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From Four Part Tests to First Principles: Putting Free Speech Jurisprudence into Perspective

Joshua D. Rosenberg

Joshua P. Davis

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JOSHUA D. ROSENBERG[†] AND JOSHUA P. DAVIS[‡]

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[†] Professor, University of San Francisco School of Law.
[‡] Professor, Associate Dean for Faculty Scholarship, and Director, Center for Law and Ethics, University of San Francisco School of Law.

INTRODUCTION

Freedom of speech is one of the liberties of which Americans are most proud.[1] As a result, perhaps it ought not be surprising that what constitutes less than a single sentence of the Constitution[2] is the subject matter of entire law school courses, treatises,[3] and numerous books,[4] in addition to numerous Supreme Court and lower court cases and literally hundreds of scholarly articles.[5] What would be much more surprising—to the uninitiated, at least; it is common knowledge to those involved with First Amendment law and scholarship—is the fact that all these courses, cases, texts, treatises, and articles have failed to produce any generally accepted framework for analysis of free speech issues. Instead, First Amendment law seems to have evolved into a morass of apparently unrelated, hyper-technical, and generally incoherent three- and four- part tests that more closely resemble the Internal Revenue Code and regulations than it does anything else in the law.[6]

Even the most basic introductions to free speech doctrine discuss the differences between protected speech, unprotected speech, protected but disfavored speech—usually certain kinds of

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[1] STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 159 (1990); Palko v. Connecticut, 302 U.S. 319, 326–27 (1937) (explaining that freedom of speech is indispensable).

[2] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

[3] *See, e.g.*, DANIEL A. FARBER, THE FIRST AMENDMENT (3d ed. 2010); MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS (1984); RUSSELL L. WEAVER & DONALD E. LIVELY, UNDERSTANDING THE FIRST AMENDMENT (3d ed. 2009).

[4] The Zief Law Library at the University of San Francisco School of Law, whose collection is probably typical of law school libraries, has approximately 230 books dedicated entirely to freedom of expression. Univ. of S.F. Libraries, Search for "Freedom of Expression," DONCORE, http://doncore.usfca.edu/iii/encore/search/C__Sfreedom%20of%20expression?lang=eng (last visited May 16, 2013).

[5] Actually, a Westlaw search of articles written on free speech terminated after retrieving 10,000 such articles.

[6] *See, e.g.*, Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 98 (1993); Frederick Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285, 287–88, 316; Robert F. Nagel, *How Useful Is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302, 302–03 (1984).

sexual speech—and "less" protected (commercial) speech.[7] They also uniformly apply different tests based on factors such as: (1) whether the medium being regulated is mere unaided speech, or if the human voice is somehow enhanced, whether the medium is print, broadcast television or radio, cable—or, now, satellite—television or radio, telephones, microphones, or the internet;[8] (2) where the speech occurs—private home, public forum, limited public forum, nonpublic forum, in a bus,[9] in a home, outside a home, or somewhere else;[10] (3) what aspect of the speech is being regulated—content or viewpoint or time, place, or manner;[11] (4) whether the regulation is some kind of prior restraint;[12] (5) whether the statute regulating the speech contains certain specific words;[13] (6) the degree of care exercised by the speaker;[14] (7) whether the restrictions implicate freedom of association;[15] and (8) whether there is compelled speech.[16]

All of these distinctions, and many more, appear to be necessary because the exact three- or four- part test to be applied depends on the precise combination of factors involved in each case. These different tests and distinguishing factors are important.[17] The problem, though, is that the focus on all of the different three- and four-part tests makes it appear as if there are either no underlying foundational principles for analysis of free speech issues, or that there are so many "foundational"

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[7] JEROME A. BARRON & C. THOMAS DIENES, FIRST AMENDMENT LAW IN A NUTSHELL (4th ed. 2008); FARBER, *supra* note 3; ALLAN IDES & CHRISTOPHER N. MAY, CONSTITUTIONAL LAW INDIVIDUAL RIGHTS: EXAMPLES AND EXPLANATIONS (5th ed. 2010); JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW (4th ed. 2010).

[8] BARRON & DIENES, *supra* note 7; FARBER, *supra* note 3.

[9] Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

[10] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985). *See* discussion *infra* Part I.A.

[11] *See* discussion *infra* Part I.C.

[12] Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

[13] FCC v. Pacifica Found., 438 U.S. 726, 745–46 (1978).

[14] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[15] Roberts v. U.S. Jaycees, 468 U.S. 609, 612 (1984).

[16] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 458–59 (1958); BARRON & DIENES, *supra* note 7; FARBER, *supra* note 3.

[17] *But see, e.g.*, Wallace Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479, 483–85 (1964); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 949–51 (1987).

issues, each of which requires its own special test, that even these very "foundations" of the analysis are themselves so intricate as to be incomprehensible.

Frustrated by the apparent lack of consistency and comprehensibility of free speech cases, many scholars have sought to set forth a more coherent theory of free speech.[18] Each theory typically begins with the scholar's own understanding of the fundamental notions of why it is important to protect speech, and builds from that understanding an organized set of principles with which to analyze free speech problems.[19] Unfortunately, neither the Supreme Court nor any other courts have adopted these scholars' suggestions. Their theoretical purity is outdone by their practical irrelevance.

In this Article, we approach the First Amendment not as theoreticians or philosophers looking forward from first principles, but by looking backwards, trying to make sense out of already decided cases. Rather than suggest a new or alternative set of principles that we believe the Court *should* consider, we look back at the way the Court actually *has* approached free speech cases, in an attempt to discover coherent patterns and unifying principles. We conclude that what has been described as an incoherent agglomeration of three- and four- part tests is more accurately described as nothing more than an attempt to apply what in fact are a very few clear, consistent, and coherent principles.[20] We show that, despite all of the complicated doctrinal analysis and confusing and apparently contradictory

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[18] *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (The Lawbook Exch., Ltd., 2004) (1948); JOHN STUART MILL, *On Liberty, reprinted in* ON LIBERTY AND OTHER ESSAYS ch. 2 (John Gray ed., Oxford University Press 1998) (1859); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

[19] *See, e.g.*, MEIKLEJOHN, *supra* note 18; MILL, *supra* note 18; SCHAUER, *supra* note 18; Redish, *supra* note 18.

[20] We do not suggest (or believe) that the Court's First Amendment framework is "the correct one." It has significant flaws that are inevitable in any attempt to establish three- and four-part tests as guides for what are essentially personal judgments about what is demanded by justice in the context of more and more complex and intertwined relationships between individuals and government. Nonetheless, we believe that the Court's analysis is substantially more coherent and consistent than either commentators or the Court itself understand it to be.

tests that have developed in this area, the Court's basic approach to free speech cases is not appreciably different from its approach to other constitutional rights cases, or even from tort cases.

The overarching difference between speech and other constitutional rights lies not in its inherent substantive difference from other rights, but in the fact that speech is ubiquitous and unavoidable. Everyone communicates all the time and everywhere. As a result, there are many more cases that implicate free speech rights than there are about any other constitutional right. There are many factual setting that come to courts again and again with only slight variation, and there are also many more diverse setting in free speech cases than in cases involving any other rights. In order to avoid courts' having to weigh and balance every factor in every free speech case, the Court has engaged in some categorical balancing, creating categories of speech and of government action that allow relatively simple disposition of many cases.

When these categories are used as aids to help courts address the basic questions that arise in speech cases without resorting to an in-depth analysis of every fact and every judgment in every case that arises, they make cases easier to resolve simply and efficiently. Difficulties and confusion arise, though, when judges and Justices lose sight of the purposes these tests and doctrines were designed to serve. Sometimes, judges appear to forget that all of these categories are mere labels or guides to help *simplify* the determination of the few very basic issues that arise in virtually every case. They begin—and continue—to view the categories themselves as *more important* than the ultimate issues with which these categories were designed to assist. When this happens, the doctrines and their categories not only lose their value, but they confuse observers, wreak havoc with decisions, and create the abyss we know as current free speech doctrine.

In Part I of this Article, we set out some of the most commonly used tests and doctrines in free speech cases, and discuss how they are applied. These tests include: (1) forum analysis; (2) employee speech; (3) determination of the kind of restriction placed on speech—(a) time, place, or manner, (b) content, (c) viewpoint, or (d) secondary effects; and (4) determination of whether the speech is protected, unprotected, or somehow protected but less so than other speech.

For each doctrine and set of tests, we examine the basic determinations that must be made before application and the purposes the doctrines and tests serve. We suggest that all of these tests and doctrines are useful tools to help answer the three basic questions that we believe underlie not only virtually all of free speech jurisprudence, but also the jurisprudence relating to other constitutional rights, and even to tort law. These three basic questions boil down to the following: (1) Assuming that the government has somehow negatively impacted a person's communication,[21] does the government have a constitutional duty to the would-be speaker with respect to its action? (2) If the government has potentially breached a constitutional duty with respect to the plaintiff's speech, has it done so intentionally? and (3) if the government has intentionally targeted the plaintiff's speech, is that restriction justified?[22] Put even more simply, virtually all of the free speech tests and doctrines invented and applied by courts are simply devices to help them determine duty, intention, and justification.

After setting out each of the doctrines and its accompanying tests, we show how they can serve as effective shorthand for answers to one or more of these three basic questions, and, as a result, how they have become useful tools in free speech cases. We then explain how major problems arise. The doctrines become counterproductive when the doctrinal categories overwhelm their proper roles as aids to answer the above simple questions. When these doctrines are viewed as *independent* of and *primary* to the issues of duty, intention, and justification,

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[21] We believe that the activity protected by the First Amendment is basically communication rather than simply speech. We believe this to be the case because the Court has found the right to be at issue when government has interfered only with listeners, and not simply when it interferes with speakers. *See* Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 972 (stating that theories of free speech "support the right to hear and receive information").

[22] These same three questions—and more—must be answered when the Court addresses any other constitutional right, such as due process rights. In fact, analysis of free speech cases is inherently *simpler* than due process cases, because at least the constitutional interest at stake—communication—is fairly clear. In due process and equal protection cases the same three questions must be answered, but the second question—whether government has caused an injury to a constitutionally significant interest—becomes much more complicated because defining what interests are constitutionally significant becomes a much more complex endeavor.

rather than as shorthand for the *answers* to these questions, the doctrines and the cases appear to be incomprehensible and self-contradictory.

Finally, we suggest that often judges may fail to properly use the tests as ways to answer the other basic questions because they simply lose track of the role these tests were meant to play. Other times, though, reliance on these doctrines allows judges to present what are inherently normative judgments as nothing more than factual determinations.[23]

Often, in free speech cases, conservative judges have come down on the side of pro-life demonstrators, anti-drug campaigners, Christianity, and the importance of preserving the political role of wealth. Liberal Justices have come down on the side of pro-choice demonstrators, gays, non-Christian minorities, outcasts, and the non-wealthy. What is surprising is not which side each group ultimately supported, but how often that support was framed as nothing more than the application of a non-normative, fact-based test to a given set of facts. One suspects—or at least we suspect—that there are value judgments at work in many of these cases, and that it is those differing values that make outcomes somewhat predictable. Yet outside of cases dealing with political contributions,[24] those value judgments are rarely acknowledged and almost never actually debated within the judicial opinions. Instead of addressing their normative differences, judges cast *votes* that reflect these differences while drafting *opinions* that appear to rely on nothing other than the application of technical three- or four-part tests to the specific facts of the case before them. We do not claim that the judges are being consciously disingenuous. They may simply be unaware of how their value judgments shape their perceptions of facts and their applications of the different tests. We assert only that this happens regularly.

I. STANDARD FREE SPEECH DOCTRINES

In this Part, we set out the most commonly used tests and doctrines in free speech cases and discuss how they are applied and the purposes they can serve. We also show the ways in which the doctrines become apparently incoherent and

[23] *See* discussion *infra* Part I.A.7.

[24] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

nonsensical when they are *not* used to serve their intended and sensible purposes, but are instead used by judges to retroactively justify decisions made for *other, unrelated* reasons. These tests include: (1) forum analysis; (2) doctrines relating to employee speech; (3) determination of the kind of restriction placed on speech—(a) time, place, or manner restrictions, (b) content restrictions, (c) viewpoint restrictions, or (d) restrictions on secondary effects; and (4) determination of whether the speech is protected, unprotected, or somehow protected but less so than other speech.

For each of these doctrines, we set forth the relevant three- or four-part tests mandated by the doctrines and what these doctrines accomplish. We show how these doctrines can be, and have been, effectively used as shortcuts to answer the three really important issues we have described above: duty, intention, and justification. When the doctrines are so used, they make sense within a simple and unified approach to free speech law as it currently exists. At times, though, these analytical *tools* used to help answer other, basic, questions are treated as the very *issues* to be analyzed; the tools appear to be more important than the questions they were designed to help answer. When this happens, confusion and contradiction ensue. While this confusion and contradiction is sometimes innocent, it also provides a simple way for courts to avoid announcing normative judgments that underlie their decisions, and instead to frame those judgments as mere determinations of facts.

A. The Forum Doctrines

1. Introduction

Almost every free speech case dedicates at least some attention to determining the "forum," if any, in which speech is being restricted. Each forum—as well as areas described as "not a forum at all"—describes some aspect of the context in which the speech restriction operates, and the type of forum in which government is acting in turn determines the constitutional tests which any speech restriction must pass.[25]

[25] While government can and does restrict what can be communicated on private property—one's own, or the private property of another—most of the speech cases the Court has considered have involved restrictions imposed on government-owned property. As a result, each forum was originally defined with respect to

The three "fora" in which speech typically occurs are referred to as a "public forum," a "nonpublic forum," and a "limited public forum."[26] In addition to these actual fora, there are situations described as "not a forum at all."[27]

In this Section, we briefly define each of these fora and set forth their constitutional definitions and tests as generally understood. We note some potential theoretical inconsistencies and apparent contradictions in the doctrines. But we then show that when the doctrines are appropriately applied to serve their original purpose, these theoretical problems disappear. Finally, we show that these doctrines are sometimes used by courts or judges for purposes other than those which they serve so well. Only when this occurs do these doctrines appear much more complicated, confusing, and random than they properly are.

2. Defining the Forum and Its Tests

The Court first gave voice to the notion of the public forum in *Hague v. Committee for Industrial Organization*, where it explained that the rights of the state to limit expressive activity are sharply circumscribed in places such as streets and parks, which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[28]

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government-owned property. As discussed *infra* note 49, these standards have since been found to govern most restrictions on privately owned property, so that they have come to be an integral part of almost every free speech case. *See, e.g*, City of Ladue v. Gilleo, 512 U.S. 43, 45 (1994) (analyzing the right to free speech on private property).

[26] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

[27] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998).

[28] 307 U.S. 496, 515 (1939). The Court elaborated on this idea more recently in *International Society for Krishna Consciousness, Inc. v. Lee*:

> [I]ndividuals have a right to use "streets and parks for communication of views," [and] that . . . right flowed from the fact that "streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." We confirmed this observation [when] we held that a residential street was a public forum.
>
> Our recent cases provide additional guidance on the characteristics of a public forum . . . . [W]e noted that a traditional public forum is property that has as "a principal purpose . . . the free exchange of ideas." Moreover, consistent with the notion that the government—like other property owners—"has power to preserve the property under its control for the use

Despite some differences among members of the Court about the exact definition of the public forum,[29] the Justices generally agree on the constitutional tests to be applied to speech restrictions imposed in such a forum. Speech restrictions in public fora are subject to the strictest constitutional scrutiny.[30] Content-based restrictions of protected speech in the public forum are subject to strict scrutiny.[31] Restrictions in a public forum based on the viewpoint of speech are either subject to the same strict scrutiny as content-based restrictions or are invalid per se—even if the speech is unprotected speech.[32] Content-neutral restrictions of time, place, or manner are "valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[33]

At the opposite end of the spectrum from speech restrictions in the public forum are situations in which there is "not a forum at all."[34] These cases are most obviously those in which government itself is the speaker, simply spreading its own message.[35] An example of government as speaker is the president herself making a speech. We elect her in part because of her ability to make speeches and because of the ideas she

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to which it is lawfully dedicated," the government does not create a public forum by inaction. Nor is a public forum created "whenever members of the public are permitted freely to visit a place owned or operated by the Government." The decision n [sic] to create a public forum must instead be made "by intentionally opening a nontraditional forum for public discourse." Finally, we have recognized that the location of property also has bearing because separation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction. 505 U.S. 672, 679 (1992) (internal citations omitted).

[29] *See* discussion *infra* Part I.A.7.

[30] *Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. at 678.

[31] Carey v. Brown, 447 U.S. 455, 461–62 (1980). *See* discussion of content-based restrictions and viewpoint-based restrictions *infra* Part I.C.1.

[32] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).

[33] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). As discussed *infra* Part I.C.1, time, place, or manner restrictions are restrictions aimed at harms such as preventing high noise levels at night where people are trying to sleep. They restrict speech, but only incidentally and only to the extent necessary to carry out legitimate government goals unrelated to the speech.

[34] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998).

[35] *See, e.g., id.* at 675 (stating that, "public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine").

either advocates or condemns; we expect her to continue to make speeches advocating certain ideas and condemning others. No one would suggest that the Constitution requires her to share her podium with private persons seeking access to the same audience.

