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THE FIRST AMENDMENT IN THE SEVENTH CIRCUIT: 2002

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INTRODUCTION

The First Amendment is a perennial source of litigation in federal courts. It is unsurprising, then, that the last year produced several Seventh Circuit opinions dealing with speech and religion issues. While none of these cases could be said to break new ground, they illustrate some interesting and recurring First Amendment contexts. During 2002, the Seventh Circuit dealt with claims that government had improperly limited access to both traditional and limited public forums, that a Chicago peddling ordinance constituted a prior restraint on speech, that the Milwaukee Police Department had improperly retaliated against officers for their exercise of free speech rights, and that government had denied parties their right to free exercise of religion in widely different ways.

I. PUBLIC FORUMS AND GOVERNMENT CONTROL OF PRIVATE SPEECH

In Southworth v. Board of Regents,1 the Seventh Circuit issued its fourth decision in six years dealing with a First Amendment challenge to the mandatory student activity fee system maintained by the University of Wisconsin-Madison.2 The lawsuit, originally filed in 1996, challenged that part of the fee system that authorized allocation of funds by student government to student organizations engaging in speech activity that the plaintiffs found objectionable.3 The challenge was based upon earlier

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1. Southworth v. Bd. of Regents of the Univ. of Wisconsin Sys., 307 F.3d 566 (7th Cir. 2002).
2. The case was first dismissed for lack of jurisdiction in 1997. Southworth v. Grebe, 124 F.3d 205 (7th Cir. 1997). It came up on appeal a year later and was affirmed in part, reversed in part and vacated in part, Southworth v. Grebe, 151 F.3d 717 (7th Cir. 1998), and the petitioner’s request for a Rehearing was denied. Southworth v. Grebe, 159 F.3d 1124 (7th Cir. 1998). The Supreme Court then reversed the Seventh Circuit’s earlier opinion. Bd. Of Regents v. Southworth, 529 U.S. 217 (2000). On remand, the Seventh Circuit remanded it to the district court. Southworth v. Grebe, 2000 U.S. App. LEXIS 15470 (7th Cir. 2000). It appeared before the Seventh Circuit for a fourth time, in which the Court affirmed in part and reversed in part. Southworth v. Grebe, 307 F.3d 566 (7th Cir. 2002).
3. The students claimed that "forcing them to fund other students' political and
Supreme Court decisions holding that mandatory fees charged to members of a union 4 or a unified state bar association 5 could not be used to subsidize speech on matters not germane to the purpose of the organization. 6

Both the district court and the Seventh Circuit, applying these decisions, held that the fee system violated the First Amendment, 7 but the Supreme Court reversed. 8 In the 2000 decision of Board of Regents v. Southworth, the Supreme Court found that, in light of the remarkably broad scope of matters that could be classified as germane to the purposes of a university, rules appropriate for the regulation of speech activity by unions or professional associations were "neither applicable nor workable in the context of extracurricular student speech." 9

The Court did, however, hold that objecting students were entitled to some degree of First Amendment protection. Specifically, the Court stated, "[t]he proper measure, and the principal standard of protection for objecting students . . . is the requirement of viewpoint neutrality in the allocation of funding support." 10 The case was remanded for a determination of whether the University's system satisfied this requirement. 11

The concept of viewpoint neutrality, and the way in which it differs from the more sweeping requirement of content neutrality, was developed by the Supreme Court in cases posing challenges to the ways in which government restricted access to public property by those seeking to engage in expressive activity. 12 When government regulates expressive activity on private property, perhaps the most important requirement is that the

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6. In Abood, the Court upheld the practice of mandatory service charges requiring non-union members to contribute to the activities of the union representing them insofar as the union was engaged in "collective-bargaining, contract administration, and grievance adjustment purposes." 431 U.S. at 232. But fees from non-members could not be compelled for "ideological activities unrelated to collective bargaining." Abood, 431 U.S. at 236.

Similarly, in Keller, dues paid to the State Bar of California, "in which membership and dues are required as a condition of practicing law in [the] [s]tate," could be used to "regulat[e] . . . the legal profession and improv[e] the quality of legal services," but not to fund "activities of an ideological nature which fall outside of those areas of activity." 1d. at 5, 13-14.

7. Southworth, 151 F.3d at 718.
9. Id. at 230. "If it is difficult to define germane speech with ease or precision where a union or bar association is the party, the standard becomes all the more unmanageable in the public university setting, particularly where the State undertakes to stimulate the whole universe of speech and ideas." 1d. at 232.
10. Id. at 233.
11. Id. at 236.
regulation be “content neutral,” that is, imposed regardless of the content or subject matter of the expression.\textsuperscript{13} But over the years, the Court has been inconsistent in its approach to whether the same requirement applies where government regulates access to public property. The earliest cases gave government the same right that a private landowner would have, the right to completely exclude expressive activity from its property.\textsuperscript{14} But, beginning in the 1930s, the Court recognized that at least some public property had the status of a “public forum,”\textsuperscript{15} and access to such property had to be regulated in a content neutral way.\textsuperscript{16}

This led to the question of what property was to be regarded as a public forum. Cases from the 1960s suggested, without clearly holding, that there was an initial presumption that public property was available as a forum for expression, and that it was up to the government to rebut the presumption by demonstrating that allowing access would significantly interfere with the government activity taking place on the property.\textsuperscript{17}

But in recent decades, the Court’s approach has shifted significantly. Cases now make it clear that, with the exception of venues like streets and parks that have acquired the status of “traditional public forums,”\textsuperscript{18}

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\textsuperscript{13} “[T]he First Amendment, subject to only narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals.” Turner Broad. Sys. v. FCC, 512 U.S. 622, 641 (1994), “[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.” Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

\textsuperscript{14} See Davis v. Massachusetts, 167 U.S. 43 (1897). The Court upheld a Boston ordinance prohibiting public speaking on public streets without a permit. Davis, 167 U.S. at 48. In the lower court, Oliver Wendell Holmes wrote, “For the legislature absolutely or conditionally to forbid public speaking in a highway or a public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.” Commonwealth v. Davis, 39 N.E. 113, 113 (Mass. 1895).


\textsuperscript{17} For example, in Tinker v. Des Moines School District, the Court invalidated a school district regulation prohibiting students from wearing armbands in protest of the Vietnam war. 393 U.S. 503, 514 (1969). The Court found that the armbands had caused no disruption in school activities. Tinker, 393 U.S. at 513-14. It did not initially dwell on whether the school should be classified as a public forum. Similarly, in Adderly v. Florida, the Court, in a 5-4 decision, upheld trespass convictions of protestors who gathered on the driveway of a local jail. 385 U.S. 39, 46-48 (1966). The majority stressed that the protestors were interfering with jail operations. Adderly, 385 U.S. at 45. This conclusion was questioned by the dissenters. Id. at 51 (Douglas, J., dissenting).

\textsuperscript{18} “Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” Hague, 307 U.S. at 515 (Roberts, J., concurring).
government has broad discretion to choose either to close or open its property to those who desire access for expressive activity.\textsuperscript{19} Furthermore, the decision of whether to designate government property as a public forum need not be an all-or-nothing choice. Government may choose to open a forum to expression on a limited range of subjects, as long as the choice of what to allow or exclude bears some rational relationship to the nature of the property and its normal public purpose.\textsuperscript{20}

This, of course, gives government the ability to act in a content-sensitive way. Unlike government regulation of speech on private property or in the traditional public forum, government may sometimes legitimately exclude expression from the non-public forum based on its subject matter. However, the Court has placed one significant restriction on the exercise of this discretion. If a topic or an issue is permitted into a limited public forum, government may not restrict speakers based upon their "viewpoint" or position on that issue.\textsuperscript{21} Thus, for example, while government might legitimately decide that a public school auditorium may not be used by outside groups to present positions on controversial social issues such as abortion or affirmative action, it may not allow access only to those advocating one side of such issues, and exclude their opponents.

Viewpoint neutrality, then, the requirement "that minority views are treated with the same respect as are majority views"\textsuperscript{22} on any particular issue, became the primary standard for assessing the validity of the University of Wisconsin's mandatory student fee program.\textsuperscript{23} On remand, the plaintiffs did not contend that the University had "engaged in specific acts of viewpoint discrimination," but rather that the system that the University employs fails, on its face, to assure viewpoint neutrality by granting student government "unbridled discretion" in allocating funds to student organizations.\textsuperscript{24}

\textsuperscript{19} See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44-46 (1983). The Court points out that access to a traditional public forum must be regulated in a content-neutral manner, or be subject to strict scrutiny, and that access to designated public forums is governed by the same standard, but that with respect to "[p]ublic property which is not by tradition or designation a forum for public communication," the State may "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Perry, 460 U.S. at 46.

\textsuperscript{20} See, e.g., Cornelius, 473 U.S. at 806 (stating, "access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral").

\textsuperscript{21} Id. See also Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-07 (2001). The Court stated, "[w]hen the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech." Good News Club, 533 U.S. at 106. Indeed, the State "may be justified in reserving [its forum] for certain groups or for the discussion of certain topics." Id. (quoting Rosenberger v. Rector and Visitors of Univ. of Va, 515 U.S. 819, 829 (1995)). However, the State's power to restrict speech "is not without limits. The restriction must not discriminate against speech on the basis of viewpoint . . . and the restriction must be 'reasonable in light of the purpose served by the forum.'" Id. at 106-07 (quoting Cornelius, 473 U.S. at 806).

