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Does the Federal Crime Bill's Hunter Harassment Provision Violate the First Amendment or If an Animal Rights Protester Falls Down in the Woods and a Hunter Hears, Is It a Federal Crime?

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Neatly camouflaged in the vast Federal Anti-Crime bill passed by Congress in 1994 is a seemingly innocuous statute entitled "Obstruction of a lawful hunt."[1] This statute, which makes it illegal for a person "intentionally to engage in any physical conduct that significantly hinders a lawful hunt,"[2] passed easily through the Senate by a 95-4 vote, with no floor debate and no public hearings.[3] It was slipped into the part of the anti-crime bill referred to as the "managers' package," a political reward, negotiated by the chairman and ranking minority member of the Senate Judiciary Committee - Joe Biden (D-Del.) and Orrin Hatch (R-Utah).[4] The primary movers behind the bill were the National Rifle Association and the Congress's Sportsmen's Caucus, which included 159 member of the House and 33 Senators.[5] Forty-seven states already had similar hunter harassment bills which were rarely enforced because they raise significant constitutional questions.[6] With the passage of this federal hunter harassment bill all federal land, about one-third of the entire United States, is covered by this troublesome and constitu-

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[1] 16 U.S.C. § 5201 (1994).

[2] *Id.*

[3] Roger Simon, *Surprise: Anti Crime Bill Says You Can't Peacefully Protest Hunting*, CLEVELAND PLAIN DEALER, Nov. 28, 1993, at 8D [hereinafter Simon].

[4] *Id.*

[5] Nat Hentoff, *Open Season on the First Amendment*, THE WASH. POST, Dec. 25, 1993, at A23.

[6] Simon, *supra* note 3.

tionally suspect law.[7]

Hunters argue that these statutes are necessary to promote the important government interests of managing wildlife populations and maintaining order and safety in the taking of wildlife.[8] Hunters defend their passion as well. They point out that if wildlife population is not controlled by human intervention animal populations would grow too large and many animals would starve or die from disease.[9] Hunters also argue that they make significant economic contributions by paying for taxes, permits, stamps, and licenses.[10] Norman Brunig, director of sanctuaries for the National Audubon Society claims that "hunters and fishermen have paid a disproportionate amount of the costs of wildlife management through license fees and excise taxes. . . . If license money drops, . . . those funds will have to be replaced by other sources."[11]

An argument made in favor of hunter harassment laws is the "obvious possibility that individuals in the woods who have weapons may become quite irritated and respond with violence if prevented from pursuing their lawful activities."[12] The concern over the possibility of violent encounters between animal rights activists and the hunters they are attempting to disrupt is brought up by many commentators as a rationale for these laws. "The act is intended to keep potential conflict from turning into bloodshed. . . . Anyone who stands 10 feet in front of a loaded and aimed .30-06 is not just flapping his gums. That's conduct, and dangerous conduct at that."[13]

Animal rights activists strongly disagree with the assertion that hunting is a necessary element of managing wildlife. They argue that the population problems hunters are allegedly curing were caused by humans killing off natural predators and that the solution is to return natural predators such as wolves, bears, and coyotes to their original ranges.[14] Animal right activists also note that natural

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[7] *Id.*

[8] John A. Grafton, Note, *Hunter Harassment Statues: Do They Shoot Holes into the First Amendment?*, 96 W. VA. L. REV. 191, 195 (1993) [hereinafter Grafton].

[9] *Id.* at 196.

[10] *Id.* at 197.

[11] Ben Brown, *Hunting Under Fire Criticism of the Sport Escalates*, USA TODAY, Nov. 16, 1989, at 1C.

[12] Grafton, *supra* note 8, at 197.

[13] James J. Kilpatrick, *Hunter Harassment Laws: Is Standing in front of a loaded rifle protected by the First Amendment*, ATL. J., Feb. 6, 1995, at A9.

