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Content-Neutral Restrictions

Geoffrey R. Stone†

The content-based/content-neutral distinction plays a central role in contemporary first amendment jurisprudence. This article explores the nature of content-neutral review.¹ Part I examines the mass of doctrine developed by the Supreme Court and identifies three distinct standards that the Court employs to test the constitutionality of content-neutral restrictions. Part II explores the theoretical and pragmatic bases of the Court's content-based/content-neutral distinction. Part III identifies the specific concern that most centrally defines the Court's analysis of content-neutral restrictions and examines the three distinct standards of content-neutral analysis in the light of that concern. Part IV explores a number of secondary concerns that tend in practice to alter the standards of content-neutral review. The primary goal of this article is to explain, to the extent possible, the Court's content-neutral jurisprudence in terms of a coherent, principled set of concerns and to identify those specific decisions that cannot be explained in such terms.

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¹ In prior writings, I have examined the nature of this distinction and the scope and substance of content-based review. See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189 (1983) ("Content Regulation"); Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81 (1978) ("Subject-Matter Restrictions"). See also Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 Harv. J. L. & Publ. Pol'y 461 (1986) ("Anti-Pornography Legislation"); Geoffrey R. Stone and William P. Marshall, *Brown v. Socialist Workers: Inequality as a Command of the First Amendment*, 1983 S. Ct. Rev. 583. For additional commentary on the distinction, see, e.g., Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 Cal. L. Rev. 422 (1980); Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 Georgetown L. J. 727 (1980); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 Stan. L. Rev. 113 (1981); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203 (1982).

I. CONTENT-BASED AND CONTENT-NEUTRAL RESTRICTIONS: STANDARDS OF REVIEW

A. Content-Based Restrictions

Content-based restrictions limit communication because of the message it conveys. Laws that prohibit seditious libel, ban the publication of confidential information, forbid the hiring of teachers who advocate violent overthrow of the government, or outlaw the display of the swastika in certain neighborhoods are examples of content-based restrictions. To test the constitutionality of such laws, the Court first determines whether the speech restricted occupies only a "subordinate position in the scale of First Amendment values."² If so, the Court engages in a form of "categorical balancing,"³ through which it defines the precise circumstances in which each category of "low-value" speech may be restricted.⁴ If

² *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978). The "two-level" theory first appeared in the famous dictum of *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), that "certain well-defined and narrowly limited classes of speech . . . are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Over the years, the Court has held that several classes of speech have only "low" first amendment value, including express incitement, see *Dennis v. United States*, 341 U.S. 494, 544-46 (1951) (Frankfurter, J., concurring); obscenity, see *Miller v. California*, 413 U.S. 15, 23 (1973); false statements of fact, see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); commercial advertising, see *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 770 (1976); "fighting words," see *Chaplinsky*, 315 U.S. 568, 572; and child pornography, see *New York v. Ferber*, 458 U.S. 747, 763 (1982). For a thoughtful analysis of the concept of low-value speech, see Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L. J. 589.

³ "Categorical" or "definitional" balancing is the phrase ordinarily used to define the Court's content-based jurisprudence. Under this approach, the Court strictly scrutinizes all content-based restrictions except for those directed at carefully defined categories of low-value speech. See generally Melville B. Nimmer, *Nimmer on Freedom of Speech* § 2.03 (1984) ("Nimmer on Freedom of Speech").

⁴ In attempting to strike an appropriate balance for each class of low-value speech, the Court considers a number of factors, including the relative value of the speech and the risk of inadvertently chilling "high" value expression. Applying this approach, the Court has articulated quite different standards for different classes of low-value speech. Express incitement, for example, may be suppressed only if it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Commercial speech, on the other hand, may be suppressed if it is false or misleading, or if the restriction directly advances a substantial governmental interest and is "not more extensive than is necessary" to achieve that interest. *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). And obscenity, which is perhaps the least protected class of low-value expression, may be suppressed whenever a relatively undemanding *scienter* requirement is satisfied. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60 (1973). The concept of low-value speech is examined in Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet, *Constitutional Law* ch. VII-D at 1058-1169 (1986).

the Court finds that the restricted speech does not occupy a "subordinate position in the scale of first amendment values," it accords the speech virtually absolute protection. Indeed, outside the realm of low-value speech, the Court has invalidated almost every content-based restriction that it has considered in the past thirty years.⁵ Whether applying an "absolute protection" approach, a "clear and present danger" test, a "compelling governmental interest" standard, or some other formulation, the Court almost invariably reaches the same result—content-based restrictions of "high-value" speech are unconstitutional.⁶

B. Content-Neutral Restrictions

Content-neutral restrictions limit expression without regard to the content or communicative impact of the message conveyed. Laws that restrict noisy speeches near a hospital, ban billboards in residential communities, limit campaign contributions, or prohibit the mutilation of draft cards are examples of content-neutral restrictions. The Court uses a markedly different mode of analysis to test the constitutionality of content-neutral restrictions. Because such laws are neutral with respect to content, the low-value inquiry, which plays a pivotal role in content-based analysis, is irrelevant in reviewing content-neutral restrictions. Moreover, while the Court strictly scrutinizes virtually all content-based restrictions of high-value speech, it applies a broad range of standards to test the constitutionality of content-neutral restrictions. In its analysis of content-neutral restrictions, the Court has articulated at least seven seemingly distinct standards of review:

1. Some content-neutral restrictions do not even "implicate"

⁵ See Stone et al., *Constitutional Law* at 1035 (cited in note 4).

⁶ The exceptions tend to fall within two categories. First, the Court has upheld some laws that distinguish on the basis of subject matter. See, e.g., *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (upholding a restriction on all political and public issue advertising on public transportation); *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (upholding geographic restrictions on nonobscene, sexually explicit speech). See generally Stone, *Content Regulation*, 25 Wm. & Mary L. Rev. at 239-42 (cited in note 1); Stone, *Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81 (cited in note 1). Second, the Court has suggested that content-based laws may be upheld in special contexts, see, e.g., *Branti v. Finkel*, 445 U.S. 507, 517 (1980) (party affiliation requirements for public employment), and has occasionally done so. See, e.g., *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977) (prison regulations); *Greer v. Spock*, 424 U.S. 828 (1976) (statutes governing military bases).

first amendment concerns.⁷

2. Some content-neutral restrictions are constitutional if they are "reasonable."⁸
3. Some content-neutral restrictions are constitutional if "they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication."⁹
4. Some content-neutral restrictions are constitutional if they are "within the constitutional power of the Government," they further "an important or substantial governmental interest," the governmental interest is "unrelated to the suppression of free expression," and the restriction is "no greater than is essential to the furtherance of that interest."¹⁰
5. Some content-neutral restrictions are constitutional depending upon the Court's resolution of "the delicate and difficult task" of weighing "the circumstances" and appraising "the substantiality of the reasons advanced in support of the regulation."¹¹
6. Some content-neutral restrictions are constitutional if they serve "sufficiently strong, subordinating" interests by means of "narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First

⁷ *Arcara v. Cloud Books, Inc.*, 106 S.Ct. 3172, 3178 (1986). See also *Minneapolis Star v. Minnesota Comm'r of Rev.*, 460 U.S. 575, 581 (1983) (first amendment permits newspapers to be subject to generally applicable economic regulations), and authorities cited therein.

⁸ *U. S. Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114, 131 n.7 (1981). See also *United States v. Grace*, 461 U.S. 171, 178 (1983); *North Carolina Prisoners' Union*, 433 U.S. at 130-31.

⁹ *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. 925, 928 (1986). See also *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 308 (1984); *Grace*, 461 U.S. at 177; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Greenburgh Civic Assns.*, 453 U.S. at 132; *Heffron v. Int'l Soc. for Krishna Consc.*, 452 U.S. 640, 647-48 (1981).

¹⁰ *United States v. O'Brien*, 391 U.S. 367, 377 (1968). See also *United States v. Alber-tini*, 472 U.S. 675, 687 (1985); *Wayte v. United States*, 470 U.S. 598, 611 (1985); *Community for Creative Non-Violence*, 468 U.S. at 308; *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984).

¹¹ *Schneider v. State*, 308 U.S. 147, 161 (1939). See also *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Schad v. Mount Ephraim*, 452 U.S. 61, 71 (1981); *Martin v. Struthers*, 319 U.S. 141, 144 (1943).

Amendment freedoms."¹²

7. Some content-neutral restrictions are constitutional if they are "necessitated by a compelling governmental interest" and are "narrowly tailored to serve that interest."¹³

The Court occasionally invokes each of these formulations in its analysis of content-neutral restrictions, but it has made scant effort to define the precise limits of the different standards. As a result, it is often difficult to determine where one formulation ends and the next begins. A careful review of the decisions, however, suggests that in practical application these seven formulations actually represent three distinct standards, which correspond roughly to deferential, intermediate, and strict review.

1. *Deferential review.* In many of its decisions assessing the constitutionality of content-neutral restrictions, the Court employs a deferential standard that resembles the rational basis standard of equal protection review.¹⁴ Under this standard, the Court upholds content-neutral laws that rationally further legitimate governmental interests. The Court does not seriously inquire into the substantiality of the governmental interest, and it does not seriously examine the alternative means by which the government could achieve its objectives. As a result, when the Court applies this standard, it invariably upholds the challenged restriction.

The Court generally applies formulations 1 through 4 in this manner. Formulations 1 and 2 explicitly call for a deferential standard of review.¹⁵ It is thus not surprising that the Court applies them in this manner. Formulations 3 and 4, on the other hand, seem to call for more demanding scrutiny. The Court has made

¹² *Schaumburg v. Citizens for a Better Environ.*, 444 U.S. 620, 636-37 (1980). See also *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

¹³ *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). See also *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Grace*, 461 U.S. at 177; *Minneapolis Star*, 460 U.S. at 582-83; *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-92 (1982); *N.A.A.C.P. v. Button*, 371 U.S. 415, 438-39 (1963).

¹⁴ See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 (1981); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Railway Express v. New York*, 336 U.S. 106 (1949).

¹⁵ Rationality review under formulation 2 does seem to suggest some evaluation of the government's choice of means to a permissible end. See, e.g., *Greenburgh Civic Assns.*, 453 U.S. at 131 n.7 ("government must act reasonably" when it incidentally restricts speech). Thus, the standard could have some bite if the Court chose to apply it rigorously, as it has recently in some protection cases. See Comment, *Still Newer Equal Protection*, 53 U. Chi. L. Rev. 1454 (1986). However, the Court has not yet seen fit to invigorate the standard in first amendment cases. See *Frederick Schauer*, *Cuban Cigars*, *Cuban Books*, and the Problem of Incidental Restrictions on Communications, 26 Wm. & Mary L. Rev. 779, 788 (1985).

clear, however, that formulation 3, the "time, place, and manner" test, and formulation 4, the "*O'Brien* test,"¹⁶ are substantively identical standards¹⁷ that, in actual application, also call for highly deferential review.

Formulations 3 and 4 purport to require, for example, that the challenged restriction serve a "substantial" governmental interest. In applying these formulations, however, the Court defines the governmental interest at the broadest possible level¹⁸ and then invariably terms any legitimate governmental interest "substantial."¹⁹ A "substantial" interest under formulations 3 and 4 is thus one that "has substance" or is "not imaginary," rather than one that is "important" or "weighty."²⁰

Similarly, formulations 3 and 4 purport to require that the challenged restriction be "no greater than is essential to the furtherance" of the governmental interest. In applying these formulations, however, the Court never engages in such an inquiry. Rather, as the Court has recently made clear, a regulation of speech "is no greater than is essential, and therefore is permissible under *O'Brien*," whenever the governmental interest "would be achieved less effectively absent the regulation."²¹ In application, then, this element of formulations 3 and 4 prohibits only "gratuitous" inhibitions of speech.²²

¹⁶ *O'Brien*, 391 U.S. at 377.

¹⁷ See *Community for Creative Non-Violence*, 468 U.S. at 298-99 n.8.

¹⁸ See, e.g., *Wayte*, 470 U.S. at 611 (use of a passive enforcement policy to decide whom to prosecute for failing to register for the draft serves the "nation's need to ensure its own security"); *Community for Creative Non-Violence*, 468 U.S. at 296 (prohibition on sleeping in public parks as applied to a demonstration designed to dramatize the plight of the homeless serves the nation's interest "in maintaining the parks in the heart of our capital in an attractive and intact condition").

¹⁹ See, e.g., *Wayte*, 470 U.S. at 612 (interests in avoiding delay, establishing easy evidence of intent, and promoting deterrence of those who might otherwise fail to register for the draft are "sufficiently compelling to satisfy the second *O'Brien* requirement"); *Taxpayers for Vincent*, 468 U.S. at 806 (the interest in promoting aesthetics is "substantial"); *O'Brien*, 391 U.S. at 377 (interests in providing proof that an individual has registered for the draft, providing information to the registrant that will simplify communication with his draft board, and providing a reminder to the registrant to notify his draft board of changes in his address are sufficiently "substantial" to satisfy the second part of the *O'Brien* standard).

²⁰ See *Dean Alfange, Jr., Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 S. Ct. Rev. 1, 23.

²¹ *Albertini*, 472 U.S. at 689. See also *Community for Creative Non-Violence*, 468 U.S. at 297; *Taxpayers for Vincent*, 466 U.S. at 815-16.

²² *John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1485 (1975). Unlike formulation 4, formulation 3 purports to call for an inquiry into the existence of alternative means of expression; in no case has it found the alternative means inadequate. In applying this

Thus, although formulations 3 and 4 purport to have some bite, they are in practice indistinguishable from formulations 1 and 2. The test of a test is not its formulation, but its application. Despite the apparent differences among formulations 1 through 4, the result of deferential review under all four is the same—the Court upholds the challenged restriction.²³

2. *Intermediate review.* In some of its decisions involving content-neutral restrictions, the Court employs an intermediate standard of review. Under this standard, which is reflected in formulations 5 and 6, the Court takes seriously the inquiries into the substantiality of the governmental interest and the availability of less restrictive alternatives.

The Court uses several devices in its inquiry into the substantiality of the asserted governmental interest: in some instances, the Court tests the legitimacy of the claim of substantiality by determining whether the government has restricted non-speech activities that similarly impair the asserted interest;²⁴ in others, it requires the government to present actual evidence of harm to the asserted interest;²⁵ in other cases, it carefully scrutinizes the actual operation of the restriction to determine the extent to which it furthers the asserted interest;²⁶ and in still other cases, the Court holds that the asserted governmental interest is simply too insubstantial to justify the challenged restriction.²⁷

requirement, however, the Court has taken an exceedingly generous view of "alternative" means of expression. For perhaps the most extreme example of this phenomenon, see *Taxpayers for Vincent*, 466 U.S. at 812 (ban on posting signs on public property upheld in light of "ample alternative modes of communication" in the same public areas, such as speaking or distributing literature).

²³ See *Schauer*, 26 Wm. & Mary L. Rev. at 788 (cited in note 15). I could find no decision in which the Court invalidated a content-neutral restriction under formulations 1 through 4. The Court has applied formulation 4—the *O'Brien* test—to five content-neutral restrictions and upheld them all. See *Albertini*, 472 U.S. 675; *Wayte*, 470 U.S. 598; *Community for Creative Non-Violence*, 468 U.S. 288; *Taxpayers for Vincent*, 466 U.S. 789; *O'Brien*, 391 U.S. 367.

²⁴ See, e.g., *Schad*, 452 U.S. at 73-74 (invalidating a content-neutral regulation because the Borough had failed to demonstrate that the restricted speech posed problems "more significant than those associated with various" unrestricted non-speech activities).

²⁵ See, e.g., *City of Los Angeles v. Preferred Communications*, 106 S.Ct. 2034, 2037-38 (1986); *Schad*, 452 U.S. at 72-73.

²⁶ See, e.g., *Anderson*, 460 U.S. at 796-806 (early filing deadlines for independent presidential candidates does not further Ohio's stated interests).

²⁷ See, e.g., *Grace*, 461 U.S. at 183 (suggesting that government's interest in preventing the appearance of improper influence on the Court that would be caused by a lone picketer is too insubstantial to justify restriction); *Martin*, 319 U.S. at 143 (free speech rights may not be curtailed if they create only a "minor nuisance"); *Schneider*, 308 U.S. at 161 ("Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as dimin-

Moreover, under the intermediate standard of review, the government cannot satisfy the less restrictive alternative requirement merely by demonstrating that less restrictive measures would serve its ends "less effectively" than the challenged regulation. Rather, to withstand intermediate scrutiny, the government must prove that its use of a less restrictive alternative would seriously undermine substantial governmental interests.²⁸ Under this standard, the Court may require a real sacrifice of legitimate governmental interests if that is necessary to prevent interference with first amendment rights.²⁹ Intermediate scrutiny often, though not always, results in invalidation of the challenged restriction.³⁰

3. *Strict review.* In some of its content-neutral decisions, the Court employs a strict level of scrutiny. This standard, which is reflected in formulation 7, focuses on the same considerations as intermediate review, but insists on a compelling rather than substantial governmental interest and requires a showing that the challenged restriction is "necessary" to achieve that interest. Strict scrutiny almost invariably results in invalidation of the challenged restriction.³¹

I offer several observations about the three standards of review identified above. First, although an analysis of the Court's content-neutral decisions suggests that the seven formulations roughly correspond with these three standards, the Court itself

ishes the exercise of rights so vital to the maintenance of democratic institutions.").

²⁸ See, e.g., *Citizens for Better Environ.*, 444 U.S. at 637-38 (1980) (city should protect against fraud by requiring solicitors to inform the public of the uses made of their contributions, rather than by prohibiting solicitation); *Martin*, 319 U.S. at 147-48 (city should protect homeowners from annoyance by permitting them to post signs stating that they do not wish to be disturbed rather than by prohibiting all door-to-door canvassing); *Schneider*, 308 U.S. at 162 (city should prevent littering by punishing litterers rather than by prohibiting leafletting).

²⁹ This is not to say, however, that the Court always will require the government to use less restrictive alternatives. See, e.g., *United States Jaycees*, 468 U.S. at 626 (holding under intermediate scrutiny that the state had employed "the least restrictive means of achieving its ends"); *Buckley*, 424 U.S. at 27-28 (holding under intermediate scrutiny that the government need not attempt to achieve the objectives of its contribution limitations by such less restrictive means as compulsory disclosure and laws against bribery).

³⁰ Compare *Grace*, 461 U.S. 171; *Anderson*, 460 U.S. 780; *Schad*, 452 U.S. 61; *Citizens for a Better Environment*, 444 U.S. 620; *Martin*, 319 U.S. 143; and *Schneider*, 308 U.S. 147 (all striking down content-neutral limits on speech) with *Jaycees*, 468 U.S. 609; and *Buckley*, 424 U.S. 1 (both upholding content-neutral limits on speech). Consider also *Preferred Communications*, 106 S.Ct. 2034 (remanded for factfinding showing actual harm to the government's asserted interest in limiting speech).

³¹ See, e.g., *Minneapolis Star*, 460 U.S. at 582-83; *Brown*, 459 U.S. at 92; *Globe Newspaper Co.*, 457 U.S. at 606-07; *Button*, 371 U.S. at 438-39. Even the strict standard may not always lead to invalidation. See *United States Jaycees*, 468 U.S. 609 (unclear whether strict or intermediate scrutiny).

does not speak in terms of deferential, intermediate, and strict standards of review. Accordingly, the Court's opinions do not always fit neatly within these three standards. In some cases, the standard applied is obscure at best.³² Second, even within the deferential, intermediate, and strict standards, the actual scrutiny may vary from one case to the next. These are not, in other words, three precisely defined standards. Gradations exist even within each standard. It is impossible, however, to define these more subtle variations with any clarity or precision. They are more a matter of feel and emphasis than of articulable differences in the standards applied.

Third, and most importantly, it has been suggested that the emergence of the content-based/content-neutral distinction has produced "a two-tiered approach" to first amendment cases: "while regulations that turn on the content of the expression are subjected to a strict form of judicial review," content-neutral regulations "receive only a minimal level of scrutiny."³³ The Court's frequent use of the intermediate and strict standards belies this suggestion. Although the Court at times may underestimate the extent to which content-neutral restrictions threaten first amendment values,³⁴ it does not test all such restrictions with a "minimal level of scrutiny."

II. THE CONTENT-BASED/CONTENT-NEUTRAL DISTINCTION

It may seem odd that the Court uses a stricter standard of review for content-based restrictions than for content-neutral restrictions, since both "reduce the sum total of information or opinion disseminated."³⁵ The explanation for this seeming anomaly is that the first amendment is concerned not only with the extent to which a law reduces the total quantity of communication, but also—and perhaps even more fundamentally—with at least three additional factors: distortion of public debate, improper motivation, and communicative impact. These three factors, which are

³² It is unclear, for example, whether *Jaycees*, 468 U.S. 609, applied strict or intermediate scrutiny, and whether *Heffron*, 452 U.S. 640, and *Branzburg v. Hayes*, 408 U.S. 665 (1972), applied intermediate or deferential scrutiny.