\textsuperscript{22} Bd.of Regents, 529 U.S. at 235.

\textsuperscript{23} Id.

\textsuperscript{24} Southworth, 307 F.3d at 574.
Citing a line of Supreme Court cases holding that a licensing system that granted overly broad discretion to government bodies is unconstitutional, the Seventh Circuit held that the plaintiff could attack the program on its face, and did not need to point to any particular instance of viewpoint discrimination. Just as unbridled discretion could create an unacceptable risk of content discrimination in these earlier cases, so it could create an unacceptable risk of viewpoint discrimination as well.

However, in examining the criteria that the University had imposed upon the expenditure of student government funds following the Supreme Court's 2000 decision, the Seventh Circuit held that the University had sufficiently limited the student government's discretion with respect to most funding decisions. The criteria governing grants for events include sixteen factors; the criteria for grants to cover operating expenses for student groups include eleven factors. Most of these factors are entirely unrelated to the expressive content of the event or organization. At least two of the factors for evaluating grants do require some evaluation of content. In order to gain the status of a Registered Student Organization, and become eligible for grants, a group must establish that it provides an "identifiable educational benefit and service to the students of the University." And applicants for event or program grants must establish "[t]hat the event does not duplicate events/programs provided by other University departments or programs."

Plaintiffs argued that the University criteria were inadequate in at least two respects. First, they contended that the content-neutral criteria could be used in bad faith to create a pretext for engaging in viewpoint discrimination. Second, the requirements of providing an identifiable educational service to the University and avoiding duplication could easily be manipulated to do the same. The court rejected these contentions, noting that even the finest set of standards would fail if it were sufficient to claim that they could be ignored or manipulated in bad faith, and also that the University had established an acceptable appeals procedure available to any organization claiming that its application had been improperly denied.

But though the court rejected the claim that the standards conferred unbridled discretion, it found fault with two of the criteria, on the grounds that they created too great a risk of viewpoint discrimination. Interestingly enough, the criteria found to be troubling did not make any explicit reference

25. Id.
26. Id. at 592. The exception was for the allocation of travel grants, for which the University had not yet issued standards. Id.
27. Id. at 586-87.
28. Id. Requirements include, for example, that the organizers fill out an application describing expenses, that they attend a committee hearing, that the funded event be open to all students, and that it be held on or near campus. Id.
29. Southworth, 307 F.3d at 584.
30. Id. at 587.
31. Id. at 590.
32. Id.
33. Id. at 588.
34. Id. at 593-95.
to content, unlike the "educational service" and non-duplication requirements that were permitted to stand.\textsuperscript{35}

One of the University's funding standards provided that the number of years that a student organization had been in existence should be considered in funding decisions.\textsuperscript{36} The court found that this standard "cannot be said to be unrelated to viewpoint."\textsuperscript{37} In general, this "discriminates against less traditional viewpoints."\textsuperscript{38} More specifically, the Court found that this standard would disadvantage "organizations espousing partisan political or religious viewpoints," since those categories of organizations had been excluded from University funding until recently.\textsuperscript{39}

In addition, the Court found fault with the standard that permitted the student government to consider "the number of students benefiting from the speech."\textsuperscript{40} Although it refused to find this a facially invalid standard, since "some variable expenses will legitimately depend on this factor, such as the amount of money needed for refreshments,"\textsuperscript{41} it cautioned that this standard cannot be used to allow "improper consideration of the popularity of the speech."\textsuperscript{42} Viewpoint neutrality requires "that minority views are treated with the same respect as majority views."\textsuperscript{43}

\textit{Southworth} illustrates both the currently accepted standards for analyzing government regulation of speech in a nonpublic forum,\textsuperscript{44} and some of the troubling aspects of those standards. The basic principle states that government may be sensitive to content in permitting access to nonpublic forums, provided that decisions to include or exclude categories of expression are rationally related to maintaining the core functions of the forum, and observe viewpoint neutrality.\textsuperscript{45} Depending on the forum and the expression at issue in a particular case, however, it is not always clear whether a decision is viewpoint sensitive, content sensitive but viewpoint neutral, or entirely content neutral.\textsuperscript{46} Is a municipal restriction on the volume of music played at an outdoor public place content neutral? Is the volume part of the content?\textsuperscript{47} Is it perhaps viewpoint sensitive, on the theory that the

\textsuperscript{35} \textit{Id.}
\textsuperscript{36} \textit{Southworth,} 307 F.3d at 587.
\textsuperscript{37} \textit{Id.} at 593-94.
\textsuperscript{38} \textit{Id.} at 594. "[U]nder the current funding system, historically popular viewpoints are at an advantage compared with newer viewpoints."\textsuperscript{39} \textit{Id.}
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.} at 595.
\textsuperscript{42} \textit{Southworth,} 307 F.3d at 595. Such consideration, the court noted, could give rise to "an as-applied challenge" to the standards. \textit{Id.}
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} See supra notes 19-21 (outlining those standards).
\textsuperscript{45} \textit{Southworth,} 307 F.3d at 595.
\textsuperscript{46} For example, in \textit{Hill} v. Colorado, the Court upheld a prohibition on protests within 100 feet of the entrance of an abortion clinic. 530 U.S. 703, 734-35 (2000). The Court held that this was, on its face, content neutral. \textit{Hill,} 530 U.S. at 734-35. Dissenting justices disagreed, claiming that the regulation was "directed against the opponents of abortion." \textit{Id.} at 741 (Scalia, J., dissenting).
messages conveyed by, say, heavy metal are distinctly different from those conveyed by a classical string quartet.\textsuperscript{48}

*Southworth* presents similar problems. While at least one standard, which on its face was entirely unrelated to content, was found to impermissibly create the danger of viewpoint discrimination,\textsuperscript{49} two standards for the recognition of student organizations that require obvious evaluation of content were nevertheless approved as, at least on their face, viewpoint neutral.\textsuperscript{50}

Despite occasional problems such as the classification of limitations on the volume of music, content-sensitivity is usually recognizable with some certainty.\textsuperscript{51} A somewhat more difficult problem, posed only in cases seeking access to nonpublic forums, is whether the viewpoint neutral exclusion of categories of speech from such forums is rationally related to the functioning and purposes of those forums.\textsuperscript{52} In *Southworth*, the requirement that student organizations must demonstrate that their activity provide an "identifiable educational service" to the University community\textsuperscript{53} seems on its face entirely reasonable, if not necessary, in performing this legitimate level of content analysis. But in the context of the University, it presents interesting problems when coupled with the requirement of viewpoint neutrality. Similarly, the non-duplication requirement, on its face, seems merely to help preserve a scarce resource for distribution over the widest range of subjects and viewpoints, but it also presents some problems with respect to viewpoint.

The basic premise of viewpoint neutrality in First Amendment jurisprudence seems roughly equivalent to the basic principle of modern objective journalism.\textsuperscript{54} There are two sides to every issue, and both deserve not only to be heard, but to receive equal access in disseminating their message. But even the briefest reflection on issues in the real world reveals

\textsuperscript{48} "Questions of tone and mix cannot be separated from musical expression as a whole . . . [b]ecause judgments that sounds are too loud, noiselike, or discordant can mask disapproval of the music itself." *Ward*, 491 U.S. at 810 (Marshall, J., dissenting).

\textsuperscript{49} The standard that permitted consideration of "the number of students benefiting from the speech" required not an analysis of the substance of the message, but a calculation the number of listeners; still, the Court found it to create problems with viewpoint neutrality. *Southworth*, 307 F.3d at 594-95.

\textsuperscript{50} See supra notes 32-33 and accompanying text.

\textsuperscript{51} See supra notes 12-16 and cases cited therein.

\textsuperscript{52} For example, in *Perry*, the Court held that a school policy permitting the recognized teachers' union access to the interschool mail system and teachers' mailboxes, while excluding a rival union, was rationally related to the function of the school system, specifically in efficient communication between teachers and their chosen bargaining representatives. *Perry*, 460 U.S. at 54-55. Four dissenters, however, saw the exclusion of unions challenging the currently recognized union as viewpoint discrimination, rather than permissible content limitation in a nonpublic forum. *Id.* at 56-72 (Brennan, J., dissenting).

\textsuperscript{53} *Southworth*, 307 F.3d at 590.

\textsuperscript{54} See generally RON F. SMITH, groping for Ethics in Journalism 35-54 (4th ed. 1999). Smith discusses the problems inherent in a commitment to "objectivity," and also points out that the notion that media are supposed to be unbiased was not always prevalent in American journalism, nor is it entirely accepted outside of North America. *Id.*
that the “two sides” model is far from a complete picture. First, we can easily see that with respect to many, if not most, issues of public policy, law, morality and religion, there are not merely two competing sides; rather, there are many viewpoints falling somewhere along a spectrum between extremes. At the same time, we might also recognize that, however heretical it may seem in terms of standard First Amendment theory, there are certain issues on which there simply is no legitimate “other side.”