[14] INGRID NEWKIRK, SAVE THE ANIMALS! 101 EASY THINGS YOU CAN DO, 95 (1990).

predators keep the prey strong by killing primarily weak and sick animals while hunters seek out the strongest and most fit, thus interfering with natural selection and leaving only the weak to reproduce a weaker, more disease prone line of descendants.[15]

Some animal rights groups urge members to take action on behalf of hunted animals.[16] Most of these suggestions address changing public opinion and lobbying Congress, but several of these actions are now prohibited by the federal hunter harassment statute.[17]

Meanwhile, animal rights activists argue that the hunter harassment statute violates their free speech liberties granted by the First Amendment. Robert Peck, legislative counsel for the American Civil Liberties Union pointed out four problems with the federal anti-harassment law:

> 1. It bans peaceful protest.
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> 2. It is not "viewpoint neutral." It affects those opposed to hunting, not those in favor of it.
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> 3. It is "inherently vague," because the clause that says you cannot "interfere with a hunter" can mean virtually anything.
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> 4. It provides for "prior restraint," allowing hunters to stifle speech before it has a chance to occur.[18]

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[15] Aileen M. Ugalde, Comment, *The Right to Arm Bears: Activists' Protest Against Hunting*, 45 U. MIAMI L. REV. 1109, 1112 (May, 1991) [hereinafter Ugalde].

[16] *E.g.*, NEWKIRK, *supra* note 14, at 96. *See also* Ugalde, *supra* note 15, at 1109.

[17] For example, Ingrid Newkirk, National Director of People for the Ethical Treatment of Animals (PETA) recommends that activists:

> Create an environment hostile to hunting. Spread deer repellent (available at feed and hardware stores), or hang little mesh bags of human hair (from a salon or barbershop) two or three feet above the ground along deer tracks, warning deer that humans have invaded their terrain. If hunters use dogs in your area, sprinkle a female dog's urine in heavily hunted areas or spray a solution of chopped garlic cloves soaked in water or diluted lemon juice on leaves and trails to throw dogs off the scent. Remove the food piles hunters sometimes leave as bait in hunting areas and scatter human hair or urine over the area.
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> Go into the woods the day before hunting season begins, and loudly play a radio or recordings of wolf howls and walk with dogs on leashes. Such tactics are particularly important for scattering younger animals who have not yet known the traumatizing experience of being hunted.
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> . . .
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> During hunts, assemble a group of people early in the morning and use airhorns and whistles to warn animals into hiding. Or play the national anthem on a bugle or tape and see if the hunters stand up!

NEWKIRK, *supra* note 14, at 96-97.

[18] Simon, *supra* note 3, at 8D.

This note will examine the federal hunter harassment statute, possible constitutional attacks which may be made upon it, and the likely results of those contests.

I. THE STATUTE

The "Obstruction of a lawful hunt" statute specifically prohibits any intentional "physical conduct that significantly hinders a lawful hunt" taking place upon federal lands.[19] The chapter defines "federal lands" as "(A) national forests; (B) public lands; (C) national parks; and (D) wildlife refuges."[20] Congress carefully defined conduct not to "include speech protected by the first article of amendment to the Constitution."[21] In addition to imposing penalties of "not more than $10,000, if the violation involved the use of force or violence, or the threatened use of force or violence, against the person or property of another person"[22] and "not more that $5,000 for any other violation"[23], the statute also contains a provision providing that injunctive relief may be sought by "(1) the head of a State agency with jurisdiction over fish or wildlife management; (2) the Attorney General of the United States; or (3) any person who is or would be adversely affected by the violation."[24]

II. FIRST AMENDMENT CONSIDERATIONS

The First Amendment to the United States Constitution states, in part, that: "Congress shall make no law . . . abridging the freedom of speech."[25] The first step in determining whether a statute violates the first amendment is to determine whether the statute's regulation of speech is content-based or a content-neutral. If the regulation is based on the content of the speech, the restriction must pass the Court's most "exacting scrutiny" to be found valid.[26] Content-based restrictions are subjected to heightened scrutiny[27] because they limit expression of a particular viewpoint and place lim-

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[19] 16 U.S.C. § 5201.
[20] 16 U.S.C. § 5207(1).
[21] 16 U.S.C. § 5207(8).
[22] 16 U.S.C. § 5202(b)(1).
[23] 16 U.S.C. § 5202(b)(2).
[24] 16 U.S.C. § 5203.
[25] U.S. CONST. amend. I.
[26] Widmar v. Vincent, 454 U.S. 263, 270 (1981).
[27] Texas v. Johnson, 491 U.S. 397 (1989).

its on the "marketplace of ideas."[28] To be held constitutional, a content-based regulation must serve a "compelling state interest" and be "narrowly drawn to achieve that end."[29]

A regulation is content-neutral only if its restrictions do not discriminate as to the content of the speech.[30] A content-neutral restriction applies impartially to all view points.[31] The test for content-neutrality is to see if there is any reference to the content of the restricted speech in the statute itself[32] or in the motive of those enacting it.[33] Intent to discriminate based on the content of the speech may be proved by circumstantial evidence, but evidence of a disparate effect in itself is not dispositive on the issue of intent.[34] Content-neutral regulations are subjected to a lower scrutiny and are almost never found to be unconstitutional.[35]

A. Symbolic Expression

A non-verbal action can also be protected by the First Amendment if it is meant to convey a particular message.[36] The following three cases demonstrate the Supreme Court's approach to Symbolic Expression.

