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The First Amendment Right to Silence

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Abstract: The Humanities Center of Wayne State University presented its Fall Symposium with the theme, Silence and Silencing. At this symposium, Professor Sedler presented a paper on "The First Amendment Right of Silence". The thesis of the paper is that in a number of respects, the First Amendment recognizes that the values embodied in the constitutional protection of freedom of speech and freedom of association mandate a right of silence. Thus, in answer to the question raised at the symposium, What does the law have to say about silence, the author says that in a number of contexts, the law of the First Amendment protects the right of silence. In the paper, the author discusses five contexts in which the First Amendment protects the right of silence.

(1) The right to refuse to disclose one's beliefs and associations to the government. The Supreme Court has made it clear that persons are entitled to refuse to answer questions about their organizational membership and about their beliefs and associations unless the government could demonstrate a compelling interest in obtaining that information, which the government cannot do. Thus, in the face of the government's demands that a person disclose one's beliefs and associations, the person can reply, I choose to be silent.

(2) The right to speak anonymously without disclosing one's identity. This right is an admixture of the right to speak and the right of silence. The speaker speaks the message, but is entitled to shield the speaker's identity while speaking the message. The right to speak anonymously advances the core purposes of the First Amendment, since it ensures that people will not be deterred from speaking for fear of reprisal by the government or by other people.

(3) The right not to be compelled to speak the government's message.

This aspect of the right of silence protects the right of schoolchildren to refuse to pledge allegiance to the flag, and the right of government employees to refuse to take an oath disavowing particular beliefs and associations.

(4) The right not to be associated with particular ideas.

The guarantee of freedom of speech means that a person is entitled to speak his or her own ideas and cannot forced to be associated with a particular idea with which that person disagrees. The right not to be associated with particular ideas arises in two situations. First, since money is considered speech for First Amendment purposes, the government cannot compel a person to pay money to support the expression of an idea with which that person disagrees. For example, when governmental employees are

represented by a union under an agency shop arrangement fee, the union may not use any portion of the agency fee to advance ideological purposes unrelated to the union's function as collective bargaining representative.

Second, there is the right not to be compelled to share one's own speech with opposing speech and to in effect provide a forum for that opposing speech. For example, the Court has held as unconstitutional a state right of reply law, which required a newspaper to give a right of reply in the newspaper to a political candidate that it had attacked in print. The effect of the law would be to force the newspaper to provide a forum for the political candidate to reply to the newspaper's attack on the candidate.

(5) The right to avoid unwanted communications.

The First Amendment right of silence includes the right not to listen to speech that a person wishes to avoid. This aspect of the right of silence enables a person to refuse to receive political, religious, or commercial solicitors calling on the person at home. The person can tell them to leave or post a no-solicitation sign, and if they insist on trying to communicate with the person after they have been told to leave, they can be prosecuted for trespass.

Similarly, the government can protect the right to avoid unwanted communications by establishing a system by which persons can in advance indicate their unwillingness to receive certain kinds of communications and prohibit senders from sending such communications, such as by a do not call list.

THE FIRST AMENDMENT RIGHT OF SILENCE

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In a number of respects, the First Amendment recognizes that the values embodied in the constitutional protection of freedom of speech and freedom of association mandate a right of silence. Thus, in answer to the question, "What does the law have to say about silence," I would say that in a number of contexts, the law of the First Amendment[1] protects the right of silence. In this paper, I will discuss five contexts in which the First Amendment protects the right of silence.