The first problem, that of the common existence of far more than two “sides” to an issue, can be easily dealt with in a world where there is no scarcity of resources to provide a platform for advocates. As long as there is more time available in Speaker’s Corner than there are demands for that time, the multiplicity of views presents no problems. But in many real world situations, of course, scarcity of resources is a constant, and must be squarely faced. The University of Wisconsin has only so many dollars to distribute to student groups, and it is probable, if not inevitable, that demand will exceed supply nearly every year.

Thus, the nonduplication requirement seems eminently reasonable, yet at the same time, it is likely to have a noticeable effect on the shape of student debate. This effect, however, is unlikely to take the form of shutting out systematically the voices on one or another side of the left-right, libertarian-authoritarian, liberal-conservative divide. Rather, it may well have the effect of disfavoring moderate positions. To understand why, we can look at some of the criticisms of modern objective journalism from within its own ranks.

Although claims of liberal or conservative bias in the news media have gained wide attention,55 a more subtle criticism of modern journalism has also emerged. This critique points to the unintended consequences not of bias, but of the attempt to adhere to the accepted standards of twentieth-century objective journalism.56 This self-imposed professional standard resembles, in its essential core, the viewpoint neutral standard placed on government by First Amendment caselaw. Some have noted that the demand that “both sides” be heard, when combined with scarcity of airtime or news hole, leads to the crowding out of voices in the middle.57 The typical story on a legislative or judicial struggle over abortion, for example, is likely to feature voices from the strong “pro-life” and “pro-choice” sides, but not those seeking a middle ground, despite evidence that most Americans occupy that ambivalent, moderate position on the question.58

The viewpoint neutrality requirement in constitutional law may well, in


56. SMITH, supra note 54, at 35-54.

57. Id. at 40-41.

58. Id. at 41. Smith quotes newspaper editor Cole Campbell, “Journalists keep trying to find people who are at 1 and at 9 on a scale of 1 to 10, rather than people at 3 to 7 where most people really are.” Id.
contexts where scarce resources are allocated, lead to the same crowding out of voices in the middle, voices speaking in shades of gray, in favor of the black-and-white debate that follows when practical considerations require that “all sides” of an issue must be reduced to “both sides.” It is hard to see how a funding system could function without something like a nonduplication requirement, yet it clearly does pose at least subtle dangers to the ideal of insuring that all viewpoints gain access to the forum.

The second problem with viewpoint neutrality also finds an analogue in the debate within journalism over the meaning of objectivity. Both the viewpoint neutrality requirement of First Amendment law and the standard application of the principle of objective journalism, implicitly accept that every issue does, in fact, have (at least) two legitimate sides worthy of respect and access. But journalists have pondered whether that actually is true; certainly in some instances even the most “objective” of journalists would dissent. Newspaper articles about the Holocaust rarely, if ever, feel obliged to grant equal access to Holocaust deniers. On a less obvious point, where an overwhelming majority of scientists have concluded that global warming is a real and troubling phenomenon, is it necessary, or even good journalism, to give equal time or space to the small minority position?

For the most part, government bodies can avoid the issue by maintaining content-neutral policies, but is this true where the government body is a University? Unlike, say, the Parks Department or the Port Authority, the University’s central purpose is the pursuit of knowledge, which presumably also encompasses making judgments about truth claims, and explicitly labeling some positions as false. Because the Holocaust denier must have access to a public street for expression, must the University give equal treatment to a student society dedicated to promulgating those views? Must the University recognize the Flat Earth Society?

Standard First Amendment doctrine, applied without regard to the special context of the University, would suggest that in each case, the answer is yes. But here, not only the reality of scarce resources, but also the core mission of the University, should lead us to hesitate. This should explain why the University’s requirement that student organizations contribute to the educational mission of the institution, despite the potential that it carries for illegitimate application to silence unpopular views, also seems to be reasonable, perhaps necessary.

59. *Id.* “Getting the other side became the definition of truth telling” in journalism by the 1970s. *Id.*

60. Christine Amanpour of CNN, commenting on the proper journalistic approach to the war in Bosnia during the mid-1990s, is quoted as saying, “Once you treat all sides the same in a case such as Bosnia, you are drawing a moral equivalence between victim and aggressor.” *Id.* At 53. To do so would make the press “an accessory to... genocide.” *Id.*

61. Smith points to the 1950s and 1960s, when “applying the understanding of objectivity that was popular at this time,” the press gave equal time to scientific evidence on the connection between smoking and health, and tobacco companies’ routine denials. SMITH, supra note 54, at 52.

As noted, the Seventh Circuit in *Southworth* emphasized the First Amendment principle that minority viewpoints must be given equal access, and treated with respect equal to as majority views. This leads the Court to the conclusion that grants cannot be based on the size of the membership organization and its audience. While such a standard would, in the Court’s view, discriminate in favor of popular viewpoints, it is interesting to note that the application of such a standard would not require any evaluation of the content of the message promoted at all. If this constitutes viewpoint discrimination, it is not in the obvious sense of bias against a particular belief, but rather a systematic tilt in favor of what is currently popular.

Another analogy to journalistic practices helps to clarify why this is not so obviously improper. Journalists who adhere to currently accepted standards of objectivity may be faced with an interesting dilemma when choosing which letters to the editor to print on a particular issue. Where the letters received greatly exceed the capacity to print them (that is, where resources are scarce) and the ratio of letters favoring one side of an issue over the other is, say, 2-1, which choice reflects journalistic objectivity: to print an equal number of letters on each side, or to print letters on each side in rough proportion to the way in which they reflect the number received?

Neither choice is self-evidently the objective one, that is, a choice that does not risk at least the appearance of bias. If the editor chooses to run letters in a proportion reflecting the popularity of each competing view in the overall count of letters received, he can be charged with bias against minority views. This bias will not necessarily reflect the editor’s own position, but rather will be a systematic bias in favor of the popular. If, on the other hand, the editor chooses to give equal space to letters on each side, she can legitimately be charged with bias against the popular view, in that it is not receiving its fair share of space; the paper is subtly telling its readers that the dissenters have more support than they do, thereby increasing the legitimacy of their views in the perception of readers.

Of course, the newspaper editor is not bound by the First Amendment, however much the professional standards of objective journalism may or may not resemble the restrictions that the Amendment places on

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63. *See supra* notes 40-43 and accompanying text.
64. *See supra* notes 40-43 and accompanying text.
65. *Id.* In *Arkansas Educational Television v. Forbes*, the Supreme Court found that a government-owned public television station did not engage in unconstitutional viewpoint discrimination when it limited participation in pre-election debates to candidates demonstrating a minimum level of support. 523 U.S. 666 (1998). This would seem to suggest, contrary to *Southworth*, that when resources are scarce, a decision to exclude viewpoints based on their minimal following may not in all contexts be improper.
66. *The Columbia Journalism Review* reports a recent survey of newspapers that received letters to the editor prior to the recent Iraq war that ran about 2-1 against American involvement. The papers differed on the question of what ratio of pro and anti-war letters should be published. Some published letters in approximately the ratio received, others felt that objectivity called for an equal number of letters on both sides of the issue. *War and the Letters Page: Who’s Counting?*, *COLUM. JOURNALISM REV.*, May/June 2003, at 10.
67. *Id.*
governmental decision makers. Still, the analogy is instructive. When distributing scarce resources that will enable a speaker to more effectively convey a viewpoint, it is not necessarily suspect to apportion those resources with some account taken of the level of support that viewpoint has in the community.\textsuperscript{68} Southworth, however, seems to strongly suggest otherwise. Equal access to scarce government resources for those seeking to speak means substantial equality for each viewpoint, rather than resource allocation pursuant to the level of support that each viewpoint can demonstrate.

Perhaps the best defense of a strong skepticism towards government decisions to regulate access to First Amendment forums based on the level of popularity of the viewpoint expressed is the strong suspicion that such a standard will, more often than not, lead to government support for views that the government itself favors. A popularly elected government, after all, is likely to usually be on the side of the majority viewpoint on public questions. The danger, then, may not be that government will systematically favor majority views, but rather that in doing so, it will systematically favor views that do not threaten the power of current officeholders.