1. *United States v. O'Brien*[37]

During the Vietnam War, O'Brien and several other protesters burned their draft cards on the steps of the South Boston Courthouse[38] then were prosecuted under a federal statute that made it a crime for any person to forge, alter, knowingly mutilate, or otherwise change a draft card.[39] O'Brien argued that his non-verbal act was "symbolic speech" aimed at influencing others to protest the war[40], thus the statute prohibiting the burning of draft cards was

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[28] *See* Terminiello v. City of Chicago, 337 U.S. 1 (1949).
[29] *Widmar*, 454 U.S. at 270.
[30] *See* Kovacs v. Cooper, 336 U.S. 77 (1949).
[31] *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc. 452 U.S. 640 (1981).
[32] *Kovacs*, 336 U.S. 77 at 83.
[33] *See* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).
[34] *See* Perry Educ. Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).
[35] *See* United States v. O'Brien, 391 U.S. 367 (1968).
[36] Stromberg v. California, 283 U.S. 359 (1931).
[37] 391 U.S. 367 (1968).
[38] *Id.* at 369.
[39] *Id.* at 367.
[40] *Id.* at 375-76.

unconstitutional as applied because it restricted his freedom of speech.[41]

The Court held that even if O'Brien was being perfectly candid as to his reasons for burning the draft card, conduct combining ordinary "speech" and "non speech" could be regulated by the government if: (1) The regulation was within the constitutional power of the government; (2) the regulation furthered an "important or substantial governmental interest"[42]; (3) that interest was "unrelated to the suppression of free expression"[43]; and (4) the "incidental restriction" on the First Amendment in O'Brien's case was "no greater than is essential to the furtherance" of the government's interest.[44] The Court found that all of these requirements were satisfied and held that the regulation and O'Brien's conviction were constitutional.[45] The Court opined that "[we] cannot accept this view that an apparently limitless variety of conduct . . . intends thereby to express an idea."[46]

O'Brien also argued that Congress's purpose in enacting the statute was to suppress public dissent and the regulation should thus be examined under heightened scrutiny.[47] The Court rejected this argument holding that Congress's motive for enacting a statute is irrelevant in the First Amendment analysis, as long as there was a legitimate purpose which could support the statute, regardless of whether or not Congress actually relied on it.[48] This view was echoed by the Connecticut Supreme Court in a recent decision on a challenge to the state's own hunter harassment statute. The court held:

> [I]ntentional noisemaking for the purpose of harassing a hunter would fall within the statute regardless of whether the noisemaker was motivated by a philosophical commitment to the protection of animal rights, by a determination to protest the hunter's choice of weapon or by a felt need to engage in public prayer. . . .
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> . . . .
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> . . . Just as legislative history cannot add words to a statute that it does not contain . . . such history cannot render unconsti-

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[41] *Id.* at 376.
[42] United States v. O'Brien, 391 U.S. 369, 377 (1968).
[43] *Id.*
[44] *Id.*
[45] *Id.* at 367.
[46] *Id.* at 376.
[47] *O'Brien*, 391 U.S. at 383-85.
[48] *Id.*

> tutional a statute that meets constitutional standards on its face. A statute that is otherwise constitutional does not become invalid "on the basis of an illicit legislative motive."[49]

However, later United States Supreme Court decisions indicate that Congress's motive can be constitutionally relevant.[50]

2. *Tinker v. Des Moines School District*[51]

Several high school and junior high students were suspended for wearing black armbands as part of a Vietnam War protest because the students had violated a school rule banning such armbands.[52] The Supreme Court held that the restriction violated the students' First Amendment rights.[53] The Court noted that the school authorities' attempt to avoid potentially disruptive conduct[54] is not a valid reason for forbidding the expression. "Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[55] In this situation, the Court appeared to apply the heightened scrutiny standard allowing the restriction only if necessary to serve a compelling governmental interest.[56]

3. *Texas v. Johnson*[57] and *United States v. Eichman*[58]

Two recent Supreme Court cases have addressed the issue of First Amendment protection for symbolic speech by ruling on governmental restrictions on flag desecration. In *Texas v. Johnson*, the defendant was charged with violating an anti-desecration statute for burning an American flag at a political demonstration outside the Republican National Convention in Dallas.[59] The Texas statute made it a crime to "intentionally or knowingly desecrate . . . a state

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[49] State v. Ball, 627 A.2d 892, 897-98 (Conn. 1993) (citing United States v. O'Brien, 391 U.S. 367 (1968)).