³³ *Community for Creative Non-Violence*, 468 U.S. at 313 (Marshall, J., dissenting). See also Redish, 34 Stan. L. Rev. 113 (cited in note 1).

³⁴ See text accompanying notes 134-37 below.

³⁵ Redish, 34 Stan. L. Rev. at 128 (cited in note 1). Indeed, some content-neutral restrictions may, more than content-based restrictions, reduce the total amount of opinion or information made available to the public. See Stone, *Content Regulation*, 25 Wm. & Mary L. Rev. at 197 (cited in note 1).

most clearly presented by content-based restrictions,³⁶ explain both why the Court tests virtually all content-based restrictions of high-value speech with a single, strict standard of review, and why it does not apply that same standard to all content-neutral restrictions.

A. Distortion of Public Debate

By definition, content-based restrictions distort public debate in a content-differential manner. A law forbidding any person to criticize the war, for example, completely excises a particular point of view from public debate. Such a law mutilates "the thinking process of the community"³⁷ and is thus incompatible with the central precepts of the first amendment.³⁸ Such a law necessarily violates the first amendment except, perhaps, in the most extraordinary of circumstances.

Not all content-based laws completely excise a particular point of view from public debate, however. Some content-based restrictions, such as a law prohibiting any person to criticize the war within 100 feet of an induction center, are more modest in scope. But even such modest content-based restrictions distort public debate in a content-differential manner. That is in itself an important constitutional concern. But further, and perhaps more importantly, as a practical matter content-based restrictions cannot be neatly divided into those that do and do not seriously distort public debate. The question is one of degree, and such a line would be extremely difficult to draw on a case-by-case basis. Moreover, an error in line drawing in this context—misclassifying a "serious" distortion as a "modest" one—could have serious consequences for public debate.³⁹ The safest and most sensible course in such circumstances is thus to test all content-based restrictions of high-value speech with the same strict standards of review.⁴⁰

B. Improper Motivation

The Court long has held that the government may not restrict speech because it disapproves of a particular message.⁴¹ This pre-

³⁶ For detailed elaboration, see Stone, *Content Regulation*, 25 Wm. & Mary L. Rev. 189 (cited in note 1).

³⁷ Alexander Meiklejohn, *Political Freedom* 27 (1960).

³⁸ *Id.*

³⁹ See Stone, *Content Regulation*, 25 Wm. & Mary L. Rev. at 217-27 (cited in note 1).

⁴⁰ *Id.* at 225-26.

⁴¹ See, e.g., *Cornelius v NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 105 S.Ct. 3439,

cept is central to first amendment jurisprudence. Such restrictions are inconsistent with the basic purposes of the first amendment in three ways: they impede the search for truth,⁴² obstruct meaningful participation in self-government,⁴³ and frustrate individual self-fulfillment.⁴⁴

The problem, of course, is that the government rarely admits that it is attempting to restrict a particular message because it disagrees with the ideas expressed. Rather, the government usually claims that legitimate governmental interests support the restriction. A central task of first amendment jurisprudence is to ferret out improper motivations when they in fact exist. When a restriction is content-based, the risk of improper motivation is especially high, for governmental officials considering the adoption of such a restriction will often, consciously or unconsciously, be influenced by their own opinions about the merits of the restricted speech. Accordingly, in review of content-based restrictions, the most sensible course is to presume improper motivation and to permit the government to negate that presumption only by satisfying the strict standards of content-based review.⁴⁵

C. Communicative Impact

Unlike content-neutral restrictions, content-based restrictions usually are designed to restrict speech because of its "communicative impact"—that is, because of "a fear of how people will react to what the speaker is saying."⁴⁶ This is important because governmental efforts to restrict speech because of its communicative impact usually rest upon constitutionally disfavored justifications. That is, either the government does not trust its citizens to make wise decisions if they are exposed to the expression, or it fears that the expression will offend others and perhaps provoke a hostile au-

3454 (1985); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980); *Greenburgh Civic Assns.*, 453 U.S. at 132.

⁴² See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (in the long run, the best test of truth is "the power of the thought to get itself accepted in the competition of the market").

⁴³ See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791 (1978) (in a self-governing nation, the people, not the government, "are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments").

⁴⁴ See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (in our constitutional system, the protection of free expression is designed to enhance personal growth, self-realization, and the development of individual autonomy).

⁴⁵ See Stone, *Content Regulation*, 25 Wm. & Mary L. Rev. at 227-33 (cited in note 1).

⁴⁶ John Hart Ely, *Democracy and Distrust* 111 (1980). See also Laurence H. Tribe, *American Constitutional Law* 580-81 (1978).

dience response. Justifications for the suppression of particular messages that, like these, are based on paternalism or intolerance, are incompatible with the basic premises of the first amendment. Laws that restrict speech for such reasons are thus presumptively unconstitutional.⁴⁷

These three factors—distortion of public debate, improper motivation, and communicative impact—provide a sound basis for the Court's use of a strict standard of review to test the constitutionality of even those content-based restrictions that do not substantially reduce "the sum total of information or opinion disseminated."⁴⁸ Moreover, because these three factors do not arise with the same frequency in content-neutral restrictions, they also explain why the Court does not employ a similarly strict standard to test the constitutionality of all content-neutral restrictions.⁴⁹

III. THE CENTRAL CONCERN OF CONTENT-NEUTRAL ANALYSIS: RESTRICTING THE OPPORTUNITIES FOR FREE EXPRESSION

Because content-neutral restrictions are not directed at particular points of view, and thus are usually not censorial in nature, one could imagine a regime in which such restrictions were deemed wholly outside the scope of first amendment concern.⁵⁰ The Court, however, has never adopted such a view.⁵¹ Rather, the Court long has recognized that by limiting the availability of particular means of communication, content-neutral restrictions can significantly impair the ability of individuals to communicate their views to others. This is a central first amendment concern: to the extent that content-neutral restrictions actually have this effect, they necessarily dampen the search for truth, impede meaningful participation in self-governance, and frustrate individual self-fulfillment.

⁴⁷ See Stone, Content Regulation, 25 Wm. & Mary L. Rev. at 207-17 (cited in note 1).

⁴⁸ Id. at 197, quoting Redish, 34 Stan. L. Rev. at 128 (cited in note 1).

⁴⁹ Some content-neutral laws may, of course, de facto limit the expression of some viewpoints more than others. In such situations, content-neutral laws may be the product of improper government motivation. But a law that is facially content-neutral is both less likely to have a differential effect on particular viewpoints and less likely to be the product of improper motivation than a law explicitly directed at a particular point of view. Similarly, a law that is neutral with respect to content is less likely to be rooted in paternalistic government concerns or amount to a heckler's veto of unpopular ideas. See Stone, Content Regulation, 25 Wm & Mary L. Rev. at 199-200, 218-27, 234-39 (cited in note 1). I discuss this issue further in the text accompanying notes 123-33 below.

⁵⁰ See *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (upholding a regulation of the use of sound trucks on the ground that no "infringement of free speech arises unless such regulation . . . undertakes to censor the contents of the broadcasting").

⁵¹ See Tribe, American Constitutional Law at 682-83 (cited in note 46).

A simple example illustrates the point: "No person may make any speech; distribute any leaflet; publish any newspaper, magazine, or other periodical; operate any radio, television, or cable system; or engage in any other form of public communication." Such a law is content-neutral. But it would cripple the system of free expression. Less dramatic restrictions have less dramatic effects. The central point, however, remains the same. To ensure "the widest possible dissemination of information"⁵² and the "unfettered interchange of ideas,"⁵³ the first amendment prohibits not only content-based restrictions that censor particular points of view, but also content-neutral restrictions that unduly constrict the opportunities for free expression.⁵⁴

This is not to say that every content-neutral law that restricts the opportunities for free expression is unconstitutional.⁵⁵ Rather, in recognition that some limitations may be justified by countervailing governmental interests, the Court generally tests content-neutral restrictions with an implicit balancing approach: the greater the interference with the marketplace of ideas, the greater the burden on government to justify the restriction.

The Court does not speak explicitly in these terms. There is a strong correlation in practice, however, between the extent to which a challenged law actually interferes with the opportunities for free expression and the Court's use of the strict, intermediate, and deferential standards of review identified earlier.⁵⁶ When the challenged restriction has a relatively severe effect, the Court invokes strict scrutiny. When the challenged restriction has a significant but not severe effect, the Court employs intermediate scrutiny. And when the restriction has a relatively modest effect, the Court applies deferential scrutiny.

There are, of course, exceptions to the pattern. As we shall see,

⁵² *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

⁵³ *Roth v. United States*, 354 U.S. 476, 484 (1957). See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (the first amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

⁵⁴ See, e.g., Tribe, *American Constitutional Law* at 582 (cited in note 46); Daniel A. Farber and John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219, 1238-39 (1984); C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 Nw. U. L. Rev. 937, 969 (1983); Redish, 34 Stan. L. Rev. at 131 (cited in note 1).

⁵⁵ See notes 23 and 31 above. See also, e.g., *Taxpayers for Vincent*, 466 U.S. at 803-04; *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 549 (1981) (Stevens, J., dissenting in part); *Kovacs*, 336 U.S. at 89.

⁵⁶ See notes 14-34 and accompanying text above.

those exceptions are often quite revealing, for they suggest the impact of additional factors that at times trump the central concern of content-neutral analysis. For present purposes, however, it is the pattern rather than the exceptions that is of interest. And the general pattern is clear: as the restrictive effect increases, the standard of review increases as well.

A. The Central Concern in Practice

Although this doctrine seems straightforward, the pivotal inquiry—the extent to which the challenged restriction actually diminishes the opportunities for free expression—is quite complex. In assessing the restrictive effect of particular laws, the Court considers two separate but related factors: the extent to which the challenged restriction reduces the total quantity of public debate, and the extent to which the challenged restriction limits important opportunities for the free expression of particular groups, individuals, or causes. An analysis of several illustrative cases may help to sharpen the inquiry and highlight some of the more difficult issues.

1. *Buckley*. In *Buckley v. Valeo*,⁵⁷ the Court invalidated the expenditure limitations of the Federal Election Campaign Act of 1971, which prohibited any person from spending more than \$1,000 on behalf of the campaign of any political candidate. As the Court recognized, these provisions had a severe effect on the opportunities for free expression:

A restriction on the amount of money a person or group can spend on political communication . . . necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. . . . The expenditure limitations . . . represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.⁵⁸

Unlike most content-neutral restrictions, which leave speakers relatively free to shift to alternative means of expression, the expenditure limitations in *Buckley* restricted “the extent of the reasonable use of virtually every means of communicating information.”⁵⁹ An individual willing to spend \$10,000, but limited by law

⁵⁷ 424 U.S. 1 (1976).

⁵⁸ *Id.* at 19 (footnotes omitted).

⁵⁹ *Id.* at 18 n.17.

to \$1,000, has no ready alternative to make up for the \$9,000 reduction in the total amount of his expression. It simply won't do to tell that individual to distribute leaflets instead. Thus, the expenditure limitations had a potentially severe effect both on the freedom of individual speakers and on the total quantity of public debate. In such circumstances, the Court appropriately invoked the strict standard of content-neutral review.

The Court in *Buckley* also considered the constitutionality of the Act's provisions that prohibited any person from contributing more than \$1,000 to a political candidate. As the Court recognized, the contribution limitations, unlike the expenditure limitations, entailed "only a marginal restriction upon the contributor's ability to engage in free communication."⁶⁰ This was so because an individual wishing to spend more than \$1,000 in support of a particular candidate could do so by means other than direct contributions to the candidate, such as by direct expenditures in support of the candidate, contributions to political action committees, or contributions to other organizations formed to support the candidate. The Court therefore tested the contribution limitations under the intermediate rather than the strict standard of review.⁶¹

2. *Button*. In *NAACP v. Button*,⁶² the Court invalidated, as applied to the NAACP, a Virginia law that prohibited any organization from retaining a lawyer in connection with litigation to which it was not a party and in which it had no pecuniary right or liability. As the Court recognized, in the South in the late 1950s and early 1960s, the "mere existence" of such a law could effectively "freeze out of existence" virtually all NAACP litigation "on behalf of the civil rights of Negro citizens."⁶³ Such an effect would severely restrict the NAACP's opportunities for free expression:

In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achiev-

⁶⁰ Id. at 20-21. The Court also concluded that insofar as a contribution constitutes a symbolic expression of the contributor's support for the candidate, the "quantity of communication by the contributor does not increase perceptibly with the size of the contribution." Id. at 21. Thus, the effect of the contribution limitations on the contributor's right of association, like their effect on the contributor's right of expression, was only "marginal." Id. at 20. For criticism of the Court's distinction between the expenditure and contribution limitations, see L. A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 S. Ct. Rev. 243, 253; Marlene Arnold Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 Wis. L. Rev. 323, 344-45.

⁶¹ 424 U.S. at 27-28. The Court upheld this restriction. Id.

⁶² 371 U.S. 415 (1963).

⁶³ Id. at 434-36.

ing the lawful objectives of equality of treatment . . . for the members of the Negro community in this country. It is thus a form of political expression. . . . And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances. . . . For such a group, association for litigation may be the most effective form of political association.⁶⁴

Button warrants two observations. First, unlike the expenditure limitations in *Buckley*, the legislation at issue in *Button* did not restrict "the reasonable use of virtually every means of communicating information." To the contrary, the Virginia law left the NAACP and its members free to pursue their objectives by such alternative means as leafletting, picketing, publishing their views in newspapers, and supporting sympathetic political candidates. As the Court recognized, however, these alternatives are not interchangeable with litigation. Litigation is a distinct means of political expression. It seeks to achieve its objectives in a different forum and through a different process than most other forms of political expression. Thus, the Virginia statute restricted not merely one of many interchangeable means of expression, but what in the circumstances was perhaps "the most effective form of political" expression available. The Court therefore appropriately tested the challenged law with the strict standard of review.⁶⁵

Second, there were two distinct components to the conclusion in *Button* that the Virginia statute had a severe effect on the opportunities for free expression: (1) the law substantially limited the availability (2) of a very important means of political action. Both components must be present for the Court to invoke strict scrutiny. A law that has a minor effect on a relatively important means of expression or a substantial effect on a relatively unimportant means of expression does not trigger the most demanding standard of review.⁶⁶

Button also raises a question. The Court in *Button* held the challenged law invalid as applied to the NAACP. Suppose, however, the Virginia law was challenged by an environmental group shortly after the decision in *Button*. Would *Button* govern? Or would the law be constitutional as applied to the environmental group because its need to use litigation as a means of political ex-

⁶⁴ Id. at 429-31.

⁶⁵ Id. at 438-39.

⁶⁶ See the discussion of *Brown* and *Jaycees* accompanying notes 72-73, 75-78 and 92 below.

pression was not so acute as that of the NAACP? Would the law, in other words, be unconstitutional as applied to some groups, but not others, depending upon the relative severity of the effect of the law on the different groups' opportunities for free expression?⁶⁷

3. *Brown*. In *Brown v. Socialist Workers '74 Campaign Committee*,⁶⁸ the Court invalidated the disclosure provisions of Ohio's campaign reporting law, which required every political party to report the names and addresses of campaign contributors. The Court explained that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."⁶⁹ The Court did not hold the law unconstitutional on its face, however. Rather, the Court held it invalid only as applied to the Socialist Workers Party. To understand this aspect of *Brown*, it is important to note that several years earlier, the Court in *Buckley*, applying intermediate scrutiny, had held that the disclosure provisions of the Federal Election Campaign Act of 1971 were not unconstitutional on their face.⁷⁰ The Court in *Brown* distinguished *Buckley* on the ground that, unlike contributors to most political parties, contributors to the Socialist Workers Party might be deterred from exercising their right of association in light of the long history "of both governmental and private hostility toward and harassment of SWP members and supporters."⁷¹ Thus, as applied to the Socialist Workers Party, the challenged law had a relatively severe effect on the opportunities for free expression:

"[T]he damage done by disclosure to the associational interests of the minor parties and their members . . . could be significant. These movements are less likely to have a sound financial base and thus are more vulnerable to falloffs in contributions. In some instances fears of reprisal may deter contributions to the point where the movement cannot survive. The public interest also suffers if that result comes to pass, for there is a consequent reduction in the free circulation of ideas."⁷²

In *Brown*, then, the Court recognized that association, like liti-

⁶⁷ See the discussion of *Brown*, *Adderley*, *Heffron*, *Grayned*, *O'Brien*, and *Community for Creative Non-Violence*, accompanying notes 69-73, 101-06, and 110-13 below.

⁶⁸ 459 U.S. 87 (1982).

⁶⁹ *Id.* at 91, quoting *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

⁷⁰ 424 U.S. at 68-72.

⁷¹ 459 U.S. at 99, quoting the unreported opinion of the district court.

⁷² *Id.* at 93, quoting *Buckley*, 424 U.S. at 71.

gation, is not a readily interchangeable means of political expression. The government cannot eliminate an individual's right to associate on the plea that the individual still has the right to leaflet. Association, like litigation, is a unique means of political action. In this sense, *Brown* and *Button* reflect consistent applications of the same underlying principle. But *Brown*, read in light of *Buckley*, also clarifies *Button* in two ways: first, it makes clear that a law that has a substantial effect on an important right triggers a more demanding standard of review than a law that has only a modest effect on the same right; second, it makes clear that, in at least some circumstances, the Court will consider the severity of the restrictive effect of a content-neutral law as applied to different speakers, and thus hold such a law unconstitutional as applied to some speakers although it is constitutional as applied to others. The creation of such constitutionally compelled exemptions, however, is both rare and problematic.⁷³

4. *Jaycees*. In *Roberts v. United States Jaycees*,⁷⁴ the Court held that a Minnesota law prohibiting discrimination on the basis of sex could constitutionally be applied to the Jaycees, who would not admit women as members. At the outset, the Court recognized that by "requiring the Jaycees to admit women as full voting members," the antidiscrimination law interfered "with the internal organization or affairs of the group," and that there "can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."⁷⁵ The Court concluded, however, that the application of the law to the Jaycees did not have a severe effect on the group's first amendment rights:

[T]he Jaycees have failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association. . . . There is . . . no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views. The Act requires no change in the Jaycees' creed of promoting

⁷³ See the discussion of the role of disparate impact in *Adderley*, *Grayned*, *Heffron*, *O'Brien*, and *Community for Creative Non-Violence*, accompanying notes 101-06 and 110-13 below. The general problems with applying heightened scrutiny to content-neutral laws are discussed in part III-B below (at notes 123-33 and accompanying text). For another general discussion of these points, see Stone and Marshall, 1983 S. Ct. Rev. 583 (cited in note 1).

⁷⁴ 470 U.S. 609 (1984).

⁷⁵ *Id.* at 623.

the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members.⁷⁶

Jaycees thus can be understood as posing an issue analogous to those addressed in *Button* and *Brown*. As in those cases, the law challenged in *Jaycees* interfered with an especially important means of expression. But in *Jaycees*, the party challenging the law was unable to demonstrate that the law substantially interfered with this means of expression. In such circumstances, the Court appropriately applied intermediate rather than strict scrutiny.⁷⁷ If the compelled association had had a more substantial effect on the right, the Court would have invoked strict scrutiny. Such a case might arise, for example, if a law required political parties to permit members of opposing parties to participate as full voting members in their primaries or conventions.⁷⁸

5. *The prohibited media cases.* In a series of cases, the Court has considered the constitutionality of laws that substantially or entirely prohibit particular means of communication, such as leafletting,⁷⁹ door-to-door solicitation,⁸⁰ public solicitation,⁸¹ sound trucks,⁸² live entertainment,⁸³ peaceful political boycotts,⁸⁴ street demonstrations,⁸⁵ billboards,⁸⁶ and signs on public utility poles.⁸⁷ These cases are different from *Buckley*, *Button*, *Brown*, and *Jaycees* because the particular means of expression restricted in these cases are not as distinctive as campaign expenditures, litiga-

⁷⁶ *Id.* at 626-27.

⁷⁷ Although the Court used terms such as "compelling interest" and "least restrictive means," *id.* at 624, 626, its application of the "least restrictive means" component was clearly less rigorous than is usually associated with strict scrutiny; it more closely resembled intermediate scrutiny.