When government seeks to further its own views by regulating private speech in a viewpoint discriminatory way, it raises serious constitutional issues. But what limits, if any, exist on government's power to vigorously advocate its own views? This question was in the background in a Seventh Circuit opinion that did not explicitly consider any First Amendment issues at all. \textit{A Woman's Choice v. Newman} focused instead on the level of permissible government restriction on the right to abortion, but in doing so, considered the government's right to advocate and persuade, and to also enlist private citizens in delivering that advocacy.\textsuperscript{69}

\textit{Newman} involved a challenge to the 1995 Indiana statute that imposed an informed consent requirement on women seeking an abortion.\textsuperscript{70} Under the statute, a physician performing an abortion, a referring physician, or a health care professional designated by one of those physicians must provide information to the pregnant woman, much of which is clearly designed to persuade the woman to forego the abortion.\textsuperscript{71} The challenge in \textit{Newman} was

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\item \textsuperscript{68} See, e.g., \textit{Arkansas Educ. Television}, 523 U.S. at 666.
\item \textsuperscript{69} \textit{A Woman's Choice-East Side Women's Clinic v. Newman}, 305 F.3d 684 (7th Cir. 2002).
\item \textsuperscript{70} \textit{Newman}, 305 F.3d at 684; \textit{IND. CODE ANN.} § 16-34-2-1.1 (Michie 1995).
\item \textsuperscript{71} The statute requires that, at least 18 hours before an abortion, “in the presence of the pregnant woman,” the physician who is to perform the abortion, the referring physician, or a health care professional delegated the responsibility by one of these physicians “orally inform[] the pregnant woman” of the following:
\begin{itemize}
\item (A) The name of the physician performing the abortion.
\item (B) The nature of the proposed procedure or treatment.
\item (C) The risks of and alternatives to the procedure or treatment.
\item (D) The probable gestational age of the fetus, including an offer to provide:
\begin{itemize}
\item (i) A picture or drawing of a fetus;
\item (ii) The dimensions of a fetus; and
\item (iii) Relevant information on the potential survival of an unborn fetus; at this stage of development.
\end{itemize}
\item (E) The medical risks associated with carrying the fetus to term.
\end{itemize}
not to the substance of the information required, but rather to the requirement that it be provided in person at least eighteen hours prior to the procedure.\textsuperscript{72}

In \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}, the Supreme Court set forth the current standards for evaluating the constitutionality of statutory restrictions on the abortion right.\textsuperscript{73} Under the \textit{Casey} framework, a state may regulate abortion in a manner intended to discourage exercise of the right unless the restriction constitutes an "undue burden."\textsuperscript{74} That term is defined as one that places "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."\textsuperscript{75} Plaintiffs in \textit{Newman} contended that the Indiana requirement of in person receipt of the information, by creating the requirement of two visits to a physician, created such an obstacle.\textsuperscript{76}

Plaintiffs argued that the requirement of two trips could, by raising the financial and emotional cost of the abortion, deter a significant number of women from going through with the procedure, despite their continued desire for it.\textsuperscript{77} They relied on studies conducted in Mississippi and Utah on the effect of similar statutory requirements, that indicated that the number of abortions declined by ten to thirteen percent due to the statute,\textsuperscript{78} as well as data indicating that in Indiana, abortions did not decline when abortion information was provided over the phone, or on paper.\textsuperscript{79} This led the district court to conclude that the two-visit requirement would lead to a similar decline in the incidence of abortion in Indiana, and that this sufficiently demonstrated that the statute imposed an undue burden.\textsuperscript{80}

The Seventh Circuit reversed the district court.\textsuperscript{81} First, the court pointed out that \textit{Casey} itself upheld a waiting period that would require two visits to a physician, demonstrating that such requirements were clearly not always impermissible.\textsuperscript{82} Next, the Court held that the Utah and Mississippi

\begin{itemize}
\item[(2)] At least eighteen (18) hours before the abortion, the pregnant woman will be orally informed of the following:
\begin{itemize}
\item[(A)] That medical assistance benefits may be available for prenatal care, childbirth and neonatal care from the county office of family and children.
\item[(B)] That the father of the unborn fetus is legally required to assist in the support of the child. In the case of rape, the information required under this clause may be omitted.
\item[(C)] That adoption alternatives are available and that adoptive parents may legally pay the costs of prenatal care, childbirth and neonatal care.
\end{itemize}

\textit{IND. CODE ANN. § 16-34-2-1.1.}
\end{itemize}

\textsuperscript{72} \textit{Newman}, 305 F.3d at 685.
\textsuperscript{74} \textit{Casey}, 505 U.S. at 874-76.
\textsuperscript{75} \textit{Id.} at 877.
\textsuperscript{76} \textit{Newman}, 305 F.3d at 685.
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.}
\textsuperscript{81} \textit{Newman}, 305 F.3d at 693.
\textsuperscript{82} "For seven years Indiana has been prevented from enforcing a statute materially identical to a law held valid by the Supreme Court in \textit{Casey} ..." \textit{Id.} at 693.
findings could not be used to demonstrate that a similar result would occur in Indiana, given the significant differences in culture, economics, and availability of abortion providers. Finally, even if it could be established that the Utah and Mississippi studies could accurately predict a decline in the incidence of abortion in Indiana, these studies cannot establish whether the decline reflects the illegitimate imposition of a substantial obstacle, or the legitimate persuasive effect of the information.

Newman was decided without any reference to the First Amendment. The Indiana statute was upheld on the grounds that the requirement of two visits to a physician did not constitute an undue burden on the abortion right. But beneath the surface, the case tells us something about the government’s power to speak, and to compel speech. While most First Amendment jurisprudence involves a challenge to government attempts to punish or otherwise limit private speech, the problem of government compelled speech has also received judicial attention.

The judges deciding Newman, including dissenting Judge Wood, agree that government may legitimately seek to persuade women to forego the right to an abortion. Even where a constitutional right is involved, then, government need not refrain from taking a position on whether it should be exercised, and stating it with some force.

At first glance, the power of government to persuade on choices of lifestyle that are not illegal, and may even be constitutionally protected, may seem troubling. Some have contended that the constitutional principle of equality compels government to maintain a position of neutrality on questions such as these, and to show equal respect for those who have chosen different alternatives. But to take this to the point of regarding government attempts to persuade as illegitimate goes too far. To be sure, there are some questions on which government cannot take a position. The Establishment Clause places religion outside of the range of legitimate government concern. And government, as distinguished from the individuals who comprise it, may not openly seek to persuade voters to retain currently

83. Id. at 689-90.
84. Id. at 690-91.
85. Id. at 693.
87. Newman, 305 F.3d at 705 (Wood, J., dissenting). “[A]n increased cost is unconstitutional if it has the purpose or effect of forcing some women to give up their constitutional right to choose abortion; it is constitutional if it genuinely furthers the state’s legitimate interest in persuading women not to select abortion . . . .” Id.
88. This position is prominent in the jurisprudence of Ronald Dworkin. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 272-78 (1977).
89. U.S. CONST. amend. 1 (stating, “Congress shall make no law respecting an establishment of religion . . . ”).
dominant political parties or individuals in office. The basic premise of a liberal democratic government is that it is open to change; for government to propagandize in favor of its own retention of power would contradict that basic commitment.

On a wide range of issues concerning how individuals should live, however, there is no serious objection to government expressing its own views. No one is required to devote a year or more of his or her life to public service, yet government may surely promote volunteerism through such organizations as the Peace Corp or AmeriCorp. Obesity is not illegal, yet government may surely promote healthy eating habits. Government may urge teenagers to stay in school beyond the mandatory education age. These, and a host of other examples, demonstrate that government persuasion is usually entirely acceptable in pursuance of legitimate social ends.

Potential problems arise, however, at the point that persuasion becomes coercion. And coercion may take two different forms. The most obvious is where government directly coerces the individual in a way that interferes with a substantive right, such as the abortion right. The second form of coercion, with which we are concerned here, is where government coerces private individuals to themselves deliver the persuasive messages favored by government.

Of course, government compelled speech is not always constitutionally suspect. This is most clearly so in commercial contexts. FDA labeling requirements, product safety warnings, and cigarette health labeling requirements are obvious examples. And in the medical field, statutory and common law requirements of informed consent are legitimate restrictions on physicians' right not to speak.

However, the Indiana statute at issue in Newman, with its requirement of an oral, face-to-face presentation of a specific range of information by a private health care professional, should raise some concerns. First, unlike many of the unexceptional labeling requirements just mentioned, the required information in Newman is obviously aimed at discouraging the women from having the abortion. Unlike the typical medical informed consent situation, some of the information is unrelated to the potential of harm to the patient.

In this regard, the required information might be seen as analogous to the health warnings required by law on cigarette packages, which are also clearly intended to discourage smoking. There is, however, one significant

90. Although the Court, in Davis v. Bandemer, found no constitutional violation in the partisan gerrymandering of the Indiana legislature, it noted that an equal protection violation could be established by a system that persistently evidenced "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." 478 U.S. 109, 127 (1986).


94. See supra notes 69-85 and accompanying text.
difference. The cigarette warnings are labeled as government warnings; no one would regard the anti-smoking message as coming from the manufacturer of the product itself. The mandatory oral, face-to-face nature of the Indiana warnings, in contrast, may distort the source of the message, thereby adding weight to it.

Written materials setting forth the information required by the statute, identifying the source of the information as the State of Indiana, would clearly convey the message that it is, in fact, the State that urges women to pursue alternatives to abortion. But when the information is delivered orally by a woman's physician, the source of the message is unclear. Is it the state, pursuing the general welfare, that discourages abortion, or is it the physician? Any patient will, with justification, expect that the primary, if not the sole concern of the health care professional is the patient's welfare, and that the opinions expressed by the professional are his or her own best estimates of how to further that welfare, rather than the pursuit of State-endorsed social goals.

A rough, though not perfect, analogy can be drawn between this context and the lawyer-client relationship. Obviously, the government itself, acting through its own agents, can seek to persuade a criminal defendant to plead guilty. But just as obviously, it would be clearly improper for government to mandate that private defense attorneys always present these clients with information intended to place a guilty plea in the best possible light. The defendant legitimately expects that his attorney will act in her client's best interests, and the defendant will take persuasive information delivered by his attorney more seriously than the same persuasion coming from outside of the attorney-client relationship. The perceived source of the information matters; here, to paraphrase McLuhan, the medium is at least part of the message.