[50] *See* Washington v. Davis, 426 U.S. 229 (1976).

[51] 393 U.S. 503 (1969).

[52] *Id.* at 503.

[53] *Id.* at 514.

[54] *Id.* at 507.

[55] *Id.* at 508.

[56] *Tinker*, 393 U.S. at 514.

[57] 491 U.S. 397 (1989).

[58] 496 U.S. 310 (1990).

[59] Texas v. Johnson, 491 U.S. 397 (1989).

or national flag."[60] The statute defined "desecrate" as to "deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."[61] At trial, several witnesses testified that they had been seriously offended by the flag burning.[62]

The Court held that the Texas statute, as applied, violated the First Amendment.[63] The Court applied the heightened scrutiny standard after determining that the prosecution of Johnson was "directly related to [his intended] expression."[64] The Court analyzed the two objectives Texas stated it was pursuing through the prohibition of flag desecration: (1) preventing breaches of the peace; and (2) preserving the flag as a symbol of national unity and nationhood.[65] The Court held that preventing breaches of the peace was not what actually motivated Texas in this case, since no disturbance occurred or was threatened in this particular incident.[66] The Court also held that the objective of preserving the flag as a symbol of national unity may have been worthwhile, but this interest in "nationhood" was outweighed by the need to uphold First Amendment rights.[67] "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[68] The Court specifically addressed the possibility of violent reactions to incidents of flag desecration by those offended by such acts:

> The State's position, therefore amounts to a claim that an audience that takes serious offense at articular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal function of free speech is to invite dispute. [Free speech] may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. It would be odd indeed to conclude both that

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[60] *Id.* at 400, n.1.
[61] *Id.*
[62] *Id.* at 408.
[63] *Id.* at 400.
[64] *Johnson*, 491 U.S. at 407.
[65] *Id.* at 407.
[66] *Id.* at 410
[67] *Id.* at 420.
[68] *Id.* at 414.

> if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection, and that the government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence.[69]

U.S. v. Eichman involved a decision on the constitutionality of a federal anti-desecration statute which applied to anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States. . . ."[70] Even though the statute did not rely on "offense to others" to define the prohibited activity as had the Texas statute in *Johnson*, the Court found this statute also violated the First Amendment.[71] The Court found that this statute, like its Texas counterpart, was a content-based restriction on symbolic speech: "Although the [Act] contains no explicit content-based limitation on the scope of the prohibited conduct, it is nevertheless clear that the government's asserted interest is 'related to the suppression of free expression,' and concerned with the content of such expression."[72]

B. Symbolic Speech In Application to the Federal Hunter Harassment Statute

Perhaps the strongest argument available to a challenger of the federal hunter harassment statute is that it is an unconstitutional limitation on symbolic speech. However, there is little legislative history to suggest that Congress's intent in enacting the statute was to stifle the content of the message delivered by the animal rights activists. The activists could argue that their conduct in attempting to prevent hunters from killing animals itself is intended primarily for the message it sends to the public. Protesters have intentionally targeted high-profile hunts to gain media attention, such as the annual quail hunt of former President Bush.[73] Animal rights activists can also attack the validity of the governmental interest of possible disturbances could result from these symbolic acts citing both *Tinker* and *Johnson*.

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[69] *Id.* at 408-09 (citations and quotations omitted).

[70] U.S. v. Eichman, 496 U.S. 310, 314 (1990).

[71] *Id.*

[72] *Id* at 315.

[73] *Animal Lovers to Protest Bush Hunting Vacation*, ARIZ. REPUBLIC, Dec. 25, 1991, at A6.