⁷⁸ See *Storer v. Brown*, 415 U.S. 724, 726 (1974) (upholding a California statute forbidding ballot position to an independent candidate who "had a registered affiliation with [any] qualified political party at any time within one year prior to the immediately preceding primary election"); *Rosario v. Rockefeller*, 410 U.S. 752 (1973) (upholding a New York statute requiring voters to register their party affiliation eleven months prior to the next party primary in order to inhibit "party raiding").

⁷⁹ *Schneider*, 308 U.S. 147.

⁸⁰ *Martin*, 319 U.S. 141.

⁸¹ *Citizens for Better Environ.*, 444 U.S. 620.

⁸² *Kovacs*, 336 U.S. 77.

⁸³ *Schad*, 452 U.S. 61.

⁸⁴ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

⁸⁵ *Cox v. Louisiana*, 379 U.S. 536 (1965).

⁸⁶ *Metromedia, Inc.*, 453 U.S. 490.

⁸⁷ *Taxpayers for Vincent*, 466 U.S. 789.

tion, or association. It is not unreasonable, in other words, to expect an individual who is prohibited from using one of these means of expression to shift to another. An individual prohibited from leafletting may post signs; an individual prohibited from door-to-door solicitation may solicit on the street; an individual prohibited from using sound trucks may rent billboards; an individual prohibited from using billboards may advertise on the radio; and so on.

These substitutions are not perfect, of course. Depending upon the circumstances, some means of expression may have special advantages for particular groups, individuals, or causes. But for the most part, the elimination of any one of these means of expression is unlikely to cause a significant reduction in the total quantity of free expression.⁸⁸ Accordingly, one might argue that such restrictions have only a modest effect on the total quantity of free expression and thus should be tested with the deferential standard of review.⁸⁹

The Court has not accepted this argument. Rather, recognizing that substantial or total bans on particular means of expression pose significant dangers,⁹⁰ the Court generally has tested such restrictions with an intermediate standard of review.⁹¹ Several considerations support this conclusion. First, it may be that laws that substantially or wholly prohibit particular means of expression do in fact significantly restrict free expression. Although speakers often can shift to alternative means of communication, the very fact that a speaker prefers the prohibited means of expression suggests that something is lost in transition. Second, to the extent

⁸⁸ For example, although I have placed the political boycott in this category, it is at least arguable that this is a sufficiently distinctive means of political action that it should be grouped instead with expenditures, litigation, and association. I should point out that, in *Schad*, 452 U.S. 61, the "alternative means" argument focused not on the ability to shift to alternative means of expression, but on the ability to view live entertainment in neighboring towns. *Id.* at 76.

⁸⁹ For such an argument, see *Metromedia, Inc.*, 453 U.S. at 549-53 (Stevens, J., dissenting in part).

⁹⁰ See, e.g., *id.* at 526-27, 527 n.6 (Brennan, J., concurring); *id.* at 515 n.20; *Schad*, 452 U.S. at 69-72; *Taxpayers for Vincent*, 466 U.S. at 824 (Brennan, J., dissenting). See also Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 S. Ct. Rev. 285, 301 n.90.

⁹¹ See, e.g., *Schneider*, 308 U.S. 147; *Martin*, 319 U.S. 141; *Schad*, 452 U.S. 61; *Citizens for Better Environ.*, 444 U.S. 620; *Claiborne Hardware Co.*, 458 U.S. 886. See also *Metromedia, Inc.*, 453 U.S. at 516, 517 n.22, 517-18 n.23, 519-20 (plurality opinion); *id.* at 525-28 (Brennan, J., concurring).

For a contrary view, see *Taxpayers for Vincent*, 466 U.S. 789, examined in text accompanying notes 178-79 below. See also *Kovacs*, 336 U.S. 77 (construing the challenged ordinance as a limited rather than substantial regulation and thus applying a more deferential standard of review).

that such means of expression are used disproportionately by certain types of speakers or by speakers associated with particular points of view, the potential distorting effect of such laws is more serious than the potential distorting effect of laws that regulate such means of expression in a more limited way.⁹² Third, although the advent of radio, television, and cable has dramatically expanded the "marketplace of ideas," it remains important to preserve the more traditional and less expensive means of communication, which are most often the subject of prohibition. As Justice Black observed, such means of expression may be "essential to the poorly financed causes of little people."⁹³ These means provide an important outlet for unconventional and dissident ideas, and they may play a critical role in local if not nationwide debates. Finally, although the elimination of any one of these means of communication may not significantly reduce the total quantity of public debate, the use of a deferential standard of review gradually could lead to the elimination of many of these means of expression. The cumulative effect could be serious indeed.⁹⁴ To avoid these dangers, the Court has embraced a presumption that laws that substantially or wholly prohibit particular means of expression are invalid unless they withstand intermediate scrutiny.

The most significant difficulty with this approach is that it places considerable weight on the determination of whether a challenged law bans a particular means of expression. This determination can be quite complex, requiring an analysis of both the degree of regulation and the definition of "means of expression." The first of these factors is illustrated by *Kovacs v. Cooper*.⁹⁵ Is a law that prohibits the use of any sound truck that emits "loud and raucous noises" a total ban or a mere regulation? At what point does regulation become prohibition? The second factor—defining the means of expression—is illustrated by *United States Postal Service v. Council of Greenburgh Civic Associations*.⁹⁶ Is a law that prohibits the deposit of unstamped matter in the letter boxes of private

⁹² See *Kovacs*, 336 U.S. at 102-03 (Black, J., dissenting). See the discussion of *Adlerley*, *Heffron*, *Grayned*, *O'Brien*, and *Community for Creative Non-Violence* accompanying notes 101-06, 110-13 below.

⁹³ *Martin*, 319 U.S. at 146. See also Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 S. Ct. Rev. 233, 234 ("Fora Americana").

⁹⁴ For a problematic effort to address this danger by ad hoc judicial inquiry into the "adequacy" of the "overall communications market," see *Metromedia, Inc.*, 453 U.S. at 552-53 (Stevens, J., dissenting in part).

⁹⁵ 336 U.S. 77 (1949).

⁹⁶ 453 U.S. 114 (1981).

homes a total ban, or is it merely a regulation of the more broadly defined practice of leaving unstamped matter at private homes, which might include such means as slipping the matter under the door, tying it to the doorknob, or leaving it under the mat?

Although these are not inconsiderable puzzles, and may require fine judgments in marginal cases, they do not undermine the force of the general principle: laws that substantially or wholly prohibit particular means of expression should ordinarily be tested by intermediate scrutiny. No matter where lines are drawn, line-drawing problems will arise at the margin. That such problems arise is not in itself sufficient reason to reject an otherwise sound principle.

6. *The restricted media cases.* In another series of cases, the Court has considered the constitutionality of laws that restrict particular means of expression without substantially eliminating their availability. In some cases, these "time, place, and manner" regulations serve merely a channeling function and have no appreciable impact on free expression. A narrowly defined law governing the issuance of parade permits illustrates this sort of regulation.⁹⁷ In other cases, these regulations declare certain places off-limits to all or some means of expression. *Adderley v. Florida*,⁹⁸ *Grayned v. City of Rockford*,⁹⁹ and *Heffron v. International Society for Krishna Consciousness*¹⁰⁰ illustrate this sort of regulation.¹⁰¹ In *Adderley*, about 200 students were convicted of trespass for conducting a demonstration on the grounds of a county jail in order to protest the arrest of several of their schoolmates who had engaged in a civil rights demonstration. In *Grayned*, a demonstrator against racism in a particular school was convicted of violating an ordinance prohibiting any person, while on grounds adjacent to any

⁹⁷ See, e.g., *Cox v. New Hampshire*, 312 U.S. 569 (1941). As an example of the limit of this principle, consider *Walker v. City of Birmingham*, 388 U.S. 307 (1967), which held that a city ordinance requiring that public demonstrations be licensed by the city commission, which could deny a permit only if "in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience" so required, *id.* at 310 n.1, was sufficiently vague that it "would unquestionably raise substantial constitutional issues concerning some of its provisions." *Id.* at 316.

⁹⁸ 385 U.S. 39 (1966).

⁹⁹ 408 U.S. 104 (1972).

¹⁰⁰ 452 U.S. 640 (1981).

¹⁰¹ See also *Albertini*, 472 U.S. 675 (prohibiting certain persons from entering a military base even for speech purposes); *Community for Creative Non-Violence*, 468 U.S. 288 (prohibiting sleeping in public parks as part of demonstration); *Grace*, 461 U.S. 171 (prohibiting display of flag, banner, or other device on the public sidewalks surrounding the Supreme Court); *Schad*, 452 U.S. 61 (prohibiting commercial live entertainment in borough); *Greer v. Spock*, 424 U.S. 828 (1976) (prohibiting political demonstrations on military base).

school, from making any noise that disturbs the peace or good order of that school. And in *Heffron*, the members of a religious group were prohibited from engaging in peripatetic leafletting on the grounds of a state fair by a rule banning the distribution on the fairgrounds of any merchandise, including written material, except from a booth.

From one perspective, restrictions like those in *Adderley*, *Grayned*, and *Heffron* seem quite modest. In light of the availability of alternative means of expression, it seems doubtful that such restrictions have an appreciable effect on the total quantity of public debate. It might be argued, however, that although this may be true in the abstract, it is not always true in application. The actual restrictive effect of such regulations may vary from one speaker or issue to the next. Although rules prohibiting demonstrations in the curtilage of a jailhouse, noisy protests near a school, and leafletting on the grounds of a state fair may have little effect on the vast majority of speakers, they may have a significant effect on those speakers whose messages are tied directly to the jail, the school, or the state fair. By denying these speakers access to what are the most logical targets of their expression, such regulations deprive them of access to the most important audience and prevent them from utilizing especially dramatic and effective means of communication. Moreover, because such regulations have a disparate impact on particular speakers and messages, they may distort public debate in a content-differential manner and thus implicate a central first amendment concern. In such circumstances, one might argue that the Court should invalidate such regulations—at least as applied to those speakers whose messages are directly tied to the off-limits locations.¹⁰² This argument would extend the principle adopted in *Button* and *Brown*, in which the Court held unconstitutional as applied to particular speakers laws that were otherwise valid on their face.

The Court has never accepted this argument. Rather, the Court has declined to hold laws unconstitutional as applied in this manner except where, as in *Button* and *Brown*, the differential restrictive effect is quite severe. Two considerations support this conclusion. First, the creation of such constitutionally compelled exemptions converts a law that is content-neutral into one that is content-based. In *Brown*, for example, the Court held that the first amendment mandated preferential treatment for the Socialist

¹⁰² See Baker, 78 Nw. U. L. Rev. at 973 n.88 (cited in note 54). See also Ronald A. Cass, First Amendment Access to Government Facilities, 65 Va. L. Rev. 1287, 1319 (1979).

Workers Party but not for the Republican Party, the Democratic Party, the Liberal Party, the Libertarian Party, or the Conservative Party. This turns topsy-turvy the usual presumptions of free speech jurisprudence, and it creates the danger that the exemption will actually distort public debate in favor of the exempted group.

Second, widespread application of the method followed in *Button* and *Brown* would generate a host of exceedingly difficult and discomfiting questions of application. When is a speaker's message sufficiently tied to a particular location to justify a special exemption? Should it make a difference in *Adderley*, for example, whether the demonstrators are protesting the arrests of their friends, calling for changes in bail procedures, supporting a particular candidate for sheriff, or complaining about low wages for jail personnel? Should it make a difference in *Heffron* whether the leafletters are protesting employment discrimination at the fair, supporting a candidate for governor who voted for extra appropriations for the fair, or espousing their religious beliefs to potential converts near the health food exhibits? It is doubtful, at best, that courts should be in the business of making such inquiries when, in so doing, they will be called upon to draw critical distinctions between speakers because of the particular messages or viewpoints they seek to convey. Although constitutionally compelled exemptions may be justified when an otherwise valid law severely restricts a particular individual's or group's opportunities for free expression, such exemptions are more questionable when, as in *Adderley*, *Heffron*, and *Grayned*, the actual restrictive effect is much less severe.¹⁰³

Thus, time, place, and manner regulations have only a modest effect on overall public debate, and to the extent such regulations disproportionately disadvantage particular speakers, the restrictive effect is not sufficiently severe to warrant the creation of constitutionally compelled exemptions. Accordingly, one might expect the Court routinely to test such regulations with the deferential standard of review. In fact, however, although the Court usually gives such restrictions only deferential scrutiny,¹⁰⁴ it occasionally invokes intermediate scrutiny as well.¹⁰⁵ As we shall see, the explana-

¹⁰³ For a more extensive discussion, see Stone and Marshall, 1983 S. Ct. Rev. at 607-13 (cited in note 1). For an analysis of parallel concerns under the free exercise clause, see Geoffrey R. Stone, Constitutionally Compelled Exemptions and the Free Exercise Clause, 28 Wm. & Mary L. Rev. (forthcoming 1986) ("Compelled Exemptions").

¹⁰⁴ See, e.g., *Albertini*, 472 U.S. 675; *Community for Creative Non-Violence*, 468 U.S. 288; *Heffron*, 452 U.S. 640; *Greer*, 424 U.S. 828; *Adderley*, 385 U.S. 39.

¹⁰⁵ See, e.g., *Grace*, 461 U.S. 171; *Grayned*, 408 U.S. 104.

tion lies neither in the impact of the challenged regulation on the total quantity of public debate, nor in its differential effect on particular speakers, but in the peculiarities of the Court's public forum doctrine.¹⁰⁶

7. *The symbolic expression cases.* In *United States v. O'Brien*¹⁰⁷ and *Clark v. Community for Creative Non-Violence*,¹⁰⁸ the Court considered the constitutionality of content-neutral laws that restricted certain forms of symbolic expression. In *O'Brien*, the Court upheld a federal statute that prohibited any person from knowingly destroying a draft card, as applied to an individual who publicly burned his draft card as a symbolic expression of protest against the draft and the Vietnam War. In *Community for Creative Non-Violence*, the Court upheld a National Park Service regulation that prohibited any person from sleeping in a public park, as applied to individuals engaged in a round-the-clock demonstration designed to call attention to the plight of the homeless.¹⁰⁹

The issue posed in these cases is similar to that posed in *Adderley*, *Grayned*, and *Heffron*. Laws that prohibit destroying of draft cards or sleeping in public parks do not have an appreciable effect on the total quantity of public debate. These are not widely used means of expression. Such laws do have an effect, however, on those speakers for whom the destruction of a draft card or sleeping in a public park constitutes an especially dramatic or effective means of communication.¹¹⁰ The question then, as in *Adderley*, *Grayned*, and *Heffron*, is whether a law that has no appreciable effect on public debate should be tested by (a) intermediate rather than deferential scrutiny because of its disproportionate effect on certain speakers; (b) intermediate scrutiny, as applied to such speakers; or (c) deferential scrutiny, because the disproportionate effect is insufficiently severe to justify either elevation of the stan-

¹⁰⁶ See part IV-B below.

¹⁰⁷ 391 U.S. 367 (1968).

¹⁰⁸ 468 U.S. 288 (1984).

¹⁰⁹ *Jaycees*, 468 U.S. 609, offers another illustration of this type of restriction. The *Jaycees'* gender discrimination in selecting members may be seen as a form of symbolic expression—"our refusal to admit women is itself an expression to others of our view that women and men are different in important ways." The Court viewed this aspect of the act of discriminating as tantamount to symbolic expression regulated in a content-neutral manner.

¹¹⁰ For discussion of the significance of draft card burning as a means of protesting the draft, see *Alfange*, 1968 S. Ct. Rev. at 27 (cited in note 20); *Ely*, 88 Harv. L. Rev. at 1489-90 & n.29 (cited in note 22); *Redish*, 34 Stan. L. Rev. at 147-50 (cited in note 1); *Tribe*, *American Constitutional Law* at 686 (cited in note 46). See also *Lawrence R. Velvel*, *Draft Card Burning Cases*, 16 U. Kan. L. Rev. 149, 153 (1968); *Vincent Blasi*, *The Checking Value in First Amendment Theory*, 1977 Am. Bar Found. Res. J. 521, 640.

dard of review for the law as a whole or creation of a constitutionally compelled exemption.¹¹¹

As in the line of cases including *Adderley*, *Grayned*, and *Heffron*, the Court generally has decided to apply deferential scrutiny in these cases involving symbolic expression.¹¹² This conclusion seems justified where, as in *O'Brien* and *Community for Creative Non-Violence*, the differential restrictive effect is not severe and speakers who might prefer to burn draft cards or to sleep in public parks can readily shift to alternative means of expression.¹¹³

As the above illustrations demonstrate, in evaluating the concern that content-neutral restrictions may limit the opportunities for free expression, the Court generally calibrates the standard of review to the actual restrictive effect of the challenged restriction. Laws having severe effects ordinarily trigger strict scrutiny; laws having significant effects ordinarily trigger intermediate scrutiny; and laws having relatively modest effects ordinarily trigger deferential scrutiny.

¹¹¹ Unlike the situations in *Adderley*, *Grayned*, and *Heffron*, the creation of a constitutionally compelled exemption in cases like *O'Brien* and *Community for Creative Non-Violence* might not require the Court to draw lines explicitly in terms of content. In *O'Brien*, for example, the Court could exempt from the statute any person who destroys a draft card for the purpose of expression, and in *Community for Creative Non-Violence* it could exempt from the regulation any person who sleeps in a park as a means of expression. Such an exemption would focus on the act of expression rather than the particular message conveyed. But such exemptions would generate a different but similarly troublesome task of distinguishing "imposters." See Stone et al., *Constitutional Law* at 1202 (cited in note 4).

¹¹² Although the public forum doctrine has occasionally led the Court to apply intermediate scrutiny in the context of cases like *Adderley*, *Grayned*, and *Heffron*, see note 104 above, it has not departed from deferential scrutiny in cases like *O'Brien* and *Community for Creative Non-Violence*.

¹¹³ See Tribe, *American Constitutional Law* at 685-86 (cited in note 46); Farber and Nowak, 70 Va. L. Rev. at 1237-38 n.95 (cited in note 54). This is not to say that all restrictions on symbolic expression must be tested by deferential scrutiny. Some restrictions of symbolic expression may be directed explicitly at the content of the expression. Such restrictions must be tested by the ordinary standards of content-based review. See, e.g., *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (black arm bands); *Stromberg v. California*, 283 U.S. 359 (1931) (red flag). Other restrictions of symbolic expression may have a more severe effect on the opportunities for free expression and must therefore be tested by more demanding standards of content-neutral review. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (peaceful political boycotts); *Buckley v. Valeo*, 424 U.S. 1 (1976) (contribution limitations). And still other restrictions of symbolic expression may be premised on government interests that pose concerns similar to content-based restrictions and must therefore be tested by an elevated standard of review. See, e.g., *Spence v. Washington*, 418 U.S. 405 (1974) (flag misuse).

B. Setting the Standards for Content-Neutral Review: Balancing vs. Bright Lines

The Court's use of balancing to evaluate content-neutral restrictions brings us back to the original question: why does the Court not use the same methodology in its analysis of content-based and content-neutral restrictions? Content-based and content-neutral restrictions both threaten basic first amendment values, although they do so in different ways. Content-based restrictions are more likely than content-neutral restrictions to distort public debate, to be tainted by improper motivation, and to be defended with constitutionally disfavored justifications. But content-neutral restrictions also threaten important first amendment values. By diminishing the opportunities for free expression, such restrictions limit the marketplace of ideas and enervate public debate.

In its analysis of content-based restrictions, however, the Court does not calibrate the degree of scrutiny with the degree to which particular content-based restrictions actually undermine first amendment values. It does not distinguish among content-based restrictions in terms of their potential to distort public debate, the relative likelihood of improper motivation, or the extent to which they actually rest on disfavored justifications.¹¹⁴ Rather, eschewing such balancing, the Court tests all content-based restrictions of high-value speech with essentially the same strict standard of review.¹¹⁵

Three arguments are most commonly invoked to justify the Court's rejection of balancing in review of content-based restrictions. First, balancing is inherently uncertain. It creates a realm in which speakers may not know whether their speech is protected. This inhibits the exercise of first amendment rights.¹¹⁶ Second, balancing invites judges to understate speech interests by focusing on the value of free speech to individuals, as a private interest, rather than on its value to the community generally, as a public interest

¹¹⁴ This observation is explored more fully in part IV-E below.

¹¹⁵ The one notable exception is the Court's occasionally more lenient analysis of subject-matter restrictions, which is the product of generalized judgments about the risks of distortion, motivation, and justification. See *Stone*, *Content Regulation*, 25 *Wm. & Mary L. Rev.* at 239-42 (cited in note 1); *Stone*, *Subject-Matter Restrictions*, 46 *U. Chi. L. Rev.* at 81 (cited in note 1).