The right to refuse to disclose one's beliefs and associations to the government

This aspect of the right of silence traces back to the 1950's and 1960's,when Congressional and state legislative committees tried to question witnesses about their membership in the Communist Party and other allegedly "subversive" organizations - the classic question was "Are you now or have you ever been a member of the Communist Party?" - and when governmental bodies in the southern states tried to identify members of the N.A.A.C.P. and other civil rights organizations. After some fits and starts, the Supreme Court in the early 1960's made it clear that people were entitled to refuse to answer questions about their organizational membership and about their beliefs and associations unless the government could demonstrate a compelling interest in obtaining that information, which it could not do. Specifically the Court held that a governmental body investigating subversion could not require witnesses to testify as to their past membership in allegedly "subversive" organizations, [2] nor could it require an organization such as the N.A.A.C.P. to turn over its membership list to the investigating committee.[3] A school board could not require that teachers list all the organizations to which they belonged or had contributed money for the preceding five years,[4] nor could the state require that applicants for admission to

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the practice of law disclose their political beliefs and organizational memberships.[5] And while the First Amendment allows the government to require that political contributors report their contributions to or expenditures on behalf of a candidate, and to requirethat campaign committees report a list of their contributors,[6] such a requirement could not constitutionally be applied to a minor political party, where the party showed a reasonable probability that such disclosure would subject the contributors to threats, harassment and reprisals from government officials and private persons.[7]

As a result of these decisions, it is clear that the First Amendment fully protects the right to refuse to disclose one's beliefs and associations to the government. In the face of the government's demands that a person disclose one's beliefs and associations, the person can reply, "I choose to be silent."

The right to speak anonymously

The First Amendment protects the right to speak anonymously. This right is an admixture of the right to speak and the right of silence. The speaker speaks the message, but is entitled to shield the speaker's identity while speaking the message. Recognition of this right reflects the fact that in the United States, there has been a long tradition of anonymity in the advocacy of political causes.[8] This tradition of anonymity advances the core purposes of the First Amendment, since it ensures that people will not be deterred from speaking for fear or reprisal by the government or by other people. It must be remembered that the core purposes of the First Amendment focus more on the right of the listener to receive information and ideas to the listener than on the right of the speaker to convey the information and ideas. The preservation of the speaker's anonymity enhances these core purposes by increasing the flow of information and ideas to the public.

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[5] Law Students Civil Rights Research Council,Inc. v. Wadmond, 401 U.S. 154 (1971); Baird v. State Bar of Arizona, 401 U.S. 1 (1971). The most that the state could do was to make an inquiry into an applicant's "knowing membership in an illegal organization with the intent to further the organization's illegal purpose" in order to determine the applicant's "character and fitness" to practice law.

[6] Buckley v. Valeo, 424 U.S. 1 (1976).

[7] Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982).

[8] See the discussion in Watchtower Bible & Tract Society of New York v. Village of Stratton, *infra*, note 12 at 166-167.

Because the First Amendment protects the right to speak anonymously, it is unconstitutional for the government to prohibit the dissemination of handbills that do not contain the names and addresses of the persons who prepared and disseminated the handbills.[9] It is likewise unconstitutional for the government to require such information in connection with the distribution of literature in political campaigns.[10]

The Supreme Court has gone further in protecting the right to speak anonymously. It has held unconstitutional a state law that required the paid solicitors gathering signatures for a ballot initiative to wear name tags and to report their income from gathering signatures for the initiative.[11] And it has also held unconstitutional a local law requiring persons to obtain a permit prior to engaging in door-to-door advocacy and to display on demand the permit containing that person's name. The law was unconstitutional even though local officials were required to issue the permit, since the permit requirement could discourage anonymous advocacy, and the permit requirement was not narrowly tailored to advance the asserted governmental interests in protecting householder privacy and preventing fraud and crime.[12]

As the results in these cases demonstrate, in the American constitutional system the right of silence includes the right to speak anonymously and to express ideas while keeping secret the identity of the speaker.

The right not to be compelled to speak the government's message

"If there is any star fixed in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word of act their faith therein."[13] This ringing declaration of the right not to be compelled to speak the government's message was made by United States Supreme Court Justice Robert H. Jackson in 1943, when in the midst of World War II, a West Virginia school board expelled a Jehovah's Witness student for refusing to salute the American flag. While to most Americans saluting the flag represented the highest form of patriotism, to Jehovah's Witnesses it represented a violation of the biblical command, "thou shall not bow down to g raven images.