Between the public forum, in which government restrictions are subject to the strictest scrutiny, and "not a forum at all," in which government has no obligation at all to assist others' speech, are the "non-public forum" and the "limited public forum." Typically, a non-public forum is used to describe a place where government is conducting some business that is not open to the general public, but that is open to some selected nongovernment speakers.[36] Examples include public broadcasting stations that exercise discretion in programming,[37] debates among the leading candidates for public office,[38] and similar situations where speech is carried on by a group that includes only selected nongovernment representatives.[39]

The Court set out the standards by which speech restrictions in a nonpublic forum are to be evaluated in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, where it stated, "In addition to time, place, and manner regulations, the state may reserve the [nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[40] In *Arkansas Educational Television Commission v. Forbes*, the Court went on to state, "To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in

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[36] *Id.* at 679 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 805 (1985)).

[37] *Id.* at 669. The Court there described a "non-public forum" more by reference to what it is not than to what it is, stating that, "Where the property is not a traditional public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all." *Id.* at 678. While the Court has never defined what it means when it refers to some government-owned property as "not a forum at all," its use of that term strongly suggests that when the Court uses it, it means that no one has any cognizable first amendment right to speak. *Id.*

[38] *Id.* at 669.

[39] *Id.* at 679 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 805 (1985)).

[40] 460 U.S. 37, 46 (1983).

light of the purpose of the property."[41] Put another way, government can restrict speaker access to a nonpublic forum "as long as the restrictions are reasonable" and viewpoint neutral.[42] For example, government can sponsor political debates and invite only those candidates who appear to have some minimum amount of popular support, but it cannot restrict such debates only to candidates who agree with those currently in office.

The last type of forum, according to the Court, is a designated, or limited, public forum.[43] A limited public forum is basically an area that government could, if it chose, close to all speech activities, but that it chooses to make publicly available for speech.[44] The limited public forum differs from the traditional public forum in that while traditional public fora are open for expressive activity regardless of the government's intent, the limited public forum is a place that would otherwise not be open for speech, but that is *intentionally* opened by the government for expressive use by the general public or by a particular class of speakers.[45] Examples of limited public fora can include schoolrooms or auditoriums opened for use by the public when

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[41] *Forbes*, 523 U.S. at 682.

[42] *See Perry Educ. Ass'n*, 460 U.S. at 46. Public property which is not by tradition or designation a forum for public communication is governed by different standards. U.S. Postal Serv. v. Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981). The Court recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *Id.* "In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n*, 460 U.S. at 46. As the Court has stated on several occasions, "[T]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *U.S. Postal Serv.*, 453 U.S. at 129–30 (quoting Greer v. Spock, 424 U.S. 828, 836 (1976)).

[43] "The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." Widmar v. Vincent, 454 U.S. 263, 267–68 (1981) (university meeting facilities); *see also* City of Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n, 429 U.S. 167, 176 (1976) (school board meeting); Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557–58 (1975) (municipal theater). Although a state is not required to indefinitely retain the open character of the facility, as long as it does so, it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. *Widmar*, 454 U.S. at 269–70.

[44] *See Forbes*, 523 U.S. at 677.

[45] *See id.* at 677.

school is not in session.[46] The school need not allow the public to use the facilities at all, but if it decides to open up the facilities generally for public use, those facilities become a limited public forum.

Governmental action in a limited public forum is subject to standards similar to those in a nonpublic forum, in that there is applied a kind of mid-level review.[47] Basically, in a limited public forum, government can enact restrictions on speech so long as those restrictions are "reasonable in light of the purpose served by the forum and are viewpoint neutral."[48] As a result, if public schools allow people to use classrooms for "discussion groups" during the evenings so long as they do not damage or rearrange the room, it will have created a limited public forum. If public schools allow groups to use the classrooms to have pro-Democratic discussion groups, but not pro-Republican discussion groups, the "viewpoint discrimination" inherent in the restriction will invalidate that restriction.[49] In another context, if public

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[46] *But see* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001) ("We have previously declined to decide whether a school district's opening of its facilities pursuant to N.Y. Educ. Law § 414 creates a limited or a traditional public forum . . . . Because the parties have agreed that Milford created a limited public forum when it opened its facilities in 1992 . . . we need not resolve the issue here. Instead, we simply will assume that Milford operates a limited public forum.") (citations omitted).

[47] In *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984), the Court stated that speech limitations in a nonpublic forum are "valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information"—a relaxed level of scrutiny. *See also* discussion *infra* Part I.A.4.

[48] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392–93 (1993). In *Good News Club*, the Court stated that "When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified 'in reserving [its forum] for certain groups or for the discussion of certain topics.' " 533 U.S. at 106 (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)). "The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint . . . and the restriction must be 'reasonable in light of the purpose served by the forum.' " *Id.* at 106–07 (citation omitted) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).

[49] While the Court has not attached a particular "forum" label to speech restrictions that operate on private property, it has made it clear that the tests for restrictions of speech on one's own private property are essentially the same as—or even more stringent than—those for restrictions on speech in the public forum. The private property of one who is not the speaker is also subject to regulation similar to

schools decide to allow theatre groups to use the school auditorium to present shows open to the public, it would not thereby be required to also open up that theatre for political discussion groups closed to the public.

3. Common Sense of the Forum Doctrines

There is intuitive appeal to these forum classifications and restrictions. To begin with the most restrictive of these, "not a forum at all," it would be difficult to find anyone to seriously suggest that in areas where government is speaking or is carrying on a business, and where it needs to control the internal environment in order to accomplish its own legitimate purpose, it is nonetheless somehow constitutionally mandated to permit outsiders to come in and disrupt those activities at will. If the president is holding a news conference, making a speech, or having a meeting with a foreign head of state, he need not invite the general public to join him. If police are driving in their squad car, they need not invite strangers to come in and talk.

Because the reach and property ownership of government is so significant, there are a great many places that are "not a forum at all." For example, a place familiar to lawyers where the government operates on its own behalf, and thus where it generally has no duty to protect the speech of others, is the

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that of the public forum. As Justice Thomas stated in *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*:

> [I]t would be puzzling if regulations of speech taking place on *another citizen's* private property warranted greater scrutiny than regulations of speech taking place in public forums. Common sense and our precedent say just the opposite. In *Hynes*, the Court explained: " 'Of all the methods of spreading unpopular ideas, [house-to-house canvassing] seems the least entitled to extensive protection. The possibilities of persuasion are slight compared with the certainties of annoyance. Great as is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires.' " . . . In *Ward*, the Court held that intermediate scrutiny was appropriate *"even* in a public forum," . . . appropriately recognizing that speech enjoys greater protection in a public forum that has been opened to all citizens . . . . Indeed, we have held that the mere proximity of private residential property to a public forum permits more extensive regulation of speech taking place at the public forum than would otherwise be allowed. Surely then, intermediate scrutiny applies to a content-neutral regulation of speech that occurs not just near, but at, another citizen's private residence.

536 U.S. 150, 176 (2002) (second and third alterations in original) (citations omitted).

courtroom.[50] The judge is conducting the legitimate government business of finding the facts and applying the proper law to the case at hand; and in conducting that business, she can set the rules necessary to accomplish her legitimate judicial goals. The judge is in strict control of what can be said and done. She determines who can speak, for how long they can speak, how loud, what questions the witness shall and shall not answer, and even the manner in which people speak and dress.[51] She is carrying out the judicial function. She is "proprietor" of the courtroom.[52] As such, her control of the content and perspective—viewpoint—of all that gets said in her courtroom is not only accepted, but *required* by law.

To hold that the witness stand in a courtroom is "not a forum" for private speech can be a simple and convenient way to explain that government is constitutionally permitted to conduct its own legitimate business, and when doing so it has no affirmative constitutional duty or obligation to allow individuals to speak in any way that interferes with that business.

Other branches of government can similarly limit speech to the extent necessary to allow them to conduct business, and are similarly not fora for private speech when they are doing so. Legislatures may require observers not to interfere with debates, and the executive branch may exclude the public from cabinet and other meetings. Under the Constitution, neither branch needs to let outsiders either hear or participate in the discussions that they may have in the course of doing their government work;

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[50] Because the judiciary enforces the rules put in place by other branches of government—as well as the common law, we generally think of the courts and their personnel as an integral part of the government rather than as a proprietorship conducting business. Indeed, courts are the primary mechanism for enforcement of the rules and regulations made by government, and it may at first appear nonsensical to speak of courts as anything but the epitome of government acting as a maker and enforcer of rules. Without rules to implement, the courts would be either nonexistent or at least irrelevant. While the purpose of the judicial process is to resolve disputes by enforcing the law, the *conduct* of that judicial process is itself an example of the government—or in this case the judge as the agent of government—acting as "proprietor" of a business rather than as rule-maker or rule-enforcer.

[51] Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 725 (2004) (quoting Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 689–90 (1997)).

[52] *Id.* at 710–11.

and if and when they do decide to take input from others, they themselves determine when, where, and how they will do so—for example, by written statements, oral statements, etc.

To go a bit further, municipal libraries may select some books for their shelves but not others; the military may prescribe severe limits on communication, so long as they are in the service of training and accomplishing its assigned missions;[53] and post offices may limit behaviors and speech that would interfere with their proper functioning.[54]

Government also acts on its own behalf as proprietor of schools.[55] The Board of Education can determine the curriculum for public school teachers—from kindergarten through graduate school—to follow, and teachers in turn can determine which students speak, what they talk about, and how they talk about it, whether in the classroom, or the auditorium if school-sponsored assemblies,[56] or in the school paper,[57] so long as the actions are in support of the school's legitimate mission.[58]

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[53] Greer v. Spock, 424 U.S. 828, 837–38 (1976).

[54] United States v. Kokinda, 497 U.S. 720, 734–35 (1990).

[55] We discuss the role of government in education in Joshua P. Davis & Joshua D. Rosenberg, *The Inherent Structure of Free Speech Law*, 19 WM. & MARY BILL RTS. J. 131, 141–42 (2010).

[56] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

[57] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271, 273 (1988). *See* David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 504–05 (1981) (discussing a pre-*Hazelwood* Second Circuit precedent); Bruce C. Hafen, Comment, Hazelwood School District *and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 692–93.

[58] One might reasonably confuse the issue of whether government is acting as regulator or as proprietor with the issue of whether government has an important reason for restricting speech. Government may restrict speech, regardless of the role in which it is acting, if it can show that the restriction is narrowly tailored to accomplish a compelling government interest. *See, e.g.*, United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000) (applying strict scrutiny to a Congressional statute regulating cable television). As a result, if government can show that restricting student speech in the classroom and requiring students to speak accurately about topics such as history and science is essential if schools are going to educate students, it can enact these restrictions on student speech regardless of the role in which it is acting.

While this presents an appealingly simple explanation of the school cases, its simplicity is not matched by consistency or accuracy. It would be difficult, if not impossible, for government to show that any particular speech, answer, or subject matter is really so essential a part of all education as to be considered a "compelling" interest. While government might be able to establish that its compelling interest is in requiring students to learn obedience and attention to teachers, every public school does much more than that. It also dictates subject matter and determines the correctness of viewpoints expressed.

To hold that these situations are not fora for private speech makes perfect sense when it means simply that government is entitled to speak and to carry on its own legitimate business, on its own behalf, and on its own legitimate terms. The government simply has no constitutional obligation to allow others to control the way it speaks or carries on that business.[59]

When government is *not* legitimately speaking or carrying on its own business, things change. There are contexts where people have always spoken freely, where they feel entitled to speak freely, where they assume that their speech is constitutionally protected. For example, people have always expected to speak in public parks and on public sidewalks.[60]

The more significant response, though, is that when government functions as proprietor, it is never even held to a standard anywhere near strict scrutiny. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 89 (1987) (refusing to apply strict scrutiny to prison mail regulations); Brown v. Glines, 444 U.S. 348, 356–58 (1980) (upholding military regulation under lightened standard). Instead, once a court is convinced that government is acting as proprietor, any restrictions it enacts in that role will be upheld so long as there is any rational basis for those restrictions. *Compare Turner*, 482 U.S. at 89 ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is *reasonably related to legitimate penological interests.*") (emphasis added), *with* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000) ("States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is *rationally related to a legitimate state interest.*") (emphasis added). Courts will uphold required courses in Medieval History as readily as they will uphold required courses in basic English. We do not mean to suggest that determining when school activities or requirements are within government's legitimate role as proprietor is always and easy question. We suggest only that it is the appropriate question in these cases. *See generally* Joshua Davis & Joshua Rosenberg, *Government as Patron or Regulator in the Student Speech Cases*, 83 ST. JOHN'S L. REV. 1047 (2009).

[59] There has been some dispute about the extent to which determining the content of what appears in the school paper or what is said in a school assembly is actually a legitimate part of the educational program of the school, and if so, whether the more significant part of that educational program is teaching self-restraint or teaching tolerance. *Compare Hazelwood Sch. Dist.*, 484 U.S. at 271 (holding that a school may limit a school paper's content to further educational goals to ensure material inappropriate for certain age groups does not reach them), *with Bethel Sch. Dist. No. 403*, 478 U.S. at 681 (holding schools may limit student speech in order to "inculcate" students with the "fundamental value" of tolerance for divergent views). We do not mean to weigh in on the debate about the extent of the school's constitutionally legitimate mission. We mean only that if it is determined that some action is part of that mission, then when the school carries out its actions, it is acting as proprietor of the school rather than as regulator, so that its constitutional duties are limited.

[60] *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 714–15 (2000) (describing sidewalks as " 'quintessential' public forums"); U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 130–32 (1981) ("This Court has not hesitated in the past to

Indeed, if they could not speak there, the First Amendment would have virtually no meaning at all—except, perhaps, to allow people to speak only inside their own homes. When government has contact with individuals in these contexts, it is not acting on its own behalf, but is acting—as governments traditionally do—as a ruler and regulator of its subordinates. For those who subscribe to the notion that the Constitution functions only as a limit on government action and not as an actual positive grant of rights to individuals,[61] it is only in that role of regulator of others, rather than as speaker or actor on its own behalf, that government is subject to significant constitutional restrictions. It has a constitutional duty to respect the speech—and other constitutionally guaranteed—rights of its subjects. To suggest that government can regulate speech in these areas so long as that regulation is only "reasonable" would essentially strip the First Amendment of any independent meaning because any government action must be reasonable in order to survive even a simple Due Process challenge, regardless of its subject. Thus, governmental action in the public forum is subject to a significantly higher level of scrutiny.[62]

4. Theoretical Problems with the Forum Doctrines

The fact that a particular context is not a forum for speech does not necessarily mean that government can act in any way it wants without constitutional restraint. As discussed earlier, a courtroom is a nonpublic forum—or not a forum at all—and the judge's strict control of what can be said in the courtroom is generally constitutional.[63] Nonetheless, consider the judge who includes testimony and allows argument only if it is pro-American, regardless of its relevance to the matter at issue, and who excludes any evidence or argument that is anti-American. That restriction would clearly be unconstitutional, regardless of

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hold invalid laws . . . which too broadly inhibited the access of persons to traditional First Amendment forums such as the public streets and parks.").

[61] *See* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2273–74 (1990).

[62] For a discussion of time, place, and manner regulations, content and viewpoint based regulations, and the exact level of scrutiny required for each, see infra Part I.C.1.

[63] Peters, *supra* note 51, at 710–11, 730.

anything to do with any kind of forum. So would the behavior of a public school that counted as correct only those answers that displayed a pro-Republican bias.

As explained earlier, government can restrict speaker access to a nonpublic forum only "so long as the distinctions . . . are reasonable . . . and are viewpoint neutral."[64] The problem with this "reasonable and viewpoint neutral" test is that while it properly limits the judge's constitutional capacity to admit only pro-American testimony and limits the teachers' constitutional ability to reward only pro-Republican statements while punishing pro-Democratic ones, it goes too far. The teacher required to be entirely viewpoint neutral would have to reward wrong answers to the same extent as correct ones. Similarly, the judge would be prohibited from making virtually any ruling on any argument made by either the plaintiff or the defendant. It would simply be impossible for her to be "viewpoint neutral" in the restrictions she puts on speech in her courtroom, as it would be for the teacher in the classroom. Indeed it is the very job of the judge and the teacher to determine which viewpoints are correct and which are wrong.

While the requirement of viewpoint neutrality sometimes demands too much, the same test for speech in a nonpublic forum seems to demand too little. For example, if a town decided to build a four-block square that people could use only to talk about the current city administration, it would appear that the square was not a public forum because it was built for the sole purpose of discussing current office-holders. If that were the case, then limiting the area to speech only about current officeholders would appear to be constitutionally acceptable, because the restriction relates to content rather than viewpoint, and because the restriction, though seemingly unreasonable, is "reasonable *in light of the purpose served by the forum.*"[65] Despite these facts, though, no one can doubt that the construction and use of this square for its intended purpose would be struck down.

There are problems with application of the forum doctrines in the public forum as well. For example, consider a public park—a public forum—where people are allowed to carry and hold signs. Assume that while the park is open, though, Ms.

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[64] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985).
[65] *Id.* (emphasis added).

Parkcloser holds a big sign at the entrance to the park that says, "Do Not Enter: Park Closed," so that all would-be visitors are deterred from coming in. By definition, a park is a "public forum." As a result, any content or viewpoint-based restriction on speech in a park is unconstitutional under the forum doctrines. Since people carrying signs that read, "This park is open. Come in" would be allowed to make their point, the restriction of signs that misrepresent the park's status appears to be a clear example of that unacceptable viewpoint discrimination.[66] The result would appear to be unconstitutional content discrimination in a public forum. Nonetheless, there is little doubt that the park could, one way or another, constitutionally require Ms. Parkcloser to remove her sign from the park entrance. Any other ruling could lead to chaos.

