CONTENT DISCRIMINATION AND THE FIRST AMENDMENT

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The doctrinal web surrounding the free speech clause of the first amendment is one of the most complicated and confusing in constitutional law.¹ Perhaps in part in an effort to bring order to this confusion, the Supreme Court has turned increasingly in recent years to larger organizing principles that cut across the various lines of doctrine. One of the most important of these is the distinction between content-based and content-neutral regulations of speech.² The distinction has enjoyed growing prominence as a judicial tool for categorizing government actions regarding expression and for justifying the level of scrutiny applied to those actions.³ Although both the coherence and the usefulness of the distinction have generated great controversy among commentators,⁴ the Supreme

¹ See S. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 3 (1990); Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285, 308-09.

² The Court has also developed two other large organizing principles. The first is the public forum doctrine, which allows the Court to relegate certain regulations of speech to lower levels of scrutiny because they apply to speech on government property that has neither traditionally nor voluntarily been opened to the public for speech purposes. See *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 802-03 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). The second organizing principle is the categorization of speech into certain content categories that receive less than full constitutional protection. See, e.g., *New York v. Ferber*, 458 U.S. 747, 763-64 (1982) (child pornography); *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63 (1980) (commercial speech); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) (commercial speech). These two principles have been just as controversial as the content discrimination principle that is the subject of this Article. For a sampling of the commentary on the latter principle, see Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671 (1983).

Although all three organizing principles intersect at various points, see, e.g., *Perry*, 460 U.S. at 46 (finding viewpoint discrimination illegitimate even in a non-public forum), they are fundamentally independent, and my focus is on the content discrimination principle. I will, therefore, consider almost exclusively cases involving fully protected speech taking place in a public forum.

³ See Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189-97 (1983).

⁴ See, e.g., Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980) (supporting the Court's use of the distinction); Redish, *The*

Court has continued to use the distinction, to develop it in new ways,⁵ and to apply it in new contexts.⁶

The Court's growing focus on content discrimination as the central concern of the first amendment has met with mixed enthusiasm from legal scholars. This new organizing principle in first amendment jurisprudence has been criticized, among other things, as ignoring the impact that content-neutral regulation can have on the total quantity of speech.⁷ As Justice Marshall put it, the principle condemning content discrimination has been used by the Court to turn equality from a floor guaranteed to all into a ceiling.⁸ I believe that these criticisms are justified and that the content discrimination principle is by no means a sufficient foundation for first amendment doctrine. I also believe, however, that the principle is a quite powerful one and that it does capture one of the central and essential elements of the free speech guarantee. Rather than criticizing the Court's overly exclusive reliance on the content discrimination principle, I would like to suggest that, in an important sense, the Court has not used the principle enough.

One of the major problems with the Court's present use of content discrimination is simply that the Court has not understood and applied the principle broadly. The Court, with the concurrence of most commentators, has interpreted content discrimination quite narrowly as involving a particular type of government purpose served by the regulation of speech. It has, therefore, ignored other types of content discrimination unrelated to the government's purpose. This refusal to recognize other types of content discrimi-

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Content Distinction in First Amendment Analysis, 34 STAN. L. REV. 113, 113 (1981) (stating that the Court's content distinction "is both theoretically questionable and difficult to apply"); Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 203-06 (1982) (arguing that government should be able to regulate based on subject matter but not viewpoint of speech); Stone, *supra* note 3 (arguing that the content distinction is necessary); Note, *Content Regulation and the Dimensions of Free Expression*, 96 HARV. L. REV. 1854, 1856 (1983) (suggesting an alternative approach to content-based regulation of speech).

⁵ See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49 (1986) (involving city ordinance restricting location of adult theaters); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 65-71 (1976) (same).

⁶ See, e.g., *Boos v. Barry*, 485 U.S. 312, 319-20 (1988) (regarding ordinance prohibiting protests within 500 feet of foreign embassies).

⁷ See, e.g., Redish, *supra* note 4, at 128-31.

⁸ See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 313 (1984) (Marshall, J., dissenting).

nation has resulted in the systematic underprotection of speech and serious doctrinal confusion.

Most observers appear to agree with the Court that the special danger in cases of content discrimination lies in the fact that the government's purpose is connected to the "communicative impact" of the speech regulated.⁹ "Communicative impact," although defined slightly differently by different authors,¹⁰ involves the function of the speech act as communication—its transmission of a message to the mind of a listener—rather than the function of the speech act as a physical event in the world. For example, the communicative impact of a sound truck announcing "The Vice President is an idiot" is the outrage, or amusement, of the recipients of the message; a noncommunicative impact might be the increased noise on the street. All expression takes place through some physical medium, therefore all speech has both communicative and noncommunicative effects.¹¹ As a general rule, the communicative effects of a given speech act will depend upon the content of the message communicated, while the noncommunicative effects will usually be independent of the message. Therefore, according to the Court, content discrimination occurs when the government's purpose concerns the communicative impact of the speech, and not

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⁹ See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 789-91 (2d ed. 1988); Alexander, *Low Value Speech*, 83 NW. U.L. REV. 547, 553 (1989); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1497 (1975); Friedman, *Why Do You Speak That Way?—Symbolic Expression Reconsidered*, 15 HASTINGS CONST. L.Q. 587, 599-601 (1988); Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29 (1973); Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 WM. & MARY L. REV. 779, 782-83 (1985); cf. Stone, *supra* note 3, at 207-17 (arguing that although communicative impact alone will not explain the prohibition on content discrimination, it is an important part of the explanation because most content-based regulations are aimed at communicative impact). But see Farber, *supra* note 4, at 743-47 (rejecting attempts to define content regulation in terms of communicative impact). For evidence of the Court's own recognition that content discrimination has to do with a government purpose concerned with communicative harms, see *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2753-55 (1989); *Playtime Theatres*, 475 U.S. at 48; *Buckley v. Valeo*, 424 U.S. 1, 17 (1976).

¹⁰ See, e.g., M. NIMMER, *NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT* § 2.04 (1984 & Supp. 1989); L. TRIBE, *supra* note 9, § 12-2, at 789-91; Ely, *supra* note 9, at 1497.

¹¹ If the speech does not reach a listener, there may be no actual communicative impact. There may, however, still be the potential for a communicative impact about which the government might legitimately be concerned.

when the government's purpose concerns the noncommunicative impact.¹²

This focus on a narrow concept of content discrimination has meant that the vast range of "content-neutral" regulations of speech—which once generated a broad and flexible array of tests and standards—have been relegated to a secondary status, their distinctions often ignored and their fate a very deferential level of review. The largest single class of such regulations is comprised of "time, place, or manner" (TPM) restrictions. This category is itself a small universe, ranging from parade permit requirements¹³ to total bans on particular speech formats, such as handbilling¹⁴ or posting signs on public utility poles.¹⁵ In addition, many symbolic speech cases also fall into the content-neutral category, including, for example, *United States v. O'Brien*,¹⁶ which concerned the validity of a law prohibiting draft card burning. Finally, the category also includes a variety of other less easily classifiable cases, often involving the incidental impact of non-speech oriented regulations on speech or speakers.¹⁷

One of the most noticeable yet least noticed results of the Court's growing neglect of "content-neutral" regulations of speech has been its collapse of the previously independent lines of doctrine regarding TPM regulations and symbolic speech regulations into a single standard.¹⁸ The Court, arguing that the two standards were always functionally identical, has melded them into one test.¹⁹

¹² See *infra* notes 26-89 and accompanying text.

¹³ See *Cox v. New Hampshire*, 312 U.S. 569 (1941).

¹⁴ See *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

¹⁵ See *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

¹⁶ 391 U.S. 367 (1968).

¹⁷ See, e.g., *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (involving the closing, under a general public health nuisance law, of an adult bookstore which was the site of prostitution); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (concerning a tax on ink and newsprint that affected only a small portion of the press and supplemented the general sales tax).

¹⁸ For a look at some of the rare commentary on this doctrinal collapse, see Day, *The Hybridization of the Content-Neutral Standards for the Free Speech Clause*, 19 ARIZ. ST. L.J. 195, 196-97 (1987); Day, *The Incidental Regulation of Free Speech*, 42 U. MIAMI L. REV. 491, 495, 518 (1988) [hereinafter Day, *Incidental Regulation*]; Werhan, *The O'Briening of Free Speech Methodology*, 19 ARIZ. ST. L.J. 635, 637-38 (1987).

¹⁹ See *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2757 (1989) (stating that "in the last analysis [the *O'Brien* test] is little, if any, different from the standard applied to time, place, or manner restrictions" (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984))); *Taxpayers for Vincent*, 466 U.S. at 804-12 (using both the *O'Brien* and TPM tests in its analysis of content-neutral regulations).

Legal scholars have largely abetted the Court in this move to unify the treatment of "content-neutral" regulations of speech by arguing that the *O'Brien* test was not intended to, and should not, be limited to symbolic speech cases.²⁰ Although the two separate lines of doctrine were far from robust even when they were independent, the new unified doctrine provides even less protection for speech. This result should be unsurprising given that the Court's move to unify the standards arose out of a devaluation of the speech concerns at stake in regulations that did not involve content discrimination in the government's purpose.

This Article will argue, however, that content discrimination is not one concept but many. There are several different types of content discrimination. The government's purpose is one type of discrimination, but it is only one. Content discrimination may occur in the impact of the regulation on the marketplace of ideas available to listeners, as when a regulation bans a certain format that is systematically associated with particular speakers or points of view, thereby reducing the availability of that point of view in the marketplace.²¹ Content discrimination may also occur in the impact of the regulation on the speaker's chosen message, as when a regulation removes certain symbols or symbolic activities from the range of expression available to speakers.²² Each of these types of content discrimination may exist in conjunction with, or indepen-

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²⁰ See, e.g., M. NIMMER, *supra* note 10, § 2.06[A], at 2-85 to -93; Ely, *supra* note 9, at 1484 n.11; Schauer, *supra* note 9, at 785 n.22; cf. L. TRIBE, *supra* note 9, § 12-23, at 982-84 (arguing that if the government's purpose was understood as noncommunicative in *O'Brien*, then the Court's analysis was an appropriate application of the lower level of scrutiny reserved for content-neutral regulations generally); Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48-52 (1987) (describing *O'Brien* as one of the general content-neutral standards, essentially identical to the TPM standard, and in no way restricted to symbolic speech cases).

²¹ See, e.g., *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) (pointing out that door-to-door distribution of literature is "essential to the poorly financed causes of little people"); *Schneider v. New Jersey*, 308 U.S. 147, 170-71 (1939) (striking down a law that prohibited handbilling). But see *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 802 (1984) (upholding regulation barring posting of signs on public utility poles); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 50-54 (1983) (upholding regulation barring rival union from use of school mailbox system).

²² For examples of such content discrimination in symbolic speech cases (although it is not always recognized as such in the opinions), see *United States v. Eichman*, 58 U.S.L.W. 4744 (U.S. June 11, 1990) (striking down a law restricting the burning of the American flag); *Texas v. Johnson*, 109 S. Ct. 2533 (1989) (same). But see *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding a regulation against burning draft cards).

dently of, the other types. Content discrimination, then, can best be understood not as a single concept, but as a family of concepts.

Each type of content discrimination raises related, but distinct, first amendment concerns. As a result, each type should receive somewhat different doctrinal treatment. The issue here is not primarily one of the level or stringency of review but of tailoring the standard to meet the problem. Certain doctrinal tools—for example, least restrictive means, adequacy of alternatives, and restrictions on official discretion—are particularly well suited to dealing with certain types of discrimination. A variety of tests is appropriate (and will not lead to chaos) if the tests respond to a range of discretely identifiable problems.

The effort to construct such specific and context-sensitive standards to deal with the different types of content discrimination discloses the value of keeping distinct the old lines of doctrine that the Court has recently elided. Several of the types of discrimination unrecognized by the Court affect regulations that are, in the Court's narrower view, "content-neutral." TPM regulations may have a discriminatory impact on the free speech market by silencing some messages more than others, and it is a central feature of the symbolic speech cases that the regulation restricts not merely the occasion for speech but the speaker's message itself. The old lines of doctrine concerning TPM regulations and symbolic speech regulations, far from being interchangeable, utilized different doctrinal tools to respond to the different types of content discrimination inherent in these various regulations. A broader view of content discrimination leads to a greater understanding of the differences between these lines of doctrine and of the valuable and independent role of each.

Indeed, it is the Court's refusal to recognize the other types of content discrimination and the usefulness of the old tests in dealing with them that has led to doctrinal confusion. For example, the Court has failed to give a coherent account of why the TPM and symbolic speech lines were ever separate at all, of why the adequacy of alternatives is constitutionally significant, and of why regulations that chill certain types of speech should receive strict scrutiny if content discrimination in the government's purpose is the central concern of the first amendment. All of these doctrinal issues become clear when the various types of content discrimination, with their unique characteristics and difficulties, are recognized.

This Article will present an argument for using a broader interpretation of the content discrimination principle to bring some

order to this corner of first amendment doctrine. Part I will trace the development of the Court's focus on content discrimination and the erosion of the independent lines of TPM and symbolic speech doctrine. Part II will then define more precisely the different types of content discrimination, and discuss the sense in which they are related to basic notions of equality and to the central concerns of the first amendment. Part III will describe a doctrinal approach sensitive to each type of content discrimination and will examine some representative cases to illustrate the application of that approach.

The goal of this Article is not to provide a comprehensive framework for first amendment analysis, but simply to contribute to the process of practical reasoning²³ concerning one part of the complex reality addressed by free speech doctrine. Content discrimination, while not the only concern of the first amendment, is a central concern and one that has been misunderstood. This Article attempts to provide a more complete and coherent picture of what content discrimination means, why it is significant, and how recent doctrinal developments have reduced the tools that once existed to deal with its various manifestations.

I. THE DOCTRINAL BACKGROUND

The development of free speech doctrine is generally traced to the beginning of the twentieth century.²⁴ The concern with content discrimination by government was a part of that doctrine from very near the beginning and is in no sense a new idea. The modern evolution of that idea, however, has taken two distinctive directions.

First, content discrimination has evolved from a characteristic of the regulation more generally, in either its words or its operation, to a characteristic of the government purpose served by the regulation. Under the Court's present approach, a regulation will qualify as content discriminatory only if the government purpose

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²³ See Farber & Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1616-17 (1987) (rejecting the high level of abstract thinking common to modern theories of the first amendment and explaining that the process of practical reasoning is a complex process that is better "learned through example than through rules").

²⁴ See Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 516-17 (1981). Rabban argues that the years before the First World War also offer important insights, but he acknowledges that the Court wrote a greater number of carefully considered opinions in the period that is generally the focus of study. See *id.* at 518-20.

served by the regulation is related to the content of the speech. Neither a content-discriminatory impact, either on the speech market in general or on the speaker in particular, nor a content distinction on the face of the regulation, will suffice to make a regulation content-discriminatory in the absence of this type of government purpose.²⁵ This narrow, "government purpose" interpretation of content discrimination is a dramatic change from the broader, more pragmatic approach utilized by the Court earlier in the development of the concern about content discrimination.

Second, this limited notion of content discrimination has become so dominant a part of the Court's view of the first amendment that it has caused the Court to ignore other distinctions within the class of "content-neutral" regulations. Different types of regulations, even if they all share a lack of discriminatory government purpose, have the potential to create other serious and distinct types of problems. Early first amendment doctrine, developed in the case-specific common law method, was sensitive to these variations and employed a broad variety of doctrinal tools to assess the different problems each case presented. The Court, however, recently has collapsed these previously independent lines of doctrine into one, rather weak, standard.

These two developments are related. Once the Court became preoccupied with the government purpose view of content discrimination, the most salient fact about "content-neutral" regulations was a shared lack of this kind of discrimination. From this perspective, such regulations looked more alike than different. It is, therefore, unsurprising that the Court should be inclined to design a unified standard to handle all of them. Similarly, if the focus is on content discrimination in the government's purpose, then other dangers posed by these "content-neutral" regulations seem less serious. It is, therefore, also unsurprising that the unified standard should be a fairly lenient one. Thus, I suggest that the Court's focus on the narrow, government purpose model of content discrimination was instrumental in reducing both the complexity and the stringency of the doctrine applicable to "content-neutral" regulations.

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²⁵ See *infra* notes 26-89 and accompanying text.

A. Content Discrimination in the Government's Purpose

The Court's concern with content discrimination in a regulation originally included, but was not limited to, discrimination in the government's purpose. This concern has gradually narrowed, however, until the only locus of content discrimination recognized by the present majority is the government purpose served by the regulation. Although this narrowing took place primarily in the context of sexually explicit speech, most of the Justices have recently indicated that they are willing to apply this constricted notion of content discrimination even to fully protected political speech.²⁶

Despite some early indications of concern about content discrimination,²⁷ the classic statement of the requirement of content neutrality did not appear until 1972. In *Police Department v. Mosley*,²⁸ the Court clearly announced the first amendment's antipathy for content discrimination and, less clearly, described what content discrimination meant. Although *Mosley* is somewhat ambiguous, the best interpretation of the case is that the Court's concern about content discrimination extended beyond discriminatory government purposes.

The local ordinance at issue in *Mosley* prohibited picketing within a certain distance of school buildings during school hours, but exempted "peaceful picketing of any school involved in a labor dispute."²⁹ Justice Marshall, writing for the majority, first pointed out that the regulation referred on its face to the content of the speech: the law permitted picketers with labor-related messages on their signs but prohibited picketers with other messages.³⁰ He then wrote the broad language that is often quoted as the clearest statement of the Court's hostility to content discrimination: "above all else, the First Amendment means that government has no power

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²⁶ See *infra* notes 70-85 and accompanying text.

²⁷ In *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), for example, the Court struck down a tax that applied to only thirteen of Louisiana's newspapers, twelve of which had opposed Governor Huey Long on a recent policy issue. Although the opinion is far from a model of clarity, the Court was candid about its concern that the tax had the "plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers." *Id.* at 251. This opinion, then, confirms that the Court was concerned, even quite early, with content-discriminatory government purposes. For a discussion of some of the other early references to content discrimination, see *infra* notes 316-23 and accompanying text (describing early licensing cases).

²⁸ 408 U.S. 92 (1972).

²⁹ *Id.* at 93.

³⁰ See *id.* at 95.

to restrict expression because of its message, its ideas, its subject matter, or its content."³¹

Although the opinion contains language suggesting that content discrimination is *per se* unconstitutional,³² *Mosley*, along with both earlier and later opinions, makes clear that at least some content-based regulations of speech may be upheld if supported by a compelling enough state interest. The subversive speech cases are quite clear on this point. The government may regulate such speech if it can demonstrate the proper combination of intent to cause harm and sufficient proximity between the speech and serious illegal action.³³ Similarly, *Mosley* itself recognized that "there may be sufficient regulatory interests justifying selective exclusions or distinctions among pickets. . . . But these justifications for selective exclusions from a public forum must be carefully scrutinized."³⁴ The level of scrutiny applied to content-based regulations of speech may often be fatal in fact, but that scrutiny must be applied in each case: content discrimination is not *per se* unconstitutional.³⁵

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³¹ *Id.* The *Mosley* opinion relies on the equal protection clause as well as on the first amendment to generate this anti-discrimination principle. See *id.* at 94-95. It is, of course, entirely possible that the equal protection clause would require this concern with content discrimination even if the first amendment did not. However, the Court's subsequent focus on content discrimination in cases where the equal protection clause is not mentioned makes it quite clear that the first amendment is itself an independent source of the anti-discrimination principle. See Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536-38 (1980); cf. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 26-29 (1975) (asserting that although the Court often addresses the relationship between the first amendment and the equal protection clause, it uses the former as authority in *Mosley*). But cf. United States v. Kokinda, 110 S. Ct. 3115, 3123 (1990) (plurality opinion) (suggesting that concern about disparate treatment of different forms of speech, rather than content categories, is better addressed under equal protection than under free speech doctrine). *Mosley* itself has generally been read by commentators as a first amendment case, see, e.g., M. NIMMER, *supra* note 10, § 2.07, at 2-98; L. TRIBE, *supra* note 9, § 12-2, at 789; Karst, *supra*, at 26-29, and used by the Court as first amendment precedent, see, e.g., San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 571 (1987); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986). I will, therefore, treat it as a first amendment analysis.

³² See *Mosley*, 408 U.S. at 96 ("The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))).

³³ See *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973); *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969).

³⁴ *Mosley*, 408 U.S. at 98-99.

³⁵ See M. NIMMER, *supra* note 10, § 2.05(B), at 2-28; L. TRIBE, *supra* note 9, § 12-2, at 790 n.101.

In light of the first amendment's suspicion of content discrimination, the Court went on to consider and reject the city's claim that the regulation was justified as a means of preventing violent and disruptive picketing.³⁶ This discussion could be interpreted as the Court's explanation of why the asserted state interest was not either sufficiently compelling or sufficiently closely tailored to meet the strict scrutiny standard applied to content-based regulations of speech. Indeed, the Court explicitly asserted that the statute at issue was "broad";³⁷ that the legitimate harms could "be controlled by narrowly drawn statutes";³⁸ and that "Chicago's ordinance impose[d] a selective restriction on expressive conduct far 'greater than [was] essential to the furtherance of [a substantial governmental] interest.'"³⁹

This discussion may alternatively be seen as a hint of the transformation of content discrimination to come. The Court might implicitly have been relying on a concept of content discrimination focused on the government's purpose. This part of the opinion would then have functioned as a rejection of the city's claim that it had a non-content-discriminatory purpose that justified its regulation: preventing noisy and violent picketing that would disrupt schools. The Court cast doubt on the city's claim that its goal was simply to avoid disruption by pointing out that the regulation prohibited even peaceful non-labor picketing. If the structure of the regulation did not match the asserted noncommunicative interest, then maybe the city was really motivated by a desire to silence certain categories of speech because of their content.

As these two readings of the opinion suggest, the case leaves uncertain the relationship between a discriminatory government purpose and the concept of content discrimination. The best interpretation of *Mosley*, however, is that discriminatory purposes and discriminatory operation are each independent and sufficient grounds to find a regulation content-based and subject it to strict scrutiny. The first bit of evidence for this interpretation is the Court's assertion, at the conclusion of its review of the principle banning content discrimination, that "[s]elective exclusions from a public forum may not be based on content alone, and may not be

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³⁶ See *Mosley*, 408 U.S. at 100-02.

³⁷ *Id.* at 102.

³⁸ *Id.* (quoting *Saia v. New York*, 334 U.S. 558, 562 (1948)).

³⁹ *Id.* (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

justified by reference to content alone.”⁴⁰ The second half of this conjunction clearly refers to the government purpose that the regulation serves and that justifies the imposition of a burden on speech. “[J]ustified by reference to content alone” could very easily be translated into “justified by reference to a communicative harm.”⁴¹ The first half of the conjunction, though, presumably refers to something else, or there would be no sense in stating the proposition as a conjunction. In light of the law at issue in the case itself, as well as the cases cited by the Court as applications of this principle, “based on content alone” most sensibly refers to content discrimination on the face or in the operation of the regulation.⁴² This concluding statement of the content discrimination principle would then mean that either type of discrimination—in the government’s purpose, or in the operation of the law—would be sufficient to invoke a higher level of scrutiny.

The second piece of evidence indicating that *Mosley* recognized the possibility of content discrimination even when the government had a neutral purpose appears in the Court’s rejection of the city’s argument about disruption. As I discussed above, this part of the opinion can be read as casting doubt on the city’s proclaimed motive of preventing disruption and suggesting a motive based on a more communicative harm. The city responded to this suggestion by arguing that the content categories mirrored the noncommunicative harm because labor picketing was less likely to be disruptive than other types of picketing. The Court rejected this argument as well. First, the Court suggested that it simply disagreed with the city’s assessment of the relative orderliness of various categories of pickets. The opinion refers to “undifferentiated fear or apprehension”⁴³ and asserts that “[s]ome labor picketing is peaceful, some

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⁴⁰ *Id.* at 96.

⁴¹ Though other translations are possible, subsequent development of the case law, *see infra* notes 47-69 and accompanying text, makes this the most plausible and relevant translation.

⁴² The Court described a series of cases involving discretionary licensing schemes that were, or might have been, used to discriminate against certain speech because of its content. *See Mosley*, 408 U.S. at 96-97. In addition, the decision quoted at length from a concurring opinion by Justice Black dealing with a statute that discriminated on its face between labor picketing and other types of picketing. *See id.* at 97-98 (quoting *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring)).

⁴³ *Id.* at 101 (quoting *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 508 (1969)).

disorderly; the same is true of picketing on other themes."⁴⁴ Second, the Court insisted that the city must make such judgements about disruption "on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression . . . would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis."⁴⁵

While the Court's first argument may simply reflect a higher evidentiary standard, the second argument clearly indicates that content-based classifications are suspect even in the absence of a discriminatory government purpose. Without disputing the city's claim that what it was worried about was noise and violence, the Court refused to allow the city to pursue those legitimate, noncommunicative goals through means that were facially content-based. It relegated the city, instead, to a ban on violent or disruptive picketing and the task of determining on an individualized basis whether any particular picketing posed that danger. Thus, the content-discriminatory operation of the regulation alone must have been constitutionally suspect, even if it was a generally accurate proxy for the noncommunicative harm that was the government's goal.

While ambiguous, *Mosley* suggests that content discrimination can occur even when the government's purpose is noncommunicative, simply because a regulation operates by singling out a certain content category of speech for different treatment. This interpretation of *Mosley* is somewhat inferential; the opinion does not directly address the question of the relationship between content discrimination generally and a discriminatory government purpose. Nonetheless, the language the Court used to describe the proscribed discrimination and the way it analyzed the city's disruption argument make the inference a strong one.

And inference was, for a time, all the Court offered. In subsequent cases, the Court reiterated its concern about content discrimination while avoiding any clarification of the relationship between operational discrimination and a discriminatory government purpose.⁴⁶ The Court finally faced the issue squarely in

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⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (invalidating, because it discriminated on the basis of content, an ordinance prohibiting drive-in theaters with screens visible from public streets from showing films containing

Young v. American Mini Theatres, Inc.,⁴⁷ which addressed a statute restricting the location of movie theaters and bookstores purveying sexually explicit materials but leaving the location of other theaters and bookstores unregulated. Facially and in its operation, the law placed a burden on certain speech because of its content. The city claimed that its goal in regulating this speech was not to silence any viewpoint or subject matter, but to prevent some of the urban blight caused by aggregations of movie theaters and bookstores purveying this category of speech: a rise in the crime rate, a drop in property values, and increasing neglect and abandonment. The city claimed it was trying to reduce these deleterious effects by dispersing such businesses throughout the city.⁴⁸

The Court accepted this argument. Despite the fact that the law was facially content-based, the Court applied the lower standard of scrutiny applicable to content-neutral regulations.⁴⁹ Justice Stevens wrote⁵⁰ that "the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message the film may be intended to communicate."⁵¹ The government did not intend to regulate the films because of such messages, or even because of their offensiveness. Rather, "[t]he [city's] determination was that a concentration of 'adult' movie theaters causes the area to deteriorate . . . . It is this secondary effect which these zoning ordinances attempt to

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nudity).

⁴⁷ 427 U.S. 50 (1976).

⁴⁸ See *id.* at 54-55.

⁴⁹ See *id.* at 71 (finding for the government on the relatively weak basis that "[t]he record discloses a factual basis for the [city's] conclusion that this kind of restriction will have the desired effect"); see also *id.* at 71 n.35 (accepting the district court's finding that there will still be sufficient access to sexually explicit speech). But cf. *L. TRIBE*, *supra* note 9, § 12-18, at 930 & n.11 (suggesting that *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *American Mini Theatres* represent one category of "less-than-complete constitutional protection").

⁵⁰ This part of the Stevens opinion was joined by only three other members of the Court. Justice Stevens relied in his opinion on the lesser first amendment value of sexually explicit speech. Justice Powell refused in his concurrence to endorse that notion, finding it unnecessary to resolve the issue of lower-value categories in order to decide this case. *American Mini Theatres* therefore leaves unanswered the question whether this type of analysis of the government's purpose could save from strict scrutiny a content-based regulation that applied to a fully protected category of speech, such as political speech. As discussed below, the Court is beginning to hint at answers to this question in some recent opinions. See *infra* notes 70-85 and accompanying text.

⁵¹ *American Mini Theatres*, 427 U.S. at 70.

avoid, not the dissemination of 'offensive' speech."⁵² Justice Powell, in a concurrence necessary to make a majority, agreed that "the [city] did not inversely zone adult theaters in an effort to protect citizens against the *content* of adult movies. . . . [T]he [city] simply acted to protect the economic integrity of large areas . . . ."⁵³ Believing that this purpose was unrelated to the suppression of free speech, Justice Powell also applied a lower standard of review than that reserved for content-based regulations of speech.⁵⁴

In what sense is economic and physical deterioration a "secondary" effect distinct from the effect of offense to viewers or listeners?⁵⁵ Secondary effects are, in fact, noncommunicative effects arising from the speech as a physical event in the world, not from the communicative aspect of the speech. That is, the causal chain connecting speech to a secondary effect does not include a link that takes place in the mind of a recipient of the speech. Communication involves the transmission of a message of some kind from one person to another.⁵⁶ If the harm at which the government is aiming will only come about if some message is in fact received by a listener, then the harm is a communicative one. Offense is, of course, a communicative harm. The harm of offense can only occur

⁵² *Id.* at 71 n.34.

⁵³ *Id.* at 81 n.4 (Powell, J., concurring).

⁵⁴ *See id.* at 79-80 (applying the test stated in *United States v. O'Brien*, 391 U.S. 367 (1968)).

⁵⁵ Surely, "secondary" cannot simply mean "indirect," despite the fact that some Justices have interpreted it that way. *See, e.g.,* *Boos v. Barry*, 485 U.S. 312, 336 (1988) (Brennan, J., concurring). The number of intermediate links in the causal chain connecting speech to any type of harm is almost infinitely malleable; the number is entirely a matter of how one chooses to describe them. In addition, unless there is some qualitative difference in the type of causal connection, there is no reason—in terms of the purposes of free speech or the dangers of content discrimination—why a longer causal chain should leave the government freer to regulate based on the resulting harm than would a shorter one.

⁵⁶ Some scholars have argued that communication is too narrow a description of the protected functions of speech. *See, e.g.,* Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 992-96 (1978). *But see* Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 206-07 (1972) (arguing that "free speech" protects communicative acts of expression). While the Supreme Court has occasionally protected solitary, and perhaps noncommunicative, speech, *see e.g.,* *Stanley v. Georgia*, 394 U.S. 557 (1969) (striking down law banning private possession of obscene material), it is clear that communication is the primary speech function that has concerned the Court. *See* L. TRIBE, *supra* note 9, § 12-8, at 837 (using Justice Murphy's dictum in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), as an example); Nimmer, *supra* note 9, at 36 ("Whatever else may or may not be true of speech, as an irreducible minimum it must constitute a communication.").

if someone in fact receives a message from the speech. A drop in property values is, however, a noncommunicative harm. Even if all of the people who actually entered the "adult" theater were deaf and blind, and therefore unable to receive any message from the speech, the property values in the neighborhood of the theater would still drop as long as the business continued to operate.⁵⁷

Justice Stevens's opinion in *American Mini Theatres* treated a facially content-based regulation as content-neutral because the stated government purpose was to control a secondary, or noncommunicative, effect. Indeed, Justice Stevens was quite explicit about his belief that the "essence" of the principle banning content discrimination is a concern about governmental purpose.⁵⁸ Justice Powell also relied on the nature of the government purpose to explain why a lower level of review was appropriate.⁵⁹

This limited, purposive interpretation of content discrimination has been reaffirmed in a series of subsequent cases. In *City of Renton v. Playtime Theatres, Inc.*,⁶⁰ which involved a regulation very similar to the one in *American Mini Theatres*, the Court recognized that the law facially discriminated among content categories of protected speech.⁶¹ Nonetheless, the Court explicitly found the

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⁵⁷ See Quadres, *The Applicability of Content-Based Time, Place, and Manner Regulations to Offensive Language: The Burger Decade*, 21 SANTA CLARA L. REV. 995, 1021 (1981).