A similar argument, however, failed to persuade the Montana Supreme Court in *State v. Lilburn*.[74] The court overruled the holding of the district court that the Montana hunter harassment statute was "obviously content-based" and could apply to "all verbal and expressive conduct which has the intention to dissuade from hunting. Conduct such as prayer at trailheads, the singing of protest songs or the burning of hunting maps, if done with the intent to dissuade a hunter, would be violations of the statute."[75] The Montana court did not apply heightened scrutiny. It held that the hunter harassment statute was content-neutral noting:

> While the disturbance which is prohibited may, under other circumstances, result from a verbal utterance, it makes no difference what the content of the verbal utterance is. The language of the statute does not support the assertion that the statute is aimed primarily at pure speech and expressive conduct conveying only an anti-hunting sentiment. The disturbance could just as well be caused by shouting "fire!".[76]

C. Time, Place and Manner Restrictions

The Supreme Court has held that restrictions on the time, place and manner of a particular activity are valid under the First Amendment if: (1) they are "content-neutral;" (2) they are "narrowly tailored to serve a significant governmental interest;" and (3) "alternative channels are left available for communicating the information."[77] The location where the expression takes place affects the test to be applied. The above test applies when the expression takes place in a public forum. Examples of public forums include streets, sidewalks, parks[78], open government meetings[79], and municipal theaters.[80]

If the forum is found to be a semi-public forum, the test applied is "whether the manner of expression is basically incompatible

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[74] 875 P.2d 1036 (Mont. 1994), *cert. denied*, Lilburn v. Montana, 63 U.S.L.W. 3514 (1995).

[75] State v. Lilburn, 875 P.2d 1036, 1041 (Mont. 1994).

[76] *Id.* at 1041-42.

[77] City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984).

[78] *See* Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939).

[79] *See* City of Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976).

[80] *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

with the normal activity of particular place at a particular time."[81] Semi-public forums include schools[82], libraries[83], and fairgrounds.[84]

If the expression takes place in a non-public forum, the government regulation must merely be reasonable in light of the purpose served by the forum.[85] Non-public forums include airport terminals[86], jails[87], military bases[88], courthouses[89], governmental workplaces,[90] and buses[91]. In 1983 the Supreme Court more succinctly set forth the approach to determining the constitutionality of a restriction on speech based, in part, on the degree of "publicness" associated with the forum of the attempted expression.[92]

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[81] Grayned v. Rockford, 408 U.S. 104, 108 (1972).

[82] *Id.*

[83] *See* Brown v. Louisiana, 383 U.S. 131 (1966).

[84] *See* Heffron v. Int'l Soc'y For Krishna Consciousness, 452 U.S. 640 (1981).

[85] Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 783 (1992).

[86] *Id.*

[87] *See* Adderley v. Florida, 385 U.S. 39 (1966).

[88] *See* Greer v. Spock, 424 U.S. 828 (1976).

[89] *See* United States v. Grace, 461 U.S. 171 (1983).

[90] *See* Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788 (1985).

[91] *See* Lehman v. Shaker Heights, 418 U.S. 298 (1974).

[92] In Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37 (1983), the Supreme Court set forth the law as to time, place and manner restrictions on expression depending on where the regulated expression is attempted as follows:

> [I]n places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public, and [since] time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. A second category consists of public property which the state has opened for the public as a place for expressive activity. The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recog-

Successful challengers of the federal hunter harassment statute will have difficulty showing that the federal lands described in this statute constitute public fora because the federal lands are not analogous to streets or parks that have "immemorially been held in trust for the use of the public" and have been used for purposes of assembly and communication.[93] The federal lands are not public property opened by the government for purposes of assembly and communication. The Court would probably determine that federal lands used for hunting are government owned, non-public fora. The government can easily meet its meager burden of demonstrating that prohibitions on animal rights activists harassing hunters in the field are reasonable in light of the purpose served by the fora. The only effective response by the activists would be to prove that Congress's intent in passing this statute was to suppress content-based speech. If the federal courts follow the lead of the Montana and Connecticut courts, the hunter harassment statute will withstand any challenges on First Amendment grounds.

III. VAGUENESS AND OVERBREADTH

There are other possible grounds upon which to challenge the hunter harassment law, however. The Supreme Court has held that a "[p]enal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties."[94] Courts approach this through the use of two doctrines - overbreadth and vagueness. In *Dorman v. Satti*[95], the Second Circuit found Connecticut's hunter harassment statute overbroad and vague due to provisions stating that no person shall "interfere with" or "harass" persons engaged in hunting or "acts in preparation" for hunting.[96] The state argued the statute could be saved by a limiting construction. The court rejected this argument, relying on the holding in *Houston v. Hill*,[97] that the words "interfere," "harass," and "acts in preparation of" do not allow a limiting

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nized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." 460 U.S. at 45-46 (citations omitted).

[93] Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

[94] Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

[95] 862 F.2d 432 (2d Cir. 1988), *cert denied*, 490 U.S. 1099 (1989).

[96] CONN. GEN. STAT. ANN. § 53a-183a (West 1990).