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[10] McIntyre v. Ohio Election Commission, 514 U.S. 334 (1995).

[11] Buckley v. Secretary of State of Colorado, 525 U.S. 182 (1999).

[12] Watchtower Bible & Tract Society of New York v. Village of Stratton, 536 U.S. 150 (2002).

[13] West Virginia Board of Education v. Barnette, 319 U.S. 624, (1943).

" In this case, the Court held that the First Amendment precluded the government from forcing citizens to "confess their patriotism" by saluting the American flag. As a result of this decision, whenever a school board requires a recitation of the pledge of allegiance or any other declaration of belief, it must excuse objecting students from the requirements

Some thirty years later, a Jehovah's Witness couple again refused to speak the government's message, here by covering up the New Hampshire state motto on their automobile license plate. The New Hampshire state motto, "live free or die," traced back to a 1794 reunion of the state's Revolutionary War militia, when its commander, well into his cups, cried out, "live free or die." To Jehovah's Witnesses, the notion of "live free or die," was inconsistent with their beliefs in eternal life, so the Maynards covered up that portion of the license plate containing the motto. The local prosecutor insisted on prosecuting them for not properly displaying the license plate, and their case reached the Supreme Court. Relying on the 1943 flag salute decision, the Court held that the state could not require the Maynards to be a "mobile billboard" for the state's ideological message. Such a requirement, said the Court, "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to reserve from all official control."

During the cold war era, states were concerned about allegedly "disloyal" and "subversive" teachers in the public schools and universities, and in an effort to "root out" such teachers, imposed the requirement that they take a "loyalty oath." These "loyalty oaths" typically required the teacher to swear that he or she did not belong to any "subversive" organizations and did not "advocate violent overthrow of the government." Because these "loyalty oaths" required teachers and government employees to swear that they did not hold certain beliefs or belong to certain organizations, they "invaded the sphere of intellect and spirit,"and so violated the First Amendment.[14] All that the government can require is that its employees take an affirmative oath to support the constitutional system of government.[15]

The right not to be associated with particular ideas

The guarantee of freedom of speech means that a person is entitled to speak his or her own ideas and cannot forced to be associated with a particular idea with which that person disagrees. The right not to be associated with

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[14] Keyishian v. Board of Regents of State University of New York, 385 U.S. 589 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961).

[15] Cole v. Richardson, 405 U.S. 676 (1972). Most loyalty oath requirements were held unconstitutional because they were not limited to affirmative oaths.

particular ideas arises in two contexts. First, since money is considered "speech" for First Amendment purposes,[16] the government cannot compel a person to pay money to support the expression of an idea with which that person disagrees. In Michigan and in a number of other states, there is what is called an "integrated bar," which requires that all lawyers belong to and pay dues to a state bar association. To a large extent, the compulsory dues are used to support the activities of the state bar association, and all lawyers are considered to benefit from those activities. But sometimes the state bar association takes positions on ideological issues, such as supporting a woman's right to choose to have an abortion. When the bar association uses the compulsory dues to support ideological positions, it is violating the rights of its members who oppose that position, such as members who are opposed to abortion. The First Amendment, therefore, requires that objecting lawyers are entitled to a *pro rata* refund of that portion of the compulsory dues that are used by the bar association for ideological purposes.[17] Likewise, when governmental employees are represented by a union under an "agency shop" arrangement that requires non-union members of the bargaining to pay the equivalent of union dues by means of an agency fee, the union may not use any portion of the agency fee to advance ideological purposes unrelated to the union's function as collective bargaining representative.[18]

Second, there is the right not to be compelled to share one's own speech with opposing speech and in effect to provide a forum for that opposing speech.

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[16] See Buckley v. Valeo, 424 U.S. 1 (1976).

[17] Keller v. State Bar of California, 496 U.S. 1 (1990).

[18] Abood v. Detroit Board of Education, 431 U.S. 209 (1977).