There are other contexts where rigid application of public forum doctrines would simply fail to capture the basic intuition behind these doctrines. For example, a town can constitutionally grant permits for exclusive use of some field in the park on a first-come first-served basis, even though the result is that the group that reserves that field for a particular day has been designated by the town to determine who can say what—content discrimination—at that field on that date.[67] The Court has often explained that the granting of such exclusive use permits for public fora can be upheld even though the permit-holder is not content neutral because—and only when—the permit *process* is "content neutral," so that it does not discriminate against speech. Even though the licensing may take place in the public forum, it is treated as a "time, place, or manner restriction," and as such is acceptable even within that public forum.[68]

Consider, though, a town that enacts a law requiring people to file an application with the town for "speaking time" on town *sidewalks*, rather than in particular parts of a park. Whoever files first may speak for the time they reserve. Others may, in turn, sign up with city hall to reserve their own speaking time. Under the announced rules for the public forum, the results of

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[66] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391–92 (1992). *See* discussion *infra* notes 290–96 and accompanying text.

[67] *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981) (upholding a first-come, first-serve regulation for state fairgrounds space).

[68] *See, e.g.*, Thomas v. Chi. Park Dist., 534 U.S. 316, 322 (2002) (construing a public park ordinance requiring a permit for certain gatherings as a "time, place, and manner regulation").

licensing speaking times in parks and on sidewalks ought to be identical because they are both public fora. In reality, these situations should not be and would not be treated the same. Any court would conclude that permits for park bandstands are valid, but that permits for speaking on sidewalks are not.

In addition to problems in applying the tests for various fora, there are also significant definitional problems that can arise. For example, if a park is a "public forum," can government nonetheless put in buildings or areas such as storage sheds or police stations reserved exclusively for government use? If airports are not public fora, does that mean that they can allow individuals in the public areas of an airport to discuss the local sports teams but not other teams because one of the purposes of the airport is to encourage local pride?

5. An Answer: The Proper Functions of the Forum Doctrines

Clearly, if the forum doctrines are taken as pronouncements carved in stone from on high, and if they are applied rigidly, they do not always work. If the doctrines are taken as ends in themselves that must always be adhered to, they can lead to significant complications as well as wrong and conflicting answers, and they make free speech doctrine appear unnecessarily and incomprehensibly complicated. We suggest, though, that the forum doctrines are not ends in themselves, but that they are merely helpful ways to another end. The forum doctrines make sense when, and only when, they are seen as ways to represent a court's determination regarding the existence of a constitutional duty on government to accommodate individual speech in any particular context.

One might suggest, and many people believe, that government *always* has a duty to avoid interfering with a person's right to free speech, regardless of the context.[69] Nonetheless, several decisions of the current Court, past Supreme Courts, and other courts seem to belie that conclusion.[70]

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[69] Patricia R. Stembridge, Note, *Adjusting Absolutism: First Amendment Protection for the Fringe*, 80 B.U. L. REV. 907, 912–13 (2000) (discussing various approaches to first amendment absolutism); *see also* Beauharnais v. Illinois, 343 U.S. 250, 274–75 (1952) (Black, J., dissenting) (arguing that the first amendment "absolutely" restricts regulation of speech on a proposed piece of legislation).

[70] *See* Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) ("The Free Speech clause restricts government regulation of private speech; it does not regulate government speech"); *see also* Redd v. City of Enterprise, 140 F.3d 1378, 1383 (11th

It is true that government cannot act in a way that infringes on constitutional interests. But for many on the current Court, it appears that in order to determine whether government *infringes* on a constitutional right to freedom of speech, one must first determine whether the speaker *had* a constitutional right to speak in the first place.[71] Whether the speaker potentially had a constitutional *right* to speak in turn depends on whether government had a constitutional *duty* to the would-be speaker.[72]

The utility of forum analysis to the current Court rests on the implicit, but important, assumption that when government speaks on its own behalf, or when government is acting legitimately as a proprietor carrying on its own business, it has no duty at all to attend to the speech of others. Instead, a majority of the Court seems committed to the idea that government itself has the right to speak or conduct business on its own behalf without interference from others.[73] Since government is free to speak and to conduct its own business on its own behalf, it is only when it is engaging in neither of these activities that government has any duty to avoid interference with others' speech. In other words, it is only when government

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Cir. 1998) ("When a police officer has probable cause to believe that a person is committing a particular public offense, he is justified in arresting that person, even if the offender may be speaking at the time that he is arrested.").

[71] *See* Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 797 (1985) ("The issue presented is whether respondents *have* a First Amendment right to solicit contributions that was violated by their exclusion from the CFC." (emphasis added)).

[72] *See Summum*, 555 U.S. at 467 (2009) (holding that the government did not have a duty to refrain from interfering with an individual's right to free speech when the government was engaged in government speech).

[73] In *Summum*, the Court stated as follows:

> The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. . . . A government entity has the right to "speak for itself." . . . and to select the views that it wants to express. . . .
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> . . . .
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> Indeed, it is not easy to imagine how government could function if it lacked this freedom. "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed. . . .
>
> A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message.

Id. at 467–68 (citations omitted).

acts in its capacity as *regulator* of, or rule-maker for, the behavior of others that it has any duty to consider the speech of others.

The various fora, in turn, represent the role in which government is acting, and provide appropriate rules for such actions. If the government is either speaking on its own behalf or legitimately carrying on its own business, it has no duty to accommodate the speech of others. The public forum doctrine simply means that when government acts in its other capacity—as regulator—it is subject to constitutional duties with respect to the speech of others. The entire idea behind the limited public forum doctrine is to enable courts to determine the role in which government is acting when the issue is not obvious to all. It provides guidance when it is neither clearly government acting on its own behalf nor a clear example of government regulating.

To see how this applies by returning to earlier examples, consider first the prototypical public fora—parks and sidewalks.[74] While it is true that government is likely the proprietor—or at least the owner—of the park or sidewalk, its legitimate proprietorship extends for the most part only to the maintenance and upkeep of the sidewalk or park. When government imposes limits and restrictions on speech in parks and sidewalks, it is acting not as proprietor of the grounds, but as a lawmaker or "regulator," of speech. The determination that these areas are public fora means simply that when government limits speech in these areas—that is, in public fora—it is "regulating" the speech of private persons rather than itself speaking or carrying on its own business. As a regulator, government has a clear constitutional duty to respect the speech of others.

Of course, there is little doubt that the park in the above example could require Ms. Parkcloser to remove her sign saying "Park Closed" from the park entrance without violating the Constitution. This is because when the park eliminates the misleading sign at the entrance, it is doing so not as a regulator, but pursuant to its legitimate role as *proprietor* of the park. It is merely carrying on the business of operating the park in a manner that allows people to take advantage of its existence. Unlike most speech restrictions in a park, the act of ensuring that people are not wrongly turned away at the entrance to a

[74] *See supra* Part I.A.3.

park represents government protecting its own ability to carry on its own business—park operations—more than it does a regulation. Whether or not a park is generally a public forum, the viewpoint-based restriction in this case is an obviously legitimate part of government's role as proprietor of the park, and as such will be permitted. No real court would ever say simply that the park is a public forum, the restriction is viewpoint based, so the restriction is unconstitutional.

In addition, recall that a town can constitutionally grant permits for exclusive use of some field in the park on a first-come first-served basis, because the granting of such exclusive use permits for public fora can be upheld so long as the permit *process* is "content neutral." Despite the fact that sidewalks, as parks, are public fora, no one would suggest that any town could constitutionally license speaking time on sidewalks regardless of the process. The difference, not reflected in the enunciated doctrine but nonetheless entirely sensible, is that towns have traditionally licensed certain park areas to groups for limited periods, so that doing so appears to be nothing more than the typical, legitimate "proprietorship" over parks in which public entities routinely engage. Licensing speaking times on public sidewalks, on the other hand, would appear to be outside of anything one might expect or approve of as part of the legitimate proprietary role that government plays with respect to a sidewalk. When the forum doctrines are viewed not as ends in themselves, but as relatively accurate representations of the role in which government is acting, which in turn determines whether or not government owes a duty to would-be speakers, they make perfect sense.

Next, consider the actions of the pro-American judge in the courtroom.[75] No one would suggest that the actions are constitutionally permissible. Nonetheless, the justification cannot be simply that the restriction is not viewpoint neutral, because to require the judge to be viewpoint neutral would be to require the impossible. The case becomes simple if one understands that government is constitutionally permitted to conduct its own legitimate business, such as trying cases, and when doing so it has no affirmative constitutional duty or obligation to allow individuals to speak in any way that

[75] *See supra* Part I.A.4.

interferes with that business. It can make rulings based on content and viewpoint. To hold that the witness stand in a courtroom is generally "not a forum" for private speech can be a simple and convenient way to explain that government is typically simply acting as proprietor when it tries cases. When the judge excludes testimony that may be anti-American, it is not the viewpoint discrimination that makes the action unconstitutional. It is the fact that the judge who restricts speech because it appears anti-American is acting *outside* her constitutionally legitimate role as proprietor of the courtroom. Because she is so doing, she is not shielded by the right that government has to act legitimately on its own behalf without concern for others. Instead, she is subject to the constitutional duty imposed on government acting as regulator, and must respect freedom of speech.

Similarly, while teachers can often discriminate on the basis of viewpoints, there are certain times when by their actions—such as censoring pro-Democratic speech and rewarding pro-Republican speech—they make it clear that they are acting outside of any conceivably legitimate constitutional role as proprietor of the school. In those cases, their actions are not shielded by government's right to act on its own behalf. Instead, the teacher's actions are subject to constraints of the Free Speech clause.

In both of these cases, the speech—of the judge and of the teacher—would likely be struck down under the forum doctrines because it was not "reasonable" in light of the purposes to be served by the forum—in addition to its lack of viewpoint neutrality. If that "reasonableness" requirement is understood to mean nothing more than that government is not acting reasonably when it takes actions not compatible with its legitimate proprietorship, that part of the forum doctrine makes complete sense. If it is understood as meaning anything different from that,[76] though, it leads only to confusion.

All of these cases are simple if the forumdoctrines are seen as labels to represent the role in which government is acting—in order to determine whether government has a duty to accommodate speech in the context at issue. If government is

[76] For example, if reasonableness were interpreted to mean nothing more than rational basis review, which is the case in much of constitutional law.

legitimately speaking on its own behalf or acting as proprietor of a business, it owes no duty to accommodate private speech. It can ensure that people actually know whether or not a park is open, and it can grant permits for use of a bandstand or field. On the other hand, if government is *not* itself operating in a protected role—as a legitimate proprietor of a business or as a speaker—but is acting as a regulator of its subjects, then government has a duty to accommodate private speech. Licensing speaking time on sidewalks is simply outside any legitimate action government could take as "proprietor" of the sidewalks, as is a judge admitting only pro-American testimony or a teacher allowing only pro-Republican statements. None of these represent government acting in anything like a legitimate proprietary function, so in none of these situations would government be free of a constitutional duty to accommodate speech.

6. Use of the Forum Doctrines in Service of Their Purpose

To preserve the forum doctrines as helpful tools to represent whether government is acting as a regulator, and is thus subject to constitutional scrutiny, or whether it is legitimately acting on its own behalf and is exempt from such scrutiny, courts have at times adjusted the forum definitions and doctrines to fit the context in which cases arise. In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, where the Court was faced with a challenge to the "Combined Federal Campaign" ("CFC"), it adjusted the forum definition to suit the forum doctrine's intended function. In that case, the CFC was a fundraising campaign sponsored by the government to raise funds from federal employees.[77] The CFC, by way of the various government agency employers, sent to federal employees at their workplace brochures and collection envelopes soliciting contributions to the CFC, which in turn divided the proceeds between its selected beneficiaries.[78] The petitioner, NAACP Legal Defense and Educational Fund, Inc., which was not one of those selected beneficiaries and not otherwise permitted to solicit in the federal workplace, brought suit against the CFC.[79]

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[77] 473 U.S. 788, 790 (1985).
[78] *Id.* at 791.
[79] *Id.* at 793.

The Court acknowledged that the proper first step in deciding the case was to decide the "forum" in which the petitioner wanted to speak.[80] While it was urged on the Court that the forum was the federal workplace, the Court instead stated,

> [F]orum analysis is not completed merely by identifying the government property at issue. Rather, in defining the forum we have focused on the access sought by the speaker. When speakers seek general access to public property, the forum encompasses that property. In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property.[81]

In other words, the Court defined the forum in the way that best described the *role* in which government was acting. The *purpose* of the CFC, and not the mere geographic situs, determined the role in which government was acting, the extent of its duty to accommodate speech, and thus the forum. In *Board of Education v. Pico*, the Court again defined the relevant forum not by reference to the geographical situs nor by reference to the type of access sought by the private party, but directly by reference to the type of action the government was taking.[82] It addressed a claim that the board of education violated the First Amendment by removing books from the library.[83] In doing so, the Court suggested that the library's determination of which books to *acquire* warranted a non-forum analysis. But its determination regarding which books to *remove* required a public-forum analysis, subjecting it to stricter standards.[84] To come up with what it believed was an appropriate application of the forum doctrines, the Court drew a distinction between what looked like the exercise of proper proprietorial discretion in building up a collection, and the removal of certain books, which looked a lot more like regulation. [85]

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[80] *Id.* at 797.

[81] *Id.* at 801 (citations omitted) (stating that State school boards must exercise their regulatory power in a manner that comports with the First Amendment).

[82] 457 U.S. 853, 863–64 (1982).

[83] *Id.* at 857–58.

[84] *Id.* at 870–71.

[85] "[W]e do not deny that local school boards have a substantial legitimate role to play in the determination of school library content. We thus must turn to the question of the extent to which the First Amendment places limitations upon the

In other cases, the Court has referred to its forum analysis by analogy. For example, in *Rosenberger v. Rector and Visitors of the University of Virginia*,[86] in analyzing the use of a university's student activity fee to fund student publications, the Court defined the fund as a public forum, noting that it was "a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable."[87] In other words, once the university established a fund from which virtually all student publication could draw, any actions the university took to restrict or exclude particular publications from the fund looked like regulation. The majority did not see the university simply acting on its own behalf by funding only a few student publications that it desired. Similarly, in *Board of Regents of University of Wisconsin System v. Southworth*, the Court did not define a fund open to virtually all student organizations using standard forum analysis, but it explained,

> Our public forum cases are instructive here by close analogy. This is true even though the student activities fund is not a public forum in the traditional sense of the term and despite the circumstance that those cases most often involve a demand for access, not a claim to be exempt from supporting speech. The standard of viewpoint neutrality found in the public forum cases provides the standard we find controlling. We decide that the viewpoint neutrality requirement of the University program is in general sufficient to protect the rights of the objecting students.[88]

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discretion of petitioners to remove books from their libraries." *Id.* at 869. "[T]he action before us does not involve the acquisition of books. Respondents have not sought to compel their school Board to add to the school library shelves any books that students desire to read. Rather, the only action challenged in this case is the removal from school libraries of books originally placed there by the school authorities, or without objection from them." *Id.* at 862.

[86] 515 U.S. 819 (1995).

[87] *Id.* at 830.

[88] 529 U.S. 217, 229–30 (2000) (citations omitted). See also *Ark. Educ. Television Comm'n v. Forbes*, where the Court explained, "The televised debate forum at issue in this case may not squarely fit within our public forum analysis, but its importance cannot be denied. 523 U.S. 666, 692 (1998) (Stevens, J., dissenting) (footnote omitted). Indeed, a plurality of the Court recently has expressed reluctance about applying public forum analysis to new and changing contexts." *Id.* at 692 n.16 (Stevens, J., dissenting).

Essentially, in those cases where government was *regulating* rather than merely acting on its own behalf, constitutional questions arose because government had a duty to avoid restricting speech. Referring to the public forum was a simple way to make that statement.

This flexibility of the definitions of different fora seem both appropriate and necessary to allow the doctrines to serve their purpose—to represent the court's determination of whether government is regulating or simply acting legitimately on its own behalf, in which case it has no duty to individuals with respect to their speech.

7. The Real Cause of Problems: Misapplication of the Doctrines

Despite the common sense behind the forum doctrines, those doctrines have come to represent incoherence and complexity in free speech jurisprudence rather than anything remotely resembling common sense.[89] The problem is that sometimes, rather than determining the role in which government is acting and using a forum to represent that role, the Court first determines the "forum" by reference to factors exclusive of and unrelated to the role in which government was acting, and then uses *that* definition to determine the extent of government's duty to accommodate speech. In other words, rather than using the forum doctrines as convenient labels to describe the role in which government was acting and whether or not government had a duty with respect to speech, the Court sometimes reverses the process. By occasionally giving the doctrine importance well beyond its appropriate role, and by defining the forum in a way that virtually guarantees that the doctrine will be applied in a way that is unrelated to its actual legitimate purpose, the Court has made the forum doctrines seem complicated, haphazard, and rootless.

The most obvious case where this has happened is *International Society for Krishna Consciousness, Inc. v. Lee* ("ISKCON"). In that case, government limited the speech of Krishna devotees in the public areas of an airport.[90] The Court upheld the speech restriction because it determined that an

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[89] Suzanne Stone Montgomery, *When the Klan Adopts-A-Highway: The Weaknesses of the Public Forum Doctrine Exposed*, 77 WASH. U. L.Q. 557, 557–58 (1999).