[97] 482 U.S. 451 (1987).

construction because "[t]hey can mean anything."[98]

A. Overbreadth

A statute is overbroad if it is not aimed specifically at curbing "evils within the allowable area of [state] control, but . . . sweeps within its ambit other activities."[99] This doctrine has been significantly curtailed by the decision in *Broadrick v. Oklahoma*,[100] which involved a challenge to a statute which was, like hunter harassment laws, primarily directed at regulating conduct and not pure speech.[101] The Supreme Court found that the statute was not "substantially overbroad," since it applied to a substantial spectrum of conduct that could be constitutionally subjected to governmental regulation.[102]

The carefully worded federal hunter harassment statute is directed primarily, if not entirely, at regulating conduct.[103] Thus, just as with the First Amendment analysis, absent a showing that the true purpose of this statute is to restrict symbolic expression, a challenge under the overbreadth doctrine will fail.

B. Vagueness

There are two possible grounds to challenge a statute as unconstitutionally vague: (1) show that "persons of ordinary intelligence and experience [have not been] afforded a reasonable opportunity to know what is prohibited, so that they may govern their behavior accordingly;"[104] or (2) show that the statute "fails to provide legally fixed standards and adequate guidelines for police, judicial officers, triers of fact and others whose obligation it is to enforce, apply and administer the penal laws."[105]

The federal hunter harassment statute avoids these difficulties because its application is limited to those who "intentionally . . . engage in any physical conduct that significantly hinders a lawful

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[98] *Dorman*, 862 F.2d at 436.

[99] Thornbill v. Alabama, 310 U.S. 88, 90 (1940).

[100] 413 U.S. 601 (1973).

[101] *Id.*

[102] *Id.*

[103] 16 U.S.C. § 5207 (8).

[104] Bowers v. State, 389 A.2d 341, 345 (1978). *See also* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

[105] *Bowers*, 389 A.2d at 345. *See also Grayned*, 408 U.S. at 1099.

hunt."[106] There may be an argument that the use of the word "any" is overbroad and vague. For example, would it violate the statute if a protester attempts to talk a hunter out of a planned lawful hunt on a public forum while the hunter is in route to the hunt? By defining conduct not to include First Amendment protected speech the statute attempts to answer this question.[107] However, unlike the Montana statute in *Lilburn*, which the state court noted that the regulated conduct was limited to obstructing those "engaged" in a lawful hunt[108], the federal statute's usage of the word "engage" refers to the physical conduct itself rather than when that conduct takes place. So it is possible that the federal statute has the same vagueness and overbreadth problems that the Connecticut statute in *Dorman* contained.

IV. PRIOR RESTRAINT

A governmental action which prevents expression from occurring (as opposed to punishing it once it has occurred) is presumed to be constitutionally invalid.[109] Only in very rare cases in which there is a virtual certainty the speech "will surely result in direct, immediate, and irreparable damage to our Nation or its people" will a prior restraint on speech be found constitutionally valid.[110] Thus the provision for injunctive relief in the federal hunter harassment law may is troubling.

> Injunctive relief against a violation of section 5201 of this title may be sought by -
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> (1) the head of a State agency with jurisdiction over fish or wildlife management;
>
> (2) the Attorney General of the United States; or
>
> (3) any person who is or would be adversely affected by the violation.[111]

The government can still argue that the hunter harassment statute only covers physical conduct and does not implicate the First Amendment.[112] Therefore a prior restraint of free speech is not in-

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[106] 16 U.S.C. § 5201.
[107] 16 U.S.C. § 5207(8).
[108] State v. Lilburn, 875 P.2d 1036, 1042 (Mont. 1994).
[109] LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1041 (1988).
[110] New York Times Co. v. United States, 403 U.S. 713, 722 (1971).
[111] 16 U.S.C. § 5203.
[112] 16 U.S.C. § 5207(8).

volved, but merely an injunction to stop illegal physical interferences with lawful hunting.

CONCLUSION

The Federal Recreational Hunting Safety statute is carefully drafted to avoid a constitutional challenge. There are, however, strong arguments that: (1) the statute impermissibly chills constitutionally protected symbolic expression; (2) the statute is vague and overbroad; and (3) the statute works as a prior restraint on expression. Another much weaker argument is that the governmental interest is not strong enough to justify the chill on protected speech under any standard. This statute will probably survive a challenge by animal rights protesters. Challengers may be more successful in limiting hunting by educating the public on the problems with allowing hunting and building a base of public opinion before challenging the strength of the governmental interest involved.