An interesting application of the principle that the government cannot compel a person to pay money to support the expression of an idea with which that person disagrees involved two federally-authorized agricultural marketing associations. In one case the Court held that the First Amendment was not violated by governmentally-authorized assessments for generic advertising imposed on members of an association of agricultural producers, because the generic advertising did not promote any particular message, but merely urged consumers to purchase the agricultural products. Glikckman v. Wileman Brothers & Elliot,Inc., 521 U.S. 457 (1997). But in another case the Court held that the First Amendment was violated by a mushroom marketing scheme under which a federally-established mushroom association imposed mandatory assessments on handlers of fresh mushrooms for generic advertising to promote mushroom sales. Here the Court concluded that the assessment was not germane to a purpose of the association independent of the speech itself and so compelled support only for speech. United States Department of Agriculture v. United Foods,Inc., 533 U.S. 405 (2001).

In one case involving this right a public utility had been including in its monthly billing statement additional materials expressing the utility's views on energy issues and conservation. A consumer group had urged the state regulatory commission to prohibit the utility from including the additional materials in the billing statement. Instead the commission ordered the utility to allow the consumer group to include the group's own materials in the billing statement four times a year. The materials would be identified as expressing the views of the consumer group and not those of the utility. Nonetheless, the Supreme Court held that this requirement violated the utility's First Amendment rights because it forced the utility to provide a forum for views other than its own.[19]

In another case, the Court struck down a state "right of reply law," which required a newspaper to give a right of reply in the newspaper to a political candidate that it had attacked in print. The Court based its decision on the fact that such a requirement could have a "chilling effect" on the newspaper's willingness to attack political candidates.[20] However, the result here is supportive of the right not to be associated with ideas with which a person disagrees, since the effect of the law would be to force the newspaper to provide a forum for the political candidate to reply to the newspaper's attack on the candidate.

A third case involved the efforts of an Irish-American gay, lesbian and bisexual group to march in a St. Patrick's Day parade sponsored by an Irish-American Veterans group. The parade was licensed by the City of Boston, and a main street was blocked off for the parade. The sponsor allowed a number of Irish-American groups to march in the parade, but refused to allow the gay, lesbian, and bisexual group to do so. That group wanted to march in the parade under its own banner to convey the message that its members had pride in being both Irish-American and being gay, lesbian and bisexual. The state court held that under state law, the parade was a "place of public accommodation," and that the sponsor could not exclude a group from marching in the parade because of its sexual orientation. The Supreme Court held that the application of the state public accommodations law to require the sponsor to include the gay, lesbian and bisexual group in the parade violate the sponsor's First Amendment rights. The Court said that the sponsor was entitled to exclude a message that the sponsor did not like from the sponsor's own communication, that the sponsor was entitled to chose the content of the message that its communication conveyed, and that permitting the gay, lesbian, and bisexual group to participate would alter the expressive content of the parade.[21]

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[19] Pacific Gas & Electric Co. v. Public Utilities Commission, 475 U.S. 1 (1986).

[20] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

[21] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995).

At first glance, the decision may appear to be a defeat for the gay, lesbian, and bisexual group, but in retrospect it was a victory for the group. This is because under the First Amendment's equal access principle, the group was entitled to have its own parade and to have what the Supreme Court referred to as a "fair shot" to having it on the main street on St. Patrick's day. When a city decides to open up the public streets to parades, it is required to provide to provide equal access to all groups and cannot give preference to any group based on the content of the message that the group wishes to parade. So, if the City of Boston was to open up the main street for a parade on St. Patrick's Day, it was required to establish a content neutral licensing system by which any Irish-American group, including the Irish-American gay, lesbian and bisexual group, would have the opportunity to hold their own parade on St. Patrick's Day. The city could not reserve the main street for a St. Patrick's Day parade for any particular group. Thus, under the First Amendment, the Irish-American gay, lesbian, and bisexual group was entitled to have its own parade, in which it could convey its own message of Irish-American gay, lesbian and bisexual pride, and the Irish-American veterans group was entitled to have its own parade and to exclude an Irish-American gay, lesbian and bisexual group from that parade.