⁵⁸ See *American Mini Theatres*, 427 U.S. at 67. Justice Stevens apparently takes an even narrower view of content discrimination than the one here attributed to the Court: only government purposes aimed at communicative effects arising from a *viewpoint* are prohibited; the government is still free to regulate communicative effects that arise from whole *subject matter* categories. Cf. *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978) (arguing that government may, in some circumstances, censor words that are offensive because of their subject matter—depicting intimate bodily functions—but not because of their viewpoint—the political point being made by the use of such words).

⁵⁹ See *American Mini Theatres*, 427 U.S. at 81 n.4 (Powell, J., concurring). Both Justices Stevens and Powell did suggest that if the effect of the ordinance were severely to limit access to these movies, then a stricter standard of review might be appropriate. See *id.* at 71-72 n.35 (Stevens, J.); *id.* at 81 n.4 (Powell, J., concurring). It is possible that they recognized the dangers of content-discriminatory effects even where no government purpose to discriminate exists, but they were more likely restating the requirement of "ample alternative channels for communication," *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976), that was a traditional part of the test applied to content-neutral TPM regulations without evincing any recognition of the content implications that arise when the alternatives are inadequate. See *infra* notes 104-22 and accompanying text (discussing TPM test).

⁶⁰ 475 U.S. 41 (1986).

⁶¹ See *id.* at 47.

law to be content-neutral and properly appraised as a TPM regulation because the government's primary concern was with the secondary effects of the speech.⁶² It concluded, "In short, the Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are justified without reference to the content of the regulated speech.'"⁶³ The Court thereby transformed *Police Department v. Mosley's* two-part statement giving equal concern to facial and operational content discrimination,⁶⁴ into a single-focus standard concerned only with the government's purpose. It explained this definition by pointing to the "fundamental principle that underlies our concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.'"⁶⁵ The Court then proceeded to apply the TPM standard and uphold the regulation against a series of challenges.⁶⁶ This opinion, unlike the Stevens opinion in *American Mini Theatres*, was joined by Justice Powell and commanded a majority of the Court.⁶⁷

After *Renton*, it was clear that the Court had adopted the secondary effects analysis and its underlying purposive theory of content discrimination with respect to zoning ordinances regulating sexually explicit (but non-obscene) speech. Justice Stevens's *American Mini Theatres* plurality opinion relied on the "lesser" first amendment value of such speech in justifying this approach,⁶⁸ while the majority opinion in *Renton* qualified its holding by saying that the content-neutral TPM standard would apply to such zoning regulations "at least with respect to businesses that purvey sexually explicit materials."⁶⁹ The question remaining is whether the Court will extend the secondary effects approach to facially content-based

⁶² See *id.* at 48-49.

⁶³ *Id.* at 48 (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

⁶⁴ 408 U.S. 92, 99-102 (1972).

⁶⁵ *Renton*, 475 U.S. at 48-49 (quoting *Mosley*, 408 U.S. at 95-96).

⁶⁶ See *id.* at 50-55.

⁶⁷ Justice Blackmun, who dissented in *American Mini Theatres*, concurred in the result in *Renton*, although he did not join Justice Rehnquist's majority opinion. Justice Stewart, who had also dissented in *American Mini Theatres*, had been replaced by Justice O'Connor, who joined the majority opinion in *Renton*.

⁶⁸ See *American Mini Theatres*, 427 U.S. at 70-71.

⁶⁹ *Renton*, 475 U.S. at 49.

regulations affecting "higher" value speech, such as core political speech.

Although this question has not yet definitively been answered, the recent case of *Boos v. Barry*⁷⁰ indicates that an affirmative response by a majority of the Court may not be far off. *Boos* involved a law in the District of Columbia prohibiting, among other things, the display of any sign within 500 feet of a foreign embassy if the sign tends to bring the foreign government into "public odium" or "public disrepute."⁷¹ A majority of the Court found the law to be a violation of the first amendment; as many as six Justices may have believed the secondary effects analysis to be appropriate despite the political nature of the speech, and at least five Justices interpreted that standard in such a way as to confirm the claim that a secondary effect is a noncommunicative effect.⁷²

Justice O'Connor, in a section of the Court's opinion joined only by Justices Stevens and Scalia, applied the secondary-effects analysis. She did not explicitly acknowledge that she was extending the analysis beyond its previous realm of application; rather, she described the *Renton* case as simply providing a general definition of content-neutral statutes.⁷³ Thus the opinion does not explain why it is appropriate to apply the secondary-effects test to fully protected political speech. Justice Rehnquist, in a separate opinion joined by Justices White and Blackmun, endorsed the circuit court's reasoning,⁷⁴ a part of which claimed that the *Renton* analysis might be applicable to this regulation of political speech.⁷⁵ As in the O'Connor opinion, neither the circuit court nor Justice Rehnquist provided any explanation of why such an application was appropriate given the special context in which the secondary effects analysis developed. Only Justices Brennan and Marshall insisted that the *Renton* analysis should not be extended to fully protected, political speech.⁷⁶ Thus, a majority of the Court may now be prepared to apply the secondary effects standard to facially content-based regulations of speech in general.

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⁷⁰ 485 U.S. 312 (1988).

⁷¹ *Id.* at 315 (quoting D.C. CODE ANN. § 22-1115 (1981)).

⁷² Justice Kennedy took no part in the case.

⁷³ *See id.* at 320-21.

⁷⁴ *See id.* at 338-39 (Rehnquist, C.J., concurring in part, dissenting in part).

⁷⁵ *See Finzer v. Barry*, 798 F.2d 1450, 1469 n.15 (1987).

⁷⁶ *See Boos*, 485 U.S. at 335-38 (Brennan, J., concurring). These two justices also continued to object to the use of the secondary-effects analysis to transform an otherwise content-based regulation into a content-neutral one. *See id.* at 334.

The *Boos* opinion also confirms that secondary effects are noncommunicative effects, that is, the effects of speech as a physical act in the world, rather than the effects of speech as communication. Justice O'Connor, joined by Justices Stevens and Scalia, found that the law in *Boos* was content-based even under the *Renton* standard because the harm at which it was aimed—the offense to the dignity of foreign diplomats—was not a secondary effect. She explained that “[l]isteners’ reactions to speech are not the type of ‘secondary effects’ we referred to in *Renton*.”⁷⁷ Secondary effects are features that “happen to be associated with that type of speech.”⁷⁸ Examples of secondary effects include congestion, visual clutter, and interference with ingress and egress.⁷⁹ They do not include the “emotive impact of speech on its audience.”⁸⁰ Justices Brennan and Marshall, while finding this standard unmanageable⁸¹ and dangerous,⁸² interpreted it in the same way.⁸³ At least five members of the Court⁸⁴ have, therefore, subscribed to the “noncommunicative effect” interpretation of the *Renton* doctrine.⁸⁵

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⁷⁷ *Id.* at 321.

⁷⁸ *Id.* at 320.

⁷⁹ *See id.* at 321.

⁸⁰ *Id.*

⁸¹ *See id.* at 336.

⁸² *See id.* at 335, 337.

⁸³ *See id.* at 334.

⁸⁴ Three members of the Court may well disagree with this interpretation. Although the Rehnquist opinion, joined by White and Blackmun, does not explicitly address this issue, the circuit court opinion that Rehnquist endorsed argued that the law might well be content-neutral under *Renton*. *See Finzer v. Barry*, 798 F.2d 1450, 1469 n.15 (1987), *modified*, 485 U.S. 312 (1988).

⁸⁵ The recent case of *United States v. Kokinda*, 110 S. Ct. 3114 (1990), illustrates one of the difficulties in applying the communicative-impact approach. *Kokinda* involved a post office ban on solicitation on the sidewalk connecting the building and the parking lot. Obviously, as Justice Brennan pointed out in dissent, the rule is content-based on its face: you can't be arrested if you say “support my cause,” but you can be arrested if you say “contribute ten dollars to my cause.” *Id.* at 3134 (Brennan, J., dissenting). Moreover, Brennan suggested that the post office's purpose in restricting the speech was related to a communicative harm: the embarrassment or annoyance felt by listeners when asked for money. *See id.* The plurality and concurrence, on the other hand, found the regulation content-neutral, *see id.* at 3124, 3125, because they believed the government's purpose was to prevent the congestion and inconvenience caused by the physical acts associated with giving money to a solicitor, such as taking out a wallet or writing a check. Such physical effects may appear to be noncommunicative, but they are not. If the solicitation took place in a language unknown to the listeners, then no one would stop to give money to the speaker. The causal chain connecting speech to harm necessarily involves a step in the mind of a listener who receives and responds to the message. The harm, therefore, was communicative.

Thus the case law demonstrates that the meaning of content discrimination has changed over time from "any restriction on speech, the application of which turns on the content of the speech"⁸⁶ to regulations that are justified "only by reference to the content of speech."⁸⁷ The focus has shifted from the means utilized by a statute and how they actually operate, to the government purpose those means are intended to serve.⁸⁸ Moreover, the government purpose proscribed is one aimed at a communicative effect of speech, an effect involving the communication of some message to the mind of a listener. Finally, this new principle of content discrimination is now in the process of becoming a part of first amendment analysis applicable even to fully protected, political speech.⁸⁹

Although the plurality's failure to recognize the restriction as content discriminatory does cast some doubt on the communicative-impact interpretation, the relevance of the case is limited by the fact that the plurality did not believe that a public forum was involved. In a non-public forum, the government is permitted to engage in "reasonable" regulation on the basis of content as long as it does not disadvantage particular viewpoints. See *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802-03 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). The plurality's discussion of content discrimination, coming as it did within the analysis of a non-public forum restriction, can be read either as dicta or as holding that the rule at issue was not viewpoint discriminatory. In neither case is it a clear refutation of the communicative impact model, but it does indicate the difficulty of applying that model.

⁸⁶ *Boos*, 485 U.S. at 335-36 (Brennan, J., concurring).

⁸⁷ *Id.* at 321 (plurality opinion).

⁸⁸ This development represents yet another example of the growing importance of legislative motive as a limiting principle in constitutional analysis. See, e.g., *Employment Div. v. Smith*, 110 S. Ct. 1595, 1604 n.3 (1990) (explicitly comparing treatment of neutral laws that cause a religious burden to treatment of neutral laws that cause a burden on speech or have a racially disproportionate impact); *Washington v. Davis*, 426 U.S. 229, 240 (1976) (holding that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose").

⁸⁹ I am, in effect, adopting as a descriptive matter the "third formulation" examined by Dean Stone: a regulation is content-based if it turns on communicative impact. See Stone, *supra* note 3, at 209. Stone objected to this formula as not comporting with the case law. However, my description of the history satisfactorily explains the cases he cites as counter-examples. See *id.* at 210-11. *Police Dep't v. Mosley*, 408 U.S. 92 (1972), which I agree does not involve a communicative-impact approach, was decided before the Court adopted this approach in *Young v. American Mini Theatres*, 427 U.S. 50 (1976). *City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976), and *New York v. Ferber*, 458 U.S. 747 (1982), were both decided after *American Mini Theatres*, but are both consistent with the Court's acceptance of a communicative-impact theory of content discrimination.

B. *The Demise of Distinctions Within Content-Neutral Regulations*

The meaning of content discrimination evolved alongside the development of different doctrinal lines designed to deal with the distinct problems of content-neutral regulations of speech. Two of the most important of these lines are the symbolic speech doctrine and the TPM doctrine. Unfortunately, the Supreme Court recently collapsed these two lines into a single, combined standard that apparently applies to almost all cases involving content-neutral regulations.⁹⁰

1. The Time, Place, or Manner Doctrine

The TPM doctrine had its genesis in and acquired its name from the early licensing cases. In *Lovell v. City of Griffin*,⁹¹ for example, the Court pointed out that the ordinance at issue gave the city manager unlimited discretion to deny a license for the distribution of literature "at any time, at any place, and in any manner."⁹² The

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In *City of Madison*, the state had prohibited non-union teachers from speaking on matters related to collective bargaining at board of education meetings open to the public, claiming that such speech constituted "negotiation" with someone other than the union representative and therefore amounted to an unfair labor practice. See *City of Madison*, 429 U.S. at 172-73. Speech constitutes negotiation, however, only when it is communication on issues subject to collective bargaining, not because of any physical effects of the act of speaking. The state, then, was concerned with a communicative harm.

In *Ferber*, the state sought to prohibit the distribution of child pornography. See *Ferber*, 458 U.S. at 750-51. The Court could have analyzed this case under the standard of *American Mini Theatres*, since the primary harm the law sought to regulate was the noncommunicative harm inflicted on children by the production of these materials; distribution was attacked as a means of getting at production. See *id.* at 759. But the regulation in *Ferber*, unlike the one in *American Mini Theatres*, completely prohibited distribution, and might have failed the TPM test by leaving inadequate alternatives. See, e.g., *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 71, 76-77 (1981) (noting that regulation leaving inadequate alternatives fails TPM test). The Court avoided this issue entirely by finding the content category at issue to be excluded from first amendment protection, and thus undeserving of a stricter standard of review despite the facially content-based regulation. See *Ferber*, 458 U.S. at 763-64. Once a category is excluded, the state is free to regulate it any way it chooses, including completely prohibiting it. See *id.* The Court's opinion, which is devoted to justifying the exclusion rather than examining the regulation under the normal content-based standard, is, therefore, consistent with an acceptance of the communicative impact conception of content discrimination as applied to at least partially protected speech.

⁹⁰ See *infra* text accompanying notes 146-72.

⁹¹ 303 U.S. 444 (1938).

⁹² *Id.* at 451; see also *Martin v. Struthers*, 319 U.S. 141, 143 (1943); *Schneider v. State*, 308 U.S. 147, 161-62 (1939).

Court upheld a licensing scheme in *Cox v. New Hampshire*⁹³ after finding that it did not authorize discrimination on the basis of content, asserting that "[i]f a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets."⁹⁴

The name of this category of regulations—TPM—might suggest that these restrictions are distinguished by the fact that they are not total bans on speech but merely regulations of the circumstances in which speech may occur. In other words, the "opposite" of a TPM regulation would be a complete ban or prohibition. The language in these early cases indicates, however, that a TPM regulation is distinguished primarily by its lack of content discrimination, either on its face or in its operation, rather than by the limited nature of its prohibition. It regulates the circumstances of speech rather than the content of the speech.⁹⁵ The "opposite" of a TPM regulation is a content-based regulation.⁹⁶

The Court's approach to format bans confirms this understanding of TPM regulations. If any content-neutral rule⁹⁷ ought to qualify as a prohibition rather than a regulation of circumstances, a ban on an entire format of speech, such as handbilling or posting signs on public utility poles, would appear to be it. The Court, however, has consistently treated format bans as TPM regula-

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⁹³ 312 U.S. 569 (1941).

⁹⁴ *Id.* at 576.

⁹⁵ Cf. Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1219 (1984) (stating that traditional TPM regulations relate only to the physical context of speech).

There is, of course, a relationship between content discrimination and total bans. It would be possible to have a total ban that was content-neutral, but it literally would have to prohibit all types of speech, at all times, in all places, and through all manners and media. Such a regulation, obviously, would be unconstitutional even under the most lenient interpretation of the first amendment, regardless of the particular doctrinal test applied. Short of such a regulation, however, no content-neutral regulation will (technically) be a complete ban. If it leaves any time, place, or manner open then it does not prohibit the speech entirely. Many content-based regulations would also not be total bans, i.e., they would regulate a certain content category without prohibiting it entirely, but content-based regulations do have the potential to function as total bans on certain categories of speech without reaching the absurdity of the total silence rule.

⁹⁶ This is by no means an uncontroversial usage of the term, and not necessarily the one I would choose if I were designing the doctrine, but I believe it is the one most in accord with the Court's own usage. See cases cited *infra* note 99.

⁹⁷ Other than the total silence regulation I discuss above. See *supra* note 95.

tions.⁹⁸ The Court has refused to do so only when the format bans are themselves content-based.⁹⁹

It took some time and a couple of false starts, however, before the Court was able to specify the test to be applied to regulations of the time, place, or manner of speech.¹⁰⁰ The first serious attempt

⁹⁸ See *Stone*, *supra* note 20, at 65; see also *Schad v. Mount Ephraim*, 452 U.S. 61, 74-77 (1981) (ban on live entertainment); *Schneider v. State*, 308 U.S. 147, 155 (1939) (ban on handbilling); cf. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803-06 (1984) (analyzing a ban on posting signs on public utility poles under the combined TPM and *O'Brien* standard that developed later).

⁹⁹ See, e.g., *Metromedia Inc. v. San Diego*, 453 U.S. 490, 515-17 (1981) (rejecting ban on billboards that made exceptions for some commercial billboards); *Carey v. Brown*, 447 U.S. 455, 460-61, 470 (1980) (rejecting ban on residential picketing that made an exception for labor picketing); cf. *Schauer*, *supra* note 1, at 301-02 (discussing *Ferber* as an example of a content-based format ban).

Some commentators have argued for the interpretation I reject here. See, e.g., *Ely*, *supra* note 9, at 1497-98 (describing *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 526 (1969), as a TPM regulation aimed at the content of the speech); *Redish*, *supra* note 4, at 115-16 (describing the opposite of a TPM regulation as a total ban on expression). They approach the issue by assuming that the category of TPM regulations is defined by the plain meaning of its name and then criticize the Court for misunderstanding the implications of that categorization. They also suggest that good reasons exist for treating total bans differently from regulations of the circumstances of speech. See *id.* at 116. As to the plain meaning argument, I demur. It may well be that the words are most naturally read that way, but that is not how the Court has read them. My only purpose in this section is to describe, in as coherent a fashion as possible, the actual state of the doctrine. I think that my interpretation of the category of TPM cases is a better explanation of the precedent than is the plain meaning argument.

As for the second argument, I have two responses to the claim that there are good reasons to treat a ban differently from a regulation. First, short of the extreme hypothetical discussed *supra* note 95, I do not believe that the line between a content-neutral ban and a content-neutral regulation of circumstances can easily be drawn, and I have not seen a satisfactory description of it in the work of its proponents. Second, I believe that the TPM test, properly understood, provides sufficient flexibility to address the additional burdens created by the more restrictive regulations that might be described as bans. See *infra* notes 368-71 and accompanying text.

¹⁰⁰ In a case several years after *Cox*, the Court upheld a local ordinance restricting the use of loudspeaker trucks on city streets. See *Kovacs v. Cooper*, 336 U.S. 77 (1949). Justice Reed's plurality opinion interpreted the ordinance as prohibiting only sound amplifiers that emitted "loud and raucous noises." *Id.* at 85. After considering the important government interests served by reducing noise on the streets and mentioning the other means of communication left open, the plurality upheld the ordinance, as limited by its interpretation. See *id.* at 86-87, 89. Justices Frankfurter and Jackson, writing separately, rejected the plurality's interpretation of the law as limited to loud and raucous noises and stated that sound trucks could be regulated or even prohibited as long as the city avoided content discrimination. See *id.* at 89 (Frankfurter, J., concurring) (referring to his dissent in *Saia v. New York*, 334 U.S. 558, 562-66 (1948)); *id.* at 97-98 (Jackson, J., concurring). Given that both concurrences were necessary for a majority, neither the statutory interpretation nor

to define a standard came with the "compatibility" approach in *Grayned v. City of Rockford*.¹⁰¹ The majority in *Grayned* held that "[t]he nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a

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the incipient doctrinal standard in the plurality opinion could have much precedential value. Indeed, as Justice Rutledge pointed out in his dissent, a majority of the Court interpreted the law as a complete prohibition on sound trucks, regardless of whether they were emitting loud and raucous noises. *See id.* at 104 (Rutledge, J., dissenting). Nonetheless, later Courts have cited *Kovacs* as authority for the proposition that restrictions on decibel levels are acceptable TPM regulations. *See, e.g.,* *Regan v. Time, Inc.*, 468 U.S. 641, 656 (1984).

In several other cases, the Court's analysis of TPM regulations relied on doctrines that have since been discredited and abandoned. In *Cox v. Louisiana*, 379 U.S. 536 (1965), for example, the Court avoided the issue of the constitutionality of a content-neutral ban on parades and meetings on public streets because it found the ordinance at issue to have a history of discriminatory application. *See id.* at 558. Nonetheless, in the course of the opinion, the Court referred to the doctrine that parading and picketing, because they are "speech plus" action, are less deserving of constitutional protection than "pure speech." *See id.* at 555. The Court reaffirmed this doctrine in *Cox's* companion case. *See Cox v. Louisiana*, 379 U.S. 559, 563-64 (1965). In the face of fierce criticism by commentators, however, the Court largely has abandoned the "speech plus" approach. For a sampling of the criticism, see L. TRIBE, *supra* note 9, § 12-7, at 825-27; Ely, *supra* note 9, at 1495.

Similarly, in *Adderley v. Florida*, 385 U.S. 39 (1966), the majority relied on the since-discredited right of "[t]he State, no less than a private owner of property, . . . to preserve the property under its control for the use to which it is lawfully dedicated," *id.* at 47, to uphold a trespass conviction for protesting on the grounds of a jailhouse. The dissent in *Adderley* does hint at the TPM doctrine that was soon to develop, with Justice Douglas admitting that "[t]here may be some instances in which assemblies and petitions for redress of grievances are not consistent with other necessary purposes of public property. A noisy meeting may be out of keeping with the serenity of the statehouse or the quiet of the courthouse." *Id.* at 54.

¹⁰¹ 408 U.S. 104 (1972). Like *Adderley*, *Grayned* poses two questions. First, is the government-owned property the type of place in which the public has a right to engage in first amendment activity? And second, even if it is, does the Constitution allow particular content-neutral restrictions on that activity? The "government as private property owner" argument is clearly an attempt to answer the first question in the negative and thereby eliminate the need to consider the second. The Court has abandoned this argument and now uses the considerably more complex and ambiguous "public forum" doctrine to answer the first question. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-49 (1983). If the Court finds that the property at issue is not a voluntary or traditional public forum, then the test used to answer the second question changes dramatically. *See id.* at 46-47 (upholding regulation because it was "reasonable"). This Article uses TPM to refer only to the type of test applied to answer the second question in the context of a public forum. Neither *Adderley* nor *Grayned* clearly distinguishes these two questions, so I limit my discussion of the opinions to what they reveal about the test to be applied in answering the second question.

particular place at a particular time."¹⁰² The only specific doctrinal formula suggested by the Court to implement this approach was that "the regulation must be narrowly tailored to further the State's legitimate interest."¹⁰³ The opinion's broader TPM statement indicates that both the tailoring of the regulation and the state interest asserted were to be assessed in light of the functions of the place involved. In other words, *Grayned* calls for a highly contextual and case-specific analysis, focused on the degree of and justification for the government's intrusion on expression.

The *Grayned* compatibility approach has, however, been overtaken by a more structured, and generally more lenient, test. The first statement of the modern TPM test appears, strangely enough, as a passing reference in a case creating new doctrine in a different area of first amendment jurisprudence. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹⁰⁴ the Court announced a new approach to commercial speech. In the course of its analysis, however, it purported to summarize existing doctrine on TPM regulations, asserting that such regulations are constitutional "provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information."¹⁰⁵

The first two branches of the three part test do not raise any problems. The content neutrality requirement is a reasonable inference from the early licensing cases.¹⁰⁶ The "significant" state interest requirement also has a foundation in precedent. A significant state interest represents a type of lowest common denominator: some of the earlier cases required a stronger state interest than that, but all required at least that much. The last branch of the test is, however, a substantial departure from precedent. The cases cited in support of this test—*Grayned*, *United States v. O'Brien*,¹⁰⁷ and *Kovacs v. Cooper*¹⁰⁸—simply do not con-

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¹⁰² *Grayned*, 408 U.S. at 116 (quoting Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1042 (1969)).

¹⁰³ *Id.* at 116-17.

¹⁰⁴ 425 U.S. 748 (1976).

¹⁰⁵ *Id.* at 771.

¹⁰⁶ See *supra* notes 91-94 and accompanying text. When phrased in terms of the justification for the regulation, however, this test appears to adopt the government purpose conception of content discrimination.

¹⁰⁷ 391 U.S. 367 (1968).

¹⁰⁸ 336 U.S. 77 (1949).

tain this formula. Although the *Kovacs* plurality mentions the alternative channels of communication left open, it did not present the existence of those alternatives as a constitutional requirement.¹⁰⁹ Indeed, the plurality specifically refused to consider the much greater cost of the alternatives as relevant to the constitutionality of restrictions on loud speaker trucks.¹¹⁰ Neither of the two concurring opinions in *Kovacs*—both of which were necessary for a majority—mentioned the adequacy of alternatives at all.¹¹¹ On the other hand, both *Grayned* and *O'Brien* required that the government's means be closely tailored to serve the state interest asserted.¹¹²

Although the names of the two tests sound similar, there is a substantial difference between a tailoring requirement, like the least restrictive means test, and an ample alternatives requirement. The tailoring requirement asks about the relationship between the end the government wants the regulation to serve and the means it uses to achieve that end. In particular, the Court examines whether there is a different method of achieving the government's goals that places fewer restrictions on first amendment freedom. The "least restrictive means" test is the strictest type of tailoring requirement: in theory the regulation will be struck down if there is any alternative method of achieving the government's goal that is less intrusive

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¹⁰⁹ See *id.* at 89.

¹¹⁰ See *id.* at 88-89.

¹¹¹ Indeed, *Schneider v. State*, 308 U.S. 147 (1939), one of the early TPM cases striking down an anti-handbilling ordinance, indicates that an inquiry into alternatives is not only unnecessary but inappropriate. The opinion states, in often quoted language, 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." *Id.* at 163. The regulations in *Schneider* were struck down because there were more narrowly drawn means of achieving the state's goals of preventing litter and fraud. See, e.g., *id.* at 162 ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets."). Any residual litter or fraud caused by the fact that these alternatives are not as effective as a complete ban is simply too small a government interest to warrant a sweeping prohibition of an important avenue of speech. See *id.* at 164 ("If it is said that these means are less efficient and convenient . . . , the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press."); see also Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1291 & n.28 (1979) (noting requirements in early cases that the government find means other than restrictions on speech to further nonspeech interests).

Thus, *Schneider* is evidence of both the existence of a tight tailoring requirement in the early TPM test and the unprecedented character of the adequate alternatives requirement.

¹¹² See *Grayned*, 408 U.S. at 116-17; *O'Brien*, 391 U.S. at 377.

on speech. The "narrowly tailored" standard, as recently interpreted by the Court, is considerably weaker, requiring only that the means/end fit be good, reasonable, and not an unnecessary intrusion on speech.¹¹³ All tailoring requirements, however, are concerned with the fit between the government end served by the regulation and the means used.

The *Virginia Pharmacy* ample alternatives test, on the other hand, concerns the avenues of speech left open to the speaker if the government regulation is upheld. It asks not about the government's alternatives, but about the speaker's alternatives. The requirement exists because the Court believes that if adequate alternative channels of communication remain, then a regulation restricting a particular alternative will have no more than a minimal effect on speech. This test can also have degrees of strictness. The Court has sometimes described the requirement as one of ample alternative channels,¹¹⁴ which appears to set a high standard. In practice, however, the Court has often applied an "adequate" alternatives test, not an "ample" alternatives test. For example, in *Members of the City Council v. Taxpayers for Vincent*,¹¹⁵ the Court upheld a ban on the posting of signs on public property, asserting that the remaining modes of communication were adequate without specifying what alternatives were available.¹¹⁶ Moreover, the Court suggested that while it will sometimes consider the relative cost of allegedly available alternatives, "this solicitude has practical boundaries."¹¹⁷

Virginia Pharmacy does not mention any type of means/end tailoring requirement, apparently substituting the adequate alternatives requirement for the tailoring requirement. Thus, the *Virginia Pharmacy* test, far from being a mere restatement of established doctrine, was a substantial deviation from precedent, accomplished almost casually, without explanation or argument.

Despite the test's questionable beginning, the Court reiterated its reliance on this three-part standard in several subsequent cases.¹¹⁸ The adequate alternatives branch became firmly estab-

¹¹³ See *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2758 (1989).

¹¹⁴ See *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516 (1981); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981).

¹¹⁵ 466 U.S. 789 (1984).

¹¹⁶ See *id.* at 812.

¹¹⁷ *Id.* at 813 n.30.

¹¹⁸ See, e.g., *Regan*, 468 U.S. at 648 (applying the test to a statute regulating the

lished and, although applied rather differently by different members of the Court, it was relatively uncontroversial. The content neutrality and tailoring prongs, however, generated substantial variation in the test. The meaning of content neutrality has, as discussed above, changed greatly over time. The description of the strength of the government interest required to justify a TPM regulation has varied as well. The major controversy, however, came to center around whether the test included a tailoring requirement, and if so, how stringent a requirement.¹¹⁹

This issue was recently settled in the case of *Ward v. Rock Against Racism*.¹²⁰ The Court held that although a TPM regulation must be "narrowly tailored," it need not be the least restrictive means of serving the government's interest. Indeed, the tailoring requirement is satisfied as long as the "regulation promotes a substantial government interest that would be achieved less

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printing of photographs of United States currency); *Grace*, 461 U.S. at 177 (applying a modified version of the test to a statute prohibiting the display of political flags or banners at the Supreme Court); *Metromedia*, 453 U.S. at 516 (applying the test to an ordinance restricting the use of outdoor advertising); *Heffron*, 452 U.S. at 647-48 (applying the test to a regulation governing the distribution of literature at a state fair).

¹¹⁹ For example, the Court provided a truly ambiguous opinion in *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). Justice White, writing for the majority, quoted a version of the three part standard that did not include a tailoring requirement. *See id.* at 648. He then proceeded to reject the argument that the state interest could have been served by a less restrictive means. He did not, however, take the simplest route and explicitly deny that the test included a tailoring requirement. Instead, he held that the less restrictive means offered would be ineffective, thus suggesting that effective alternatives might have created a constitutional problem for the regulation. *See id.* at 652-54. On the other hand, he rejected the alternatives without any discussion. This lack of serious consideration suggests that the closeness of the means/end fit is not constitutionally significant. *See id.* at 654. The case, in other words, is filled with mixed signals.

The confusion continued through the next several years. In *United States v. Grace*, 461 U.S. 171 (1983), the Court quoted a version of the TPM test that explicitly included a requirement that the regulation be "narrowly tailored to serve a significant government interest," *id.* at 177 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)), and proceeded to strike down the law at issue because it "[did] not sufficiently serve those public interests that are urged as its justification." *Id.* at 181. The following year in *Regan v. Time, Inc.*, 468 U.S. 641 (1984), however, the Court held that "[t]he less-restrictive-alternative analysis invoked by Time has never been a part of the inquiry into the validity of a time, place, and manner regulation. It is enough that the . . . restriction substantially serves the Government's legitimate ends." *Id.* at 657. These variations could, of course, be explained by different opinions held by different members of the Court. *Heffron*, *Grace*, and *Regan* were, however, all written by the same Justice: Justice White.