¹¹⁶ See, e.g., *Nimmer on Freedom of Speech* at § 2.02 (cited in note 4); Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 *Stan. L. Rev.* 1001, 1026-27 (1972); Laurent B. Frantz, *The First Amendment in the Balance*, 71 *Yale L. J.* 1424, 1443 (1962).

that serves the essential ends of a self-governing society.¹¹⁷ Third, balancing invites judges to overstate governmental interests and to defer unduly to legislative judgments. It thus tends in practice to legitimate rather than to check governmental abuse.¹¹⁸

The factual truth of the first argument seems self-evident: balancing is more likely than "absolutism" or "categorical balancing"¹¹⁹ to generate uncertainty. The significance of the second and third observations, however, is less clear. Why is the deflation of constitutional interests and the inflation of governmental interests more likely in the review of content-based restrictions of speech than in the review of other laws raising constitutional issues? The answer lies in the essential nature of content-based restrictions. Because such restrictions enable legislators and administrators to single out and silence those views they find most threatening, the enactment of content-based restrictions is often closely bound up with the self-interest and fears of government officials. In such circumstances, judicial deference to such officials is unwarranted. Moreover, as history teaches, judicial evaluations of content-based restrictions are especially likely to "become involved with the ideological predispositions of those doing the evaluating."¹²⁰ There is a danger, in other words, that judges and jurors may be influenced by their own conscious or unconscious biases, which may undermine their ability to evaluate accurately and impartially the extent to which particular content-based restrictions actually impair the communication of specific, often disfavored, messages. If the judicial branch is to preserve free expression, especially in times of crisis, against an intolerant and perhaps frightened majority, it cannot rely on a process of review that requires the courts after each incident to guess at the risks created and "to assign a specific value to the hard-to-measure worth of particular instances of free expression."¹²¹ Thus, in analyzing content-based restrictions, the

¹¹⁷ See, e.g., Nimmer on Freedom of Speech at § 2.02 (cited in note 4); Paul G. Kauper, *Civil Liberties and the Constitution* 119-20 (1962); Fred C. Zacharias, *Flowcharting the First Amendment: A Comprehensive Approach to Balancing in Political Protest Cases*, 72 *Cornell L. Rev.* (forthcoming 1987); Frantz, 72 *Yale L. J.* at 1441 (cited in note 116).

¹¹⁸ See, e.g., Nimmer on Freedom of Speech § 2.02 (cited in note 4); Martin Shapiro, *Freedom of Speech, The Supreme Court and Judicial Review* 86, 89 (1966); Zacharias, 72 *Cornell L. J.* (cited in note 117); Gunther, 24 *Stan. L. Rev.* at 1005 (cited in note 116).

¹¹⁹ See note 4 and accompanying text above.

¹²⁰ Ely, *Democracy and Distrust* at 112 (cited in note 46).

¹²¹ Tribe, *American Constitutional Law* at 583 (cited in note 46). See also Frederick Schauer, *Slippery Slopes*, 99 *Harv. L. Rev.* 361, 376-77 (1985); Stone, *Content Regulation*, 25 *Wm. & Mary L. Rev.* at 225-26 (cited in note 1).

Court has appropriately embraced a "fortress model"¹²² of jurisprudence that gives judges little room to maneuver and that intentionally overprotects speech, in order to minimize the potential harm from legislative and administrative abuse and judicial miscalculation. By applying strict scrutiny to virtually all content-based restrictions of high-value speech, rather than attempting to calibrate its standards according to assessments of the relative speech and governmental interests in each case, the Court has erected a strong barrier against institutional underprotection.

To some extent, similar concerns exist in the context of content-neutral restrictions. Government officials are usually deeply committed to the maintenance of order and the conservation of resources. This orientation produces an oversensitivity to disruption and a restrictive attitude towards nontraditional means of expression.¹²³ Moreover, such officials tend to be particularly reluctant to sacrifice public services when "the communication is controversial or is of interest to only a small segment of the population."¹²⁴ This is so not only because government officials may be hostile or unsympathetic to the views of such speakers, but also because as between the two groups whose interests government officials must accommodate—the general public and those who seek to use nontraditional means of communication—"the political power of the former is likely to be far greater than that of the latter."¹²⁵

Despite these concerns, there are several persuasive reasons for not extending the fortress model to review of content-neutral restrictions. First, although the concerns noted above undoubtedly exist, they are not as powerful as the concerns that exist in the context of content-based restrictions. Government officials are more likely to undervalue first amendment interests and overvalue governmental interests when they enact laws that exclude Communists from public employment or ban Nazi demonstrations than when they enact laws prohibiting all billboards or forbidding all leafletting at a state fair. The biases cut in the same direction, but they arise less frequently and have less force in the context of con-

¹²² Lee C. Bollinger, *The Tolerant Society* 76 (1986). For a critical analysis of this model, see *id.* at 76-103.

¹²³ See Baker, 78 Nw. U. L. Rev. at 941-43 (cited in note 54); David Goldberger, *Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials*, 32 Buff. L. Rev. 175, 206-07 (1983); Redish, 34 Stan. L. Rev. at 134 (cited in note 1).

¹²⁴ Goldberger, 32 Buff. L. Rev. at 207 (cited in note 123).

¹²⁵ *Community for Creative Non-Violence*, 468 U.S. at 315 (Marshall, J., dissenting). See also David A. Strauss, *Why be Tolerant?*, 53 U. Chi. L. Rev. 1485, 1489-90 (1986), reviewing Bollinger, *The Tolerant Society* (cited in note 122).

tent-neutral restrictions.

Second, the concerns noted about content-neutral restrictions run more to the legislative and administrative processes than to the process of judicial review. Because challenges to content-neutral restrictions center on the concern that the law may unduly restrict the flow of speech into the "marketplace of ideas," the focus of the inquiry is on the interests of the entire community, not just the interests of the particular plaintiff bringing the suit. Accordingly, the need to adopt rules that protect judges and jurors from their own biases or miscalculations is less in the context of content-neutral review than in content-based review. So long as courts do not unduly defer to legislative and administrative judgments, they should be in a reasonably good position independently to protect first amendment rights. Bias is most likely to exist in the judicial process when content-neutral laws have clear content-differential effects on their face.¹²⁶ Such laws are relatively rare, however. Moreover, even in such cases, the harm that can flow from judicial miscalculation is limited. Content-neutral restrictions usually limit the availability of only particular means of expression. They are thus unlikely substantially to block the communication of particular messages.¹²⁷

Third, the extension of strict scrutiny to all content-neutral restrictions would invalidate many laws that limit speech in a content-neutral manner.¹²⁸ The consequential disruption, if individuals were free to speak or assemble at any time and place and in any manner they chose, would be intolerable. Many content-neutral laws that could not satisfy the "fortress" model's strict scrutiny are essential to the general well-being of society. Laws, for example, prohibiting two groups from marching on Main Street at the same time, or forbidding the use of loudspeakers in residential neighborhoods at night, or prohibiting the scattering of leaflets over an entire city from helicopters, are perfectly sensible enactments despite the fact that they restrict free expression. It is simply not sensible to construe the first amendment in such a way as to turn people's homes and society's police stations, courthouses, and schools into completely open "forums in which anyone may freely engage in first amendment expression."¹²⁹ As the Court observed almost fifty

¹²⁶ See Stone, Content Regulation, 25 Wm & Mary L. Rev. at 226 (cited in note 1).

¹²⁷ See id.

¹²⁸ See Harold L. Quadres, Content-Neutral Public Forum Regulations: The Rise of the Aesthetic State Interest, The Fall of Judicial Scrutiny, 37 Hastings L. J. 429, 453 (1986).

¹²⁹ Baker, 78 Nw. U. L. Rev. at 939 (cited in note 54).

years ago, civil liberties "imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."¹³⁰ The extension of strict scrutiny to all content-neutral restrictions would threaten society with chaos.

Content-based laws, on the other hand, do not serve such purposes, so the Court's near-absolute prohibition on any content-based restriction of high-value speech does not impose nearly the same costs as would wholesale invalidation of content-neutral laws. Moreover, unlike most content-neutral restrictions, the objectives of most content-based restrictions can be attained by other means. In some situations, content-based laws can be converted into content-neutral laws. For example, a law prohibiting the exhibition of *any* movie displaying nudity in any drive-in theatre visible from a public street can be converted into a law prohibiting the exhibition of any movie in any drive-in theatre visible from a public street. Such a conversion protects the legitimate governmental interest in traffic safety without posing the special dangers of content-based restrictions.¹³¹ It also would tend to spread the costs of preserving traffic safety among many speakers, rather than allowing government to concentrate the costs on one small group. The more speakers in a community are affected, the more government would be forced to ensure its purposes truly were substantial before it enacted the restriction. In other situations, the objectives of content-based restrictions can be attained by shifting attention from the speech to the harm caused by the speech. For example, instead of prohibiting criticism of a war in order to prevent draft evasion, the government can raise the penalty for evasion.

A fourth reason why the "fortress" methodology of content-based review should not be carried over to content-neutral analysis is that it comes at the cost of encouraging strategic behavior by people who want to violate laws reasonably necessary to public order. To the extent that litigants are able to characterize their actions as protected speech, virtually all laws could be subject to first amendment challenge. For example, laws banning graffiti on publicly and privately owned buildings and vehicles, or speed limit laws, could be challenged on first amendment grounds: graffiti is clearly a form of expressive behavior and even speeding can be seen as a form of expression—a symbolic expression of protest against, say, the 55 m.p.h. speed limit. The need to balance the

¹³⁰ *Cox v. New Hampshire*, 312 U.S. at 574.

¹³¹ See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 (1975).

protection of first amendment rights against the need to limit strategic abuses of those rights has figured prominently in free exercise cases.¹³² The problem is no less pressing in the context of free speech claims.

Finally, extending the "fortress" model's strict scrutiny to all content-neutral restrictions might lead to the dilution of strict scrutiny. Because society would not tolerate the invalidation of virtually all content-neutral restrictions, the extension of strict scrutiny to all content-neutral restrictions would ultimately weaken the "fortress" and undermine the doctrinal and jurisprudential safeguards against the dangers of content-based restrictions.¹³³ The net effect might well be to erode rather than to bolster the protection of free expression.

The Court's approach to content-neutral review thus seems a sensible response to the concern that content-neutral restrictions can diminish the opportunities for free expression. Unlike a consistently deferential approach, which would uphold every content-neutral restriction that rationally furthers a legitimate governmental interest, the Court's approach critically examines restrictions that seriously threaten significant first amendment rights. And unlike a rigid strict scrutiny approach, which would invalidate almost all content-neutral restrictions, the Court's analysis does not sacrifice legitimate governmental interests when significant first amendment rights are not at issue.

C. An Evaluation of the Court's Results

As we saw in the discussion of the fortress model of content-based review, an essential function of standards of review is to allocate the risk of uncertainty. The pivotal inquiry in content-neutral analysis is the extent to which particular restrictions actually diminish the opportunities for free expression. As the illustrative cases suggest, this is not an easy question. Such judgments are largely speculative. They lend themselves more to hunches and

¹³² For example, in *United States v. Lee*, 455 U.S. 252 (1982), the Supreme Court limited the scope of the mandatory free exercise exemption from facially neutral laws set out in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Lee* held that the broad public interest in maintaining the "fiscal vitality of the social security system," 455 U.S. at 260, was so important that allowing religiously motivated exemptions—even for sincerely held religious beliefs such as the Amish beliefs forbidding payment of Social Security tax—offered no basis for resisting the tax. *Id.* at 261.

¹³³ Those who propose unified standards for both content-based and content-neutral restrictions inevitably dilute the existing standards of content-based review. For an illustration of this phenomenon, see Redish, 34 *Stan. L. Rev.* at 142-50 (cited in note 1).

guesswork than to empirical proof. Who should bear the risk of uncertainty—the speaker or the government? When uncertainty exists, should the speaker have to shift to alternative means of expression or should the government have to shift to alternative means of achieving its objectives?

In its decisions involving content-neutral restrictions that have significant or severe effects on the opportunities for free expression, the Court has been reasonably protective of speech. Decisions such as *Buckley*, *Button*, *Brown*, and *Jaycees* demonstrate a thoughtful concern for the system of free expression and a healthy skepticism about the government's need to restrict free speech to achieve its ends.

In its decisions involving content-neutral restrictions that have only modest effects on the opportunities for free expression, however, the Court too often has exhibited insensitivity to the importance of nontraditional means of expression, the uncertainty of its own judgments, and the dangers of undue deference to legislative and administrative officials. As noted above, powerful incentives may induce legislative and administrative officials to deflate speech interests and inflate governmental interests when they fashion content-neutral restrictions. The Court's highly deferential standard of review does not adequately take account of these distortions. Although the Court has generally applied low-level scrutiny in the right cases, its low-level scrutiny is simply too low.

Even when a particular content-neutral restriction has only a modest effect on the total quantity of public debate because the speaker can shift to alternative means of expression, some weight should be given to the speaker's choice of means, since the speaker can be presumed to have chosen the most effective means available.¹³⁴ In cases like *Adderley*, *O'Brien*, and *Community for Crea-*

¹³⁴ This rationale is distinct from the concern that the speaker's choice should be respected because, even if alternative means are equally effective, the speaker has an independently valued "self-fulfillment" interest in using the particular means of expression he prefers. See *Baker*, 78 Nw. U. L. Rev. at 945-49, 972-77 (cited in note 54); *Powe*, 1982 S. Ct. Rev. at 267 (cited in note 60); *Emerson*, 68 Cal. L. Rev. at 474 (cited in note 1).

In analyzing content-neutral restrictions, the Court seems to have given little weight to the "self-fulfillment" interest in choosing a particular means of expression. This seems sound. The central concern of the self-fulfillment rationale for the protection of free speech is that each person have the opportunity to express his autonomously formulated thoughts and opinions, not that each person have the opportunity to express those views by whatever means he chooses. *Stone*, *Compelled Exemptions*, 28 Wm. & Mary L. Rev. (forthcoming 1986) (cited in note 103); *Farber and Nowak*, 70 Va. L. Rev. at 1237 (cited in note 54); *Tribe*, *American Constitutional Law* at 684 (cited in note 46). However, the self-fulfillment concern should be given some weight, and it may be sufficient in itself to require the government to offer at least some reasonable explanation for its refusal to accommodate the

tive Non-Violence, for example, the government's decision to prevent speakers from using their chosen means of expression may not have significantly diminished the total quantity of public debate, but there can be no doubt that the challenged restrictions denied speakers access to especially effective and dramatic means of communication. A modest effect, in other words, is not no effect. And even if a modest effect is insufficient to elevate the standard of review to intermediate scrutiny, or to justify a constitutionally compelled exemption, it is sufficient to require the government to offer some meaningful explanation for its refusal to accommodate free speech.

Thus, in cases like *Adderley*, *Grayned*, *Heffron*, *O'Brien*, and *Community for Creative Non-Violence*, the Court should be more skeptical of the claimed governmental interests and more sensitive to the interests of free speech. Although each of these issues viewed in isolation may seem trivial,¹³⁵ the issues take on a different appearance when one steps back and examines the cumulative effect. From that perspective, it is difficult to escape the conclusion that the Court's current approach will gradually produce a choking off of all but the most traditional means of expression. A rational basis standard is too deferential. It does not fairly accommodate the competing interests. In such cases, the Court should invalidate even a modest content-neutral restriction unless the government can demonstrate that the challenged restriction serves a significant governmental interest that could not be substantially achieved by alternative means that reasonably accommodate free expression.¹³⁶ The application of this standard is illustrated in the dissenting opinions in *Community for Creative Non-Violence*, *Heffron*, and *Adderley*.¹³⁷

In deciding whether and to what extent particular content-neutral restrictions diminish the opportunities for free expression, the Court should err on the side of free speech. It should allocate the risk of uncertainty to the government, not to speakers. The

speaker's choice of means.

¹³⁵ The Court's abdication in these cases is no doubt due in part to its desire to conserve judicial resources and to avoid the endless quibbling and fine balancing that might be necessary if the Court were to open the door to litigation over what it appears to regard as trivial issues. These are legitimate concerns.

¹³⁶ Note that this standard is the one embodied in formulations 4 and 5, not as those formulations have been applied in the past, but as they are articulated. See text accompanying notes 9-10 above.

¹³⁷ See *Community for Creative Non-Violence*, 468 U.S. at 301-16 (Marshall, J., dissenting); *Heffron*, 452 U.S. at 656-63 (Brennan, J., concurring in part and dissenting in part); *Adderley*, 385 U.S. at 48-56 (Douglas, J., dissenting).

opposite approach—requiring speakers to prove that they could not reach their audience by alternative means before the Court will “require the state to justify its speech limitations”¹³⁸—creates the risk that an ever-narrowing circle of expression will remain free as the anti-speech allocation gradually takes its toll.¹³⁹

This does not mean that the Court should extend the fortress model to the realm of content-neutral restrictions or test all content-neutral restrictions with strict scrutiny. It does mean, however, that in evaluating content-neutral restrictions, the Court must be sensitive to the dangers of ad hoc evaluation and the risk of gradual erosion of the opportunities for effective free expression.

To help focus its analysis and to produce a more stable and predictable jurisprudence, the Court should move away from ad hoc inquiry and towards a more structured approach. As suggested above, the Court has in deed, if not in word, already embraced a relatively structured analysis. In practice, the Court ordinarily tests restrictions that have a severe effect on free expression with strict scrutiny; it ordinarily tests restrictions that have a significant effect with intermediate scrutiny; and it ordinarily tests restrictions that have a modest effect with deferential scrutiny. It is time for the Court to make explicit what is already implicit in its decisions.

IV. SECONDARY CONCERNS

The Court's content-neutral balancing is designed to deal primarily with the concern that, by limiting the opportunities for free expression, content-neutral restrictions can diminish the total quantity of public debate. However, this is not the only concern that shapes the Court's analysis of content-neutral restrictions. In at least some cases additional concerns may significantly raise or lower the standard of review.¹⁴⁰ This part examines six of these concerns: disparate impact, public property, tradition, discrimination against speech, incidental effect, and communicative impact.¹⁴¹

¹³⁸ Quadres, 37 *Hastings L. J.* at 482 (cited in note 128).

¹³⁹ See Emerson, 68 *Cal. L. Rev.* at 474 (cited in note 1).

¹⁴⁰ For example, compare *Cloud Books*, 106 S. Ct. 3172; *Wayte*, 470 U.S. 598; *Taxpayers for Vincent*, 468 U.S. 789; *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); and *Branzburg*, 408 U.S. 665 (all applying deferential review despite restriction's significant effect on speech) with *Grace*, 461 U.S. 171; and *Grayned*, 408 U.S. 104 (both applying intermediate review despite restriction's modest effects on speech).

¹⁴¹ Two additional concerns merit mention. First, the Court in the 1960s frequently invoked a distinction between “speech” and “conduct” in analyzing content-neutral restric-

A. Disparate Impact

Even content-neutral laws can have content-differential effects.¹⁴² That is, even a law that on its face applies even-handedly to all speakers may have a greater impact on some speakers than on others. For example, a law banning all billboards will have a disparate impact on those speakers who tend disproportionately to rely upon billboards to communicate their messages.

The existence of disparate impacts poses several concerns. First, a law that has a disparate impact is more likely to distort public debate than is a law that has a perfectly equal impact on all speakers. Second, a law that has a disparate impact is more likely to have been motivated by impermissible purposes than is a law that has a perfectly equal impact. And third, it is more difficult to measure the restrictive effects of a law that has a different impact on different speakers than a law that has a perfectly equal impact.

Faced with these concerns, the Court has three options, each of which has distinct disadvantages. First, the Court may disregard

tions. See, e.g., *Cox*, 379 U.S. at 555 (distinguishing "patrolling, marching, and picketing" from "pure" speech). The Court has sensibly abandoned this distinction in more recent decisions. See, e.g., *Food Employees Local 590 v. Logan Valley Plaza*, 391 U.S. 308, 313-14 (1968). For commentary on the distinction, see Tribe, *American Constitutional Law* at 598-601 (cited in note 46); Ely, 88 Harv. L. Rev. at 1493-96 (cited in note 22); Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 S. Ct. Rev. 1, 23.