An important component of the First Amendment right of silence is the right of a speaker not to be forced to be associated with an idea with which the speaker disagrees. As these cases indicate, this right has been broadly interpreted by the Supreme Court and has been applied in a number of contexts.

The right to avoid unwanted communications

The First Amendment right of silence includes the right not to listen to speech that a person wishes to avoid. The right to avoid unwanted communications operates in three ways. First, it enables a person to refuse to receive political, religious, or commercial solicitors calling on the person at home. The person can tell them to leave or post a no-solicitation sign, and if they resists in trying to communicate with the person after they have been told to leave, they can be prosecuted for trespass. Second, precisely because a person has the right to avoid unwanted communications in that person's home, state and municipal anti-solicitation laws cannot be justified on the ground that they are designed to protect householder privacy. As a result, they are likely to be found to be violative of the First Amendment.[22]

[22] See *e.g.*, Martin v. Struthers, 319 U.S. 141 (1943) (Ordinance prohibiting ringing of doorbell or otherwise summoning resident to the door for purpose of receiving literature as applied to distribution of religious literature); Hynes v. Mayor and Council of Oradel, 425 U.S. 610 (1976) (Ordinance requiring advance notice to police department by persons who want to canvas door-to-door for charitable causes or political campaigns or causes); Watchtower Bible & Tract Society v. Stratton, 536 U.S. 150 (2002) (Ordinance requiring door to door

Third, and most importantly, the government can protect the right to avoid unwanted communications by establishing a system by which persons can in advance indicate their unwillingness to receive certain kinds of communications and prohibit senders from sending such communications. Because the First Amendment includes the right to avoid unwanted communications, the establishment of such an "opt-out system" does not violate the First Amendment rights of those who wish to send the communications. The leading case recognizing this right is Rowan v. United States Post Office Department, [23] where the Court upheld a federal law enabling persons to put themselves on a list that prevented mailers of sexually explicit material from sending that kind of material to them. The mailers were required to purchase the list, and they risked criminal prosecution for sending the material to persons on the list. In holding that the law did not violate the First Amendment rights of the mailers, the Court emphasized that the mailer's right to communicate must stop at the mailbox of the unwilling addressee.

The recipient's right to avoid unwanted communications is the basis for the court's upholding the constitutionality of the national "do-not-call" registry, which allows individuals to register their phone numbers on a national "do-not-call" list and prohibits most commercial mailers from calling the numbers on the list. This law has an "opt-in" feature that provides a mechanism for consumers to restrict commercial sales calls, and since commercial speech receives less constitutional protection than non-commercial speech, it does not matter that the law does not provide a similar mechanism to limit charitable or political calls.[24] For the same reason the courts have also upheld a number of state "do-not-call" laws that allow individuals to avoid some or all commercial and other solicitations.[25]

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advocates or solicitors of literature to register with the mayor). In response to the argument that the ordinance was designed to protect the privacy of the resident, the Court observed that, "sec. 107 of the ordinance, which provides for the posting of 'No solicitation' signs, and which is not challenged in this case, coupled with the resident's unquestioned right to refuse to engage in conversation with unwelcome visitors, provides ample protection for the unwilling listener." 536 U.S. at 168.

[23] 397 U.S. 728 (1970).

[24] See *e.g.*, Mainstream Marketing Services,Inc. v. Federal Communications Commission, 358 F.3d 1228 (10th Cir. 2004).

[25] See *e.g.*, National Coalition of Prayer,Inc. v. Carter, 455 F.3d 783 (7th Cir. 2006); National Federation of the Blind of Arkansas, Inc. v. Pryor, 258 F.3d 851 (8th Cir. 2001); National Federation of the Blind v. Federal Trade Commission, 420 F.3d 331 (4th Cir. 2005); Fraternal Order of Police, North Dakota State Lodge v. Stenehjem, 431 F.3d 591 (8th Cir. 2005).