¹²⁰ 109 S. Ct. 2746 (1989).

effectively absent the regulation”¹²¹ and the regulation does not “burden substantially more speech than is necessary to further the government’s legitimate interests.”¹²²

Thus, the TPM test has developed, from hazy and variable beginnings, into a fairly clear and fairly lenient standard. The government interest and tailoring requirements are quite close to the rational basis standard applied to regulations that do not affect fundamental rights at all. But the adequate alternatives branch of the test is unique and provides a foundation for a more protective approach towards speech.

2. The Symbolic Speech Doctrine

Symbolic speech occurs when the speaker attempts to communicate through non-verbal means. Such means include the simple presentation of recognized symbols, like the swastika or the *Marseillaise*,¹²³ as well as the more active use of symbols, traditional or otherwise, such as the burning of a flag¹²⁴ or of a draft card.¹²⁵ In a true symbolic speech case—one in which it is crucial that the communication takes place through symbolic action—the regulation would have to be aimed at particular non-speech activities, rather than at certain content categories of speech, and the government’s purpose would have to be to prevent some noncommunicative harm caused by such activities. That is, the government action would have to be content-neutral in the ways that the Court has recognized. Only if these conditions are met could the government accurately say that the regulation impacts on speech only because of the speaker’s choice to use that activity as a symbolic part of her message. Because the regulation will be content-neutral, a true symbolic speech case may look very much like a TPM case. Indeed, the regulation may be identical to a TPM regulation, differing only in that in a symbolic speech case it

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¹²¹ *Id.* at 2758 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

¹²² *Id.*

¹²³ See *Casablanca* (Metro-Goldwyn-Mayer 1942) (containing a scene in which Victor Laslo leads the patrons of the club in singing the French national anthem as a symbol of resistance to the Nazi occupation of France and the collaborationist Vichy government).

¹²⁴ See, e.g., *United States v. Eichman*, 110 S. Ct. 2404 (1990) (striking down a federal statute that prohibited flag burning); *Texas v. Johnson*, 109 S. Ct. 2533 (1989) (striking down a state statute that prohibited flag desecration).

¹²⁵ See, e.g., *United States v. O'Brien*, 391 U.S. 367, 376 (1968). See generally *infra* notes 128-42 and accompanying text (discussing *O'Brien*).

interferes with speech by preventing symbolic action rather than by restricting the time, place, or manner of verbal expression.

The Court initially responded to this distinction between the two types of cases by designing a test for symbolic speech cases that was significantly stronger, on its face, than the test for TPM regulations.¹²⁶ It had little opportunity, however, to apply that test to subsequent symbolic speech cases. Gradually, the Court lost sight of the distinction and began to treat the two types of cases as the same. This process culminated in the virtual abandonment of the symbolic speech doctrine in favor of applying a fairly weak version of the TPM test to all "content-neutral" regulations.¹²⁷

The Court first encountered a true symbolic speech case in *United States v. O'Brien*.¹²⁸ The Selective Service law at issue

¹²⁶ See *id.* at 377; see also *infra* text accompanying note 134 (setting forth the *O'Brien* four-part test).

¹²⁷ See *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2757-58 (1989).

¹²⁸ 391 U.S. 367 (1968). At least the case was a symbolic speech case under the Court's interpretation of the facts. Under other, perhaps more plausible interpretations of the facts, *O'Brien* might have been a subversive speech case. See *infra* note 138.

The Court had previously addressed a symbolic speech problem in *Stromberg v. California*, 283 U.S. 359 (1931), in which a teacher was prosecuted for leading a group of children in a pro-communist pledge to a red flag. Unlike the statutes in true symbolic speech cases, however, the regulation at issue in *Stromberg* was facially content-based: it prohibited the display or saluting of any red flag intended to symbolize opposition to organized government. See *id.* at 361. Because the activity—displaying or saluting a red flag—was prohibited only if it carried a certain message—opposition to organized government—the statute was clearly intended to prevent a communicative harm rather than a noncommunicative harm. See *O'Brien*, 391 U.S. at 382. The Court, therefore, treated *Stromberg* as a content-based regulation and rejected the statutory prohibition as too broad and vague to involve the type of serious and immediate threat required to justify regulations of potentially subversive speech. See *Stromberg*, 283 U.S. at 368-70. *Stromberg* is thus better understood as a subversive speech case than a symbolic speech case.

The same analysis might apply to the recent and controversial flag burning cases. See *United States v. Eichman*, 110 S. Ct. 2404 (1990); *Texas v. Johnson*, 109 S. Ct. 2533 (1989). The Court held that the laws at issue in those cases, like the one in *Stromberg*, were concerned with the communicative effects of the proscribed act. See *Eichman*, 110 S. Ct. at 2408-09; *Johnson*, 109 S. Ct. at 2542-43. The question for the Court, therefore, was not how much the government may incidentally limit expression through symbols in the course of its normal regulation of non-expressive behavior—as it would be in a true symbolic speech case—but when it is legitimate for the government intentionally to regulate the messages speakers may offer. The government's concern in these cases was itself a symbolic one—it wished to send a message of contempt for, and intolerance of, hated speech—rather than some practical welfare consideration. Perhaps the cases generated so much anger in the public and in Congress precisely because of the perception that the Court's decision prevented the government from sending that message. The public outcry could be seen as a

prohibited the knowing destruction of a draft registration card. O'Brien had burned his draft card on the steps of the Boston Courthouse as a protest against the Vietnam war.¹²⁹ The Supreme Court upheld his conviction and provided a clear statement of the test to be used in a symbolic speech case.¹³⁰

Although worried about the potentially limitless range of symbolic expression, the Court proceeded on the assumption that O'Brien's act qualified as speech within the meaning of the first amendment.¹³¹ It thereby postponed the difficult task of defining symbolic speech for constitutional purposes.¹³² Noting that "speech" and "nonspeech" elements were combined in O'Brien's expression, the Court held that "a sufficiently important governmental interest in regulating the nonspeech element can justify

confirmation of the majority view that it was dealing with a content-based regulation deserving of strict scrutiny.

¹²⁹ See *O'Brien*, 391 U.S. at 369.

¹³⁰ See *id.* at 376-77.

¹³¹ See *id.* at 376.

¹³² The only case in which the Court has seriously considered this definitional issue is *Spence v. Washington*, 418 U.S. 405 (1974). The case involved a college student who was prosecuted under a state "improper use" statute for displaying a flag with a peace symbol attached to it. The Court recognized that it had to "determine whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Id.* at 409. In order to make this determination, the Court looked to "the nature of appellant's activity, combined with the factual context and environment in which it was undertaken," *id.* at 409-10, and concluded that "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Id.* at 410-11. This conclusion has become the basis for a two-part test applied in order to determine whether purportedly symbolic behavior qualifies for first amendment protection. For example, the Court applied this test in one of the recent flag burning cases. See *Johnson*, 109 S. Ct. at 2539. The Court did not attempt to refine this test any further in the few symbolic speech cases between *Spence* and *Johnson*, preferring instead to adopt the *O'Brien* expedient of simply assuming that the symbolic activity qualified as protected speech. See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (assuming for purposes of decision that "overnight sleeping in connection with a demonstration is expressive conduct protected to some extent by the First Amendment"). But see *id.* at 301-02 (Marshall, J., dissenting) (arguing that making this assumption, rather than carefully examining the basis of the first amendment claim, led the Court to undervalue the speech interest at stake). The Court did offer an interesting view of the symbolic speech issue in *Buckley v. Valeo*, 424 U.S. 1 (1976), in which it found that political expenditures were themselves speech acts (like parading) rather than symbolically expressive conduct, while political contributions were primarily symbolic expressions of support. See *id.* at 16-17, 20-22. Unfortunately, the Court's cryptic discussion of these issues did nothing to clarify the standard for determining which activities qualify as symbolic speech.

incidental limitations on First Amendment freedoms.”¹³³ The four-part test announced in *O’Brien* allows such incidental restriction if the regulation is

within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹³⁴

The language of this test seems to represent a fairly high standard of review. For example, it calls for an “important or substantial” state interest with the means “no greater than is essential” to serve the end.¹³⁵ The Court’s application of the test to *O’Brien*’s facts, though, presaged the lax and deferential way in which it has been used ever since.¹³⁶ The Court found that the Selective Service law met all parts of the test. First, Congress had the constitutional power to pass a law prohibiting the destruction of government documents used in the conscription of an army. Second, “important or substantial” government purposes unrelated to the suppression of free expression were served by preservation of the registration cards, including verification of status and emergency identification. Finally, preventing the destruction of these cards was no more restrictive than essential to insure their continued availability.¹³⁷ The Court, therefore, upheld *O’Brien*’s conviction.¹³⁸

The most interesting aspect of *O’Brien* is that the Court articulated a new four-part test rather than applying the TPM test already available in the case law. The new test was not, of course,

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¹³³ *O’Brien*, 391 U.S. at 376.

¹³⁴ *Id.* at 377.

¹³⁵ *See id.*

¹³⁶ *See, e.g.,* Schauer, *supra* note 9, at 787-88 (explaining that the test was applied toothlessly in *O’Brien* and never used by the Supreme Court thereafter to uphold a speaker’s claim). The test has, however, become a more serious hurdle for the government in the hands of lower courts. *See* W. LOCKHART, Y. KAMISAR, J. CHOPER, & S. SHIFFRIN, *CONSTITUTIONAL LAW* 254 (6th ed. Supp. 1989) (citing lower court cases).

¹³⁷ *O’Brien*, 391 U.S. at 377-82.

¹³⁸ Along the way, the Court also rejected *O’Brien*’s claim that it should invalidate the law because Congress was not motivated by any of the practical purposes the Court considered, but rather by the desire to punish draft card burners precisely because Congress disliked the message of their speech. *See id.* at 382-83. There was substantial evidence in the legislative record to support *O’Brien*’s contention about

created without reference to existing standards. Indeed, there is evidence that the test was merely a restatement of the strict scrutiny standard, but the Court was simply too nervous about the floodgates effect to apply it properly.¹³⁹ Regardless of its relation to strict scrutiny, however, it is clear that the four-part test announced in *O'Brien* was distinct from the TPM test and designed to deal with a different problem.

The *O'Brien* test differs from the traditional TPM standard in at least two ways. First, the TPM test's tailoring requirement is relatively weak.¹⁴⁰ It certainly has never demanded that the restriction be "no greater than is essential to the furtherance of [the government] interest."¹⁴¹ On the other hand, the TPM standard includes an assessment of the adequacy of alternative avenues of speech. This prong is entirely absent from the *O'Brien* analysis, despite a concurrence by Justice Harlan specifically raising the issue.¹⁴²

The Court had little opportunity, however, to apply the test after *O'Brien*. There have been only a handful of cases involving communication through symbolic activity since *O'Brien*, and in each case, the Court has avoided applying the four-part test.¹⁴³ None-

congressional motive. See Velvel, *Freedom of Speech and the Draft Card Burning Cases*, 16 U. KAN. L. REV. 149, 162-63, 167 (1968). Nonetheless, the Court reiterated the "familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *O'Brien*, 391 U.S. at 383.

¹³⁹ See *infra* notes 339-46 and accompanying text (discussing the *O'Brien* standard as strict scrutiny). The *O'Brien* standard is distinguishable from strict scrutiny because it requires that the government purpose be unrelated to the suppression of free expression, while strict scrutiny applies to regulations that are admittedly aimed at silencing certain speech, such as subversive speech laws. Clearly, the Court intended this requirement of the *O'Brien* test to mark its recognition that symbolic speech cases are different from the normal run of strict scrutiny cases because they do not involve content discrimination in the government's purpose.

¹⁴⁰ See *supra* notes 120-22 and accompanying text.

¹⁴¹ *O'Brien*, 391 U.S. at 377.

¹⁴² See *id.* at 388-89 (Harlan, J., concurring).

¹⁴³ A year after *O'Brien*, several school children were disciplined for wearing black armbands as a sign of their opposition to the war in Vietnam. See *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969). The Court decided the *Tinker* case without even citing, let alone applying, *O'Brien*. The conspicuous absence of this recent precedent may have been due to the fact that the school officials acted to silence a particular viewpoint by banning the armbands while allowing students to wear symbols of other political allegiances. See *id.* at 510-11. Such content discrimination would indicate a government purpose related to the suppression of certain speech and, thereby, take the case outside the scope of the *O'Brien* test. It is also possible that the school officials were attempting to silence political expression

theless, it reserved *O'Brien* for the symbolic speech context, never attempting to apply it to run-of-the-mill TPM cases.¹⁴⁴ Thus,

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generally, rather than a single viewpoint. *See id.* at 509 n.3. Such a goal would also take the regulation outside of the *O'Brien* test. Or perhaps because the Court found no evidence to support the school officials' claim that the armbands would cause disruption, *see id.* at 508-09, the school authorities simply had no legitimate reason to prevent the demonstration, and the Court had no need to complete the *O'Brien* analysis by asking whether their reasons were sufficiently substantial and their means no broader than essential.

Similarly, in three cases involving the symbolic use of the United States flag, the Court failed to apply *O'Brien*. In *Street v. New York*, 394 U.S. 576 (1969), the Court believed that Street's conviction might have rested on the words he spoke while burning the flag rather than on his conduct. *See id.* at 588-90. Thus, it treated the case as a government effort to silence "pure speech" because of its content, instead of as a symbolic speech case. Because the speech did not fall into any excluded category (i.e. fighting words) and the strict scrutiny standard for content-based restrictions on protected speech was not met, the Court overturned Street's conviction. *See id.* at 590-94. In *Smith v. Goguen*, 415 U.S. 566 (1974), the Court reversed a conviction for "publicly . . . treat[ing] contemptuously" the United States flag after Goguen was prosecuted for wearing a small flag sewn to the seat of a pair of trousers. The Court found that the statutory language was too vague to give adequate notice of what kinds of behavior were prohibited at a time when casual and unceremonious treatment of the flag had become common. *See id.* at 572-76. The opinion thus failed to consider first amendment issues at all, resting instead on the due process ground of vagueness. Vagueness may be an independent first amendment concern, *see infra* notes 324-28 and accompanying text, but in this case the Court was explicit about the due process foundations of the argument. *See Goguen*, 415 U.S. at 572-76. Finally, in *Spence v. Washington*, 418 U.S. 405 (1974), the Court found that the government interest in statutes proscribing the improper use of the flag was not unrelated to the suppression of speech and that the *O'Brien* test was therefore inapplicable. *See id.* at 414 n.8.

The Court did finally apply the *O'Brien* test in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984), but only after it had, less than two months earlier, combined *O'Brien* and the TPM test into a single standard. *See Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804-12 (1984); *see also infra* notes 146-72 and accompanying text.

¹⁴⁴ *O'Brien* was cited for a number of propositions in the years before *Vincent*, but it was never applied by the Court to a straightforward TPM case. *See, e.g.*, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 69 n.7 (1981) (citing *O'Brien* as support for a fairly stringent tailoring requirement); *Police Dep't v. Mosley*, 408 U.S. 92, 101 n.8 (1972) (same); *Palmer v. Thompson*, 403 U.S. 217, 224 (1971) (citing *O'Brien* as support for the Court's unwillingness to scrutinize legislative motive); *Epperson v. Arkansas*, 393 U.S. 97, 113 (1968) (same). And although the Court in *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982), quoted *O'Brien's* four-part test in a footnote, *see id.* at 912 n.47, it did not explicitly apply the test. In any event, *Claiborne Hardware* involved constitutional protection for a boycott, and might therefore qualify as an instance of symbolic speech rather than a TPM case. *Cf. FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768, 779 (1990) (suggesting that *Claiborne Hardware* marks the boundary of *O'Brien's* protection for expressive boycotts against the antitrust laws). As far as I have been able to determine, the closest the Court ever came in those years to treating *O'Brien* as a TPM case was including it in a string cite in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425

O'Brien, both in its inception and for fifteen years thereafter, functioned as a separate and distinct test for symbolic speech cases, but not TPM cases.¹⁴⁵

3. The Collapse of the Two Lines of Doctrine

As this brief history of almost half a century demonstrates, the Court developed two distinct lines of doctrine to deal with TPM cases and symbolic speech cases. The Court, however, never carefully articulated the differences between the two types of cases that warranted this disparate treatment. It is unsurprising, then, that the two types of cases should come to look more alike under the pressure of a growing focus on content discrimination in the government's purpose. Disregarding the separate lines of development and different doctrinal standards for TPM and symbolic speech cases, the Court has, in the last decade, responded to this pressure by collapsing the two standards into a single test.

The process of consolidation began in *Members of the City Council v. Taxpayers for Vincent*,¹⁴⁶ in which the Court upheld a municipal ordinance prohibiting the posting of signs on public utility poles. The regulation represented a straightforward, indeed almost a classic, instance of a time, place, or manner restriction.¹⁴⁷ The regulation was both facially and operatively content-neutral, and it was designed to combat the noncommunicative harms of distraction to motorists and visual clutter. Moreover, the would-be speakers never suggested that the use of the utility poles carried any symbolic

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U.S. 748, 771 (1976).

¹⁴⁵ See Day, *Incidental Regulation*, *supra* note 18, at 495.

¹⁴⁶ 466 U.S. 789 (1984).

¹⁴⁷ The speakers asserted, and the Court denied, that the utility poles were a "public forum." See *id.* at 813-15. The case might therefore alternatively be described as one involving a non-public-forum regulation, but I think this description would be misleading because the Court applied the TPM and *O'Brien* tests—both of which deal with regulations of speech occurring in a public forum—rather than the tests developed under *Perry Education Ass'n. v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), for non-public fora. I think the Court is most accurately described as having treated the utility poles as part of the larger public forum of the streets, just as a statue would be part of the public forum of the park in which it stood, but refusing to recognize the poles themselves as an independent and important forum. As a result, it assessed the regulation as a restriction on one manner of communicating in the larger public forum of the streets. The Court has recognized, though, that the distinction between these two approaches—classifying the regulation and classifying the speech location regulated—may often be somewhat artificial. See *Vincent*, 466 U.S. at 815 n.32.

or communicative significance for them; it was simply a cheap and efficient means of reaching a substantial audience.

Despite the obvious appropriateness of the TPM test, Justice Stevens, for the majority, stated that *O'Brien* "set forth the appropriate framework for reviewing a viewpoint-neutral regulation of this kind"¹⁴⁸ and proceeded to apply the *O'Brien* standard to the case. The Court did not, however, completely ignore the TPM line of doctrine; the opinion is sprinkled with references to TPM cases and the TPM test.¹⁴⁹ Indeed, the majority opinion devotes a separate section to discussing the adequacy of alternative methods of speech,¹⁵⁰ despite the fact that the *O'Brien* test as quoted by the Court included no such inquiry.¹⁵¹ Thus the majority opinion, although purporting to apply *O'Brien*, actually mixed the two standards for content-neutral regulations. The dissent explicitly concurred in the standard applied,¹⁵² while disagreeing with the majority's application of it, and so joined in the mixing and melding of symbolic speech and TPM doctrine.¹⁵³ In short, no member of the Court addressed and explained, let alone objected to, the combination of the two standards.

Six weeks later, the Court reaffirmed its combined test and addressed the issue somewhat more directly. In *Clark v. Community for Creative Non-Violence*,¹⁵⁴ the majority upheld a National Park Service regulation prohibiting sleeping in Lafayette Park in Washington, D.C. This rule had been challenged by a group wishing to sleep in tents in the winter as a symbolic protest of the plight of the homeless.¹⁵⁵ The Court began its analysis by stating that expression, including symbolic expression, is subject to

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¹⁴⁸ *Vincent*, 466 U.S. at 804.

¹⁴⁹ See, e.g., *id.* at 805 ("[A] city is [not] powerless to protect its citizens from . . . expression which may legitimately be deemed a public nuisance" (citing *Kovacs v. Cooper*, 336 U.S. 77 (1949))); *id.* at 808 (discussing whether the city's regulation, as a TPM regulation, was narrowly tailored to serve its interest (citing *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981))).

¹⁵⁰ See *id.* at 812.

¹⁵¹ See *id.* at 805.

¹⁵² See *id.* at 818 (Brennan, J., dissenting) ("These are the right questions to consider when analyzing the constitutionality of the challenged ordinance . . .").

¹⁵³ See *id.* at 821 & n.2 (Brennan, J., dissenting) (stating that the test for a content-neutral regulation is "(1) whether the governmental objective advanced by the restriction is substantial, and (2) whether the restriction imposed on speech is no greater than is essential to further that objective" and "leave[s] open ample alternative avenues of communication").

¹⁵⁴ 468 U.S. 288 (1984).

¹⁵⁵ See *id.* at 290-92.

reasonable time, place, or manner regulations that are "justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information."¹⁵⁶ The Court also stated that symbolic conduct may be forbidden if the *O'Brien* test is met.¹⁵⁷ The Court then applied the TPM standard in detail and, finding each branch of the test to be met,¹⁵⁸ concluded its assessment by observing that "the foregoing analysis demonstrates that the Park Service regulation [was] sustainable under the four-factor standard of *United States v. O'Brien* for validating a regulation of expressive conduct, which, in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions."¹⁵⁹ The Court explained its conflation of the two tests in a footnote consisting of two largely unsatisfactory reasons for treating the two unique standards as interchangeable.¹⁶⁰

First, the Court asserted that "[i]t would be odd to insist on a higher standard for limitations aimed at regulable conduct and having only an incidental impact on speech" than for "reasonable time, place, and manner restrictions [that] directly limit oral or written expression."¹⁶¹ Time, place, and manner regulations do not, of course, always explicitly limit expression. Traffic regulations may be addressed directly to obstructions of the street, which are generally considered to be regulable conduct, but may also be used to prevent a speech in the middle of Main Street. If "direct" means "explicit," then, as this example illustrates, not all TPM regulations are direct. If "direct" does not mean "explicit," then it is not at all clear what it does mean. In what sense is a TPM regulation like the traffic ordinance a more direct limit on expression than a restriction that prevents the burning of a draft card? Both regulate activities that are usually engaged in for purposes other than communication and both affect speakers as part of the larger category of actors rather than singling them out. Without further explanation, the

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¹⁵⁶ *Id.* at 293.

¹⁵⁷ *See id.* at 294.

¹⁵⁸ *See id.* at 294-98.

¹⁵⁹ *Id.* at 298 (citation omitted). As if to prove the point, the Court then spent a paragraph reviewing why the regulation would pass the *O'Brien* test as well. *See id.* at 298-99.

¹⁶⁰ *See id.* at 298 n.8.

¹⁶¹ *Id.*

reference to directness simply will not justify reducing the facially more stringent *O'Brien* standard to the level of the TPM test.

The other explanation the Court offered was a reference to the precedent provided by *Members of the City Council v. Taxpayers for Vincent*.¹⁶² The majority noted that the *Vincent* "Court framed the issue under *O'Brien* and then based a crucial part of its analysis on the time, place, and manner cases."¹⁶³ While this is true, it is not an explanation. *Clark*, therefore, makes the blending of the tests explicit but offers no further justification for it.

More recent cases have confirmed the demise of the TPM/symbolic speech distinction without providing substantially more by way of explanation. For example, in *Ward v. Rock Against Racism*,¹⁶⁴ the Court, quoting from *Clark*, reasserted the similarity of the two tests and held that neither *O'Brien* nor the TPM standard required the government to use the least restrictive means of achieving its goal.¹⁶⁵ The only explanation offered for the lower tailoring standard shared by the two tests was that they both concerned content-neutral, rather than content-based, regulations.¹⁶⁶ And again the dissent, although disagreeing with the majority's characterization of the standard, did not question the combination of the two tests.¹⁶⁷

These two lines of parallel doctrinal development, then, have miraculously ended in a single point. Despite the different circumstances under which they arose and their very different verbal formulations, the Court has collapsed the TPM and symbolic speech doctrines into a single, rather weak, standard.

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¹⁶² 466 U.S. 789 (1984).

¹⁶³ *Clark*, 468 U.S. at 298 n.8 (citation omitted). This "crucial part" was the discussion of the tailoring requirement and the use of TPM cases to explain why no more narrowly drawn restriction would have sufficed to prevent the visual blight with which the city was concerned. See *Vincent*, 466 U.S. at 808-10.

¹⁶⁴ 109 S. Ct. 2746 (1989).

¹⁶⁵ See *id.* at 2757-58.

¹⁶⁶ See *id.* at 2758 n.6.

¹⁶⁷ See *id.* at 2760 (Marshall, J., dissenting). Interestingly, the majority opinion implicitly separated the two lines of doctrine again in a case handed down shortly after *Ward*. See *Board of Trustees v. Fox*, 109 S. Ct. 3028 (1989). Although insisting that both TPM and symbolic speech doctrines included only a weak tailoring requirement, the majority opinion described the two lines separately and explicitly referred to them as "two lines of authority." See *id.* at 3034 & n.3. This was all dicta, though, since the Court treated the case as involving commercial speech and therefore subject to a separate test altogether. When it matters to the outcome, the Court has shown itself consistently unwilling to distinguish between the two lines of doctrine.

Although the Court continues to refer to the *O'Brien* test, the unified standard that has evolved is really just a weak version of the TPM test. It includes the TPM test's adequate alternatives branch but leaves aside *O'Brien's* explicit demand for heightened attention to both the strength of the government interest and the degree of means/end fit. Unlike some versions of the TPM test, the new standard does purport to include a tailoring requirement. That requirement, however, amounts to little more than the most minimal rational relation review as defined in *Ward*.¹⁶⁸ In the absence of a meaningful tailoring requirement, the new test borrows nothing from *O'Brien* and is functionally identical to the TPM standard as described in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹⁶⁹ As a result, the range of doctrinal tools available to deal with complex first amendment problems has been reduced, and real first amendment protections have been lost.

The Court's growing focus on content discrimination and its gradually narrowing definition of discrimination in terms of government purpose may have caused the Court to conflate the various types of "content-neutral" regulations and to devalue the threat that such regulations pose to freedom of speech. When this narrow, government-purpose version of content discrimination becomes the central concern of the first amendment, then all "neutral" regulations come to look the same and it is plausible that all should receive the same doctrinal treatment.¹⁷⁰ Moreover, that doctrine is likely to be fairly weak since "neutral" regulations do not pose the type of threat with which the Court is primarily concerned.¹⁷¹ Thus, the collapse of these independent lines of doctrine appears to be tied directly to the Court's increasingly restricted interpretation of content discrimination.¹⁷²

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¹⁶⁸ See *Ward*, 109 S. Ct. at 2762 (Marshall, J., dissenting) ("[T]he majority thus has abandoned the requirement that restrictions on speech be narrowly tailored in any ordinary use of the phrase.").

¹⁶⁹ 425 U.S. 748 (1976); see *supra* text accompanying notes 104-17.

¹⁷⁰ See *Ward*, 109 S. Ct. at 2758 n.6.

¹⁷¹ See *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978) (Stevens, J.) (stating that "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas"); *Young v. American Mini Theatres*, 427 U.S. 50, 70 (1976) (Stevens, J., concurring) (noting "the government's paramount obligation of neutrality in its regulation of protected communication").

¹⁷² See *supra* text accompanying notes 24-89.

II. THE CONCEPTUAL FRAMEWORK

In order to understand why the two related doctrinal developments described above are misdirected, it is necessary to examine the concept of content discrimination. This is by no means a novel endeavor. A tremendous amount of scholarly attention has focused on the types of content discrimination and the justification, or lack thereof, for the Court's proclaimed prohibition of content discrimination.¹⁷³ The focus of this section will, however, be slightly different. I will assume that content discrimination is one of the most serious concerns of the first amendment. My goal here is to describe and explain the significance of three different types of content discrimination, of which the Court has recognized only one. The first subsection will define these types and distinguish them from the degrees of content discrimination that are often the focus of scholarly literature. The second subsection will examine general theories of equality, equal protection doctrine, and the more specific theories of free speech in order to justify treating all three types of content discrimination as serious first amendment problems.

A. *Types of Content Discrimination*

The most common approach to content discrimination defines different degrees of discrimination along a continuum in terms of the kind of content category at which the government is aiming, and how evenhanded or biased the content category is. At the most biased end of the continuum is viewpoint discrimination, where the government singles out and disadvantages one view on a subject while leaving other points of view untouched.¹⁷⁴ In the middle of the spectrum is subject-matter discrimination, where the government silences or disadvantages all views on a particular subject.¹⁷⁵ Many scholars have noted the Court's apparent waffling on whether subject-matter regulations receive full content-discrimination scrutiny.¹⁷⁶ At the other end of the spectrum is content-neutral

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¹⁷³ See sources cited *supra* note 4.

¹⁷⁴ The subversive speech cases are good examples of viewpoint discrimination. See *supra* note 128.

¹⁷⁵ For example, a state utility commission might forbid utilities' including literature on controversial public issues in their billing envelopes, regardless of the viewpoint expressed. See *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980).

¹⁷⁶ See, e.g., *Redish*, *supra* note 4, at 117-18; *Stone*, *Restrictions of Speech Because of*

regulation, which applies to all speech, regardless of subject matter or viewpoint.¹⁷⁷

The degrees of content discrimination are crucial in understanding the function and significance of the concept of content discrimination to the Supreme Court.¹⁷⁸ Nonetheless, I would like to suggest and flesh out a different, perhaps more basic, typology. The types of content discrimination that I will describe can, with some modification, take the form of each of the degrees of content discrimination in this schema. The two typologies are thus complementary, not inconsistent.

In order fully to understand content discrimination, we need to recognize not only the degree of discrimination, as defined by the schema above, but also the locus of discrimination. The Court and commentators have predominantly focused on discriminatory government purpose. The method for determining when content discrimination has occurred is usually phrased in terms of communicative impact. When the harm the regulation seeks to remedy necessarily flows from the communicative impact of the speech, then the government's purpose is related to content and the regulation is deemed content discriminatory. Regulations aimed at some noncommunicative impact have no discriminatory purpose toward speech and are seen as content-neutral. Thus, the concept of communicative impact offers a means of determining when governmental purpose should be suspect under the doctrine of content discrimination. The communicative impact model fits comfortably with the motives made suspect by a variety of theories of speech.¹⁷⁹ I will adopt the communicative impact model as an adequate interpretation of the type of content discrimination that

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its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. CHI. L. REV. 81, 83-88 (1978).

¹⁷⁷ For examples and applications of this approach to degrees of discrimination, see Stone, *supra* note 176, at 108-15.

¹⁷⁸ This schema does, however, have some difficulties—most notably in finding a place for some of the other types of content-related discrimination that have come before the Court. For example, speaker-identity discrimination and format discrimination do not easily fit into this schema, but both types of discrimination may have serious implications for communication of certain subject matters or viewpoints. See *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 819-20 (1984) (Brennan, J., dissenting) (format discrimination); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 63-66 (1983) (Brennan, J., dissenting) (speaker identity discrimination).