Second, the Court has frequently indicated that a content-neutral law is invalid if it was motivated by a desire to suppress a particular point of view. See, e.g., *Cornelius*, 105 S.Ct. at 3454-55; *Wayte*, 470 U.S. at 608; *Taxpayers for Vincent*, 466 U.S. at 804; *Minneapolis Star*, 460 U.S. at 580. But see *O'Brien*, 391 U.S. at 383-85 (court should not strike down otherwise constitutional statute on basis of alleged illicit legislative motive). For discussion of inquiries into improper motivation, see, e.g., Tribe, *American Constitutional Law* at 591-98 (cited in note 46); Zacharias, 72 Cornell L. Rev. (cited in note 117); J. Morris Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 San Diego L. Rev. 953 (1978); Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 San Diego L. Rev. 1041 (1978); Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. Rev. 36 (1977); Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 S. Ct. Rev. 95; John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L. J. 1205 (1970). For the view that many of the doctrines formulated by the Court are best understood as prophylactic devices designed to screen out improper motivation, see David S. Bogen, *Balancing Freedom of Speech*, 38 Md. L. Rev. 387 (1979); David S. Bogen, *The Supreme Court's Interpretation of the Guarantee of Freedom of Speech*, 35 Md. L. Rev. 555 (1976).

¹⁴² See, e.g., *Stone*, *Content Regulation*, 25 Wm. & Mary L. Rev. at 218 (cited in note 1); *Stone*, *Subject-Matter Restrictions*, 46 U. Chi. L. Rev. at 102-03 (cited in note 1); Redish, 34 Stan. L. Rev. at 131 (cited in note 1); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20, 36 (1975). See also *Taxpayers for Vincent*, 466 U.S. at 823 n.5 (Brennan, J., dissenting); *Community for Creative Non-Violence*, 468 U.S. at 312-16 (Marshall, J., dissenting).

the disparate impact and scrutinize the law as if the disparate impact did not exist. However, this would ignore the significant concerns raised by disparate impact.

Second, the Court may elevate the standard of review for the law as a whole. Under this approach, the Court will require the government to bear a greater burden of justification whenever a law has a disparate impact. However, almost all content-neutral restrictions have a disparate impact in some degree, and in most instances, the disparate impact will be quite minor. Accordingly, elevation of the standard of review for every law that has a disparate impact would prevent the government from achieving its legitimate interests in many instances in which the disparate impact concerns are insubstantial. The costs of elevating the standard of review, in other words, may substantially outweigh the benefits.

Third, the Court may apply an elevated standard of review only for those speakers who are disproportionately affected. It may then sustain the law in most of its applications but create a constitutionally compelled exemption for those speakers who are disproportionately affected. At first blush, this third option may seem a perfect middle ground, respecting both the free speech interests of the group and the legitimate societal interests behind the restriction. But it has two significant disadvantages.

The first disadvantage of constitutionally compelled exemptions is that they may create preferences that threaten first amendment values to an even greater extent than the problems they are designed to solve. Suppose, for example, that anti-abortion groups rely especially heavily on billboards to communicate their message. A constitutionally compelled exemption for anti-abortion groups from an otherwise constitutional prohibition of billboards would convert a content-neutral law into one based on viewpoint. In so doing, it would invert the usual presumptions of free speech jurisprudence. In recognizing an exemption for a particular group, government would be manipulating the marketplace of ideas. Although the differential governmental treatment in this instance would be designed to counteract the differential effect of the restriction, the danger is similar: government judging how much speech each group in society should get.

The second problem with constitutionally compelled exemptions is that they may necessitate inquiries that threaten first amendment values even more than the problems such exemptions are designed to solve. In the billboard case, for example, the implementation of a constitutionally compelled exemption would require administrative officials to determine whether each speaker seeking

to use a billboard was in fact taking an "anti-abortion" stance. The unseemliness of such inquiries is obvious.

In its analysis of the disparate impact of content-neutral restrictions, the Court has employed all three of these options.¹⁴³ The choice of option has corresponded to the extent to which the challenged law restricts the opportunities for free expression of a particular group or viewpoint. Laws that have only a modest effect on free expression trigger no special treatment; laws that have a significant effect trigger heightened scrutiny of the law as a whole; and laws that have a severe effect on a particular group trigger creation of an exemption for that group.

As we saw earlier,¹⁴⁴ many modest content-neutral restrictions have a disparate impact upon particular speakers. However, the Court routinely disregards disparate impact in considering the constitutionality of such restrictions. In *Greer*,¹⁴⁵ for example, the Court upheld a regulation prohibiting all political speeches and demonstrations on a military base, without considering the fact that such a regulation is likely to impair the first amendment interests of some speakers far more than the interests of others: the regulation prevents exposure to "those minor candidates whose campaigns are neither prominent enough nor sufficiently well-financed to attract media coverage" and are thus compelled to "make do with the more old fashioned face-to-face style of campaigning."¹⁴⁶ Similarly, in *Heffron*,¹⁴⁷ the Court upheld a restriction on peripatetic distribution of written material at a state fair, without considering the fact that the rule was substantially more likely to impair the first amendment interests of those speakers who traditionally use this means of communication. And in *O'Brien*,¹⁴⁸ the Court upheld a federal statute prohibiting any person from knowingly destroying a draft card, as applied to an individual who publicly burned his draft card as a symbolic expression of protest against the draft, without considering the fact that the statute was substantially more likely to impair the speech of those who opposed government policy than of those who supported it. Who, after all, would destroy a draft card as an expression of support of government policy?

¹⁴³ For analysis of these three options in the free exercise context, see Stone, Constitutionally Compelled Exemptions, 28 Wm. & Mary L. Rev. (cited in note 103).

¹⁴⁴ See text accompanying notes 46-47 above.

¹⁴⁵ 424 U.S. 828 (1976).

¹⁴⁶ *Spock v. David*, 469 F.2d 1047, 1056 (3d Cir. 1972).

¹⁴⁷ 452 U.S. 640 (1981).

¹⁴⁸ 391 U.S. 367 (1968).

In these and similar cases,¹⁴⁹ the actual restrictive effect of the challenged law is clearly disparate, but it is not severe, for even the disproportionately disadvantaged speakers may readily shift to alternative means of expression. In such circumstances, the disparate impact does not significantly restrict free expression, nor does it appreciably distort public debate. And it is unlikely to be the result of improper motivation, because legislative and administrative officials are much more likely to adopt a content-neutral law in order to disadvantage speech they dislike when the law significantly disadvantages the disfavored speech than when it has only a modest effect. The concerns generated by disparate impact in such cases are thus not sufficiently substantial to warrant either applying a higher degree of scrutiny or creating a constitutionally compelled exemption. In these cases, the Court is justified in disregarding the disparate impact and applying a deferential standard of review.¹⁵⁰

Content-neutral laws that have a significant effect on free expression may also have a disparate impact. In this context, however, the Court sometimes employs the second option, elevating the standard of review for the restriction as a whole. For example, in *Anderson v. Celebrezze*, which invalidated a filing deadline for ballot access, the Court observed that a restriction on political participation "that falls unequally on new or small political parties or on independent candidates" must be tested by a heightened standard of review.¹⁵¹ Similarly, in *Martin v. City of Struthers*, which invalidated an ordinance prohibiting door-to-door leafletting, the Court emphasized that this means of expression "is essential to the poorly financed causes of little people."¹⁵² And in the public forum context, the Court, recognizing that laws substantially restricting leafletting or similar means of expression may have a disproportionate impact upon those who, for reasons of finances or ideology, do not have ready access to more conventional means of communication, has long considered this a factor that may justify a heightened standard of review.¹⁵³ In each of these contexts, the Court

¹⁴⁹ See, e.g., *Community for Creative Non-Violence*, 468 U.S. 288; *Grace*, 461 U.S. 171; *Grayned*, 408 U.S. 104; *Adderley*, 385 U.S. 39.

¹⁵⁰ This is subject, of course, to my earlier criticism of the unduly timid nature of the Court's deferential standard of review. See text accompanying notes 134-39 above.

¹⁵¹ 460 U.S. at 793.

¹⁵² 319 U.S. at 146.

¹⁵³ See Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 Georgetown L. J. 257, 297 (1985); *Baker*, 78 Nw. U. L. Rev. at 944-45 (cited in note 54); *Stone and Marshall*, 1983 S. Ct. Rev. at 596 (cited in note 1); *Karst*, 43 U.

elevates the level of scrutiny for the restriction as a whole, either by shifting from one level of review to another or by subtly intensifying the application of the same standard. If the law cannot withstand the heightened scrutiny, it is invalidated in its entirety. If it satisfies the higher standard, it is upheld despite the disparate impact.

Two final observations are in order with respect to laws that have a significant effect on free expression. First, although the above illustrations show that the Court sometimes employs a higher standard in reviewing these sorts of restrictions, in other cases the Court disregards the disparate impact and does not elevate the standard of review.¹⁵⁴ There is no clear pattern to the cases. Second, although the Court often employs the second option in these cases, it never employs the third. That is, the Court does not create constitutionally compelled exemptions to laws that have only a significant, not a severe, effect on free expression. In this context, the dangers of creating a constitutionally compelled exemption are greater than the costs of either invalidating the law as a whole or disregarding the disparate impact entirely.

The Court employs the third option—creation of a constitutionally compelled exemption—only when a content-neutral law has a significantly disparate effect on some speakers and the actual restrictive effect on those speakers is severe. In *Brown v. Socialist Workers '74 Campaign Committee*, for example, the Court created a constitutionally compelled exemption for the Socialist Workers Party from state campaign contributor disclosure requirements. The Court explained that in light of the history of harassment of Party members, disclosure could cripple the organization's ability to operate effectively and could deter membership and contributions to such an extent that "the movement cannot survive."¹⁵⁵ The consequence would be a "reduction in the free circulation of ideas both within and without the political arena."¹⁵⁶ In such circumstances, the disparate impact is so severe, and the risk of distorting public debate is so great, that a constitutionally compelled

Chi. L. Rev. at 36 (cited in note 142); *Kalven*, 1965 S. Ct. Rev. at 30 (cited in note 141). See also *Taxpayers for Vincent*, 466 U.S. at 813 n.30; *Metromedia, Inc.*, 453 U.S. 490 at 550, 552 (Stevens, J., dissenting), 563 (Burger, C.J., dissenting); *Kovacs*, 336 U.S. at 102 (Black, J., dissenting).

¹⁵⁴ See, e.g., *Wayte*, 470 U.S. at 608-10; *Taxpayers for Vincent*, 466 U.S. at 813 n.30; *Buckley*, 424 U.S. at 31-33; *Kovacs*, 336 U.S. at 88-89.

¹⁵⁵ *Brown*, 459 U.S. at 93, quoting *Buckley*, 424 U.S. at 71.

¹⁵⁶ 459 U.S. at 93, quoting *Buckley*, 424 U.S. at 71. See also *Anderson*, 460 U.S. at 793.

exemption is warranted. For the reasons given above,¹⁵⁷ however, granting an exemption from an otherwise valid law is an extraordinary device, and it is only in the rare case that the Court employs it.¹⁵⁸

B. Public Property

To what extent, if any, should the fact that speech takes place on public property shift the standard of review? This is a crucial question, for a great many content-neutral restrictions are aimed at speech on public property. There are at least five distinct positions:¹⁵⁹

1. *The government has plenary power to control public property.* Under this view, public ownership trumps the central concern of content-neutral analysis. That is, regardless of the effect on public debate of content-neutral restrictions of speech on public property, the first amendment does not guarantee speakers the right to commandeer such property.

This position finds support in two sources. First, there is an analogy to private property. The Court has generally held that an owner of private property may forbid others to use his property for speech purposes. Indeed, the Court has indicated that, in most circumstances, "an uninvited guest may [not] exercise general rights of free speech on property privately owned," for it "would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights."¹⁶⁰ This approach might be extended to hold that the first amendment respects the property rights of the government to essentially the same extent that it respects the property rights of any other owner of property. Second, the position finds support in the principle that the government is not constitutionally obligated to subsidize the exercise of constitutional rights.¹⁶¹ The government's failure to provide funds

¹⁵⁷ See notes 114-33 and accompanying text above.

¹⁵⁸ See *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958). For a more thorough discussion of constitutionally compelled exemptions, see Stone and Marshall, 1983 S. Ct. Rev. 583 (cited in note 1).

¹⁵⁹ This discussion deals only with content-neutral restrictions. Content-based restrictions involving public property also generate a distinct set of problems. See generally Stone et al., *Constitutional Law* at 1244-47 (cited in note 4); Farber and Nowak, 70 Va. L. Rev. at 1219 (cited in note 54).

¹⁶⁰ *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568, 567 (1972). See also *Martin*, 319 U.S. at 148 (conceding that a city constitutionally could "punish those who call at a home in defiance of the previously expressed will of the occupant").

¹⁶¹ See, e.g., *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 544-46 (1983) (lobbying); *Harris v. McRae*, 448 U.S. 297, 316-17 (1980) (abortion funding);

for those who want to operate newspapers, for example, does not violate the first amendment. Similarly, the government's failure to make public property available to those who want to speak on public property does not abridge the freedom of speech.¹⁶²

2. *Public ownership dilutes the standard of review.* This position is similar to the first, but concedes that there are constitutionally significant differences between government and private ownership and between requiring the government directly to subsidize constitutional rights and requiring the government to bear the incidental costs associated with the exercise of such rights.¹⁶³ It thus adopts a less severe version of the first position. Under this view, a content-neutral restriction that severely restricts the opportunities for free expression by denying access to public property might be tested by intermediate rather than strict scrutiny; a restriction that significantly restricts free expression might be tested by deferential rather than intermediate scrutiny; and a restriction that only modestly restricts free expression might not be scrutinized at all.

3. *Public ownership does not alter the standard of review.* Under this view, the government's status as property owner is irrelevant to the standard of review. Thus, as in cases that do not

Maier v. Roe, 432 U.S. 464, 473-74 (1977) (abortion funding).

¹⁶² This is the approach taken by Justice Holmes in his 1895 opinion for the Supreme Judicial Court of Massachusetts in *Commonwealth v. Davis*, 162 Mass. 510 (1895), which upheld an ordinance restricting the use of the Boston Common for "any public address." Holmes explained that for "the Legislature absolutely or conditionally to forbid public speaking in a highway or 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." *Id.* at 511. On appeal, the United States Supreme Court unanimously adopted Holmes's position, observing that the federal Constitution "does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the State." *Davis v. Massachusetts*, 167 U.S. 43, 47-48 (1897). Thus, the Court in *Davis* embraced position 1, holding that the government may prohibit the exercise of first amendment rights on public property simply by asserting the prerogatives traditionally associated with the private ownership of land.

¹⁶³ Indeed, the very notion of constitutional rights implies a "subsidy" in the broad sense that government bears the costs incident to exercise of that right. For example, when the government is prevented from searching an individual without probable cause, it is in effect "subsidizing" his right because it must continue its investigation by other, less efficient, means. Similarly, when the government is prevented from collecting damages from a speaker whose constitutionally protected speech "causes" a crowd to burn a government building it is in effect "subsidizing" the freedom of speech. Of course, in these examples the government is not giving government property directly to the speaker. The mere fact that the protection of a particular constitutional right requires the government to "subsidize" the cost of the right in this broad sense is not in itself dispositive. For a useful discussion, see Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. Pa. L. Rev. 1293 (1984).

involve public property, the constitutional inquiry in cases that involve public property focuses entirely on the central concern of content-neutral balancing—whether the governmental interests are sufficiently weighty to offset the effects on free speech. Of course, the very fact of public ownership may enable the government to assert some interests, such as the avoidance of disruption of the property, that are tied directly to the government's status as owner. But, under this view, public ownership does not alter the standard of review itself.¹⁶⁴

4. *Public ownership elevates the standard of review.* This position finds support in several considerations: access to public property is often essential for large gatherings; it enables speakers to challenge governmental action at its source; it permits speakers to reach audiences that might otherwise be difficult to reach; it enables less affluent speakers to utilize means of expression that are more affordable than most "private" means of expression, such as newspapers, television, and radio; and it prevents controversial or dissident speakers from being shut out of public debate by the refusal of private owners to sell or lease them their facilities.¹⁶⁵ In light of these considerations, this position maintains that governmental restrictions of speech on public property pose special dangers that warrant heightened scrutiny. Thus, under this view a restriction of speech on public property that has a modest effect on free expression might be tested by intermediate rather than deferential scrutiny; a restriction that has a significant effect might be tested by strict rather than intermediate scrutiny; and a restriction that has a severe effect might be per se unconstitutional.

5. *Public ownership affects the standard of review differently for different types of public property.* Under this approach, public ownership might raise, lower, or have no effect upon the standard of review for content-neutral restrictions, depending upon such factors as tradition, the importance of the property for effective free speech, and the general suitability of the property for free expression.

Existing doctrine divides public property into three categories.¹⁶⁶ Public places traditionally associated with expressive activi-

¹⁶⁴ For support of this position, see Farber and Nowak, 70 Va. L. Rev. at 1234-35 (cited in note 54).

¹⁶⁵ See Neisser, 74 Georgetown L. J. at 297 (cited in note 153); Cass, 65 Va. L. Rev. at 1288 (cited in note 102). See also Cornelius, 105 S. Ct. at 3456 (Blackmun, J., dissenting); Taxpayers for Vincent, 466 U.S. at 819-20 (Brennan, J., dissenting); Martin, 319 U.S. at 145-46.

¹⁶⁶ For accounts of the development of public forum doctrine, see Cass, 65 Va. L. Rev.

ties, such as streets, sidewalks, and parks, are deemed “quintessential” public forums. As the Court noted in dictum in *Hague v. CIO*,¹⁶⁷ such places have been dedicated “time out of mind” to free expression. In such forums, the government may not shut off all communicative activity; it may not substantially or completely prohibit a particular means of expression unless the prohibition is “narrowly drawn to accomplish a compelling governmental interest”;¹⁶⁸ and it may not enforce a time, place, or manner restriction unless the restriction is “narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication.”¹⁶⁹

Public places that have not been dedicated “time out of mind” to free expression, but have been opened voluntarily by the government for use by the public as places for expressive activity, are deemed “designated” public forums. The government is not required to retain the open character of such forums, but “as long as it does so it is bound by the same standards as apply in a traditional public forum.”¹⁷⁰

Public places that are not by tradition or designation public forums are deemed “nonpublic” forums. In nonpublic forums, the government’s rights as a property owner generally are paramount. As the Court declared in *Adderley v. Florida*, the government, “no less than a private owner of property,” may preserve its property “for the use to which it is lawfully dedicated.”¹⁷¹ The government

1287 (cited in note 102); *Stone, Fora Americana*, 1974 S. Ct. Rev. 233 (cited in note 93); *Kalven*, 1965 S. Ct. Rev. 1 (cited in note 141).

¹⁶⁷ 307 U.S. 496, 515-16 (1939) (“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.”).

¹⁶⁸ *Grace*, 461 U.S. at 177.

¹⁶⁹ *Perry Education Association v. Perry Local Educators’ Association*, 460 U.S. 37, 45 (1983). See also *Grace*, 461 U.S. at 177.

¹⁷⁰ *Perry Education Association*, 460 U.S. at 46. See also *Cornelius*, 105 S.Ct. at 3448.

¹⁷¹ 385 U.S. at 47. The Court has reaffirmed this approach in, e.g., *Greer*, 424 U.S. at 836; *Perry Education Association*, 460 U.S. at 46; *Cornelius*, 105 S.Ct. at 3448.

Several years after *Adderley*, the Court in *Grayned v. Rockford*, 408 U.S. 104 (1972), appeared in dictum to abandon the distinction between traditional public forums and traditionally closed public property. The Court said the “crucial question” in every case is “whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.” 408 U.S. at 116. In celebration of *Grayned*, I wrote at the time that “[n]o longer does the right to effective freedom of expression turn on the common law property rights of the state . . . [or] whether the particular place at issue has historically been dedicated to the exercise of First Amendment rights.” *Stone, Fora Americana*, 1974 S. Ct. Rev. at 251-52 (cited in note 93). But the celebration was premature. Although the Court since *Grayned* has tempered the *Adderley* approach that treats the

may thus restrict expressive activity in nonpublic forums as long as its restrictions are "reasonable."¹⁷² The Court has applied the "reasonableness" standard in this context in a highly deferential manner: it will uphold a content-neutral exclusion of speech from a nonpublic forum as long as the exclusion rationally furthers a legitimate governmental interest. Applying this standard, the Court has upheld every content-neutral restriction of speech in a nonpublic forum that it has considered.¹⁷³

Existing public forum doctrine prompts several observations. First, although several commentators have suggested to the contrary,¹⁷⁴ it seems clear to me that the Court does indeed apply different standards of review to public forums and nonpublic forums. Contrast, for example, *United States v. Grace*,¹⁷⁵ which invalidated a federal statute prohibiting any display of flags, banners, or similar devices on the public sidewalk surrounding the Supreme Court, with *Greer v. Spock*,¹⁷⁶ which upheld a military regulation prohibiting any political speeches, demonstrations, or similar activities in the public areas of a military base. The actual effects of the challenged restrictions on the opportunities for free expression seem similar in degree. If there is a difference, it is that the military regulation seems likely to restrict more speech. The Court held in *Greer*, however, that a military base is a nonpublic forum. It therefore applied a highly deferential standard of review and upheld the regulation because it served its legitimate interest in insulating the military from both the reality and the appearance of political involvement. By contrast, the Court in *Grace* held that the

government in many cases as simply another property owner, the Court has continued to differentiate sharply between public and nonpublic forums.