The Seventh Circuit, in Newman, did not address this question. It is quite likely that if the Court had, it would have dismissed any First Amendment claim based upon compelled speech, pointing to the clearly justifiable requirements of informed consent placed upon all health care practitioners. In addition, the Supreme Court, in the 1991 case of Rust v. Sullivan, upheld a federal statutory requirement that federally funded family planning clinics could not counsel their clients on the possible use of abortion as a method of family planning. Although Rust dealt with a restriction on speech, rather than compelled speech, and dealt only with conditions placed on recipients of government funding, rather than requirements placed on all health care professionals, it suggests the Court's willingness to permit government to deliver its message of disapproval of abortion through restrictions placed on health care professionals.

But the contrast between the two cases discussed in this section is striking. In Southworth, the Seventh Circuit was careful to assure that when

95. See supra notes 69-85 and accompanying text.
97. Id. at 203. The statute and regulations issued under it are summarized. Id. at 178-181.
government supports private speech, it does so in a way that does not
disadvantage viewpoints that government finds offensive. In *Newman*,
without addressing First Amendment concerns, the Seventh Circuit upheld a
state requirement that enlists private health care professionals in the
presentation of information conveying the State’s obvious disapproval of
abortion.

II. ACCESS TO TRADITIONAL PUBLIC FORUMS

In *Weinberg v. City of Chicago*, the Seventh Circuit addressed the First
Amendment implications of Chicago’s attempt to limit peddling in the
vicinity of the United Center, the home of the Chicago Bulls and Chicago
Blackhawks. Mark Weinberg is a longtime fierce critic of Bill Wirtz,
owner of the Blackhawks of the National Hockey League. For several
years, Weinberg published and sold a magazine to Blackhawk fans on public
streets outside the United Center. The magazine took a negative view of
Wirtz’s ownership activity. City authorities did not interfere with
Weinberg’s magazine sales. But in 2000, Weinberg wrote and self-
published a book whose title, *Career Misconduct: The Story of Bill Wirtz’s
Greed, Corruption and the Betrayal of Blackhawk Fans*, accurately
summarizes its contents, “a highly critical look” at the Blackhawk’s
owner. When Weinberg began selling his book on streets outside the
United Center during the 2000-2001 Blackhawk’s season, he was informed
by police that selling his book would place him in violation of Chicago’s
peddling ordinance. Two provisions of the ordinance were relevant to
Weinberg’s activity. The first provided that only “a licensed peddler” was
permitted to sell “any article or service whatsoever, except newspapers, on
any public way.” The second, more specific provision, stated that no one
could peddle merchandise on “any portion of the public way within 1000 feet

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98. *Weinberg v. City of Chicago*, 310 F.3d 1029 (7th Cir. 2000).
99. *Id.* at 1033.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 1034. The ordinance, Section 4-244-147 of the Chicago Municipal Code,
provided:
   No person shall peddle merchandise of any type on any portion of the public way
   within 1,000 feet of the United Center. A person holding a valid peddlers license
   may peddle merchandise while on private property within 1,000 feet of the United
   Center only from a cart, table or temporary stand on private property without
   obstructing the public way, and pursuant to prior written permission from the
   property owner to do so.

98. *Weinberg v. City of Chicago*, 310 F.3d 1029 (7th Cir. 2000).
99. *Id.* at 1033.
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   Center only from a cart, table or temporary stand on private property without
   obstructing the public way, and pursuant to prior written permission from the
   property owner to do so.

105. *Weinberg*, 310 F.3d at 1034.
of the United Center, but that a properly licensed peddler could sell merchandise while on private property within that same radius if the peddler obtained permission of the property owner, sold only from a fixed stand, and did not obstruct the public way. The stated purpose of the ordinance was "to alleviate traffic congestion and maintain pedestrian safety."

When threatened with arrest, Weinberg stopped selling his book outside the United Center, and then brought suit seeking to have the ordinance declared unconstitutional as applied to the sale of books, on the grounds that it violated his First Amendment rights. Weinberg and the City agreed to have the case heard by a magistrate judge, who granted summary judgment for the City. The Seventh Circuit reversed, in an opinion discussing the limits placed on government in its attempt to regulate time, place and manner restrictions on speech in traditional public forums, as well as the limits placed on government when it insists that prior licensing is a condition for expression.

When regulating expressive activity in a traditional public forum such as a public street, government is held to standards more stringent than those that govern regulation of a limited, or designated, public forum, such as the student government activity fund discussed above in Southworth. Government may not close off a traditional public forum from all expressive activity, and in regulating, it must be not only viewpoint neutral, but also content neutral, that is, indifferent to the subject matter of the speech. In addition, the content neutral regulation of the time, place and manner of expression must be narrowly tailored to serve a significant government interest and leave open ample alternative channels for the speaker to convey the message.

The City was able to demonstrate that its ordinance was content neutral. The only arguable content-based distinction made in the ordinance

106. Id.
107. Id.
108. Id. Similar restrictions were enacted applying to areas "around other large stadiums throughout Chicago." Id.
109. Id.
110. Id.
111. Weinberg, 310 F.3d at 1046.
112. See supra note 18. See also Schneider, 308 U.S. at 163 (stating, "the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place").
113. See supra notes 19-21 and accompanying text.
114. See supra note 16. Contrast the Supreme Court's decision upholding an ordinance that banned all focused picketing outside of a residence in Frisby v. Schultz, 487 U.S. 474 (1988), with its decision striking down on Illinois statute that prohibited picketing of a residence unless the residence was also a place of business involved in a labor dispute, in Carey v. Brown, 447 U.S. 455 (1980). The latter case found that the exemption for labor disputes "accords preferential treatment to the expression of views on one particular subject," in violation of the principle of content-neutrality. Carey, 447 U.S. at 461.
was the exception of newspapers from the items that could not be sold without a permit.\(^{116}\) Weinberg argued that this was content-sensitive, permitting “topical” expression while restricting “non-topical” matters.\(^{117}\) But the Court rejected this argument, finding that neither the ordinance nor the exception for newspapers had anything to do with the content of expression. Differential treatment of forms of expression violates the principle of content neutrality only where “it is directed at, or presents the danger of suppressing, particular ideas.”\(^{118}\)

Weinberg was more successful in his contention that the ordinance failed to meet the requirements for a valid time, place or manner restriction, beyond the core requirement of content neutrality.\(^{119}\) The Court easily found that the City’s interest in public safety and the related interest in maintaining a steady flow of pedestrian traffic qualified as legitimate.\(^{120}\) However, the Court refused to accept mere “speculation as to what might happen if booksellers could sell their books and the cumulative effect this might have on pedestrian traffic” as sufficient to establish that the ordinance actually advanced the public interest.\(^{121}\)

Where First Amendment concerns are present, the court insisted on “objective evidence” of disruption of the traffic flow, and here “[t]he City offered no empirical studies, no police records, no reported injuries, nor evidence of any lawsuits filed.”\(^{122}\) And although the exception for newspaper sales was found not to violate the principle of content neutrality, it, along with the fact that “activities such as leafleting... street performances, and charitable solicitations” were not prohibited, led the court to conclude that the ordinance insufficiently advanced the City’s interest in pedestrian safety.\(^{123}\)

Further, the Court held that the 1000-foot ban, which included not only sidewalks immediately adjacent to the United Center, but also “less congested walkways” and most of the United Center parking lots, to be insufficiently tailored to address the legitimate interest of the City.\(^{124}\) The test here is not the “least restrictive means” test commonly used in strict scrutiny analysis; but “while a regulation does not have to be a perfect fit for the government’s needs, it cannot substantially burden more speech than

\(^{116}\) See supra note 104.
\(^{117}\) Weinberg, 310 F.3d at 1037.
\(^{118}\) Id. at 1036. The Seventh Circuit concluded that “[t]he City’s restriction on selling goods, with the exception of newspapers, is based on its concerns about the disruption and the effects on traffic congestion, not on suppressing ideas captured in book form.” Id.
\(^{119}\) Id. at 1038.
\(^{120}\) Id.
\(^{121}\) Id. at 1039. “The City of Chicago has provided no objective evidence that traffic flow on the sidewalk or street is disrupted when Mr. Weinberg sells his book. The City offered no empirical studies, no police records, no reported injuries, nor evidence of any lawsuits filed.” Id.
\(^{122}\) Weinberg, 310 F.3d at 1039.
\(^{123}\) Id.
\(^{124}\) Id. at 1040.
The court found that there were obvious “middle ground” approaches, “such as a ban of less distance, a ban on peddling on certain narrow walkways, or a ban on peddling on the sidewalks immediately surrounding the United Center.”

The final requirement of a valid time, place or manner restriction is that it leave open “ample alternative channels” for the regulated expression. The City noted that Weinberg could sell his book through bookstores, over the Internet, or in other parts of the City, and noted that an alternative can be considered adequate even if it is not “the speaker’s first choice.” But the court pointed out that the consideration of whether the preferred alternative means are sufficient must be undertaken in light of the target audience of the speaker.

Weinberg’s primary intended audience was, of course, Blackhawk fans. Clearly the best, perhaps the only, way to effectively reach this audience is to be allowed to deliver one’s message to the concentration of fans going to and from home games. An alternative, held the Court, “is not adequate if it forecloses a speaker’s ability to reach [the intended] audience even if it allows the speaker to reach other groups.” Here, in view of “Weinberg’s customer base and his unique marketplace,” any proposed alternative would require “Herculean efforts by Weinberg or his customers to complete the sale.”