¹⁷⁹ See *infra* notes 233-302 and accompanying text.

occurs in the government's purpose because it fits both case law and literature.¹⁸⁰

¹⁸⁰ It is worth noting that a regulation may aim at communicative impact without being content-discriminatory; the fit between the two is not perfect. The government may regulate to prevent a harm that arises from the fact of communication alone. Here, the government is aiming at a communicative impact—a harm that would not occur unless a message were being sent and received—but one that does not depend on the content or viewpoint of the message, only on the fact that it is intended and understood as a message. For example, when hecklers interrupt a public speaker, the government could seek to punish them for disrupting a public meeting regardless of what they are shouting. The government's interest does not depend upon whether the content of their speech is obscenities or political oratory, or whether their viewpoint is identical to the speaker's or opposite to it. If, however, the "hecklers" were making noise because they were all ill and could not help coughing, then the government would be much less likely to act against them. The government's interest is not simply in minimizing noise; it is in enforcing the rule of order that requires people to restrain their own urge to communicate while someone else has the floor in a public meeting. This latter interest is, of course, legitimate: without such rules public communication might deteriorate into chaos. It is nonetheless an interest aimed at a communicative harm: only if something is intended to be communicated, and is in fact understood as communication, does the harm occur. As a result, the very same act of coughing would be proscribed if engaged in as communication (heckling) but not if engaged in for some other purpose (clearing one's throat). Such a rule would be justified by a government purpose to prevent a communicative effect, but it could not properly be called content discriminatory because it would silence all content categories of speech evenhandedly.

Because such communicative impacts arising from the mere fact of communication should be relatively rare, this lack of fit does not cause significant problems for the model. Communicative impact is, after all, merely a useful tool for determining when the government is acting with a content-discriminatory purpose. It has no independent constitutional significance of its own.

It is important to note the difference between the example of the hecklers and a case in which the government's intention, although perhaps even more suspect, is to regulate a noncommunicative harm and is therefore non-content discriminatory. In the example above, the communicative harm is both legitimate and serious enough to distinguish speech from other noise-producing activities and may justify the relatively limited infringement on expression posed by a rule against heckling. In some cases, however, the choice to limit speech, but not other activities that cause the same harm, may flow simply from a judgment that the speech is not valuable enough to counterbalance the noncommunicative harm, while other activities are. For example, imagine a noise pollution ordinance that interferes with speech, but not with other activities that might cause the harm, by requiring that loudspeaker trucks be licensed, but not lawnmowers or construction machinery producing the same level of noise. In the absence of some other explanation, the only reason for this different treatment would appear to be that the government values the practical effects of lawnmowers and construction equipment more highly than the communicative effects of speech.

Not surprisingly, even when officials are not hostile to speech, they may value it less than other activities. Officials may inflate their estimate of the harm such speech causes because their power will thereby be increased. Or they may undervalue speech because the political power of speakers is poorly correlated with their social utility. See Goldberger, *Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment*

The government purpose/communicative impact analysis, however, addresses the question of content discrimination solely from the viewpoint of the government officials responsible for a challenged regulation and thus identifies only that type of content discrimination the government intentionally inflicts. There are at least two other speech players from whose perspective content discrimination can be perceived: the audience (or potential audience) and the speaker. When these perspectives are considered, other types of content discrimination emerge.

Commentators opposing the Court's narrow view of content discrimination have often noted that even regulations serving a noncommunicative purpose can have a discriminatory effect on the speech market available to would-be listeners.¹⁸¹ From the perspective of the audience, the relevant question concerning discrimination is whether the impact of the regulation falls evenly across the speech marketplace or disproportionately on one part of it. Even if the government has no wish to discriminate, even if it is aiming at a noncommunicative harm, a regulation may silence some content categories of speech more than others. For example, the Court has long recognized that certain formats, like leafletting, are essential to communication by the poorer segments of society.¹⁸² Restrictions on such formats, even if they serve a noncommunicative

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of *Public Officials*, 32 BUFFALO L. REV. 175, 206-10 (1983) (arguing that officials overregulate potentially controversial and disruptive speech because the disruption, were it to occur, would be more visible and hence more damaging politically than the suppression of speech, and the speakers do not have the power to change the officials' minds). Indeed, the relation between the social utility of speech and the political power of the speaker may often be one of inverse correlation. Cf. *id.* at 208-09 (discussing the special incentives to avoid controversial speech).

Despite these natural incentives to undervalue speech (or perhaps because of them), the first amendment forbids such a low valuation by singling out speech for special constitutional protection. Just as government dislike of a certain viewpoint is inherently suspect, so too is government dislike of speech as compared to other activities. Although it cannot in any obvious way be called content discrimination, this type of discrimination is just as deserving of a stringent level of judicial review. See Baker, *Unreasonable Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U.L. REV. 937, 956-60 (1983).

¹⁸¹ See Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 472 (1980); Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 764-71 (1986); Redish, *supra* note 4, at 130-31.

¹⁸² See *Martin v. Struthers*, 319 U.S. 141, 146 (1943). The Court's sympathy in response to this fact has, however, been sporadic even in the best of times, see *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949), and has been declining in recent years, see *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 n.30 (1984).

purpose like reducing litter, would fall disproportionately on the subjects on which and points of view from which poorer people might speak. If those subjects or points of view are systematically different from the ones that wealthier speakers would raise, then the effect of the "content-neutral" format regulation is to disadvantage some content categories of speech relative to others. From the government's perspective, this result might appear to be simply an unfortunate and unintended byproduct of a neutral regulation. From the perspective of the audience deprived of these points of view, however, it raises a serious issue of content discrimination, an issue independent of the government's purpose.

Government purpose and the impact on the speech market are both fairly obvious loci of discrimination. There is, however, a third type of content discrimination that is somewhat less obvious and much less discussed: that resulting from the impact of a regulation on the speaker. Imagine a law banning all bonfires in public places. The harm the government seeks to control is the danger of the fire's getting out of control and causing damage. This is a noncommunicative harm because it does not depend on anyone's sending or receiving any communication. In this sense, the law is content-neutral in terms of the government's purpose. Suppose also that bonfires are not regularly associated with any particular subject matter or viewpoint. The impact of the law on the marketplace of ideas would then also be content-neutral: the prohibition would not cause some ideas to be systematically disadvantaged relative to others. Finally, imagine that there are two groups who wish to build bonfires in violation of the law. The first is a student group protesting continued investment by the university in businesses operating in South Africa. They will be burning old newspapers to attract a crowd to hear the speakers they have assembled. The second group is made up of students from the People's Republic of China. They wish to burn their student visas as a symbolic protest against the President's veto of a bill that would have allowed them to stay in the United States.

The impact of this law on these two different groups illustrates a third type of content discrimination: discrimination in the impact on the speaker. In order to demonstrate that this impact is a form of *content* discrimination, however, I must introduce a distinction mentioned—although neither clearly defined nor really relied upon—

by the Court in *Clark v. Community for Creative Non-Violence*.¹⁸³ the distinction between facilitative and communicative aspects of speech.¹⁸⁴ A facilitative aspect of speech is that part of the speech activity which the speaker uses to aid in the transmission or receipt of the message, but which does not itself play a role in the representation of the message. A communicative aspect of speech does play a role in the representation of the message. Communication takes place through symbols that represent a message, whether those symbols are words, sounds, actions, images or whatever.¹⁸⁵ Some aspects of any speech activity function as such symbols, and some do not. For example, the decibel level of a loudspeaker truck announcing "A vote for Joe is a vote for the environment" is likely to be facilitative rather than communicative. The loudness itself does not carry or represent a message, it merely makes it more likely that the message carried by the other symbols (here, words) will reach a larger audience than if the loudspeaker were quieter. If, however, the truck were painted green, then that color might well be communicative (as a symbolic representation of the message of environmentalism) rather than simply facilitative (eye-catching so as to increase the chance that passers-by will pay attention to the message carried by the words).¹⁸⁶

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¹⁸³ 468 U.S. 288 (1984).

¹⁸⁴ See *id.* at 296.

¹⁸⁵ Cf. Kaufman, *The Medium, the Message and the First Amendment*, 45 N.Y.U. L. REV. 761, 763-64 (1970) (stating that communication is the transfer of messages, and messages are made up of "any patterned output no matter how primitive the patterning"). Moreover, the nature of the symbol should have no impact on the strength of the *prima facie* claim, although it may, of course, affect the strength of the government's interest in restricting the expression. As one commentator has noted:

[I]t would be surprising if those who poured tea into the sea and who refused to buy stamps did not recognize that ideas are communicated, disagreements expressed, protests made other than by word of mouth or pen. Words may be less ambiguous than other symbols and are common coin of communication, but there is no reason to limit the constitutional protection to that form of communication alone—as the Court itself has recognized when its sympathies sharpened rather than blurred its vision.

Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79 (1968).

¹⁸⁶ This distinction may collapse in extreme and unusual cases, as, for example, where the "message" being represented is simply "Hey, caught your attention!" In addition, the distinction is not always easy to apply in practice, since the speaker's uses for various aspects of the speech activity are often unclear and sometimes mixed. Nonetheless, whatever difficulties it may entail are worth undertaking because the distinction captures a fundamental difference in the speaker's attitude that ought to carry first amendment significance if we are concerned about content discrimination. In any case, as the analysis employing it demonstrates, the distinction is generally a

Now, consider the pro-divestment student group in my earlier hypothetical. The anti-bonfire law does not interfere with a communicative aspect of the group's activity, only a facilitative aspect. The bonfire does not act as a symbol representing a part of their message; it simply helps to increase the number of people to whom the message can be transmitted. If the group can find another way to draw as large a crowd, the ban on bonfires will not affect their speech at all. And even if they cannot find another way to draw as large a crowd, only the effectiveness, not the content, of the message will have been altered.

The law as it affects this group is most appropriately analogized to a traditional TPM regulation prohibiting parades down Main Street during rush hour. Clearly a parade at rush hour will reach more people, so the regulation interferes with the speech of would-be paraders who now have to find some other time or place for their expression. This interference is why the first amendment applies to such TPM regulations and raises the level of judicial scrutiny above the mere rationality standard. But such laws are not content discriminatory, and the same is true of the bonfire ban as applied to my first student group.

The group of Chinese students, on the other hand, is experiencing a type of content discrimination, despite the fact that neither the government's purpose nor the general impact of the law on the speech marketplace is discriminatory. The discriminatory effect arises because the prohibited activity—building a bonfire—is, in this case, inherently communicative rather than merely facilitative. The bonfire is itself a symbolic message. To tell this group that it may not build the fire is not merely to alter the effectiveness of its speech; it is to change the very content of the group's message, to limit what the group may say.

It is true, of course, that the group could try to send a similar message through different means. The members might explain that they wanted to burn their visas but were prevented from doing so, or perhaps they could destroy the visas by cutting them up or trampling on them. But the message would not be the same. The fire itself carries certain connotations—raging destructiveness, hell fire, etc.—that are not captured by a denotative description of the

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manageable one. See *infra* notes 187-89 and accompanying text; *infra* notes 375-83 and accompanying text.

act or by a different means of destruction. The content of the speech is necessarily altered.¹⁸⁷

The point is clearer when placed in the context of that set of symbols we call words. If the government put certain words off limits—like “tyrant” and “tyranny”—speakers would find other words to try to express their thoughts. Nonetheless, what they could say would be different, lacking in the historical and patriotic nuances inherent in the word “tyranny.” Speakers would experience such a law as a limit on the content of their message and not merely on the format or manner or medium. Moreover, a law restricting the very words one may use is surely so obvious a content-based regulation of speech that no consideration of the government’s purposes is necessary.¹⁸⁸ When the symbols used by a speaker are not words, other types of regulations may have this same limiting impact on a communicative aspect of speech activity, and should also be seen as content discriminatory.¹⁸⁹

All three types of content discrimination—in the government purpose, in the impact on the audience, and in the impact on the speaker—may appear in different degrees. The government’s purpose may be related to the communicative effect of a particular viewpoint or of an entire subject. A regulation aimed at a non-communicative effect may result in the audience’s loss of access to a particular viewpoint or to a whole subject category. Furthermore, the inherently expressive activity restricted in the impact on the speaker may contain a message tied very closely to a particular viewpoint, as in my example, or it may communicate only a general subject matter. But these distinctions of degree are less meaningful in the context of this last type of discrimination than they were in the other two. From the speaker’s perspective it may not matter very much whether it is her particular viewpoint or an entire subject matter that is affected; in either case, the speaker is being told she cannot say what she wishes to say. And although there can be relevant differences of degree—for example, how central the speech is to the overall message she wishes to convey—the view-

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¹⁸⁷ See Friedman, *supra* note 9, at 594-95 (making a similar argument that the act of sleeping in *Clark* had communicative impact).

¹⁸⁸ But see *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 537 (1987) (upholding a statute banning unauthorized use of the word “olympic”).

¹⁸⁹ See Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091, 1100 n.53 (1968) (analogizing the restriction of symbolic speech to “government[’s] telling a speaker not to use a metaphor, because simile is a reasonable alternative”).

point/subject matter distinction does not capture them very well.¹⁹⁰

The three types of content discrimination, then, correspond to the perspectives of the three players I have identified in speech situations: the government, the audience, and the speaker. Each player experiences regulations affecting speech from different perspectives, and will consider different kinds of regulations content-discriminatory. Nonetheless, the audience and speaker perspectives share one logically necessary connection: whenever the speaker experiences content discrimination, there will also be content discrimination from the audience's perspective. Clearly, if a regulation silences content from the speaker's point of view, then the audience will be deprived of that content category as well. For instance, if the Chinese students cannot communicate the message inhering in a bonfire, then neither can the audience receive it. Alternative methods of expression are inadequate channels to provide the audience with the speaker's view because such alternatives do not merely communicate less effectively, they communicate something different.

The converse of this inference, however, does not necessarily hold true. That is, it is possible to have a regulation that only acts upon a facilitative aspect of the speech, and therefore is not content-discriminatory from the speaker's point of view, and yet effectively silences a certain content category from the audience's perspective. For example, TPM regulations that reduce access to media favored by certain groups can silence those groups without ever affecting a communicative aspect of their speech. The various types of content discrimination are, therefore, related but distinct. They must be recognized, separated, and dealt with individually.

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¹⁹⁰ Indeed, the degrees of discrimination may have decreasing utility as we progress along the continuum of discrimination. The arguments for considering the degrees of discrimination are strongest in the case of discriminatory governmental purpose. They become somewhat weaker in the case of discrimination that has an impact on the speech market. And the degree distinctions seem quite irrelevant to the case of content discrimination in the impact on the speaker. This is completely appropriate since the degree schema was designed in light of the Court's present focus on government purpose.

B. *Justifications for the Three Types of Content Discrimination*

In light of the differences among these three types of content discrimination, two larger questions arise. First, what do these three distinct problems share that would incline us to view them as instantiations of a single concept or principle? And second, why is that unifying concept content discrimination, which we consider to be quite serious, rather than some less important principle? An examination of how the three types of discrimination identified above share a relationship to the concerns underlying content discrimination yields an answer to both questions.

Identifying the concerns underlying the ban on content discrimination has proved to be no simple task. Commentators have generated a broad range of possible answers.¹⁹¹ Many such answers, however, focus on the question of why we should avoid discrimination in the government's intent, and are therefore too narrow for my purposes.¹⁹² It is also possible to frame the question too broadly. Asking why content discrimination is such a bad thing is quite different from asking whether content discrimination is a bad thing at all; the first amendment commits us, at a minimum, to a positive attitude toward speech that makes any restriction on it a *prima facie* problem. The better question, then, is whether content discrimination is an evil independent of the quantity of speech actually restricted; whether the first amendment means anything more than just that speech is (for whatever reasons) valuable, so the more of it we have, the better.

The starkest way to frame the inquiry is: Are there any reasons why it might be worse (or at least a different type of evil) to silence some people, based on the content of their speech, than to silence everyone? There could be many ways to answer this question; I will offer two. Both answers help explain why the three types of discrimination defined above¹⁹³ are related to each other and to the concerns underlying content discrimination. The first answer looks to the reasons often adduced to support the general principle of equal treatment, of which the ban on content discrimination may be seen as a particular application.¹⁹⁴ The second looks to the theories that specifically argue for a special solicitude for speech.

¹⁹¹ See, e.g., Stone, *supra* note 3, at 200-33.

¹⁹² See *id.* at 212-17, 227-33.

¹⁹³ See *supra* notes 179-90 and accompanying text.

¹⁹⁴ See Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 101 (1977); Karst, *supra* note 31, at 21.

Along with many others, I am inclined to believe that the free speech guarantee serves many purposes or values.¹⁹⁵ Taken in the aggregate, the major theories represent a rich resource responding to a broad range of first amendment issues.¹⁹⁶

If these answers are persuasive, and the three types of discrimination can be described as aspects of content discrimination, then the path is cleared to a better understanding of why the Court's doctrinal developments are counterproductive. A conception of

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¹⁹⁵ See, e.g., L. BOLLINGER, *THE TOLERANT SOCIETY* 104-05 (1986) (asserting that free speech performs many functions in society); S. SHIFFRIN, *supra* note 1, at 2-4, 132-33 (providing a "laundry list" of issues bound up with the notion of "how free speech should be"; and identifying issues to consider in balancing first amendment concerns); L. TRIBE, *supra* note 9, § 12-2, at 792-93 (noting that various concerns must be weighed in ascertaining the reach of first amendment protections); Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 878-86 (1963) (identifying several "values sought by society in protecting the right to freedom of expression").

¹⁹⁶ I will be assuming, rather than attempting to prove, that each of my answers is in fact a good statement of the concerns underlying content discrimination, an assumption I believe is reasonable. First, the focus of this Article is on a later stage in the analysis; a justification of any particular theory upon which I rely would require a separate article. Second, the assumption should be less problematic given the answers I am suggesting. No one, that I am aware of, denies that these theories of speech are relevant to the meaning and purpose of the principle condemning content discrimination. Someone may, of course, disagree with my interpretation of those theories, but the general approach should be unexceptionable.

There is, on the other hand, some serious disagreement over the usefulness of general equality theories in understanding the concept of content discrimination. For example, Geoffrey Stone has argued that while the general concern with equality "may support the content-based/content-neutral distinction, it does not in itself have much explanatory power." Stone, *supra* note 3, at 207. I agree that the general arguments will not explain the particulars of first amendment doctrine and I rely much more on the theories dealing specifically with speech to serve that function.

It is possible, however, that Stone intends a deeper criticism of equality arguments. He may be suggesting that equality, being an empty and tautological concept—"treat like cases alike"—cannot specify which differences matter, and in particular, cannot explain why content differences do not justify different treatment. See *id.* at 207 & n.77 (citing Westen, *The Empty Idea of Equality*, 95 *HARV. L. REV.* 537 (1982)). The deeper criticism is tenable only if one shares this tautological and impoverished conception of equality. The equality arguments on which I draw are meant to provide a richer content for the idea of equality by explaining why we might find it important and suggesting why some types of distinctions might be more troubling than others as the basis for differential treatment.

Of course, as soon as I provide more content for the idea of equality, I run the risk of invoking controversial arguments that need to be defended in their own right rather than merely assumed. While some of the implications of the arguments I provide are undoubtedly controversial, I believe that the theories of equality I discuss are basic to our shared political culture. If we are committed to equality for these reasons, as I believe we are, then we should hold a conception of content discrimination that responds to these concerns.

content discrimination that focuses exclusively on government purpose will be shown to be too narrow. An expansion of that focus to include the two other types of discrimination will, in turn, lead to a resurrection of the independent TPM and symbolic speech doctrines. As the final section will demonstrate, these doctrines are well suited to the problems illuminated by such a broadened conception of content discrimination.

1. Equality Theories

General theories of equality, widely shared although variously interpreted, apply to many areas of social life, including speech. These theories provide strong support for the claim that a concern with equality should lead one to scrutinize not only the motives of the discriminator, but also the impact on both the person discriminated against and society more generally. The doctrine and commentary surrounding the equal protection clause provide a particularly clear illustration of the importance of all three of these concerns, and an interesting analogy to the free speech clause. A diverse array of arguments can be and has been offered for treating people equally.¹⁹⁷ I will highlight only three because I believe they are widely shared, deeply held, and sufficient to support my claim.

a. *Social Contract Theory*

It is hardly controversial to assert that if one is concerned about equality, one should see a serious problem in government actions motivated by a desire to discriminate. The connection between equality and a concern with government motive may be based on a fundamental commitment to equal respect. One way to understand this commitment is through the social contract arguments that form

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¹⁹⁷ See, e.g., Benn, *Egalitarianism and the Equal Consideration of Interests*, in NOMOS IX: EQUALITY 61, 69-70 (1967) (proposing that society should respect the interests of individuals equally, "giv[ing] to the interests of each the same serious consideration"); Schaar, *Equality of Opportunity, and Beyond*, in NOMOS IX: EQUALITY 228, 229 (1967) (analyzing the doctrine of equality of opportunity); Williams, *The Idea of Equality*, in 2 PHILOSOPHY, POLITICS, AND SOCIETY 110 (P. Laslett & W. Runciman eds. 1962) (presenting several bases for a claim of equality).

part of our political culture.¹⁹⁸ Social contract arguments generally assert that the foundations of political organization and obligation lie in a social contract¹⁹⁹ that includes a provision requiring the government to respect the equal moral status of its citizens.²⁰⁰ These contract theories argue that people began in a state of fundamental moral equality because they all met the criterion for moral personhood, whether that be reason,²⁰¹ free will,²⁰² or a conception of the good and a capacity for a sense of justice.²⁰³ When people came together to form the social contract they would have insisted that the contract require the government to respect their equal personhood since, acting as self-interested bargainers,²⁰⁴ it would not be rational for them to join a compact that did not include this protection. Any government that violates this basic norm of equal respect thereby abrogates the social contract and dissolves the basis for political obligation on the part of the citizens.²⁰⁵

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¹⁹⁸ It might also be possible to derive this commitment to equal respect from other foundations, like moral intuitionism or communitarianism. I rely here on social contract theory not because it is the only path, or even necessarily the best path, but because it is the most familiar path to this conclusion.

¹⁹⁹ See, e.g., J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 54 (T. Peardon ed. 1952). Locke seems to have believed that the contract was an actual historical event, see *id.* at 56-65, while more modern philosophers generally posit a hypothetical contract, see J. RAWLS, *A THEORY OF JUSTICE* 11-17 (1971). The historical accuracy of the theory is irrelevant for the purposes of my argument.

²⁰⁰ See, e.g., J. ROUSSEAU, *ON THE SOCIAL CONTRACT* 23-25, 32-35 (D. Cress trans. 1983).

²⁰¹ See, e.g., J. LOCKE, *supra* note 199, at 4-6 (arguing that all men are equal in the state of nature by virtue of their similar faculties, including reason, which allow them to understand the laws of nature).

²⁰² See I. KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 24 (L.W. Beck trans. 1969). Kant argued that moral laws apply to all rational beings, see *id.*; that rational beings as such, including but not limited to human beings, have the capacity to will in accordance with laws, see *id.* at 28-29; and that willing in accordance with universal laws constitutes a free will, and all rational beings have the capacity for a free will, see *id.* at 64-67. Although not explicitly a social contract theory, Kant's theory shares important features with liberal social contract theories and has become part of the tradition out of which they grow. See J. RAWLS, *supra* note 199, at 11.

²⁰³ See J. RAWLS, *supra* note 199, at 19.

²⁰⁴ See J. LOCKE, *supra* note 199, at 70-73; J. RAWLS, *supra* note 199, at 13-14.

²⁰⁵ See J. LOCKE, *supra* note 199, at 84-85. There is broad agreement that Locke's brand of social contract theory is liberal, even among those who disagree about what liberalism is. See, e.g., C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* 1-2 (1962); R. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* 13-17 (1985). Because of the perception that republican political theories historically have been less concerned with equality, the recent republican revival has involved an attempt to make republican principles consistent with a commitment to

Two quick caveats must be added. First, equal respect does not necessarily mean equal treatment. Indeed, there is dramatic variation among philosophers on what equal respect means in practical terms.²⁰⁶ Whether or not equal respect requires practical equality, it certainly requires that the government not have a purpose to display or to encourage less respect for the personhood of some people than for that of others. Such a requirement explains in part why a concern with government motive flows so naturally from this type of social contract approach.²⁰⁷ Second, not every purpose to create inequality is intended to show less

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a more egalitarian society or politics. See, e.g., Deutsch, *Truth and the Law: A Critical View of Community*, 10 CARDOZO L. REV. 635, 645 (1989) (proposing reliance on "the checks and balances in our political system . . . to preserve the multiple facets of our political process"); Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1528-29 (1988) (suggesting that the pursuit of political freedom through law requires the inclusion of the "hitherto absent voices of emergently self-conscious social groups"); Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1577 (1988) ("[R]epublican understandings would point toward large reforms of the electoral process . . . to promote political equality and citizenship."). To the extent that such an attempt is successful, republicanism, with its non-contractarian explanation of the purpose and foundation of political obligation, would provide a different type of explanation for equality.

²⁰⁶ For example, there is great disagreement over whether equal respect requires the government to protect the free market and its distribution of property, see R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 32-33, 149-82 (1974) (referring to a concept of "neutrality" between citizens that is equivalent to equal respect for their entitlements), or actively to redistribute property more equally, see Held, *Men, Women, and Equal Liberty*, in *EQUALITY AND SOCIAL POLICY* 66, 71 (W. Feinberg ed. 1978); Schaar, *supra* note 197, at 242. For a discussion of the differences between equal respect and equal treatment, see R. DWORKIN, *A MATTER OF PRINCIPLE* 190-91 (1985).

²⁰⁷ The requirements placed on government by the social compact may, of course, go far beyond keeping its own motives clean. First of all, the equality required may be not merely equality of motive, but equality of treatment with respect to basic liberties. Second, the social compact can be read to go even further and demand equality of outcome. The government would then be required to assure, for example, not only that everyone has the legal right to use the mass media for communication, but that everyone has the means to do so. The inequality in this example arises not from the legal regime, but from the combination of law and the distribution of wealth that leaves some people without a meaningful opportunity to speak. But if distribution of wealth is held to be outside the scope of governmental concern, then social contract theory might require only equal legal rights.

How far one should go in holding government responsible for the underlying social and economic structure is one of the most important disagreements among various social contract theorists. Depending on the position one takes along this continuum, other types of (non-purposeful) content discrimination, and even other types of completely neutral regulations, could also be seen as violations of the obligation of equal respect. But while the implications of the social contract may go beyond the issue of content discrimination in the government's purpose, it is certain that, at a minimum, such intentional discrimination should be illegitimate.

respect for the personhood of those disadvantaged, and some created inequalities in relation to some social or economic goods may be consistent with equal respect.²⁰⁸ Freedom of speech, however, is a basic liberty. Speech is so intimately connected with the characteristics that make us persons in a moral sense—reason, free will, etc.—that the intentional denial of an equal right to speak denies some people their equal personhood. If the government's purpose in regulating speech is to deny equal personhood in this way, then it has clearly violated the social compact on which its own legitimacy depends.

It is not surprising, then, that the concern about government purpose seems so natural a focus in first amendment doctrine. There are, however, other theories that offer explanations of what equality means and reasons why it is important. These alternative reasons can in turn be threatened by different types of discrimination.

b. *Democracy Theory*

A second theory suggests that unequal treatment under the law violates one of the basic tenets of democracy. Modern conceptions of democracy²⁰⁹ rest on the premise that all citizens, the class of people empowered to take part in the decision of public issues, are equal as citizens.²¹⁰ When a democratic government denies equal rights to some of its citizens, it creates a kind of second-class citizenship that is inconsistent with democratic ideals and violative of the premise upon which that government's legitimacy rests. Treating all citizens badly²¹¹ may be bad policy, or even unjust, but treating some worse than others is simply illegitimate.²¹²

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²⁰⁸ See, e.g., R. DWORKIN, *supra* note 206, at 190 (stating that the government would have to provide more disaster relief to an area seriously devastated by a flood than to one less seriously affected to treat both areas with equal respect).

²⁰⁹ Certain ancient (generally republican) conceptions of democracy included great inequality. The most obvious basis for such inequality was that many people—women and slaves, for example—were not permitted to be citizens at all. See J. ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN* 41-47 (1981) (describing Aristotle's withholding of political rights from women, children, and slaves).

²¹⁰ See Raphael, *Equality, Democracy, and International Law*, in *NOMOS IX: EQUALITY* 277, 278-79 (1967); cf. J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* 4-5 (1980) (describing the different types of equality concerns central to unitary and adversary democracy).

²¹¹ Where a fundamental right is implicated, denying that right to all citizens may also strike at the government's legitimacy. But inequality raises legitimacy concerns even where no fundamental right is at stake.

²¹² This discussion doesn't address the difficult question of which differences

Such a loss of legitimacy may not be worse than the evil of mistreating everyone, but it is certainly a separately identifiable harm.

The essence of this kind of harm is not the government purpose served, but the impact on those discriminated against. It may be that you can only be disrespected when disrespect is intended.²¹³ But the government can make you a second-class citizen even absent an intent to do so. This theory of equality says we should be concerned when government creates second-class citizens—even inadvertently—because the impact on those discriminated against itself is a violation of that part of the meaning of equality that follows from our commitment to democracy.

Just as not every inequality constitutes disrespect, not every inequality constitutes second-class citizenship. Speech, however, is one of the most important aspects of citizenship in a democracy. If the government silences a group of people, it makes them second-class citizens in a clear and dramatic way: it robs them of the full opportunity to participate in the governance of their society.²¹⁴ And content discrimination is a type of speech regulation particularly likely to interfere with such political participation.²¹⁵

Certain kinds of inequalities can interfere with democracy in another way as well. Democracy is sometimes justified on the

between people justify different treatment and which do not. I am simply cataloguing general arguments for equality without attempting to explain what, in particular, equality requires. In doing so I rely, in the first amendment context, on a great deal of doctrine spelling out what equality requires. Nonetheless, I would be inclined to agree with Kenneth Karst that equality—at least the equality with which our Constitution is concerned—is not merely the formal, almost tautological claim that one must treat like cases (or persons) alike, but includes a substantive element specifying the social goods in relation to which people are to be treated alike. See Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977).

²¹³ Whether or not dogs know the difference between being tripped over and being kicked, people certainly do. See O.W. HOLMES, *THE COMMON LAW* 7 (M. Howe ed. 1963). But cf. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321-44 (1987) (describing unconscious racism). It is important to recognize, moreover, that if you are tripped over often enough, the indifference to your pain that such behavior implies may itself constitute a type of disrespect. Cf. L. TRIBE, *supra* note 9, § 16-21, at 1519 (“[I]f one is first dragged toward the boot and then stumbled over often enough, the pains and bruises become indistinguishable from those inflicted by kicking.”).

²¹⁴ Some other goods may be foundational in a similar way. For example, a vastly unequal distribution of wealth may also leave some citizens without the opportunity for meaningful participation in the political process and, therefore, violate the equality principle inherent in our concept of democracy.

²¹⁵ See *infra* notes 250-54 and accompanying text (discussing content discrimination in context of democracy theories).

utilitarian²¹⁶ grounds that allowing all citizens to register their preferences through the political process enables the government to reach policy decisions that maximize the total quantity of satisfaction in the society.²¹⁷ This calculus only works properly, however, if all the persons who may be affected by a policy are equally represented in the decisionmaking process.²¹⁸ Unequal distribution of the right to participate in the political process interferes with the purposes of democracy not just by making some people second-class citizens, but by destroying the ability of the political process to generate reliable conclusions about which policies are in the general welfare.

This danger to the welfare calculus is independent of the government's purpose in creating the inequality. Even when a government intends no disrespect toward those excluded, their lack of opportunity to participate means that the final tally will not accurately represent the interests and desires of everyone affected by the proposed policy. The danger is intimately connected to the threat of second-class citizenship; that lower status is necessarily created whenever a right is so essential to political participation that interference with it harms the welfare calculus. Speech is such a basic political right.