¹⁷² *Cornelius*, 105 S.Ct. at 3448. See *Perry Education Association*, 460 U.S. at 46; *Council of Greenburgh Civic Associations*, 453 U.S. at 131 n.7. In addition, such restrictions must not be "an effort to suppress expression merely because public officials oppose the speaker's view." *Cornelius*, 105 S.Ct. at 3448.

¹⁷³ See, e.g., *Albertini*, 472 U.S. 675 (military base); *Taxpayers for Vincent*, 466 U.S. 789 (public utility poles); *Council of Greenburgh Civic Associations*, 453 U.S. 114 (letter boxes); *Bell v. Wolfish*, 441 U.S. 520, 548-52 (1979) (prison); *Adderley*, 385 U.S. 39 (jail grounds); *Heffron*, 452 U.S. 640 (state fair grounds); *Greer*, 424 U.S. 828 (military base). In upholding a number of subject matter or speaker-based exclusions from nonpublic forums, the Court has indicated that it would also uphold content-neutral exclusions from such forums. See, e.g., *Cornelius*, 473 U.S. 788, 105 S.Ct. 3439 (charitable contribution campaign among federal employees); *Perry Education Association*, 460 U.S. 37 (interschool mail system); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (public transit vehicles).

¹⁷⁴ See *Nimmer on Freedom of Speech* § 4.09(D) (cited in note 4); *Farber and Nowak*, 70 Va. L. Rev. at 1239 (cited in note 54).

¹⁷⁵ 461 U.S. 171 (1983).

¹⁷⁶ 424 U.S. 828 (1976).

sidewalk surrounding the Supreme Court building is a traditional public forum. The Court therefore applied a more demanding standard of review and invalidated the regulation despite the government's argument that the regulation served its legitimate interest in insulating the Court from both the reality and the appearance of outside influence.

Similarly, contrast *Schneider v. State*,¹⁷⁷ which invalidated an ordinance prohibiting the distribution of leaflets on public streets, parks, and sidewalks, with *Members of the City Council of Los Angeles v. Taxpayers for Vincent*,¹⁷⁸ which upheld an ordinance prohibiting the posting of signs, including political campaign signs, on public utility poles. Again, the actual effects of the challenged restrictions seem similar. The Court held in *Vincent*, however, that public utility poles are nonpublic forums. It therefore applied a deferential standard of review and upheld the ordinance because it served the city's legitimate interest in preventing visual blight. By contrast, the Court in *Schneider* held that streets, parks, and sidewalks are public forums. It therefore applied a more demanding standard of review and invalidated the ordinance despite the city's argument that the ordinance served the city's legitimate interest in preventing litter. Thus, although there are grey areas,¹⁷⁹ it seems clear that the Court does in fact apply different standards of review to public forums and nonpublic forums. In terms of the five positions described earlier in this section, the Court has adopted the fifth.

Second, although it is clear that the Court applies different standards of review for public forums and nonpublic forums, it is less clear precisely what standards it applies. That is, in comparing the standards the Court uses to test restrictions of speech on public property with the ordinary standards of content-neutral review, it is unclear whether the Court applies diluted standards of review for nonpublic forums and unaltered standards for public forums, unaltered standards for nonpublic forums and heightened standards for public forums, or diluted standards for nonpublic forums and heightened standards for public forums. This uncertainty is

¹⁷⁷ 308 U.S. 147 (1939).

¹⁷⁸ 466 U.S. 789 (1984).

¹⁷⁹ The Court has indicated, for example, that "the analytical line between a regulation of the 'time, place, and manner' in which First Amendment rights may be exercised in a traditional public forum, and the question of whether a particular piece of personal or real property owned or controlled by the government is in fact a 'public forum' may blur at the edges." *Taxpayers for Vincent*, 466 U.S. at 815 n.32, quoting *Council of Greenburgh Civic Associations*, 453 U.S. at 132.

due to several factors—such as the Court's general lack of care in articulating its standards, its occasional inconsistency in articulating and applying its standards within both the public forum and nonpublic forum categories,¹⁸⁰ and the fact that most modest content-neutral restrictions involve speech on public property—that make it difficult to identify an independent baseline for comparison. In general, however, the Court seems to apply the ordinary standards of content-neutral review to laws that restrict speech in public forums, and diluted standards of review to laws that restrict speech in nonpublic forums.

Third, although, as indicated earlier, it is possible to make a case for elevating the standard of review when the government restricts speech on public property, the Court seems not to have adopted this view even for public forums. This may be due to a judgment that the arguments concerning the importance of public forums for free expression are sufficient to offset the government's property rights, but not to elevate the standard of review. Experience suggests that this is a reasonable judgment. The Court's analysis of content-neutral restrictions in public forums has produced a set of speech-protective results without unduly sacrificing important governmental interests. Not surprisingly, then, there has been little criticism of the Court's decisions in this regard.¹⁸¹

Finally, unlike its public forum decisions, the Court's nonpublic forum decisions have provoked considerable criticism.¹⁸² Part of

¹⁸⁰ In the public forum context, consider, e.g., *Grace*, 461 U.S. 171, which applied a demanding standard of review to a modest restriction; and *Schneider*, 308 U.S. 147, which tested a law having a significant effect on free expression with a standard similar to that used in *Martin*, 319 U.S. 141, which also involved a law having a significant effect on free expression, even though *Schneider*, unlike *Martin*, involved a public forum.

In the nonpublic forum context, some decisions seem unaltered by the factor of public property, whereas others seem to dilute the standard of review because of this element. In *Heffron*, 452 U.S. 640, for example, the Court tested a modest restriction in a nonpublic forum with the ordinary standards of content-neutral analysis. In *Taxpayers for Vincent*, 466 U.S. 789, however, the Court tested a law having a significant effect on free expression with the deferential standard ordinarily reserved for modest restrictions.

¹⁸¹ Among the relevant decisions are *Grace*, 461 U.S. 171; *Grayned*, 408 U.S. 104; *Cox v. New Hampshire*, 312 U.S. 569 (1941); and *Schneider*, 308 U.S. 147. The one decision involving a public forum that has triggered significant commentary is *Community for Creative Non-Violence*, 468 U.S. 288. See, e.g., Laurence H. Tribe, *Constitutional Choices* at 204-07 (1985); Baker, 78 Nw. U. L. Rev. at 974-75 (cited in note 54) (criticizing the lower court decision, *Community for Creative Non-Violence v. Watt*, 703 F.2d 586 (D.C. Cir. 1983)). Most objection to *Community for Creative Non-Violence*, however, focuses more on the Court's unwillingness to protect a particular means of expression than on its application of public forum doctrine as such. See Baker, 78 Nw. U. L. Rev. at 974-75.

¹⁸² See, e.g., *Nimmer on Freedom of Speech* at § 4.09(D) (cited in note 4); *Quadres*, 37 *Hastings L. J.* 429 (cited in note 128); Farber and Nowak, 70 *Va. L. Rev.* 1219 (cited in note

the difficulty stems from the highly deferential standard of review the Court uses for modest content-neutral restrictions generally. For the reasons offered earlier, this standard is unduly deferential and should be abandoned. One might argue, however, that even if this standard is inappropriate for most modest content-neutral restrictions, it is appropriate for those restrictions that involve nonpublic forums. That is, one might argue that the Court should be especially reluctant to interfere with the government's interest in controlling the use of nonpublic forum property.

Experience with the rigid public/nonpublic forum distinction, however, has served only to dramatize the artificiality of the distinction. Is a public utility pole located on a public street a public or nonpublic forum?¹⁸³ Is the sidewalk surrounding the Supreme Court a public or nonpublic forum?¹⁸⁴ Is the public area between the sidewalk and the Supreme Court building a public or nonpublic forum?¹⁸⁵ Is the public area of a state fair a public or nonpublic forum?¹⁸⁶ Is the public area of a military base a public or nonpublic forum?¹⁸⁷ Unless one rigidly limits the concept of "public forum" to streets, parks, and sidewalks, narrowly defined, answers to these questions are difficult, if not incoherent.¹⁸⁸

More importantly, these are the wrong questions. Whether the first amendment guarantees individuals a right to engage in expressive activities on public property should turn not on the common law property rights of the government and such artificial and fictitious concepts as "first amendment easements," "adverse possession," and "public trust," but on a reasonable accommodation of the competing speech and governmental interests. Existing doctrine, with its myopic focus on formalistic labels, serves only to distract attention from the real stakes in these disputes. As the Court declared in *Grayned v. Rockford*, the "crucial question" in every case should be "whether the manner of expression is basically in-

54); *Goldberger*, 32 Buff. L. Rev. 175 (cited in note 123); *Baker*, 78 Nw. U. L. Rev. 937 (cited in note 54); Norman Dorsen and Joel Gora, *Free Speech, Property, and the Burger Court: Old Values, New Balances*, 1982 S. Ct. Rev. 195.

¹⁸³ *Taxpayers for Vincent*, 466 U.S. 789 (nonpublic).

¹⁸⁴ *Grace*, 461 U.S. 171 (public).

¹⁸⁵ See *id.* at 178-80 (nonpublic).

¹⁸⁶ *Heffron*, 452 U.S. 640 (nonpublic).

¹⁸⁷ *Greer*, 424 U.S. 828 (nonpublic).

¹⁸⁸ The public/nonpublic forum distinction has muddled analysis of subject matter and speaker-based restrictions as well. See *Cornelius*, 473 U.S. 788, 105 S.Ct. 3439; *Perry Education Association*, 460 U.S. 37; *Widmar v. Vincent*, 454 U.S. 263 (1981); *Carey v. Brown*, 447 U.S. 455 (1980); *Lehman*, 418 U.S. 298; *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972). See generally *Farber and Nowak*, 70 Va. L. Rev. 1219 (cited in note 54).

compatible with the normal activity of a particular place at a particular time.”¹⁸⁹

That the government owns the property is not irrelevant. To the contrary, as already suggested, the government's rights as property owner may be sufficient in themselves to offset the powerful arguments that have been made for elevating the standards of review whenever public property is involved.

Similarly, that some public places have been used “time out of mind” for speech purposes is not irrelevant. That a particular place traditionally has been used for speech purposes suggests that it may be an especially valuable forum, the elimination of which may be particularly costly to free expression. Accordingly, we may evaluate restrictions of speech in such forums with heightened scrutiny.¹⁹⁰ Moreover, that a particular place has traditionally been used for speech purposes suggests that the government reasonably can tolerate speech in that forum. Accordingly, we appropriately may look skeptically on the government's reasons for restricting speech in such forums. In these ways, both property rights and tradition can count in the balance without assuming undue importance. Existing doctrine, however, accords them too much weight.

A simple and sensible solution to the public property issue, then, is to apply the same standards of content-neutral review to restrictions of speech on public property that we apply to content-neutral restrictions generally. Public ownership should neither elevate nor dilute the appropriate standard of review. And the fact that a place has been used “time out of mind” for speech purposes should affect the analysis not as a dispositive criterion, but as a relevant factor to be considered in the balance. The appropriate standard should be that stated by the Court in dictum in *Grayned*: the “critical question” in every case should be “whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.”¹⁹¹

¹⁸⁹ *Grayned*, 408 U.S. at 116.

¹⁹⁰ This might be implemented, for example, either by shifting in appropriate cases from deferential to intermediate review or from intermediate to strict review, or by reviewing restrictions of speech in “traditional” forums in light of the principle of *Schneider*, 308 U.S. at 163, that “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.” On the *Schneider* principle, see Tribe, *American Constitutional Law* at 684 (cited in note 46).

¹⁹¹ *Grayned*, 408 U.S. at 116. See Stone, *Fora Americana*, 1974 S. Ct. Rev. at 251-52 (cited in note 93).

C. Tradition

As we have seen, tradition has played a central role in the formulation of public forum doctrine. Indeed, it has played too central a role. When used in a more disciplined manner, however, tradition can be useful in informing first amendment analysis—not only in the public forum context, but in others as well.

The Court has often looked to tradition for guidance in its effort to assess the restrictive effects of content-neutral limits on speech. In *Schneider v. State*,¹⁹² which invalidated a restriction of leafletting, the Court observed that leaflets “had become historical weapons in the defense of liberty.” In *Martin v. City of Struthers*,¹⁹³ which invalidated a restriction of door-to-door solicitation, the Court emphasized that for “centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants.” In *Talley v. California*,¹⁹⁴ which struck down a prohibition of anonymous leaflets, the Court noted that anonymous publications “have played an important role in the progress of mankind” and that “[p]ersecuted groups . . . throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.” In *Globe Newspaper Co. v. Superior Court*,¹⁹⁵ invalidating an exclusion of the press and public from a criminal trial, the Court explained that “the criminal trial historically has been open to the press and general public” and that since the adoption of the Constitution “the presumption of openness has remained secure.” And in *Minneapolis Star v. Minnesota Commissioner of Revenue*,¹⁹⁶ which invalidated a special tax on the press, the Court observed that differential taxation of the press has been historically suspect and “would have troubled the Framers of the First Amendment.”¹⁹⁷

As these cases recognize, the traditional use of a particular means of expression and the traditional ban on a particular form of prohibition are constitutionally significant both because “the Constitution carries the gloss of history” and because traditional

¹⁹² 308 U.S. 147, 162 (1939).

¹⁹³ 319 U.S. 141, 141 (1943).

¹⁹⁴ 362 U.S. 60, 64 (1960).

¹⁹⁵ 457 U.S. 596, 605 (1982).

¹⁹⁶ 460 U.S. 575 (1983).

¹⁹⁷ *Id.* at 583. See also *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (“‘outdoor signs have played a prominent role throughout American history, rallying support for political and social causes’”) (plurality opinion), quoting *Metromedia, Inc. v. San Diego*, 26 Cal.3d 848, 164 Cal. Rptr. 510, 610 P.2d 407, 430-31 (1980) (Clark, J., dissenting).

use “ ‘implies the favorable judgment of experience.’ ”¹⁹⁸ Thus, the Court appropriately considers tradition both in evaluating the extent to which a particular restriction actually limits the opportunities for free expression, which in turn determines the standard of review, and in evaluating the legitimacy and strength of the interests the government asserts in defense of the restriction.

Tradition also can cut the other way. For example, in *Schneider*, although the Court invalidated a municipal ordinance prohibiting the traditional practice of leafletting, it made clear that the first amendment does not “deprive a municipality of power to enact regulations against throwing literature broadcast in the streets.”¹⁹⁹ At first glance, this may seem anomalous. After all, throwing literature “broadcast in the streets” may be an even more effective means of distribution than hand-to-hand leafletting, and the city’s interest in keeping “the streets clean and of good appearance” is no more substantial when weighed against one means of distributing leaflets than the other.²⁰⁰ The Court explained, however, that the prohibition of throwing leaflets “broadcast in the streets” does “not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print, or distribute information or opinion.”²⁰¹ The Court, in other words, found the city’s interest in keeping “the streets clean and of good appearance” insufficiently weighty to justify a ban on leafletting, but sufficiently weighty to justify a ban on throwing leaflets “broadcast in the streets” because tradition strongly supported the speaker’s interest in using the former means of expression and strongly supported the city’s interest in restricting the latter. Thus, tradition in this context worked in favor of restricting rather than protecting free speech.

¹⁹⁸ *Globe Newspaper Co.*, 457 U.S. at 605, quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring).

¹⁹⁹ 308 U.S. at 160-61.

²⁰⁰ *Id.* at 162. It might be argued that the distinction between hand-to-hand distribution and throwing leaflets “broadcast in the streets” is that in the former case the city can attempt to achieve its interests by a less restrictive means: punishing litterers. *Id.* Punishing litterers, however, does not eliminate the problem as well as punishing leafletters. Thus, although there is a less restrictive means, it is also a less effective means. It does not, in other words, fully satisfy the city’s interest in keeping the “streets clean and of good appearance.” Moreover, there are similar, less restrictive means available to deal with those who throw leaflets “broadcast in the streets,” such as limiting the number of leaflets or requiring the individuals who throw leaflets “broadcast in the streets” to clean up the leaflets that remain on the ground. In any event, this was not the argument used by the Court in *Schneider* to distinguish traditional leafletting from throwing leaflets “broadcast in the streets.”

²⁰¹ *Id.* at 161.

Similarly, in *Branzburg v. Hayes*,²⁰² which declined to recognize a newsman's first amendment privilege not to reveal the identity of confidential sources to a grand jury, the Court took into account the longstanding principle that "the public . . . has a right to every man's evidence," and the traditional refusal of the common law to recognize such a privilege. As in *Schneider*, tradition in this context worked to restrict rather than protect free speech.

Such "negative" uses of tradition are in principle perfectly legitimate. That the marketplace of ideas has performed satisfactorily despite the longstanding restriction of a particular means of expression suggests that continued denial of the asserted right is unlikely to have a significant effect on public debate. But here, as with the "positive" use of tradition, the tradition is not dispositive. In some instances, even a traditional restriction may be constitutionally unsound. In other instances, the legitimacy of a traditional restriction may be undermined by changed circumstances relating to either its altered effects on free expression or to the underlying justifications for the restriction. In such circumstances the Court should invalidate the restriction if, even after factoring in the lessons of history, the governmental interests do not outweigh the restrictive effects on free expression.²⁰³

Whether a particular practice is supported by "tradition" is often a subtle and complex judgment. How many exceptions are sufficient to destroy the "tradition"? How narrowly or broadly should the "tradition" be defined? How long must the practice exist to qualify as a "tradition"? In making its judgments about "tradition," the Court has not examined these issues with care. Rather, it tends to assert its conclusions in a casual and untested manner. This is inevitable to some extent, however, given the nature of the inquiry. Moreover, the Court's judgments in this regard tend to reflect rough but reasonable approximations of reality. Nonetheless, in making these judgments the Court should be conscious of the very approximate nature of its assessments, and when in doubt it should, as in other contexts, err on the side of free speech.²⁰⁴

²⁰² 408 U.S. 665, 688 (1972), quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950).

²⁰³ See, e.g., *Elrod v. Burns*, 427 U.S. 347 (1976) (invalidating partisan dismissal of public employees); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (invalidating the common law of libel in the context of statements about public officials).

²⁰⁴ See text accompanying notes 134-39 above. For an illustration of a case in which the Court was neither careful in its judgment nor conscious to err on the side of free speech, see *Taxpayers for Vincent*, 466 U.S. at 814, in which the Court denied "the existence of a traditional right" to post signs on public utility poles. This judgment, which was critical to the

A final caveat is in order concerning tradition. It makes sense to grant special protection to traditional means of expression, for this helps to preserve at least minimum opportunities for free speech. But undue emphasis on tradition can backfire and generate a tendency to undervalue new and unorthodox means of expression. Such a tendency is evident, for example, in the Court's analysis of cases involving nonpublic forums. Because such property has not been used "time out of mind" for speech purposes, the Court does not invalidate content-neutral restrictions of speech on such property. Undue emphasis on tradition may similarly produce a tendency to underprotect new means of expression, such as television, radio, movies, and cable media. When loudspeakers and motion pictures first made their appearance, the Court accorded them little if any protection,²⁰⁵ and it still gives greater first amendment protection to the print than to the broadcast media.²⁰⁶ These are worrisome tendencies. The Court should not view new means of expression as inherently dangerous instrumentalities unworthy of protection equal to that accorded the more traditional means of expression. Rather, as Justice Black observed, a basic premise of the first amendment "is that all present instruments of communication, as well as others that inventive genius may bring into being," must be free of unwarranted restriction.²⁰⁷

Similarly, unduly emphasizing tradition may have an especially severe impact on unorthodox means of expression, such as burning draft cards to dramatize one's opposition to the draft²⁰⁸ or sleeping in a public park to dramatize the plight of the homeless.²⁰⁹

decision, was both off-hand and questionable. See *id.* at 818 (Brennan, J., dissenting) (noting that the "posting of signs is . . . a time-honored means of communicating"). Consider also *Metromedia, Inc.*, 453 U.S. at 501 (plurality opinion) (noting that posters "have played a prominent role throughout American history").

²⁰⁵ See *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U.S. 230, 243 (1915) (expressing doubt that motion pictures constitute "speech" within the protection of the first amendment); *Kovacs*, 336 U.S. 77 (upholding restrictions of soundtracks). Even today, while motion pictures are considered "speech," *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), the Court grants less protection to motion pictures than to published material in the context of licensing. See *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961) (upholding an ordinance requiring the submission of all motion pictures to a licensing authority before exhibition).