[90] 505 U.S. 672, 674–75 (1992).

airport was not a public forum.[91] In defining the forum, the Court completely ignored the role in which government was acting. Instead, it explicitly relied on the history of aviation and geographical situs to reach its conclusion.[92] It gave as its primary justification that "airport terminals have only recently achieved their contemporary size and character . . . [so that an airport] hardly qualifies for the description of having 'immemorially . . . time out of mind' been held in the public trust and used for purposes of expressive activity."[93]

Of course, historical context can be useful in explaining the role in which government is acting. To return to earlier examples, in parks and on sidewalks, government's role as proprietor is typically restricted to maintaining the physical integrity of the area and ensuring general public safety through adequate police and fire protection. Because speech restrictions do not appear to be any part of government's role as proprietor of these "public fora," any such restrictions are generally frowned upon. The historical use of these areas is indicative of the extent to which government is fulfilling its legitimate function as proprietor—for example, as a legitimate proprietor when granting permits for use of a park field, but not when it grants permits for exclusive speech on a sidewalk.

In other words, to the extent that location and historical use give relevant background to determine whether or not government is acting within its legitimate proprietary capacity, they can provide useful guidance in determining the role in which government is acting. On the other hand, elevating historical use and physical area to *primary* significance, as the Court did in *ISKCON*, leads to confusion. It suggests, for example, that what can be done in a library depends not on whether government is removing books or spending to acquire new ones, or on how it decides to bias its future collections, but on what libraries have done in the past; it suggests that because a park is historically a public forum, the geographical situs of the park and nothing more determines what speech restrictions are acceptable, so that signs saying "park closed" when the park is

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[91] *Id.* at 680–81.

[92] *Id.*

[93] *Id.* at 680; see also United States v. Am. Library Ass'n, 539 U.S. 194, 205 (2003), where the majority also made use of the "time immemorial" test for a public forum.

open cannot be restricted; it suggests that because a sidewalk is a public forum, signs directed at cars saying "15 miles per hour" cannot be restricted even if they are wrong, and that speech may be restricted more readily on the internet than on a sidewalk or park simply because the internet is newer.

Unfortunately, once the definitions of fora are separated from the role in which government is acting, the concepts that they represent become entirely unhinged from logic, and the doctrines lead to complexity. Free speech jurisprudence remains relatively straightforward, so long as holdings such as *ISKCON* are understood as cases where Justices relied on technically literal, but contextually inappropriate, definitions and applications of doctrine. So long as these cases are understood as *misapplication* of doctrine, rather than *explanation* of doctrine, the complexity and incoherence of First Amendment jurisprudence disappears.[94]

The misapplication of forum analysis is not only confusing, but it is also significant because defining the relevant forum often determines the outcome of the case. The vast majority of the time, declaring that the context is a public forum results in the regulation being struck down.[95] On the other hand, the Court's declaration that some context is not a public forum can minimize or eliminate a party's constitutional liability. In this way, the Court can hold government responsible only for results

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[94] We do not mean to suggest that the forum doctrines, when properly understood and applied, solve all problems. Indeed, suggesting that all cases should or even can be decided by forum analysis puts more pressure on that doctrine than it can bear and ends up confusing observers more than it clarifies the law. In most cases, where the Court debates the forum in which speech occurs, the government's action is neither clearly that of a proprietor or spender or speaker, nor clearly that of a regulator. It has aspects of both, and that is exactly why the issue is up for debate and disagreement among the Justices. *See, e.g.*, *Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. 671.

When forum analysis is used to determine the role in which government is acting and is simply left out of those cases where it is not helpful—because the role in which government is acting, and the issue of what, if any, duty government owes to the speaker is not in dispute, the doctrines are to be straightforward. *See, e.g.*, *id.*; *Am. Library Ass'n*, 539 U.S. 194. When, in these cases—where there is no need for forum analysis—judges and Justices neither disregard the temporarily useless doctrine, nor cabin the doctrine within its appropriate function, but apply the doctrines in ways that disregard their very legitimate and useful purposes, more significant problems and confusion arise.

[95] Stephen K. Schutte, International Society for Krishna Consciousness, Inc. v. Lee: *The Public Forum Doctrine Falls to a Government Intent Standard*, 23 GOLDEN GATE U. L. REV. 563, 566 (1993).

it causes when acting as a regulator while excusing it from liability when it acts as a speaker or proprietor of its owns business. The result is that using forum analysis can provide a seemingly *factual* justification for what otherwise would likely be seen as *normative* judgments that judges might prefer to avoid announcing.

For example, in *United States v. American Library Ass'n*, the Court was faced with restrictions on internet access—primarily to sexually explicit sites—on computer terminals at the public library.[96] The majority—made up primarily of Justices who are most against explicit sexuality in most contexts—decided that internet access in libraries was not akin to a public forum but was instead a non-forum, in large part because the internet has not been around "since time immemorial" and because the library was "acquiring" sources rather than removing them.[97] As a result, the blocking software could be used without constitutional scrutiny.[98] The dissent, issued by those generally more tolerant of sexually explicit material, found that the limitation on speech was unconstitutional because the context was most like a public forum; unlike libraries that had only limited funds for books and were required to make choices in acquisitions, libraries with internet terminals initially had access to all sites and took affirmative action to block them.[99]

Both sides attached significant importance to the determination of the role in which government was acting. Those less accepting of sexually explicit speech determined that there was no "public forum" so that the sexual speech could be prevented.[100] Those more accepting of sexually explicit speech found that there was a public forum so that the restrictions should be struck down.[101] To be sure, the issue is debatable. More significant, though, is that it is highly unlikely that the real differences between the conclusions of the majority and the dissent were the result of their different perspectives of the forum. Instead, the real disagreements were likely over the value of sexually explicit speech and the harm such speech

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[96] 539 U.S. 194, 198–99 (2003).
[97] *Id.* at 204–05.
[98] *Id.* at 214.
[99] *Id.* at 236–37 (Souter, J., dissenting).
[100] *Id.* at 205 (majority opinion).
[101] *Id.* at 242–43 (Souter, J., dissenting).

causes. Relying on forum doctrines allowed them all to adopt opinions that reflected their real normative differences while at the same time giving the appearance that those normative differences were completely unrelated to their decisions.

Other examples where the role of government was at issue include *Ysursa v. Pocatello Education Ass'n*.[102] The majority—again made up of conservative justices—again held that the context presented in the case was a non-forum.[103] As a result, it found that a limitation on union political speech was not constitutionally suspect.[104] The (liberal) dissenting Justices suggested that the case seemed more like regulation in the public forum, so that the limitation on union political speech ought to be struck down.[105] Again, it is somewhat difficult to believe that the determinative differences between the liberal and conservative justices lay in their differing definitions of the particular forum and not at all on their different views of labor unions.

On the other hand, in *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, the speech affected was neither sexually explicit communication nor speech of a labor union, but speech of a Christian group that excluded nonbelievers.[106] Not surprisingly, in that case, the positions of the liberal and conservative Justices were reversed. It was the liberal Justices who argued that the government was merely spending money to help certain groups, so that there was no public forum and the limitation on speech should be upheld; and it was the conservative Justices who saw the context as that of a public forum, and argued that the limitation constituted viewpoint discrimination that ought to be struck down.[107]

To be clear, we do not seek to debate which side is right and which side is wrong in these cases. We suggest, instead, that the straightforward use of a "forum analysis" in these cases is not the sole reason, or even the primary reason, for the differing results reached by the different Justices. The correlation between the substantive outcome the different Justices would favor and the way they define the forum at issue seems too strong to be

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[102] 555 U.S. 353 (2010).

[103] *Id.* at 359.

[104] *Id.* at 364.

[105] *See id.* at 365–70 (Breyer, J., concurring in part and dissenting in part); *id.* at 370–75 (Stevens, J., dissenting); *id.* at 376–78 (Souter, J., dissenting).

[106] 130 S. Ct. 2971, 2978 (2010).

[107] *Id.* at 3000–20.

coincidental. We suggest that Justices differ significantly in their opinions concerning what constitutionally justifies restricting speech—for example, concerns about the Establishment of Religion, or concerns about sexual morals—and whom they feel is most in need of protection—for example, pregnant women seeking an abortion, or firm and assertive believers in Christianity. Reliance on technical formalism in the application of the forum doctrines avoids discussion of these normative and political differences.

We believe that the perspectives of all the Justices have some merit, and we understand that a decisionmaker might want to marshal as many arguments as possible to support his decision. The problem is that when used to support substantive differences and not cabined within their legitimate function of representing the role in which government is acting and its correlative duty to third parties, the forum doctrines are pushed not simply beyond their usefulness, but beyond the ways in which they make sense. This serves to make the law appear significantly more complicated than it really is.

B. Employee Speech

In this Section, we set forth the Court's enunciated test for restrictions on the speech of government employees, and we explain the utility and proper function of this test. We show that when used as a device to determine whether government is acting as a proprietor or as a regulator—and, as a result, whether or not government has a duty to allow the employee's speech—the test is straightforward and easily comprehensible. As with the forum doctrines, potential confusion can arise, but only if and when the employee speech tests are not cabined within their appropriate purpose.

We discuss the notions of content and viewpoint discrimination at some length later,[108] but when discussing the realm of employee speech, one cannot help but notice that the Court's treatment of content-based restrictions, as opposed to content-neutral restrictions, is turned on its head. While in most cases content-based restrictions on speech are likely to be struck down, in the case of employee speech, content-based restrictions are generally *necessary* if a limitation on speech is to be upheld.

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[108] *See infra* Part C.

In this area, "[t]he Court has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees [may be] uniquely qualified to comment."[109] On the other hand, statements by a government employee at work that are not about a matter of public concern can be punished without any potential constitutional problem.[110] In other words, and in exact opposition to the normal rules, it appears to be only content-based restrictions on employee speech that can be upheld.

So long as the Court's employee speech test is understood as simply addressing the issue of whether government is acting as a regulator—with a corresponding duty to respect speech—or as a legitimate proprietor in employee speech cases, the doctrine is entirely sensible. If the government employer is restricting speech in pursuit of its legitimate proprietary functions, the restriction is valid; if government is acting outside of those legitimate proprietary functions, its actions become suspect. Speech on a matter of public interest is more likely to be targeted by the employer who seeks to illegitimately restrict speech under the guise of proprietorship. As a result, the Court will pay special attention to restrictions of that kind of speech.

This content-based approach to employee speech makes perfect sense when one keeps in mind its proper function. It can appear confusing and self-contradictory, though, when the test becomes unanchored from that function. Consider, for example, *City of San Diego v. Roe*.[111] Roe, a member of the San Diego Police Department, offered for sale on eBay videos of himself dressed in a generic police uniform.[112] In these films, he stopped a car, issued a traffic citation, but then disrobed, masturbated, and revoked the citation for the apparently interested and cooperative driver.[113] When the Department discovered this activity, it fired Roe from the force for conduct unbecoming of an

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[109] City of San Diego v. Roe, 543 U.S. 77, 80 (2004); *see also* Garcetti v. Ceballos, 547 U.S. 410, 420 (2006).

[110] *Garcetti*, 547 U.S. at 419 ("So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."); Connick v. Myers, 461 U.S. 138, 146 (1983).

[111] 543 U.S. 77 (2004).

[112] *Id.* at 78.

[113] *Id.* at 79.

officer and for immoral conduct.[114] The Court, in a per curiam opinion, noted when a public employee speaks " 'as a citizen upon matters of public concern' rather than 'as an employee upon matters only of personal interest,' " the employee's speech is substantially protected.[115] Because the Court determined that Roe's speech was not a matter of "public concern," it upheld his termination.[116]

If Roe is understood as a case in which the Court was convinced that government was acting within its legitimate proprietary capacity when it fired Roe, it is straightforward. If Roe is taken as suggesting that the determination of whether or not speech is of public concern plays a role beyond that determination in this case, it could be quite confusing. Although the Court has acknowledged that "the boundaries of the public concern test are not well defined,"[117] it has explained at least that speech is of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community,"[118] or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."[119] While sexually explicit speech may be valueless and offensive to many, one would be hard pressed to show that this kind of speech is not "of value and concern to the general public." After all, whether or not Justices approve, Americans do spend significant amounts of both time and money viewing pornography. Indeed, it may well be that society as a whole places significantly more value on, and spends more time with, pornography than it does on political speech.[120]

Another potential problem with an unconstrained interpretation of *Roe* is that it would appear that in future cases, other Roes could avoid being fired so long as, while they are masturbating in front of the soon-to-be-ticket-free driver in their pornographic videos, they talk about how some police really do take sexual favors. Such statements would make the speech be

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[114] *Id.*

[115] *Id.* at 83 (quoting Connick v. Myers, 461 U.S. 138, 147 (1983)).

[116] *Id.* at 84–85.

[117] Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011) (quoting City of San Diego v. Roe, 543 U.S. 77, 83 (2004)).

[118] Connick v. Myers, 461 U.S. 138, 146 (1983).

[119] *Roe*, 543 U.S. at 83–84.

[120] Frank Rich, *Naked Capitalists: There's No Business Like Porn Business*, N.Y. TIMES MAG., May 18, 2001.

on "matters of public concern," and as such the speech would apparently be protected.[121] We seriously doubt that the Court would countenance such results, but they are the results that would be inevitable were lower courts to apply the employee speech test literally and without regard to its proper function.

In addition to suggesting that an employee can somehow immunize speech by speaking about matters of public concern, a literal interpretation of the Court's employee speech test might also be taken to suggest that government can constitutionally fire employees in ways that would appear to be clearly unconstitutional. For example, assume that Employee is overheard talking to her friend in a private conversation saying, "I don't care about politics or the community or any issues. I always vote Republican because my parents asked me to." The Court has explained that in determining whether or not speech is on a matter of public concern, it must "evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said."[122] Given that this was said in private and without regard to any public issues, it would appear to be of only private concern. In reality, though, if the agency in which she works then fires Employee because she has said that she is a Republican, her termination on that ground would not withstand constitutional scrutiny.[123] The termination would serve no legitimate proprietary purpose, because the speech, whether public or private, did not interfere with the agency's functions.

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[121] Indeed, the inappropriate sexual behavior of officers on duty would clearly be a matter of public concern even if everything that Roe said was false. The truth or falsity of statements is an entirely separate issue from whether or not the topic is one of public concern.

[122] Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011).

[123] Some might be tempted to suggest that the governmental action in this case might be struck down because of Due Process concerns rather than because of any concerns having to do with speech—that is, because the Due Process clause would prevent the government from terminating employees because of their political affiliation. But the truth is that the termination in this case would be prohibited by the free speech clause even if the Due Process clause did not come into play. Consider, for example, the governmental agency that terminated no one simply because of her political affiliation, but terminated anyone who made her political affiliation public. It would be the speech, and not the affiliation, that was punished, so that the First Amendment, and not the Due Process clause, would apply.

Roe presented a different case not because his speech was more "private," but because his part-time acting job created too much of a distraction in and about the department, and preventing that distraction is a legitimate part of running the department.[124] The public concern test is not an end in itself and need not always be followed, but it provides a useful tool with which to analyze whether the employer is exceeding its legitimate proprietary behavior.

Garcetti v. Ceballos[125] provides another example of how the employee speech doctrines can be quite sensible if simply understood in the context we suggest, but also could lead one astray if elevated to a role that includes *more* than helping to answer the question about the role in which government is acting. In *Garcetti*, a deputy district attorney was demoted as a result of having written a memorandum suggesting problems with a pending case.[126] The Court determined that when he wrote the memorandum the way he did, it was in contravention of the instructions from his supervisor, and as a result, the termination was constitutionally acceptable.[127] Put in the way we suggest, to the extent that government is directing its employees to simply do their legitimate job, it is not "regulating" and thus has no constitutional duty with respect to speech. The Court in *Garcetti* stated that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[128] It focused on the "as citizens" requirement in previous employee speech cases and determined that Garcetti could be fired because he was speaking as an *employee* rather than as a *citizen*.[129]

This focus on the employee as speaking either as a citizen or as an employee, rather than on the role of government, can create the same kind of confusion as does the exaggerated focus on the public versus private speech issue. Assume, for example, that A, a local government employee, is overheard saying in a

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[124] *Roe*, 543 U.S. at 81.
[125] Garcetti v. Ceballos, 547 U.S. 410 (2006).
[126] *Id.* at 414–15.
[127] *Id.* at 421.
[128] *Id.*
[129] *Id.* at 421–22.

private conversation to a friend that she voted Democratic. She explains that her vote was the result only of her employment, and only because the Democratic candidate promised to give government employees, including her, a salary raise—"I am voting for X because I'm a city bus driver and X is going to give me a raise. That's the only reason. I never voted before and I never will again, but I need that raise." A herself has made it clear that she was speaking only as an employee and not as a "citizen," but it is nonetheless highly unlikely that the local Republican government could constitutionally fire A because of what she said.

The real underlying issue in this, and other employee speech cases, is not whether the *employee* was acting as a citizen or in some other capacity, but whether *government* was acting in pursuit of its own legitimate proprietary goals when it disciplined the employee. If the government fired her for her asserted pro-Democratic vote rather than for job-related reasons, it would be acting outside of its legitimate role as proprietor/employer, and, as such, would not be exempted from any duty with respect to the employee. Again, the case makes perfect sense when seen as merely a way to determine the role in which government is acting and, as a result, whether or not government has a duty with respect to the employee speech. To understand the case as simply defining and relying on when an employee speaks "as a citizen" in terms required by the employee speech doctrine would be to allow doctrines meant as shortcuts to overwhelm, and thus complicate, a simple and coherent understanding of free speech law.