There is, however, an interesting difference between the harms caused by unequal citizenship and the harm inherent in this damage to the welfare calculus. The latter harm falls on all members of the political community, not merely those excluded. The political thermometer on which they all rely has been miscalibrated. Such an imbalance will likely result in short-term difficulties, including

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²¹⁶ I use here that variety of utilitarianism that does not presume to define utility in abstract terms and then measure it objectively, but assumes that each person's utility is maximized by satisfying her desires. This utilitarianism sees the democratic process as an accurate mechanism for generating policies that respond to the utility curves of the various individuals affected. This view of democracy is by no means inconsistent with the social contract theory above. Indeed, if one of the basic characteristics that makes someone a moral person is the capacity to define what is for her a good life, then this utilitarian approach may be the most natural view: it precludes the possibility of legislation based on the paternalistic (and fundamentally disrespectful) claim that someone else knows what is in your best interest better than you do. For further discussion of different theories of democracy, see *infra* notes 245-54 and accompanying text.

²¹⁷ See Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32-34 (1985) (describing the pluralist understanding of government).

²¹⁸ This aspect of equality is captured by the Supreme Court's famous guiding principle in the apportionment cases: one person, one vote. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

policies that fail to achieve their goals or generate unexpected problems, and—possibly—serious unresolved problems in the long term. These results will likely affect every member of the society as a whole, those included in the political process as well as those excluded. Thus, inequalities that damage the welfare calculus are characterized by their costs to society more generally, not by the government's intentions or the harm to the individual victims.

These equality theories suggest that if we value equal respect, equal citizenship, and equal political weight, then we should be particularly concerned about three problems: intentional discrimination by the government; inequality, whether intentionally created or not, that imposes second-class status on the person discriminated against; and inequalities that distort basic social institutions and, thereby, harm society in general. The three types of content discrimination I define above²¹⁹ are particular examples of these more general types of inequality. Government purpose to suppress speech because of its communicative effects disrespects the moral and intellectual personhood of both speaker and listener; a regulation the speaker perceives as silencing the content of her viewpoint relegates her to a lower level of participation, and thus a lower level of citizenship; a law that results in the systematic silencing of a content category from the audience's perspective robs all society of information and ideas necessary to the general welfare.

c. *The Equal Protection Clause*

If these equality arguments are an important part of our political culture, then we would expect to find some recognition of the various concerns they raise in the area of our constitutional law most directly devoted to considerations of equality: the equal protection clause of the fourteenth amendment. In fact, a comparison of first amendment content discrimination doctrine and equal protection clause jurisprudence does produce some striking parallels.

First and most obviously, the Court has been preoccupied in both areas with the issue of government purpose or motive. In *Washington v. Davis*²²⁰ and *Village of Arlington Heights v. Metropoli-*

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²¹⁹ That is, content discrimination in the government purpose, in the impact on the audience, and in the impact on the speaker. See *supra* notes 179-90 and accompanying text.

²²⁰ 426 U.S. 229 (1976).

tan Housing Development Corp.,²²¹ the Court held that improper government motivation is the hallmark of an equal protection claim. Without evidence of an illegitimate governmental purpose, the Court is unwilling to find a violation of the equal protection clause, even if the obvious effect of a rule is to exclude the members of a suspect classification from a benefit. These cases clearly established the "basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."²²²

There is a significant difference, however, between the treatment of government purpose in equal protection and speech doctrines: the Court has not yet abandoned strict scrutiny for facially discriminatory laws in the equal protection area. The need to prove a discriminatory motive in order to command strict scrutiny only arises when the law does not contain a suspect or quasi-suspect classification on its face.²²³ No equal protection doctrine paralleling the holdings in *Young v. American Mini Theatres, Inc.*²²⁴ and *City of Renton v. Playtime Theatres, Inc.*,²²⁵ yet exists.

²²¹ 429 U.S. 252 (1977).

²²² *Davis*, 426 U.S. at 240; see also *Arlington Heights*, 429 U.S. at 264-65; Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 131 ("Modern equal protection jurisprudence thus operates as a limitation on the reasons . . . that are permitted to underlie statutory classifications." (footnote omitted)).

²²³ See L. TRIBE, *supra* note 9, § 16-14, at 1466; Sunstein, *supra* note 222, at 127-28.

²²⁴ 427 U.S. 50 (1976).

²²⁵ 475 U.S. 41 (1986). One equal protection case looked as though it might be moving in this direction. In *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Court upheld a state employer's refusal to extend employee disability benefits to pregnancy. The Court's ostensible explanation was that the relevant disadvantaged category—"pregnant persons"—was not a suspect class, and no fundamental right existed to the benefits denied, so only rational basis review was warranted. See *id.* at 496 n.20. The absurdity of describing the category "pregnant persons" as gender neutral has been demonstrated too often to need repetition here. See, e.g., Karst, *supra* note 212, at 54 n.304 (criticizing *Geduldig's* "Alice-in-Wonderland view of pregnancy as a sex-neutral phenomenon"); Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 (1984); Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 337-38 (1985).

If we were to take *Geduldig* seriously, however, it would seem to hold that a government policy that discriminates on its face against a subset of a quasi-suspect class may be tested against the low, rational basis standard if the policy serves a legitimate, non-suspect purpose. This reading of *Geduldig* would make it strikingly similar to *American Mini Theatres*, in which the Court used the lower, content-neutral standard of review to assess a law facially discriminating on the basis of content because the government's purpose was to address a noncommunicative harm. See *supra* notes 47-59 and accompanying text.

One explanation for this difference is that the Court may be more willing to presume an illicit motive in a law facially directed at a suspect class than in one facially directed at a content category of speech. Such a distinction would not be unreasonable. Certain types of discrimination—most notably racism and sexism—have a long and virulent history in this country, perhaps unmatched by hatred for any particular ideology or point of view. Equally important, discrimination against groups of people can become so embedded in social stereotypes and assumptions that it becomes almost unconscious, so that legislators may be largely unaware that they are influenced by it.²²⁶ This phenomenon may be less common with animus against particular content categories of speech. Reasons like these might well incline the Court to be more systematically suspicious of facially discriminatory laws in the equal protection context.

But perhaps the Court's willingness to use strict scrutiny under the equal protection clause for facially discriminatory laws marks a grudging acceptance of the fact that there is more at stake than just government motive. Even if the government is not moved by racial animus, a discriminatory law creates a risk of stigma for the group and individual disadvantaged and, if such laws accumulate, could lead to systematic and long term subordination of some people to others. The risk of these broad social harms is significant enough to require a strong showing of necessity for the law regardless of the government's motive.²²⁷ The first amendment parallel to this situation is a facially content-discriminatory law where the government's purpose is to deal with a noncommunicative harm. If such a law disadvantages one content category of speech, then it can lead to serious social harms, including distortion of the public debate, interference with the democratic process, and a possible consequent loss of political legitimacy.²²⁸ If these harms are among the sorts of things the first amendment is supposed to prevent—just as stigma and subordination are among the things the equal protection clause is intended to prevent—then the standard of review should be high regardless of the government's noncommunicative purposes.

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²²⁶ See L. TRIBE, *supra* note 9, § 16-21, at 1519 n.44; Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 14-15 (1976).

²²⁷ See Brest, *supra* note 226, at 8-11; Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 150-51 (1976); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1040-41 (1979).

²²⁸ See *infra* notes 233-302 and accompanying text (discussing theories of speech).

If, however, these social harms raise serious constitutional concerns, then these concerns should arise whenever a law generates such results, whether or not the law is facially discriminatory. This notion is at the heart of the "disparate impact" argument in equal protection doctrine, which claims that if a law disproportionately disadvantages a suspect class, it should receive a higher level of scrutiny than mere rational basis even if neither the government's motive nor the law on its face is explicitly discriminatory.²²⁹ The first amendment analogy here is to a facially neutral regulation of speech serving noncommunicative purposes that, nonetheless, has a systematically different impact on certain content categories of speech. For example, a law preventing any interference with the flow of people into and out of commercial establishments would be content-neutral on its face and might serve noncommunicative public safety and commercial purposes. Nonetheless, it would clearly impact disproportionately on speakers involved in labor disputes with commercial establishments for whom on site picketing is a traditional and particularly effective means of speech. Such a content-based effect should arguably be subjected to a more stringent standard of review. The Supreme Court has so far refused to accept this type of argument in either its first or its fourteenth amendment guises.

In addition to the social harms caused by discrimination, there are harms borne by the individual victim. In equal protection theory, individualized harms are quite explicitly recognized. They can include a loss of self-respect, a lowering of life expectations, a reduced sense of responsibility for society and for oneself, and an apathy toward public participation.²³⁰ That the Court considers such harms to be important is demonstrated in its insistence that purely symbolic discrimination, which causes no material, physical, or economic harm and is therefore unlikely to lead to long-term subordination of the suspect class, receives strict scrutiny.²³¹ The

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²²⁹ See Karst, *supra* note 212, at 50-52 n.287; Perry, *supra* note 227, at 1040-41; cf. Eisenberg, *supra* note 194, at 57-83 (proposing "the causation principle" as a mechanism for taking account of impact in the absence of illicit motive).

²³⁰ See *Brown v. Board of Educ.*, 347 U.S. 483, 493-94 (1954); Karst, *supra* note 212, at 6-8.

²³¹ See, e.g., *Johnson v. Virginia*, 373 U.S. 61, 62 (1963) (per curiam) (striking down law requiring segregation in courtrooms); *Turner v. City of Memphis*, 369 U.S. 350, 353 (1962) (per curiam) (striking down segregation in a municipal airport restaurant); *Gayle v. Browder*, 352 U.S. 903, 903 (1956) (per curiam) (striking down segregation on buses).

primary harm in such cases is the emotional and psychological harm to the individuals subjected to such discrimination.

Once again, there is a parallel in the first amendment context. A speaker who is silenced because of the content of her speech—told she may not say *that*—experiences emotional and psychological harms as well. These may include frustration, feelings of exclusion and isolation, and the sense that her expression, perhaps even she herself, is undervalued. Moreover, these harms may occur even when the rule under which she is silenced is facially content-neutral, serves a noncommunicative purpose, and would not necessarily interfere with others wishing to express similar points of view. In other words, the Chinese students in my example above²³² may experience these harms. The recent collapse of the symbolic speech line leaves such speakers with no real protection.

Equality theory generally, and equal protection doctrine in particular, indicate why all three types of content discrimination are of serious concern. But we can go further and explain why the three types of discrimination are not just a threat to equality, but a serious threat to freedom of speech.

2. Theories of Free Speech

I will examine a cross section²³³ of the major theories of speech in order to determine why content discrimination matters to each and, in light of those concerns, which of the three types of discrimination each theory recognizes. This examination serves two functions: it illustrates why the three types of discrimination are

²³² See *supra* notes 183-87 and accompanying text.

²³³ There are other theories that have received a great deal of attention and that should not be left out of any thorough study. See, e.g., Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (proposing the theory that free speech is valuable because it can check the abuse of power by public officials). I am not attempting a thorough survey here. I review only a collection of the most general and widely recognized theories. That other, important theories might also be analyzed in terms of these three types of content discrimination does not disturb my argument. I am not aware of any prominent theory that would refuse to recognize at least one of the types of discrimination I discuss as a serious threat to free speech, or that would insist on some other type of content discrimination that does not fit my schema. While many theories may suggest that certain types of content-neutral regulations could also pose a threat to free speech, the focus of this Article is not on the relative importance of content-based and content-neutral regulations. Whether or not we accept the Court's apparently more lenient approach to content-neutral regulations, the category of content-based ones must be larger than the Court has so far recognized. Nothing in the omitted theories casts doubt on my central claim.

types of *content* discrimination, and it demonstrates that these theories, taken in the aggregate, indicate that first amendment doctrine should take seriously and respond to all three types of content discrimination.

a. *Truth Theory*

The truth theory is perhaps the best established theory explaining why speech should receive special protection. It argues that a free exchange of ideas is indispensable to the acquisition and expansion of human knowledge. The theory is often credited to John Milton²³⁴ and John Stuart Mill,²³⁵ but there are many modern versions and revisions as well.²³⁶ Moreover, this theory has enjoyed some real acceptance in the courts. The Supreme Court's references to the truth theory run from Justice Holmes's famous metaphor of the "marketplace of ideas,"²³⁷ through Justice Brennan's use of Mill in *New York Times v. Sullivan*,²³⁸ even to Justice Rehnquist's assessment of the fact/opinion distinction in libel law in terms of the marketplace of ideas.²³⁹

The truth theory focuses on the value of speech to the listener, not the speaker. Through witnessing the clash of ideas and struggling to reconcile new ideas with old assumptions, the listener comes to a clearer and more accurate perception of the truth. This benefit accrues almost regardless of the speaker's motive or means of speech.²⁴⁰ Similarly, the benefit is lost when speech is si-

²³⁴ See J. MILTON, *AREOPAGITICA* (J. Suffolk ed. 1968) (1644).

²³⁵ See J. MILL, *ON LIBERTY* (D. Spitz ed. 1975) (1859).

²³⁶ See generally DuVal, *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161 (1972) (arguing for an approach to free speech emphasizing the purpose of freedom of expression as modification of beliefs and ideas); Wright, *A Rationale from J.S. Mill for the Free Speech Clause*, 1985 SUP. CT. REV. 149, 156-63 (outlining a Millian framework for interpretation of free speech clause in which protected speech must communicate a social idea).

²³⁷ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (explaining that "the ultimate good desired is best reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market").

²³⁸ 376 U.S. 254, 272 n.13 (1964).

²³⁹ See *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2705 (1990).

²⁴⁰ This theory may generate some limits on the speaker, but they are minimal. For example, coercion by a speaker might well interfere with a listener's ability to assess the message rather than promote it. Fraud may be another exception, although it is possible that even intentional falsehood could contribute at least to the livelier impression of truth. See *New York Times*, 376 U.S. at 279 n.19 (endorsing Mill's

lenced, regardless of the government's reasons for doing so. The truth theory, in other words, sees the value of speech and the danger of restrictions from the perspective of the audience. From this perspective, what is the danger of inequality generally and content discrimination in particular?

Unequal treatment is dangerous because it distorts the free-speech market,²⁴¹ reducing its ability to generate truth. This distortion is, in some cases, at least as damaging as a more general silencing. If a very large quantity of speech is silenced, either across the market or in a large part of it, then the truth-producing function of speech is destroyed, but that effect is quite obvious to any observer. No one would rely any longer on the remaining marketplace of ideas to determine the truth. This phenomenon is commonplace in totalitarian countries, where the people regularly assume that the speech made available to them by the government is false or misleading. If, on the other hand, the silencing is not severe and is evenly distributed across the market, then the impact on the truth-producing function of speech may not be very great: all voices will be proportionately quieter, but if all can still be heard then the struggle for truth can continue with the relative strengths of the contestants unaltered.²⁴² But if a fairly small part of the speech market is silenced or disadvantaged relative to the rest, the truth-producing function will be crippled, and yet the injury may not be readily apparent to those who rely upon the marketplace. Such distortion, although causing less damage, may be as dangerous as a broader silencing because it is more easily hidden, overlooked, or ignored.

Content discrimination, in the context of the truth theory, should be defined as any government action that has the effect of systematically²⁴³ silencing or disadvantaging²⁴⁴ particular con-

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argument for the usefulness of falsehood). *But see* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (rejecting the idea that falsehood is useful to the exposition of ideas or the search for truth).

²⁴¹ See Stone, *supra* note 3, at 198.

²⁴² The truth-seeking process may be slowed or reduced in importance by such a general reduction in speech, but no distortion of outcome should be produced. Truth is only one social value among many. The existence of the first amendment, under the truth theory, indicates that truth is an important value, but it does not provide any clear framework for deciding how it ranks as against other values. Where the truth-seeking function is not distorted or destroyed, but merely somewhat reduced in importance relative to other social goals, the truth theory alone does not provide a clear basis for finding a constitutional violation.

²⁴³ Almost any government action could, under the right circumstances, silence

tent categories of speech. Since it is generally the content that carries whatever truth value the speech may have, a regulation that impacts unequally on the time or place of speech without causing any disproportionate impact on content would not usually pose a threat to the truth function. Impact on content is the primary, if not the exclusive, concern of the truth theory.

Content discrimination, so defined, would be precisely the type of inequality condemned by the truth theory. When the impact of a regulation is limited to certain content-categories of speech, it has the potential to do damage that is deep but not broad, thus causing distortion without delegitimizing the marketplace. Thus, if we accept the truth theory as an explanation of the first amendment's protection for speech, we would be primarily concerned about the type of content discrimination that appears from the audience's perspective.

b. *Democracy Theory*

Another common free speech theory is the democracy theory, which holds that the first amendment gives speech special protection because free speech is necessary to the proper functioning of a democracy. The democracy theory is associated primarily with Alexander Meiklejohn²⁴⁵ and Robert Bork,²⁴⁶ but, once again,

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or disadvantage some content category of speech. In order to restrict the reach of the first amendment under the truth theory, it is necessary to adopt some limitation, such as requiring that this effect be systematic. By systematic, I mean that the impact occurs within the normal range of circumstances under which the regulation could reasonably be expected to operate, and that the impact is not random but is targeted at a particular content category.

²⁴⁴ Even when the impact of the regulation is proportionately equal on all speakers or viewpoints, the regulation should qualify as content discrimination if the burden is great enough that the weaker ones are effectively silenced. From the audience's perspective, a voice that it would have heard is now unavailable to it and the truth-seeking process is distorted as a result. In other words, telling both rich and poor that they may not leaflet or use sound trucks will still qualify as discrimination, at least if the poor person has no other means of communicating. Cf. Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 30 ("We would do well to avoid . . . new epigrams about the majestic equality of the law prohibiting the rich man, too, from distributing leaflets or picketing.").

²⁴⁵ See generally A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (asserting that freedom of speech and an educated citizenry are the basis of the social compact); A. MEIKLEJOHN, *POLITICAL FREEDOM* (1960) [hereinafter A. MEIKLEJOHN, *POLITICAL FREEDOM*] (stating that a responsible electorate requires the freedom of speech necessary to participate directly in governing).

²⁴⁶ See Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1

there are many other scholars who have adopted and modified it.²⁴⁷

Assuming that all adult citizens may vote on issues of public concern in a democracy, why must they also be able to speak on those issues? There are at least two explanations of why free speech might be necessary to democracy, each corresponding to a rather different model of democracy. First, although people may express their preferences and opinions by voting, those opinions must be informed rather than ignorant if the democratic process is to generate responsible and workable policies. Free and open discussion of issues of public concern is, therefore, indispensable if democracy is to lead to good results.

In this model of democracy, the value of speech is to the audience, those potential voters who will hear the speech and use it to make their decisions. This version of the democracy theory is simply a variation on the truth theory, but the truth for which listeners search is the truth about issues necessary to make political decisions.²⁴⁸ Arguments about how inequality in general and content discrimination in particular distort the marketplace of ideas are equally applicable here.²⁴⁹ This democracy theory is primarily

(1971).

²⁴⁷ See, e.g., G. ANASTAPLO, *THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT* (1971) (tying protection of speech to a theory of republican government); A. BICKEL, *THE MORALITY OF CONSENT* 62 (1975) (arguing that free speech should be protected and encouraged so long as it serves to make the political process work by persuading majorities of voters); BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978) (expanding the political process theory to include other pragmatic and institutional concerns); Kalven, *The New York Times Case: A Note On "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 209 (arguing that the decision marks the Court's acceptance of Meiklejohn's theory).

²⁴⁸ There is, of course, substantial variation among scholars on the question of just which speech is relevant to the decision of political issues. Compare Bork, *supra* note 246, at 26-31 (rejecting all but speech explicitly concerning political issues) with A. MEIKLEJOHN, *POLITICAL FREEDOM*, *supra* note 245, at 117 (including art, science, and literature as relevant to forming political judgments).

²⁴⁹ Notice that this model of democracy can take either a classical liberal or a republican form. In a liberal version, the truth that citizens search for is the truth about what their own individual values are and about the most practical and least costly policies for effectuating them. The democratic process then reaches a result by summing up these preferences. In an even moderately sophisticated view, all sorts of discussion by and with other people could be relevant to a citizen attempting to decide what he actually wants and what is the most efficient way to achieve it.

In a republican version, the truth for which citizens search is an understanding of the common good, rather than of their own individual conceptions of the good. The democratic process is seen, ideally, as a way of reaching a consensus (or

concerned about content discrimination from the perspective of the audience.

The second version of the democracy theory relies on a model in which the democratic process, including free political dialogue, is valued not for the wise or just policies it may produce, but for the process itself. Hannah Arendt is probably the best known exponent of this theory,²⁵⁰ but it has been adopted and modified by several of the participants in the recent republican revival.²⁵¹ Participation in public decisionmaking is, under this theory of democracy, essential to full citizenship, perhaps even to the attainment of full humanity. Voting alone is, however, too solitary and infrequent an activity to constitute full participation—a fully participating citizen must engage in the free expression and exchange of views in which the characters of both societies and individuals are formed. Free speech is necessary in this second model of democracy, not because it helps the process to reach good results, but because it is the very stuff of which the democratic process is made.

The value of free speech in this theory is primarily to the speaker. Speech is a means of participating in the life of one's society, of being a full citizen and fulfilling one's human potential.

something close) about what the common good requires. Once again, discussion by and with others is essential to the discovery and recognition of the common good since no one citizen can be sure that she has all of the information or arguments that are relevant until she has heard her fellow citizens. For a discussion of these two types of democracies, see generally J. MANSBRIDGE, *supra* note 210.

In both the liberal and republican versions, the process of free political dialogue is valuable not for its own sake, but because it is a necessary (although not, perhaps, always sufficient) means of producing truth, a truth that is defined in terms independent of the process itself. In this theory, democracy is a procedure for reaching an antecedently defined goal. See J. RAWLS, *supra* note 199, at 85-86 (describing imperfect procedural justice).

²⁵⁰ See, e.g., H. ARENDT, *THE HUMAN CONDITION* 22-33 (1958) (tracing the genealogy of the idea that the highest good lies in political action).

²⁵¹ See, e.g., B. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 150-55 (1984) (arguing for a system of "strong democracy" where every citizen participates in the political process); W. SULLIVAN, *RECONSTRUCTING PUBLIC PHILOSOPHY* 155-70 (1982) (arguing for a revitalization of civic commitment and participation). There is no classical liberal counterpart to this second theory of democracy. Although liberalism does, of course, demand equal citizenship, the notion of citizenship is a narrower one. Individuals come to the political union already formed and the required equality is simply the right to have their wishes considered equally with everyone else's, to be treated as creatures with their own ends. Voting might well suffice as a basis for this equality. Because the democratic process is simply a means of achieving just policies rather than an identity forming experience, the liberal idea of democracy is too narrow to support this richer concept of citizenship.

This value remains even if the citizen's listeners never receive any enlightenment from her speech.²⁵² It is destroyed, though, by any government prohibition of the speech. Even if the government's purpose shows no disrespect for the speaker, the effect of a law that excludes her from public participation is the loss of the democratic value of speech.

Content discrimination, from the perspective of this second democracy theory, is a government action that restricts an aspect of expression valued by the speaker as part of her message rather than as merely facilitative; it is an unequal bar to full participation falling on the content of the message. As such, content discrimination is one of the most serious threats to the participatory democratic value of speech.

My example of the Chinese students²⁵³ illustrates why such content discrimination is more dangerous than many other types of inequality. A speaker whose chosen act of participation is frustrated by a law which falls on a facilitative aspect of her speech can often find an alternative method of conveying her message. The pro-divestment students in the example might play loud music or flash a large collection of lights into the sky in order to draw the crowd that the bonfire was intended to attract. The impact on their participation, on the expression of their message, is real and therefore deserving of some first amendment scrutiny, but it is minimal if some adequate alternative exists. There is, however, no adequate alternative for the symbols with which a speaker chooses to express her message. The Chinese students' ability to participate in the public debate is, from their own perspective, more severely restricted than that of the pro-divestment students. When the government action restricts the message from the speaker's point of view, it cuts more deeply into the speaker's ability to function as a fully participating citizen than when it restricts only a facilitative mechanism for which alternatives exist. From the perspective of this second democracy theory, the central issue raised by content discrimination is the impact on the speaker.²⁵⁴

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²⁵² They must, of course, listen with respect if the speech is to function as real participation. But even if they all believe that they learned nothing of value, that—in the terms of the other democracy theory—they received no information that helped them to make a better and more responsible decision, the speech would still have value to the speaker under this democracy theory.

²⁵³ See *supra* notes 183-87 and accompanying text.

²⁵⁴ The two types of democracy theories also share a concern about certain government motives for restricting speech. Both theories posit that, for either

c. *Self-Expression or Self Realization Theory*

The third common theory of speech is the self-expression or self-realization theory. Perhaps the two most influential proponents of this theory are C. Edwin Baker²⁵⁵ and Martin Redish.²⁵⁶ This theory suggests that special protection for speech is justified by the role speech plays in the processes of self-fulfillment,²⁵⁷ participation in change,²⁵⁸ development of personal faculties,²⁵⁹ and control of one's own life-affecting decisions.²⁶⁰ The authors

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instrumental or intrinsic reasons, political decisions ought to be made by the people. Certain government reasons for regulating speech evince a desire to take that power out of the hands of the people. Such motives should be illegitimate in a democratic system. At least, they should be illegitimate if the removal of the issue from majoritarian control is not constitutionally required, as it is on issues of religious belief. For example, a simple desire on the part of present officials to insulate themselves from criticism or threats to their own power would clearly violate the premises of a democratic system. Similarly, official paternalism, in which the government restricts speech "because it does not trust its citizens to make wise or desirable decisions if they are exposed to such expression," Stone, *supra* note 3, at 213, contradicts the basic democratic commitment to the proposition that "the people . . . are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 791 (1978).

The concern about such illegitimate motives should lead a democracy theorist to embrace the government purpose conception of content discrimination, but might not suffice to convince a democracy theorist of the utility of the communicative impact model. Under that model, the government's purpose is discriminatory when it aims at a communicative harm of the speech. The suspect motives discussed above both involve such communicative harms. There is, however, one other major category of motives that would fall under the communicative harm model, but which would not necessarily be suspect within the democracy theory: offense to listeners. The communicative harm model would, therefore, be overinclusive from the perspective of the democracy theories.

The democracy theories would recognize the dangers of content discrimination in the government's purpose, but might endorse a narrower view of those purposes than the communicative impact model suggests. If, however, the democracy theory is supplemented by other theories—tolerance and dissent, for example—then the composite theory fits very comfortably with the communicative impact model of government purposes. Thus, democracy theory, although not sufficient by itself to justify this model of discriminatory government purposes, does contribute to the justification.

An exactly parallel argument could be made for the truth theory.

²⁵⁵ See generally C.E. BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989) (arguing for a free speech theory based on individual liberty and autonomy rather than the marketplace of ideas); Baker, *supra* note 56 (same).

²⁵⁶ See generally Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (asserting that free speech serves the value of individual self-realization).

²⁵⁷ See C.E. BAKER, *supra* note 255, at 47-48.

²⁵⁸ See *id.*

²⁵⁹ See Redish, *supra* note 256, at 604.

²⁶⁰ See *id.*

derive the requirement of protection for these types of personal development from various sources. Baker relies directly on a theory of equal respect for the autonomy of individuals as the necessary foundation for legal obligation.²⁶¹ Redish, on the other hand, argues that our constitutional commitment to democracy, while not itself the justification for freedom of speech, provides evidence of an underlying commitment to self-realization that justifies both free speech and democracy.²⁶²

While there is great variation in these theories, they share a focus on the value of speech from the perspective of the speaker, who will reap the benefits of self-expression and self-realization most directly.²⁶³ Once again, as in the second democracy theory, these benefits will flow regardless of whether any listeners feel that the speech has value to them, and the benefits will be prevented by government action restricting the speech regardless of the noncommunicative purposes such action might serve.

The danger of inequality (as opposed to repression more generally) from the perspective of the self-expression theory depends on the basis for the value of self-expression. If, as in Baker's theory, protection of self-expression is a necessary element of respect for personhood,²⁶⁴ then denial of this freedom to some people is a denial of their personhood. Bad as it is when the government denies your personhood, it is an independent and additional harm when the government denies your personhood while recognizing it for other people. When a government denies a fundamental right inherent in personhood, it is saying either that it does not believe the right to be necessary to personhood, or that it does not intend to respect the personhood of anyone. When that government respects the right for some but not for others, it is saying either that the disadvantaged are not moral persons in the same sense as the others, or that their personhood is not as deserving of respect. Inequality includes the separate disrespect of being told that you are, or can be treated as, less of a person than others.²⁶⁵

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²⁶¹ See C.E. BAKER, *supra* note 255, at 49-50.

²⁶² See Redish, *supra* note 256, at 603-04.

²⁶³ In Redish's theory, at least, it is possible that some of these benefits also flow to listeners who are better able to make autonomous decisions because of the information they receive through free exchange of ideas. Cf. *id.* at 605 n.54.

²⁶⁴ See C.E. BAKER, *supra* note 255, at 47-48.

²⁶⁵ See Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 247-49 (1983).

Content discrimination, from the perspective of the self-expression theory, occurs whenever government action interferes with speech by silencing or disadvantaging the content of the message from the speaker's point of view. While any interference with speech serving the function of self-realization should raise first amendment concerns, interference with the content of the message may be particularly troublesome.²⁶⁶ Baker recognizes that some aspects of speech will be substantively valued by the speaker while others will be merely a means of facilitating the expression.²⁶⁷ For example, the time and place chosen for the speech may simply be the best way to reach a large audience, rather than valued in themselves. When a regulation of speech interferes with a substantively valued aspect of the speech, it causes far more damage to the ability of speech to promote self-realization in all of its forms than if the regulation affected only a facilitative aspect of speech.

The content or message of the speech will almost always be part of what is substantively valued by the speaker. After all, the speaker expresses herself, creates something, participates in the shaping of the culture, or develops her faculties primarily through the content of the speech. It is true that other aspects of the speech may be substantively valued as well. For example, reaching a very particular audience may be of substantive value to the speaker. And it is possible, although very unusual, for the content of the speech not to be a part of what is substantively valued, as where a group of people value singing together who care little about the content of the songs themselves. The relationship between substantive value and content is not one of logical necessity. Nonetheless, there is a high degree of correspondence: content will almost always be among the aspects of speech substantively valued, and few, if any, other aspects will as regularly share that position. The self-expression theory should consider content discrimination a particularly serious issue because of its great potential to interfere with substantively valued speech from the perspective of the speaker.²⁶⁸

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²⁶⁶ Baker rejects a focus on content because he sees it as tied both to the truth theory, which focuses on the audience receiving information transfers, *see* C.E. BAKER, *supra* note 255, at 51-52, and to the speech/action distinction, *see* Baker, *supra* note 180 at 941. If content is understood in a more non-propositional way and it is recognized that content cannot exist separate from some form of expressive activity, then a focus on content may become more consistent with an emphasis on the speaker's perspective.

²⁶⁷ *See* C.E. BAKER, *supra* note 255, at 77-78.