²⁰⁶ Compare *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (print), with *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969) (broadcast). See generally Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 Mich. L. Rev. 1 (1976).

²⁰⁷ *Kovacs*, 336 U.S. at 102 (Black, J., dissenting).

²⁰⁸ *O'Brien*, 391 U.S. 367.

²⁰⁹ *Community for Creative Non-Violence*, 468 U.S. 288.

Because such unorthodox means of expression lack the familiarity of the traditional means, legislative and administrative officials are especially likely to view them unsympathetically. Excessive concern with tradition on the Court's part may compound the problem by failing to adjust for such insensitivity. The predictable consequence will be an undervaluation of unorthodox means of expression. There are real dangers in such an approach, for if only orthodox means of expression are protected, many of our most poignant, imaginative, and dramatic means of expression will be left unprotected.²¹⁰

D. Discrimination Against Speech

Content-neutral restrictions generally fall into one of two categories: either they expressly restrict only communicative activities, or they expressly restrict only noncommunicative activities but have an incidental effect on free speech.²¹¹ The first category is illustrated by laws that expressly prohibit leafletting, ban billboards, and limit political contributions. The second category is illustrated by laws that prohibit the destruction of draft cards (as applied to an individual who burns a draft card as a symbolic expression of protest against the draft), ban racial discrimination (as applied to a racist political organization that excludes blacks), and forbid speeding (as applied to a reporter in a rush to make a deadline). To what extent, if any, does this categorization affect content-neutral analysis? In exploring this question, I will begin with laws that expressly restrict only communicative activities, and I will then turn in part IV-E to those laws that only incidentally restrict free speech.

In *Martin v. City of Struthers*, the Court invalidated an ordinance that declared it unlawful for "any person distributing handbills . . . to ring the door bell, sound the door knocker, or otherwise summon the inmate . . . of any residence to the door for the purpose of receiving such handbills."²¹² The ordinance was designed to protect "householders from annoyance, including in-

²¹⁰ Ely, 88 Harv. L. Rev. at 1489 (cited in note 22). See Tribe, American Constitutional Law at 685 n.12 (cited in note 46).

²¹¹ Some content-neutral restrictions—such as, say, one prohibiting all "speeches, bicycle riding, and ballplaying" in public parks—expressly restrict both communicative and noncommunicative activities. Such laws, of course, share some of the characteristics of each of the categories discussed in the text. The extent to which laws in this category resemble laws in the first or second category depends upon the proportion of communicative to noncommunicative activities.

²¹² 319 U.S. at 142.

trusion upon the hours of rest.”²¹³ Two characteristics of this ordinance are relevant to the present inquiry: it expressly restricts only communicative activities, and it does so in an underinclusive manner. The ordinance is underinclusive because it restricts the communicative activity of distributing handbills but does not restrict noncommunicative activities, such as the door-to-door selling of pots and pans, that similarly threaten the asserted governmental interest in protecting “householders from annoyance.”²¹⁴ Such underinclusiveness raises the spectre of governmental discrimination against a constitutional right, and it also impeaches the substantiality of the governmental interest said to support the restriction of speech.

Underinclusiveness is a common concern of first amendment analysis. In *Police Department v. Mosley*,²¹⁵ for example, the Court, emphasizing underinclusiveness, invalidated a Chicago ordinance that prohibited picketing within 150 feet of a school building while the school was in session, except for “peaceful picketing of any school involved in a labor dispute.” The Court explained that, if “peaceful labor picketing is permitted, there is no justification for prohibiting all nonlabor picketing,” for peaceful nonlabor picketing “is obviously no more disruptive than ‘peaceful’ labor picketing.”²¹⁶ Similarly, in *Erznoznik v. Jacksonville*,²¹⁷ the Court invalidated an ordinance that prohibited drive-in movie theatres from exhibiting films containing nudity if the movie screen was visible from a public street. The Court explained that the ordinance was “strikingly underinclusive” because there was “no reason to think that a wide variety of other scenes in the customary screen diet, ranging from soap opera to violence, would be any less distracting to the passing motorist.”²¹⁸

As in *Mosley* and *Erznoznik*, the underinclusiveness in *Martin* impeaches the substantiality of the government’s asserted justifica-

²¹³ Id. at 144.

²¹⁴ Of course, to the extent that commercial speech is protected by the first amendment, even selling pots and pans might be treated as a communicative activity. See *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762-65 (1976). However, the Court’s approach to commercial speech following *Virginia Pharmacy* has recognized that the government has considerable power to regulate commercial speech. See, e.g., *Central Hudson Gas & Elec. v. Public Serv. Comm’n*, 447 U.S. 557, 561-66 (1980) (even commercial speech that is neither misleading nor concerns unlawful activity may be regulated if the regulation is no more extensive than necessary to directly advance a substantial government interest).

²¹⁵ 408 U.S. 92, 93 (1972).

²¹⁶ Id. at 100.

²¹⁷ 422 U.S. 205 (1975).

²¹⁸ Id. at 214-15. See also *Carey v. Brown*, 447 U.S. 455 (1980).

tion for restricting speech. That is, the exclusion of door-to-door salesmen in *Martin* calls into question the substantiality of the government's commitment to protecting householders from "annoyance."

The more difficult question is whether the underinclusiveness in *Martin* should elevate the standard of review. Unlike the ordinances invalidated in *Mosley* and *Erznoznik*, the ordinance in *Martin* was content-neutral. *Martin* thus raises the question whether content-neutral discrimination against communicative activity elevates the standard of review to the same degree as content-based discrimination.²¹⁹ On the one hand, it seems clear that content-based discrimination poses special dangers to the system of free expression that are not posed by content-neutral discrimination against communicative activity. A content-neutral discrimination against communicative activity, for example, does not distort public debate as does a content-based restriction. On the other hand, given the special status of constitutional rights, it seems clear that "the government ought to treat first amendment activities as being at least as valuable as other privately chosen activities."²²⁰ Thus, the government should be required to justify the underinclusiveness of any law that restricts communicative but not analogous noncommunicative activity. This might be accomplished either by elevating the standard of review for the challenged law as a whole, or by undertaking a separate and distinct inquiry focusing on the government's justification for treating communicative activity less favorably than analogous noncommunicative activity.

For the most part, the Court has taken a hard line on discrimination against communicative activity, although not nearly as hard a line as it has taken on content-based discrimination. In *Martin*, for example, Justice Frankfurter noted that "door-knocking and bell-ringing by professed peddlers" may destroy the city inhabitants' opportunities for "sleep and refreshment," but that the challenged ordinance "merely penalizes the distribution of 'literature.'"²²¹ Similarly, in *Schad v. Borough of Mt. Ephraim*,²²²

²¹⁹ For an affirmative answer, see Baker, 78 N.W. U. L. Rev. at 957-61 (cited in note 54).

²²⁰ Id. at 958.

²²¹ 319 U.S. at 153 (separate opinion). The majority in *Martin*, by striking down the ordinance, implicitly rejected Justice Frankfurter's argument that the ordinance could be sustained even though it penalized the distribution of literature because "those in whose keeping is the peace of the City of Struthers" could conceivably have concluded that distributors of literature were "the particular source of mischief." See id. at 154. The Court, in other words, was not prepared to adopt so deferential an approach to the issue of underinclusiveness.

²²² 452 U.S. 61 (1981). HeinOnline -- 54 U. Chi. L. Rev. 101 1987

which invalidated an ordinance excluding all commercial live entertainment from the Borough, the Court rejected the contention that the ordinance was justified by the Borough's interest in avoiding "the problems that may be associated with live entertainment, such as parking, trash, police protection, and medical facilities." The Court noted that the Borough had "presented no evidence, and it is not immediately apparent as a matter of experience, that live entertainment poses problems of this nature more significant than those associated with various permitted [activities]."²²³ And in *Minneapolis Star*,²²⁴ which invalidated a special tax on publications, the Court explained that although the government "can subject newspapers to generally applicable economic regulations without creating constitutional problems," differential taxation of the press "suggests that the goal of the regulation is not unrelated to suppression of expression" and "places such a burden on the interests protected by the First Amendment" that it is invalid unless necessary to achieve "a counterbalancing interest of compelling importance."²²⁵

Thus, in *Schad* and *Minneapolis Star*, and implicitly in *Martin*, the Court gave considerable weight to the underinclusiveness of content-neutral restrictions that expressly discriminated against communicative activity, subjecting such restrictions to an elevated standard of review.

In two recent decisions, however, the Court has departed from this approach. In *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*,²²⁶ the Court held that an ordinance prohibiting the posting of signs on public property was justified by what the Court termed the city's "weighty" interest "in eliminating visual clutter."²²⁷ As Justice Brennan observed in dissent, however, for the city to establish that it was not discriminating against communicative activity and that its aesthetic interest was substantial, it should "have to demonstrate that it is pursuing its goal of eliminating visual clutter in a serious and comprehensive manner," that it is pursuing this goal through means "other than its ban on signs," and that at least some of these other means "do not entail the restriction of speech" and parallel the ban on signs

²²³ Id. at 73.

²²⁴ 460 U.S. 575.

²²⁵ Id. at 581, 585.

²²⁶ 466 U.S. 789 (1984).

²²⁷ Id. at 806.

"in their stringency, geographical scope, and aesthetic focus."²²⁸ The Court, however, exercised only the most cursory judicial oversight. It upheld the ordinance without any inquiry of the sort undertaken in *Martin*, *Schad*, or *Minneapolis Star*.

As a doctrinal matter, *Vincent* may be explained on the ground that the Court viewed the ordinance as only a modest regulation of nonpublic forum public property. It thus applied its highly deferential standard of review. This is unsatisfactory, however, because unjustified underinclusiveness should invalidate even a modest content-neutral restriction,²²⁹ because the Court's analysis of nonpublic forum public property is itself unsatisfactory,²³⁰ and because the restriction in *Vincent*, like the restrictions in *Martin* and *Schad*, constituted a substantial limitation on an important means of expression. In such circumstances, the underinclusiveness of the restriction upheld in *Vincent* called for closer scrutiny.²³¹

More recently, in *Renton v. Playtime Theatres, Inc.*,²³² the Court upheld an ordinance prohibiting any "adult motion picture theater" from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, or within one mile of any school. The ordinance was designed to prevent the "secondary effects" of such theaters on surrounding neighborhoods.²³³ The Court upheld the ordinance despite the fact that it did not restrict other businesses, such as adult bookstores, bars, massage parlors, pool halls, liquor stores, and so on, that produce "secondary effects" similar to those produced by adult theaters.²³⁴ The Court, treating the ordinance as content-neutral,²³⁵ explained that the ordinance was not impermissibly underinclusive for two reasons: the parties challenging the ordinance had failed to prove that any other adult businesses were located in the city; and there was no basis for assuming that the city would not in the future "amend its ordinance to include other kinds of adult businesses"

²²⁸ Id. at 829.

²²⁹ Consider, for example, a law prohibiting any person from destroying a draft card as a means of expression, or a law prohibiting any person from making loud noises during the course of any demonstration on the grounds of the county jail (where other noisy activities are not prohibited).

²³⁰ See part IV-B above (notes 159-91 and accompanying text).

²³¹ For further analysis and criticism of this aspect of *Vincent*, see Quadres, 37 Hastings L. J. at 474-78 (cited in note 128).

²³² 106 S.Ct. 925, 927 (1986).

²³³ Id. at 929.

²³⁴ See id. at 934 (Brennan, J., dissenting).

²³⁵ See part IV-F below (notes 270-81 and accompanying text).

that "produce the same kinds of secondary effects as adult theaters."²³⁶ Citing the passage in *Williamson v. Lee Optical Co.*²³⁷ that authorizes the government to undertake reforms "one step at a time," the Court carried over to first amendment analysis one of the most highly deferential components of traditional rational basis review. The contrast between *Renton*, on the one hand, and *Martin*, *Schad*, and *Minneapolis Star*, on the other, is striking. In sum, although the Court has generally taken care to guard against laws that discriminate against communicative activity, *Vincent* and *Renton* stand as two recent and disturbing exceptions to this general approach.

It is important to note that not all laws that expressly restrict only communicative activities are underinclusive. To the contrary, in many instances communicative activities are the only activities that pose the relevant harm. In such circumstances, the law's exclusive focus on communicative activities is unproblematic. For example, a law restricting political contributions does not discriminate against communicative activity, for noncommunicative activity does not pose an analogous threat to the political process.²³⁸ Similarly, a regulation prohibiting face-to-face interviews between members of the press and individual prison inmates does not discriminate against communicative activity, for noncommunicative activity does not pose an analogous threat to the government's interest in preventing the disciplinary problems that arise when particular inmates become public figures.²³⁹ And a law prohibiting any person from displaying "any flag, banner, or device" on the public sidewalk surrounding the Supreme Court building does not discriminate against communicative activity, for noncommunicative activity does not pose an analogous threat to the government's interest in preventing the appearance or reality of improper influence on the Court.²⁴⁰ In such cases, the fact that the challenged law expressly restricts only communicative activity does not impeach the government's justification for the law and

²³⁶ 106 S.Ct. at 931-32.

²³⁷ 348 U.S. 483, 488-89 (1955), cited in *Renton*, 106 S.Ct. at 932.

²³⁸ See, e.g., *Buckley*, 424 U.S. 1. See also *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973) (upholding § 9(a) of the Hatch Act, which prohibits certain federal employees from taking "an active part in political management or in political campaigns").

²³⁹ See, e.g., *Pell v. Procunier*, 417 U.S. 817 (1974).

²⁴⁰ See, e.g., *Grace*, 461 U.S. at 182-83. See also *Greer*, 424 U.S. 828 (upholding a regulation excluding political speeches and demonstrations from a military base in order to preserve both the appearance and reality of the military's noninvolvement in partisan politics).

should not elevate the standard of review.²⁴¹

E. Incidental Effects on Speech

A second category of content-neutral restrictions consists of those laws that expressly restrict noncommunicative activities, but have an incidental effect on free speech. The number of laws falling within this second category is virtually limitless. It includes, for example, environmental and minimum wage laws that raise the price of newspapers, thus dampening public debate; laws that convert public parks to parking lots, thus eliminating public forums; and laws that tax income, thus reducing the amount of money individuals have to spend on expressive activities. At first glance, one might conclude that such laws have so indirect and tangential an effect on free expression that they should be beyond the scope of first amendment review.

It is not so simple, however. Consider the following pairs of regulations:

- A law that prohibits all bookstores in a certain area, and a law that zones that area for residential use only;
- A law that prohibits all parades in order to prevent obstruction of traffic, and a law that prohibits obstruction of traffic by any means, including parades;
- A law that prohibits sound trucks in order to prevent excessive noise, and a law that prohibits excessive noise, which in practice bans among other things cars with defective mufflers, jackhammers, and sound trucks;
- A law that prohibits any person from destroying a draft card as a means of expression, and a law that prohibits any person from destroying a draft card, regardless of purpose;
- A law that prohibits any uninvited person from ringing the doorbell of a home to distribute literature, and a law that prohibits any uninvited person from ringing the doorbell of a home for any purpose;
- A law that prohibits reporters from wiretapping, and a law that prohibits wiretapping.²⁴²

The first example in each of these pairs expressly restricts

²⁴¹ For examples of such laws, see text at notes 236-38 above.

²⁴² This list is derived in part from Gerald Gunther, *Constitutional Law* 1169 n.12 (1985).

communicative activity and obviously raises a serious first amendment question. The second example in each pair has only an incidental effect on free expression. Should each of the second examples be beyond the scope of first amendment review? The difficulty is that, as we have seen, the central concern of content-neutral analysis is the extent to which content-neutral restrictions limit the opportunities for free expression. The second example in each pair has *precisely* the same restrictive effect as the first. How, then, can we justify drawing so sharp a distinction between the first and second examples in each pair?

I can imagine four arguments that might support such a distinction. First, one might argue that content-neutral analysis is not primarily about restrictive effect at all. Rather, it is primarily about discrimination against communicative activity. Under this view, if a law does not discriminate against communicative activity, it is beyond the scope of first amendment review. The difficulty with this argument is that, although discrimination against communicative activity is a legitimate first amendment concern, it does not seem sufficiently important to support the entire weight of content-neutral analysis. Moreover, such a view would offer no constitutional protection against laws that expressly restrict communicative activity, but are not underinclusive and thus do not discriminate against free speech.²⁴³ Such an approach would significantly limit the protection of the first amendment.

Second, one might argue that the central concern of content-neutral analysis is not restrictive effect, but the probability of improper motivation—that is, the probability that the challenged restriction was motivated by a desire to suppress a particular point of view. Under this view, the degree of scrutiny would turn not on restrictive effect, but on the probability of improper motivation. Laws that do not expressly restrict communicative activity, but have only an incidental effect on free speech, are especially unlikely—because of their breadth—to be motivated by such considerations. Thus, under this view, such laws are beyond the scope of first amendment review. The difficulty with this approach is that although the probability of improper motivation is no doubt rele-

²⁴³ Of course, the line between laws that are and are not underinclusive is not perfect. Underinclusiveness is a matter of degree. Viewed in this light, *Vincent* and *Renton* can be seen as cases in which the Court (intentionally) understated the degree of underinclusiveness either because of its desire to avoid the difficulties of the inquiry into underinclusiveness (*Vincent*) or because of its antipathy towards the restricted speech (*Renton*).

vant to content-neutral analysis, the correlation between improper motivation and direct versus incidental restrictions of speech is not strong enough to justify so sharp a distinction. Many direct restrictions rest on perfectly legitimate motivations; and some incidental restrictions may be the product of improper motives, where, for example, officials can predict that a neutral law will have a strong incidental effect on communicative activities. Moreover, a concern with the probability of improper motivation explains little, if any, of the rest of content-neutral analysis.

Third, one might argue that because laws that have only an incidental effect on free speech are not aimed at speech, but restrict a broader class of activities, they are likely to rest on more substantial justifications than do laws that expressly restrict communicative activities. In the above illustrations, for example, the governmental interest furthered by the second law of each pair is arguably more substantial than the interest furthered by the first. But even if this is so generally, it does not follow that the interests supporting laws that have only an incidental effect on free expression are *sufficiently* substantial to outweigh their restrictive effect on free expression. Moreover, if the governmental interest is more substantial, this should be simply one factor in the Court's analysis in favor of upholding the law. It should not free the law from review.

Finally, one might argue that to extend content-neutral balancing to all laws that have only an incidental effect on free expression would open up a Pandora's box of judicial review. Under this view, such inquiries would create a nightmare of judicial administration that would simply not be worth the cost.²⁴⁴ The difficulty with this approach is that some laws that have only an incidental effect on free expression may have a substantial restrictive effect. Consider, for example, a law prohibiting the manufacture of paper. The interest in administrative simplicity is weighty, but it does not invariably outweigh the need to avoid substantial restrictions of free expression.

Thus, although these arguments have some force, they are not sufficiently powerful, either singly or in combination, to support the conclusion that laws having only an incidental effect on free speech should be beyond the scope of first amendment review. The potential restrictive effect of such laws is simply too great to disregard them entirely. The problem, then, is to decide how to analyze

²⁴⁴ See Schauer, 26 Wm. & Mary L. Rev. at 784 (cited in note 15).

the problem of incidental effects.

In dealing with laws that have only an incidental effect on free speech, the Court starts from the presumption that such laws raise no first amendment issue. In *Associated Press v. NLRB*,²⁴⁵ for example, the Court held that the application to the Associated Press of section 7 of the National Labor Relations Act, which confers on employees the right to organize and bargain collectively, did not violate the first amendment:

The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. Like others he must pay equitable and nondiscriminatory taxes on his business. The regulation here in question has no relation whatever to the impartial distribution of news.²⁴⁶

Following *Associated Press*, the Court has held that the application of general regulatory schemes, such as the Sherman Act,²⁴⁷ the Fair Labor Standards Act,²⁴⁸ and various fire and health code regulations,²⁴⁹ to individuals or organizations exercising first amendment rights does not raise a first amendment question.²⁵⁰ In 1986 the Court built further on *Associated Press*, holding in *Arcara v. Cloud Books, Inc.*²⁵¹ that no first amendment question was raised by the application to an adult book store of a municipal ordinance requiring the closing for a period of one year of any place of business found to be a place of prostitution.

Although reaffirming the presumption that laws having only an incidental effect on free expression are not subject to first amendment review, the Court in *Cloud Books* refined its analysis of "incidental effects." First, the Court observed that incidental restrictions that have a highly disproportionate impact on groups or

²⁴⁵ 301 U.S. 103 (1937).

²⁴⁶ Id. at 132-33 (footnotes omitted).