A separate line of employee speech doctrine is represented by the Court's decision in *Perry v. Sindermann*.[130] Sindermann was a teacher in the state college system.[131] He had been hired pursuant to a series of one-year contracts.[132] He testified before committees of the Texas Legislature and became involved in public disagreements with the policies of the college's Board of Regents, and the following term his contract was not renewed.[133]

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[130] Perry v. Sindermann, 408 U.S. 593 (1972).
[131] *Id.* at 594.
[132] *Id.*
[133] *Id.* at 594–95.

Sindermann alleged that his non-retention was in retaliation for his public speech and, as such, violated his rights to free speech.[134]

In holding that Sindermann's allegations, if proven, stated a constitutional claim, the Court stated that:

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons . . . . It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.[135]

At first blush, it seems eminently sensible to suggest that government can deny a benefit such as employment for no reason at all, but that it cannot deny a benefit for certain prohibited reasons. Similar rules exist with respect to discrimination on the basis of race, gender, and sexual orientation.

There are some significant differences between restrictions based on speech and restrictions based on race or gender.[136] Most significant for our purposes is the fact that while a court would have to examine government's motive to determine whether a person's termination was based on her race, religion, or sexual orientation, at least the issue of whether or not a person *has* a particular trait—skin color, religion, or sexual orientation—is obvious to any observer. However, when the "prohibited" basis for discrimination is the employee's exercise of a constitutional right such as free speech, rather than an existing inalterable classification such as race or gender, the court must decide not simply whether the employee was *fired* for her speech, but whether she *had* the right to speak as she did in the first place.

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[134] *Id.* at 595.

[135] *Id.* at 597.

[136] One significant difference is that while many restrictions on communication are obviously necessary to enable government to perform its legitimate proprietary interests, there are few, if any situations in which discriminating on the basis of race is related to government's pursuit of any legitimate interest. Whether or not the guarantee of Equal Protection is limited to situations where government is not otherwise legitimately acting as proprietor is irrelevant, because the very use of race as a determining characteristic would likely convince any court that government's enterprise, whatever it is, is illegitimate. *See, e.g.*, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.").

The determination of whether an employee had a constitutional right to speak as she did in any situation, unlike the determination of an employee's race or gender, necessarily depends on the context. To state that government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech" means only that government cannot constitutionally deny a benefit to a person for speaking as she did in a particular situation *if* the person had a constitutional right to speak as she did in that situation.[137] The reasoning is not inaccurate. Neither, though, is it helpful. It is simply circular.

To see the circularity of the reasoning, assume that A, a city bus driver, is fired from her government job for saying "dirty" words. In order to determine whether A has been punished for *exercising* her right to free speech, one must first determine whether she *had* the right to say what she said in the first place. That, in turn, necessarily depends on the context in which she said it. A likely has the right to speak as she wishes in the privacy of her home, so if A is fired for so doing, the action is likely unconstitutional. But what if A spoke her profanities while working as a bus driver on a crowded city bus? Does she *have* a constitutional right to do so? Unless a court can answer that question, it cannot determine whether or not A was fired for *exercising* a constitutional right. To simply state that A cannot be fired for exercising a constitutional right, then, says nothing at all about whether A can be fired for doing what she did. It simply brings us back to the question of whether or not A had a constitutional right to say what she did in the context in which she said it.

Our suggested framework puts the issue in a way that is capable of being intelligently answered. If government was acting as a regulator, it has a constitutional duty to accommodate A's speech. On the other hand, government has no such constitutional duty if it is acting legitimately as the proprietor of public transportation and as A's employer. In other words, when government dismisses an employee and the employee claims a violation of her free speech rights, the Court has no choice but to determine government's duty to the employee. In turn, the

[137] *See Garcetti*, 547 U.S. at 422 (holding that an employee did not have a constitutional right to speak as he did in his capacity as a government employee, and, thus, there was no First Amendment violation).

existence of a duty to the employee depends on the role in which government is acting when it restricts speech. Unless one looks to the role of government to determine the existence of a duty in any particular situation, the determination of A's constitutional rights, and of whether she has been fired for exercising those rights, is essentially ad hoc.[138]

C. *Types of Speech Restrictions: Time, Place, or Manner; Content-Based; Viewpoint-Based; and Secondary Effects*

1. The Doctrines

In most speech cases, the result depends not only on the role in which government is acting, but also on the type of speech restriction at issue. Even in the public forum, restrictions on the time, place, or manner of speech will be upheld.[139] Content-based restrictions and viewpoint-based restrictions will be struck down, though.[140] In a nonpublic forum, both time, place, and manner restrictions and content-based restrictions will be upheld,[141] while viewpoint-based restrictions will be struck down.[142] In a limited public forum, time, place, and manner restrictions will be upheld,[143] content-based restrictions will be upheld so long as they are reasonable in light of the purposes for which the forum is being used,[144] and viewpoint based restrictions will be either struck down or, at other times, upheld if reasonable in light of the purpose of the forum.[145]

Put most simply, viewpoint-based and content-based restrictions are almost always struck down; time, place, or manner restrictions are almost always upheld. The next obvious question, then, is "what do these terms mean?"

The notion of time, place, and manner restrictions exists because an individual can theoretically use virtually any behavior to communicate something; as a result, any regulation of virtually any conduct can have an impact on some person's

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[138] We do not suggest that ad hoc balancing would be inappropriate. We mean only that it does not accurately represent what the court has done.

[139] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 297–98 (1984).

[140] Police Dep't of Chi. v. Mosley, 408 U.S. 92, 99 (1972).

[141] *See* Greer v. Spock, 424 U.S. 828, 838 (1976).

[142] *See id.* at 838–40.

[143] Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 648 (1981).

[144] See discussion of limited public fora, *supra* Part I.A.2.

[145] *See* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678–79 (1992).

communicative efforts, regardless of the government's intent. For example, laws against battery might not seem related to speech, but they drastically limit the communicative ability of those who like to rely on personal physical force to send a message. Similarly, laws against the destruction of draft cards may have been enacted for reasons having nothing to do with speech. But burning a draft card may be a direct and forceful way to express one's disagreement with the draft to society at large, a communication that may be severely restricted by those laws.[146] These regulations of conduct that may incidentally and unintentionally restrict some communication are generally referred to as time, place, or manner regulations, and are almost always upheld.[147]

Not surprisingly, "content-based" restrictions are those that are based on the content of the speech at issue. If, for example, a speaker is allowed to discuss Capitalism but not Communism, or Christianity but not Islam, the restrictions will be reviewed much more harshly.[148]

Most suspect of all speech restrictions—indeed, so suspect that the Court has at times stated that they will be struck down regardless of the government interest at stake—are those restrictions based on the viewpoint of the speaker. These are restrictions that might, for example, allow discussion of

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[146] *See generally* United States v. O'Brien, 391 U.S. 367 (1968). We express no opinion about the Court's conclusion with respect to legislative intent in that particular case.

[147] "The principal inquiry in . . . time, place, or manner cases . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.' " Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citations omitted) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1994)). *See also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 573 (2001) (Thomas, J., concurring) ("[T]he abiding characteristic of valid time, place, and manner regulations is their content neutrality.").

[148] "[G]overnment 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. . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972) (citations omitted).

American foreign policy so long as the speaker favored current policy, but disallow discussion of the same topic—content—by a speaker who was against current policy.[149]

2. Common Sense Behind the Doctrines

There is appeal to establishing different tests for different kinds of speech restrictions. By treating some actions, topics or points of view differently than others, statutes or regulations provide evidence that the regulation is *intentionally* restricting the targeted communication rather than some other behavior or consequence unrelated to the communication being restricted.[150] Since we suggest that the Court will not strike down government action in the absence of that intent,[151] the relevance of content and viewpoint discrimination to constitutional analysis is obvious. A finding of discrimination against communication can properly play the same role in First Amendment cases that a finding of discrimination against a protected class can play in Equal Protection cases.

To see this, assume that government prohibits the use of Styrofoam containers by fast food restaurants because of environmental concerns. Clearly, this regulation would not violate the First Amendment; there is no evidence of any intention to limit communication. On the other hand, if a regulation allows the use of Styrofoam containers *except* those that have some communication on them—for example, words, sentences, or even pictures—the regulation discriminates, on its face, against speech. By allowing the use of Styrofoam containers that do not communicate, the regulation suggests that its motivation was hostility to the communication rather than to potential environmental damage. As a result, it likely violates the First Amendment.

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[149] The Court explained the basis for this permanent and apparently undilutable taint that viewpoint discrimination brings with it in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–94 (1992). It stated that:

> [Government] has no . . . authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.
>
> . . . .
>
> The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.

Id. at 392.

[150] *See id.* at 391–92.

[151] *See* discussion, *infra* Part I.C.2.

Similarly, a regulation that prohibits loud noises in a residential neighborhood would likely be upheld because a court would assume that the regulation is intended to provide relative quiet and is not aimed at communication. On the other hand, a regulation that prohibited only loud noises incidental to labor disputes, while allowing other loud noises, would likely be struck down. The facial content discrimination provides evidence that the intent behind the regulation was to restrict certain communication rather than to protect against high noise levels.

Finally, the same intent to target communication is obvious if, for example, the regulation prohibits only loud noises in support of labor but not loud noises in support of management. In that case, the facial viewpoint discrimination again suggests that it is communication that is being intentionally targeted.

While facial discrimination against speech, or against certain topics or viewpoints, typically serves as evidence of intentional targeting of speech, there are also many occasions when intentional discrimination against speech is constitutionally acceptable. For example, "fighting words" are a kind of speech that can be regulated under the First Amendment.[152] Their intentional regulation can be constitutionally justified by the need to prevent the immediate harm that would be caused by their utterance.[153] Indeed, if a limit on fighting words prohibits additional speech and is *not* limited to discriminating against fighting words—content and or viewpoint discrimination—it would likely be found to be overbroad and unconstitutional.[154]

Nonetheless, a regulation that prohibits fighting words only if they mention race—content discrimination—or only if they are anti-American—viewpoint discrimination—would likely be struck down because of that content or viewpoint discrimination.[155] In such cases, discrimination *against* all

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[152] See discussion of protected and unprotected speech, *infra* Part I.D.

[153] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[154] *See R.A.V.*, 505 U.S. at 381.

[155] In *R.A.V.*, the Court stated:

> From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." We have recognized that "the freedom of speech" referred to by the First Amendment does not include a freedom to disregard these traditional limitations. . . .

fighting words is justifiable, but discrimination *among* fighting words, against only racial or anti-American fighting words, is not. By targeting only *some* fighting words, while allowing others, the content or viewpoint discrimination provides evidence that the restriction is motivated by hostility to the message or content of those particular fighting words that are prohibited, rather than by the need to prevent the harm that is common to, and that justifies the restriction of, *all* fighting words. This role played by content and viewpoint discrimination on the face of a statute or regulation serves the same function as does the Court's reference in Equal Protection and Due Process cases to certain regulations as being "under-inclusive."[156]

In the same way—by pointing out the underinclusiveness of some action—content or viewpoint discrimination can also provide substantial evidence that a government agency is acting outside its legitimate proprietary role, and is thus subject to constitutional duties. For example, park management might, as proprietor, prohibit the posting of any signs in order to preserve the natural beauty of the park. There would be no doubt that this restriction targeted communication, but there would also be little doubt that it was doing so in its role as proprietor of the park. If, instead, the park prohibits the posting only of signs that criticize the mayor, or only signs about American foreign policy, its actions will likely come under constitutional scrutiny. While

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> We have sometimes said that these categories of expression are "not within the area of constitutionally protected speech," or that the "protection of the First Amendment does not extend" to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity "as not being speech at all." What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.

Id. at 382–84 (citations omitted).

Similarly, even regulations of those categories of speech traditionally thought of as wholly outside of the First Amendment, such as assault or fraud, would be struck down if they were aimed only at fraud or assault that communicated an anti-government message but did not restrict fraud or assault that contained a pro-government message. *See id.*

[156] *See* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 348 (1949).

a court might simply point to "content or viewpoint discrimination" as the problem, there are two different problems evidenced by the content or viewpoint discrimination in this situation. One is that it suggests that government is intentionally targeting the speech. The other is that this specific targeting in turn provides strong evidence that the speech restriction at issue is not a part of any legitimate proprietary function being exercised by government. The proprietor of a park may well, as such, seek to preserve natural beauty by restricting all signs. It is impossible, though, to imagine any legitimate proprietary function that depends on the content or viewpoint of the political signs that might be posted in the park. As a result, the content and viewpoint discrimination is evidence that government is acting as a regulator rather than as a proprietor. As such, it has a duty not to interfere with the speech of others. In other words, the content or viewpoint discrimination suggests that government is acting as a regulator so that the public forum standards apply. In turn, because government is acting as a regulator, content discrimination is impermissible.

Basically, then, the notion of content and viewpoint discrimination in a statute or regulation can make sense when seen either as evidence that (1) government is intentionally targeting certain speech—which generally invalidates a regulation, but may at other times actually justify a regulation if the targeted speech is of a kind that makes it subject to regulation, and/or (2) government's actual reason for targeting particular speech is something other than an asserted justification that would suggest the need to regulate more than just the targeted speech. These, in turn, may be relevant to a determination of the role in which government is acting, or whether government is intentionally targeting speech, or whether an asserted justification for targeting speech is actually the real justification for the speech restriction.

3. Problems

These doctrines and their application become confusing for two reasons: (1) although the presence of content or viewpoint discrimination is usually apparent in a statute or regulation, and typically serves only as *evidence* of the intent or motivation for a statute, sometimes courts use the terms not to describe *facial* discrimination that serves as *evidence* of intent or motive, but to

label *conclusions* regarding intent or motive based on sources outside of the statute itself; and (2) sometimes courts seem not to understand that all types of discrimination against speech, whether it is discrimination against all speech, or only against certain content, or only against certain viewpoints, can serve both of the purposes described above, and by so doing they confuse themselves.

To see how the labels content discrimination and viewpoint discrimination are at times used to label *conclusions* about intent rather than facial discrimination that is merely *evidence* of intent, consider *Perry Education Ass'n v. Perry Local Educators' Ass'n*,[157] where a regulation enacted right after a union vote and pursuant to the new contract with the winning union excluded the losing union from the school mail system.[158] The majority concluded that the action was constitutional because it was viewpoint neutral.[159] It believed that there was no viewpoint discrimination because the exclusion was based on the *status* of the rival union—as not representing any teachers—rather than

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[157] 460 U.S. 37, 55 (1983).

[158] The Court described the facts as follows:

> Prior to 1977, both the Perry Education Association (PEA) and the Perry Local Educators' Association (PLEA) represented teachers in the school district and apparently had equal access to the interschool mail system. In 1977, PLEA challenged PEA's status as *de facto* bargaining representative for the Perry Township teachers by filing an election petition with the Indiana Education Employment Relations Board (Board). PEA won the election and was certified as the exclusive representative, as provided by Indiana law.
>
> The Board permits a school district to provide access to communication facilities to the union selected for the discharge of the exclusive representative duties of representing the bargaining unit and its individual members without having to provide equal access to rival unions. Following the election, PEA and the school district negotiated a labor contract in which the school board gave PEA "access to teachers' mailboxes in which to insert material" and the right to use the interschool mail delivery system to the extent that the school district incurred no extra expense by such use. The labor agreement noted that these access rights were being accorded to PEA "acting as the representative of the teachers" and went on to stipulate that these access rights shall not be granted to any other "school employee organization"-a term of art defined by Indiana law to mean "any organization which has school employees as members and one of whose primary purposes is representing school employees in dealing with their employer." The PEA contract with these provisions was renewed in 1980 and is presently in force.

Id. at 39–41 (footnote omitted) (citations omitted).

[159] *Id.* at 49.

on the viewpoint the group sought to express—its differences with the other union.[160] The dissent concluded that the exclusion was unconstitutional because it constituted viewpoint discrimination—they believed that it was precisely because the rival union wanted to put forth a viewpoint different from that of the winning union that it was excluded.[161] Neither side based its argument simply on the face of the regulation. Instead, both sides looked to other facts and circumstances to justify their conclusions that the regulation was or was not an example of viewpoint discrimination.

The fact that the label of "viewpoint discrimination" or "viewpoint neutral" was used to describe each side's conclusion with regard to government's intent and motivation rather than to describe discrimination on the face of the regulation is not itself necessarily problematic, but it does raise some concerns. Decisions would be more understandable if Justices used labels such as "intentional" discrimination and facial discrimination, as they do in Equal Protection cases, to describe the two different uses of the term—that is, either as evidence of discrimination or as a conclusion of discrimination based on different evidence. But mere confusion in First Amendment cases is nothing new.[162]

More significantly, the broad use of the labels content or viewpoint discrimination can obscure the real issues at play in the case. Ultimately, the difference between the Justices in *Perry* was that the majority believed that the regulation was part of the government's legitimate job as proprietor of the school and employer of the teachers, and the dissent believed that the regulation was outside of the school's legitimate proprietary interest.[163] Conclusions about the school's target and its intent are certainly important in making that determination. The intentional targeting of speech—the second kind of viewpoint discrimination—is typically not a legitimate proprietary function, but preserving school property for school business would seem to be.[164] Both the majority and the dissent, however, made the presence or absence of viewpoint discrimination appear to be the ultimate legal issue, rather than a factor—albeit an important

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[160] *Id.*

[161] *Id.* at 65 (Brennan, J., dissenting).

