broadcasting, issues involving the First Amendment rights of broadcasters are less likely to arise in the near future.

The advent of cable television and its regulation by the federal government and by municipalities has given rise to a number of First Amendment questions that cannot be fit neatly into the doctrines that the Court has developed to deal with broadcast regulation. Conventional cablecasting involves placing cable wires under streets or on municipally-owned utility poles, and municipalities generally enter into franchise agreements with a particular cable operator, thereby giving the operator an effective monopoly on conventional cablecasting within the municipality. These agreements typically require the cable operator to reserve some channels for public, educational and governmental access (PEGs).

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126. See *CBS, Inc. v. FCC*, 453 U.S. 367 (1981).

127. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

128. See *FCC v. League of Women Voters*, 468 U.S. 364 (1984). In *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973), the television network refused to accept any public issue advertising. *Id.* at 98. Parties seeking to purchase such advertising challenged the ban, and the Supreme Court held that there was no constitutional requirement that the network accept such advertising. *Id.* at 130–32. While conceding that the television network was not a state actor for constitutional purposes, the Democratic National Committee contended that the First Amendment imposed an obligation on the FCC to make the airwaves open for such advertising. *Id.* at 98. The contrary contention was that for the FCC to require the networks accept such advertising would itself violate the networks' First Amendment rights. *Id.* at 94–95. While the Court did not decide the latter issue, it indicated that the First Amendment did not impose an obligation on the FCC to require broadcasters to accept public issue advertising. *Id.* at 119–21. The Court indicated that the networks had a First Amendment right to exercise a degree of editorial discretion over their programming. *Id.*

Congress was concerned about the monopolistic character of cablecasting in most municipalities, and, in the Cable Television and Consumer Protection and Competition Act of 1992 (the “1992 Act” or the “Act”),<sup>129</sup> required cable operators to devote a portion of their channels to programs of local broadcasters. A sharply divided Court upheld the constitutionality of these “must-carry” provisions, over objections by the cable operators that such provisions violated their First Amendment rights.<sup>130</sup>

Federal law generally prevents cable operators from exercising any editorial control over the content of leased-access or public-access channels. The 1992 Act, however, permitted cable operators to prohibit the broadcast of material on leased-access and public-access channels that the operator “reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner.”<sup>131</sup> The Act further provided that, if the cable operator did not prohibit such material from being broadcast, it must provide a separate channel for the material, scramble or otherwise block its presentation, and permit its viewing only upon written request of a subscriber.<sup>132</sup> Congress also imposed these “segregate and block” requirements on channels primarily dedicated to sexual programming and required cable operators to honor a subscriber’s request to block any undesired programs.<sup>133</sup>

In what turned out to be a clear victory for the cable operators, a sharply divided Court upheld the Act’s provision granting the cable operators the authority to prohibit sexual programming on leased-access and public-access channels, but held that its “segregate and

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129. Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.).

130. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997). The majority took the position that it was appropriate in this area for the Court to defer to congressional judgment, so long as Congress “ha[d] drawn reasonable inferences based upon substantial evidence.” *Id.* at 195. The majority held that the legislation was narrowly tailored to preserve the benefits of local broadcast television, to promote widespread dissemination from a multiplicity of sources, and to promote fair competition. *Id.* at 189–90, 224–25. The dissenting Justices contended that the record did not support the conclusion that cable television posed a significant threat to local broadcast markets or that the law was narrowly tailored to deal with anti-competitive conduct. *Id.* at 257–58 (O’Connor, J., dissenting).

131. 47 U.S.C. § 532(h) (2000).

132. *Id.*

133. *Id.* § 532(h)–(j), app. § 531.

block” requirements violated the cable operators’ First Amendment rights.<sup>134</sup> In another victory for cable operators, the Court, again sharply divided, held unconstitutional a federal law requiring that cable operators who provided channels primarily dedicated to sexually-oriented programming either completely block these channels so that non-subscribers would be unable to see or hear them or, if they could not completely block these channels, that they operate them only between the hours of 10:00 P.M. and 6:00 A.M., when children were unlikely to be viewing.<sup>135</sup> The Court majority held that this law was content-based, with a serious impact on protected speech, and that there was available the less restrictive alternative of allowing an individual subscriber to request that the channel be blocked.<sup>136</sup>

Congress’ efforts to prevent minors from receiving sexually-oriented material over the internet have foundered on the rock of the First Amendment. In the Communications Decency Act (CDA), Congress prohibited transmitting indecent messages to any recipient under eighteen years of age<sup>137</sup> and knowingly sending or displaying patently offensive messages in a manner that is available to persons under eighteen years of age.<sup>138</sup> The Court invalidated both of these provisions as too vague and too broad to withstand First Amendment scrutiny.<sup>139</sup> In the Child Online Protection Act (COPA), Congress prohibited knowingly posting for commercial purposes material harmful to minors, which was essentially defined as material that was obscene for minors.<sup>140</sup> In a five-to-four decision, the Court upheld the grant of a preliminary injunction against enforcement of this law on the ground that it probably violated the First Amendment because there were less restrictive alternatives available to protect children, such as filtering software at the receiving end.<sup>141</sup>

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134. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

135. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000).

136. *Id.*

137. 47 U.S.C. § 223(a) (2000).

138. *Id.* § 223(d).

139. *Reno v. ACLU*, 521 U.S. 844 (1997).

140. 47 U.S.C. § 231(a) (2000).

141. *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

#### IV. CONCLUSION

This Article has analyzed the impact of the First Amendment's free speech guarantee on the use, enjoyment and control of property. A review of Supreme Court decisions in this area demonstrates that the impact has been quite significant. The discussion of "The First Amendment as Sword" has shown that the First Amendment has been asserted effectively to interfere with a property owner's use or control of tangible property and to limit the protection of an owner's property interests. The discussion of "The First Amendment as Shield" has shown that the First Amendment has been asserted effectively to invalidate or limit otherwise permissible governmental regulation of property ownership or use by enterprises engaged in the business of expression.

The effective assertion of the First Amendment on the one hand as "sword," and on the other hand as "shield," demonstrates most cogently the high degree of protection afforded to freedom of expression by the American constitutional system. With the First Amendment as "sword," property rights are subordinated to First Amendment rights; with the First Amendment as "shield," enterprises engaged in the business of expression can invalidate or limit otherwise permissible regulation of property ownership or use. This Article has explained how the strong constitutional protection afforded to freedom of expression in the American constitutional system is reflected in the "law of the First Amendment," and has demonstrated by a review of cases that the application of the "law of the First Amendment" to questions of property and speech has continued on the same course during the years of the Rehnquist Court. During this era, as it has at least since the 1960s, the Court as an institution has demonstrated a strong commitment to the constitutional protection of freedom of expression, and this commitment has been evident in the Court's decisions in the area of property and speech.