In addition to challenging the 1000-foot ban on peddling around the United Center, Weinberg also challenged the licensing procedures under the Chicago peddling ordinance, on grounds similar to those invoked by the challengers in Southworth. Weinberg’s claim was that the City had unfettered discretion in the denial of permits, and that in the context of a decision to license expression, this would constitute an impermissible prior restraint on speech.

Prior restraints, often regarded as the most offensive of possible First Amendment violations, can appear in two forms: court-imposed injunctions or administrative decisions to deny permits or licenses. Despite the obvious potential threats to free expression that these government acts pose, neither form of restraint is invariably unconstitutional. Apart from court

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125. Id.
126. Id.
127. Id. at 1040-41. See also Heffron, 452 U.S. at 648.
128. Weinberg, 310 F.3d at 1041.
129. Id. The court cites Heffron, 452 U.S. at 647, and the recent Seventh Circuit case of Gresham v. Peterson, 225 F.3d 899, 906 (7th Cir. 2000). Weinberg, 310 F.3d at 1041.
130. Id.
131. Id. at 1042.
132. Id. at 1041.
133. Id. at 1042.
134. Id. at 1043. See supra notes 1-11 and accompanying text.
135. Weinberg, 310 F.3d at 1043.
137. See Lakewood, 486 U.S. at 750; N.Y. Times, 403 U.S. at 713; Near, 283 U.S. at 697.
orders restricting attorneys or other officers of the court from commenting publicly on cases in a way that might threaten the ability to conduct a fair trial, the standard for permitting an injunction barring speech is extremely high. In contrast, permit and licensing systems do not initially carry with them such a heavy suspicion of illegitimacy. Systems of licensing can be used in ways that do not seriously threaten to stifle expression; permit systems may actually serve to facilitate speakers’ ability to deliver their message.

At the same time, however, allowing government to license expression creates the obvious threat that such permission will be granted or denied improperly. Unsurprisingly, the basic requirement for a valid permit system is that it be content-neutral. But a licensing scheme may be challenged on its face even where it does not expressly permit consideration of the content of the speaker’s message. It is sufficient for a challenge to demonstrate that the system gives government “substantial power to discriminate based on the content or viewpoint of speech,” and this power can be found in the absence of sufficient limits on discretion just as easily as in the authorization of the power to consider content.

The Seventh Circuit had little trouble finding that the challenged ordinance was unconstitutional. The peddling ordinance contained “absolutely nothing to guide city officials in determining whether to grant a permit.” The court contrasted this ordinance with the licensing system approved in Graff v. City of Chicago. There, the Commissioner of Transportation was given “six set criteria” by which to judge applications for a permit to build a newsstand. These criteria, the Court held, were

138. In Gentile v. State Bar of Nevada, the Court upheld the constitutionality of a state bar disciplinary rule prohibiting out-of-court speech by attorneys that created a “substantial likelihood of material prejudice” to a pending case, although it did strike down a provision of the Nevada disciplinary code as impermissibly vague. 501 U.S. 1030, 1074-76 (1991).

Although this case dealt with subsequent punishment, rather than prior restraint, it does clearly suggest that attorneys, in their role as officers of the court, are subject to greater regulation of their speech activities in the interest of protecting the integrity of judicial proceedings.

139. See N.Y. Times, 403 U.S. at 713; Near, 283 U.S. at 697. However, even a strong presumption against prior restraints may be overcome in an exceptional case. See Neb. Press Ass’n v. Stuart, 427 U.S. 539 (1976) (upholding a gag order placed on the press to assure a fair trial for a criminal defendant).

140. Lakewood, 486 U.S. at 759.

141. “[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional,” Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969).

142. Weinberg, 310 F.3d at 1044.

143. Id.; Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993).

144. Graff, 9 F.3d at 1317-18. The criteria are:
(1) Whether the design, materials and color scheme of the newspaper stand comport with and enhance the quality and character of the streetscape, including nearby development and existing land uses;
(2) Whether the newspaper stand complies with this code;
sufficient to assure that the Commissioner would not approve or disapprove applications based on the content of the material to be sold.\textsuperscript{145} The peddling ordinance at issue in \textit{Weinberg} provided no such assurance.\textsuperscript{146}

Of course, one might find the entire discussion of the ordinance in First Amendment terms to be inappropriate. It regulates the sale or solicitation of sales of articles or services; it is not concerned on its face with expression, but with activity. The Supreme Court has given limited protection to "commercial speech," that is, speech that proposes or solicits a commercial transaction.\textsuperscript{147} But here, the Seventh Circuit did not resort to the commercial speech framework.

A key component of finding speech to constitute commercial speech is the primarily economic motivation of the speaker.\textsuperscript{148} Weinberg's principal motivation, the Court found, was the dissemination of his criticism of Bill Wirtz, not merely making a profit.\textsuperscript{149} But even if that were not so clear, prior cases make it clear that the distribution and sale of books, as well as newspapers and magazines, receives strong First Amendment protection, since "distribution is an inseparable part of expression."\textsuperscript{150} The City's discretion under the ordinance could be exercised in a content-based way to limit "expression or . . . conduct commonly associated with expression."\textsuperscript{151}

\textit{Weinberg}, then, makes no new law, but is interesting nonetheless. It provides a clear and concise example of the application of current First Amendment doctrine on two issues involving access to a traditional public forum: the limits on government's power to impose time, place and manner restrictions, and the circumstances under which a licensing system may be regarded as an unconstitutional prior restraint on expression.

III. SPEECH BY GOVERNMENT EMPLOYEES

No speech is more clearly at the core of what the First Amendment means to protect than speech criticizing government. Often no one is in a

\begin{itemize}
  \item (3) Whether the applicant has previously operated a newsstand at this location;
  \item (4) The extent to which services that would be offered by the newspaper stand are already available in the area;
  \item (5) The number of daily publications proposed to be sold from the newspaper stand; and
  \item (6) The size of the stand relative to the number of days the stand will be open and operating.
\end{itemize}


\textsuperscript{145} \textit{Graff}, 9 F.3d at 1317-18.

\textsuperscript{146} \textit{Weinberg}, 310 F.3d at 1044.


\textsuperscript{148} \textit{Central Hudson}, 447 U.S. at 561.

\textsuperscript{149} \textit{Weinberg}, 310 F.3d at 1044-45.

\textsuperscript{150} \textit{Id.} at 1045 (quoting \textit{Graff}, 9 F.3d at 1337 (Cummings, J., dissenting)).

\textsuperscript{151} \textit{Id.} at 1044 (quoting \textit{Lakewood}, 486 U.S. at 759).
better position to offer informed criticism of government than a disaffected
government employee. Yet any employer, including a government agency,
must have some power to discipline or dismiss an employee whose conduct
is disruptive to the efficient functioning of the agency. These conflicting
principles must be balanced where a government employee alleges that a
negative employment decision was made in retaliation for the employee’s
exercise of First Amendment rights. Two Seventh Circuit cases decided in
2002 involving the Milwaukee Police Department illustrate the Court’s
approach to such disputes.

_Gustafson v. Jones_\(^{152}\) involved a claim of retaliation by the Chief and
former Chief of Police of Milwaukee against two police officers for their
criticism of a policy change that limited officers’ discretion to conduct
follow-up investigations of crimes that the officers had begun to work on.\(^\text{153}\) Gustafson and fellow officer Cornejo were assigned to an elite Tactical
Enforcement Unit, “whose job would be to patrol designated districts and
respond to service calls relayed through the district dispatchers.”\(^{154}\)

Before July 13, 1993, TEU officers could “take themselves off patrol
duty to conduct follow-up investigations of crimes they had previously
begun to work on,” if they notified the district dispatcher and had the
permission of their unit supervisor.\(^\text{155}\) On the night of July 13, 1993,
Gustafson and Cornejo, after receiving permission from their supervisor
sergeant, took themselves off patrol duty to follow-up an investigation of a
gang member thought to have held a family at gunpoint a week earlier, and
to have taken shots at a member of that family since then.\(^\text{156}\) The officers
had just been provided with some addresses where the suspect might be
found.\(^\text{157}\)

In mid-investigation, however, they were instructed by Jones, then
Deputy Inspector and on duty that night as the officer in charge of the
department, to discontinue the follow-up and resume their normal duties,
patrolling and taking assignments only from the dispatcher.\(^\text{158}\) The next day,
Jones issued a new protocol for TEU officers.\(^\text{159}\) They were “not to engage
in follow-up investigations without Jones’s express permission.”\(^\text{160}\) Jones
justified this order as “necessary to overcome the resistance of TEU officers
to doing regular patrol.”\(^\text{161}\)

Gustafson and Cornejo, along with other TEU officers, were confused
and upset about the order, which they felt severely limited their ability to do
necessary follow-up work.\(^\text{162}\) The importance of follow-up work was even
more on the minds of officers, since "just over a year earlier two patrol officers were fired after failing to properly follow up on information suggesting criminal conduct by Jeffrey Dahmer." 163

Gustafson and Cornejo, after approaching their superior officers and being told that nothing could be done about the order, went to the president of the police union, to discuss the issue. 164 The union president then sent a letter criticizing the new policy to Police Chief Arreola, and sent copies to the media and to elected officials. 165 Both Milwaukee newspapers and several members of the City Council called for Jones to repeal his order. 166