²⁶⁸ *See, e.g., id.* at 177-80 (discussing cases involving TPM regulation of symbolic

d. *Tolerance Theory*

The tolerance theory developed by Lee Bollinger²⁶⁹ suggests that free speech is a mechanism through which we teach ourselves to tolerate ideas and people that we might otherwise stifle with irrational zeal. The value of speech, under this theory, is primarily to the audience that hates the ideas expressed but nonetheless learns to tolerate them.²⁷⁰ This lesson may be learned whether or not the speaker achieves any satisfaction from the speech. And, of course, a government regulation silencing the speech will prevent this education, regardless of the purpose served by the regulation. The tolerance theory, then, sees the value of speech as primarily to the audience.

Content discrimination poses a danger to this lesson of audience tolerance. The reaction of intolerance that must be curbed is most often directed at content that outrages or offends. A government regulation falling relatively evenly on various content categories and silencing none will leave available the speech necessary to learn tolerance, but a regulation significantly weakening or even silencing some content categories may rob the audience of its chance to learn tolerance. Indeed, the lesson is quite likely to be lost, given that the legislature is most willing to sacrifice unpopular speech categories to avoid either communicative or noncommunicative harms.

Such legislative motivation indicates a second harm in content discrimination from the perspective of the tolerance theory: if the discrimination is motivated by a hatred for the ideas, then it represents a failure to learn the lesson of tolerance. The tolerance theory is concerned with our present ability to tolerate, as demonstrated by the legal acts of our representatives, as well as with our future tolerance. The tolerance theory would, therefore, focus on the legislative purposes served by a law restricting speech. Any purpose that relied on the inherent evil of the message, or on the evil consequences of people either accepting or being offended by the message, would qualify as content discrimination deserving of stricter scrutiny.²⁷¹

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speech).

²⁶⁹ See L. BOLLINGER, *supra* note 195.

²⁷⁰ See *id.* at 8-11.

²⁷¹ The communicative impact model captures fairly accurately these suspect government purposes; all of the purposes rejected by the tolerance theory relate to communicative impacts of the speech. In addition, the communicative impact theory would catch few motives that do not fall into one of these categories. See Stone, *supra*

e. *Dissent Theory*

In a new book, *The First Amendment, Democracy, and Romance*,²⁷² Steven Shiffrin has suggested that one aspect of the first amendment often overlooked by scholars and jurists is the value of dissent. Dissent involves a challenge to any "prevailing conventions, norms, authorities, and institutions,"²⁷³ whether political, social, cultural, economic, or otherwise. Shiffrin criticizes the myopic focus by both courts and commentators on content discrimination, defined as a government purpose tied to a communicative effect of speech.²⁷⁴ Nonetheless, certain types of content discrimination do interfere with the values of dissent and are, therefore, suspect in first amendment terms.

Shiffrin argues for dissent as an important organizing image²⁷⁵ rather than as a foundation for a set of propositions deductively to be applied to cases.²⁷⁶ The image of dissent makes its mark on first amendment analysis by suggesting that where the values it enshrines are threatened, the first amendment should be understood to be endangered.²⁷⁷ The perspective of dissent

note 3, at 217 (arguing that when government regulates based on communicative impact, it almost invariably relies upon paternalistic or intolerance-based grounds). One exception to this generalization, although a fairly minor one, is discussed *supra* note 178.

²⁷² S. SHIFFRIN, *supra* note 1.

²⁷³ *Id.* at 86-87.

²⁷⁴ Shiffrin criticizes content discrimination as an organizing principle for first amendment analysis on three grounds: First, content discrimination, when understood as a government purpose aimed at a communicative harm, is both under- and over-inclusive as a proxy for government hostility to the ideas expressed; second, first amendment law has, in any event, been concerned with other things besides government hostility to ideas; and third, government hostility to certain ideas, far from being *per se* unconstitutional, has often been accepted as a legitimate basis for regulations of speech. *See id.* at 17-24.

I agree with all of these criticisms. The arguments that Shiffrin marshals against content discrimination as an organizing principle do not apply to the approach I am suggesting for two reasons. First, my conception of content discrimination is much broader than the restrictive, government-hostility model that Shiffrin criticizes. Second, I am not claiming that content discrimination is the only, or even necessarily the single greatest, concern of the first amendment. When content discrimination is understood, not as a proxy for government hostility, but as a collection of related problems making up a part, rather than the whole, of the meaning of the first amendment, then most of these difficulties are avoided.

²⁷⁵ *See id.* at 86 (describing it as "another portrait in the first amendment gallery").

²⁷⁶ *See id.* at 110-39 (discussing the methodological implications of different approaches to the first amendment and contrasting Kantian and eclectic methods).

²⁷⁷ One does not, in other words, simply ask whether the speech at issue is or is not dissent, "(as if it had an essence)," but rather "whether the values associated with

illuminates a number of values, perhaps the most important of which flow to the dissenter herself. In dissenting, the speaker affirms her individuality and her integrity.²⁷⁸ Dissent may also provide some values to the listening audience or to society more generally. First, the audience may achieve a greater appreciation of truth because of the dissenter's challenges to conventional wisdom.²⁷⁹ And second, society may move more quickly toward needed social change when stimulated by the criticisms of those who are unsatisfied with the status quo.²⁸⁰ The value of dissent to the audience should not, however, be seen simply in its usefulness for attaining truth or change, but more generally in the constant challenging of our assumptions that keeps us lively, engaged, and growing. Finally, the value of dissent also suggests that certain motives on the part of government regulators of speech may be suspect, such as the desire to suppress dissent.²⁸¹

If "dissent" referred to a particular category of speech identifiable by its content, then the dissent approach might well endorse content discrimination that favored that category.²⁸² Although such a dissent theory might still be suspicious of content-based regulations for historical reasons,²⁸³ it would have no general objection to content discrimination. If, however, dissent is understood as a collection of values and concerns generated by speech and the regulation of speech, then any speech that serves those values and any regulation that implicates those concerns, should raise first amendment scrutiny. Content discrimination is a

dissent are present." *Id.* at 107.

²⁷⁸ See *id.* at 90-93. Shiffrin also explains how dissent may be, and usually is, an act of association rather than of isolation of the individual. He is quite right to suggest that such an associative aspect helps to assure that the idealization of dissent will not result in the glorification of atomistic individualism. See *id.* Nevertheless, association is not, I think, a part of what is idealized in the image of the dissenter. Indeed, the ability to maintain a certain critical distance from one's associations lies at the heart of dissent. I, therefore, do not include association among the values of dissent to the speaker.

²⁷⁹ See *id.* at 93-96.

²⁸⁰ See *id.* at 96-97.

²⁸¹ Cf. *id.* at 81 (discussing *United States v. O'Brien*, 391 U.S. 367 (1968), from the dissent perspective and noting that part of the "first amendment insult" comes from the fact that the government silenced speech because they found it "unpatriotic, threatening, and offensive").

²⁸² But see *id.* at 105-06 (doubting the ability of bureaucrats to distinguish on an ad hoc basis).

²⁸³ That is, most content-based regulations have disadvantaged dissenters rather than privileged them.

type of government action that should regularly interfere with those values and raise those concerns.

First, from the speaker's perspective, any regulation that interferes with her assertion of integrity and individuality through speech should receive first amendment scrutiny. Regulations that impact on the content or message of her speech, as understood by the speaker, will almost always have this effect because it is generally through the message that individuality is expressed. Regulations that impact on an aspect of the speech not intended to be communicative by the speaker are far less likely to have this effect. For example, O'Brien's expression of his own integrity and individuality would have been stifled regardless of the government's purpose in passing the regulation because, from his perspective, burning his draft card was part of the content or message of his speech. On the other hand, assuming that the location of the symbolic burning had no communicative content and that other sites were available, being told he could not block the steps of the courthouse would have interfered far less with the function of the speech as an expression of individuality. Thus, from the perspective of the dissenter, content discrimination is any government interference with the content of the message from the speaker's point of view. So understood, content discrimination deserves strict first amendment scrutiny because such interference would correlate highly, although by no means perfectly, with an intrusion on the value of dissent for the speaker.

From the perspective of the audience, content discrimination is any government action that has the systematic effect of silencing or disadvantaging some part of the cacophony of voices and points of view that keeps the audience on its collective toes. Although a general silencing would also interfere with the value of dissent for the audience, the problem with a silencing of only some points of view is distinct and independently important. The difference is perhaps best captured by the distinction between apathy and complacency. If the government silences speech generally, the danger from the perspective of dissent is that the people will become apathetic, no longer interested in pursuing truth or promoting change. With no means of free discussion, they will simply cease to care about those goals at all. The effect of silencing only a relatively small number of points of view is rather different. The people need not become apathetic, but they will very likely become complacent, at least with respect to those issues on which the silenced points of view would have challenged them. They may

well continue to believe in the importance and efficacy of seeking truth and change, but will rest satisfied with their present positions on the issues on which dissent has been lost. Thus, apathy and complacency are distinct and serious harms. From the perspective of the audience, then, content discrimination poses a real and independent danger, deserving of first amendment scrutiny.²⁸⁴

Finally, some of the danger of content discrimination from the dissent perspective lies in the government purposes that so regularly motivate it. As Shiffrin argues, "[t]o accept dissent as a value . . . is to assume that wielders of power have advantages in defending their position and that their use of power is more often self-serving than they admit—even to themselves."²⁸⁵ One who accepts the value of dissent would be suspicious of the government's motives whenever it interferes with speech. Most obviously, if the first amendment protects dissent, then it should be a *per se* constitutional violation for legislators or administrators to regulate speech in order to suppress dissent because it threatens their own power.²⁸⁶ More-

²⁸⁴ When the dissent perspective is compared to the truth theory, an interesting lack of parallelism occurs. Both positions would see a harm in total silencing (apathy for one, loss of truth-seeking function for the other), and both would see a harm in silencing only some points of view (complacency, deception), but only the dissent perspective suggests an independent harm in lowering the volume of the whole social conversation without silencing anyone. Within the truth theory, such a general and evenhanded quieting does not change the relative strengths of the contending points of view and, therefore, should not affect the ability of the speech "market" to generate truth. Cf. Redish, *supra* note 4, at 130-31 (raising the issue of whether silence is a less severe interference with the marketplace of ideas than distortion). From the dissent perspective, however, there may be value simply in speech's capacity to rile people up, which may depend on the "loudness" of the speech. "Loudness" might take the form of quantity of speech, frequency with which the message is received, or even decibel level. Quieting speech might interfere with its ability to unsettle its audience and thereby endanger the value of dissent in a way that such quieting does not endanger the value of truth.

²⁸⁵ S. SHIFFRIN, *supra* note 1, at 96.

²⁸⁶ Shiffrin has noted that under the dissent theory government does not automatically violate the first amendment when it acts to silence speech simply because it is hostile to the content. See *id.* at 12. Hostility, however, is a very broad concept that could encompass many of the more specific reasons discussed in the text. If the government official responsible does not like the content because she believes it will offend people, or because she believes it will persuade them to behave badly, then the motive, while suspicious, is not outright unconstitutional. If, on the other hand, the official is hostile to the content because it threatens her own power, then the motive is not merely suspicious, but illegitimate. The government, needless to say, will rarely suggest such a motive. Moreover, this motive will rarely be the only plausible purpose for a regulation (in which case the Court might be forced to confront it even if the government did not raise it). In other words, this category of *per se* unconstitutional purpose will have little practical significance. The category

over, suppressing speech because it might offend people should generally be suspect, since riling people up is part of the value of dissent.²⁸⁷ Finally, the government sometimes suppresses speech because people might be persuaded by it and behave in ways of which the government disapproves. If one takes the value of dissent seriously, however, one might suggest that the government often uses this reason to silence speech simply in order to bolster its own power, even when the behavior attacked is neither very dangerous nor very likely. One response to this suspicion is to raise the level of review for regulations justified in this way, perhaps by requiring that the harm be both real and immediate.²⁸⁸ Thus, the dissent perspective illuminates aspects of all three types of content discrimination.

f. *Negative Theory*

All of the foregoing theories are "positive" ones in that they see a positive value in speech justifying its special protection. There are also "negative" theories of free speech, which argue that it is not the peculiar value of speech but the peculiar danger of censorship that justifies the special solicitude for free speech. One of the most forceful proponents of the negative view is Frederick Schauer.²⁸⁹ Although the concern about content discrimination as an aspect of the government's motives arises in some of the positive theo-

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is, however, consistent with both the case law, *see Grosjean v. American Press*, 297 U.S. 233, 250 (1936), and the broader approach to content discrimination suggested by this Article.

²⁸⁷ *See Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

²⁸⁸ *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (overruling *Whitney v. California*, 274 U.S. 357 (1927), which had held that speech advocating violence to effect social change is so dangerous to the security of the state that the government may outlaw it).

²⁸⁹ *See, e.g., Schauer, supra* note 9, at 782-83; Schauer, *Must Speech Be Special?*, 78 NW. U.L. REV. 1284, 1300-01 (1983) (arguing that the dangers of excess government regulation justify free speech); Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 2 (1989) (arguing that the first amendment is "an embodiment of a risk-averse distrust of decisionmakers"); *see also* Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1490 (1987). Schauer is the source of the "positive/negative" terminology. *See* F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 80-81 (1982).

ries,²⁹⁰ the focus on government purpose becomes sharpest in the negative theory.²⁹¹

Both pragmatic and conceptual reasons suggest that giving the government control over speech is more dangerous than giving it control over many other human activities.²⁹² One practical difficulty arises from the bias or self-interest of the censors. When speech is regulated because of the danger it poses to the government, allowing the government to fashion the regulations is very much a case of putting the fox in charge of the henhouse.²⁹³ This is true whether the government is suppressing speech because the speech is critical of the government, as in a sedition law, or because it fears the speech will lead people to behave in ways dangerous to the government, as in a subversive speech law. The government is quite likely systematically to overestimate the risk of harm and undervalue the social utility of such speech. While speech is not unique in this regard, it is somewhat unusual. The range of activities, other than speech, that pose so direct a threat to the persons who make up the government—and who would administer the regulatory system—is relatively small.—And, as the example of treason indicates, other such activities may themselves be the subject of special constitutional protection, perhaps for much the same reason.²⁹⁴

A second practical difficulty arises from the human desire for unanimity or consensus. This urge toward intolerance may be particularly strong with respect to speech, as opposed to other forms of conduct, because it is so public and demands our attention. We may be prepared to tolerate far more unorthodox behavior when we do not need to actually see or hear it. As Schauer suggests, “if the urge towards intolerance is greater with

²⁹⁰ The tolerance theory would be suspicious of government purposes aimed at the content of speech, *see supra* notes 269-71 and accompanying text, as might the democracy theories, *see supra* note 254.

²⁹¹ *See* Schauer, *supra* note 9, at 782-83.

²⁹² Other fundamental rights can also be justified in this negative way. For example, one of the strongest and most common arguments for religious freedom relies not on the value of religion itself, but on the dangers of government regulation of religion. *See, e.g.,* *Lemon v. Kurtzman*, 403 U.S. 602, 622-23 (1971) (warning that state entanglement with religion through public aid to parochial schools would engender destructive political fragmentation along religious lines). Speech may not be unique, but rather one of a small number of particularly poor subjects for regulation.

²⁹³ *See* F. SCHAUER, *supra* note 289, at 81-82.

²⁹⁴ *See* U.S. CONST. art. III, § 3.

respect to speech than with respect to other actions, . . . then a Free Speech Principle may be necessary merely to counter the tendency toward over-regulation."²⁹⁵

Finally, there are the conceptual difficulties that the need to draw distinctions poses in any regulatory scheme. This slippery slope problem may be particularly serious in the context of regulating speech because of the conceptual vagueness of our categories for dealing with speech, and the counterintuitive complexity of a scheme that could deal adequately with all of the relevant variables in a speech situation.²⁹⁶ While such conceptual difficulties are a basis for avoiding regulation altogether, they are also a reason to be especially concerned about improper government motivation. Vagueness and complexity provide convenient cover under which governments can suppress speech contrary to the interests of the powerful, or offensive to our desire for unanimity.

The primary focus of the negative theory, then, is on the dangers posed by government regulation of speech, and, in particular, regulation based on improper motives. Content discrimination under the negative theory would be defined in terms of government purpose. The communicative impact model fits quite comfortably with the negative theory as a method for determining when the government purpose is closely enough tied to the content of the speech to qualify as content discrimination. The practical dangers discussed above, which can encourage government censors to overregulate, are all related to the communicative harms of the speech. When a government regulation of speech seeks to prevent a communicative harm, it provides a ready opportunity for the type of government abuse with which the negative theory is concerned. In addition, these suspect motives should account for a rather large percentage of regulations aimed at a communicative harm. Regulations aimed at a communicative impact of speech should, therefore, receive a stringent level of judicial review.

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²⁹⁵ F. SCHAUER, *supra* note 289, at 83. It is interesting to note that Bollinger, focusing on intolerance as a justification for protection of free speech, does not agree that we are more intolerant of speech than of other behavior. He argues that intolerance of both speech and action comes from the same source, namely, a concern with the mind that lies behind the activity. See L. BOLLINGER, *supra* note 195, at 110-13. The justification for protecting speech rather than other behavior is that speech, for a variety of reasons, offers a particularly good arena for the lesson in tolerance. See *id.* at 119-24.

²⁹⁶ See F. SCHAUER, *supra* note 289, at 83-85.

Clearly, a regulation apparently aimed at a noncommunicative harm could also be motivated by one of these suspect reasons. For example, although the local ordinance in *Young v. American Mini Theatres*²⁹⁷ explicitly cited the noncommunicative harms of crime and depression of property values,²⁹⁸ it might well have been motivated by a desire to suppress speech offensive to the sensibilities of the majority. This possibility suggests that under the negative theory, even regulations apparently aimed at non-communicative harms should be subject to stringent review. Stringent review is, however, only warranted where there is reason to believe that the regulation was in fact motivated by suspect purposes. Unfortunately, this direct inquiry into motive is blocked by the Court's consistent refusal in the free speech context to examine the types of evidence (such as legislative history and common sense) that would allow one to determine actual motive.²⁹⁹ Absent such evidence, it is unreasonable to subject all regulations aimed at noncommunicative harms—the vast majority of which will be innocent—to as stringent a review as regulations aimed at communicative harms.³⁰⁰ In light of this restriction on the analysis of actual motive, the negative theory fits comfortably with the communicative impact model of governmental-purpose content discrimination.

g. *Summary*

Thus, all three types of content discrimination find foundation and justification in these theories of speech. Governmental purpose is of concern to the negative theory, the tolerance theory, and the

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²⁹⁷ 427 U.S. 50 (1976).

²⁹⁸ See *id.* at 54 n.6, 71 n.34.

²⁹⁹ But see *Grosjean v. American Press*, 297 U.S. 233, 250 (1936). The Court does, of course, engage in precisely this type of inquiry in other contexts. See, e.g., *Stone v. Graham*, 449 U.S. 39, 41 (1980) (looking behind the avowed secular purpose in an establishment clause case to the pre-eminent "plainly religious" purpose of the state).

³⁰⁰ The Court has, however, sometimes used doctrines such as overbreadth to examine legislative motive through the back door. See *infra* notes 305-15 and accompanying text (discussing analysis of legislative motive). There is, of course, the relatively simple solution Justice Brennan has suggested: the Court could require the government to regulate noncommunicative effects directly rather than using content-categories as proxies for the effect. See *Boos v. Barry*, 485 U.S. 312, 335 (1988) (Brennan, J., concurring in part). This approach would resolve the *American Mini Theatres* situation, but it would not help ferret out suspect motives behind laws that are already facially directed at noncommunicative effects without any reference to content, as in *United States v. O'Brien*, 391 U.S. 367 (1968).

dissent theory. Content discrimination from the audience's perspective is a serious problem within the truth, democracy, and tolerance theories. And the impact on content from the speaker's point of view is a major issue in the self-fulfillment theory, one type of democracy theory, and the dissent theory.

I intend this theoretical discussion to be illustrative rather than exhaustive in two ways. First, each theory may connect to types of content discrimination other than the one upon which I have focused in discussing the theory. For example, both the truth and democracy theories have implications for the government purpose type of content discrimination, although I do not discuss those implications in the text.³⁰¹ Similarly, the truth theory may also support a view of content discrimination from the perspective of the speaker, or the self-expression theory may generate a concern about content discrimination in the form of certain government purposes. I believe that the connections I have drawn are the strongest and most important ones, but additional connections would, of course, simply strengthen the argument for the proposed recognition of all three types of content discrimination. Second, the theories I discuss may well suggest that certain types of interference with speech other than content discrimination also deserve stringent review. For example, the truth and democracy theories would view a government regulation having the effect of silencing speech broadly across content categories as a serious violation of free speech.³⁰²

The concept of content discrimination offers a foundation for only part of first amendment doctrine. When the various types of content discrimination are recognized, however, that foundation is seen to be an exceptionally secure one. Some of the deep political commitments giving content to the concept of equality provide an explanation of the seriousness of the three types of discrimination, and parallels between first amendment doctrine and equal protection doctrine help to shed light on the significance of equality in the first amendment context. Also, all of the major theories of the first amendment accept one or more of the types of content discrimination as very serious threats to free speech. Taken in the aggregate,

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³⁰¹ See *supra* note 254.

³⁰² Although it may seem that every theory should find such a broad silencing to be constitutionally suspect, it is not clear that the negative theory would. Under that theory, broad effect alone should not be suspect because speech is not necessarily a particularly valuable social good. Only the type of regulation that might hide an illegitimate motive should raise such suspicions.

the free speech theories explain and justify all of the types of content discrimination.

III. THE PROPOSED APPROACH

In the preceding section, I argued that content discrimination, while a central concern of the first amendment, is by no means a unitary concept. In this section, I will sketch a doctrinal approach based on recognition of the various types of content discrimination. The sketch cannot be exhaustive, but I hope that it will provide a clear outline of one area of the first amendment and the relationship between the different types of content discrimination and several other doctrines.³⁰³

My approach incorporates several general conclusions. First and most generally, different types of content discrimination raise different problems and require different doctrinal tools. The issue here is not simply one of the degree of strictness, although issues of degree are involved, but rather of tailoring the doctrine to meet the specific nature of the problem.³⁰⁴ Second, contrary to the opinion of every member of the Supreme Court and most of the commentators, the old lines of TPM and symbolic speech doctrine are not and should not be a single unified standard. Indeed, these two types of cases provide an excellent example of my first conclusion: they involve two different types of content discrimination—from the perspective of the audience in TPM cases and from that of the speaker in symbolic speech cases—and require different doctrinal responses. And third, issues of remedy—whether the regulation should be invalidated on its face or only as applied to this speaker—also depend in part on the nature of the content discrimination involved.

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³⁰³ I will assume that the theoretical background informing interpretation of the first amendment incorporates elements of all of the free speech theories discussed in the previous section.

³⁰⁴ See Schauer, *supra* note 2, at 287 ("We are accustomed to thinking in terms of levels of protection, . . . it may be that different categories of speech should be treated differently, which does not necessarily entail more or less.").

A. Government Purpose

1. Legislative Purpose

Some government purposes will be per se unconstitutional as reasons for regulating speech. For example, it should be unconstitutional if the government silences or disadvantages speech because it believes the ideas expressed to be false and wishes to prevent the spread of falsehood.³⁰⁵ Similarly, it would be illegitimate for the government to silence speech simply because the speech is critical of those in power.³⁰⁶ The Supreme Court has also indicated that offensiveness of the ideas expressed, at least where there is no substantial privacy interest and no exposure to children, may be an illegitimate basis on which to silence fully protected speech.³⁰⁷

The doctrinal analysis should start by inquiring whether the regulation serves one of these illegitimate purposes.³⁰⁸ Such an inquiry into purpose, however, raises several difficulties. First, there are the institutional problems of impropriety and futility. It violates a sense of the dignity of separate branches to allow judicial inspection of the motives of individual legislators. And there is

³⁰⁵ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964). There are some important exceptions to this generalization. The government can try to silence false or misleading advertising because commercial speech does not receive full first amendment protection. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976). The government can also attempt to silence false and defamatory speech under its libel and slander laws. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-48 (1974). Here, however, only statements of fact, and not unprovable statements of opinion or idea, can be the basis of a suit. This protection for opinions and ideas places a premium on distinguishing them from facts. After a substantial period of silence on this issue, last term, the Court finally held that while there is no separate and independent protection for opinion as such, existing first amendment doctrine does not allow a libel suit based on statements that are not provable as false, at least where matters of public concern and a media defendant are involved. See *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2706 (1990). This position is consistent with the claim in the text that the government may not attempt to prevent the spread of an *idea* simply because it believes it to be false.

³⁰⁶ See *New York Times*, 376 U.S. at 272-73.

³⁰⁷ See *Texas v. Johnson*, 109 S. Ct. 2533, 2544 (1989); *Cohen v. California*, 403 U.S. 15, 21-26 (1971). Once again, I am leaving aside the complex issue of lower value categories of speech. See *FCC v. Pacifica Found.*, 438 U.S. 726, 744-48 (1978).

³⁰⁸ There are two reasons for beginning with this inquiry. First, identification of one of this handful of unconstitutional purposes is a reasonably straightforward way to invalidate a regulation of speech. Second, this ground for invalidation requires a fairly sweeping remedy, which some alternate line of doctrinal analysis would probably not provide.

always the danger that the judiciary will find itself impotent in the face of legislative dissembling about motives. As Chief Justice Warren argued in *United States v. O'Brien*.³⁰⁹

What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it.³¹⁰

Beyond these institutional concerns there is also the practical difficulty in ascertaining motive. The motives of individuals are often complex and ambiguous, even to themselves, and such problems increase exponentially in the case of a legislature that is both large and full of multi-faceted relationships that may affect motive. Thus, both institutional and pragmatic reasons counsel against using personal motives as the basis for an analysis of legislative purpose.

There is a long-standing debate in the literature over how to deal with these difficulties. Some commentators have suggested that the problems are simply not that severe and should not prevent an examination of actual motives.³¹¹ Others believe that a distinction can be drawn between motive and purpose, where purpose is understood in a more objective sense that avoids some of these pitfalls.³¹² It is unnecessary for me to enter this debate because

³⁰⁹ 391 U.S. 367 (1968).

³¹⁰ *Id.* at 384; see also Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1212-17 (1970) (discussing the problems with assessment of legislative motive).

³¹¹ See Eisenberg, *supra* note 194, at 132-39 (arguing that motive analysis is appropriate at least where rights of equality are involved, as they are in content discrimination). See generally Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95.

³¹² See *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) (asserting that it is possible to find the objective purpose of a statute, but generally not possible to find the subjective motives of those enacting it); A. BICKEL, *THE LEAST DANGEROUS BRANCH* 209 (1962); Heyman, *The Chief Justice, Racial Segregation, and the Friendly Critics*, 49 CALIF. L. REV. 104, 115-16 (1961); Mac Callum, *Legislative Intent*, 75 YALE L.J. 754, 756-57 (1966); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1091 (1969). But see Ely, *supra* note 310, at 1217-21 (arguing that the distinction is untenable).

If purpose is defined as the goal that a reasonable person looking at the regulation would assume it was designed to serve, then this approach is similar, although not identical, to the *O'Brien* Court's description of the accepted method in cases such as *Grosjean v. American Press Co.*, 297 U.S. 233 (1936): "the inevitable

either of these responses provides an adequate foundation for the analysis of the government's purposes.³¹³

When the court finds that the purpose of a regulation is an illegitimate one, the remedy is plain: hold the regulation invalid on its face, finding it unconstitutional as applied to this speaker, all speakers, and even to non-speakers.³¹⁴ When the government

effect of a statute on its face may render it unconstitutional." *O'Brien*, 391 U.S. at 384. "On its face" indicates that the Court does not look at empirical evidence about actual effects, but rather at what anyone reading the statute would expect its effect to be. "Inevitable effect" indicates that it is not just any effect that will suffice but only one which seems to be a necessary and obvious consequence of the statute. The "objective" conception of purpose would certainly qualify as this type of effect.

³¹³ The "objective" conception of purpose may seem to be somewhat at odds with the theories of free speech that underlie the concern with content discrimination in the government's purpose. The theories, after all, are concerned with what actually motivated the government, not with what a reasonable observer might see as the goal of a regulation. The tension is real, but the "objective" conception of purpose represents a compromise that should be acceptable to a pragmatic theorist in light of the institutional and practical difficulties with actual motive.

The compromise is acceptable because it will weed out the worst cases of legislative abuse, where it is plain even to an outsider that the legislature is attempting to silence speech for an illegitimate reason. It may also catch a few instances where the legislature did not intend what seems the obvious goal to an outside observer, but that overinclusiveness is simply a useful prophylactic in the eyes of a negative theorist. Conversely, it may miss some cases where the legislature cleverly crafts a statute to hide its invidious motive. The direct inquiry into motive is, however, only the first line of defense, and these cases of covert content discrimination—if they actually suppress speech—should be caught by one of the later doctrinal stages.

Only one class of regulations can consistently escape under this conception of purpose: those laws in which the legislature is cunning enough to try to hide its illicit motive but incompetent enough that the final product does not in fact have the effect of silencing or disadvantaging the targeted speech. This failure might be a real cost from the point of view of a negative theorist; however, given the probably small number of such cases, the cost should be more than outweighed by the benefit of avoiding the institutional and pragmatic difficulties of the more "subjective" conception of purpose that would allow a court to catch these cases.

³¹⁴ A regulation should rarely have as its plain purpose, on its face, the silencing of a certain content-category of speech for one of the reasons above and yet also apply to non-speech activities. Such a situation might, however, be less rare if the analysis of purpose were to include consideration of the state of affairs under which the regulation was passed. Such an analysis would not involve an examination of legislators' personal motives, only of the facts that were common knowledge at the time. For example, if the Court in *O'Brien* had taken account of the existence of mass dissatisfaction with the Vietnam war and the fact that burning one's draft card had become a common and well-recognized means of protesting that war, then it might have seen the legislative purpose rather differently even without examining the speeches of a handful of legislators. If the Court had in fact recognized that the legislature's purpose was to silence speech that was critical of government policies and offensive to some people, then it should have invalidated the regulation as a whole, even though some of its applications might have been to non-speakers. Congress

acts to further one of these illegitimate purposes, it acts outside of its delegated powers and the act is invalid in all of its applications.

There are, however, many government purposes that are suspicious without being *per se* unconstitutional. Indeed, all government purposes that are aimed at a communicative impact of speech, but that do not fall into one of the categories of illegitimate purposes, should be suspect. If one of these suspect (but arguably legitimate) purposes is behind a regulation of speech, the law should not be automatically invalidated, but it should be subjected to some variant of strict scrutiny. The scrutiny assures that the state interest is seriously implicated in both the case at hand and the class of cases addressed by the regulation generally and that the interest is important enough to warrant the intrusion on speech. If this high standard is met, then the suspicion about the government's purposes should be allayed and the regulation upheld. If the standard is not met, then the suspicion that the government is using the purpose as an excuse to overregulate is confirmed and the law should be invalidated.

For example, the government may legitimately seek to prevent speech because it fears that the speech will lead listeners to behave in dangerous or even illegal ways. Experience has shown, however, that the government can be far too quick to stifle speech on this basis, so the justification, while legitimate, is highly suspect. Traditionally, and quite appropriately, the Court has responded to this situation by demanding that the government show that the dangerous behavior is serious, likely, and imminent.³¹⁵ The seriousness and likelihood both address the issue of the weight of

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could, if it wanted to, pass a new law punishing those who destroy their cards for other reasons, but specifically exempting speakers.