[162] *See supra* Parts I.A–B.

[163] *See Perry*, 460 U.S. at 65 (Brennan, J., dissenting).

[164] *See* discussion *supra* notes 55–58.

one—that influenced their determination of the role in which government was acting. In fact, if government is legitimately acting as proprietor, as it does when it teaches that 2+2=4 and 2+2 does not equal 7, it can and often must engage in viewpoint discrimination; only if government is acting in some other role is viewpoint discrimination fatal. In other words, the ultimate issue was whether or not what the school did was a legitimate proprietary action—an issue that implicates intent as well as other questions, but clearly an issue that cannot be decided based only on the presence or absence of viewpoint discrimination. Indeed, the majority states that the restriction was viewpoint neutral because it was within government's legitimate proprietary domain, when in fact if government is legitimately acting as proprietor its actions do not need to be viewpoint neutral. The dissent stated that viewpoint discrimination condemned the restriction *regardless* of the forum involved.[165] Of course, though, if government is legitimately acting as proprietor, viewpoint discrimination is acceptable. Viewpoint discrimination does not condemn government action *regardless* of forum; it condemns government action only *because* of the forum. The result is obfuscation of the real issues in addition to unnecessary confusion.

Similar to *Perry* in its use of viewpoint discrimination as a conclusion about intent is *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*.[166] The dissent argued that a regulation that excluded

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[165] *Perry*, 460 U.S. at 71–72 (Brennan, J., dissenting). The dissent concluded:

> Because the grant to the petitioner of exclusive access to the internal school mail system amounts to viewpoint discrimination that infringes the respondents' First Amendment rights and because the petitioner has failed to show that the policy furthers any substantial state interest, the policy must be invalidated as violative of the First Amendment.
>
> In order to secure the First Amendment's guarantee of freedom of speech and to prevent distortions of "the marketplace of ideas," governments generally are prohibited from discriminating among viewpoints on issues within the realm of protected speech. In this case the board has infringed the respondents' First Amendment rights by granting exclusive access to an effective channel of communication to the petitioner and denying such access to the respondents. In view of the petitioner's failure to establish even a substantial state interest that is advanced by the exclusive access policy, the policy must be held to be constitutionally infirm. The decision of the Court of Appeals should be affirmed.

Id. (citation omitted).

[166] 130 S. Ct. 2971, 2994 (2010).

a Christian group which allowed only believers to join was viewpoint discriminatory. Although the regulation was drafted to look like it was based only on status, it was exactly the group's status as a Christian-believer-only group that meant that the group represented the unwanted Christian point of view.[167] The majority reasoned that the group was excluded because of its status as the only group that was not open to all comers, so that the regulation, based as it was on status, was viewpoint neutral.[168] The difference between the majority and the dissent lay primarily in the different motives they attributed to the government defendant—was it anti-groups that discriminate, or was it anti-religion?

That the different Justices viewed government's actions through different lenses, which in turn gave rise to different conclusions with respect to government's intent in this case, is neither surprising nor inappropriate. Using "content discrimination" or "content neutral" to describe their conclusions, though, is both confusing and distracting. We are left confused about what the terms mean, and we are left without any discussion of how intent can be shown in free speech cases. Is the standard the same as in Equal Protection, or is the standard of proof and the evidence required to show intent in speech cases more lenient because one need only show "content discrimination" or "viewpoint discrimination"?

More confusing than using content and viewpoint discrimination sometimes to indicate facial discrimination that is evidence of intent and other times to label a conclusion with respect to government's intent—or even about the outcome of the case—is the Court's use of the terms content and viewpoint "neutral" to describe regulations that do discriminate on their face. There are some occasions where government action discriminates on its face against certain speech, but where Justices determine that there is no intentional discrimination.[169] In these cases, rather than simply stating that the discrimination against speech is not intentional, they often say that the government action is "content and/or viewpoint neutral."[170] One useful result of this labeling is that government action that does

[167] *Id.* at 3009–10 (Alito, J., dissenting).
[168] *Id.* at 2994 (majority opinion).
[169] *See infra* notes 172–85 and accompanying text.
[170] *See infra* notes 172–85 and accompanying text.

not intentionally target speech is upheld, as the Court seems to believe it should be. Another less useful result is that observers and courts become even more confused about what content and viewpoint discrimination and neutrality mean.

One example of this confusing approach was in *Hill v. Colorado*.[171] Prior to that case, in *Burson v. Freeman*,[172] the Court found to be content-based, and unconstitutional, an ordinance that prohibited solicitation of votes and display of campaign materials within 100 feet of any entrance to a polling place on election day.[173] Similarly, in *Boos v. Barry*, the Court was faced with a provision that made it unlawful to

> display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party, or organization, or any officer or officers thereof, or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government, party or organization . . . within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes.[174]

In accordance with its determinations in *Burson*, the Court found that this restriction was content-based because,

> Whether individuals may picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not. One category of speech has been completely prohibited within 500 feet of embassies. Other

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[171] 530 U.S. 703, 719–20 (2000).

[172] 504 U.S. 191 (1992).

[173] The Court explained,

> The Tennessee restriction under consideration . . . is not a facially content-neutral time, place, or manner restriction. Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign. The statute does not reach other categories of speech, such as commercial solicitation, distribution, and display. This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic.

Id. at 197.

[174] Boos v. Barry, 485 U.S. 312, 316 (1988) (quoting D.C. CODE § 22-1115 (1981)).

> categories of speech, however, such as favorable speech about a foreign government or speech concerning a labor dispute with a foreign government, are permitted.[175]

Somewhat akin to the above cases, the *Hill* Court addressed a statute that prevented persons from knowingly approaching within eight feet of an individual who is within 100 feet of a health care facility entrance, for purposes of displaying a sign, engaging in oral protest, education, counseling or passing leaflets or handbills, unless such individual consented to that approach.[176] The Court found that the provision was a content-neutral time, place, and manner regulation for First Amendment purposes, even if it might be necessary to examine the content of oral statements made by the approaching speaker to determine whether the speaker violated the statute.[177] The Court reasoned that the statute regulated only *places* where some speech could occur, and that the state's interests in protecting access to medical facilities and privacy, and providing police with clear guidelines, were unrelated to the content of demonstrators' speech.[178] The Court did not address how the regulation of the places where certain speech could occur is content and viewpoint neutral when the proscribed places are within 100 feet of a medical facility, but content and viewpoint discriminatory when the proscribed places are within 100 feet of a polling place or 500 feet of an embassy.[179]

Similarly, in *Madsen v. Women's Health Center, Inc.*, the Court upheld an injunction issued by a lower court against anti-abortion demonstrators at an abortion facility.[180] The restriction was aimed at anti-abortion protesters and the court order delegated to the addressees the power to determine who could approach them by giving them a choice of consenting or not consenting to be approached within the restricted area.[181] Thus, the would-be patient was delegated the opportunity to decide

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[175] *Id.* at 318–19.

[176] *Hill*, 530 U.S. at 707.

[177] *Id.* at 719–26.

[178] *Id.* at 719–20.

[179] We do not mean to suggest or even imply that a constitutional review of the ordinances in *Hill*, *Burson*, and *Mosley* ought to lead to similar results. We mean only that, to the extent the ordinances differ, it is not in whether or not they are content-neutral. *See infra* notes 195–201 and accompanying text.

[180] 512 U.S. 753, 757 (1994).

[181] *Id.* at 773.

who could and could not approach her to speak, and it is quite likely that she would use that delegated discretion to discriminate on the basis of viewpoint.[182] In addition, the injunction was directed at people acting "in conjunction with" the pro-life demonstrators, so it did not apply at all to anyone who was pro-choice. The Court upheld the restrictions, explaining that they were not only viewpoint neutral, but even "content-neutral."[183]

In these cases, there were important issues and questions, and clearly one of these issues was the motivation of the governmental entity that imposed the restrictions—the issue typically addressed in the context of content or viewpoint discrimination.[184] It was not unreasonable for the Court to determine, in these cases, that government's intention was to protect women from verbal abuse that might result in significant health risks, and was not to restrict the message of the pro-life demonstrators. It was quite confusing, however, for the Court to not simply present this conclusion directly, but instead to announce that the restriction that discriminated against content and viewpoint on its face was "content and viewpoint neutral."

Even more confusing than the Court's use of "content neutral and viewpoint neutral" to describe restrictions that discriminate against content or viewpoint on their face, but where the Court concludes that the apparent discrimination against speech is not intentional, is the occasional use of the terms "content and viewpoint neutral" to describe restrictions that discriminate on their face against speech where the discrimination against certain speech is intentional, but where the Court finds that the intentional discrimination is justified.[185] That the Court upholds these regulations where the targeting of speech is justified is entirely sensible. That it does so by labeling regulations that directly target specific speech as "content and viewpoint neutral" is entirely confusing.

Use of this approach, though, is common. For example, a person who yells to a responsive crowd, "Kill that man. Violence is necessary!" while pointing at a particular person, in a successful effort to get the crowd to take the encouraged action,

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[182] *See supra* Parts I.A.2–4.

[183] *Madsen*, 512 U.S. at 763–64.

[184] *See, e.g., id.* at 763.

[185] *See infra* notes 195–204 and accompanying text.

can be punished for unlawful incitement without government violating the First Amendment.[186] A person who says, "Don't give me your money, or I will just walk away and not hurt you" will not be convicted of assault or robbery, but the person who says, "Do give me your money or I will hurt you" can be constitutionally convicted of both.

Similarly, government can constitutionally ban true threats,[187] but it cannot ban "true promises." The employer who constantly says to her employee, "I want to have sex with you now" is committing unlawful sexual harassment, while the employer who constantly says to her employee, "I am not interested in sex" is not.

The fact that in these cases, content discrimination is not only appropriate but necessary to preserve the constitutionality of a speech restriction is not itself problematic. Confusion arises, when, and only because, justices often refer to these speech restrictions as "content neutral" rather than simply acknowledging that in these cases content discrimination serves a different, constitutionally legitimate, purpose than it does in some other cases.

Another example of this kind of semantic confusion is the decision in *Virginia v. Black*.[188] There the Court found that a regulation prohibiting cross-burning with the intent to intimidate was constitutional, in large part because the history of cross-burning in this country makes that act such a powerful message of threat and hatred.[189] While it might be eminently sensible to hold that government was justified in restricting cross-burning, the interesting aspect of this holding was that the Court found the regulation to be constitutional because it was "viewpoint neutral."[190] Again, it determined that viewpoint discrimination is actually viewpoint neutral.

The "secondary effects" cases[191] are also good examples of this same kind of reasoning. In *Renton v. Playtime Theatres, Inc.*, the Court was faced with an ordinance that "prohibit[ed]

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[186] *See infra* Part I.D.1.

[187] Virginia v. Black, 538 U.S. 343, 359 (2003).

[188] *Id.* at 343.

[189] *Id.* at 357.

[190] *Id.* at 362.

[191] *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986); City of Erie v. Pap's A.M., 529 U.S. 277, 286 (2000).

adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school."[192] It explained that,

> To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the District Court concluded, the Renton ordinance is aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community.[193]

The ordinance was upheld because it was content-neutral.[194] In other words, although it was obvious that it was exactly the content of the restricted entertainment that motivated the regulation, the Justices justified the result they reached by holding that the speech restriction was content and viewpoint neutral. Had the Court simply acknowledged that the content being targeted, albeit indirectly, was of less value and more harm than other speech—subjecting it to stricter regulation, consistent with the First Amendment—it could have reached the same result without leading observers to wonder exactly what viewpoint and content discrimination actually mean.

While the problems we point out with the use of these doctrines are basically ones of nomenclature, they nonetheless add considerably to the confusion surrounding free speech jurisprudence. It appears that at times the very different roles played by the terms "content," "viewpoint discrimination," and "neutrality" even confuse not only which role the determination plays in each case but also how that determination is reached. We have seen that content and or viewpoint discrimination can be used to describe government action that intentionally targets speech;[195] but that "content and viewpoint neutral" can be used to describe intentional targeting of speech that is constitutionally justified.[196] The potentially different meanings can make it impossible to tell what judges mean by the term in any particular

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[192] *Playtime Theatres*, 475 U.S. at 43.

[193] *Id.* at 47.

[194] Again, we do not suggest that the Court was wrong to treat the *Playtime Theatres* ordinance differently from the ordinance struck down in *Mosley*. We believe only that any differences in the constitutionality of the ordinances are not the result of differences in their content neutrality.

[195] *See, e.g.*, Boos v. Barry, 485 U.S. 312, 319 (1988); Burson v. Freeman, 504 U.S. 191, 197 (1992).

[196] *See, e.g.*, Virginia v. Black, 538 U.S. 343, 360 (2003).

case. For example, in *Hill*,[197] *Madsen*,[198] *Hastings*,[199] and *Perry*,[200] the majority and the dissent argued over content and viewpoint neutrality, and both sides discussed both evidence of intent and evidence of justification.[201] Neither side made it clear whether its ultimate judgment was that the government did or did not intentionally discriminate against speech, or that the government did discriminate against speech but the discrimination was or was not justified. One is left not quite understanding what evidence is sufficient to justify which conclusion, or exactly what it really was that both sides concluded.

In terms of free speech doctrine as a whole, the net result of these cases seems to be that a regulation that manifests viewpoint discrimination is usually unconstitutional, but sometimes it is not. Sometimes viewpoint discrimination means that the regulation discriminates against a certain point of view.[202] Other times, viewpoint discrimination means that a statute discriminates against a certain subject matter.[203] Other times, though, regulations that discriminate against a certain point of view and a certain subject matter are *not* viewpoint discrimination, but are viewpoint and content neutral.[204]

In addition to being confusing, another significant problem with describing restrictions as "content neutral" rather than acknowledging the different roles played by "content discrimination" in these cases is that the debate between the Justices can morph from the one about whether a restriction on speech can be justified because of the harm it causes into a debate about whether the restrictions at issue are content-based or viewpoint-based, or whether they are content and viewpoint neutral.

A brief review of relevant cases seems to support the notion that the differing uses and definitions of viewpoint discrimination and viewpoint neutrality in different cases have at least something to do with political values and are not simply

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[197] 530 U.S. 703 (2000).
[198] 512 U.S. 753 (1994).
[199] 130 S. Ct. 2971 (2010).
[200] 460 U.S. 37 (1983).
[201] *See supra* notes 157–85 and accompanying text.
[202] R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).
[203] Carey v. Brown, 447 U.S. 455, 462 (1980).
[204] Hill v. Colorado, 530 U.S. 703, 724–25 (2000).

technical. For example, in *Hill*[205] and in *Madsen*,[206] the restrictions were aimed at pro-life protestors whose actions arguably threatened the health of women seeking abortions.[207] The more liberal, pro-choice Justices on the Court argued that the restriction was content-neutral and so should be upheld, and the more conservative, pro-life Justices argued that there was viewpoint discrimination that made the restriction unconstitutional.[208] On the other hand, in the secondary effects cases, the challenged restrictions were aimed at sexually oriented speech.[209] When it was sexually explicit speech that was being treated differently, the roles reversed and the conservatives saw viewpoint-neutrality and upheld the restriction where the liberals saw content-neutrality.

Another example is *Rosenberger*, where the dissent argued that the case was about establishment of religion, because the Court for the first time appeared to accept the constitutionality of the direct funding of religious organizations, and it believed that by restricting funding to the religious organization, the university was doing the only thing it could under the Establishment Clause.[210] Rather than weighing the relative importance of speech and religion where they appeared to be at odds, the majority simply found viewpoint discrimination and condemned the university's action on that ground.[211] Rather than debate about the relative importance of the need for pregnant women seeking abortions to be shielded from verbal assault versus the wishes of pro-life demonstrators to stop those women, or about the relative importance of free speech and establishment of religion, judges debate about "viewpoint neutrality."[212] Rather than debating the harm caused by sexually

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[205] 530 U.S. 703 (2000).

[206] 512 U.S. 753 (1994).

[207] *Id.* at 757–59; *Hill*, 530 U.S. at 708–10.

[208] *Hill*, 530 U.S. at 725.

[209] City of Erie v. Pap's A.M., 529 U.S. 277, 284 (2000); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 44 (1986).

[210] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 863–64 (1995) (Souter, J., dissenting).

[211] *Id.* at 845–46 (majority opinion).

[212] *Id.*; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983).

oriented communication, they debate about "secondary effects."[213] We believe that this is an unnecessarily confusing way to avoid facing some real value differences among the Justices.

We make no attempt to suggest which side is right in any of these cases, because that is beside our point. We raise these cases to show that the very different opinions about speech that is content and viewpoint neutral and speech that discriminates on the basis of viewpoint are sometimes based neither on different ideas of the *definitions* of content discrimination and viewpoint discrimination, nor on different conclusions regarding the facts of the case. Sometimes the different results are simply the result of different fundamental values held by different decisionmakers.