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The right to refuse to disclose one's beliefs and associations to the government

This aspect of the right of silence traces back to the 1950's and 1960's,when Congressional and state legislative committees tried to question witnesses about their membership in the Communist Party and other allegedly "subversive" organizations - the classic question was "Are you now or have you ever been a member of the Communist Party?" - and when governmental bodies in the southern states tried to identify members of the N.A.A.C.P. and other civil rights organizations. After some fits and starts, the Supreme Court in the early 1960's made it clear that people were entitled to refuse to answer questions about their organizational membership and about their beliefs and associations unless the government could demonstrate a compelling interest in obtaining that information, which it could not do. Specifically the Court held that a governmental body investigating subversion could not require witnesses to testify as to their past membership in allegedly "subversive" organizations, [2] nor could it require an organization such as the N.A.A.C.P. to turn over its membership list to the investigating committee.[3] A school board could not require that teachers list all the organizations to which they belonged or had contributed money for the preceding five years,[4] nor could the state require that applicants for admission to

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As a result of these decisions, it is clear that the First Amendment fully protects the right to refuse to disclose one's beliefs and associations to the government. In the face of the government's demands that a person disclose one's beliefs and associations, the person can reply, "I choose to be silent."

The right to speak anonymously

The First Amendment protects the right to speak anonymously. This right is an admixture of the right to speak and the right of silence. The speaker speaks the message, but is entitled to shield the speaker's identity while speaking the message. Recognition of this right reflects the fact that in the United States, there has been a long tradition of anonymity in the advocacy of political causes.[8] This tradition of anonymity advances the core purposes of the First Amendment, since it ensures that people will not be deterred from speaking for fear or reprisal by the government or by other people. It must be remembered that the core purposes of the First Amendment focus more on the right of the listener to receive information and ideas to the listener than on the right of the speaker to convey the information and ideas. The preservation of the speaker's anonymity enhances these core purposes by increasing the flow of information and ideas to the public.

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The right not to be compelled to speak the government's message

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The right not to be associated with particular ideas

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[14] Keyishian v. Board of Regents of State University of New York, 385 U.S. 589 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961).

[15] Cole v. Richardson, 405 U.S. 676 (1972). Most loyalty oath requirements were held unconstitutional because they were not limited to affirmative oaths.

particular ideas arises in two contexts. First, since money is considered "speech" for First Amendment purposes,[16] the government cannot compel a person to pay money to support the expression of an idea with which that person disagrees. In Michigan and in a number of other states, there is what is called an "integrated bar," which requires that all lawyers belong to and pay dues to a state bar association. To a large extent, the compulsory dues are used to support the activities of the state bar association, and all lawyers are considered to benefit from those activities. But sometimes the state bar association takes positions on ideological issues, such as supporting a woman's right to choose to have an abortion. When the bar association uses the compulsory dues to support ideological positions, it is violating the rights of its members who oppose that position, such as members who are opposed to abortion. The First Amendment, therefore, requires that objecting lawyers are entitled to a *pro rata* refund of that portion of the compulsory dues that are used by the bar association for ideological purposes.[17] Likewise, when governmental employees are represented by a union under an "agency shop" arrangement that requires non-union members of the bargaining to pay the equivalent of union dues by means of an agency fee, the union may not use any portion of the agency fee to advance ideological purposes unrelated to the union's function as collective bargaining representative.[18]

Second, there is the right not to be compelled to share one's own speech with opposing speech and in effect to provide a forum for that opposing speech.

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[16] See Buckley v. Valeo, 424 U.S. 1 (1976).

[17] Keller v. State Bar of California, 496 U.S. 1 (1990).

[18] Abood v. Detroit Board of Education, 431 U.S. 209 (1977).