I recognize that this approach to purpose raises some interesting difficulties. By what standard must one establish the facts? Which party bears the burden of proof on this issue? Is it enough to show that something was the case or must one also show that it was known to the legislature, or even widely known to the public? Although these issues are important ones for the doctrinal standard I am suggesting, I will not attempt to answer them here. I do believe that it is worth attempting to resolve these issues in ways that provide a manageable doctrine, as the alternative is to leave the Court acting the undignified role of the ostrich.

³¹⁵ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (imminent and likely); cf. *Whitney v. California*, 274 U.S. 357, 377-78 (1927) (Brandeis, J., concurring) (imminent and serious), *overruled*, *Brandenburg*, 395 U.S. 444 (1969). Although the *Brandenburg* test also requires that the speaker intend to cause the dangerous behavior, the intent requirement seems to have less to do with concern about the government's suspicious motives and more to do with concern about the blameworthiness of the individual who will be criminally punished.

the government interest, while the imminence can be understood as a question about the efficacy of less speech-restrictive means, like counter-speech. Thus, the *Brandenburg* test can be seen as a variant of the strict scrutiny "compelling state end/least restrictive means" standard, modified to deal with the special character of a government interest in preventing behavior caused by speech.

When the purpose is suspect but legitimate, facial invalidation will not always be appropriate. The question in such cases is whether the government has given too much weight to other concerns as against speech. Because the government's concerns may vary somewhat in strength from case to case, it is possible that the regulation could be unconstitutional as applied to some speakers—whose speech, although fitting the statutory category, does not pose a very great threat—while constitutional as applied to most in the category. Thus, the remedy might be either invalidation as applied to all speakers or invalidation as applied only to the present speaker.

2. Administrative Purpose

The foregoing analysis has been directed exclusively to the purposes of the legislature, but, as the Court recognized in some of the earliest free speech cases, the purposes of government administrators can also raise content discrimination concerns. The laws at issue in this series of cases were facially content-neutral—for example, requiring all distributors of any type of literature to obtain permission from the city manager³¹⁶—but the Court was worried about the broad discretion they gave to government officials. The Court's suspicion of such discretion arose, in large part, from its fear that officials would use their power to discriminate among speakers based upon the content of their speech.³¹⁷ Indeed, in *Cox v. New Hampshire*,³¹⁸ one of the cases in which the Court upheld a licensing scheme, the Court emphasized the limiting construction placed on the statute by the highest state court: "the

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³¹⁶ See *Lovell v. City of Griffin*, 303 U.S. 444, 445 (1938).

³¹⁷ See, e.g., *Saia v. New York*, 334 U.S. 558, 560-61 (1948); *Cantwell v. Connecticut*, 310 U.S. 296, 305-06 (1940); *Hague v. CIO*, 307 U.S. 496, 516 (1939); *Lovell*, 303 U.S. at 451; see also *Cox v. New Hampshire*, 312 U.S. 569, 577-78 (1941) (describing the previous cases as involving licensing or permit schemes which created a risk of official censorship). Of course, the fact that such licensing schemes were the classic form of prior restraints provided an additional source of concern. See, e.g., *Cantwell*, 310 U.S. at 306; *Lovell*, 303 U.S. at 451-52.

³¹⁸ 312 U.S. 569 (1941).

court held that the licensing board was not vested with arbitrary power or an unfettered discretion; that its discretion must be exercised with 'uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination.'³¹⁹ In addition, the Court specifically found that the board had acted within these limits: "[t]here is no evidence that the statute has been administered otherwise than in the fair and non-discriminatory manner which the state court has construed it to require."³²⁰

This concern with censorship is not an assessment of the purpose of the state or local legislature in passing the regulation. The Court has either accepted the government's assertion that the laws were aimed at noncommunicative harms, like litter or public safety,³²¹ or refused to consider the legislature's motive at all.³²² The censorship problem arises from the actual or potential discrimination by officials administering the regulation, not the legislature's purpose.

Evidence of impermissible administrative motive should activate the same standard of review as evidence of the same type of legislative motive. The remedy, on the other hand, would be different.³²³ Since administrative motive may vary with each instance of application, while legislative motive colors the whole regulation, a finding in favor of the speaker on the issue of illicit administrative motive should lead to invalidation of the regulation as applied to this speaker rather than on its face.

3. Vagueness

The possibility of illicit administrative purpose does raise another issue, which forms a kind of bridge between concerns about content discrimination in the government's purpose and content discrimination in the impact on the speaker. The outlines of that issue become clearer when we examine why the Court invalidates regulations based on the possibility of government abuse, even when there is no evidence that any abuse has actually occurred.³²⁴

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³¹⁹ *Id.* at 576.

³²⁰ *Id.* at 577.

³²¹ *See, e.g., Cantwell*, 310 U.S. at 307; *Schneider v. State*, 308 U.S. 147, 162 (1939).

³²² *See, e.g., Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938).

³²³ If the administrators were moved by illegitimate purposes, then their action should be struck down automatically; if their motives were suspect but not illegitimate, then their action should be subject to strict scrutiny.

³²⁴ There was evidence of abuse in some of these cases, *see, e.g., Hague v. CIO*, 307

Assume that there is no content discrimination in either the legislators' or the administrators' purposes, but the regulation is open-ended and vague. What, then, is the danger to speech that justifies striking down the regulation? The danger lies partially in the harm that could be occasioned by a future illegitimate government motive, and in the practical difficulties facing the Court if it were to attempt to distinguish in a particular case between a legitimate exercise of discretion and a discriminatory denial of permission.³²⁵ But there is also a harm that has nothing to do with the government's motives: even if the government's motives are perfectly pure from its own perspective, from the speaker's perspective, vague and discretionary licensing generates a silencing fear and encourages self-censorship, particularly of controversial or unpopular contents. One important result of this anticipatory self-censorship is that the audience may lose the opportunity to hear speech with these less common viewpoints. It is, of course, this danger of content discrimination from the perspective of the speaker and audience, described by the Court as the "chilling" of speech, that has long been at the heart of the explanation for the Court's insistence on clarity and precision in the regulation of speech.³²⁶

There are three differences between this type of vagueness analysis and the direct assessment of administrative purpose. First, administrators can act out of illegitimate or suspect purposes even when the guiding regulation is perfectly clear and non-discretionary;³²⁷ an argument about present administrative purpose does not require a showing of vagueness or discretion in the regulation itself. Second, the remedy for an unconstitutionally vague or discretionary regulation must be facial invalidation (if no clarifying construction is possible) because the chill continues as long as the regulation remains in operation. The harm, unlike in the case of a present unconstitutional administrative purpose, inheres not in the

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U.S. 496, 505 (1939) (noting findings that officials enforced a policy of forbidding communications of views regarding the National Labor Relations Act), but such evidence was noticeably lacking in others. *See, e.g.,* *Saia v. New York*, 334 U.S. 558, 559 (1948); *Schneider v. State*, 308 U.S. 147, 157-59, 163-64 (1939).

³²⁵ *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988).

³²⁶ *See id.* at 757-58; *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940); *cf. Schneider*, 308 U.S. at 164 (describing the licensing examination as "burdensome and inquisitorial" and indicating a concern that it could intimidate speakers into silence).

³²⁷ For example, a local official consistently might find that civil rights marchers do not meet the clear and non-discretionary standard of order and convenience that is the precondition for a license to parade.

particular application, but simply in the continued existence of the regulation. And third, the harm caused by vagueness has as much (or more) to do with content discrimination from the speaker's perspective as with content discrimination in the government's purpose.

On the surface, vagueness and discretion appear to be problematic because of the risk of hypothetical (presently nonexistent) illicit administrative motives. This superficial concern appears to connect vagueness and discretion to the type of content discrimination that exists in the government's purpose. The serious, present harm in vagueness and discretion lies, however, in the concept of chill, a concept more closely related to content discrimination from the speaker's perspective. Chill implicates content discrimination through the mechanism of self-censorship by speakers who perceive administrators as a threat, and it inheres in the speaker's view of what the government is doing—and the consequent impact of the regulation on the speaker's behavior—rather than in the government's own purposes. Curing or avoiding chill requires changing the regulatory scheme so that speakers no longer feel threatened rather than changing the motives of government actors, who, by hypothesis, need not actually be discriminating. Thus the issues of vagueness and discretion form a bridge between the content discrimination residing in a bad government purpose and the content discrimination occurring in the impact of the regulation on the speaker.³²⁸

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³²⁸ Overbreadth, although often coupled with vagueness, raises distinct and unrelated issues. In its more colloquial usage, overbreadth refers simply to the lack of fit between the regulatory means chosen by the government and the goal they are intended to serve. This tailoring issue is relevant, in varying degrees, to all types of speech regulation.

In its more technical usage, overbreadth refers to an exception to the usual standing requirements that allows a person—whose own behavior could constitutionally be regulated—to raise the free speech claims that a third party might make against the law at issue. Because those speakers to whom the regulation could not constitutionally be applied might be silenced by its very existence, we allow the party before the Court to raise these third-party claims.

This type of chill is, however, distinct from that involved in vagueness, and generally will be unrelated to content discrimination. The category of speech chilled by vagueness is likely to be defined by the content of the speech because speakers are more likely to fear government censorship of controversial or unpopular views than commonplace and popular ones. The chill in overbreadth, on the other hand, arises from the fact that the regulation does, in fact, prohibit the contemplated speech and the would-be speakers are disinclined to break the law in order to test its constitutionality. The category of speech chilled is that category actually, and unconstitutionally, covered by the law, which need not be defined in terms of content. For example, the

B. *Impact on the Speaker*

If neither an illegitimate nor a suspect government purpose is present—the regulation is aimed at a noncommunicative harm—and the law is neither too vague nor too discretionary, then the doctrine should next explore the impact of the regulation on the speech act from the perspective of the speaker. A regulation may affect a communicative aspect of the speech or a facilitative aspect or both. If the regulation affects a communicative aspect—a part of the speech that actually expresses a message—then it strikes at the content from the speaker's point of view and merits a fairly high standard of review.

All true symbolic speech cases, where the government is concerned about an activity that causes a noncommunicative harm and the speaker chooses to use that activity as a means of symbolic expression, will fall into this category.³²⁹ Indeed, it is precisely this impact on an expressive rather than a facilitative aspect of the speech that distinguishes symbolic speech cases from TPM cases. The two lines can look identical in terms of the government purposes at issue and the impact on the marketplace of speech. It is the failure to attend to the difference in their impact on the speaker that has led courts and commentators to collapse the two sets into one category of cases.³³⁰

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regulation could legitimately prohibit parades in a certain part of town, but be overbroad in also prohibiting street-corner oratory. All street-corner speakers might be chilled by this law, regardless of the content of their speech. Thus overbreadth has no regular correlation with content discrimination.

³²⁹ *But cf.* Friedman, *supra* note 9, at 593 (discussing a broad collection of reasons why one might engage in symbolic speech, not all of which would qualify for the protection proposed here).

When the government is aiming at a communicative harm, the regulation is also very likely to impact on a communicative aspect of the speech. These cases will, however, already have been disposed of by the previous prong of the analysis dealing with the government's purpose. The standard of review under that prong is at least as high as under the one now being considered, so there is no need to consider such cases again from the speaker's point of view. Thus I will consider here only those cases where the government's purpose is noncommunicative but the regulation nonetheless impacts on a communicative aspect of the speech.

³³⁰ *See id.* at 601 (arguing that the focus must be on the speaker's purposes rather than only the government's purposes). Recognizing this difference between the two types of cases also helps to dispel the lingering effects of the "speech plus" doctrine. The question is not whether we have an instance of "pure speech" or of "speech plus." As many commentators have noted, all speech is "speech plus" something: noise if it is oral, litter if it is written, etc. The real question concerns not the size of the "plus" part, but the relationship between the message and the "plus." *See* Henkin, *supra* note 185, at 79-80 (arguing that the constitutionally significant distinction is that

The difference between symbolic speech cases and TPM cases has some important doctrinal implications. First, the "adequate alternatives" branch of the TPM test is inapplicable in symbolic speech cases. Where the regulation impacts on an expressive aspect of speech, there are no adequate alternatives. It is true that verbal and written means of expression are left open when symbolic speech is foreclosed. But saying "I hate and resist the Vietnam war" was no more an adequate alternative for O'Brien³³¹ than if Thomas Jefferson had been forced to write that "The tree of liberty must be refreshed from time to time with the blood of patriots and *very bad rulers*."³³² An alternate content is never an adequate alternative. What makes this test relevant in the TPM context is precisely the fact that content, at least from the speaker's perspective, is not at issue.

The second doctrinal implication of this difference is that, all other things being equal,³³³ the standard of review for a symbolic speech case should be stricter than for a TPM case. Although this conclusion violates the accepted wisdom in the field,³³⁴ it is required by the recognition that symbolic speech cases involve a type of content discrimination which is absent from TPM cases. Indeed, the content-discriminatory impact in symbolic speech cases

between "conduct that speaks, communicates, and other kinds of conduct"). If the physical activity about which the government is concerned is expressive, we have a symbolic speech case; if it is facilitative, we have a TPM case.

³³¹ Indeed, even burning a facsimile of his draft card, would not necessarily have been an adequate alternative. See Redish, *supra* note 4, at 148 (suggesting that burning a copy of the card would not have been as effective, not because of the illegality, but because burning the actual card demonstrated a rejection of the authority of the U.S. government). But see L. TRIBE, *supra* note 9, § 12-23, at 983 (suggesting that the only reason that burning a copy of the card is less effective is because that act is legal and furthermore, that reliance on an act's illegality to establish its unique effectiveness is impermissible).

³³² He, of course, wrote "tyrants." T. JEFFERSON, JEFFERSON: WRITINGS 911 (M. Peterson ed. 1984) (reprinting Letter from Thomas Jefferson to William S. Smith (Nov. 13, 1787)).

³³³ In particular, assuming there is no content-discriminatory impact on the speech market available to the audience. Such an impact would itself be a form of content discrimination deserving of stricter scrutiny. As I will discuss in the next subsection, the TPM test as it presently stands is an adequate mechanism for determining when such an impact is likely to be present. A TPM regulation that does not cause such an impact is content-neutral in all three senses and is therefore deserving of less scrutiny than a regulation that discriminates against certain content from the point of view of the speaker.

³³⁴ See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 n.8 (1984); Day, *Incidental Regulation*, *supra* note 18, at 493 n.6; Werhan, *supra* note 18, at 642-46.

should, it would seem, require some version of strict scrutiny if the various types of content discrimination are to be treated as equally serious. After all, both parts of the strict scrutiny test address issues that would be relevant in justifying the intrusion here: the weight of the government's interest and the fit between the means chosen and the end served. The strict scrutiny test simply demands the highest level of justification on both of these points: the state end must be compelling and it must be served through the least restrictive means.

It would be impracticable to invalidate all the regulations that fall into this category unless they meet the high strict scrutiny standard, because almost any activity could be used in an expressive way by someone. The whole range of government regulation would then be vulnerable. Such an approach would essentially eliminate the much lower standard of review traditionally applied to regulations—like most of the ones in symbolic speech cases—that only rarely have anything to do with speech.

There are two fairly straightforward ways to avoid this difficulty. The first, and simplest, is to reduce the stringency of the standard of review. It is possible to read *United States v. O'Brien*³³⁵ as having done precisely that: the required government interest went from “compelling” to “substantial” or “important,”³³⁶ and the fit requirement, at least in its application if not in its wording, was considerably less stringent than in the strict scrutiny standard.³³⁷ Certainly, the later cases applying the *O'Brien* standard fall far short of strict scrutiny.³³⁸

Nonetheless, I think the *O'Brien* standard, as resuscitated in my approach, should be interpreted as essentially equivalent to strict scrutiny. The first reason for this interpretation is that it is the best reading of the *O'Brien* case itself. The standard calls for an “important or substantial” government interest. In the sentence immediately preceding this statement of the test, the Court describes its precedent as “employ[ing] a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong.”³³⁹ This list—and the fact that the cases cited for each term are all strict scrutiny cases—suggests that the Court did not see

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³³⁵ 391 U.S. 367 (1968).

³³⁶ *Id.* at 376-77.

³³⁷ *See id.* at 382.

³³⁸ *See, e.g.,* *Wayte v. United States*, 470 U.S. 598, 610-14 (1985).

³³⁹ *O'Brien*, 391 U.S. at 376-77.

a real difference between the traditional "compelling" interest required for strict scrutiny and the "substantial" interest required under *O'Brien*. Similarly, the language of the test calls for the restriction of first amendment freedoms to be "no greater than is essential to the furtherance"³⁴⁰ of the state interest. It is difficult to discern in the wording of this phrase any meaningful difference from the traditional strict scrutiny standard, which requires that the government use the "least restrictive means" of furthering its goal.³⁴¹ The *O'Brien* standard, in both its phrasing and in the background explanation that the Court offers, is simply a version of strict scrutiny.

Two apparently contradictory aspects of *O'Brien* must be explained in order to support this interpretation. First, the Court states that O'Brien's behavior involved both speech and nonspeech elements, apparently indicating that such mixed behavior was not deserving of as much protection as "pure speech."³⁴² The response is simply that the "speech plus" language has functioned in the Court's opinions almost exclusively as a makeweight; it never developed as the basis for an identifiable, different standard of review and should not be so taken here. Indeed, in *O'Brien* itself, the Court eschewed reliance on the speech/action distinction and assumed that the burning of the draft card was protected speech.³⁴³ The second, and stronger, objection to my interpretation comes from the fact that the Court applied the standard in the *O'Brien* case in a much more lenient way than would be expected from strict scrutiny review. That leniency appears, however, to arise from the Court's concern over the seemingly endless variety of behavior that could come under the protection of the first amendment as symbolic speech.³⁴⁴ If the "slippery slope" was, in fact, the Court's concern, then the appropriate response would have been to design a fairly restrictive test for the behavior that can qualify as symbolic speech. The Court in fact adopted such a test

³⁴⁰ *Id.* at 377.

³⁴¹ See Ely, *supra* note 9, at 1484-85.

³⁴² See *O'Brien*, 391 U.S. at 376.

³⁴³ See *id.*

³⁴⁴ See *id.* As Steven Shiffrin has pointed out, the Supreme Court knows how to write a toothless test when it wants to, and *O'Brien*, on its face, is not one. Also, the Court often has allowed lower federal courts to apply the *O'Brien* test fairly strictly. See S. SHIFFRIN, *supra* note 1, at 184 n.97, 187 n.122. These facts indicate that the Court recognized the potential stringency of the test it designed even while it applied the test toothlessly.

in *Spence v. Washington*.³⁴⁵ Once the category of symbolic speech is restricted, however, the high standard suggested by *O'Brien* is both less threatening and more suitable.

There are other reasons for interpreting the *O'Brien* standard as a strict scrutiny variation, in addition to the language of the opinion itself. One of these is that a high standard of review best fits with the coequal status of the different types of content discrimination. Unless one is prepared to eliminate some of the theories of speech, or to rank them in importance, there is no basis for believing that discrimination in the government's purpose is more troubling in first amendment terms than is discrimination from the speaker's or audience's point of view. The standard of review for all three types of content discrimination should, therefore, be comparable in severity even if different in detail.³⁴⁶

Finally, it is unnecessary to weaken the *O'Brien* test because another means exists to avoid the damaging effect such a stringent test would have on the vast range of regulations that might impact on symbolic speech: the nature of the remedy may be altered. The remedy in a symbolic speech case should not be invalidation of the whole regulation, or even invalidation as applied to all speakers, but only an exemption for those speakers upon whom the regulation acts to restrict an expressive aspect of speech. For example, in my

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³⁴⁵ 418 U.S. 405, 410-11 (1974) (reversing conviction for "improper use" of a United States flag, stating that "[a]n intent to convey a particularized meaning was present and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it").

³⁴⁶ It would, of course, be possible to offer an argument for the reduced importance of some of the theories of speech. The different types of content discrimination would then properly receive different levels of review depending on the importance of the theories that recognize each type. Although I see no reason to offer such an argument, it would not alter the basic point of this Article: there are different types of content discrimination; they are all constitutionally suspect (even if not equally so); and they each require a particular doctrinal response tailored to their particular characters.

Eliminating certain theories altogether would, of course, have a much greater effect on my argument. If enough of them were eliminated, it might be that only one or two of the three types of content discrimination would remain. For example, if only negative theories were accepted, then both the audience's and speaker's perspectives might become irrelevant. Only government purpose discrimination would continue to seem very important. This approach might, therefore, generate something akin to the present state of the doctrine. Nonetheless, a total reliance on negative theory will not explain the present doctrine because the Court consistently has relied upon positive theories as well as negative ones. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-73 (1964). Unless the Court is prepared to abandon the positive theories it has so long endorsed, it must broaden its conception of content discrimination to include all three types.

hypothetical concerning the two student groups,³⁴⁷ neither persons who build fires for noncommunicative reasons (burning trash), nor the students who used the fire as a facilitative aspect of their speech (to draw a crowd) would receive an exemption. The high standard of review should apply only in the case of speakers like the Chinese students, for whom the fire was itself expressive of their message, and if the regulation fails, only those speakers should receive an exemption.³⁴⁸

There are several objections that can be, and have been, raised against this type of exemption. First, there is what Justice Marshall, dissenting in *Clark*, called "the imposter problem": the danger that persons who wish to engage in a prohibited activity for noncommunicative reasons will pretend to be symbolic speakers in order to qualify for the exemption.³⁴⁹ The government would then be forced to assess the sincerity of each speaker's motives in order to determine whether he or she is entitled to the exemption. But as Justice Marshall pointed out, the various branches of government have had some experience with such assessments already: the free exercise clause of the first amendment has, until recently, afforded similar exemptions, but only when a sincerely held religious belief would be violated by the required or prohibited action.³⁵⁰ The

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³⁴⁷ See *supra* text accompanying notes 182-87.

³⁴⁸ As a result, the relevant class to consider in assessing the government's interest is neither the present speaker alone, in which case the interest would almost always be quite small, nor all possible violators of the regulation, in which case the interest very often would be quite large. The relevant class is the class of potential violators who have the same type and strength of first amendment claim as the present speaker. For further discussion of this issue, see *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296-97 (1984); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1980).

³⁴⁹ *Clark*, 468 U.S. at 306 (Marshall, J., dissenting); see also *Stone*, *supra* note 20, at 76-77 (noting that content-neutral analysis "comes at the cost of encouraging strategic behavior by people who want to violate laws").

³⁵⁰ See *Clark*, at 307 (Marshall, J., dissenting) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972)). This whole line of free exercise cases, beginning with *Sherbert v. Verner*, 374 U.S. 398 (1963), has been called into question by the recent decision in *Employment Div. v. Smith*, 110 S. Ct. 1595 (1990). The Court held in *Smith* that a member of the Native American Church, who sincerely believed that his religion required him to take peyote as part of certain religious rituals, was not entitled to an exemption from the state's generally applicable criminal law prohibiting the use of that drug. Along the way to this conclusion, the majority opinion denied that free exercise doctrine ever included religious exemptions from generally applicable laws. See *id.* at 1600. The Court reinterpreted the earlier cases, including *Sherbert* and *Yoder*, in narrower ways. Admittedly, the *Smith* case is strong evidence (if any was necessary) that the Court is unlikely to adopt the approach that I am suggesting in the free speech context, having just abandoned it in the free exercise context.

analogous inquiry in the symbolic speech context would require the government to ask whether the person seeking the exemption sincerely wished to engage in the activity for reasons relating to speech. This inquiry would, of course, rely heavily on the petitioner's own statements about her purpose, but also could consider both statements and actions of the would-be speaker in other contexts that shed light on the sincerity of her motives.³⁵¹ Indeed, there have been some fairly obvious attempts by "imposters" to take advantage of the exemptions in the free exercise context, but all easily were prevented.³⁵² And there does not seem to have been any of the "floodgates" effect that the government purports to fear. There is no reason to believe that such an effect would be more likely in the speech context than in the religion context.³⁵³

In light of my proposed approach, however, the analogy to free exercise of religion is not entirely fair. After having enquired into the sincerity and speech-relatedness of the would-be speaker's motives, the government must, in the speech context, go a step further and determine whether the activity at issue is actually an expressive aspect of the speech or merely facilitative. There is no analogue to this step in the free exercise context.³⁵⁴

Nonetheless, the majority in *Smith* is considerably less than candid when it claims that such exemptions were not a part of the free exercise doctrine before this year. Therefore, I believe that it is both relevant and valid to look to the experience with free exercise exemptions over the past 25 years in order to assess the practicality of free speech exemptions.

³⁵¹ Consider these comments:

[M]any of our actions [can] be understood only in relation to a norm. . . . There is a difference between sleeping late on Sunday and refusing the sacraments, between having a snack and desecrating the fast of Yom Kippur, between banking a check and refusing to pay your income tax. In each case an act signifies something new and powerful when we understand that the act is in reference to a norm.

Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 7-8 (1983) (footnotes omitted).

³⁵² See, e.g., *State v. Randall*, 540 S.W.2d 156, 160 (Mo. Ct. App. 1976) (rejecting the claim for an exemption for the use of marijuana, LSD, and hashish by the members of the Aquarian Brotherhood Church).

³⁵³ Indeed, the "imposter" argument depends upon the assumption that some substantial number of potential imposters will go to the trouble of discovering the current state of first amendment doctrine before they engage in the prohibited activity. Without such advance preparation, it would be very difficult for the imposter to tailor her story to the very particular issue of constitutional concern: the content-discriminatory impact on the speaker.

³⁵⁴ The analogy is quite fair when used by Justice Marshall in his dissent in *Clark* because neither he nor the majority sees any need to treat expressive and facilitative aspects of speech differently.

This additional inquiry will, undoubtedly, increase the difficulty for the government, but it should not render the approach unworkable. First, because there is substantial protection against interference with facilitative aspects of speech,³⁵⁵ less is at stake for would-be speakers, and there is less of an incentive to pretend than there might be on issues that would eliminate the constitutional protection altogether.³⁵⁶ Indeed, if the impact on the facilitative aspect is severe enough to cause content discrimination from the audience's perspective, then the standard of review should be identical.³⁵⁷

It is important to recognize the limits of this incentive argument. Some activities may be so consistently rewarding to such a large group of people that the incentive to pretend will remain strong regardless of the alternatives. For example, many people no doubt would feel compelled to undertake a symbolic refusal to pay their income taxes. Similarly, some laws simply will become unworkable or inequitable if exemptions are allowed. The Court has dealt with these sorts of difficulties in the free exercise context by simply refusing exemptions to certain laws, such as the tax laws.³⁵⁸ I see no reason why the same approach would not suffice in the speech context.

Second, while any aspect of speech conceivably could be intended to be symbolic—including the time, place, or manner of the speech—intention alone is insufficient to make an aspect symbolic rather than facilitative. In order to qualify as symbolic speech, the activity, in its context, must be such that some intended audience is reasonably likely to understand its symbolic significance.³⁵⁹ This objective requirement places some limits on the pretenses of imposters.

Suppose I wished to march down Main Street at rush hour with the message "Vote for Joe and make our town a nuclear free zone." I have chosen that hour because I believe it will get me the largest audience. I could attempt to construct some explanation of why the hour and location are themselves symbolically communicative of my

³⁵⁵ See *infra* notes 361-74 & 387-405 and accompanying text.

³⁵⁶ For example, issues such as whether the motive is sincerely communicative, or—in the free exercise context—sincerely religious.

³⁵⁷ See *infra* notes 361-71 and accompanying text.

³⁵⁸ See, e.g., *United States v. Lee*, 455 U.S. 252, 260-61 (1982) (rejecting claim by Amish employer, who was exempt from paying his own social security tax, for exemption on religious freedom grounds with respect to his employees).

³⁵⁹ See *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

message, albeit a rather far-fetched explanation. But, in the context of my whole behavior—my posters and shouts of “Vote for Joe and make our town nuclear free”—no audience is likely to perceive the time and place of the demonstration as symbolic. I could, of course, change the surrounding context in ways that would make the symbolic message of the time and place clear enough that the audience would perceive it. For example, I could put something on my posters like, “Move forward with Joe—he will march through the city’s most tangled problems” and argue that the traffic congestion of rush hour will symbolically represent the tangled problems as we, Joe’s campaign, march through it. If I were willing to alter my communication in that way, however, it would indicate that my concern for the time was in fact related to its message, at least in part, and not merely a ruse to reach a larger audience. It is, in other words, always within the power of the speaker to make the symbolic speech claim credible, but the cost in terms of the real message often will be high enough to dissuade imposters from the effort.

The second objection to this exemption approach is that it is itself a type of content discrimination: exemptions are available to some speakers, because of the content of their speech, and not to others.³⁶⁰ This charge is true, in a technical sense, but it misses the

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³⁶⁰ See *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 619-22 (D.C. Cir. 1983) (Wilkey, J., dissenting), *rev'd sub nom.* *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); Lee, *supra* note 181, at 770. But see *Watt*, 703 F.2d at 598 nn.31-32 (the majority’s response).

Perhaps because of a fear of content discrimination, the Court generally has refused to provide exemptions from regulations that it classifies as content-neutral, even for those who have a special interest in the behavior limited. The only notable exceptions to this generalization involved political campaign regulations that posed a very serious threat to the continued existence of a minor party, see *Brown v. Socialist Workers Campaign Comm.*, 459 U.S. 87, 101-02 (1982) (holding that the first amendment requires exemption from the campaign disclosure rule), and a municipal ordinance requiring disclosure of membership lists, see *Bates v. Little Rock*, 361 U.S. 516, 527 (1960) (holding that the first amendment requires an exemption for groups who can demonstrate harm to associational rights from disclosure). Cf. *Stone & Marshall, Brown v. Socialist Workers: Inequality as a Command of the First Amendment*, 1983 SUP. CT. REV. 583, 589-92 (arguing that the exemption provided in the *Brown* case turned a content-neutral statute into a content-based one). *Stone and Marshall* argue that this extraordinary remedy was appropriate in these limited cases, but only because the exceptionally severe impact of disclosure requirements on unpopular groups might actually destroy those groups. See *id.* at 607-13. This position is related to the issue I consider in the next subsection: what is the appropriate remedy when the regulation leaves the speaker with no adequate alternatives? That is one of the central questions in dealing with a TPM case. In this section, however, I am concerned with the quality of the impact as content discrimination from the speaker’s

point of my argument. The exemption is given to everyone who can make a claim of content discrimination, regardless of the subject matter or viewpoint she is expressing, and to no one else. A speaker can only make that claim if the content of her speech is connected in a certain way to the activity at issue—the activity symbolically communicates the content—but that connection does not set any predetermined limits on subject matter or viewpoint.

Even if the connection did correlate systematically with certain subjects or viewpoints, this exemption approach would be appropriate. The situation would then be analogous to one in which a law has two separate provisions, one facially content-based and one content-neutral. If the content-based provision is struck down, then all those whose speech involved the prohibited content category would be freed from that impact of the law. They would still have to obey the content-neutral part of the law, but their situation would be better than it was before. Those whose speech did not involve the prohibited category, however, would be in exactly the same position as before because the invalid provision never affected them at all. The same is true of the content-discriminatory impact on the speaker: those who experience it are freed from it by exemptions and those who never experienced it are left in exactly the same position they were in before. The exemption singles out content categories for a special benefit only in the sense that invalidating a content-discriminatory law singles out that category for the special benefit of no longer being particularly harmed.