Four months later, Gustafson and Cornejo, despite consistently positive performance reviews, were involuntarily transferred from the elite TEU unit. 167 They subsequently applied for reassignment to the TEU, but were passed over, despite being "ranked at the top of the list" for the assignment. 168 They then sued Arreola and Jones, who had since become Police Chief. 169 A jury verdict awarded both compensatory and punitive damages to the officers, and the defendants unsuccessfully appealed. 170

In the second case, Delgado v. Jones, 171 plaintiff was a veteran officer of the Milwaukee Police Department, working in the Vice Control Unit. 172 After arresting a suspect on drug charges, Delgado received a letter from the suspect claiming that he "had information about the buying and selling of drugs by public school employees and the patronage of a drug house by a close relative of a public official." 173 The letter also claimed that the public official was "a close personal friend" of Police Chief Jones. 174

After showing the letter to his lieutenant, Delgado was instructed to interview the letter writer, and submit a memorandum summarizing the interview to the lieutenant. 175 The memo “moved up the chain of command” to a deputy chief, who recommended that the matter be investigated by "an outside law enforcement agency." 176 Chief Jones, however, ordered that the investigation remain within the Milwaukee Police Department “and instructed Delgado’s captain not to discuss the . . . memorandum with Delgado or anyone else.” 177

163. Id. at 901. See Balcerzak v. City of Milwaukee, 163 F.3d 993 (7th Cir. 1998) (upholding City’s disciplinary action against officers who failed to properly follow-up information concerning Jeffrey Dahmer).
164. Gustafson, 290 F.3d at 902.
165. Id. at 902-03.
166. Id. at 903.
167. Id. at 904.
168. Id.
169. Id. at 903-04.
170. Id. at 899.
171. Delgado v. Jones, 282 F.3d 511 (7th Cir. 2002).
172. Id. at 514.
173. Id.
174. Id.
175. Id. The lieutenant’s sardonic comment to Delgado was, “what district do you want to be transferred to?” Id.
176. Id.
Shortly thereafter, Delgado was involuntarily transferred out of the Vice Control Division, ordered to take a drug test, and was informed that his communication with the letter writer was being investigated by the Department's Internal Affairs Division. Delgado brought suit, claiming that his transfer and other actions by Chief Jones were retaliation for the exercise of his First Amendment rights. The district court denied Jones's motion to dismiss, in which Jones had claimed qualified immunity. The denial of that defense was unsuccessfully appealed to the Seventh Circuit.

A century ago, the Supreme Court gave short shrift to the claim by government employees that they could criticize the operation of their agencies without retaliation. Justice Holmes remarked, in one of his famous aphorisms, that while a police officer had a right to free speech, he had no right to a job as a police officer. But in recent decades, the Court has established that government employees do, in fact, sometimes have both rights.

At the same time, the Court has recognized that the free speech rights of government employees cannot be precisely coextensive with those of the general public. In Pickering v. Board of Education, the Court noted that

the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs.

In a series of cases, the Supreme Court has framed a three-part test for determining whether an employee’s First Amendment rights have been infringed by a retaliatory adverse employment decision. First, the employee must establish that the speech in question was on “a matter of public concern.” Next, the employee must show that the speech was “a
motivating factor" in the employment decision.\textsuperscript{188} Here, the burden is on the employer to show "by a preponderance of the evidence that it would have reached the same decision" apart from the speech.\textsuperscript{189} If the employee satisfies these requirements, the court must balance the employee's speech interests against any harm the speech has done to the efficiency of the agency.\textsuperscript{190}

Although \textit{Gustafson} was on appeal from a jury verdict, and \textit{Delgado} on appeal of a denial of a Rule 12(b)(6) motion, the cases may be examined together for insight into the application of the three-part test. This is so because in \textit{Delgado}, the Seventh Circuit pointed out that the standard for invocation of qualified immunity includes an analysis of the facts as pleaded, to determine whether "a reasonable official would . . . have concluded that Detective Delgado had a First Amendment right" in his speech.\textsuperscript{191}

In each case, the Seventh Circuit had little difficulty holding that the officer's speech was on a matter of public concern. The determination of whether speech should be so classified is made in consideration of "the content, form, and context" of the speech.\textsuperscript{192}

The content of the speech in these cases, the effective operation of the Milwaukee Police Department, undoubtedly qualifies as a public concern.\textsuperscript{193} However, analysis does not end with an examination of content. Even speech concerning the operation of public agencies may not ultimately qualify as addressing a matter of public concern if it is "only motivated by private concerns."\textsuperscript{194} In each of these cases, Chief Jones argued that the plaintiff officers were motivated by their own career agendas, and that this negated the contention that the speech was of public concern.\textsuperscript{195}

The Court in each case rejected this argument. As a matter of law, motive will control only if the private agenda is the only reason for the speech;\textsuperscript{196} at most in these cases, private and public concerns were without intrusive oversight by the judiciary in the name of the name of the First Amendment." \textit{Id.}\textsuperscript{198} \textit{Mt. Healthy}, 429 U.S. at 287. The employee must show that his expression "was a 'substantial factor,' or, to put it in other words, that it was a 'motivating factor'" for the government's action. \textit{Id.}\textsuperscript{189} \textit{Id.}\textsuperscript{190} \textit{Rankin}, 483 U.S. at 384.

\textit{Delgado}, 282 F.3d at 515.


\textit{Delgado}, 282 F.3d at 517 (citing \textit{Glass v. Dachel}, 2 F.3d 733, 741 (7th Cir. 1993): "Obviously, speech that focuses on police departments (and ultimately police protection and public safety) involve matters of public concern.").

\textit{See Gustafson}, 290 F.3d at 908. Where the speech, even speech concerning the operation of a public agency, is entirely motivated by self-interest, it can lose its status as a matter of public concern worthy of First Amendment protection. \textit{See Connick}, 461 U.S. at 148; \textit{Linhart v. Glatfelter}, 771 F.2d 1004 (7th Cir. 1985).

\textit{Gustafson}, 290 F.3d at 908, \textit{Delgado}, 282 F.3d at 518.


\textsuperscript{196} "We emphasize the word 'only' because, while speech that is only motivated by private concerns may not be protected, '[a] personal aspect contained within the motive of the speaker does not necessarily remove the speech from the scope of public concern,'" \textit{Gustafson}, 290 F.3d at 908 (citing \textit{Greer v. Amesqua}, 212 F.3d 358, 371 (7th Cir. 2000)).
conjoined. In addition, particularly in Delgado, the Court noted that the officers acted with the knowledge that, if anything, speaking out would make their professional lives more difficult, rather than advancing their careers.

With the officers' speech found to address a matter of public concern, the next step is to determine whether the speech was a motivating factor in this negative job action, and whether the public benefit was outweighed by the harm this speech may have caused to the efficient operation of the Department. In Delgado, an appeal of a denial of a Rule 12(b)(6) motion to dismiss on the grounds of qualified immunity, the Court held that these were fact-based inquiries that must await trial. Gustafson, an appeal from a final judgment, presented the Court with an opportunity to review a full factual record.

The first point of interest here, particularly for government defendants in cases such as this, is the interesting intersection of the causation and the balancing inquiries. In Gustafson, the defendants denied that the officers' speech upset them or caused noticeable harm to the operation of the Department. These denials were obviously meant to establish that the speech was not a motivating factor in the job action, a conclusion rejected by the jury verdict. Yet these very assertions largely undermined the defendants' argument that harm to the operation of the department not only was present, but outweighed the officers free speech rights and the public value of the speech.

In performing the balancing test required here, courts will primarily focus on the presence or absence of evidence that the speech interfered with the employee's job performance, or created disharmony or morale problems within the agency. It would seem clear that by developing evidence in support of these disruptive effects, the government defendant abandons, or at least undermines, any contention that the expression was not a motivating factor in the job action. In Gustafson, the defendants attempted to finesse this problem by claiming that they were concerned with possible future harm to morale or performance that had not yet become evident, but that

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197. Gustafson, 290 F.3d at 908; Delgado, 282 F.3d at 518.
198. Delgado, 282 F.3d at 519.
199. Id. at 521.
200. Gustafson, 290 F.3d at 906.
201. Id. at 913.
202. Id. The Gustafson Court wrote:

At trial, Chief Arreola and Deputy Inspector Jones elected not only to deny that they were motivated to transfer Gustafson and Comejo because of their speech, but also to deny having any knowledge of the speech (Jones) or any concerns regarding it (Arreola) at the time they recommended that the officers be transferred. Both denied that the speech embarrassed them and neither offered any testimony suggesting that the officers' speech either created, or created the potential for, the kind of disruption that would have warranted punishing speech that is on a matter of public concern. . . . Having created this record, they are stuck with it.

Id.
203. See Pickering, 391 U.S. at 572-73.
204. See Gustafson, 290 F.3d at 911 (writing "Mere assertions of a generalized potential for disruption are . . . insufficient.").
argument was found unpersuasive. The lesson here would seem to be that a government defendant must decide to vigorously contend either that the expression was not a motivating factor in the job action, or that the job action was justified by the negative effect of the expression on the agency. An attempt to establish both at the same time makes each argument the enemy of the other.