An interesting application of the principle that the government cannot compel a person to pay money to support the expression of an idea with which that person disagrees involved two federally-authorized agricultural marketing associations. In one case the Court held that the First Amendment was not violated by governmentally-authorized assessments for generic advertising imposed on members of an association of agricultural producers, because the generic advertising did not promote any particular message, but merely urged consumers to purchase the agricultural products. Glikckman v. Wileman Brothers & Elliot,Inc., 521 U.S. 457 (1997). But in another case the Court held that the First Amendment was violated by a mushroom marketing scheme under which a federally-established mushroom association imposed mandatory assessments on handlers of fresh mushrooms for generic advertising to promote mushroom sales. Here the Court concluded that the assessment was not germane to a purpose of the association independent of the speech itself and so compelled support only for speech. United States Department of Agriculture v. United Foods,Inc., 533 U.S. 405 (2001).

In one case involving this right a public utility had been including in its monthly billing statement additional materials expressing the utility's views on energy issues and conservation. A consumer group had urged the state regulatory commission to prohibit the utility from including the additional materials in the billing statement. Instead the commission ordered the utility to allow the consumer group to include the group's own materials in the billing statement four times a year. The materials would be identified as expressing the views of the consumer group and not those of the utility. Nonetheless, the Supreme Court held that this requirement violated the utility's First Amendment rights because it forced the utility to provide a forum for views other than its own.[19]

In another case, the Court struck down a state "right of reply law," which required a newspaper to give a right of reply in the newspaper to a political candidate that it had attacked in print. The Court based its decision on the fact that such a requirement could have a "chilling effect" on the newspaper's willingness to attack political candidates.[20] However, the result here is supportive of the right not to be associated with ideas with which a person disagrees, since the effect of the law would be to force the newspaper to provide a forum for the political candidate to reply to the newspaper's attack on the candidate.

A third case involved the efforts of an Irish-American gay, lesbian and bisexual group to march in a St. Patrick's Day parade sponsored by an Irish-American Veterans group. The parade was licensed by the City of Boston, and a main street was blocked off for the parade. The sponsor allowed a number of Irish-American groups to march in the parade, but refused to allow the gay, lesbian, and bisexual group to do so. That group wanted to march in the parade under its own banner to convey the message that its members had pride in being both Irish-American and being gay, lesbian and bisexual. The state court held that under state law, the parade was a "place of public accommodation," and that the sponsor could not exclude a group from marching in the parade because of its sexual orientation. The Supreme Court held that the application of the state public accommodations law to require the sponsor to include the gay, lesbian and bisexual group in the parade violate the sponsor's First Amendment rights. The Court said that the sponsor was entitled to exclude a message that the sponsor did not like from the sponsor's own communication, that the sponsor was entitled to chose the content of the message that its communication conveyed, and that permitting the gay, lesbian, and bisexual group to participate would alter the expressive content of the parade.[21]

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[19] Pacific Gas & Electric Co. v. Public Utilities Commission, 475 U.S. 1 (1986).

[20] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

[21] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995).

At first glance, the decision may appear to be a defeat for the gay, lesbian, and bisexual group, but in retrospect it was a victory for the group. This is because under the First Amendment's equal access principle, the group was entitled to have its own parade and to have what the Supreme Court referred to as a "fair shot" to having it on the main street on St. Patrick's day. When a city decides to open up the public streets to parades, it is required to provide to provide equal access to all groups and cannot give preference to any group based on the content of the message that the group wishes to parade. So, if the City of Boston was to open up the main street for a parade on St. Patrick's Day, it was required to establish a content neutral licensing system by which any Irish-American group, including the Irish-American gay, lesbian and bisexual group, would have the opportunity to hold their own parade on St. Patrick's Day. The city could not reserve the main street for a St. Patrick's Day parade for any particular group. Thus, under the First Amendment, the Irish-American gay, lesbian, and bisexual group was entitled to have its own parade, in which it could convey its own message of Irish-American gay, lesbian and bisexual pride, and the Irish-American veterans group was entitled to have its own parade and to exclude an Irish-American gay, lesbian and bisexual group from that parade.