When a regulation restricts the content of speech from the speaker's viewpoint, it must be tested by a very high standard of review. The *O'Brien* standard—as written rather than as applied—is an appropriate one for this purpose. The potentially disruptive implications of this strict review are reduced substantially by limiting the remedy to an exemption for the class of speakers who experience this content-discriminatory effect. The symbolic speech line of doctrine thus serves a special and important role in remedying one type of content discrimination.

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point of view, rather than with the quantity of the impact on the speech market available to listeners. *See id.* at 610, 625-26 (pointing out that the effect on the speech market is the central issue). In other words, I am considering symbolic speech cases here rather than TPM cases. As Dean Stone has recognized elsewhere, exemptions in a symbolic speech situation do not necessarily involve the court in drawing lines explicitly in terms of the content of the speech: anyone who undertakes the activity as speech, regardless of the message, would get the exemption. *See Stone, supra* note 20, at 71 n.111.

C. *Impact on the Audience*

If neither the government's purpose nor the impact on the speaker is content-discriminatory, then the next question should be whether the impact on speech available to the audience is content-discriminatory.³⁶¹ Content discrimination in this context means that the result of the regulation is systematically to silence or disadvantage certain content categories of speech. Some regulations that affect only facilitative aspects of speech—that is, TPM regulations—will, nonetheless, make speech concerning certain content categories consistently difficult or impossible. Such regulations are an example of this third type of content discrimination and deserve strict scrutiny.³⁶²

A direct inquiry into the general content effect of a regulation would, however, be both difficult and troubling. Such an inquiry would require the Court to determine not only how the regulation affects the speaker, but also whether there are other speakers offering messages with the same content and how the regulation could affect them. The Court would be forced to consider other speakers because, from the audience's perspective, it does not matter whether everyone speaks, but only whether everything gets said.³⁶³ The prospect of the Court's deciding whose speech is equivalent to—and replaceable by—someone else's raises serious first amendment concerns in its own right. And the determination of how the regulation affects such alternate speakers would be terribly time consuming and, in the end, often highly speculative.

Once again, the doctrine resolves this dilemma with a compromise between the theoretical concerns over content discrimination and the pragmatic (and perhaps constitutional) limitations of the institution. In the TPM context this compromise is the adequate-alternatives branch of the test, which asks whether the particular speaker has adequate avenues of speech available other than those foreclosed by the regulation. The doctrine establishes a presumption that every speaker has something unique to say, so that there is no question of replacing one voice with another. The impact on other speakers becomes irrelevant to the question of whether the

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³⁶¹ The first branch of the traditional TPM test—that the regulation be content-neutral—can be understood as a requirement that the two other types of content discrimination previously discussed already have been ruled out.

³⁶² See Karst, *supra* note 31, at 36-37.

³⁶³ See A. MEIKLEJOHN, *POLITICAL FREEDOM*, *supra* note 245, at 27. *But cf.* Karst, *supra* note 31, at 40 (claiming that even repetition sends a message of wide support).

regulation has a content-discriminatory impact.³⁶⁴ If the speaker has adequate alternative channels of communication available, then there is no content-discriminatory effect from the audience's perspective because the speaker will remain able to convey her message to them. If, on the other hand, the speaker does not have adequate alternatives, then we must presume that whatever was unique in this speaker's message will be lost to the audience. From the perspective of free speech theory, this approach might overprotect: some speakers whose messages could be duplicated elsewhere will, nonetheless, receive protection. Such overprotection is necessary in order to consider the impact of speech on the audience without creating serious constitutional and practical problems.

The definition of an adequate alternative must be constructed realistically in light of the characteristics of the particular speaker in each case.³⁶⁵ Nonetheless, some general comments are possible. First, the adequacy of the alternative and its availability are distinct issues; a failure of either should be decisive. To be found adequate, an alternative channel of communication must reach roughly the same audience—in size and character—and must not predictably distort the message the speaker wishes to send—for example, by making it shorter or less detailed than the foreclosed channel.³⁶⁶ To be considered available, the alternative must not place the speaker at the mercy of potentially hostile "gatekeepers," public or private, and must not use substantially more of the speaker's resources than the activity foreclosed by the regulation.³⁶⁷ These two requirements are fairly stiff and should serve to put some teeth back into the adequate alternatives test.

This approach is far from easy or determinate. Difficulties arise because it is not possible to prove a negative on this issue: the speaker could never demonstrate to a logical certainty that no alternative exists because the possible alternatives are practically infinite. It is appropriate, therefore, to place on the speaker only the *prima facie* burden of showing that the most obvious or reasonable alternatives are unavailable. The burden should then

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³⁶⁴ It remains relevant, however, to the question of the breadth of the appropriate remedy. See *infra* notes 369-71 and accompanying text.

³⁶⁵ See Quadres, *Content-Neutral Public Forum Regulations: The Rise of the Aesthetic State Interest, the Fall of Judicial Scrutiny*, 37 HASTINGS L.J. 439, 481 (1986).

³⁶⁶ See Redish, *supra* note 4, at 143.

³⁶⁷ See Lee, *supra* note 181, at 806. See generally Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels*, 9 PACE L. REV. 57, 77-88 (1989).

shift to the government to prove that some adequate alternative remains.

One of the likely results of putting some teeth back into the adequate alternatives standard is that bans on whole formats of speech will be more effectively controlled. When the government forbids an entire format (e.g., no sound trucks) it wipes out a rather large avenue of communication. It may often be possible for speakers to show that no other format provides them with roughly the same audience without costing substantially more. If, on the other hand, the government restricts a format without totally eliminating it (no sound trucks in residential areas between the hours of 5 p.m. and 9 a.m.) then the speaker has the more difficult task of showing why the remaining uses of the format are insufficient (sound trucks in business areas and in residential areas during the permitted hours). This is a question of degree. There is no clear line between a ban and a regulation; there is, instead, a continuum defined by the amount of opportunity restricted. The adequate-alternatives test responds directly to this important variable rather than relying on inaccurate and simplistic categorization.³⁶⁸ Because this test addresses precisely the issue of concern in format bans, it could be a useful tool in controlling them.

If the Court determines that no adequate alternatives exist, then it must subject the regulation to a strict scrutiny standard. Only if the rule narrowly serves a compelling state interest is the content-discriminatory impact on speech justified. The Court can only determine the extent of the state interest, however, after it has decided whether the appropriate remedy is facial invalidation or exemption, because the remedy will determine the number of people who will be authorized to flout the government policy.³⁶⁹

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³⁶⁸ Justice Brennan has suggested that format bans are a separate category of TPM regulations, perhaps deserving of a different standard of review. *See Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 823-24 (1984) (Brennan, J., dissenting). While I sympathize with the concern motivating this suggestion, I believe it is misguided: there is no obvious place at which a restriction becomes a ban. The adequate-alternatives test is appropriate for all regulations on this continuum and should be effective at invalidating the more restrictive ones. A separate test is, therefore, both theoretically incoherent and practically unnecessary.

³⁶⁹ If the class of speakers for whom the alternatives are inadequate or unavailable is likely to be large, then facial invalidation would be the appropriate remedy. This may often be the case when less expensive formats are banned, leaving only more expensive ones. Cost is likely to concern a great many speakers to whom the regulation applies. If, on the other hand, the class of speakers for whom the alternatives are inadequate or unavailable is quite small, then exemptions would be a more responsive remedy. Although exemptions do treat some speakers differently

While the government interest in preventing one or a few speakers from using billboards, for example, should usually be fairly small, the interest in preventing the visual clutter that might result from widespread use of billboards is substantially larger.³⁷⁰ Thus, before the strict-scrutiny analysis can be carried out, the Court must make a rough estimate of the size of the class of speakers who could raise this first amendment claim.³⁷¹

If the Court determines that adequate alternatives do exist, then strict scrutiny is not necessary. If alternative channels are both adequate and available, then there will be no content-discriminatory impact on the speech market available to the audience. A TPM regulation that leaves adequate alternatives has a content-neutral effect on a facilitative aspect of the speech. Although this effect is itself an interference with speech, and deserves something more than a rational-basis review, it will generally be of less concern than content discrimination.³⁷² The remainder of the traditional TPM test—calling for a significant state interest and a reasonably direct means/end fit—is an appropriate standard of review for such cases.³⁷³ If the regulation then fails this test, it should be invali-

from others, "when the commitment to neutrality conflicts with the commitment to preservation of ideas in the political marketplace, the latter will prevail." Stone & Marshall, *supra* note 360, at 626.

³⁷⁰ Some government interests will be strong enough to overcome even an exemption for a single person. For example, if the prohibited activity would cause substantial physical danger to other people, even one exemption would implicate a compelling state interest. In the context of garden variety TPM regulations such a situation should be rare. As a result, when only a small number of potential exemptions are at issue, the government should usually be unable to demonstrate a compelling state interest and meet the strict-scrutiny test.

³⁷¹ While this determination of the size of the group is admittedly difficult, it is not very dangerous from the perspective of protecting first amendment rights. If the Court underestimates the number of people affected, and therefore orders exemptions rather than facial invalidation, then the flooding of the government mechanism for processing exemptions will soon indicate the need for a broader remedy.

³⁷² A possible instance in which it should be as much of a concern as content discrimination is when the government's purpose devalues speech as opposed to other activities. See *supra* note 180; see also Baker, *supra* note 180, at 956-60.

³⁷³ I still envision a stricter test than mere rational basis-review and, therefore, a stricter means/end fit than the Court has adopted in its recent interpretations of the TPM test.

dated with respect to all speakers,³⁷⁴ because it will impact in at least this facilitative way on all the speakers it affects.

The adequate-alternatives branch of TPM doctrine is well suited to the task of identifying content discrimination in the impact on the audience. If such discrimination exists, then strict scrutiny must be applied. If not, then the more lenient TPM test applies. The TPM line of doctrine, like the symbolic speech line, thus serves an important and independent function in the first amendment response to content discrimination.

D. *An Illustration:* Clark v. Community for Creative Non-Violence

It may be useful to consider an example that involves both the symbolic speech and the TPM doctrines. *Clark v. Community for Creative Non-Violence*³⁷⁵ concerned a regulation prohibiting camping—which was defined to include sleeping—in Lafayette Park. The Community for Creative Non-Violence (CCNV) wished to stage a sleep-over demonstration in the park for two reasons. First, sleep functioned as a symbolic means of communicating the plight of the homeless, who are forced to sleep outdoors in the winter. And second, sleep facilitated other speech in the demonstration: more homeless people would be encouraged to participate if they were offered a tent in which to sleep. Because sleep served both symbolic and facilitative functions here, the regulation should be invalid as applied to CCNV if it fails either the symbolic speech or the TPM test.

It was undisputed in the case that CCNV's interest in sleeping in the park was at least in part symbolic. Many of those witnessing the demonstration—it involved the construction of a tent city across from the White House on the first days of winter—would recognize

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³⁷⁴ This conclusion will often mean facial invalidation. Whenever the regulation is explicitly directed at a speech activity—parading, using loud-speaker trucks, holding a public meeting—it will be facially invalidated. There will be some occasions when more general regulations will be applied to speech as restrictions on TPM: traffic regulations prohibiting the obstruction of streets, anti-noise ordinances, and hour limitations on the use of the public parks. If these are found to leave adequate alternatives but fail the TPM test, then they would be invalid as applied to speakers, but not necessarily as applied to persons engaged in other activities that block the streets, make noise, or use parks after hours, because regulation of these other activities would generally receive no more than rational-basis review and the TPM test should be a somewhat higher standard than that.

³⁷⁵ 468 U.S. 288 (1984).

the sleeping as communicative of the plight of the homeless.³⁷⁶ The sleeping thus met both parts of the test in *Spence v. Washington*:³⁷⁷ that the activity be intended to communicate a particular message, and that it be likely to be understood as such.³⁷⁸ Because the activity at issue should have qualified for protection under the first amendment as symbolic speech, and the regulation directly prohibited that speech, the strict *O'Brien* standard was appropriate.³⁷⁹

The broad government interest at issue was the preservation of the nation's parks. The narrower question in *Clark* was how great a threat is posed to that interest by sleeping in the park only by those who do so as a means of symbolic communication. The government carries the burden of proof on the question of a compelling interest, and the record in *Clark* was simply devoid of evidence that any substantial harm would be caused by this group of potential speakers sleeping as part of an already approved

³⁷⁶ See Note, *Clark v. Community for Creative Non-Violence: The Demise of First Amendment Protection for Symbolic Expression?*, 36 MERCER L. REV. 1371, 1392 (1985).

³⁷⁷ 418 U.S. 405 (1974).

³⁷⁸ See *id.* at 410-11; Note, *First Amendment Protection of Ambiguous Conduct*, 84 COLUM. L. REV. 467, 478, 488-93 (1984) (discussing the relationship of the *Spence* test to theories of speech and certain practical issues in the application of the test).

The two requirements I mention are the only parts of the Supreme Court's test. Perhaps there ought to be a third requirement: that the activity be intended to serve no other purpose than communication, or at least that communication be its predominant purpose. This additional requirement would alleviate the problem of dealing with speakers whose actions are intended partly to communicate and partly to make a practical change in the world—say by occupying a building until demands are met or by destroying government property used in the production of weapons. These activities cannot be immunized from generally applicable laws simply because expression is one of the purposes they serve. See Note, *supra* note 189, at 1103; *cf.* Henkin, *supra* note 185, at 82 (distinguishing civil disobedience from communicative action because civil disobedience involves an act intended to have an effect on the operation of the challenged law). If the Supreme Court were to take the symbolic-speech issue seriously, then it would need to face this issue. The protestors in *Clark* would satisfy this test because the sleeping served only speech functions. It was facilitative, rather than only expressive, but it facilitated *speech*, not some other, and otherwise illegal, activity.

³⁷⁹ If the regulation merely restricted the time, place, or manner of the symbolic speech—by allowing sleeping only for three consecutive nights, or only in a particular area of the park, or only on cots rather than sleeping bags—then it would be analyzed in terms of that restriction rather than in terms of sleeping generally. If the length of time, precise location, or manner were themselves expressive, then such restrictions would be analyzed under *O'Brien*. If the length of time, precise location, or manner were simply a means of facilitating the expressive act of sleeping, however, then these restrictions should be analyzed as TPM regulations. The question in any case is whether the precise activity restricted is itself facilitative or expressive.

demonstration. Moreover, even if such a harm could have been demonstrated, the ban on sleeping was "greater than is essential"³⁸⁰ to the protection of the parks. A limit on the number of tents or sleepers would more narrowly have served the interest while allowing the symbolic speech to take place.³⁸¹

The Court rejected many of these same arguments,³⁸² but did so because it believed it should apply a lower standard of review than the one I am utilizing. The Court chose that lower standard because it failed to recognize the content discrimination in the impact on the speaker, and because it had already destroyed the independence of the symbolic speech doctrine that was designed to deal with that discrimination. I don't believe there is any question that if the Court had subjected the regulation to strict scrutiny, it would not have survived.³⁸³

The TPM issue is a bit more complex. Because the presence of the homeless was an important aspect of the message, a demonstration without them should qualify as a distorted and inadequate alternative. Would there have been alternative means through which CCNV could have drawn substantial numbers of the homeless to participate in the demonstration? In theory, such alternatives as hot meals (they could not be prepared at the site because of the camping regulations, but they could have been eaten there), blankets to keep warm, and, of course, companionship and caring were available. But evidence in the record, based on similar demonstrations in previous years, indicated that these other means were insufficient.³⁸⁴ This is the type of factual question on which CCNV would bear the initial burden of proof.

Assuming that the burden was met, the obvious alternatives were shown to be inadequate, and the government could not suggest any less apparent alternatives, then the regulation would receive strict scrutiny. The balance under this standard would differ slightly from that under the symbolic speech analysis, because the class of potential exemptions, all those speakers whose opportunities for speech would be inadequate if they were prohibited from sleeping

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³⁸⁰ *O'Brien*, 391 U.S. at 377.

³⁸¹ See *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 598-99 (D.C. Cir. 1983), *rev'd sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

³⁸² See, e.g., *Clark*, 468 U.S. at 299.

³⁸³ Indeed, Justice Marshall's dissent suggests that even under the lower standard, the regulation should have failed. See *id.* at 308 (Marshall, J., dissenting).

³⁸⁴ See Joint Appendix at 14, *Clark* (No. 82-1998).

in the park to facilitate their speech, might be somewhat larger. Although the potential for harm to the parks would be correspondingly higher than in the symbolic speech analysis, the argument that a less restrictive means would serve the government interest would remain. The regulation should, therefore, again fail strict scrutiny.

On the other hand, if CCNV was not able to establish that the obvious alternatives were inadequate, then the regulation would be tested against the much lower TPM standard. The disagreement between the majority and the dissent in the *Clark* case arises precisely over the question of whether the regulation should survive this level of review. Clearly the protection of national parks is a significant government interest. The difficulty lies in determining the stringency of the test's means/end fit requirement.

If, as the recent cases suggest, the fit requirement means nothing more than that the government interest would be less well-served without the regulation than with it, then CCNV would lose. Such a standard, however, reduces the TPM test to rational-basis review. If the first amendment generates any concern about content-neutral regulations of speech, as the Court appeared to admit in *Clark*,³⁸⁵ then such regulations should receive stricter review than the level reserved for economic regulations, which implicate no constitutional right. It makes more sense, therefore, to interpret the fit requirement of the TPM test as requiring means that are reasonably tailored to the end they are supposed to serve. On that interpretation, CCNV might well win.

As this example indicates, the suggested framework does not eliminate the need for judgment or the ambiguity of the constitutional standards. It is not intended to do so. It does, however, structure the inquiry in a way that highlights the different types of content discrimination and explains the relation of the doctrine to the problems posed.

E. *Indirect Impacts on Speech*

Government regulations sometimes affect speech even when they impact on neither an expressive nor a directly facilitative aspect of the speech activity. Although the terms "indirect" or "incidental" regulation of speech have become quite common,³⁸⁶ I suggest

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³⁸⁵ See *Clark*, 468 U.S. at 295.

³⁸⁶ See, e.g., Day, *Incidental Regulation*, *supra* note 18, at 492; Schauer, *supra* note 9, at 780-82.

they be reserved for this last type of interference. The regulations considered up to this point have all impacted directly on the speech activity, whether on the content of that activity (from one perspective or another) or on the facilitative aspects of the activity. "Indirect" or "incidental" should be used to describe only those laws that may affect the ability to speak, but do so without regulating either the expressive or facilitative aspects of speech at all.

Perhaps the best examples of this category of indirect regulation lie in the run-of-the-mill regulations of businesses and individuals that also apply to speakers: traffic laws may prevent a reporter from speeding to turn in a story; labor laws may restrict the managers of newspapers; or income tax laws may take away money that would have been used for speech. It is usually accepted, both by courts and commentators, that such generally applicable laws do not raise a first amendment issue when applied to speakers.³⁸⁷

Under my approach, these regulations would also usually raise no first amendment issue. The activity proscribed—for example, speeding—is almost never a communicative or symbolic aspect of the speech. If it were, the analysis discussed above³⁸⁸ would apply, but in the vast majority of cases, there will be no impact on a communicative aspect of the speech. It might appear, however, that the activities at issue are facilitative aspects of the speech. Getting to the office faster certainly helps the news story appear more quickly, and being free of labor law restrictions might well allow more funds to be used by a newspaper for speech purposes. In this sense, it is true that labor policies, speeding, and additional money might all facilitate speech. Regulation of these activities or resources, however, is not regulation of a facilitative aspect of speech.

It would be convenient if there were some clear principle demarcating the line between those activities and resources that should be considered facilitative and those that should not. For example, perhaps only those activities or resources that are themselves a part of the speech act, like the decibel level or location of speech, should qualify as facilitative. This close a connection cannot, however, be deemed necessary. Owning a printing press is not an aspect of a speech activity itself, and yet we would surely

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³⁸⁷ See Schauer, *supra* note 9, at 779-80.

³⁸⁸ See *supra* notes 329-60 and accompanying text (discussing analysis of symbolic speech cases).

consider regulations prescribing who may own printing presses to be regulations of speech, unlike the labor or tax laws.

There is, in fact, no clear dividing line between facilitative aspects of speech and other activities. Instead, there is a continuum running from facilitative aspects of the speech activity itself at one end, through separate activities that are specifically designed to facilitate speech, to general activities or benefits that may facilitate many behaviors—including speech—at the other end. Some cases in the middle will be difficult, but at least when we reach the most general sorts of benefits (such as money), the first amendment cannot be implicated unless speakers are treated differently from others.

Attempting to place various benefits and activities on this continuum will, admittedly, be a difficult task. Indeed, the distinctions may be almost metaphysical. The task is required, however, because the alternatives are simply unacceptable. Some activities or resources that are not themselves a part of the act of speaking are, nonetheless, so closely related to speech that it would be absurd not to recognize that regulating them raises first amendment issues. Access to paper or typewriters might be a good example. On the other hand, without some limit, the free speech guarantee would be transformed into an invitation for all speakers to violate any generally applicable law if the violation contributes in any way, no matter how indirect, to their ability to speak. The constitutional solicitude for free speech demands that speakers receive special protection from regulations (even generally applicable ones) that affect either a communicative or a directly facilitative aspect of their speech activity. Nonetheless, at some point the connection to speech becomes so attenuated that the protection must disappear.

This does not mean, however, that speakers subject to such general regulatory schemes are entirely at the mercy of the government. Several protections from regulatory abuse exist: regulation derived from an actual intent to silence certain content categories is subject to strict review;³⁸⁹ excessively vague or discretionary statutes, which threaten to chill speech, also receive searching scrutiny;³⁹⁰ and regulations that apply only to speakers or, worse, only to a subset of speakers, rather than to persons

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³⁸⁹ See *supra* notes 308-23 and accompanying text.

³⁹⁰ See *supra* notes 324-28 and accompanying text.

involved in a broad range of activities, raise a problem of chill analogous to the one involved in vagueness.

In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,³⁹¹ for example, the Court subjected to strict scrutiny and struck down a state law imposing a special tax on newsprint that was not imposed on other materials used in the manufacture of consumer products.³⁹² In its application, the law affected only a handful of the largest newspapers in the state. Although the Court found no evidence that the state legislature was trying to silence those papers because of their content,³⁹³ and despite the fact that no other type of content discrimination was present, the Court applied a stringent standard of review.³⁹⁴

The Court justified this high standard by pointing to the tremendous potential for chilling speech that is inherent in a statutory scheme that singles out speakers (here the press), and particularly a small number of speakers (here large publications), for special treatment.³⁹⁵ This chill is very similar to that caused by vague regulations: self-censorship by speakers trying to avoid content that they believe the government would not like.³⁹⁶ In this case the chill is caused, not by vagueness or discretion, but by the very narrow focus of the law on an easily identifiable group of speakers. This narrow focus allows the government to target rewards or punishments at a small group. Such power may be abused by varying the treatment the group receives based on the content of their speech.³⁹⁷ The more specific the focus, the greater the chance of content-discriminatory self-censorship, and the greater the need for stringent review. In light of *Minneapolis Star*, it appears that only truly general regulatory schemes that have a merely incidental impact on speech raise no first amendment concerns.³⁹⁸

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³⁹¹ 460 U.S. 575 (1983).

³⁹² See *id.* at 591.

³⁹³ See *id.* at 592.

³⁹⁴ See *id.* at 585.

³⁹⁵ See *id.* at 591-92.

³⁹⁶ See *id.* at 585, 588.

³⁹⁷ The structure of the argument here parallels that regarding vagueness. Superficially, the problem lies in the potential for content-discriminatory abuse by the government. The more troubling problem lies in present, content-discriminatory self-censorship by speakers in response to their view of that possibility of abuse. See *supra* note 328 and accompanying text.

³⁹⁸ See Stone, *supra* note 20, at 109.

One of the most interesting and difficult cases involving an indirect impact on speech is *Arcara v. Cloud Books, Inc.*³⁹⁹ The state brought proceedings to close a bookstore selling pornographic materials because prostitution was taking place on the premises. The Court found that the first amendment was not implicated at all and refused to apply any type of heightened scrutiny.⁴⁰⁰

The substantive law under which the injunction was sought was aimed at the noncommunicative harms associated with prostitution, not at any communicative harm arising from the materials sold or distributed by the bookstore. As a result, there was no content discrimination in the government's purpose. Nor was the owner using the prostitution as symbolic speech communicating something about his wares or anything else. Moreover, the prostitution was not facilitating the owner's protected speech—it was not intentionally being used to draw the customers into the store. The prostitution simply was not directly related to the speech in any way. From the perspective of the first amendment, prohibiting prostitution in this instance was not a regulation of speech at all. The underlying law itself was, therefore, immune from attack under the free speech clause.

Nevertheless, the state did interfere with speech by using the injunctive remedy to close the bookstore. This remedy must be assessed independently of the underlying prohibition to see if it presents any first amendment problems. Such an assessment is necessary to prevent the government from using general laws as a mechanism for limiting speech, for example by punishing people for traffic violations by refusing them permits to leaflet on the streets.

The assessment of the remedy raises at least two issues. First—the issue that seemed to primarily concern the dissent in *Arcara*—is the remedy unrelated to the bad act proscribed by the underlying law? The dissent compared the closing of the bookstore here to the closing of a church because of a traffic violation by the minister.⁴⁰¹ In fact, a better analogy would be to the closing of a church because of a health code violation in the building. In *Arcara*, it was not the personal wrongdoing of the owner that led to the closing, but rather the existence of a dangerous condition in the building. Of course, the person managing the premises could have corrected the condition—indeed, was ordered to correct it before

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³⁹⁹ 478 U.S. 697 (1986).

⁴⁰⁰ See *id.* at 706-07.

⁴⁰¹ See *id.* at 710-11 (Blackmun, J., dissenting).

the injunction could issue⁴⁰²—just as would be true of a health code violation in a church. The remedy of closing the building responded directly to the harm caused by the violation and reduced the danger. Thus, if some type of relation was required, it would seem to have been met in this case.

The existence of such a relation is not, in any event, a primary concern of the free speech clause. There might be some type of due process claim available because of the lack of relation between the violation of law and the punishment or because of the disproportionality of the punishment to the seriousness of the crime,⁴⁰³ but there would be no greater claim under the due process clause when the law operates to close a bookstore than when it operates to close a hardware store. The only first amendment issues raised by such a lack of relation would be the doubt cast on the government's purposes and the suspicion that the underlying prohibition may simply be an excuse to impose the punishment on speakers.

The remedy raises a second issue that is more directly relevant to the first amendment analysis: does the remedy impact on a communicative or facilitative aspect of speech? The remedy in *Arcara* did precisely that. Owning a bookstore, like owning a printing press, is directly facilitative of speech. It is true that the remedy at issue here did not apply exclusively to bookstores but to all businesses found to have a public nuisance on the premises. Nonetheless, as applied in this case, the effect of the remedy was to close a bookstore. The situation was, therefore, analogous to a classic TPM situation in which a regulation prohibiting the obstruction of the street is applied to prevent a parade. The impact in the case at hand must be assessed to see if the first amendment is implicated. If the impact falls on a resource or activity that directly facilitates speech, such as owning a bookstore, organizing a parade, or having access to paper, then the first amendment applies. If the impact falls on a resource or activity that is not so closely tied to speech, such as the labor policies of a newspaper, speeding by a

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⁴⁰² If no such opportunity to correct the problem was offered before the injunction was issued, then a constitutional claim could be made in both the free exercise and the free speech contexts. Such a harsh and irrational response would raise an inference of illegitimate administrative purposes. See *supra* text accompanying notes 316-23.

⁴⁰³ See Note, Dropout Statutes: Prompting Reform of Traditional Due Process Doctrine and Equal Protection Rationality (unpublished manuscript on file with the *Cornell Law Review*).

reporter, or simply access to more money, then the first amendment does not apply.

Under this approach, most generally applicable laws that are not facially directed at speech activity will not raise a first amendment issue at all. Similarly, legal remedies or penalties such as fines, imprisonment, or community service, generally will not raise a first amendment issue. Such laws and remedies can be applied to speakers and non-speakers alike without the necessity of any first amendment analysis. Some generally applicable laws, such as the prohibition on highway obstruction, may implicate the first amendment in their application to certain speakers. This phenomenon is familiar from the long line of TPM cases. Other remedies or penalties, even when used to enforce laws that do not otherwise raise first amendment concerns, may require a free speech analysis.⁴⁰⁴ Such an approach provides substantial first amendment protection without allowing speakers to cripple the normal functioning of government regulation.

The doctrinal framework I propose is far from complete. I have not addressed every possible issue related to content discrimination, let alone many of the other, non-content-related concerns of the first amendment.⁴⁰⁵ Nonetheless, I hope that this brief sketch indicates that a richer, more rounded concept of content discrimination can be doctrinally useful.

CONCLUSION

Content discrimination is not the only important first amendment issue, but it is a crucial one. Moreover, given the attitudes of the present members of the Supreme Court, content discrimination promises to be one of the central first amendment issues for some time to come. In light of this constitutional significance, the concept deserves a fuller explication.

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⁴⁰⁴ I have not addressed the question of what standard the courts should use in assessing remedies or penalties that cause such problems. I am inclined to believe that the general approach outlined in this Article for assessing the underlying regulations could also be applied to the laws or decisions imposing remedies. Some modifications of the general approach may be required given the special circumstances of the assessment. In any event, if no content discrimination is involved and if the impact falls only on a facilitative aspect of the speech, the level of review would generally be fairly low.

⁴⁰⁵ First amendment doctrine is, and should be, concerned with several other important goals, including the creation and maintenance of a lively and accessible forum for public discussion and debate.

I have attempted to show that a broad concept of content discrimination is both appropriate and useful. Two recent and related trends in the doctrine have led to a narrowed focus on content discrimination only in the government's purpose and to the collapse of the independent symbolic speech and TPM doctrinal lines. These trends are related in that they both rest on an overly restrictive concept of content discrimination that ignores the fact that there are several types of content discrimination, including not only discrimination in the government's purpose, but discrimination in the impact on the speaker and in the impact on the speech available to the audience. All three of these types of discrimination are related to equality concerns and to the values enshrined in the popular free speech theories. They deserve serious first amendment consideration. If all three types were recognized, then the unfortunate doctrinal trends could be reversed and this area of first amendment doctrine could attain a greater degree of responsiveness and coherence. Greater responsiveness would result from the availability of a variety of tests tailored to disparate problems. Greater coherence would be achieved by bringing to the surface some of the concerns that underlie, and give order to, the application of specific doctrinal tools and standards.

The broad concept of content discrimination can help bring order to this confusing area of the law without diminishing the awareness of or the appreciation for the complexity of the world in which legal doctrine must apply. Indeed, a certain degree of complexity is necessary if the doctrine is to respond adequately to the intricate and constantly changing social phenomenon of speech. Order and complexity are in tension, but they need not be in open conflict. By adopting an oversimplified version of content discrimination and then abandoning all other distinctions among "content-neutral" regulations as insignificant, the Court has sacrificed a carefully tailored collection of doctrines to the desire for orderliness. Free speech doctrine is in need of greater clarity and order, and some simplification is essential if any structure is to be imposed on an unruly reality. The Court, however, has struck the balance between order and complexity in a way that achieves order at the cost of the very values the Constitution was designed to protect. The values of equality and of free speech, two ideals that are ingrained in our national character and our Constitution, are

inadequately protected by the Court's impoverished notion of content discrimination. If content discrimination is to play the important role the Court has assigned to it, it must be a richer, broader, and more complex concept.