Of course, there is no problem with different Justices having different values, and we do not mean to suggest that Justices ought not to support their opinions in whatever way they can. We do mean to point out that when lawyers and judges take these arguments at face value and accept them as being value-free judgments about the definition and application of terms such as viewpoint and content discrimination and viewpoint neutrality, confusion necessarily abounds. The confusion, in these cases, is not the result of any fundamental problems with First Amendment doctrines. It is the result of those doctrines being misplaced, misused, and unmoored from their own valid theoretical foundations. It results in both confusion and distraction from the real issues and concerns that separate the Justices.

Unfortunately, the Court has never actually explained or contextualized the different roles of these characterizations, and that failure has led to a great deal of the apparent complexity of First Amendment doctrine. The Court has never simply explained that the notion of content or viewpoint discrimination serves several different purposes, and that what it means can vary based on the context in which it is used.[214] When it serves the purposes of describing underinclusiveness it can be a fatal flaw. Other times it might be used to point out that government is not acting simply as proprietor but as a regulator; other times

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[213] *Playtime Theatres*, 475 U.S. at 47.

[214] Edward J. Bloustein, *The Origin, Validity, and Interrelationships of the Political Values Served by Freedom of Expression*, 33 RUTGERS L. REV. 372, 372 (1981).

it might be evidence that government is targeting speech; and still other times it might provide the justification for targeting speech.[215] Instead of simply acknowledging these different applications, the Court has attempted to resolve this apparent dilemma by twisting the definitions of viewpoint and content discrimination, and viewpoint and content neutrality, beyond recognition.[216] This, in turn, has served to significantly muddy the waters of free speech doctrine.

4. Time, Place, or Manner Restrictions

a. Intuitive Appeal

Despite some confusion, there are numerous regulations of speech that all would agree are legitimate, content-neutral, "time, place, or manner restrictions." As stated above,

> The principal inquiry in . . . time, place, or manner cases . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. "The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.[217]

Again, there is intuitive appeal to the notion that time, place, or manner regulations are constitutionally acceptable. As with both Equal Protection cases and Due Process cases, government action that unintentionally makes it harder for some person to engage in a desired activity is typically constitutionally acceptable.[218] The fact that the location of a road happens to make it easier for one person to travel than it does another, or the fact that legitimate and valid requirements for a government job may make it harder for one person to gain employment than it does for another, does not make those government actions

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[215] *See supra* Part I.C.2.

[216] *See supra* text accompanying notes 195–201.

[217] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); *see also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 573 (2001) ("[T]he abiding characteristic of valid time, place, and manner regulations is their content neutrality.").

[218] *See, e.g.*, Ry. Express Agency v. New York, 336 U.S. 106, 110 (1949) (finding a New York City restriction on advertising vehicles constitutional absent some evidence of invidious discrimination); Washington v. Davis, 426 U.S. 229, 239 (1976) (explaining the requirement that the challenged law have a discriminatory purpose for a valid equal protection claim).

unconstitutional. Similarly, if a restriction legitimately aimed at action such as assault, speeding, or polluting makes it more difficult for a person to express her views in a particular way, she nonetheless has no constitutional claim. When used as a shortcut for a determination that a particular regulation is intentionally aimed at consequences unrelated to the content or viewpoint of the speech, the classification of the regulation as one of "time, place, or manner" is simple and efficient.

b. Reality

As explained above, some of the difficulty and uncertainty in free speech doctrine is the result of different decisionmakers twisting the definition of time, place, or manner regulations to fit their needs. It appears to us that some of the confusion in this area is also due to the Court's enunciated test for determining the constitutionality of these restrictions. Courts state that these restrictions will be upheld provided "that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[219] This test appears to be significantly more restrictive than a basic rational basis test. This appearance is quite misleading.

Despite some suggestions that even time, place, or manner regulations not aimed at communication can be struck down under the First Amendment,[220] the outcomes of the cases strongly suggest that so long as a reviewing court is convinced that government regulation is not *intended* to restrict communication, the fact that the regulation may have that effect will *not* result in First Amendment problems.[221] We do not advocate this notion,[222] but we do posit that its use explains, greatly simplifies, and organizes free speech cases to date.

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[219] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

[220] *Id.* at 294.

[221] *See supra* Part I.C.2; Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 415 (1996).

[222] The idea that only intentional targeting of speech is constitutionally suspect accords with the notion of constitutional rights being only limits on government action rather than actual affirmative guarantees to individuals. In this Article we are trying only to describe the behavior of the courts, and not to set out our own theories of the Constitution.

The Court has struck down very few "time, place, and manner" restrictions, and where they have been, the cases suggest that the Court did so not because the restriction failed the test for time, place, and manner restriction, but because the Court believed that the restrictions were actually intentional, not neutral, restrictions of speech. In *Schneider v. New Jersey*,[223] for example, the Court struck down ordinances that prohibited the distribution of handbills on public sidewalks, and the Court stated that although the ordinance was intended to prevent littering, it imposed an unjustified burden on freedom of speech.[224] In *Martin v. City of Struthers*, the Court struck down a "neutral" ordinance prohibiting people from going door to door to distribute literature.[225] In *City of Ladue v. Gilleo*, the Court struck down a "time, place, or manner" ordinance that prohibited homeowners from displaying signs on their property.[226] Each of these cases is generally viewed as an example of legislation aimed at something other than speech that, albeit unintentionally, restricted too much speech.[227] There are no recent cases in which the Court has struck down restrictions not clearly and intentionally targeting speech.

Despite the pervasive understanding of these cases as instances of regulations that were neutral toward speech but incidentally restricting speech while attempting to regulate some other activity, both the facts of the cases, and the fact that so many other regulations that incidentally restrict communication are treated differently, suggest that the common understanding of these cases is simply wrong. In *Gilleo*, the most recent of these cases, the Court explained that "even regulations [of] . . . time, place, or manner . . . must 'leave open ample alternative channels for communication.' In this case, we are not persuaded that adequate substitutes exist for the important medium of speech

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[223] 308 U.S. 147, 165 (1939).

[224] *Id.* at 162.

[225] 319 U.S. 141, 147–49 (1943).

[226] 512 U.S. 43, 56, 58–59 (1994).

[227] *See, e.g.*, Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 933–34 (1993); Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1178–79 (1996); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 101 (1987).

that Ladue has closed off."[228] Most commentators take this as showing that the Court is uncomfortable with even neutral regulations that eliminate an entire means of communication.[229] The fact is that there are numerous instances of government regulations that eliminate many more means of communication, and where many more people than were impacted than in *Gilleo*, without any problem at all.[230]

Indeed, had the town of Ladue required that all structures on private property in excess of one foot high to be completely covered in either polished marble or glass, it would likely have made it impossible for any homeowner to post a sign either unattached to a building—unless she had a spare marble signpost—or on her building—the outside of the building must be only marble or glass; no paper or cardboard. Nonetheless, such a restriction likely would not have resulted in First Amendment problems. The difference between this regulation and that in *Gilleo* is not how much speech the regulations restrict, but the fact that the regulation banning the posting of signs looked as if it were suspiciously *intentionally targeted* at communication.

In addition, tax and employment laws that make it impossible for some people to accumulate enough money to acquire property, and property laws that forbid non-owners of property from posting signs on property owned by others, limit

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[228] 512 U.S. at 56 (citations omitted) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

[229] *See, e.g.*, Dorf, *supra* note 227, at 1200–01; Stone, *supra* note 227, at 114. We have no doubt that regulations that entirely eliminated certain mediums of communication would be struck down quickly. Regulations that banned talking on the phone or communicating by email or text messaging would certainly not last long—because it would be clear that they targeted speech. If the Court actually did believe that eliminating an entire medium of speech was enough to invalidate a particular regulation even though that regulation did not target speech, the result would be quite similar to the Court's jurisprudence in due process and the takings clause. In *Lucas v. S.C. Coastal Council*, the Court held that a regulation that rendered a property completely without value could not be sustained. 505 U.S. 1003, 1031–32 (1992). If the Court held that a regulation that rendered a mode of communication completely without value, a clear analogy exists. Interestingly, the extreme rarity with which economic regulations are struck down just about matches the rarity with which "incidental" restrictions on speech are struck down—almost never.

[230] *See infra* Part I.D.1.

those non-owners in the same way that the restrictions in *Gilleo* limited the homeowners there. Nonetheless, no such laws have ever been struck down.[231]

Similarly, towns and rural areas that have no sidewalks or public parks and as a result have no areas for leafleting are not as such unconstitutional, despite the fact that residents have no more ability to communicate than did the residents in Schneider.[232] And laws that allow homeowners to prevent anyone from coming on their property for any purpose at all, including solicitation, are upheld despite the fact that they restrict solicitation as much as did the non-solicitation laws in *Struthers*.[233]

What made the laws in *Schneider*, *Gilleo*, and *Struthers* suspect was not the fact that they unintentionally restricted too much speech while targeting behaviors unrelated to speech. Instead, what tainted the restrictions in these cases was more likely the fact that in each of these cases the restriction *was* indeed aimed at speech. Just as content discrimination suggests to courts that some restriction is aimed at restricting communication, each of the regulations in these cases was drawn narrowly around speech-related activities while leaving unregulated non-speech activities that were equally likely to result in the harm government suggested it was seeking to prevent.[234]

Consider, for example, if the government in *Schneider* had not simply restricted the distribution of handbills, but had instead restricted "the transfer by any person of any object that the transferor knows or has reason to know may be used to litter public property." Such a restriction would have addressed the town's concern in *Schneider*, but it would not have singled out communicative activities for regulation. It would have applied to fast food containers and cigarette butts as well as to leaflets, and likely would not have been found to violate the First

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[231] *See* City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 811–12 (1984) (highlighting the distinction between public and private property with regard to First Amendment jurisprudence).

[232] *See* Schneider v. New Jersey, 308 U.S. 147, 148 (1939).

[233] *See* Otwell v. State, 850 S.W.2d 815, 818 (Tex. Ct. App. 1993).

[234] *See* City of Ladue v. Gilleo, 512 U.S. 43, 46–47, 58–59 (1994); Martin v. City of Struthers, 319 U.S. 141, 142–44 (1943); *Schneider*, 308 U.S. at 160–62, 164.

Amendment.[235] Similarly, if the city of Struthers had prevented all people from entering on and intruding into the property of another, rather than preventing only door-to-door distribution of *literature*, it is likely that the result would have been much different. The former simply does not target speech in the way that the actual regulation in that case did.

All of this suggests that the Court's decision to strike down the government action in each of these cases was not the result of incidental effects on speech, but was instead the result of *facial discrimination* against certain kinds of communication in the statutes at issue. Restrictions aimed at signs, or at solicitation, or at leaflets, target some aspect of speech on their very face. Interestingly, the Court's opinions seemed to ignore the facial discrimination against speech in each of these cases, despite the fact that it provided a simple, straightforward basis for the outcome that would have been more in line with the rest of the Court's free speech jurisprudence.[236] We suggest that this may be simply because the Court confused itself with its own definition of "neutral" time, place, and manner restrictions.

As explained above, time, place, or manner restrictions are those that "are justified without reference to the content of the regulated speech."[237] As a result, the Court concludes that they do not intentionally target communication so cannot violate the free speech clause.[238] The problem with this reasoning is that the conclusion is not always correct. Time, place, and manner restrictions target neither the content nor the viewpoint of communication, but that does not make them in all cases neutral towards communication or speech. In *Schneider*, *Gilleo*, and *Struthers*, the regulations targeted not the substance—content or viewpoint—of speech but the *means* of speech.[239] They were not restrictions aimed at something *other* than communication that incidentally burdened speech. Instead, they were aimed directly at methods of communication: signs, solicitation, and leafleting. They were not aimed at clutter, or litter, or noise, or intrusions on privacy. They were, on their face, aimed only at means of

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[235] Such a broadly sweeping restriction on the transfer of property might raise due process problems, but would not implicate the First Amendment.

[236] *See* Kagan, *supra* note 221, at 491–92.

[237] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

[238] *Id.* at 298–99.

[239] *See Gilleo*, 512 U.S. at 53; *Martin*, 319 U.S. at 142; *Schneider*, 308 U.S. at 154–57.

communication that may have contributed to the perceived harms.[240] Discrimination against an entire form of communication may be neutral with respect to content or viewpoint, but it is far from neutral with respect to communication or speech. This, and not incidental effects, was the problem with the restrictions in *Schneider*, *Gilleo*, and *Struthers*.

D. Unprotected Speech

1. Intuitive Appeal

As discussed above, if a court determines that a regulation intentionally targets communication, it will hold that regulation to a relatively high level of review.[241] Basically, the Court has announced that the regulation will be struck down unless it narrowly targets speech that is "unprotected."[242] The kinds of speech referred to as "unprotected" include incitement,[243] fighting words,[244] "hostile audience" cases,[245] assault,[246] obscenity,[247] child pornography,[248] defamation,[249] and true threats.[250] Categories such as obscenity and fighting words have frequently been referred to by the Court as having little if any social value.[251] Categories such as fighting words, assault, defamation, and obscenity have been described as causing harm by their very utterance.[252] Incitement and hostile audience cases involve speech that will cause listeners to immediately engage in

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[240] *See Gilleo*, 512 U.S. at 46, 48; *Martin*, 319 U.S. at 143–44; *Schneider*, 308 U.S. at 162–63.

[241] *See supra* Part I.C.2.

[242] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 960–61, 997, 1017 (4th ed. 2011).

[243] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam); *see generally* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE (1989).

[244] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[245] *See* Feiner v. New York, 340 U.S. 315, 320–21 (1951).

[246] *See* Virginia v. Black, 538 U.S. 343, 363 (2003).

[247] Roth v. United States, 354 U.S. 476, 485 (1957).

[248] New York v. Ferber, 458 U.S. 747, 764 (1982).

[249] *See* Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 50 (1983).

[250] *Black*, 538 U.S. at 359.

[251] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[252] *Id.* at 572.

criminal conduct.[253] Each of these categories, then, describes speech that causes a harm that, when compared to the benefits of allowing that speech, justifies its regulation.

As the other categories and classifications that seem to pervade free speech law, these categories of "unprotected speech" have intuitive appeal. They provide categorical shortcuts on which courts can rely to determine whether particular regulations of speech are justified. Courts need not re-evaluate the compelling nature of the government's interest in each case; if speech is unprotected, its intentional restriction is justified. Indeed, the Court has been explicit in its demand for application of categories and has made very clear its decision to respect this categorical approach rather than to permit any sort of case-by-case, or even categorical, balancing.[254]

2. Problems

As does the use of any categorical approach, the utility of the labels "unprotected speech" and "protected speech" has limits. First of all, such labels seem to ignore several cases where the Court has openly acknowledged its application of a cost-benefit analysis. For example, in *Snyder v. Phelps*, Phelps and several other members of his church made a practice of picketing funerals of American servicemen killed in battles in order to show their displeasure with the United States.[255] On the day of one such memorial service, they picketed on public land adjacent to the soldier's funeral.[256] They carried signs that stated, for instance: " 'God Hates the USA/Thank God for 9/11,' 'America is Doomed,' 'Don't Pray for the USA,' 'Thank God for IEDs,' 'Thank God for Dead Soldiers,' 'Pope in Hell,' 'Priests Rape Boys,' 'God

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[253] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); Feiner v. New York, 340 U.S. 315, 320 (1951).

[254] In *United States v. Stevens*, 130 S. Ct. 1577 (2010), the Court explained that,

> The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs."
>
> As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.

Id. at 1585 (citations omitted).

[255] 131 S. Ct. 1207, 1213 (2011).

[256] *Id.*

Hates Fags,' 'You're Going to Hell,' and 'God Hates You.' "[257] On appeal from a jury finding that this action constituted intentional infliction of emotional distress, the Court announced, "[T]his case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case. '[S]peech on "matters of public concern" . . . is "at the heart of the First Amendment's protection" ' . . . and is entitled to special protection."[258] The same favoring of speech on public concern over speech of only personal interest is evident in the employee speech cases.[259] Similarly, the secondary effects cases, while not based on the public-private distinction, are explicit in the lower value they assign to sexually explicit speech.[260]

More problematic than the Court's apparently straightforward application of cost-benefit analysis is that at other times, while proclaiming that it is applying a clear categorical approach not subject to balancing, the Court does not simply *apply* those categories, but *manipulates* them to achieve the results that would arise from a balancing approach, and it ends up substituting for a direct cost-benefit debate a debate over whether the speech being restricted falls into one of the "unprotected categories." For example, fighting words have long been, and continue to be, unprotected speech, so that they can be regulated.[261] Over time, though, the Court has become somewhat more protective of the kinds of offensive speech that arguably fit within the original definition of "fighting words."[262] As a result, in several cases involving speech that would have fit within the original definition of fighting words, the Court concluded that protecting listeners from the offensive speech at issue did not in fact merit restricting the speech.[263] Rather than simply announcing that the result of its cost-benefit analysis was its determination that the restriction at issue ought to be struck down, the Court determined that the speech being regulated in

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[257] *Id.*

[258] *Id.* at 1215 (citations omitted).

[259] *See supra* text accompanying notes 111–16.

[260] *See supra* discussion of secondary effects accompanying notes 191–93.

[261] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[262] *Id.* at 573; *see also* Cohen v. California, 403 U.S. 15, 20 (1971).

[263] Texas v. Johnson, 491 U.S. 397, 411 (1989); *Cohen*, 403 U.S at 21; Street v. New York, 394 U.S. 576, 592 (1969).

these cases was not "fighting words."[264] It substituted a definitional debate—is the speech "fighting words"—for a more straightforward cost-benefit analysis.