An important component of the First Amendment right of silence is the right of a speaker not to be forced to be associated with an idea with which the speaker disagrees. As these cases indicate, this right has been broadly interpreted by the Supreme Court and has been applied in a number of contexts.

The right to avoid unwanted communications

The First Amendment right of silence includes the right not to listen to speech that a person wishes to avoid. The right to avoid unwanted communications operates in three ways. First, it enables a person to refuse to receive political, religious, or commercial solicitors calling on the person at home. The person can tell them to leave or post a no-solicitation sign, and if they resists in trying to communicate with the person after they have been told to leave, they can be prosecuted for trespass. Second, precisely because a person has the right to avoid unwanted communications in that person's home, state and municipal anti-solicitation laws cannot be justified on the ground that they are designed to protect householder privacy. As a result, they are likely to be found to be violative of the First Amendment.[22]

[22] See *e.g.*, Martin v. Struthers, 319 U.S. 141 (1943) (Ordinance prohibiting ringing of doorbell or otherwise summoning resident to the door for purpose of receiving literature as applied to distribution of religious literature); Hynes v. Mayor and Council of Oradel, 425 U.S. 610 (1976) (Ordinance requiring advance notice to police department by persons who want to canvas door-to-door for charitable causes or political campaigns or causes); Watchtower Bible & Tract Society v. Stratton, 536 U.S. 150 (2002) (Ordinance requiring door to door

Third, and most importantly, the government can protect the right to avoid unwanted communications by establishing a system by which persons can in advance indicate their unwillingness to receive certain kinds of communications and prohibit senders from sending such communications. Because the First Amendment includes the right to avoid unwanted communications, the establishment of such an "opt-out system" does not violate the First Amendment rights of those who wish to send the communications. The leading case recognizing this right is Rowan v. United States Post Office Department, [23] where the Court upheld a federal law enabling persons to put themselves on a list that prevented mailers of sexually explicit material from sending that kind of material to them. The mailers were required to purchase the list, and they risked criminal prosecution for sending the material to persons on the list. In holding that the law did not violate the First Amendment rights of the mailers, the Court emphasized that the mailer's right to communicate must stop at the mailbox of the unwilling addressee.

The recipient's right to avoid unwanted communications is the basis for the court's upholding the constitutionality of the national "do-not-call" registry, which allows individuals to register their phone numbers on a national "do-not-call" list and prohibits most commercial mailers from calling the numbers on the list. This law has an "opt-in" feature that provides a mechanism for consumers to restrict commercial sales calls, and since commercial speech receives less constitutional protection than non-commercial speech, it does not matter that the law does not provide a similar mechanism to limit charitable or political calls.[24] For the same reason the courts have also upheld a number of state "do-not-call" laws that allow individuals to avoid some or all commercial and other solicitations.[25]

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advocates or solicitors of literature to register with the mayor). In response to the argument that the ordinance was designed to protect the privacy of the resident, the Court observed that, "sec. 107 of the ordinance, which provides for the posting of 'No solicitation' signs, and which is not challenged in this case, coupled with the resident's unquestioned right to refuse to engage in conversation with unwelcome visitors, provides ample protection for the unwilling listener." 536 U.S. at 168.

[23] 397 U.S. 728 (1970).

[24] See *e.g.*, Mainstream Marketing Services,Inc. v. Federal Communications Commission, 358 F.3d 1228 (10th Cir. 2004).

[25] See *e.g.*, National Coalition of Prayer,Inc. v. Carter, 455 F.3d 783 (7th Cir. 2006); National Federation of the Blind of Arkansas, Inc. v. Pryor, 258 F.3d 851 (8th Cir. 2001); National Federation of the Blind v. Federal Trade Commission, 420 F.3d 331 (4th Cir. 2005); Fraternal Order of Police, North Dakota State Lodge v. Stenehjem, 431 F.3d 591 (8th Cir. 2005).