Also worth noting is the court's discussion, in *Gustafson*, of the significance of the "manner and means" of the employee's speech. An employee who quickly "fires off his news release" about internal problems "without taking advantage of any kind of internal complaint procedures" may have difficulty surviving application of the balancing test. Significantly, the officers in *Gustafson* went up the proper internal chain of command, and went public only when, in good faith, they concluded that "disclosure was necessary given the nature of their concerns and their supervisor's unwillingness to do anything." 206

In both of these cases, the defendants maintained that they were entitled to qualified immunity. Such immunity requires a defendant to establish that "there was no clearly established law that would have put them on notice" that their actions, i.e. taking a negative job action based upon the exercise of an employee's free speech rights, was unconstitutional. 207 Seventh Circuit cases dating back to 1979 establish this principle. 208 If this news had not reached the upper echelons of the Milwaukee Police Department by the 1990s, one can only hope that all public employers within the Circuit have by now gotten the message. At the same time, employees should keep in mind that there are legitimate restrictions on the extent to which they may criticize their own agencies and avoid retaliation. A whistleblower with a genuine concern for the public good, rather than merely an ax to grind, and a willingness to first seek redress through established channels, however, should be encouraged by the Seventh Circuit's disposition of *Gustafson* and *Delgado*.

IV. THE RELIGION CLAUSES – FREE EXERCISE

The First Amendment may, in the public mind, be most closely associated with the protection of freedom of expression. But it cannot be forgotten that the first freedoms referred to by the Amendment involve religion. A survey of the Seventh Circuit's recent First Amendment activity, then, should include at least a brief discussion of the court's treatment of cases presenting free exercise issues. Two recent cases illustrate the relative ease with which federal courts can dispose of most claims of free exercise-

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205. *Id.* at 912. The court found this to be a significant distinction of *Gustafson* from *Greer*. *Id.*
206. *Id.*
207. *Id.; Delgado*, 282 F.3d at 520.
208. See McGill v. Bd. of Educ., 602 F.2d 774 (7th Cir. 1979); Walsh v. Ward, 991 F.2d 1344 (7th Cir. 1993).
based exemptions from generally applicable law in the years since the
Supreme Court’s 1990 decision in Employment Division v. Smith.209

In Tarpley v. Allen County,210 plaintiff Tarpley was a prisoner moved
from incarceration in New York to the Allen County, Indiana, jail.211
Following their normal procedures, jail officials “put all of his personal
property into a storage box, including a ‘New International Version’ Study
Bible”.212 Tarpley asked for the return of his Bible, but was refused.213
Instead, “the jail’s chaplain gave him access to a substitute Bible,”214 one
that contained the identical text as Tarpley’s NIV Bible [New International
Version], but did not include the interpretive commentary contained in his
NIV Edition.215

The jail officials based their refusal on a general policy that, while
distributing reading materials, religious and otherwise, to inmates, prohibited
inmates from having “possessory interests” in reading materials.216 The
policy was created “to curb fights over who owned what and to avoid
compensation claims if the materials were lost or stolen.”217 Tarpley,
however, claimed that the denial of access to his preferred version of the
Bible violated his free exercise rights.218

The Seventh Circuit affirmed the district court’s rejection of Tarpley’s
claim.219 The Court stated that “[p]rison restrictions that infringe on an
inmate’s exercise of his religion are permissible if they are reasonably
related to a legitimate penological objective.”220 This standard was not
difficult to satisfy. The court accepted the rationale behind the jail’s general
policy regarding reading material and found both that an exception would
compromise that policy and that the offer to loan Tarpley the substitute Bible
was sufficient to accommodate his legitimate religious needs.221

From the early 1960s222 until the Smith decision in 1990, it was
generally thought that a claim to a religious exemption from an otherwise
applicable law called for the application of strict scrutiny.223 Even during

neutral law of general applicability need only satisfy rational basis review to justify
denying an exception to religious believers).
210. Tarpley v. Allen County, 312 F.3d 895 (7th Cir. 2002).
211. Tarpley, 312 F.3d at 897.
212. Id.
213. Id.
214. Id.
215. Id.
216. Id.
217. Id. at 897.
218. Tarpley, 312 F.3d at 898.
219. Id. at 897.
220. Id. at 898.
221. Id. at 898-99.
223. “We must next consider whether some compelling state interest . . . justifies the
substantial infringement of appellant’s First Amendment right. It is basic that no showing
merely of a rational relationship to some colorable state interest would suffice; in this
this time, however, the Supreme Court’s approach in cases brought by prison inmates gave substantial deference to the claim that a religion-based exemption would unduly harm the state’s legitimate penological objectives.\textsuperscript{224} In \textit{Smith}, the Court limited strict scrutiny to the rare case where the challenged statute was not one of general application, but rather was targeted at religious practice.\textsuperscript{225} Where a statutory obligation is one of general application, the Court held, its application in a way that impinges on religious practices raises no unique problems; it need only be defended as rational.\textsuperscript{226}

Although \textit{Tarpley} is a case involving prisoners, and therefore one examining the particular justification of “legitimate penological objectives,” it nevertheless illustrates the difficulty of successfully maintaining a free exercise claim in the post-\textit{Smith} world. Under strict scrutiny, it seems at least questionable whether an exception for religious materials would seriously threaten a compelling state interest. But low-level scrutiny is quite different. While, outside of prison, no one needs to fear government confiscation of their own religious reading material, \textit{Tarpley} does demonstrate the limited force of the Free Exercise Clause as currently applied.

The free exercise claim in \textit{Te-Ta-Ma Truth Foundation v. World Church of the Creator}\textsuperscript{227} received even less consideration than the claim in \textit{Tarpley}. \textit{Te-Ta-Ma} was primarily a trademark dispute between two self-described churches.\textsuperscript{228} The Truth Foundation, operating under the trademarked name “Church of the Creator,” is dedicated to a doctrine of “universal love and respect.”\textsuperscript{229} In contrast, the World Church of the Creator is a white supremacist group that “depicts the ‘white race’ as the ‘Creator’ and calls for the elimination of Jews, blacks, and what it labels ‘mud races’.”\textsuperscript{230} Pointing to evidence of public confusion between the two organizations, the Truth Foundation sought an injunction against “the World Church’s use of what is obviously a confusingly similar name.”\textsuperscript{231} Applying standard principles of trademark law, the Seventh Circuit reversed a district court decision in favor of the World Church, and remanded the case with instructions to enter judgment in favor of the Truth Foundation.\textsuperscript{232}

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\textit{highly sensitive constitutional area, “only the gravest abuses, engendering paramount interests, give occasion for permissible limitation.”} \textit{Sherbert}, 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).
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\textsuperscript{224} \textit{See, e.g., O’Lone v. Estate of Shabazz, 482 U.S. 342, 347-48 (1987).}
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\textsuperscript{225} \textit{Smith}, 494 U.S. at 877-78. The only example of such a statute in Supreme Court cases is \textit{Church of Lukmi Babalu Aye, Inc. v. City of Hialeah}, 508 U.S. 520, 524 (1993) (striking down an ordinance directed at practitioners of the Santeria religion, prohibiting ritual animal sacrifice).
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\textsuperscript{226} \textit{See Smith}, 494 U.S. at 878-80.
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\textsuperscript{227} \textit{Te-Ta-Ma Truth Found. v. World Church of the Creator}, 297 F.3d 662 (7th Cir. 2002).
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\textsuperscript{228} \textit{Te-Ta-Ma}, 297 F.3d at 664-65.
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\textsuperscript{229} \textit{Id.} at 664.
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\textsuperscript{230} \textit{Id.}
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\textsuperscript{232} \textit{Id.} at 667.
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In addition to its arguments based in trademark law, the World Church argued that to use trademark law to deny it the use of “Church of the Creator,” and assign exclusive rights in that name to another group, would violate the First Amendment. Citing Employment Division v. Smith, the court was able to dispose of this argument in a simple paragraph. “Congress need not exempt religions from generally applicable laws,” and the general aim of trademark law is not only legitimate, but “promote[s] the aims of the First Amendment by enabling producers of the spoken and written word to differentiate themselves.”

Since the Supreme Court’s ruling in Smith, free exercise claimants have turned to state constitutional provisions or state or federal statutes to secure strict scrutiny review of government failure to honor a request for a religious exemption from an otherwise generally applicable statutory obligation. As these recent Seventh Circuit cases indicate, the Free Exercise Clause of the First Amendment has become a much less effective weapon in securing such an exemption.

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233. Id.
234. Smith, 494 U.S. at 872.
235. Te-Ta-Ma, 297 F.3d at 667.
236. Id.

At the federal level, the Supreme Court rejected, on separation of powers grounds, an attempt by Congress to reinstate the strict scrutiny approach to free exercise claims. See City of Boerne v. Flores, 521 U.S. 507, 511-15 (1997). Boerne’s essential holding was that Congress is not empowered, under Section 5 of the Fourteenth Amendment, to broaden the substantive scope of the rights provided under the Amendment. See Boerne, 521 U.S. at 519. After Boerne, Congress enacted legislation, under its Article I commerce and spending powers, requiring application of Sherbert strict scrutiny to free exercise claims challenging the application of land use regulations and to claims brought by persons institutionalized in facilities receiving federal funds. See The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-2000cc-5 (Supp. 2003). For a recent application of the Act, within the Seventh Circuit, see Charles v. Verhagen, 220 F. Supp. 2d 937 (W.D. Wis. 2002).