Another example of substituting a definitional issue for a balancing issue is *Virginia v. Black*.[265] Barry Black led a Ku Klux Klan rally, attended by twenty-five to thirty people, on private property—with the permission of the owner, who was in attendance—that was located on an open field just off a state highway.[266] He was convicted of violating a statute that made it unlawful for "any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another."[267] The Court upheld the speech restriction because it banned only "true threats," an unprotected category of speech.[268] The "discovery" of this new category of "unprotected" speech looks very much like the application of a balancing approach—where the Court found that the speech restriction was worthwhile—than like a discovery of an unprotected category of speech.

Of course, the substitution of a definitional debate—whether some particular communication falls within the definition of a particular category of unprotected speech—for a more direct, less categorical, cost-benefit analysis of the particular communication is often not problematic and can be quite useful. But it can become seriously confusing and distracting when the Court uses the definition of unprotected speech for purposes in *addition* to substituting for a categorical cost-benefit analysis. For example, because "incitement" is typically followed by criminal penalties, the Court has explained that whether or not speech is "incitement" depends, in part, on the intention of the speaker.[269] Speech is not unprotected "incitement" unless the speaker intends—and is likely to—cause imminent lawless action. Thus, the definition of incitement not only includes the results of a cost-benefit analysis—the determination that the harm resulting from speech that is likely to cause imminent lawless action outweighs the benefits of allowing that speech—but it also provides

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[264] *Johnson*, 491 U.S. at 409; *Cohen*, 403 U.S. at 20; *Street*, 394 U.S. at 592.

[265] 538 U.S. 343, 363 (2003) (stating that burning the flag constituted a true threat under the particular circumstances).

[266] *Id.* at 348.

[267] *Id.*

[268] *Id.* at 359–63.

[269] *Id.* at 362–65.

guidance to legislatures about how to ensure that regulations of incitement will satisfy Due Process as well as the First Amendment, and it guarantees that no person will be convicted of a criminal offense without the requisite mens rea necessary for the application of criminal penalties.

In terms of the limits imposed only by the First Amendment, the hostile audience cases make it clear that government can prevent speech when such action is necessary to protect a person from imminent violence, *regardless* of the speaker's intent.[270] Thus, in terms of the right to freedom of speech, if government has a compelling interest in preventing imminent lawless action, the speaker's state of mind can make speech neither less dangerous nor less subject to regulation.[271]

Doctrine becomes confusing when government's interest in protecting the community from imminent harm is inappropriately conflated with the speaker's state of mind, and analysts lose track of what it is they ought to be analyzing.[272] In fact, incitement, fighting words—to the extent they are unprotected because they will evoke a violent reaction—and hostile audience cases are all examples of situations where speech can be regulated because government has no other way to prevent violence—other than spending on extra police, and the Court apparently believes that the constitution does not require government to spend money to guarantee rights.[273] To the extent that defining these as different kinds of "unprotected" speech cases leads people to believe that the First Amendment, rather than the Due Process clause, demands that they be treated differently, doing so is unnecessarily confusing.[274]

Child pornography is another area of unprotected speech, and is also another area where classification of child pornography as "unprotected speech" becomes confusing. In originally holding that child pornography was unprotected speech, the Court bolstered its argument by pointing out its relative lack of

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[270] Feiner v. New York, 340 U.S. 315, 320–21 (1951).

[271] *See id.*

[272] Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 543 (2004).

[273] *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 192–93 (1991); *see* discussion *supra* Part II.D.1.

[274] Similar discontinuities arise, of course, in defamation cases.

value,[275] and if one is determining whether or not certain speech is "protected," analyzing the value of that speech seems eminently sensible. On the other hand, a few years later, in *Ashcroft v. Free Speech Coalition*,[276] the Court explained that its actual basis for upholding the anti-child pornography statute at issue in *Ferber* related only to "how it was made" and had nothing to do with the actual communication at issue in that case.[277] As a result, child pornography that was computer generated or otherwise did not involve real children in its production *was* protected speech.[278]

Once again, free speech jurisprudence becomes complicated not simply because there are categories of unprotected speech, but only because, and only when, those categories actually take into account factors other than the First Amendment. While it may well make sense to hold that the use of videos that were made by sexually abusing minors can be restricted while also holding that films made by the use of "virtual" children cannot be so restricted, it is confusing to do so by holding that films made using real children are "child pornography" and therefore unprotected speech, while films using virtual children are not child pornography, so are protected speech.[279]

The most fundamental problem with relying on a definition of child pornography that includes as unprotected speech only videos that use real children is that a film shown by the same person to the same audience may or may not be "protected speech" based on how the film was made. The actual "speech" of the person who shows the film is identical in either case. What differs is nothing about the content of the video, but only whether *production* of the video was itself criminal conduct. If it was, then mere *possession* of the video can be criminalized, regardless of whether it is shown to anyone or not. If it was not, neither the possession nor the showing can be criminalized.

In reality, then, the production or possession or display of films made using real children engaged in sexual conduct can be regulated not because of anything having to do with the "speech,"

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[275] New York v. Ferber, 458 U.S. 747, 762 (1982) ("The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*.").

[276] 535 U.S. 234 (2002).

[277] *Id.* at 251.

[278] *Id.* at 251–53.

[279] *Id.*

involved, but because of the unlawful *production* process—a restriction that seems to more closely resemble a content-neutral time, place, or manner restriction than an "unprotected speech" category. The Court's approach—calling child pornography "unprotected speech" and then defining child pornography without regard to the actual communication or speech involved—may not change the *outcome* of cases. It does, however, bring additional confusion to those searching for a fundamental understanding of free speech law.

Obscenity is also unprotected speech, but, as with incitement, it has problems in that it substitutes a definitional debate for a debate about values and justifications. As with child pornography, the definition of what "speech" constitutes obscenity involves factors in addition to mere speech. Under *Miller v. California*, what is "obscene" depends in part on whether the decider believes that the work appeals to "prurient interests," and, to paraphrase the Court, one person's "prurience" is another's "normal turn-on."[280] Similar evaluations must be made about whether the work is patently offensive to determine whether or not it is obscene.[281] Again, at best, changing the debate from a cost-benefit analysis to one about whether certain material is or is not pornography—which is likely to be decided by weighing the harm from the speech—does nothing to make the analysis easier. At worst, defining obscenity as unprotected and then focusing subsequent judicial focus on whether or not something is obscenity directs discussion away from the real underlying issue: is obscenity really so shameful and offensive that it can be constitutionally prohibited, or is sexual explicitness not so bad?[282] We do not here wish to weigh in on either side of that debate, but we suggest only that, with respect to obscenity, it is the appropriate debate to have and it is the debate that

[280] 413 U.S. 15, 23–24 (1973).

[281] *Id.*

[282] By defining obscenity as including only speech that is both prurient and patently offensive, the Court has made it clear that the substantial harm—shame and offense from exposure to the communication—is not simply imminent, but is inherent in the communication itself. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). If people are not both offended and shamed by exposure to the communication, it is not obscenity and, as a result, not easily regulated.

actually separates the opinions of the different Justices.[283] The current attitude towards protected and unprotected speech will likely provide a simple way to avoid that debate entirely.

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[283] *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957). Decisions and scholarly arguments focus on issues such as whether obscenity is "speech," because it "bypasses the brain and goes directly to the groin." *See generally* Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979); Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795 (1993). Or on whether it is not like other speech because it cannot be rebutted by counter-speech, see generally HARRY M. CLOR, OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY (1969). Or whether it is somehow of less value than other speech, see generally Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). See discussion of this issue in David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111 (1994); Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1; Stephen G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564 (1988); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1975). If one is functioning in a world where the real question is whether obscenity should be "unprotected," these efforts to distinguish the quality of communication when the content is "obscene" all make sense.

Unfortunately, although perhaps creative and brilliant, none of these arguments about the "quality" of obscene speech is convincing. Obscene material goes through the brain as much as any other; and just as with all other visual perceptions, it is the brain that processes the material and stimulates the emotive or physical response. The economic value of obscenity is undeniable to anyone familiar, on any level, with the sex industry. Billions are spent annually on obscene materials, and numerous major corporations reap significant profits from pandering in obscenity. Phil Kloer, *Upscale Vendors Cash in on Porn*, ATLANTA J.-CONST., Aug. 17, 2003, at 1A. In a market-driven economic system, disregarding this obviously significant market value seems disingenuous at best. More recently, with unabashed porn stars and porn peddlers going into politics and stressing their participation in pornography as both a personal qualification and an important political issue, it seems clear that obscenity even has some political value, at least in the minds of a few of those running for office and/or casting votes. *See Larry Flynt Announces Run for California Governor*, CNN POLITICS (Aug. 4, 2003), http://articles.cnn.com/2003-08-04/politics/flynt.governor_1_hustler-magazine-publisher-larry-flynt-flynt-publications?_s=PM:ALLPOLITICS.

While it is true that the effect of exposure to obscenity cannot be undone by "logical" counter-speech that can convince the viewer that the obscenity was somehow "incorrect," the same is generally true of every other kind of speech. Much advertising, both commercial, and more importantly political, as well as religious speech (prayers are often seen as a kind of meditation rather than a kind of thought process), violent speech, and art cannot be effectively rebutted by logical counter-speech. Indeed, the power of even the most logical arguments usually lies not in their logic itself, but in who presents them, how they are presented, and the relationship between the presenter and the listener. As a result, very often the exposure even to simple illogical argument cannot be undone by logical counter-argument, and the exposure to mistaken facts cannot be undone by subsequent exposure to the truth. Even casual observance of many advertising or even political

Another result of categorizing "obscenity" as unprotected speech, as opposed to simply stating that obscenity can be regulated because it immediately induces shame and offense in the observer, is that the definition of obscenity misdirects and confuses First Amendment analysis. Because the Court in *Miller* was deciding on the constitutionality of a criminal provision, it had concerns aside from the speech at issue, including some concerns about due process, clarity, and notice to the defendant with respect to the prohibited conduct.[284] As a result, when it defined "obscenity" it included in its requirements "sexual conduct specifically defined by the applicable state law."[285] Defining the constitutionality of a criminal law by reference to the specificity and clarity of a statute makes sense. Defining a category of "*speech*" by reference to the specificity of a *statute* does not. It serves primarily to confuse.

Similar problems arise in the Court's current definition of protected commercial speech. With respect to such speech, the Court asks, "[A]s a threshold matter whether the commercial speech concerns unlawful activity or is misleading. If so, then the speech is not protected by the First Amendment."[286] While the determination of whether speech is misleading obviously depends on the speech itself, the determination of whether commercial speech concerns unlawful activity often depends not on what is said, but to whom it is said. For example, numerous products, including alcohol and tobacco, are lawful products for adults, but unlawful for minors. Again, it is entirely sensible to suggest that whether restrictions on speech are constitutional can depend on context, including the person to whom the speech is addressed. All that does not make sense in this case is the apparent notion that the constitutionality depends on the nature of the "speech" as protected or unprotected, or as commercial speech or noncommercial corporate speech,[287] rather than on government's justification for *restricting* the speech in the actual context in which the speech is made. The "speech" that

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campaigns bears this out. Regardless of which candidate wins a political campaign, supporters of both candidates know that approximately one half the voters—those who voted for the other side—are apparently immune to logic.

[284] 413 U.S. at 27.

[285] *Id.* at 24.

[286] Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002).

[287] Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 66–68 (1983).

advertises alcohol and tobacco is the same whether or not minors are present; government's justification for restricting the speech, though, is not.

Another problem with the consistent use of categories of "unprotected" speech is that they imply that these categories of speech are actually "unprotected," when, in fact, they are not. Ultimately, as interpreted by the Court, the First Amendment neither "protects" nor restricts speech; it merely limits government's ability to regulate speech.[288] Courts have and will continue to strike down regulations of "unprotected" speech because those regulations violate the First Amendment.[289] To stay with cases already discussed elsewhere in this Article, in *R.A.V.*, the Court struck down a statute that punished only certain "unprotected" "fighting words." [290] The Court's decision may make sense, but the Court's articulated doctrine—that unprotected speech is protected, but only sometimes and only in some circumstances—is unnecessarily confusing.

On the other hand, some speech that is "protected" can, depending on the context, cause substantial and imminent harm that warrants its prohibition. Political speech, for example, perhaps the "most" protected speech, can be prevented if it takes the form of advertising in a municipal bus,[291] or advocating too near a voting booth,[292] or picketing around an individual's home.[293] While courts and scholars may debate, in these cases, the application of "captive audience"[294] and other doctrines, what they are all looking to, at the end, is simply whether the harm caused by the speech justifies the restriction. On a few very rare occasions, the Court simply acknowledges that it is engaging in straightforward cost-benefit analysis.[295] Too often, though, it does not, and the cost is confusion of what could otherwise be understood as fairly straightforward free speech law.

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[288] *See* United States v. Stevens, 130 S. Ct. 1577, 1584 (2010).

[289] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (invalidating a statute that punished only a certain category of fighting words).

[290] *See supra* notes 153–54 and accompanying text.

[291] Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974).

[292] Burson v. Freeman, 504 U.S. 191, 211 (1992).

[293] Frisby v. Schultz, 487 U.S. 474, 487–88 (1988).

[294] *Lehman*, 418 U.S. at 304.

[295] Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2723–24 (2010).

All of these apparent anomalies make perfect sense if the categorization of unprotected classes of speech is viewed as a mere shortcut to the real issue, which is simply a cost-benefit analysis being made by the courts, accompanied by a few non-First Amendment concerns that get thrown into the mix. Rather than viewing some speech as protected and some as unprotected, by instead explaining that some protected speech can be restricted; that there are ways in which unprotected speech cannot be restricted; and that sometimes the secondary effects of protected speech justify its restriction but at other times they do not, one might simply observe how the cost-benefit analysis actually plays out. The costs of restricting political and philosophical speech are high, and the value of allowing such speech is high. But it is not high enough to prevent courts from restricting it when such restriction is necessary to prevent imminent violence. The costs of restricting some kinds of extreme sexual speech—obscenity—are low, the value of that speech is seen by the Court as very low, and the harm from that speech is seen by the Court as high. Some other kinds of sexual speech are seen as less valuable than political speech, but more valuable than obscenity, and those kinds of sexual speech are the ones for which the Court has adopted and allowed the secondary effects test.

This, again, does not mean that the notions of protected and unprotected speech as shortcuts to indicate kinds of cost-benefit balancing that the Court has already done are not useful. It means only that for these notions to be useful, as opposed to simply confusing, they must be understood with due consideration of their underlying purpose.

CONCLUSION

In this Article, we have suggested neither a fundamentally new understanding of the purpose or function of the First Amendment, nor a new proposal for applying the First Amendment. Instead, we have only tried to explain what has motivated the decisions that courts have already made, and to explain a framework into which the cases may, for the most part, be properly fit. We have tried not to suggest what *ought* to happen, but to make sense out of what *has* happened.

We suggest that in the free speech cases, virtually all of the different and apparently unrelated and self-contradictory tests serve as shortcuts to answer one or more of three very specific questions: (1) in the context at issue, does the government have a constitutional duty to the would-be speaker or listener[296] with respect to its action—if the government is acting as speaker or proprietor, it does not; (2) if government has a constitutional duty with respect to a person's speech, has it *intentionally* targeted that speech; and (3) if government has intentionally targeted a person's speech when it is subject to a constitutional duty, is the restriction on that speech justified?[297] In other words, all of the free speech tests and doctrines invented and applied by courts can be sensibly understood as devices to help them address the issues of duty, intention, and justification.

We believe that putting all of the free speech tests and classifications into this framework is necessary for several reasons. First of all, without some kind of relatively straightforward and understandable framework that the cases so far have not set forth, First Amendment law is incomprehensible. Constitutional analysis and Supreme Court opinions often rely on categories and tests, especially in areas where cases are as ubiquitous as in free speech. But without a framework in which to understand and use these tests, the law appears to be nothing more than hundreds of little tests for little situations, and each test, in turn, appears to be virtually impossible to understand. The tests seem to come from nowhere and to be applied randomly.

Our suggested framework posits that in reality, these tests are basically sensible, comprehensible, and unified. The truth is that the technical definitions and tests are neither as complicated nor as important as they are often made to appear.

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[296] We believe that the activity protected by the First Amendment is basically communication rather than simply speech. We believe this to be the case because the Court has found the right to be at issue when government has interfered only with listeners, and not simply when it interferes with speakers.

[297] These same three questions—and more—must be answered when the Court addresses any other Constitutional right, such as Due process rights. In fact, analysis of free speech cases is inherently simpler than due process cases, because at least the constitutional interest at stake—communication—is fairly clear. In due process and equal protection cases the same three questions must be answered, but the second question—whether government has caused an injury to a constitutionally significant interest—becomes much more complicated because defining what interests are constitutionally significant becomes a much more complex endeavor.

Some of the apparent complexity in First Amendment jurisprudence arises because judges are not sufficiently articulate about what they are doing. Some problems arise because judges feel trapped by enunciated doctrine, and many problems arise because judges occasionally apply doctrines and definitions to justify the results they want in particular cases.

If one takes the time to understand both the appropriate function of the free speech doctrines and the inherent limitations in the doctrines, First Amendment cases can be understood as resting on the same basic issues as other constitutional rights. The issues that arise have to do with government's duty, government's intention, and government's justification for its actions. We do not mean to suggest that our framework will change whether or not any person agrees with outcomes of the different situations. Instead, we believe that, for now, just understanding the function and the unity of free speech doctrines and tests is a huge leap forward.