²⁴⁷ *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969).

²⁴⁸ *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946).

²⁴⁹ See *Arcara v. Cloud Books*, 106 S.Ct. 3172, 3177 (1986).

²⁵⁰ See *Stanford Daily*, 436 U.S. 547 (first amendment does not require police to use a subpoena rather than a search warrant to obtain information from the press); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (first amendment does not create a newsman's privilege for confidential sources that exempts newsman from the general obligation of all citizens to turn over relevant information to a grand jury).

²⁵¹ 106 S.Ct. 3172 (1986).

individuals engaged in first amendment activity do not escape first amendment review. For example, a law prohibiting the manufacture of loudspeakers or imposing a special tax on the sale of newsprint would fall so heavily on communicative as compared to noncommunicative activity that its effect on free expression could hardly be deemed "incidental." The Court recognized that such laws could not logically be exempt from first amendment scrutiny.²⁵²

Second, the Court observed in *Cloud Books* that laws having only an incidental effect on free expression cannot escape first amendment review if they penalize expressive activity.²⁵³ Indeed, the Court has consistently held that laws that penalize expressive activity are unconstitutional unless they meet the standard articulated in *O'Brien*—that is, unless they are "within the constitutional power of the Government," they further "an important or substantial governmental interest," the "governmental interest is unrelated to the suppression of free expression," and the restriction is "no greater than is essential to the furtherance of that interest."²⁵⁴

The Court explained in *Cloud Books* that cases like *O'Brien* and *Community for Creative Non-Violence*—cases where incidental restrictions penalize expressive activity—are distinguishable from cases like *Associated Press* and *Cloud Books* because in the former cases it was expressive activity that "drew the legal remedy."²⁵⁵ That is, in *O'Brien* it was the expressive act of burning a draft card, and in *Community for Creative Non-Violence* it was the expressive act of sleeping in a public park, that triggered the penalty; whereas in *Cloud Books* it was the nonexpressive act of prostitution, and in *Associated Press* the nonexpressive failure to bargain collectively, that triggered the penalty.

²⁵² It is noteworthy that the one example the Court offered of this phenomenon in *Cloud Books*, *Minneapolis Star*, was not an incidental effect at all. To the contrary, the law at issue in *Minneapolis Star* imposed a special tax on the cost of paper and ink products used "in producing a publication." 460 U.S. at 578 n.2. Although a special tax on paper and ink might be an incidental restriction that has a highly disproportionate effect on the press, a tax that applies to only the press is hardly incidental. For another opinion mischaracterizing a restriction as only "incidental," see *Taxpayers for Vincent*, 466 U.S. at 808 (characterizing as an "incidental" restriction on expression an ordinance that prohibits the posting of signs on public property).

²⁵³ As examples of review in such cases, see *O'Brien*, 391 U.S. 369 (prohibition on burning draft card, as applied to an individual who burned his card as symbolic protest against draft); and *Community for Creative Non-Violence*, 468 U.S. 288 (prohibition on sleeping in public parks, as applied to demonstrators who did so to dramatize plight of homeless).

²⁵⁴ *O'Brien*, 391 U.S. at 377; *Community for Creative Non-Violence*, 468 U.S. at 294.

²⁵⁵ *Cloud Books*, 106 S.Ct. at 3177.

It is not immediately apparent why this should matter. It may be that a law that penalizes expressive activity, even if only incidentally, looks more like an "abridgment" of free speech than a law that restricts free expression without penalizing expressive activity. It may also be that there is a greater risk of discriminatory application when expressive activity triggers the penalty. And it may be that the *Cloud Books* distinction is primarily an administrative device designed to cabin the circumstances in which incidental restrictions can raise first amendment questions. This, indeed, may be the most persuasive explanation of the distinction.

Cloud Books leaves two important questions unanswered. First, do the two refinements recognized in *Cloud Books* exhaust the circumstances in which the Court will review a law that has only an incidental effect on free expression? And second, if a law that has only an incidental effect on free expression is subject to first amendment review, to what extent, if any, does the fact that the restriction has only an incidental effect dilute the standard of review?

With respect to the first of these questions, it seems clear either that *Cloud Books* does not exhaust the field or that in at least some cases "expressive" activity is defined quite broadly. In *United States v. Albertini*,²⁵⁶ for example, the Court applied the *O'Brien* standard in upholding a federal statute prohibiting any person from entering a military base after being ordered not to do so, as applied to an individual who entered a base during an open house in order to distribute leaflets. It was the defendant's reentry onto the base, however, rather than his leafletting, that "drew the legal remedy." The defendant presumably would have been punished even if he had reentered the base for a nonexpressive purpose. On the other hand, the defendant in fact entered the base for an expressive purpose. In such circumstances, was it the expressive leafletting or the nonexpressive reentry that "drew the legal remedy"? Because the Court undertook first amendment review, *Albertini* suggests either an expansion of the *Cloud Books* exceptions or at least a very broad definition of "expressive" activity.

If the uncertainty were limited to cases like *Albertini*, where first amendment review consists of the *O'Brien* standard, this issue would be of little practical importance. For despite the lengths the Court went to in *Cloud Books* to distinguish *O'Brien*, the *O'Brien* standard, as we have seen, is highly deferential in application. It

²⁵⁶ 472 U.S. 675 (1985).

has never resulted in the invalidation of an incidental restriction of speech.²⁵⁷ Thus, if the *Cloud Books* exception for laws that penalize expressive activity affects only cases like *O'Brien*, *Community for Creative Non-Violence*, and *Albertini*, the dispute may as a practical matter be of little consequence.²⁵⁸

In fact, however, the stakes are more substantial. For in at least some cases involving incidental restrictions that have significant restrictive effects on free expression, the Court has applied a more demanding standard of review. In *Roberts v. United States Jaycees*,²⁵⁹ for example, the Court tested with intermediate scrutiny a law prohibiting discrimination on the basis of sex in any "place of public accommodation," as applied to an organization that refused to admit women as full voting members. Although the Court noted that the law had only an incidental effect on the freedom of association and did "not aim at the suppression of speech,"²⁶⁰ it invoked intermediate scrutiny because the law seriously interfered with the "internal structure" of the association by forcing it to accept members it did not desire.²⁶¹

Similarly, in *NAACP v. Alabama*,²⁶² the Court used strict scrutiny to test a state law, as applied to the NAACP, that required any foreign corporation seeking to do business in the state to provide the state with certain information, including the names and addresses of its members. Although the Court conceded that the challenged statute "may appear to be totally unrelated to protected liberties," it explained that the fact that Alabama "has taken no direct action . . . to restrict the right of petitioner's members to associate freely, does not end inquiry into the effect of the production order," for in "the domain of these indispensable liberties," unconstitutional abridgments, "even though unintended, may inevitably follow from varied forms of governmental action."²⁶³ After concluding that disclosure of NAACP membership could have a "substantial" deterrent effect on the members' first amendment rights, the Court held that, for the law to pass constitutional muster, the "'subordinating interest of the State must be compelling.'"²⁶⁴

²⁵⁷ See text accompanying notes 14-23 above.

²⁵⁸ See Schauer, 26 Wm. & Mary L. Rev. at 787-88 (cited in note 15).

²⁵⁹ 468 U.S. 609 (1984).

²⁶⁰ Id. at 625.

²⁶¹ Id.

²⁶² 357 U.S. 449 (1958).

²⁶³ Id. at 461 (citations omitted).

²⁶⁴ Id. at 462, 463, quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957) (Frank-

Finally, in *Globe Newspaper Co. v. Superior Court*,²⁶⁵ the Court tested with strict scrutiny a court order closing a courtroom to the public during the testimony of a minor victim in a criminal trial for rape, as applied to a member of the press who sought to observe the victim's testimony. Noting that "the criminal trial historically has been open to the press and general public," the Court concluded that to justify a denial of access to such proceedings the government must demonstrate "that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."²⁶⁶

In terms of the *Cloud Books* exception for incidental restrictions that penalize expressive activity, it should be noted that neither *Jaycees* nor *NAACP v. Alabama* nor *Globe* clearly involved a situation in which expressive activity "drew the legal remedy." In *Jaycees*, it was the exclusion of women that drew the legal remedy. In *NAACP v. Alabama*, it was the refusal to turn over the membership lists that drew the legal remedy. And in *Globe*, it was unauthorized presence at the trial that would have drawn the penalty, had a legal remedy been drawn. It is possible, however, to argue that each of these cases involved a penalty on expressive activity. For example, one might argue that in *Jaycees* the exclusion of women is expressive activity because it defines the organization ideologically and is a symbolic expression of policy; that in *NAACP v. Alabama* the relevant penalty is the chilling effect caused by disclosure; and that in *Globe* the presence of reporters at criminal trials is part of the news gathering function and, hence, "expressive" activity. Each of these arguments, however, is strained. Viewed cumulatively, these cases seem to suggest that the Court will undertake first amendment review when an incidental restriction has a significant effect on free expression.

This, then, brings us to the second question left open by *Cloud Books*: If an incidental restriction is subject to first amendment review, to what extent, if any, does the fact that the effect is only incidental dilute the standard of review? The two lines of cases we have already examined suggest that incidental effect does not dilute the standard. In *O'Brien*, *Community for Creative Non-Violence*, and *Albertini*, the Court tested incidental restrictions having only a modest effect on public debate with the same stan-

furter, J., concurring).

²⁶⁵ 457 U.S. 596 (1982).

²⁶⁶ Id. at 605, 607. See also *Press-Enterprise Co. v. Superior Court*, 106 S.Ct. 2735 (1986); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984).

dards of review it ordinarily applies to modest content-neutral restrictions. And in *Jaycees*, *NAACP v. Alabama*, and *Globe*, the Court tested incidental restrictions having a significant effect on public debate with the same, more demanding standards that it ordinarily applies to significant content-neutral restrictions.

This is not to say, however, that an incidental restriction having a particular level of restrictive effect on public debate is necessarily invalid whenever a nonincidental restriction having that same effect is invalid. For example, although the government cannot prohibit all speeches in public parks, this does not mean that it cannot sell its parks—even though the restrictive effects of the two actions on free expression are identical. This is so, not because the sale is tested by a less demanding standard of review, but because the government's interest in selling its parks may be sufficiently weighty, as compared to its interest in prohibiting speeches in the parks it owns, to withstand the ordinary standard of review. Similarly, in evaluating the prohibition on live commercial entertainment in *Schad v. Borough of Mt. Ephraim*, the Court responded to the Borough's contention that it could have "chosen to eliminate all commercial uses within its boundaries" by noting that it "must assess the exclusion of live entertainment in light of the commercial uses Mount Ephraim allows, not in light of what the Borough might have done."²⁶⁷ The Court added, however, that its decision did "not establish that every unit of local government . . . must provide a commercial zone in which live entertainment is permitted."²⁶⁸

At the same time, however, as *NAACP v. Alabama* and *Globe* illustrate, this does not mean that incidental restrictions are never invalid. In some cases, the interests furthered by even an incidental restriction may be insufficient to justify the restriction of free expression. Consider, for example, a law prohibiting all noise in a public park louder than the volume of ordinary conversation, as applied to an individual who wants to make a public speech; a law banning all obstruction of ordinary street traffic, as applied to an organization that wants to have a parade; and a law forbidding any uninvited person to ring a doorbell, as applied to a person who wants to distribute literature door to door. A law that expressly prohibits speeches in public parks, parades on public streets, or door-to-door distribution of literature is unconstitutional. What, then, of my hypothetical laws, which have the same restrictive ef-

²⁶⁷ 452 U.S. 61, 75 (1981).

²⁶⁸ *Id.* at 75 n.18.

fects, but are justified on somewhat different, or at least less underinclusive, bases? In my view, these laws, although less problematic than laws directed expressly at communicative activity, are nonetheless invalid because the governmental interests furthered are insufficiently weighty to justify such significant restrictions on these traditional means of free expression. Although the Court has never directly addressed these precise issues, it has indicated that at least in the public forum context, the "streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely."²⁶⁹

In sum, then, the Court's approach to incidental restrictions reflects an effort to avoid endless inquiries into incidental effect while at the same time invalidating those restrictions that most seriously threaten free expression. The general presumption is that incidental restrictions do not raise a question of first amendment review. The presumption is waived, however, whenever an incidental restriction either has a highly disproportionate impact on free expression or directly penalizes expressive activity. And the latter exception is applied quite liberally whenever the challenged restriction significantly limits the opportunities for free expression. It is an uneasy but not unprincipled compromise.

F. Communicative Impact

As noted earlier, one of the troubling aspects of content-based restrictions is that they usually are designed to restrict speech because of "a fear of how people will react to what the speaker is saying."²⁷⁰ This motivation is constitutionally disfavored because it usually rests either on the assumption that citizens cannot make wise decisions if they are exposed to the expression, or on the assumption that the expression will offend others and perhaps lead to a hostile audience response. Laws that restrict speech for such reasons are presumptively unconstitutional.²⁷¹

In some cases, the government defends content-based restrictions in terms that are unrelated to communicative impact. Should such restrictions—for this reason—be treated as content-neutral, rather than content-based, despite the fact that they are content-

²⁶⁹ *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1968).

²⁷⁰ Ely, *Democracy and Distrust* at 111 (cited in note 46).

²⁷¹ See Stone, *Content Regulation*, 25 *Wm & Mary L. Rev.* at 207-17 (cited in note 1).

based on their face?²⁷²

In *Renton*, the Court upheld a zoning ordinance that restricted the exhibition of motion pictures characterized "by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas.'"²⁷³ Although the ordinance was explicitly content-based on its face, the Court characterized and analyzed it as "content-neutral" because it was defended not in terms of the communicative impact of the restricted speech, but in terms of "the *secondary effects* of such theaters on the surrounding community."²⁷⁴

This is a disturbing, incoherent, and unsettling precedent. It is true that the ordinance in *Renton* was not defended in terms of its communicative impact—at least in the sense that the city's concerns did not implicate either of the constitutionally disfavored justifications ordinarily associated with communicative impact. But the Court had never before *Renton* suggested that the absence of a constitutionally disfavored justification is in itself a justification for treating an expressly content-based restriction as if it were content-neutral. To the contrary, with the single exception of *Renton*, the Court in such circumstances has always invoked the stringent standards of content-based review.

To cite just three of many possible examples, in *Police Department v. Mosley*, perhaps the seminal decision distinguishing content-based and content-neutral restrictions, the Court treated as content-based an ordinance prohibiting all picketing near a school, except for peaceful labor picketing, even though the city sought to defend the ordinance not in terms of communicative impact, but on the ground that nonlabor picketers are more prone to violence than labor picketers.²⁷⁵ Similarly, in *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations*

²⁷² The converse issue can also arise. That is, although the government ordinarily defends content-neutral restrictions in terms unrelated to communicative impact, in some instances it defends such restrictions by reference to communicative impact. This would be so, for example, when an individual whose speech triggers a hostile audience response is prosecuted for provoking a breach of the peace. Because breach of the peace statutes do not usually single out particular messages for restriction, but define prohibited speech in terms of prohibited effects, they are content-neutral on their face. Such laws turn in application on communicative impact, however, and are defended by a justification based on intolerance. Accordingly, such restrictions may appropriately trigger more stringent standards of review than other content-neutral restrictions. This issue is explored in depth in Stone, *Content Regulation*, 25 Wm & Mary L. Rev. at 234-39 (cited in note 1).

²⁷³ 106 S.Ct. 925, 927 (1986).

²⁷⁴ *Id.* at 929 (original emphasis).

²⁷⁵ 408 U.S. 92, 100 & n.7 (1972).

Commission, the Court treated as content-based a commission order prohibiting the school board from hearing nonunion teachers on matters subject to collective bargaining, even though the commission defended its order not in terms of communicative impact, but on the ground that the order was necessary to prevent "‘chaos in labor management [sic] relations.’"²⁷⁶ And in *New York v. Ferber*, the Court treated as content-based a law prohibiting "child pornography," even though the government defended the law not in terms of communicative impact, but on the ground that the law was necessary to protect children who participate in "sexual performances."²⁷⁷

These decisions make perfect sense. Even in the absence of a constitutionally disfavored justification, expressly content-based restrictions pose the two other dangers ordinarily associated with content-based restrictions: they expressly distort public debate in a content-differential manner, and they pose an especially high risk of improper motivation. These concerns are sufficiently serious in themselves to trigger the stringent standards of content-based review.²⁷⁸

If taken seriously, and extended to other contexts, the Court's transmogrification in *Renton* of an expressly content-based restriction into one that is content-neutral threatens to undermine the very foundation of the content-based/content-neutral distinc-

²⁷⁶ 429 U.S. 167, 173 (1976), quoting *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Comm'n*, 69 Wis.2d 200, 212, 231 N.W.2d 206, 213 (1975).

²⁷⁷ 458 U.S. 747, 751, 763-64 (1982). See also *Widmar v. Vincent*, 454 U.S. 263 (1981) (university ban on use of its facilities "for purposes of religious worship or religious teaching" held an impermissible content-based exclusion of religious speech as applied to a student religious group; no compelling state interest in maintaining strict separation of church and state because establishment clause would not bar a policy of equal access to the facilities); *Carey v. Brown*, 447 U.S. 455 (1980) (protecting the privacy of private homes held insufficient to justify a state ban on picketing of residences or dwellings that exempted peaceful picketing of a place of employment from the prohibition); *Greer*, 424 U.S. 828 (goal of keeping official military activities from "the reality and appearance of acting as a handmaiden for partisan political causes or candidates" sufficient to justify Fort Dix's limits on speeches, demonstrations, and leafletting on military property); *Lehman*, 418 U.S. 298 (city desire to limit advertising on public transit vehicles to uncontroversial commercial and public service messages insufficient to justify ban on political ads); *United States v. Robel*, 389 U.S. 258 (1967) (Congress's desire to safeguard national security insufficient to justify effect on freedom of association from statutory requirement that members of Communist Party register with U.S. government).

²⁷⁸ This is not to say that the presence or absence of a constitutionally disfavored justification is constitutionally irrelevant. To the contrary, this factor may play an important role in deciding how to analyze a law that is content-neutral on its face, but turns in application on communicative impact. See *Stone*, *Content Regulation*, 25 Wm & Mary L. Rev. at 234-39 (cited in note 1).

tion.²⁷⁹ This would in turn erode the coherence and predictability of first amendment doctrine.²⁸⁰ One can only hope that this aspect of *Renton* is soon forgotten.²⁸¹

CONCLUSION

While the use of different standards of review for content-based and content-neutral restrictions can be troubling, the content-based/content-neutral distinction is justified by several considerations. Content-based restrictions are more likely than content-neutral restrictions to raise concerns about distortion of public debate, improper motivation, and communicative impact. Moreover, extension of the strict standards of content-based review to content-neutral restrictions would hamstring regulations that are practical and necessary exercises of state power and lead ultimately to a dilution of the strict standards of content-based review.

The Court's analysis of content-neutral restrictions is designed primarily to assure that adequate opportunities for free expression remain open and available. This is essential for the preservation of a vital and robust public debate. The Court's analysis is also shaped, however, by such secondary considerations as disparate impact, public property, tradition, discrimination against speech, incidental effect, and communicative impact. The result is a complex and at times patchwork set of outcomes and doctrines.

Although the Court's content-neutral jurisprudence follows a relatively predictable pattern, the Court has failed to make sufficiently explicit the considerations that shape its analysis and yield its results. This has needlessly exacerbated the uncertainty that is already inherent in the balancing approach the Court uses in reviewing content-neutral restrictions. The time has come for the Court to take a more structured approach. It should make clear

²⁷⁹ It should be noted that there were alternative arguments the Court could have made in *Renton* that might more sensibly have supported a dilution of the standard of review. See Stone, Content Regulation, 25 Wm & Mary L. Rev. at 242-44 (cited in note 1); Stone, Subject-Matter Restrictions, 46 U. Chi. L. Rev. 81 (cited in note 1).

²⁸⁰ For discussion of a related issue in the context of pornography, see Stone, Anti-Pornography Legislation, 9 Harv. J. L. & Pub. Pol. at 469-72 (cited in note 1).

²⁸¹ It is noteworthy that in *Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986), which involved the constitutionality of a federal statute prohibiting any hostile demonstration within 500 feet of a foreign embassy in order to comply with the requirements of international law, the court of appeals, recognizing the uncertain status of this aspect of *Renton*, declined to rely upon it despite its potential application to the case at hand. See *id.* at 1469 n.15.

both the lines between content-based and content-neutral review and the three-tiered approach it takes toward content-neutral restrictions on speech. The result will be a more stable jurisprudence that will serve both to protect the opportunities for free expression and to safeguard those neutral laws that are truly necessary to the public order.